

Judgment Sheet
IN THE HIGH COURT OF SINDH, KARACHI

**C. P. No.D-6359/2018 &
C.P. No.D-8593/2017**

PRESENT:

Mr. Justice Syed Hasan Azhar Rizvi
Mr. Justice Arshad Hussain Khan

C.P. No.D-6359/2018

Syed Abdul Rehman Vs.Mst. Naheed Hussain and others.

&

C.P. No.D-8593/2017

Syed Abdul Rehman Vs.Mst. Naheed Hussain and others.

Petitioner in both the above Petitions. Through Mr. Khawaja Saiful Islam, Advocate.

Respondent No.1 in both the above Petitions. Mst. Naheed Hussain in person

Official Respondents Through Mr. Miran Muhammad Shah, Addl. A.G. Sindh and Ms. Samina Iqbal, Assistant Director NADRA.

Date of Hg. 18.08.2022

JUDGMENT

ARSHAD HUSSAIN KHAN-J. This single order will dispose of the aforesaid two constitutional petitions as the parties and the subject matter as well as prayer clauses of the petitions are one and the same. Since the prayers in both the petitions are almost same as such in order to avoid unnecessary lengthiness, the prayer clauses of subsequent petition viz. C.P. No. D-6359/2018, which covers the prayer clauses of earlier petition viz. C.P. No. D-8593 of 2017, are mentioned here as under: -

- a) Set aside the impugned order dated 14.05.2018 passed by VI ADJ Karachi East in Civil Revision No.14/2018 and dated 13.01.2018 as well as the order dated 08.12.2017, passed by Learned IV Sr. Civil Judge, Karachi [East] on the second application u/s 12(2) CPC filed by respondent No.1 on 20.04.2017 in Suit No.1444/12.
- b) Declare that the second application u/s 12(2) filed by Respondent No.1 after two years was not maintainable and the orders / decree passed in Suit No.1444/2012 had already attained finality long back.
- c) Direct respondent No.1 or anyone found in possession of the said property/flat bearing Flat No.604,6th Floor, measuring

1168 Sq. Ft. in the building known as AMBER PLAZA constructed on Plot No.110, Survey No.213, Block A, Sindhi Muslim Cooperative Housing Society, Jamshed Town, Karachi, to hand over the same to the petitioner and writ of possession of the same be issued along with police aid for handing over the same to the petitioner along with all the fittings, fixtures, furniture and air conditioners.

- d) Grant injunction thereby restraining the respondents more particularly respondent No.1, her agents, attorneys, representatives or anyone claiming on her behalf not to part with the possession or create any third party interest against the said property /flat.
- e) Direct for a judicial enquiry and take legal / disciplinary action against the delinquent officials of learned trial court for acting illegally, passing the impugned order and dispossessing the petitioner from the said property / flat on the same day without any notices/pasting as required under the mandatory provisions of law.
- f) Grant such other / better relief, which this Honourable Court may deem fit and proper under the circumstances of the case.
- g) Costs of the petition.

2. Briefly, the facts giving rise to the above petitions are that the petitioner [in both the petitions] has purchased a property bearing Flat No.604, 6th Floor, measuring 1168 Sq. Ft. in the building known as AMBER PLAZA, constructed on Plot No.110, Survey No.213, Block-A, Sindhi Muslim Cooperative Housing Society, Jamshed Town, Karachi, East [**subject property**] from respondent No.2 [Mst. Zaibun Nisa] through sale deed dated 27.08.2015 against payment of Rs.29,00,000/- [Rupees Twenty Nine Lacs Only] and physical possession of the property was also handed over to the petitioner on the very same date. It is stated that respondent No.2 had acquired the subject property through sale deed dated 30.04.2015, executed by Nazir of District & Sessions Court, Karachi, in Execution No.19 of 2013 in compliance of order dated 26.09.2014, decree dated 18.09.2013, passed in Civil Suit No.1444 of 2012. It has been stated that the petitioner was enjoying lawful physical possession of the property, however, without issuing any notice to the petitioner, learned Senior Civil Judge-IV, Karachi-East [trial court] passed an order dated 08.12.2017 [impugned herein] allowing the application under Section 12(2) CPC filed by respondent No.1 [Mst. Naheed Hussain] and on the same date i.e. 08.12.2017, issued the writ of possession with the police aid and on the

