

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
R.A. No. 25 of 2015

Date	Order with signature of Judge
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1. For hearing of CMA No. 5272 of 2019.
2. For orders on CMA No. 4804 of 2018.
3. For orders on office objection.
4. For hearing of main case.

25th September 2020

Mr Haq Nawaz Talpur, advocate for applicants.

Salahuddin Panhwar, J. Through instant revision application, the applicants have challenged the order dated 18.02.2015, passed by the learned IIIrd Senior Civil Judge, Karachi {South}, passed in Suit No.879 of 2013 {Old Suit No.1196 of 1998}, whereas the application under Section 12{2}, CPC, filed by the applicants was dismissed.

2. Precisely, relevant facts giving rise to this revision application are that the respondent No.1/plaintiff filed a suit against defendants Dr. Nazir Ahmed Said and 2 others for specific performance of contract claiming himself to be the bonafide purchaser in respect of the suit property having paid a sum of Rs.15,92,000/- {Rupees fifteen lac ninety two thousand} out of total sale consideration of Rs.25,00,000/- {Rupees twenty five lac} by virtue of sale agreement dated 21.09.1991. The defendants though handed over the possession of the suit property to the respondent No.1/plaintiff, but failed to transfer the same in his name inspite of the fact that the respondent No.1/plaintiff always ready and willing to pay the balance sale consideration of Rs.9,08,000/- {Rupees nine lac eight thousand} and finally the defendants extended threats for his forcible dispossession from the suit property, hence the respondent No.1/plaintiff filed suit seeking following relief{s):-

“{a} For specific performance of sale agreement, directing the defendants to execute the sale/transfer deed in favour of the plaintiff in respect of the suit property bearing Plot No.95, Block ‘A’, City Survey No.64, Sindhi Muslim Cooperative Housing Society, Karachi, admeasuring 600 Sq. Yards, with

construction thereon. In case of his failure, the Nazir of this Court may be directed to execute the Sale Deed on behalf of defendants in favour of plaintiff.

{b} Permanent injunction, restraining defendants and/or any other person claiming through or under them from transferring/selling or alienating the said property in favour of any other person and/or disturbing plaintiff's possession and/or ejecting him from the said property in any manner whatsoever, otherwise than in due course of law.

{c} Costs of the suit.

{d} Any other relief, which is deemed proper in the circumstances of the case.

3. The defendants though served by way of substitute service, but failed to appear and contest the suit, hence service against them was held good and the matter was ordered to proceed *ex parte* by an order dated 26.05.2006. The respondent No.1/plaintiff filed affidavit-in-*ex parte* proof and by a judgment dated 31.07.2006 the suit was decreed *ex parte*.

4. An application under Section 12{2}, CPC was filed by the applicants seeking recall of the judgment dated 31.07.2006 claiming themselves to be the owners of the suit property on the basis of registered sale deed dated 14.07.1998 executed in the name of their deceased father Muhammad Hamid Saleem, who expired on 01.04.2004, leaving behind the applicants as his surviving legal heirs and the respondent No.1/plaintiff has obtained *ex parte* judgment and decree on the back of the applicants by way of fraud, misrepresentation and concealment of actual facts, hence prayed for recalling of *ex parte* judgment dated 31.07.2006 and decree 04.08.2006.

5. After hearing the counsel for the applicants and assessing the record, the learned trial Court dismissed the application under Section 12[2], CPC as being hopelessly time barred vide order dated 18.02.2015. Being aggrieved by the order of dismissal, the applicants have preferred the instant revision application.

6. It is, *inter-alia*, contended that the applicants filed an application under Section 12(2) C.P.C against judgment dated 31.07.2006 and decree dated 04.08.2006, on the ground that the applicants are owners of the

property, having registered sale deed in their favour prior to filing of the suit, which facts were concealed from the Court by the respondents, but the learned trial Court without providing an opportunity to the applicants to lead evidence, dismissed their application *in limine*. Further, he contends that question involved with regard to limitation and *locus standi* is a mixed question, which is required to be resolved through evidence, hence, impugned orders recorded by both courts below are illegal and *ab-intio* void. He has relied upon 2020 SCMR 406, relevant para 18 of the judgment is reproduced here with:-

“18..... However, the parties would be at liberty to adduce any fresh evidence in support of their pleadings and the trial Court should ensure that the application under section 12(2), C.P.C. is decided within 60 days and in case the judgment and decree could not be sustained then restitution of property in terms of section 144 should also be considered.”

7. It is needful to refer here the settled principle, so repeated in the case of Haji Farmanullah v. Latif-ur-Rehman 2015 SCMR 1708 that:

“4. ...

Thus after the insertion of this new provision, the validity of a judgment and decree etc, obtained or alleged to have been obtained on the basis of fraud and misrepresentation or from a court having no jurisdiction could only be challenged by moving an application to the same court which passed the final decree, and not by a separate suit..

Therefore, *normally* where a judgment and decree etc. if appears to have been result of which, if would have brought on surface, would have earned a right of hearing to a *third person* (not party to suit) then it would always be requirement of *Safe Administration of Justice* to accept such application. In short, the *Safe Administration of Justice* always demands that no right, title or a registered document would lose its vitality without proper and *fair* right of hearing/adjudication. This has been the reason that remedy of section 12(2) CPC is not limited to judgment-debtor or party of the suit. Light is taken from the case of Ch. Jalal Din v. Mst. Asghari Begum & Others 1984 SCMR 586 the Honourable Apex Court held that:-

“It is obvious that in section 12(2) C.P.C, the word ‘person’ and not the judgment-debtor or his successor-in-interest or the word party to the suit have been used, thus it would not be permissible to import into that provision of law something which has not been mentioned therein. It appears that the law-maker has purposely used the word ‘person’. Had the intention of the law-maker been to restrict the right

of filing the application under section 12(2) C.P.C. only to the judgment-debtor or his successor-in-interest or a person whose was party thereto then nothing was easier for the law-maker to have said so. If the argument for the learned counsel for the petitioner is accepted then the very purpose behind enacting the aforesaid provision of law would be frustrated because then a person not being a judgment-debtor or his successor-in-interest or a party to the suit, although his rights may have been jeopardized by the decree obtained by fraud or misrepresentation, shall be obliged to undergo the exercise of filing a suit for the purpose because a number of cases can be visualized in which fraudulent decrees are obtained in order to cast clouds on the legal rights of their opponents."

