

**ORDER SHEET**  
**IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR**  
**C.P. No. D-745 of 2007**

**PRESENT:**

**Mr. Justice Shafi Muhammad Siddiqui**  
**Mr. Justice Khadim Hussain Tunio, JJ-**

**Petitioner(s):** Saleh Malik (deceased) through Legal Heirs,  
**Respondent(s):** Ghazi & others,

Mr. Syed Bahadur Ali Shah, Advocate for  
 Petitioners.

Mr. Sarfaraz Ali Akhund, Advocate for  
 Respondent.

Mr. Ahmed Ali Shahani, Assistant Advocate  
 General.

**Date of hearing:** 10.10.2018

**Date of decision:** 27.11.2018

**ORDER**

**KHADIM HUSSAIN TUNIO-** The Petitioner has invoked the constitutional jurisdiction of this court with the following prayers:

- I. *That this Hon'ble court may be pleased to declare that the impugned order dated: 06/04/2006 passed by the court of learned VI<sup>th</sup> Additional District Judge, Sukkur and orders dated 29/04/2006 passed by the court of learned II<sup>nd</sup> Senior Civil Judge, Sukkur are illegal, without known jurisdiction, nullity in the eye of law, mala fide, void ab-initio, ultra-vires and nullity in law and allow the application U/S 12(2) C.P.C,*
- II. *To grant any other relief which this Hon'ble court may deem fit and proper under the circumstances of the case.*
- III. *To award cost.*

2. Brief facts of the case are that the petitioner owns lands bearing survey No. 101/1-2 admeasuring 8 acres, situated in Deh Tirore, Taluka Rohri District Sukkur, granted to him by the Respondent No.1 in the year 1972/73. The respondent No.1 has made several attempts to take the suit land of the petitioner using criminal force, he also filed false applications to claim the suit land in order to harass the petitioner and force him to vacate the land. The respondent No.1 along with other respondents obtained ex-parte decree from the II<sup>nd</sup> Senior Civil Judge Sukkur, by filing a false suit i.e. F.C Suit No. 72 of 1991, without making the plaintiff as a party to the suit and got the suit land illegally mutated in his name. The petitioner filed F.C Suit No. 148 of 1980 and withdrew the same on 28-01-1999 and filed an application u/s 12(2) CPC in F.C. Suit No. 72 of 1991, however the same was dismissed by the court of learned II<sup>nd</sup> Senior Civil Judge, Sukkur vide order dated 29-04-2006. Therefore, the petitioner/applicant filed Civil Revision No. 18 of 2006 in the court of learned V<sup>th</sup> Additional District Judge, Sukkur against the impugned order dated 29-04-2004, who after hearing both parties at length, dismissed the said revision vide order dated 09-04-2007.

3. Mr. Bahadur Ali Shah, learned council for the petitioner, has argued that the order passed by the trial court is unwarranted by law and facts; that the entire order passed by the learned lower court was based on surmises and conjectures; that the witness has supported the Application filed u/S 12. He suggests that the impugned order may be set aside since it is not based on facts and circumstances.

4. Learned counsel for respondent argued that the certificate of *khata* restores in the favour of respondent No. 1; that if applicant received loan on the land of respondent No. 1 therefore his such act would amount to committing fraud with the bank; that the petitioner tried to usurp the property of respondent as previously in the year 1988 he filed appeal against the grant of suit land to the respondent before S.D.M Rohri and such appeal was dismissed; that there is long litigation regarding the suit land as in the year 1986 Ali Shah and others filed F.C. Suit No. 84/86 regarding the resuming of land and grant of said land to the local *haris* (farmer) including the respondent No. 1 therefore respondent No. 1 filed application under order 1 rule 10 CPC therefore was joined as defendant and said suit was dismissed but during the above mentioned case, Chief Land Commissioner of Sindh also made enquiry and found the claim of the present petitioner/applicant to be bogus; that the application u/s 12(2) CPC is time barred; that the respondent No. 1 has not committed any fraud, misrepresentation therefore present petition is liable to be dismissed in limine.

5. Learned A.A.G argued in the same line as argued by the learned counsel for the respondent.

6. We have heard the submissions of counsels for either parties and learned A.A.G Sindh and have gone through the material available on the record.

