



fraud & misrepresentation of facts. He further averred that a preliminary Decree was drawn on 23.10.2020 and a final Decree on 20.12.2010; thereafter respondent No.3 filed Execution Application No. 03 of 2011 which was allowed vide order dated 21.07.2011. Per petitioner on coming to know about the above judgment and Decree, the petitioners filed an application under Section 12(2) read with Section 151 CPC with a prayer to set aside the judgment and decree and execution order as the same had been obtained by way of fraud and misrepresentation of facts and also prayed to implead them as parties in the suit proceedings; respondents 3 and 4 filed objections/counter affidavit on application under Section 12 (2) CPC. Petitioner pointed out that in the intervening period respondent No.3 and others filed Civil Appeal No. 02 of 2012 against the above judgment and decree and final order passed in execution application which is pending before respondent No.1; that learned appellate court called the record and proceedings from the trial court and in compliance whereof learned trial court sent the record and proceedings to the appellate court along with the application under Section 12(2) read with Section 151 CPC; the trial court also passed the order for auction of property and such news was also published in the newspaper. Petitioners being aggrieved by and dissatisfied with the aforesaid action approached the trial Court for hearing of an application under Section 12(2) read with Section 151 CPC, whereby he was informed that the application under Section 12(2) CPC is lying in the R&Ps which have already been sent to the appellate Court, the petitioner approached the appellate court where he was allegedly not heard. Petitioner has emphasized that private respondents 4 and 5 are attempting to auction the subject property; therefore they have filed the instant petition with the above prayer.

3. Perusal of record reveals that since 4.3.2019 the petitioner's counsel failed to appear before this court up to 25.02.2021. On 25.08.2021 when counsel for the petitioners was not available and on his behalf, some counsel held brief when counsel for respondent No.3 as well as proposed interveners stated before the court that this petition is a collusive petition to defeat the judgment and decree passed by the learned trial court; besides that application filed under Section 12(2) CPC by the petitioners has already been decided by the learned trial court, therefore this petition has become infructuous, copy of which has already been placed on record by way of the

statement dated 13.02.2021. However, the adjournment was allowed as the petitioner's counsel was not feeling well, with the observation that the matter will be taken up on 01.09.2021 for decision-based on available record. Finally, on 01.09.2021 this petition was taken up but unfortunately, nobody turned up on behalf of the practitioners to assist this court, compelling this court to dismiss the instant petition for non-prosecution. An excerpt of the order is as under:-

“Adjournment is again requested on the part of learned counsel for the petitioners on the ground that concerned counsel is out of the station. The contention raised on part of respondents was recorded on 25.08.2021 wherein a specific date for today was given with the specific direction that the matter is liable to be concluded based upon the record available and whatsoever assistance as may be available. It is as such come on record that this petition was filed for purpose of acquiring conclusion of the application under Section 12(2) CPC which has since been decided and a copy of which was filed by way of the statement dated 13.02.2021 before this Court.

In the present circumstances, where the said contention has been brought on record and confronted to learned counsel for the petitioners no such room is available for adjournment. The said contention open to conclusion has not been attempted to be disturbed as such adjournment requested is as found not available and the matter stands dismissed for non-prosecution accordingly.

4. On 23.9.2021 an application under Section 151 CPC for restoration of the petition was moved by learned counsel for the petitioners. Today the matter is fixed for non-prosecution as no notice was issued to the other side as the counsel for the petitioner failed to supply the office a copy of the application under Section 151 CPC for restoration of the petition and cost for issuing notice to the other side.

5. When confronted with the aforesaid legal position of the case about the decision rendered by the learned trial court on the application of the petitioners filed under Section 12(2) CPC, and the fate of this petition virtually has become redundant in the term of the order dated 27.10.2020 passed by the learned IVth Senior Civil Judge, Hyderabad in F.C. Suit No. 52 of 2003 (Execution Application No. 03 of 2011 whereby the application under section 12(2) CPC along with application under Section 151 CPC and application under Order I Rule 10 CPC were dismissed due to non-prosecution.

6. Syed Muhammad Waseem Shah learned counsel for the petitioners has attempted to reopen the case and argued that the matter needs to be decided on merits rather than dismissal on account of non-prosecution and this court can take cognizance of the fraud committed with the petitioners by the private respondents. We do not agree with the assertion of the learned counsel on the aforesaid analogy for the reason that petitioners simply sought direction to the learned courts below to decide their application under Section 12(2) CPC and that has already been done as discussed supra and the said order has not yet been impugned in the present proceedings, thus no exception could be taken to that effect; however, if the petitioners' cause still subsists, they are at liberty to call in question the decision of the learned trial Court before the appropriate forum, subject to all just exceptions as provided under the law.

7. In our view in Constitutional Petition no evidence can be recorded, prima-facie, the aforesaid factual controversy could only be resolved by adducing evidence in the proper forum under the law and not in this Court, therefore the parties have to take resort of the competent forum to resolve their entitlement in the subject property.

8. In the light of the foregoing, the fate of this petition cannot be stretched further as it has served its purpose; hence this petition is restored to its original position and dismissed accordingly, with no order as to costs.

JUDGE

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