ORDER SHEET

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

C. P. No. D –27 of 2023

Date	Order with signature of Judge

Before:
Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Arbab Ali Hakro

Petitioners: Mst. Sahja & others through Mr. Muhammad Rehan Khan Durrani, Advocate

Respondent No.6: Muhammad Zaman through Mr. Ateeq-ur-Rehman Soomro, advocate

Province of Sindh & ors: Through Mr. Ali Raza Balouch, Assistant Advocate General

Date of hearings: 14.09.2023 & 10.10.2023

Date of Order: 01.11.2023

ORDER

ARBAB ALI HAKRO, J: Through the instant writ petition, petitioners have challenged the Judgment of the Additional District Judge-IV(H) Sukkur dated 24.12.2022 ("the Revisional Court"), whereby he accepted the Revision Application filed by respondent No.6, namely Muhammad Zaman and set aside the Order dated 22.9.2022 of the Senior Civil Judge-I Pano Akil ("the trial Court").

2. Concisely facts as narrated in this petition are that the Respondent No.6 filed F.C Suit No.81/2018 for specific performance of contract, possession, declaration and permanent injunction in respect of house bearing C.S No.4/4 admeasuring 04 guntas situated at Fouji Mohalla, City Pano Akil, District Sukkur, purchased by him

from Respondent No.7 i.e. Qadir Bux s/o Haji, in total sale consideration amount of Rs.50,00,000/- and paid an amount of Rs.30,00,000/- in presence of witnesses under agreement to sale dated 10.08.2017; thereafter, Respondent No.6 along with his witnesses approached the Respondent No.7 with the request to receive remaining balance consideration amount and handover possession of subject house but he sought further time. It has been further averred that Respondents No.8 & 9, having no legal title documents, illegally occupied the suit property and on approach, they issued threats for dire consequences, hence aforesaid suit was filed by the Respondent No.6; that after service, written statement was filed by Respondent No.7 wherein he categorically admitted that he sold out suit property to Respondent No.6 and claimed that Respondents No.8 & 9 have illegally occupied the suit property; however, stated that he will have no objection if the suit is decreed in favour of Respondent No.6.

3. That, from the pleadings of the parties, learned trial Court framed the issues and after concluding the evidence, decreed the suit of Respondent No.6 vide impugned Judgment and decree dated 27.04.2021 on the basis of admission by Respondent No.7. However that Judgment and decree passed by learned trial Court was assailed by Respondent No.7 & 8 through Civil Appeal Nos.92 and 93 of 2021, which ended in dismissal. Facts to the contrary are that Respondent No.6 with malafide intention and ulterior motives did not implead present petitioners as necessary party in the suit despite of knowledge that the petitioners are also in possession and occupation of suit property. Hence petitioners moved an application under Section 12(2) of Code of Civil Procedure, 1908 ("the code") for setting aside the Judgment and decree dated 27.04.2021 on the ground that same was obtained by the Respondent No.6 by way of fraud and misrepresentation, which was allowed by learned Senior Civil Judge-I, Pano Akil, vide Order dated 22.09.2022 by declaring that Respondent

No.6 obtained Judgment and decree dated 27.04.2021 by playing fraud and misrepresentation as present petitioners were necessary party to contest the matter. The Respondent No.6 challenged that Order before the Revisional Court, which was accepted vide Judgment dated 24.12.2022, in the terms that the Judgment and Decree dated 27.4.2021, passed by trial Court stood merged in the Judgment and Decree dated 05.8.2022, passed by the appellate Court, hence application under Section 12(2) of the code filed before the trial Court became infructuous and incompetent, resultantly set-aside the Order dated 22.9.2022 and dismissed the application under Section 12(2) of the Code.