very date the bailiff and the police with the collusion of respondent No.1 forcibly dispossessed the petitioner from the subject property. It is further stated that the petitioner also filed an application u/s 12(2) CPC before learned trial court for recalling of order dated 08.12.2017, which was obtained by respondent No.1 by playing fraud and misrepresentation but learned trial court by its order dated 13.01.2018 [impugned herein], dismissed the said application against which the petitioner filed Civil Revision Application No.14/2018, which was also dismissed by learned VIth Additional District & Sessions Judge, Karachi-East in a mechanical manner by its order dated 14.05.2018. The petitioner has impugned all three above orders in these petitions.

3. In response to the above petitions, respondent No.1 filed her counter affidavits dated 01.03.2018 and another one dated 12.04.2018, both are available on the record of CP No.D-8593/2017. She while supporting the impugned orders in her counter affidavits stated that she is residing in the suit property for more than 25 years, which was purchased by her grandmother namely; Ms. Hildegarte Margarite Eftychious Lves, who expired in U.K on 02.07.1985 and her death certificate is enclosed as Annexure-A to counter affidavit. It is also stated that she did not know any Abdul Rehman or Zaibun Nissa. It is further stated that the documents filed in Suit No.1444/2012 were found fake and bogus as agreement of sale, allegedly executed by respondent No.3 [H.M. Eftychiou Lves], who died much prior to the date of execution of the document. It is stated that the petition is totally based on fraud and the same should be dismissed.

4. During course of the arguments, learned counsel for the petitioner [Syed Abdul Rehman] in both the petitions has argued that the impugned orders are wrong on facts, illegal and failure to exercise the jurisdiction vested in the learned ADJ and Sr. Civil Judge, which demand serious and critical attention of this Court. It has been argued that learned courts below while passing the impugned orders arrived at the wrong conclusion that the suit was filed against a dead person whereas during the entire proceedings at execution and revisional stage, respondent No.1 has miserably failed to prove the death of respondent No.3 through concrete evidence and only one illegible copy of death certificate from UK Authorities was produced which was never verified

or put to test through evidence. It has also been argued that learned courts below while passing the impugned orders violated the provisions of Section 47 of the CPC. It has further been argued that learned lower appellate court failed to consider that the investigation of claim and objection was to be made in execution proceedings as provided under Order XXI, Rule 58 and Rule 59, which provides that the claimant / objector should adduce evidence that it had a valid title to the property but respondent No.1 has failed to produce any evidence showing her relationship and heirship with respondent No.3. It has further been argued that learned lower appellate court failed to consider that the order dated 08.12.2017 as well as its hasty implementation on the same date by learned trial court is a classic example of misuse of power and authority by learned trial court and calls for interference by this Court. It has been argued that the ejection of the petitioner from the subject property was carried out without serving mandatory notices including final seven days' notice as required under the law, besides no pasting of any notice was done at the site of the suit property, therefore, it is proved beyond any doubt that the petitioner has been condemned unheard and the principles of natural justice have been grossly violated. It is also argued that learned courts below have failed and ignored that when the earlier application of respondent No.1 filed u/s 12(2) CPC dated 21.05.2015, was already disposed of by order dated 16.09.2015, then how similar application u/s 12(2) CPC filed on 20.04.2017, on the same grounds and in the same suit, was maintainable after two years; this is nothing but a judicial blunder committed by trial court. It has been argued that respondent No.2, who was the previous owner of the property on the basis of orders / decree, passed by learned trial court, after selling out the subject property to the petitioner, had lost her interest in the proceedings, more particularly after dismissal of the application u/s 12(2) CPC by order dated 16.09.2015 but respondent No.1 manipulated the situation by not impleading the petitioner as party to that proceedings, as well as by manipulating and arranging that no notice of the proceedings is served upon the petitioner, although respondent No.1 was fully aware that the said property was already sold out by respondent No.2 to the petitioner, therefore, it is proved that the petitioner being successor of respondent No.2 has been condemned unheard. Lastly, it has been urged that under such compelling

circumstances the petitioner has no other efficacious and alternate remedy left but to knock the door by invoking its extra ordinary constitutional jurisdiction of this Court.

