

**ORDER SHEET  
IN THE HIGH COURT OF SINDH, CIRCUIT  
COURT, HYDERABAD.**

Constitutional Petition No. D- 962 of 2020

**Before:**

Mr. Justice Muhammad Iqbal Kalhoro  
Mr. Justice Adnan-ul-Karim Memon

Petitioner: Syed Ashraf Ali Shah through  
Mr. Muhammad Asif Shaikh Advocate.

Respondent-7: through Mr. Ayatullah Khowaja, Advocate.  
Mr. Allah Bachayo Soomro, Addl. A.G.

Date of hearing: 25.11.2021  
Date of Decision: 09.12.2021

**O R D E R**

**ADNAN-UL-KARIM MEMON, J.-** Through this petition, the petitioner has prayed as under:-

- a. To set aside the impugned order passed by respondent No.2 in civil revision no.36 of 2020 being void ab-initio, illegal, ultra virus and remand the application under Section 47 CPC to the respondent No.3 for proper adjudication and disposal on merits.
- b. To set aside the impugned order dated 01.02.2020 on application for grant of time and order dated 06.01.2020 passed by learned 5<sup>th</sup> Senior Civil Judge, Hyderabad (respondent No.3) on application u/s 12(2) CPC being void ab-initio, and illegal, ultra virus.
- c. To direct the learned trial court to issue directions to Mukhtiarkar city Hyderabad (respondent no.5) to furnish fresh proposal of partition of the properties in question with consent and presence of parties in view of previous approved plan for distribution of shares of parties equally, fairly as provided under the law and shariah.

2. In the instant matter, we are called upon to decide an Application of the petitioner filed under Section 12(2) of the Code of Civil Procedure, 1908 (CPC), claiming the Judgment of lower court to have been procured by the private respondents through fraud and

misrepresentation, because he being the shareholder of properties in question was/is entitled to his due share as provided under shariah.

3. We have heard learned counsel for the parties, on the subject issue and perused the record minutely with their assistance.

4. To resolve the issue at hand it is imperative to determine as to whether any fraud has been committed in the matter as agitated by the petitioner or otherwise?

5. To go ahead with the aforesaid proposition, it is expedient to have a look at section 12(2) CPC, which speaks of the principle that if a Decree, Order, or Judgment is obtained by fraud, misrepresentation, or where a question of jurisdiction has arisen, such Order Decree or Judgment can be challenged through an Application in the same court and no other separate Suit is required to lie. An excerpt of section 12(2) CPC is reproduced as under:-

“12 (1) Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies. (2) Where a person challenges the validity of a judgment, decree, or order on the plea of fraud, misrepresentation, or want of jurisdiction, he shall seek his remedy by making an application to the Court which passed the final judgment, decree, or order and not by a separate suit.”

6. Term Fraud, is not defined in Civil Procedure Code, but in most simple sense means “Deception intended to result in financial or personal Wrongful gain”. Fraud is defined in Contract Act, 1872 as follows:-

“Fraud” means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract: - (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true; (2) the active concealment of a fact by one having knowledge or belief of the fact; (3) a promise made without any intention of performing it; (4) any other act fitted to deceive; (5) any such act or omission as the law specially declares to be fraudulent.

7. We have noted that serious allegations have been leveled by the petitioner against the private respondents who are inter-se related with the petitioner, for committing fraud in the matter in fair distribution of subject properties under Shariah, through misrepresentation of facts for which evidence needs to be recorded, in the light of decision rendered by the Honorable Supreme Court in the case reported in (2008 SCMR 236). Even for the attraction of Section 12(2) CPC following are the pre-requisites. “Plea for challenging the

Order, decree or judgment shall be that the order, decree or judgment was obtained through fraud and misrepresentation.” In our view in Constitutional Petition, no evidence can be recorded, which factual controversy can only be resolved by adducing evidence at proper forum and not in this court, therefore the parties have already gone to the court of plenary jurisdiction to resolve their entitlement in the subject properties / land.