4. At the very outset, learned Counsel representing the Petitioners submits that learned Revisional Court has failed to consider that Respondent No.6 in collusion with Respondent No.7 had obtained Judgment and decree by way of fraud and mis-representation. Application under Section 12(2) was filed at the time when civil appeals preferred by Respondents No.7 & 8 were pending adjudication and as such there was no such judgment and decree or Order in field except impugned Judgment and decree dated 27.04.2021, hence learned Revisional Court has wrongly arrived at the conclusion that after dismissal of civil appeals preferred by Respondent No.7 & 8, application under Section 12(2) became infructuous and incompetent; that learned Revisional Court also failed to consider that limitation for filing an application under Section 12(2) CPC in view of Article 181 of Limitation Act, 1908, is three years from the date of knowledge of Order, hence such application was within time; that learned Revisional Court wrongly came to the conclusion that Order dated 22.09.2022 is illegal while ignoring the fact that the Respondent No.6 obtained Judgment and decree dated 27.04.2021 by way of fraud and mis-representation in collusion with Respondent No.7 in order to evict them from the suit property; besides the fact

that Respondent No.7 with malafide intention and ulterior motives secretly sold out the suit property to Respondent No.6 through a sale agreement dated 10.08.2017 in order to defraud the petitioners and to deprive them of their right created in the subject property. In support of his contention, learned Counsel has placed reliance upon the case laws reported as PLD 2002 SC 391, 1999 SCMR 1516, 2001 SCMR 1062 and 2000 SCMR 900.

5. Conversely, learned Counsel for the Respondent No.6 has supported the impugned Judgment and submits that learned Revisional Court rightly allowed the revision application by setting aside the Order dated 22.09.222, passed by learned Senior Civil Judge-I, Pano Akil on the ground that Judgment and decree dated 27.04.2021 stood merged in Judgment and decree dated 05.08.2022 passed in Civil Appeals No.92 & 93 of 2021, hence application under Section 12(2) CPC became infructuous and incompetent; that despite of the fact that petitioners had filed F.C Suit No.26/2020 against Qadir Bux and others in respect of the same subject property claiming therein that the said property was purchased by their ancestors through an oral agreement to sell in the year, 1965-66, which was contested and ultimately learned trial Court rejected plaint of F.C Suit No.26/2020 (re-Dhani Bux and others vs. Qadir Bux and others) in terms of Order VII Rule 11 CPC and conversely decree the suit of Respondent No.6; that the petitioners were well aware about filing and pendency of F.C Suit No.81/2018 but they never filed any application for joining or otherwise; however, after dismissal of Civil Appeal No.102/2021, they malafidely preferred an application under Section 12(2) CPC without having any existing adverse right or claim. In support, he has relied upon the case laws reported as 2014 YLR 1787, 2014 CLC 1172, 2015 CLD 390, 2020 CLC 1119, 2022 MLD 1910.

6. Learned Assistant Advocate General, in his arguments, contends that the learned Revisional Court has rightly allowed the revision by setting aside the Order dated 22.09.2022 as the petitioners were well aware about the pendency of suit filed by Respondent No.6, and they deliberately avoided to move an application to become a party in that proceedings; besides after dismissal of civil suit as well as appeal filed by the petitioners, malafidely preferred an application under Section 12(2) claiming therein that Judgment and decree was obtained by Respondent No.6 by way of fraud and misrepresentation, hence their claim regarding being unaware of proceedings is not tenable in law. He prayed for the dismissal of instant petition relying upon the case laws reported as 1992 SCMR 241, 1992 SCMR 663, PLD 2013 SC 358, 2022 SCMR 448 and 2022 SCMR 321.

7. We have heard Counsel for the parties and have perused the record with their assistance and taken guidance from case law submitted by them.

8. Since the Petitioners have filed an application under Section 12(2) of the Code in the trial Court for setting aside Judgment and Decree dated 27.4.2021, passed in favour of respondent No.6, therefore, first of all, we would like to reproduce provisions of Section 12(2) of the Code as under: -

> "*Section 12(2) "Where a person challenges the validity of judgment, decree or order on the plea of fraud, misrepresentation or want of jurisdiction, he shall seek remedy making an application to the court which has passed the final judgment/decree or order and not by a separate suit."*

9. Bare perusal of the aforesaid provision of the law reveals that application under Section 12(2) of the Code can be filed on three grounds, i.e., fraud, misrepresentation and want of jurisdiction. Admittedly, the trial Court had jurisdiction to pass the Judgment and decree dated 27.4.2021. As far as two other grounds, i.e., fraud and

misrepresentation, are concerned, the Petitioners have alleged in their application under Section 12(2) of the code that they are in possession/occupation of the suit property since their forefathers/ancestors, and they were not made a party in the suit.