7. Relevant portion of the judgment and decree dated 08.09.1994, passed by learned II<sup>nd</sup> Senior Civil Judge, Sukkur is reproduced herein under:-

**“On 07.09.1994, learned AGP on behalf of all defendants filed statement which is reproduced as under:-**

**“In view of the comments from Mukhtiarkar Rohri, I do hereby stated that the grant of plaintiffs land/suit land has erroneously been cancelled as he is in possession of suit land and paying LRA as such I have is accordingly decreed as prayed”**

**In the view of the above statement filed by learned AGP and after hearing learned counsel for the parties and after perusal of the record this court has come to the conclusion that whatever has been stated in the plaint has been admitted by the defendants as such in the light of above statement filed by Mr. Muhammad Hanif Shah AGP suit of the plaintiff is decreed with no order as to costs.**

**Announced in Open Court**

**Given under my hand and seal of this court**

**This 8<sup>th</sup> day of September 1994.**

**Sd/- 08.09.1994.”**

At this junction, we would like to observe that, legally, Asst. Government Pleader was not specifically authorized by the defendants No. 3 & 4 endorsed to submit statement and concede for grant of decree in favour of the plaintiff/respondent but was / is always required to see whether the person, on whose words are being made basis for an statement, was / is authorized by law to *nullify* a competently recorded order whether it be of *cancellation* or *grant*.

1. ...

2. *Persons authorized to act for Government.* - - Persons being ex-officio or otherwise authorized to act for <sup>1</sup>[the <sup>2</sup>Government] in respect of any judicial proceeding shall be deemed to be recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of <sup>1</sup>[the <sup>2</sup>Government]

The above *prima facie* does give the persons, being *ex-officio* or otherwise authorized, the status of **recognized agents** but such ***recognized agent*** shall never dress onto himself what the law does not permit. There shall be a ***considerable*** difference between a ***private authorized agent*** and ***government pleader***. The acts and omissions of *former* shall bind the *principal* if *generally* was authorized to act / omit *generally* but in latter case, the *government pleader* shall have to bring the legal position being a ***pleader*** besides his *additional* status as ***recognized agent*** but would also be required to not own any ***incorrect / incompetent*** view, even if is made by an official.

8. Before proceeding further with the case, it is necessary to understand the meaning of the words "*collusion*" & "*fraud*".

Per Black's Law Dictionary, *COLLUSION* is defined to be as:

**A deceitful agreement or compact between two or more persons, for the one party to bring an action against the other for some evil purpose, as to defraud a third party of his right.**

Collusion promotes dishonesty and fraud, which in turn, undermines the integrity of the entire judicial system.

Likewise, *FRAUD* is defined in the Black's Law Dictionary as:

**A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. A generic term, embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated.**

Fraud is false representation by one who is ***aware***. Aware that a fact was untrue; that the action would be unjust to another but would be advantageous to his self.

Fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of the courts of justice. Fraud practiced on the court is always a ground for vacating the judgment, as where the court is deceived or misled as to material circumstances, or its process is abused, resulting in the rendition of a judgment which would not have been given if the whole conduct of the case had been fair.

9. Sub-section (2) of Section 12 was made the part of Code of Civil Procedure [CPC] by withdrawing the right of the suit of the aggrieved party challenging the decree on the ground of fraud in the year 1980 by Ordinance X of 1980. Sub-section (2) of Section 12 of the code *ibid*, for the sake of connivance is reproduced here:-

**Section 12(2) C.P.C - "where a person challenges validity of the judgment, decree or order on the plea of fraud, misrepresentation or want of jurisdiction, he shall seek his remedy by making any application to the Court which pass the final judgment, decree or order and not by a separate suit".**

10. Further, in the case of *ALLAH WASAYA & 5 others v. IRSHAD AHMAD & 4 others* [1992 SCMR 2184], the Hon'ble Supreme Court of Pakistan observed that:-

**"Fraud means and includes, inter alia, the suggestion, as a fact, of that which is not true, by one who does not believe it to be true; and the active concealment of a fact by one having knowledge or belief of the fact."**

11. From the above provision, along with the definitions from the Black's Law Dictionary, it is evident that if an order or judgment and/or decree is obtained by practicing fraud and misrepresentation, the aggrieved person is left with no other remedy except the remedy provided under section 12(2) CPC and it is for the court to see whether the facts and circumstances of the case require further probe into the

allegations or not and where the Court finds that further inquiry is required, it would frame issue(s) and record evidence of ***all the interested parties*** and if it is of the opinion that no inquiry is required, it can proceed to decide the application, and thus, it is not incumbent on the Court to frame issue(s) in each and every case, but it depends upon the facts and circumstances of each case.