8. Looking at the allegations of the petitioner, Prima-facie, the record reflects that Mst. Fareeda filed F.C. Suit No. 718 of 2013 for Declaration, Cancellation, Possession, Mesne Profit, Permanent & Mandatory Injunction against Syed Ashraf Ali Shah and five others while subsequent F.C. Suit No. 188 of 2014 was filed by Mst. Allya Hashim and three others against their brother Syed Ashraf Ali Shah and six others for Declaration, Cancellation, Separate Possession, Permanent And Mandatory Injunction. Plaintiff Mst. Fareeda in his plaint claimed that she was / is exclusive owner of Sikni land, admeasuring 3751 square yards (equivalent to 0-31 acre) formed out from Revenue Survey No. 415, situated in Deh Gujo, Taluka City Hyderabad by way of registered sale deed dated 25-6-1976; that the above property was then merged into “Aziz Nagar” Housing Scheme, which was got approved from H.D.A. by their father, who intended to establish family business in the shape of Housing Scheme; therefore, she alongwith her mother and other sisters executed power of attorney dated 24-02-1976 solely for the said purpose in his favour; that her father had subsequently distributed the same through relinquishment deed in favour of other family members; vide Form VII, Entry No.30 dated 05-11-1989 with her consent; that on reaching superannuation, she started approaching petitioner/defendant No. 1 for selling out the plots and settling the accounts so that she could utilize such funds for betterment her own family, but the petitioner/defendant No.1 kept avoiding and in the month of October, 2013, she came to know that the suit land has been transferred by petitioner/defendant No.1 to his wife defendant No.2 on the basis of false, manipulated and concocted power of attorney dated 09-6-1988 allegedly executed by plaintiff; she asserted that she obtained copy of said power of attorney from the office of Sub-Registrar and found that the signature available thereon was not belonging to her, which can even be compared with her earlier power of attorney, which she had executed in favour of her father; she denied to have ever appeared before Sub-Registrar to execute such

power of attorney; that private respondent/plaintiff came to know that on 24-10-2013, the lady defendant No.2 moved an application for mutation in the record of rights on the basis of lease deed allegedly executed by her alongwith defendant No.1 & Mst. Meena and such lease deed was executed by defendant No.1 on his behalf and behalf of Mst. Meena, based on manipulated power of attorney, hence she moved applications to Assistant Commissioner City and Sub- Registrar, City Hyderabad on 01-11-2013 and 29-11-2013 respectively restraining them not to make any change in the status of khata and finally, she filed the suit with the following prayers.

- a) To hold and declare that the plaintiff is the owner of suit land as stated in para-2 of the plaint.
- b) To hold and declare that the impugned power of attorney dated 09-06-1988 allegedly executed by the plaintiff in favour of defendant No. 1 is fraudulent, manipulated, forged, and concocted, furthermore, the signature of plaintiff appearing on said power of attorney is false forged and manipulated thus the said power of attorney is not binding upon the plaintiff and of no legal affect, any sale transaction based on said power of attorney is illegal, null and void and of no legal effect.
- c) To declare that the sale transaction taken place between the defendant No. 1 and defendant No. 2 on the basis of agency dated 09-06-1988 in favour of defendant No. 2 who is wife of defendant No. 1 and defendant No. 2 is ultimate beneficiary of said transaction, thus the same is illegal and the said transaction is contrary to the dictum as laid down by the Apex Court.
- d) Grant Decree of cancellation of power of attorney dated 09-06-1988 and the impugned lease deed dated 10-07-2013 allegedly executed by the plaintiff through her illegal de-facto agent (defendant No. 1) in favour of defendant No. 2.
- e) Grant mandatory injunction directing the defendant No. 4 to bifurcate the Housing Scheme and suit land be ousted from the Aziz Nagar Housing Scheme, furthermore, the defendant No. 1 and 2 be directed to handover the physical possession of the suit land to plaintiff peacefully.
- f) Grant mesne profit at the rate of Rs. 5000/- per month since last 3 years before the date of presentation of this plaint till the suit land is vacated and handed over to the plaintiff.
- (f-i) To grant decree in respect of the property left by the father of the plaintiff and of Aziz Nagar Housing Scheme to be distributed amongst the legal heirs of Syed Tasadduq Hussain under Muhammadan Law, including Dr. Fazeela who was minor at that time.
- (f-ii) To declare that the formation of Aziz Nagar Housing Scheme upon Survey No: 415, Deh Gujjo includes the 31 ghuntas of land of plaintiff and other land of the same Survey Number of the parents of plaintiff and the plaintiff will be satisfied if the distribution will be made according to the Muhammadan Law, including the land of plaintiff i.e. 31 ghunta being merged in the Aziz Nagar Housing Scheme.