10. It is evident from the record that the Petitioners had filed an application under Section 12(2) of the Code during the pendency of appeals bearing No.92 & 93 of 2021 filed against Judgment and Decree dated 27.4.2021 by Respondent No.7 & 8, who were a party in the suit. The Petitioners did not bother to file an application under Order I Rule 10 of the Code to implead themselves as a party in the appeal. The record further reveals that the appellate Court dismissed the above appeals vide Judgment dated 05.8.2022 and maintained the Judgment and Decree dated 27.4.2021. However, the application under Section 12(2) of the Code filed by the Petitioners on 24.12.2021, which was allowed by the trial Court vide Order dated 22.9.2022; thus, the doctrine of merger and term “final order” as defined under Section 12(2) of the Code came into play.

11. As per the rule of merger, in the present case, the decree passed by the trial court on 27.4.2021, merged into that of the appellate Court after its affirmation, vide its Judgment and decree dated 05.8.2022. When appeal and revision are prescribed under a statute, and the appellate and revisional forums are invoked and entertained, for all intents and purposes, the lis continues. When a higher forum entertains an appeal or revision and passes an order on merit, the doctrine of merger would apply. The doctrine of merger is based on the principles of propriety in the hierarchy of the justice delivery system. The doctrine of merger does not make a distinction between an order of reversal, modification or an order of confirmation passed by the appellate and revisional Courts. In this respect, the Revisional Court has rightly relied upon the Apex Court Judgment rendered in the case of Sahabzadi Maharunisa and another

vs. Mst. Ghulam Sughran and another (PLD 2016 S.C 358) wherein the Apex Court concluded as under: -

> *(i) In the cases where the remedy of appeal/revision is provided against a judgment etc. or a remedy of writ is availed, the appellate/revisional/constitutional forum records reasons on the consideration of the issues of law and/or fact the judgment etc. of the subordinate court/forum will merge into the decision of the appellate court etc. irrespective of the fact that such judgment reverses, varies or affirms the decision of the subordinate court/forum and its decision will be operative and capable of enforcement on the principle of merger, the application under Section 12(2) of the C.P.C. will be maintainable before the appellate/revisional/constitutional forum (High Court, District Court, Tribunal or Special Court as the case may be);*
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> *(ii) In the situation mentioned at serial No.(ii) above, there are certain exceptions to the rule of merger which (rule) shall not apply, where an appeal etc. has been dismissed:- (i) for non-prosecution; (ii) for lack of jurisdiction; (iii) for lack of competence/maintainability; (iv) as barred by law; (v) as barred by time; (vi) withdrawal of the matter by the party; (vii) for lack of locus standi; (viii) decided on the basis of a compromise, if the very basis of the compromise by the party to the lis or even a stranger showing prejudice to his rights is not under challenge on the ground of fraud; (ix) is rendered infructuous or disposed of as having borne fruit; (x) abatement; (xi) where the writ is dismissed on the ground of availability of alternate remedy; (xii) where the writ is dismissed on the point of laches. It may be mentioned that such exceptions shall also be attracted to the decision(s) of the Supreme Court, where applicable. However where the case falls within the noted exceptions the forum for an application under Section 12(2) of the C.P.C. is the one against whose decision the matter has come and been disposed of in the above manner by the higher forum;*
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> *(iii) In the cases of reversal or modification of the judgment of the High Court(s), Tribunal(s) or Special Courts before this Court, or those affirmed in appeal (where the matter does not fall within the exceptions) the judgment of the Supreme Court shall be deemed to be final for moving an appropriate application on the plea of lack of jurisdiction, misrepresentation and fraud;*
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> *(iv) In the cases where leave is declined by this Court, the judgment etc. of the lower fora will remain intact and final and will not merge into the leave*

