

IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.D-177 of 2010

Muhammad Azam Siddiqui & another

Versus

Mrs. Rana Ejaz & others

BEFORE:

**Mr. Justice Mushir Alam, CJ
Mr. Justice Muhammad Shafi Siddiqui**

Date of Hearing: 12.12.2012

Petitioners: Through M/s. Muhammad Khalil-uz-Zaman and Mian Muhammad Akram Advocates.

Respondent No.1: Through Mr. Javed Iqbal Barqi for the respondents.

Respondent No.2 to 6: Nemo.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- The petitioners have challenged the orders dated 20.10.2009 passed by III-Additional District Judge Karachi Central as well as order dated 06.05.2009 passed by IV-Senior Civil Judge & Rent Controller Karachi Central passed on an application under section 12(2) CPC.

2. Brief facts of the case are that the petitioners have filed an application under section 12(2) CPC before the trial Court on 24.11.2008 on the ground that the alleged sale agreement on the basis of which suit No.310 of 2006 was filed and decreed is a forged and managed sale agreement and that the address of the petitioners, as mentioned in the suit, is also incorrect as he was not residing at the given address. He submitted that the trial court was pleased to dismiss the said application

vide order dated 06.05.2009 which was challenged by the petitioners in Civil Revision No.27 of 2007 before the District Judge Karachi Central which was dismissed by II-Additional District Judge Karachi Central on its transfer vide order dated 20.10.2009. Aggrieved with the aforesaid orders dated 06.05.2009 and 20.10.2009 respectively the petitioners have preferred this petition.

3. Learned counsel for petitioners has argued that the application could not have been disposed of summarily as the grounds raised therein are to be decided only after settlement of issues and recording of evidence. Learned counsel submitted that a categorical statement has been filed that the petitioners were not the resident of the address which is shown in the memo of plaint and that no service was effected on the petitioners. He submitted that on the basis of bogus and managed agreement of sale the property of the petitioners was ordered to be conveyed to respondent No.1 through the impugned judgment and decree. He argued that none of the alleged amount is shown to be paid to the petitioners by way of cross-cheque or pay order nor any amount was paid in cash. He argued that the petitioners never engaged any counsel to represent them as they were never served. Learned counsel submitted that even otherwise no service was effected and that on the basis of unsatisfactory report of the Bailiff the learned trial court held the service good without resorting to the relevant provisions of Order V CPC which deals with the events of non-availability of the petitioners, at the given address, as reported by the bailiff. Learned counsel submitted that all these assertions could not have been summarily rejected unless the fraud and misrepresentation is unearthed by recording the evidence on the crucial issues and thus the rights and interests of the petitioners are prejudiced.

4. In reply to the above, learned counsel for respondent No.1 has denied the allegations and submitted that there is no denial of the petitioners that they are not residing at the address mentioned in the memo of plaint. He submitted that the address of the petitioners was also shown as National Bank of Pakistan, Orangi Township Branch, Karachi, and the petitioners were also served at the said address. He submitted that the petitioners turned up only when the execution application was filed and the notices were served and when the Nazir of the learned trial court published and invited objections in the newspaper regarding the registration of the sale deed of the demised property. It was only at that moment of time that the petitioners approached the learned trial court. He submitted that the decree has already been complied with and that the sale deed has already been registered in compliance of the decree, therefore, this petition has become infructuous. Learned counsel submitted that the service was held good only after considering the bailiff's report. He argued that the address which is mentioned in the memo of plaint is also mentioned in the sale agreement and hence no wrong/incorrect address was mentioned in the memo of plaint.

5. We have heard the learned counsel and perused the record. The R & P of the appellate Court as well as of the learned trial court were also called and we have minutely gone through the diaries of the trial Court file of the relevant period. The controversy before us is only to the extent as to whether the exparte judgment and decree against the petitioners in pursuance of an order (exparte order) was in accordance with law (i.e. the order by which the service was held good), and whether the application under section 12(2) CPC, as preferred by the petitioners, with the allegations therein, could be disposed of summarily in view of the facts and circumstances of the case?

6. The diary of 12.7.2006 shows that the notices to the petitioners were not issued as the cost was not paid. Similarly on 28.7.2006 also notices to defendants No.1, 2 and 4 could not be issued and the plaintiff's/respondent's counsel requested for time to deposit the cost. It is only diary of 16.08.2006 that shows that the notices to defendants No.1, 2 and 4 were partly served and partly unserved and the learned trial court ordered the issuance of notices to unserved defendants No.1 and 2 through bailiff. The diary of 02.09.2006 of learned trial court reflects that the notices returned along with report of the bailiff and it was ordered that the statement of the bailiff be recorded. Diary of 02.09.2006 wherein the statement of bailiff was ordered to be recorded was emphasized categorically.

7. We have perused the entire file of the learned trial court but we could not find any statement of the bailiff on oath recorded in compliance of above diary dated 02.09.2006. The diary of 14.09.2006 again reflected that the notices to be repeated to petitioner No.2/defendant No.2 and the matter was adjourned to 22.09.2006 for recording of statement of bailiff. On 22.09.2006 the Presiding Officer was on leave and the matter was put up for further proceedings. On 26.09.2006 it was ordered that the notices to defendant No.1 and 2 be issued by pasting through bailiff as well as by TCS and the matter was adjourned to 07.10.2006 for service. On 07.10.2006 the diary reflects that the notices to defendants No.1 and 2 returned by way of pasting along with copies identity cards of witnesses and the service was held good and on 16.11.2006 defendants No.1 and 2 were debarred from filing written statement.

