

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.648 of 2020

**Muhammad Idrees Abbasi
VS
Syed Akbar Khan & others**

DATE	ORDER WITH SIGNATURE OF JUDGE(S).
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1. For orders on CMA No.2499/2022 (urgent).
2. For orders on CMA No.4878/2020 (U/O 39 R.1&2 CPC).

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Dated: 18.02.2022

Mr. Sher Ali Rizvi, Advocate for the plaintiff.

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1. Urgency granted.
2. This is an application seeking injunctive orders against the defendants as well as restraining orders against the Court of Senior Civil Judge-VI, East Karachi not to proceed with the exparte judgment and decree in suit No.302/2017 and execution No.13/2018. Learned counsel, however, has stated that in fact they have challenged the judgment/decree, which was obtained by the defendants exparte from the court of competent jurisdiction but collusively, which prayer was deleted on the directions of the Registrar/Additional Registrar of this Court.

I have heard learned counsel for the plaintiff and perused the material available on record.

At the very outset plaintiff's counsel was put on notice that the suit is not the remedy even for the remaining reliefs sought in the suit which could only be materialized once the judgment and decree or right and privileges arising out of decree, are set aside to which he agreed. He was then enquired that such judgment and decree cannot be challenged in suit since they are outcome of fraud and misrepresentation as pleaded; he however submitted that plaintiff

seeks declaration of his title notwithstanding the decree favouring defendant, granted from the court of Senior Civil Judge. He insisted to proceed with the application.

The facts of the case are that a decree was obtained by the legal heirs of Dr. Raja Muhammad Ahmed Aghai for a plot of land bearing No.B-106 measuring 400 sq. yds., Mehran Town, Korangi Township, Karachi, who have also been arrayed in these proceedings as defendant. As against their rights, the decree was challenged by plaintiff by filing application under Section 12(2) CPC, which was dismissed by the Court of VIth Senior Civil Judge, East Karachi vide order dated 18.11.2019. He claimed to have filed a Civil Revision No.120/2019 against dismissal of the application under Section 12(2) CPC which too met the same fate and was dismissed by the appellate Court. Previously, in the year 2002 a suit was filed by defendant No.1 (Syed Akbar Khan) against Syed Mohammad Ahmed Aghai as Suit No.327/2002 for asserting his title over him. Suit was contested and dismissed. Appeal preferred which too was dismissed. These facts are available in the order dated 18.11.2019 passed on an application under Section 12(2) CPC. Relevant part is as under:-

“I have heard the learned counsels for both the parties and perused the case file at length. It is paramount consideration that the defendant No.1 had filed Civil Suit No.327/2002 for declaration and permanent injunction which was dismissed vide judgment dated 30.07.2010 wherein the learned Senior Civil Judge has given verdict that the Lease Deed in the name of Dr. Muhammad Aghai is genuine whereas, the Lease Deed dated 19.09.1996 allegedly prepared by the defendant No.1 namely Syed Akbar Khan are fake and fabricated documents. After dismissal of the said suit, the defendant No.1 (Syed Akbar Khan) had preferred Civil Appeal No.298/2010 against the said judgment which was also dismissed vide Judgment dated 20.08.2014 thereafter the plaintiff have filed the instant suit for cancellation of such documents and possession which was also decreed in favour of plaintiffs vide Judgment and decree dated 24.09.2018 and now the applicant/intervener has filed the instant application and also the learned counsel for the intervener through his statement date 17.10.2019

filed the Sale Deed in favour of the intervener which was executed by one Mr. Saeed Akbar Khan through his General Attorney. From perusal of the documents annexed by the learned counsel for the intervener with his statement it appears that the Sale Deed in favour of the intervener was executed by Saeed Akbar Khan S/o Kalam Uddin through his General Attorney on the basis of same Lease Deed on which in the earlier litigation one Mr. Syed Akbar Ali had relied and the same documents were declared to be fake by the learned VII Senior Judge, Karachi East vide Judgment dated 30.07.2010 in civil Suit No.327/2002 with the observations made therein, that, "on the basis of my finding upon the aforesaid issues in favour of original allottee namely Dr. Muhammad Ahmed Aghai and after his death having produced a documents consisting a lease so also other documents, there remains no doubt plaintiff is an encroacher over the suit plot on the basis of the fake and fabricated documents." And the same judgment dated 30.07.2010 has been challenged upon the appellate forum and stands upheld by the Hon'ble appellate Court."

