

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Muhammad Shafi Siddiqui

Mr. Justice Jawad Akbar Sarwana

Constitution Petition No.D-4111 of 2020

Amir Mahmood

Versus

Izharuddin & others

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Date of hearing: 01.11.2023

Mr. Abdul Qayyum Abbasi, Advocate for the Petitioner.

Mr. Muhammad Khalid, Advocate for Respondent No.4.

Mr. Sandeep Malani, Assistant Advocate General Sindh.

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J U D G M E N T

Muhammad Shafi Siddiqui, J.- This case has some complexed history, as some multiple legal proceedings have been undertaken.

2. Originally, a suit bearing No.459/2011 for performance was filed by the petitioner against respondents No.1, 2 and 3. The suit was decreed ex parte and an execution application No.03/2013 was filed. On the issuance of writ for possession, the respondent No.4, who was then alive, came to know about the decree and moved an application under Section 12(2) CPC on the strength of his title. The trial court framed issues and evidence was recorded. Respondent No.4 Mushtaq Ahmed being applicant of application under Section 12(2) CPC, filed affidavit-in-evidence and was cross-examined, however, cross-examination was not completed on account of some medical issues with him, whereas, his attorney has not recorded further evidence.

3. Since at the relevant time the attorney did not record further evidence in pursuance of application under Section 12(2) CPC and no evidence was recorded by petitioner in the first round and

consequently application was dismissed. Aggrieved of it, a revision application was filed and the case was remanded to record the evidence. The evidence was completed and in consideration whereof the application was dismissed yet again. A revision application bearing No.65/2018 was then preferred by Mushtaq Ahmed. During pendency of the said revision, the applicant Mushtaq Ahmed expired. The Advocate, after the sad demise of the applicant, filed an application for the withdrawal of the said revision application with permission to file a fresh. The said application was allowed on 01.10.2019 and on 05.10.2019 fresh revision application was filed by the legal heirs of Mushtaq Ahmed that is revision application No.58/2019. The petitioner in the subsequent revision application No.58/2019 though moved an application for the dismissal of the said revision application as being barred by time against an order of dismissal of application under Section 12(2) CPC dated 15.11.2018, but it was dismissed. The revision was then allowed and the suit, after setting aside of the judgment and decree, obtained exparte, was sent for trial.

4. We have heard learned counsel for the parties and perused the material available on record.

5. When the application [12(2) CPC] was dismissed and the revision application No.65/2018 was filed by Mushtaq Ahmed through attorney Mirza Mukhtar Ahmed, being his brother, applicant expired during its pendency and in consideration of the reasons assigned in the application for its withdrawal, the revision application was allowed to be withdrawn by the court.

6. Though it may not be relevant to discuss the subject issue of withdrawal of the revision application to enable the legal heirs of the applicant to file fresh one, but it is necessary to provide proper legal

course/way for such events in future, which may be sum-up as under:-

That on account of sad demise of a principal, whose attorney has filed the revision application, it was not a legal compulsion upon the heirs of the principal, who expired during pendency, to withdraw it and to file a fresh. Advocate could not have withdrawn it as the legal course has to take effect. The attorney had no personal interest in it which attorney ceases after principal's demise. The legal heirs could have been replaced conveniently in the said revision application and they may have proceeded with the same case. However, the objection of the petitioner that a subsequent revision application No.58/2019 was barred by time is inconsequential, as it was done and acted upon in pursuance of the orders of the court and the parties should not be penalized on account of any fault or error that may have arisen on account of any flaw in the judicial proceedings. The earlier revision application No.65/2018 was not barred by time and when the permission was granted by the 4th Additional District Judge, Karachi Central on 01.10.2019, it was filed within five days of the said order and no timeframe granted by ADJ to file it within certain time. The subsequent revision application cannot be treated as time barred application in the first instance. Secondly, the order of 01.10.2019, whereby the permission was granted to the legal heirs of respondent No.4, was not challenged either independently or in this petition together with final order. As a consequence of the order dated 01.10.2019, a fresh revision application was filed and was allowed; hence we could only scrutinize the main impugned order passed on revision application No.58/2019 on merit which allowed the revision application.

7. Although there is no jurisdictional error highlighted by the petitioner's counsel, but the facts are very important to understand the controversy raised in the application under Section 12(2) CPC.

8. A suit for performance (suit No.549/2011) was filed in respect of an apartment against respondents No.1, 2 and 3. Respondent No.3 was the owner of a land on which the project was constructed. Ameen Mumtaz son of Muhammad Mumtaz acquired the property, on which the subject construction was raised, by virtue of a relinquishment deed dated 26th January, 2010 executed by Muhammad Mobeen son of late Muhammad Mumtaz and Mst. Nayab Waheed wife of Waheed Ahmed and daughter of late Muhammad Mumtaz both brother and sister of Ameen Mumtaz. Being sole owner, Ameen Mumtaz son of late Muhammad Mumtaz executed a sublease on 03.03.2012 in favour of Mr. Nawab Ibrahim son of Jalil Ahmed Khan in respect of an apartment raised on the said plot. It is claimed by petitioner that one Izharuddin became a partner in the said business with Mr. Ameen Mumtaz with whom (Izharuddin) the petitioner entered into an agreement, performance of which was sought in the suit. Nawab Ibrahim being owner by virtue of a sub-lease deed executed on 03.03.2012 by Ameen Mumtaz then executed a conveyance deed of the said apartment in favour of Mushtaq Ahmed son of Mirza Rahim Baig on 27.06.2013 (applicant of application under Section 12(2) CPC); thus the first title drawn in respect of the property was on 03.03.2012 when the sole owner of the property Ameen Mumtaz executed a sub-lease in favour of Nawab Ibrahim, who then executed a conveyance deed in favour of respondent No.4, who is now represented by his legal heirs by Mr. Muhammad Khalid, Advocate. The performance was sought in the suit against one Izharuddin, who prima facie is only a partner in the business and not the co-owner of the land or the project. Izharuddin may have a dispute with the co-partner within their partnership business related to accounts but cannot prima facie be deemed to be

an owner of the land in the project. The preferential right of the parties in relation to the property in question, if at all pressed, could only be determined during trial in presence of the legal heirs of respondent No.4 and not otherwise.

9. The suit in the shape of a claim of the petitioner is pending which will be defended by the respondents including the legal heirs of respondent No.4 and fresh evidence in this regard be recorded by the trial court in the said suit, if so desired by parties.

10. In view of the above, no interference as such is required in the impugned judgment. The petition as such is dismissed along with pending application(s).

Dated: 06.11.2023

JUDGE

JUDGE

Ayaz Gul