We are inclined to agree with the above exposition of law and would hold that the respondents Nos.1 and 2 had a locus standi to file a petition under section 12(2) of the C.P.C."

The party, whose rights are *prima facie*, likely to be effected by a judgment and decree can't be denied a right of hearing which includes a challenge to such judgment and decree through petition under section 12(2) CPC.

8. In the instant matter, the main ground of the applicants has been that "they are owners of the property, having registered sale deed in their favour, prior to filing of the suit" hence there can be no denial to the fact that they have / had *locus standi* because such judgment and decree *surely* affects their rights, title and interest which they claim under a **registered document**. Needful to add that a '**registered document**' unless declared to be void / cancelled by a competent court of law within meaning of section 39 of Specific Relief Act, the same shall carry presumption of *legality* which even is guaranteed by Constitution as well enunciated principle of **due process of law**, guaranteed by Article 10-A of the Constitution.

9. With regard to the office objection questioning the maintainability of the instant Revision Application, learned counsel for the applicants has relied upon 2010 CLC 120 and an unreported judgment of this Court dated 14.09.2017, the relevant portion whereof is reproduced as under:-

"6. Thus at one hand it becomes crystal clear that the High Court may call for the in any case which had been decided by any court subordinate to it, if that court appears to have exercised jurisdiction not vested in it by law etc. and make such order as it thinks fit. It is neither the case of respondent that the Senior Civil Judge passing the impugned order is not subordinate to High Court nor it can be considered as such. Besides sub-section (2) to (4)

reproduce above do not speak of any bar in approaching this court against the order passed by the Courts subordinate to it and where appeal against that is not provided, thus in my humble view of the matter, I am fortified by a decision in the case of Mst. Safia Mushtaq v. Wali Muhammad and 18 others (2010 CLC 12) where Hon'ble Mr. Justice Gulzar Ahmed (the then Judge of High Court of Sindh) has held as under:-

“As regards the maintainability of the Revision Application, as the counsel for the private respondents has himself conceded that the Revision Application can be filed directly in the High Court against an order in exceptional cases, this in itself amounts to negating the objection raised by the counsel for private respondents. In any case, I have gone through the provisions of section 115 of C.P.C. and find that it gives concurrent jurisdiction to the High Court as well as the District Court to entertain Revision Applications against the order passed by the Courts subordinate to it. Subsection (2) of section 115, C.P.C. is the provision by which such concurrent jurisdiction is conferred upon the District Court, but such conferment of concurrent jurisdiction is limited where the amount or value of subject matter does not exceed the limits of its appellate jurisdiction. This being limitation placed upon the District Court for entertaining the Revision Application, it has no application to the High Court nor such provision takes away the jurisdiction of the High Court from entertaining the Revision Application against the order passed by a Court subordinate to it. For these reasons I find this revision Application to be maintainable.”

10. *Prima facie*, there is no exception to the instant revision application rather it appears to be falling within four corners, so sketched for entertaining a *revision* application. Needless to add that entertaining a *revision* application is something *quite* different from inclining the same which shall require, *prima facie*, establishing of grounds, so detailed for accepting a revision application. Without prejudice to this, entertaining a *revision* for hearing is only in affirmation to legitimate right of *challenge* an order, so passed by a subordinate court for which no right of appeal is provided, yet substance thereof causes *grievance* to a litigating party. Accordingly, in view of the above decisions, the instant Revision application is held as maintainable and resultantly the office objection is overruled.

11. As regard the *limitation*, I would say that this is, *normally*, a mixed question of fact and law hence when, *prima facie*, valuable rights are involved it is always better to allow the parties to lead their claim (s) rather to bring a full stop to such valuable rights without their being any **due process of law**. In the case of Muhammad Bashir & another v. Province of Punjab through Collector of District Gujrat & Ors 2003 SCMR 83 it was observed as:

“7. ... Legal formalities and technicalities are intended to safeguard the paramount interest of justice and devised with a view to impart certainty, consistency and uniformity to administration of justice and to secure the same against arbitrariness, errors of individual judgment and mala fides. General speaking the object of a superior Court, while exercising its discretionary jurisdiction, is to foster the ends of justice, preserve the rights of parties and to a right a wrong and, keeping this object in view, it may in equity, set aside or annul a void judgment or decline to enforce it by refusing to intervene in the circumstances of the case.

12. Worth adding that in said case, the valuable rights were given preference over the delay in approaching Court of law. It is worth adding that since filing of instant revision application, notices were issued to respondents; they were served; they engaged counsel and in 2018 Mr. Muhammad Ali Waris Lari, advocate appeared for intervener, whereas the remaining respondents were also served through substituted service including publication but failed to cause their appearance, there appears no reasonable justification for keeping the matter pending when the applicants, *prima facie*, have a right of hearing but their application, moved under section 12(2) CPC, was dismissed in *limine* though their title (registered document) has never been adjudicated as **cancelled**. Accordingly, both orders are set aside; case is remanded back to the trial Court with directions to frame legal issues and provide an opportunity to the parties to lead their evidence.

The instant Revision Application stands disposed of in the foregoing terms.

J U D G E