8. Although it is claimed that on 23.01.2007 Mr. Sardar Abdul Hameed Iqbal Advocate filed an undertaking on behalf of the petitioner No.1 however the question before us is of prior to filing of such

undertaking i.e. whether there were sufficient material and sufficient compliance of Order V in order to held the service good upon the petitioners.

9. We have observed that some of the directions contained in diaries dated 02.9.2006 and 14.9.2006 mentioned above are not complied as the statement of the Bailiff, as ordered twice, were never recorded. It is only on the basis of statement of the Bailiff to be recorded on oath, that the learned trial court could reach to the conclusion that the petitioners have been served with the summons/notices. It appears that on 07.10.2006 the trial Court on bailiff's report dated 04.10.2006 held the service good without recording the statement of bailiff on oath, who stated to have served the notices/summons on 2nd address of petitioner No.1 at National Bank of Pakistan.

10. The shocking negligence that is seen is that there are two diaries of 26.02.2007 and 12.03.2007 with different versions. The first diaries of 26.02.2007 and 12.03.2007 are as under:-

"26.2.07

Case called. None is present for both the side. Due to strike of KBA matter is adjourned to 28.3.07 for S/P.

12.3.07

P.O. on leave

Case called. None is present for plaintiff. Counsel for the defendant is present. In the interest of justice matter is adjourned to 27.4.07 for S/P."

11. Subsequently the above diaries were re-written and the text of which, as shown in the said diaries, is as under:-

"26.2.07

Case called. Plaintiff and his advocate and as well as witness are present. Counsel for the def. Nos. 3 & 5 is also present. Cross examination of witness of plaintiff recorded at Ex.P/8. Close the side by the counsel for the plaintiff.

Counsel for the def. No.3 & 5 filed statement close the side by the counsel for the def. matter is adjourned to 12.3.07 for final arguments.

12.3.07

Case called. None is present from both sides. Due to strike KBA the advocates have not proceeded their cases. In the interest of justice case is adjourned to 28.3.07 for final arguments.”

12. It is further noted that there are overwritings on the dates of these diaries. So also out of the two diaries of 12.03.2007 the first one is not signed in which P.O. is stated to be on leave while in the subsequent diary of the same date the signature of the very P.O. is available. In such a situation it cannot be ascertained that which of the two diaries is correct and how and in what circumstances these two diaries are separately shown and mentioned with different versions therein.

13. The strength of the learned trial court order as well as of the appellate Court order is that one advocate namely Sardar Abdul Hameed Iqbal has filed an undertaking on behalf of the petitioner No.1. This could hardly be a ground to reject the application under section 12(2) CPC as primarily what is to be seen by the learned trial court as well as appellate Court is whether there was sufficient material in terms of the bailiff's report which is available on record to hold the service good against the petitioners or not. The question of filing of undertaking on behalf of petitioners is of no material consequence as it can be a managed one since it is not signed by the petitioners. Hence the learned trial court while rejecting the application under section 12(2) CPC as well as appellate Court has mainly /relied on the undertaking given by one advocate. The learned trial court has decreed the suit for specific performance against the petitioners and has ordered for registration of the conveyance deed in favour of respondent No.1. Such valuable rights in this case which were taken away from the petitioners are at stake.

The application under section 12(2) CPC which raises all these questions of fact and serious allegations, not only against the respondent No.1 but also against the serving agency including the bailiff, which needed to be thrashed out. More importantly despite the orders of the learned trial court the bailiff has not been examined, as no such record is available. Certainly if bailiff report was relied upon then his statement ought to have been recorded on oath as observed. The trial Court without realizing, his own order for recording statement of bailiff on oath, went on to hold the service good which order could not have been passed without compliance.

14. In view of these facts and circumstances we are of the opinion that the application under section 12(2) CPC filed by the petitioners before the learned trial court should not have been dismissed summarily without recording evidence and statement of witnesses therein. Therefore the petition is allowed and the impugned orders dated 06.05.2009 and 20.10.2009 passed by the Courts below are set aside and the case is remanded to the learned trial court to frame issues in consideration of application under section 12(2) CPC and decide the controversy involved therein after allowing the parties to record their evidence, if they so desire. Since the trial Court did not do the paging of the diaries, some of which appears to be controversial such as 26.2.2007 and 12.3.2007, therefore, it is important that the office of this Court should mark page numbers on the entire diary sheets i.e. from 19.4.2006 to 06.5.2009 of the trial Court file and also to retain the copies of the same in a separate file to be tagged along with this petition and only after such compliance the R&P to be sent to the trial Court and appellate Court.

15. Before parting it may be observed that since apparently there seems to be some manipulation in the diary sheets, particularly of

26.2.2007 and 12.3.2007, as observed above, the District Judge Karachi Central is required to hold an inquiry in the matter and in case anyone is found involved, he may be taken to task.

Dated:

Judge

Chief Justice