5. In reply, Mst. Naheed Hussain, [respondent No.1 in both the aforesaid petitions] while reiterating the contents of her counter affidavits stated that she is residing in the suit property for more than 25 years, which was purchased by her grandmother namely; Ms. Hildegarte Margarite Eftychiou Lves, who expired in U.K on 02.07.1985. She has stated that the orders impugned in the present proceedings are well reasoned and speaking orders, as such do not warrant any interference by this Court in the instant proceedings and the petitions are liable to be dismissed.

6. We have heard learned counsel for the petitioner and respondent No.1, appeared in person, as well as perused the material available on record.

From perusal of the record, it transpires that initially on 01.11.2012 a civil suit bearing No. 1444 of 2012 was filed before the court of IVth Senior Civil Judge, Karachi (East), by Mst. Zaibun Nisa [respondent No.2 herein] against Ms. H. M Eftychiou Lves [respondent No.3] and District Registrar Karachi [respondent No.4] for Specific Performance of contract, that is, Agreement of Sale dated 11.02.2009 [the sale agreement] entered into between her and Ms. H. M Eftychiou Lves in respect of sale transaction to purchase the subject property for total consideration of Rs. 10,00,000/-. It has been stated in the plaint of the suit that Ms. Eftychiou despite receiving entire sale consideration has failed to execute sale deed in terms of the sale agreement. Upon notice of the said suit, on 06.04 2013 a written statement on behalf of Ms. Eftychiou was filed wherein the claim of the plaintiff was admitted however, sought dismissal of the suit. Pursuant to the admission made in the written statement, Mst. Zaibun Nisa filed an application under Order XII Rule 6 of CPC for judgment on admission. Notice on the said application was issued, however, Ms. Eftychiou did not contest the application. Resultantly, on 18.08.2013 the said application was allowed and the suit was decreed as prayed. Thereafter, Execution Application No. 19 of 2013 was filed upon which counsel on behalf of the judgment debtor No.1 filed vakalatnama and subsequently he

extended his No Objection for execution of the sale deed in favour of the Nominee of the decree holder through J.D or Nazir. Thereafter, sale deed was executed by Nazir of District and Session Courts Karachi, East, in favour of Mst. Zaibun Nisa D/o Abdul Rehman through her Nominee namely; Mst. Rehana Bibi D/o of Mustaq Ahmed on 30.04.2015. Subsequently, pursuant to the court order, possession of the subject property was handed over to Mst. Zaibun Nisa by evicting Ms. Naheed Hussain (respondent No.1 herein). Ms. Naheed Hussain challenged the judgment and decree passed in the above suit through application under Section 12 (2) CPC read with section 151 CPC on the ground that the decree has been obtained through fraud and misrepresentation as the agreement of sale specific performance whereof was sought in suit No.1444 of 2012 was allegedly executed by Ms. Efthychiou on 11.02.2009 whereas she had died in the year 1985 much prior to the date of execution of the sale agreement and further the address of Ms. Efthychiou mentioned in the suit was wrong besides the CNIC of Ms. Efthychiou mentioned in the agreement of sale was one of the witnesses of the agreement and not of Ms. Efthychiou. The said application was contested by plaintiff and was decided on 08.12.2017, the relevant portions of the order are reproduced for the sake of convenience as follows :-

“5. Upshot of above discussion, I am of the considered opinion that order and decree dated 18.09.2013, passed in Civil Suit No.1444/2012 [Mst. Zaibun Nisa through her attorney Imran Yaqoob Vs. Mst. H.M. Efthychiou Ives and another] is hereby set aside. In view of above observation, prima facie, it appears that the suit has been filed against a dead person, which is nullity in the eye of law, as such the same is incompetent. I am not inclined to restore the suit on its original position, as the same has been filed against defendant No.1, who had already been died prior too many years ago from filing of instant suit, therefore, the suit is hereby dismissed with no order as to costs.