I have enquired from the counsel that how this suit is maintainable in view of bar provided under Section 12(2), as he cannot challenge a decree or even rights thereunder, learned counsel has taken me to the pleadings of the case that he was a bonafide purchaser of the property. He was put on notice about the maintainability of suit, however, he insisted to proceed with intention and confidence to respond to preliminary objection of the Court.

Section 12(2) CPC provides a bar where plaintiff is precluded by rule from instituting a further suit in respect of any particular cause of action and shall not be entitled to institute a suit in respect of such cause of action in any court to which this code applies.

Relevant part of Section 12 is Sub-section 2 as it further provides that where a person challenges the validity of 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 final judgment, decree and order and not by a separate suit. Perhaps the Registrar/Additional Registrar has rightly

pointed out that he cannot challenge a judgment and decree in an independent suit. The law, as amended, in terms of Section 12(2) CPC provides a remedy challenging a decree on the preposition of fraud and misrepresentation which cannot be challenged in an independent suit.

In the similar way, rights of a person also, which are acquired through a decree cannot be challenged without challenging a decree and similarly a person cannot assert his right against a person who is enjoying rights under a decree without its challenge, which challenge has to be under the law i.e Section 12(2). In all such eventualities, a challenge to a decree is inevitable and that cannot be bypassed to avoid rigorous of Section 12(2) CPC. The provisions of Sub-section 2 of Section 12 CPC brought on statute book with the purpose to harmonize the remedy in such eventualities by providing short-cause remedy to the aggrieved party as well and to save him from the vagaries of further litigation by conferring a right to such party for filing an application for setting aside a decree obtained on fraud, misrepresentation and without jurisdiction in the same proceedings instead of a separate suit¹.

The proceedings under Section 12(2) CPC are in the nature of a declaratory suit claiming declaration to the effect that a decree passed by a civil court was a result of fraud and misrepresentation. The effect of this amendment i.e 12(2) CPC is that a civil suit is not competent to seek relief on the ground covered by sub-section 2 of Section 12 CPC. This provision, thus, has a lawful effect to encroach upon and curtail remedy before the Courts of general jurisdiction in the relevant field.

¹ 2003 CLC 607 (Pakistan Employees' Cooperative Housing Society v. Messrs Awami Constructions Co. Ltd, and another).

Originally this suit was filed challenging judgment and decree obtained by a set of defendants under suit No.302/2017 which was modified by the plaintiff by not pressing some of them. Notwithstanding such actions of the plaintiff, the rights of the defendants are arising out of a judgment and decree which cannot be disturbed through a suit, as it amounts to a same challenge i.e judgment and decree of a court which in fact conferred right upon a party/ defendant. The approach of the plaintiff in the instant case is also tainted with mala fide, as he filed this suit after exhausting the remedy under Section 12(2) CPC before the same court and on account of failure in those proceedings under Section 12(2), as it was dismissed by the court, he preferred a revision which too was dismissed. Hence knowingly that the defendants have acquired the rights under a decree which he claimed to be outcome of collusion, fraud and misrepresentation; he has challenged the rights of defendant arising thereunder, through this suit which is not permissible.

In fact plaintiff himself seems to have extended his alleged right over property mischievously. Suit No.327/2002 was filed by defendant No.1 against defendant No.5. Defendant No.1 is a person from whom plaintiff in this suit claims to have acquired rights. Defendant No.1's suit was dismissed and defendant No.5's title was affirmed as reflected in the order above. Despite this, a sale deed executed by defendant No.1 through his attorney when he had no title as confirmed through Court decree in Suit No.327/2002. Defendant No.1's suit was dismissed on 30.07.2010 and civil appeal No.298/2010 on 20.08.2014. Thus at the time when alleged lease was executed i.e. 09.03.2015, vendor/ defendant No.1 had no title. Defendant No.5 through legal heir filed suit No.302/2017, for

cancellation of sale deed of defendant No.1 which too was decreed. Subsequently, an application under Section 12(2) CPC was also filed by plaintiff and got it dismissed and consequently Revision too, as recorded above. Plaintiff cannot acquire any right against rights determined under a decree and sustained after dismissal of application under Section 12(2) CPC.

The plaintiff thus has already exhausted a remedy under Section 12(2) CPC in terms of doctrine of election for challenging exparte and collusive decree which they have challenged on the grounds of fraud and misrepresentation. The plaintiff cannot obtain a parallel decree in respect of the property in question where rights of parties have been determined via judgment and decree. Hence in terms of above understanding of law, the suit is not maintainable and is accordingly dismissed along with pending application(s).

JUDGE

Ayaz Gul