> *refusing order, for the purposes of an application under Section 12(2) of the C.P.C. which can only be filed before the last forum i.e. the learned High Court(s) if the matter has been decided in the appellate/revisional/writ jurisdiction by the said court, or if the matter has come to this Court directly for leave from a Tribunal/Special Court (see Article 212 of the Constitution). However where the petition for leave to appeal has been dismissed with detailed reasons and a thorough decision of the questions of law and fact has been made, the judgment of the High Court(s)/Tribunal will though not merge into the order of the Supreme Court yet in order to avoid a ludicrous situation that once a question of law and fact has been elaborately and explicitly dealt with by this Court in the leave refusing order and the court below may not be in a position to adjudicate upon those points without commenting on the order/reasons of the Supreme Court and to reopen the matter, an application in the nature of Section 12(2) of the C.P.C. can be filed before this Court, leaving it to the absolute discretion of this Court to either decide such application itself or send the matter to the lower fora for the decision.*

Further, in this regard, wisdom may advantageously be sought from the case of Maulvi Abdul Qayum vs Syed Ali Asghar Shah and 5 others (1992 SCMR 241), wherein Apex Court has elaborately explained the principle of merger as under: -

> *"9. These judicial announcements leave no room for doubt that for the purpose of execution the rule of merger equally applies to the decree passed in exercise of revisional jurisdiction. This issue may also be examined from another angle. Take the case of a suit, which is dismissed by the trial Court and with this dismissal the First Appellate Court does not interfere, but it is decreed by the revisional Court. There should be no doubt that the decree of the Court of revision can well be executed."*

12. Section 12(2) of the Code states that a person can seek remedy by making an application to the Court which has passed the final judgment/decree or Order. Finality and pendency of appeal do not ordinarily go together. What is "final" cannot be the subject of appeal, and what is the subject of appeal cannot be "final". If we glimpse at

the legal definition of the words "Final Judgment" as found in Black's Law Dictionary, it has been defined as hereunder: -

> *"One which finally disposes of rights of parties, either upon entire controversy or upon some definite and separate branch thereof ..... Judgment is considered "final" only if it determines the rights of the parties and disposes of all of the issues involved so that no future action by the Court will be necessary in order to settle and determine the entire controversy."*
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> *[emphasis supplied]*

13. The "final judgment/Order" with reference to Section 12(2) of the Code has been defined by the Apex Court in the case of Mubarik Ali vs. Fazal Muhammad and another (PLD 1995 S.C 564) as one which, so far as the Court rendering it is concerned, is unalterable if it is not sought to be modified, reversed or maintained by preferring an appeal, revision or review. In the case of Abid Kamal vs. Muddassar Mustafa and others (2000 SCMR 900), wherein Apex Court has held as under: -

> *"2. We have examined the inquest so made by the learned Counsel for withdrawal of the petition but we would like to mention that even prior to the Judgment reported in PLD 1995 SC 564 it had already been decided by this Court that application under section 12(2), C.P.C. will be competent before the Court, which has passed final Order and not the Supreme Court in the case of Secretary, Ministry of Religious Affairs and Minorities and 2 others v. Syed Abdul Majid (1993 SCMR 1171). Relevant para. is reproduced from his judgment hereinbelow: --*
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> > *"4. It is well-settled that the provisions of the Code of Civil Procedure are applicable to Constitution Petitions filed in the High Court fiction 12(2), C.P.C. being a part of it will be applicable. In this connection the next point for consideration is whether in view of the fact that this Court had dismissed civil petition for leave to appeal filed by the appellants against the Judgment of the High Court, application under section 12(2), C.P.C. could be filed in the High Court or in the Supreme Court. As held in the Government of Sindh and another v. Ch. Fazal Muhammad (PLD 1991 SC 197), such*