6. Before parting with this order, I may say that the plaintiff/decreed holder has got sale deed in respect of suit property from concerned authority subsequently while obtaining the execution order, which is subsequently executed; therefore, said sale deed and any other /further transaction after passing of such order dated 18.09.2013 are hereby declared void on the ground that the order dated 18.09/2013 has been obtained by the plaintiff against dead person which has no value in the eyes of law. Let the letter to Sub-Registrar, Jamshed Town, Karachi, be issued for cancellation of said sale deed. The applicant /intervenor has already filed an application for restoration of suit property along with material documents which prima facie show that she is legal heir of Mst. H.M. Efthychiou Ives and she was in possession of suit property prior to executing of order

of delivery possession, as such she was dispossessed from the suit property on the basis of void order against defendant No.1 namely Mst. H.M. Efthyxious Lves who was her grandmother, therefore, the provision of Section 144 CPC fully attracts to the facts and circumstances of the present case on the ground that it is fundamental principle of law that an act of a court should not injure any person and the court has inherent power to order restitution. In such situation, I hereby restore the possession of suit property to the applicant/intervenor within the meaning of Section 144 CPC. Let writ of possession in respect of suit property be issued with directions to restore / hand over the peaceful and vacant possession of suit property to the applicant / intervenor. The bailiff is required to break open the lock, if the suit property found to be closed, having police aid, if required, and submit the report.”

Pursuant to the above order, the possession was restored to Mst. Naheed Hussain.

7. The present petitioner after having aggrieved by the above said order, besides challenging the same in the present petition [CP No. D-8593 of 20117] also filed applications viz. (i) under order 12(2) CPC, (ii) under order I Rule 10 CPC, and (iii) under order XXI Rule 26 CPC, in the above suit No. 1444 of 2012 stating therein that he purchased the subject property from Mst. Zaibun Nisa vide registered sale deed dated 27.08.2015 against the payment of sale consideration of Rs.29,00,000/-. Further, he has been evicted from the property without notice and the order was obtained through fraud and misrepresentation. Learned IVth Senior Civil Judge, Karachi (East) after hearing the parties dismissed all the said application, vide order dated **13.01.2018**. Thereafter, present petitioner filed Civil Revision Application No.14/2018, before learned VIth ADJ, Karachi East, against the aforesaid order dated **13.01.2018**. Learned VIth ADJ, Karachi East, after hearing the parties also dismissed the said revision application, vide order dated **14.05.2018**; the relevant portions of the said order are reproduced for the sake of ready reference:-

“.....I have also minutely perused the order dated 13.01.2018, passed by the learned IVth Senior Civil Judge, Karachi, East. It is also apparent on the record that the decree was obtained by the decree holder against the dead person and same material was produced on the record that at the time of filing the suit the defendant No.1 was already died on 26.06.1985 as per death certificate produced on the record. Therefore, the decree was obtained against the dead person having nullity in the eyes of law and learned trial court set aside the decree and judgement dated 18.09.2013, vide order dated 18.12.2017 and the suit of the plaintiff was dismissed as to no order as to costs and possession of the suit property was restored to the legal heir Mst. Naheed Hussain of defendant No.1 within the meaning of

section 144 CPC and further sale transaction in respect of suit property on the basis of the decree and judgment dated 18.09.2013 were declared void on the ground that the judgement and decree dated 18.09.2013 has been obtained by the plaintiff against the dead person which has no value in the eyes of law. The learned trial court has also held that applicant / intervenor purchased the suit property from Rehana Bibi in whose favour the sale deed was executed through Nazir of this District. Since, the plaintiff obtained the decree and judgment against the dead persons [defendant No.1] fraudulently and the right of legal heirs of defendant No.1 has been deprived as such the sale transaction would have no value in the eyes of law. The applicant/intervenor was also left to avail the remedy for recovering the amount and if any damages from Rehana Bibi. Since all the objections which were raised by the applicant/intervenor at the time of filing application u/s 12(2) CPC were decided by the learned trial court after proper appreciation with reasons. I find no any illegality in the impugned order passed by the learned trial court.

