

ORDER SHEET  
IN THE HIGH COURT OF SINDH AT KARACHI  
J. M. NO. 68 / 2014

| DATE | ORDER WITH SIGNATURE OF JUDGE |
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| 1) | For hearing of main application.   |
| 2) | For hearing of CMA No. 4854/2015.  |
| 3) | For hearing of CMA No. 5628/2015.  |
| 4) | For hearing of CMA No. 630/2015.   |
| 5) | For hearing of CMA No. 16311/2014. |

17.3.2016.

Mr. Iftikhar Javed Qazi Advocate for applicant.  
Ms. Nigar Afaq State Counsel.  
Mr. Abdul Salam Dadabhoy Director of respondent No. 2.

1. None present for the respondent No. 1 nor any intimation received, whereas, perusal of the order sheet reflects that none has affected appearance on behalf of respondent No. 1 except on 18.11.2015 when Mr. Sibte Hassan Advocate was holding brief on behalf of Mr. Qutubuz Zaman who has filed comments as well as counter affidavit and Vakalatnama on behalf of respondent No. 1 in this matter.

2. Briefly the facts as stated are that the applicant claims to be owner of property bearing Plot No. 25, Block No. "R.C" measuring 139 Sq.Yds, situated at Survey No.1, Dadabhoy Town, Deh Drigh, Tapo Malir, Dadabhoy Co-operative Housing Society Limited, Karachi, on the basis of registered Sale Deed bearing No. 1403, Book No.1 dated 24.12.2003 of Sub Registrar T-Division III-B, Karachi ("**Property**"). It is further stated that the property was allotted and leased in favor of one Muhammad Hashim S/o Muhammad Umar Merchant in the year 1975, whereas, he expired on 23.7.1987. Thereafter the property was mutated in his widows name Mrs Ahsana Ayub who gave a registered irrevocable power of attorney to Mrs. Nisar Bibi, who executed Sale Deed in favor of Mrs. Durdana Rahim from whom the predecessor in interest of the

applicant has purchased it vide Sale Deed registered at 1403, Book No.1, dated 24.12.2003. It is the case of the applicants that one Muhammad Abid acting as an attorney of Muhammad Hashim since deceased, and the original allottee of the property has made two fraudulent attempts to take over the property in question by filing Suit No. 1629 of 2010 and through another collusive Suit bearing No. 09 of 2013, and has been successful in the 2<sup>nd</sup> attempt by obtaining the impugned judgment and decree, whereas, the earlier Suit No.1629 of 2010 was dismissed for Non-prosecution.

3. Counsel for applicant submits that through this application under Section 12(2) CPC the applicant has impugned compromise Judgment dated 20.8.2014, whereby, the Suit has been compromised between Huma Aijaz the plaintiff and Muhammad Hashim defendant No. 1 through his attorney Muhammad Abid in Suit No. 09 of 2013. Counsel submits that the property in question was originally owned by Muhammad Hashim S/o Muhammad Umar having old NIC No. 513-34-17642-1 and the said Muhammad Hashim had expired on 20<sup>th</sup> July 1987, whereas, the property in question is now owned and in possession of the applicant who are legal heirs of Masood Ahmed. He further submits that defendant No. 1 in the Suit had in fact manipulated the CNIC of deceased Muhammad Hashim, and had appeared in the Suit on behalf of the said Muhammad Hashim as attorney and has got the Suit compromised between the plaintiff and himself. He has referred to annexure "B" filed along with comments on behalf of respondent No. 1 in this regard. He submits that earlier also a Suit bearing No. 1629/2010 was filed by the same attorney, Muhammad Abid in the name of Muhammad Hashim Merchant and when inspection of the property was carried out in the said Suit, it transpired that the possession of the property is not with the plaintiff and thereafter plaintiff did proceed with the Suit which was dismissed

for non-prosecution vide order dated 4.11.2013. He further submits that Suit No. 09 of 2013 was a collusive Suit between respondent Huma Ejaz and Muhammad Abid acting as an attorney of Muhammad Hashim to make another attempt of fraud before this Court and through such fraud and misrepresentation they have succeeded in obtaining the impugned judgment and decree, notwithstanding the fact the earlier Suit No1629 of 2010, was still pending when the 2<sup>nd</sup> Suit was filed.