> *application can be filed in the Court which passed the final Order. The final Order in the present case was passed by the High Court and, therefore, the application filed by the appellants there was competent. "*
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> *3. It is to be noted that the above view was expressed by three Hon'ble Judges of this Court whereas case of Mubarak Ali v. Fazal Muhammad and another (PLD 1995 SC 564) was heard by two Hon'ble Judges and whereas last-mentioned case was also heard by three Hon'ble Judges including the Hon'ble Chief Justice, Mr. Justice Ajmal Mian (as he then was) who has authored the Judgment therefore, the view expressed by the majority of Judges prevailing right from the time when the case of Secretary, Ministry of Religious Affairs and Minorities and 2 others v. Syed Abdul Majid (1993 SCMR 1171) was decided shall prevail. In both the cases i.e. 1993 SCMR 1171 and 1999 SCMR 1516 the ratio decidendi is that if Supreme Court merely affirms Judgment or Order of High Court by refusing leave the final Judgment in terms of section 12(2), C.P.C. will be of the High Court and not of the Supreme Court, and if, however, Supreme Court reverses a judgment of a High Court and records a finding on question of fact or law contrary to what was held by the High Court, in that event the final Judgment or Order would be of the Supreme Court for the purposes of section 12(2), C. P. C.*
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> *4. In the case in hand as well this Court had refused to grant leave to respondent Muddassar Mustafa and others, therefore, keeping in view these facts we are of the opinion that application under section 12(2), C.P.C. subject to all just exceptions will be competent before the Court which had finally decided the appeal."*
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> *[Emphasis Supplied]*

14. In the circumstances of the present case, the decree was originally passed by the trial Court on 27.4.2021, which was challenged before the appellate Court in its original jurisdiction, which affirmed/maintained the above Decree of the trial Court vide Judgment dated 05.8.2022. As per record, it has not been further challenged; therefore, it attained finality, thus same is treated to be final Judgment; hence application under Section 12(2) of the Code should have been filed before the appellate Court being the last Court of fact. It is also a fact that the Petitioners filed the application under

Section 12 of the Code during the pendency of the appeal. At the same time, it was decided by the trial Court on 22.09.2022, whereas the appeal was decided on 05.8.2022 before passing the Order of the trial Court on application under Section 12(2) of the Code. Thus, when the appellate Court finally decided the appeal vide Judgment dated 05.8.2022, then the Judgment and decree dated 27.4.2021, which was assailed in an application under Section 12(2) of the Code was merged into the appellate Court's Judgment. Therefore, application under Section 12(2) of the Code in the circumstances, at the most, would become infructuous after the decision of the appellate Court, as rightly discussed by the Revisional Court in the impugned Judgment.

15. The Petitioners, in their application under Section 12(2) of the Code, claimed that their ancestors/elders, namely Budhal @ Budho, Khalil and Kouro, purchased the suit land from the father of respondent No.6, in the year, 1965-66 through oral agreement to sell in the sum of Rs.22,000/- and the possession of suit land was handed over to their ancestors/elders and till today the suit property is in their occupation/possession. Alike stance has also been taken by Dhani Bux, son of Budho and Haji Ahmed Ali (respondents No.8 & 9 herein) in their written statement filed in F.C Suit No.81/2018. Moreover, the analysis of the impugned Judgment of Revisional Court reveals that the Petitioners are sister-in-law, maternal and paternal nieces, maternal and paternal nephews, as well as cousins of said Dhani Bux, who was party/defendant in F.C Suit No.81/2018. Not only this, there is another imperative factor that the Petitioners, along with said Dhani Bux, filed F.C Suit No.26/2020 against the Qadir Bux (respondent No.7) and others, seeking relief of Specific Performance of oral Contract, Declaration, Cancellation of Sale Agreement dated 10.8.2017, Damages and Permanent Injunction in respect of same suit land, but plaint was rejected by the trial Court vide Order dated 17.11.2020, which they challenged by filing Civil Appeal No.102/2021,

which was dismissed vide Judgment and Decree dated 05.8.2022. Such fact was concealed by the Petitioners in their application under Section 12(2) of the code. Thus, the Petitioners were well aware of the pending adjudication of suit between the respondents in the trial court.