In the light of above discussed circumstances, I find no any patent illegality in the impugned order passed by the learned trial court. Therefore, the same order calls no any indulgence by this court, hence I find no merits to the instant civil revision and same is hereby dismissed with no order as costs.”

The aforementioned order dated 14.05.2018, passed by the VIth ADJ, Karachi [East] along with order dated 13.01.2018, passed by IVth Senior Civil Judge Karachi (East) has been impugned in the present petition [CP No. D-6359 of 2018].

8. Learned counsel for the petitioner in the pleadings as well in his arguments has very much emphasized that learned lower appellate court has failed to consider the fact that since the earlier application under section 12(2) filed by respondent No.1 was disposed of vide order 16.09.2015, then how the second application on the same facts and grounds could be maintainable. Before going into any further discussion, it would be imperative to reproduce the relevant portion of the order dated 16.09.2015 hereunder:-

“.....In order to decide this application the visible copy of death certificate of Mst. H.M. Eftychiou Lves along with original and copy of the title documents of the suit property along with original are required for just and proper decision of the application under consideration as well as application under order 1 rule 10 CPC read with section 151 CPC filed by learned counsel for the intervener. The intervener is therefore directed to produce the visible photo state copy of death certificate of Mst. H.M. Eftychiou Lves along with original and copy of the title documents of the suit property along with original and certificate of legal heirs showing the intervener as legal heir of owner of suit property before this court on the next date hearing. The receipts of NADRA produced by the intervener be also sent for verification to NADRA for report about genuineness of the receipt. The order on the application

under section 12(2) CPC, application under section 151 CPC and order on application under order 1 rule 10 CPC filed the intervener be passed after compliance of the order of this court.”

The aforesaid order does not show that the applications filed by respondent No.1 were disposed of by the said order and as such the point raised by the petitioner with regard to maintainability of the second application under section 12 (2) CPC after disposal of earlier application on the same facts and grounds is misconceived, hence untenable in law.

9. Perusal of the record transpires that although respondent No.1 on 21.05.2015 filed an application under section 12 (2) CPC, however, the said application upon filing of fresh application with better contents/particulars was not pressed on 20.04.2017. The petitioner despite having knowledge never challenged the said order. Record also reflects that learned trial court issued notices on the fresh application to all concerned and subsequently, decided the application; vide order dated 18.12.2017 impugned herein.

10. Insofar as the second point, with regard to non-service of respondent No.1's application on the petitioner is concerned, from the record it appears that upon notice on the fresh application of respondent No.1, counsel for Zaibun Nisa [Plaintiff in the suit No.1444 of 2012] on 27.04.2017 received the copies thereafter counsel for the plaintiff had been regularly appearing in the matter, which fact is not only reflected from the dairy sheets of trial court's file but it is also mentioned in the order dated 18.12.2017. As far as service of the application particularly upon petitioner is concerned, since he was neither the party in the proceedings nor his name ever appeared in the court record that he had purchased the property from Zaibun Nisa, as such, apparently, direct notice was not issued to him, however, notice on the address subject matter of the present proceedings have been issued.

11. Insofar as the point raised by the petitioner's counsel that the petitioner is bonafide purchaser for value without notice as such his right over the property cannot be taken away and he was not liable to be evicted from the property as has been done in the present case. From

