

ORDER SHEET
IN THE HIGH COURT OF SINDH AT CIRCUIT COURT,
HYDERABAD

R. A No. 28 of 2007

Date:

Order with signature of the Judge

For hearing of case

01.10.2019

Mr. Arbab Ali Hakro, Advocate for the applicant.
Mr. Razia Ali Zaman Khan, Advocate for respondent No. 1.

1. This revision application arises from an order dated 26.01.2007 passed on an application U/S 12(2) CPC dismissing the same as was filed in the proceedings of Civil Appeal No. 24/1998. The relevant background of the matter is that the respondent No. 1 filed suit for specific performance against respondent No. 2 (since deceased) in respect of 1750 Sq.ft of Custodian No. B/234/1/2. Respondent No. 1 in the matter contested the same by way of filing written statement denying the sale agreement dated 07.10.1998 as well as alleged consideration of Rs. 22,000/-. The said proceedings are reported of having been dismissed on 14.05.1989 and restored on 30.10.1993. The said suit was decreed in favour of the plaintiff and the appeal filed therefrom was also dismissed in the proceedings wherein application U/S 12(2) CPC was filed by the present applicant who have purchased the subject property by way of registered sale deed dated 16.10.1990 i.e. during the period of dismissal. In the application U/S 12(2) CPC the applicant had claimed that the decree in question has been obtained by playing fraud upon this Court as he was the bonafide purchaser of the subject property at the time when the decree was granted and he was not made a party in the matter. It was further claimed that the defendants No. 2 to 7 therein had not contested the proceedings nor preferred any appeal as such the rights of the applicant in the matter stood infringed. The applicant had also given details of his acquired registered sale deed and claimed that the judgment and decree in the matter are illegal and nullity in the eyes of law and the same are based on misrepresentation and concealment of facts as such are liable to be set-aside. The learned Sessions Judge however passed the impugned order dismissing the said application after hearing the parties on the grounds that the applicant had no interest in

the suit property at the time of filing of the suit, the said suit was contested and decided on merits in favour of the decree holder and the appeal therefrom was dismissed whereafter revision application was also preferred before the High Court without any success. While mentioning that the intimation about the execution of sale deed was made to the trial Court it was observed that appearance before the trial Court was not made on part of the applicant. That the defendants having extended no objection to the said application it was observed that the decree holder was being dragged in unnecessary litigation and an attempt is being made to repeat the same proceedings which was not found justified.

2. This revision was heard on the earlier date of 30.09.2019 and the arguments were got recorded however learned counsels have argued the matter today also as such for the continuity, all of the same are reproduced as under:-

"Learned counsel for the applicant contends that the applicant of this revision application has filed an application U/S 12(2) CPC before the learned appellate Court as a decree was obtained by fraud and misrepresentation wherein the applicant is a bonafide purchaser without notice as he has purchased the subject property by way of sale deed from the earlier owner, who was party as defendant in the suit of specific performance filed by respondent No. 1. He further contends that the suit was dismissed on 14.05.1989 and the restoration application was filed on 18.05.1989 and the said suit was restored on 30.10.1993. The applicant meanwhile purchased the subject property by way of sale deed dated 16.10.1990, as such doctrine of lis-pendence would not apply in this case. He also contends that the learned appellate Court had passed the impugned order on merits and in case the element of forum was considerable it was not pen with the appellate Court to discuss the merits and to pass the order accordingly.

Learned counsel for the respondent No. 1, however, contends that the present applicant was in full knowledge of the proceedings as he was taken as a witness in the proceedings and the notice of the restoration application was also received by him duly reported by Bailiff in this regard. She also



contends that the impugned order has rightly discussed the element of knowledge and where the knowledge was in existence, fraud and misrepresentation would not lie. She further contends that the application U/S 12(2) before the learned appellate Court was not available as the decree at that time was in knowledge of the present applicant and learned trial Court in this matter was never approached. She next contends that in this revision all the said elements were brought up by way of counter affidavit, to which no rejoinder has been filed on part of the applicant".

3. Today the learned counsel for the respondent No. 1 further contends that the learned trial Court in this matter had already considered the element of further sale under Issue No. 4 and that the subject application U/S 12(2) CPC as filed is barred by limitation. She also contends that no fraud or misrepresentation was present on part of the respondent No. 1 and as such this revision is not tenable.