- (f-iii) To grant mandatory injunction directing the Mukhtiarkar/ Revenue authorities to mutate the Khata according to the distribution and judgment and decree passed by this Honourable Court in the name legal heirs separately, individually, independently.
- (f-iv) To grant decree of possession of suit property in favour of legal heirs in respect of their distributed plots and grant decree to eject all the illegal occupants through Execution made by the plaintiff or the defendants after getting their share in the estate left by Syed Tasadduque Hussain and Cancel fake, false, manipulated entry on the basis of fake, frivolous and false and false General Attorney and Sale Deed and cancel the entries and restore it to earlier stage for the distribution according to Muhammadan Law.
- g) Grant permanent injunction restraining the defendant No. 1 and 2 from transferring, alienating, mortgaging, construction, change the status of the suit land, creating third party interest by themselves, through their agents, servants attorneys anyone else, in any manner whatsoever.
- h) Costs of the suit may be saddled upon the defendant No. 1
- i) Any other relief as this Honourable Court deems fit and proper in the circumstances of the case.

9. In the subsequent F.C. Suit No. 188 of 2014 filed by Mst. Allya Hashim and her three other sisters against their brother Syed Ashraf Ali Shah and six others for Declaration, Cancellation, Separate Possession, Permanent And Mandatory Injunction claiming therein that an area of 2-02 acres of R.S. No. 415, Deh Gujjo City Hyderabad, was originally owned, possessed, and purchased by deceased Syed Tasadduq Hussain during his lifetime in the year, 1975, but same was purchased in the name of Mst. Latifa, Mst. Meena, though they were Benami owners, as per record, by virtue of sale deed dated 30-8-1975; and, such entry has been recorded in Dakhal Kharij on 08-11-1975; yet late Tasadduq Hussain was actual, original and exclusive owner of the suit property; that deceased Tasadduq Hussain was a builder, developer and investor; therefore, he had launched housing scheme under the name and style of "Shah Aziz Nagar" duly approved by H.D.A. in the year, 1979; that after death of Tassaduq Hussain, the petitioner / defendant No.1 became the only male member in the family; therefore, he was allowed by them to look-after all the business left by the deceased father; that, even after the death of their father, they remained dependent on nominal income generated by agricultural land bearing survey No.87, situated in Deh Gujjo, Hyderabad; that petitioner / defendant No.1 on the basis of manipulated power of attorney transferred the suit property in the name of his wife and executed such lease deed on 10-7-2013, which is illegal, malafide and without jurisdiction; that in the month of

October, 2013, an area of 31 ghuntas out of R.S. No. 415, Deh Gujo was purchased by respondent No.7 / plaintiff No. 4 on her own accord but was illegally merged in the housing scheme by petitioner/defendant No.1, and such suit bearing F.C. Suit No. 718 of 2013 (leading suit) was filed by her; that suit property was purchased as Benami transaction by Syed Tasadduq Hussain with Benami owners namely Mst. Latifa, whose name is claimed to be subsequently deleted fraudulently, Mst. Ameena and Syed Ashraf Ali Shah, who illegally and malafidely transferred the same in favor of his wife, the defendant No. 3; that petitioner/defendant No.1 kept them on false hopes for about 20 years under the guise that as soon as the scheme is materialized in the form of the plaza, besides rest of the plots to be sold, the shares will be distributed among all the legal heirs; that about three years back, the entire family decided to devolve the scheme according to their respective shares, leaving each one to dispose of their respective shares independently, whereupon they found that the petitioner/defendant No. 1 had fraudulently and malafidely transferred such property in favor of his wife, the defendant No.2; therefore, they filed the instant suit with following prayers.