the record, it appears that very suit filed by Zaibun Nisa for specific performance of the contract, that is, agreement of sale dated 11.02.2009 was fictitious on various accounts; the executant of the sale agreement Ms. H.M. Efthychiou Lves had died on 26.06.1985, much prior to execution of the sale agreement, the address of Ms. Efthychiou Lves in the agreement and in the plaint of suit No. 1444 of 2012 was found bogus, the CINC of Ms. Efthychiou Lves mentioned in the sale agreement as well as in the *vakalatnama* filed on her behalf in the suit No. 1444 of 2012, as per NADRA verification was of Agnis parveen wife of William Petric, one of the witnesses of the sale agreement, the address of Zaibun Nisa mentioned in the Plaint of suit No. 1444 of 2012, as per NADRA verification, was also bogus as the correct address of Ziabun Nisa was 2/114-A, PECHS, Karachi, whereas, in the sale agreement said address was mentioned as the address of one of the witnesses namely; Mst. Talat Yasmeen. Moreover, neither Zaibun Nisa nor the Petitioner at any point of time ever placed on record any document, which could deny the death certificate placed on record by respondent No.1 showing that Ms. Efthychiou Lves died in U.K. on 26.06.1985 or she was alive at the time of execution of agreement of sale dated 11.02.2009. As noted above, *vakalatnama* filed on behalf of Ms. Efthychiou Lves in suit No.1444 of 2012 bearing wrong CNIC number shows that the same was not of Ms. Efthychiou Lves. Consequently, written statement filed on her behalf in the suit admitting the claim of Zaibun Nisa was a sham document. It is also noted that although in the written statement, filed on behalf of Ms. Efthychiou Lves, dismissal of the suit was sought, however, the application for judgment on admission in the written statement filed by Zaibun Nissa was never contested and the decree was allowed to be obtained on the basis of admission made in the sham written statement. Furthermore, in the Execution Application again *vakalatnama* was filed on behalf of Ms. Efthychiou Lves as Judgment Debtor No.1 and 'no objection' was given on the application filed by decree holder for execution of the sale deed through Nazir of the court in favour of nominee of the plaintiff, here question arises that when Ms. Efthychiou Lves executed /issued *vakalatnama* in favour of his counsel why not she herself had appeared before the Registrar and executed the sale deed in favour of Zaibun Nisa. Such fact clearly reflects that Ms. Efthychiou Lves was not alive

at the time of sale transaction and suit for specific performance was filed against the dead person and the decree was obtained through fraud and misrepresentation and as such the decree obtained through fraud and misrepresentation has no value in the eyes of law. It is well settled principle that fraud vitiates the most solemn of the proceedings and no party should be allowed to take advantage of its fraud.

It is also well settled that nobody can transfer a better title, than that he himself possesses. In the present case Zaibun Nisa herself had no right and title in the suit property, she could have not alienated the same to the present petitioner. In this respect reliance is placed on the case of *Abdul Hameed through L.Rs. and others v. Shamsuddin and Others [PLD 2008 SC 140]*.

12. Insofar as the claim of the petitioner that he is a bonafide purchaser, is concerned, suffice to state that when an application under section 12(2) of the Civil Procedure Code is granted and decree is set aside then every change that had taken place pursuant to such decree also stand nullified. On the basis of such decree if title in favour of any person was created, then it also falls to the ground, the moment the decree is set aside. Therefore, while allowing the application filed under section 12(2) of the Civil Procedure Code court could not only be setting aside an order, judgment or decree but at the same time would also be nullifying every change that has taken place on account of such order, judgment or decree. A party may have got the order, judgment or decree executed in his favour from the court which order, judgment or decree is subsequently set aside under the provisions of section 12(2) of the Civil Procedure Code. In such eventuality, the parties have to be relegated to the position where they were before such order, judgment or decree was passed. This is logical consequence of grant of application under section 12(2) of the Civil Procedure Code.

13. Insofar as the possession of the property is concerned, from the record it appears that admittedly the physical possession of the subject property was taken over from respondent No.1 pursuant to the judgment and decree obtained through fraud and misrepresentation, who was residing in the subject property since long as such upon nullifying the decree the parties have to be relegated to the position where they were before such judgment and decree was passed. In other

words, it is nothing but the fall out effect of nullifying the order, judgment or decree under the provisions of section 12 (2) CPC. Reliance in this regard can be placed on the case of *Al-Meezan Investment Management Company Ltd. and 2 others v. WAPDA First Sukuk Company Limited , Lahore and others [2017 PLD SC 1]*.

The upshot of the above discussion is that the judgments impugned in the present proceedings passed by learned courts below are well reasoned and speaking orders, as such, does not warrant any interference by this Court. Consequently, the writ petitions being devoid of merit are dismissed.

Judge

Judge

Karachi
Dated : 26.09.2022.

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