4. Learned counsel for the applicant in rebuttal contends that joining of the applicant after knowledge was required on part of the respondent under Order 1 Rule 3 CPC and that the impugned order is liable to be set-aside on the ground of fraud and misrepresentation being present.

5. Learned counsel for the respondent No. 1 has also filed written synopsis alongwith copies of the citations relied upon in the matter. In the written synopsis, specific dates in the matter are given alongwith a repetition of the arguments made. The specific laws have been cited and relied upon by the learned counsel being Sections 41 & 54 of the Transfer of Property Act and Section 27(b) of the Specific Relief Act. Learned counsel also relied upon the following authorities:-

1. 2017 CLC Page 989 SC (AJ&K)
2. 2017 CLC Page 1115 SC (AJ&K)
3. 2015 SCMR Page 1081
4. 2018 YLR Page 1543 (Peshawar)
5. Essential Civil Reference P. 642
(Proper Forum of 12(2) CPC)
6. 2007 PLR (abbot) Page 538
7. MLD 2017 Page 507 (Sindh)
8. MLD 2017 Page 249 (Sindh)
9. YLR 2006 Page 1223
10. 2013 SCMR Page 551
11. 2019 CLC Page 252



6. Having heard the learned counsels and gone through the record, normally an application U/S 12(2) CPC is entertained by a Court of law on a prima facie existing element of fraud, misrepresentation and want of jurisdiction as the case may be and in fit cases further inquiry by way of evidence is also made in order to acquire the judicial conclusion on merits. In the present case, the present applicant is holding a registered sale deed in his favour which prima facie has been obtained during the period when the suit was yet to be restored and the application for the restoration was pending. Unfortunately both the parties have not preferred to bring forward the said restoration order. It is primarily the case of the respondent that the applicant having received the notice of restoration application as such in knowledge of the proceedings cannot be entertained and that the proper forum for the 12(2) application was the trial Court and not the appellate Court. The natural anxiety of the respondents having already suffered so many years of litigation undoubtedly is ever present but at the same time, the same cannot be the ground of disentitling the applicant if any right is available to him on this pretext alone. Maintainability of the application before the appellate Court however is a question of law but the norms of justice in accordance with law demand that it must be seen whether the impugned order has disentitled the applicant to approach the trial Court for entertaining of his application U/S 12(2) CPC?

7. Irrespective to the element ever existing that a lis on restoration is likely to be treated having antedated effect in order to avoid any conflict that may arise or as ordered under judicial acumen, for which an order of restoration itself is liable to be looked into first. There can be a little doubt that the proper forum of the application U/S 12(2) CPC was/is the trial Court however learned appellate Court was pleased to pass the impugned order not restricting itself to the maintainability of the said application (irrespective to the fact that the respondent has also not preferred to be restrict before the learned appellate Court in this regard) and had preferred to pass the order on merits and in such circumstances where the learned Sessions Judge had passed the order on merits perhaps not which room was left for the present applicant to approach the learned trial Court. As to the knowledge prima facie the proceedings were yet to be restored wherein for the purpose of restoration the present applicant (not a party to the existing/original proceedings) was not a necessary required party to be heard at that stage and no knowledge subsequent in time after restoration has been

established. In the present circumstances, the applicant has made out a case of a further inquiry under Section 12(2) CPC before the decree is liable to be disturbed and as such without commenting any further as to the elements as are present in impugned order or the arguments advanced by the learned counsels in order to ensure that the proceedings in the matter are not influenced in any manner, the impugned order is set-aside and the matter is remanded to the learned trial Court to decide the application U/S 12(2) CPC by framing the following issues:-

1. Whether the application U/S 12(2) CPC is barred by the prescribed limitation?
2. Whether the decree dated 04.04.1998 has been obtained by fraud, misrepresentation and collusion? If so, its effect?
3. Whether the present applicant is a bonafide purchaser without notice against a valid and lawful consideration, if so, its effect?

8. It is further ordered that the learned trial Court shall not be influenced or prejudiced by any observation present in the impugned order or even this order in any manner and shall proceed with full confidence and decide the matter either way in accordance with law. In case the parties lead evidence the present applicant shall lead evidence in the first place as the onus to prove rests with him in the first incident. It is reasonably expected that the learned trial Court shall decide the matter within a period of five (05) months from the date of this order.

With the above observations, this revision application stands disposed of accordingly alongwith the pending applications.

Sd/- MEHMOOD A. KHAN,

JUDGE