16. It seems that the Petitioners are hands in gloves with Respondents No.8 & 9 and they want to reopen the decided litigations and prolong it for an indefinite period. It is surprising that the entire family was part of this litigation; then how it is possible that Petitioners could never become aware of the pendency of litigation. This stance is totally unbelievable, nothing but an afterthought and false plea. If such practice is allowed, then there would be no end to the abuse of the process of Court, and there would be no finality achieved ever in litigation between the parties. The Apex Court disapproved such practices in the case of Abdul Majid and another v. Qazi Abbas Hussain Shah (1995 SCMR 429), wherein it has been held as under: -

> *"A new trend is noticed that after conclusion of proceedings in this Court, aggrieved party either directly or through someone else starts fresh round of litigation on the same subject-matter with the intention of defeating the final adjudication by this Court which is disapproved and is to be discouraged with maximum emphasis. It is held by this Court that resort to civil litigation on questions already concluded in the previous round of litigation giving rise to fresh frivolous and vexatious litigation is not to be permitted to go unnoticed. Reference can be made to the case of Muhammad Shafi and another v. Attaullah and others (1984 SCMR 1124).*
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> *[Emphasis Supplied]*

17. Moreover, the Petitioners have taken the ground that they were not made a party in the suit. It does not lead to an inference that Judgment has been obtained by fraud or misrepresentation. In the case of Mst. Shabana Irfan vs Muhammad Shafi Khan and others (2009 SCMR 40), the Apex Court has held as under: -

> *"Needless to add that petition under section 12(2) of the C.P.C. can be decided summarily by the learned*

> *Court, which has passed the final Judgment, decree or Order in dispute, when there are admitted facts, documents between the parties. There is no need to prolong the litigation, when the case ex facie appears to have not been filed in a wrong jurisdiction, and when fraud or misrepresentation was not involved therein the case or in the transaction."*
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> *[Emphasis Supplied]*

18. It is a well-settled principle of law that framing of issues and recording of evidence while deciding an application under Section 12(2), C.P.C. is not obligatory for the Court, and such application can be rejected on the basis of available evidence and relevant record if it is considered sufficient to decide such an application. It is worth mentioning that primarily it is the satisfaction of the Court either to frame the issue, record evidence or decide such applications as may be deemed fit and proper after considering the circumstances of each case. No yardstick can be fixed for adjudication of such application. Reference may be made to the Case of Warriach Zarai Corporation v. F.M.C. United (Pvt.) Ltd. *(2006 SCMR 531).*

19. In view of the above and the absence of any substance concerning the alleged fraud, misrepresentation and or concealment of facts, we are of the considered view that no relief can be granted to the Petitioner as the jurisdiction of this Court under Article 199 of the Constitution is purely discretionary and meant to foster the cause of justice and fair play. Further, the Court may decline to intervene or exercise its discretionary and equitable jurisdiction where the grant of relief would amount to the retention of ill-gotten gains; and is competent to pass such Order as may be necessary for the ends of justice. Reliance is placed on Muhammad Sharif through Legal Heirs and 4 others v. Sultan Hamayun and others (2003 SCMR 1221). It is also a settled principle of law that Constitutional jurisdiction is discretionary in character. As substantial justice has been done; therefore, we are not inclined to exercise discretion in favour of the Petitioner. In this context, we are fortified with the case of Nawab

Syed Raunaq Ali vs. Chief Settlement Commissioner and others (PLD 1973 S.C. 236), wherein the Apex Court has held as under: -

> *"An order in the nature of a writ of certiorari or mandamus is a discretionary order. Its object is to foster justice and right a wrong. Therefore, before a person can be permitted to invoke this discretionary power of a Court, it must be shown that the Order sought to be set aside had occasioned some injustice to the parties. If it does not work any injustice to any party, rather it cures a manifest illegality, then the extraordinary jurisdiction ought not to be allowed to be invoked."*

20. In view of the above-stated facts and exposition of the law, we hold that the impugned Judgment passed by the Revisional Court was according to law. No illegality or material irregularity had been pointed out in the impugned Judgment passed by the Revisional Court. Resultantly, the instant writ petition is dismissed with no order as to costs.

JUDGE

Faisal Mumtaz/PS

JUDGE