12. Now, let's examine the instant case on above touch-stone. It is evident from the facts on record that in the present case, the petitioner/applicant being an interested party was not joined in the Suit in question, through which the respondent No. 1 obtained the land in question mutated in his name though the respondent no.1 *himself* does not deny his knowledge and notice about interest of the petitioner / applicant in the subject matter. Thus, *prima facie*, deliberation on part of the respondent no.1 in not impleading '**one**' as party to the suit whose interests and *claims* were always in notice and knowledge of respondent no.1 regarding subject matter. In such eventuality, the act of not ***impleading*** such a ***proper*** person and obtaining ***decree*** at his back would always fall within meaning of ***fraud*** and ***misrepresentation***.

13. It needs no reiteration that if any order or judgment or decree had been procured without impleading a party (ies) whose rights were involved, such a decree could not be allowed to remain in field if it had injured the right of any person, who was not a party to that proceedings and that a person(s) can file application under section 12(2) CPC, Reliance in this context is placed on the case of Ch. Jalal Din V. Mst. Asghari Beghum and others [1984 SCMR 586] wherein Hon'ble

Supreme Court of Pakistan has observed that ***“persons not party to the suit can also file application under section 12(2) C.P.C”***.

14. In view of the above discussion, misrepresentation and fraud in obtaining the impugned judgment and decree is so apparent that it needs no evidence to be adduced in the case in hand; moreover collusiveness of the parties to the suit and the appeal, who claim themselves to be the owners of the subject properties in equal shares, is apparent from the face of record, which itself is a species of fraud. It is a well settled law that fraud cannot be directly proved, it has to be inferred from the surrounding circumstances and conduct of the parties. In the wake of the above discussions, we do not hesitate in holding that all the ingredients of collusion, misrepresentation and fraud are proved in the case one in hand, therefore, the controversy involved in this application can be decided without framing the issues as laid down by the Hon'ble Supreme Court of Pakistan, in the case of LAHORE DEVELOPMENT AUTHORITY V. FIRDOUS STEEL MILLS (PVT.) LTD [2010 SCMR 1097], wherein the Hon'ble Supreme Court of Pakistan has held that:-

**“...application under S. 12(2) CPC can be decided in summary manner without framing of issues, if the circumstances so warrant.”**

15. In the wake of challenge to the ownership of the parties to the suit and appeal with specific claim of the subject properties being State land, the respondent No. 1, instead of contesting the matter ought to have conceded to the grant of the instant application and sought amendments in the suit for removal of clouds on their claimed ownership, title over the subject properties by establishing, proving it through the evidence



of the nature and including the applicant/petitioner as defendant, thus it would rather be in favour of the parties to allow them opportunities to remove clouds over their claimed ownership and title by suitably amending the plaint before the trial Court in accordance with the law by adducing the evidence of the nature oral as well as documentary evidence.

16. With regard the contention regarding the limitation for filing the application under Section 12(2) CPC as was asserted by the learned counsel for the respondent, no period is provided for such challenge, therefore, Article 181 of the Limitation Act would be attracted in this case, which provides the period of three [03] years for filing of such application from the date of accrual of case of action. Reliance in this respect is placed on the cases of ABDUL AZIZ & 6 others vs. THE MEMBER, BOARD OF REVENUE & 15 others [1998 SCMR 1078], JAVED AKHTAR and another vs. SHER MUHAMMAD and others [1998 SCMR 292], and SARFARAZ vs. MUHAMMAD ASLAM KHAN and another [2001 SCMR 1062].

17. Having said that, merits or otherwise of the application u/s 12(2) C.P.C, alleging fraud against the respondent No. 1, left us quite surprised as to why the same was dismissed, which is quite entertaining of an application filed by the petitioner/applicant, for declaration that the mutation gained by the respondent No. 1 in collusion with others was nullity having been procured by fraud as the petitioner/applicant being an interested party was not joined in as a party in the suit in question.

18. For the foregoing reasons, we allow this petition, set aside the impugned order dated 29.04.2006 passed by learned V<sup>th</sup> Additional Sessions Judge, allow the application u/s 12(2) CPC and also set aside the judgment and decree dated 08.09.1994, passed by the learned II<sup>nd</sup> Senior Civil Judge, Sukkur and remand the matter to the trial court to join the petitioner/applicant as defendant in the suit and allow the plaintiff to amend the pleadings, frame proper issues and record evidence of the parties and decide the suit on merits, fully in accordance with law after providing opportunity of hearing to the parties. Parties are left to bear their own costs.

**J U D G E**

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