- a. To hold and declare that the suit property was originally owed, actually purchased by deceased Syed Tasadduq Hussain Shah S/o Syed Sagheer-ul-Hassan in the name of defendant No. 1 and 2 and Mst. Lateefan and as such suit property is required to be devolved among the legal heirs of Syed Tassaduq Hussain i.e. plaintiffs, defendant No. 1 and defendant No. 2; therefore, the plaintiffs are also entitled for separate possession with meets and bonds.
- b. To hold and declare that the alleged forged, fake power of attorney dated 09-06-1988 allegedly executed by the plaintiff No. 4 and defendant No. 2 in favour of defendant No. 1 is fraudulent, manipulated, forged and concocted, furthermore the signature of plaintiff No. 4 appearing on said power of attorney is false forged and manipulated thus the said power of attorney is not binding upon the plaintiff No. 4 and of no legal affect. The impugned sale transaction in favour of defendant No. 3 on the basis of said power of attorney is of no legal affect, illegal, null and void.
- c. To hold and declare that the sale transaction between defendant No. 01 and 03 in respect of suit land is illegal bad in law, malafide, contrary to the law and dictum as laid down by the Apex Court.
- d. Grant Decree of cancellation of the lease deed dated 10-07-2013 and power of attorney dated 09-06-1988.

- e. Grant mandatory injunction directing the defendant No. 4 to mutate the names of the plaintiffs, defendant No. 1 and 2 being co-owners of the suit property.
- f. To declare that the sale transaction taken place between the defendant No. 1 and defendant No. 2 on the basis of agency dated 09-06-1988 in favour of defendant No. 2 who is wife of defendant No. 1 and defendant No. 1 is ultimate beneficiary of said transaction, thus the same is illegal and the said transaction is contrary to the dictum as laid down by the Apex Court.
- g. Grant Permanent injunction restraining the defendant No. 1 to 3 from transferring, alienating, mortgaging, construction change the status of the suit land, creating third party interest by themselves through their agents, servants, assignees anyone else, in any manner whatsoever.
- h) Costs of the suit may be saddled upon defendant No.1.
- i) Any other relief as this Honourable Court deems fit and proper in the circumstances of the case.

10. The learned trial court consolidated both the suits, proceeded the same, and finally passed consolidated judgment dated 22.02.2017 decreeing both the suits. Subsequently, against the aforesaid Judgment, the defendant/petitioner filed an appeal which was also dismissed and the judgment of appellate court was not challenged thus it attained finality. Subsequently, the decree-holder filed Execution Application which was allowed. Subsequently, an application under Section 12(2) CPC was filed by the defendant/petitioner before the trial court which was also dismissed, and against the said dismissal he preferred Civil Revision Application before learned VIth Additional District Judge / MCAC-II, Hyderabad which too was dismissed, hence the petitioner has filed the instant Constitutional petition.

11. Primarily the petitioner has been non-suited by the courts below on merits, petitioner failed to call in question the judgment and decree passed by learned trial court, he only intervened in the execution proceedings, where he also failed, however, he did not stop here, in his abortive attempt, filed an application under Section 12(2) CPC, which was also dismissed as discussed supra. Now in this constitutional petition, he seeks indulgence of this court to reopen the case in which he lost his case on merits as judgment and decree passed by the trial court has already attained finality, thus in our view, this court has limited jurisdiction to entertain disputed questions of facts as this court could only interfere in the matter

when feeling any fundamental right of the individual has been infringed whereas in the present proceedings petitioner took resort of civil litigation up to the revisional stage and failed to convince the courts below to look into his stance on the aforesaid pleas.

12. In the light of the above facts and circumstances of the case, the instant constitutional petition is found to be not maintainable is hereby dismissed leaving the petitioner to avail his remedy before the competent forum having jurisdiction to call in question the judgment and decree passed by the learned trial Court.

JUDGE

JUDGE

Karar Hussain/PS\*