4. I have heard the applicant as well as the representative of the Society respondent No. 2 who supports the case of the applicant. Despite filing comments as well as Vakalatnama none has affected appearance on behalf of the respondent No. 1 therefore; this matter is being heard and finally decided with the assistance of the Counsel for applicant.

5. Perusal of the record including annexure "B" filed along with comments by respondent No. 1, it reflects that CNIC was made in the name of Muhammad Hashim S/O Muhammad Umar Merchant having No. 42301-5002815-1, whereas, at the bottom of such report of NADRA it reflects that the person whose picture was pasted and in whose name the said CNIC was prepared, already existed in the census database of NADRA in the name of Abdul Rauf Wichar S/O Abdul Sattar Wichar. Perusal of the record further reflects that all along the Suit property has been claimed by Mr. Muhammad Abid as attorney of Muhammad Hashim and in this regard he has also placed on record the Power of Attorney dated 24.6.2008 (Annexure A to the Counter Affidavit of the decree holder and Plaintiff in Suit) in which the same CNIC has been mentioned, whereas, the said Muhammad Hashim had already expired in the year 1987. The compromise recorded before the Court vide order dated 20.8.2014 in Suit No. 9/2013 is also through the said attorney, whereas, the actual allottee of the property is Muhammad Hashim, who even otherwise could not have been nor was never present before the

Court. Moreover, the subsequent owner Masood Ahmed S/O Noor Ahmed was arrayed as defendant without mentioning any address on the plaint along with defendant No. 4, (Ahsana Ayub) on the address of the Society, the defendant No. 2 in the Suit. Therefore, the said defendant No.3 and the present applicant through his legal heirs, was never properly served, rather could not have been served without any proper address in the plaint. On 23.1.2013 an urgent application was moved on behalf of the plaintiff along with an application under Order 39 Rule 1 & 2 CPC on which notice was ordered by the Court for date to be fixed by the office. Perusal of the record further reflects that the summons in the Suit were never issued by the office as despite several chances neither the plaintiff or his Counsel ever appeared before the Additional Registrar (OS) nor deposited cost, whereas, the matter was being fixed regularly from 24.12.2012 till 13.12.2013. Thereafter, the compromise application was filed and along with an urgent application on 20.8.2014 and in presence of the Plaintiff and the attorney of defendant No.1 the impugned judgment and decree was obtained, whereas, the bailiff report reflects that notice was only served upon defendant No. 6 (SHO Mahmoodabad, Karachi) and defendant No.7 (Province of Sindh). Such conduct on the part of plaintiff and defendant No.1/attorney speaks for itself and does not leave any manner of doubt that the impugned judgment and decree has been obtained by them to the exclusion of other defendants, fraudulently and with misrepresentation. It would not be out of place to mention that in such matters, though evidence has to be recorded ordinarily however, it is not that in every case / application under Section 12(2) CPC, issues are to be framed and evidence is to be recorded necessarily. This is left with the Court to exercise its discretion in appropriate matters and to adopt the mode for disposal of the case. Reliance in this regard may be placed on the case of ***Nazir Ahmed Vs Muhammad Sharif (2001 SCMR 46)***

6. The upshot of the above discussion is that no evidence is required in the instant matter to come to a conclusion that the applicant was never served in the Suit, whereas, it is needless to observe that concealment of facts or obtaining any order in absence of a party who is going to be materially affected through a compromise, has always been regarded as fraud with and misrepresentation to the Court.

7. In the circumstances, and in view of the discussion hereinabove, I am of the view that no further evidence is required in this matter, whereas, the decree holder (Huma Ejaz) as well as defendant No.1/attorney (Muhammad Abid) have chosen to remain absent despite being served and being represented through an Advocate, Accordingly I hold that the impugned Judgment dated 20.08.2014 and decree dated 19.9.2014 passed in Suit No. 09 of 2013 is not sustainable any further and is accordingly set-aside. The Suit will remain pending and shall proceed accordingly.

8. The application under Section 12(2) stands allowed, and in view thereof all pending applications listed today are disposed of.

J U D G E

ARSHAD/