

THE HIGH COURT OF SINDH KARACHI

Present:
Justice Adnan Iqbal Chaudhry,
Justice Mohammad Abdur Rahman

C.P. No. D - 2674 of 2023
[Muhammad Saleh vs. Abdul Ghani & others]

Petitioner : Muhammad Saleh s/o Sultan, through
Mr. Naveed Ali Advocate.
Date of hearing : 08-08-2023
Date of order : 08-08-2023

ORDER

Adnan Iqbal Chaudhry J. - Though case is fixed for 11-08-2023, learned counsel for the Petitioner pleads urgency as a writ of possession has been issued by the executing court. Application for urgent hearing is granted.

The Petitioner's application under section 12(2) CPC for setting aside *ex-parte* judgment and decree in Suit No. 1273/2015 was dismissed by the trial court by order dated 26-10-2022. Against that, a Civil Revision preferred by the Petitioner before the Additional District Judge was also dismissed by order dated 05-05-2023. The Petitioner now seeks a writ against said orders.

2. The facts are that the Petitioner filed Suit No. 903/2013 against the Respondent No.1 before the Senior Civil Judge for title to the suit plot. The plaint of that suit was rejected on 04-07-2015, and Civil Appeal No. 123/2015 there against was also dismissed. Thereafter, the Respondent No.1 filed Suit No. 1273/2015 against the Petitioner and the KDA before the Senior Civil Judge for title to the suit plot and its possession from the Petitioner who was alleged to be an encroacher without any document of title. Only the KDA appeared to contest the suit. Suit No. 1273/2015 proceeded *ex-parte* against the Petitioner, and after recording the evidence of the Respondent No.1 it was decreed his favor by judgment/decree dated 19-05-2017,

followed by a writ of possession by the executing court. The Petitioner then filed an application under section 12(2) CPC before the trial court for setting aside the *ex-parte* judgment/decree, and an application under Order XXI Rule 26 CPC before the executing court. Both applications were dismissed by order dated 28-02-2019, against which the Petitioner preferred Civil Revision No. 36/2019 before the Additional District Judge, which was allowed by order dated 13-01-2020 by remanding the application under section 12(2) to the trial court to decide afresh after recording evidence. On remand, the trial court recorded evidence on the application under section 12(2) CPC but was again inclined to dismiss the same by order dated 26-10-2022. The Petitioner once again challenged that order *via* Civil Revision No. 184/2022 before the Additional District Judge, but this time the Revision was dismissed by order dated 05-05-2023; hence this petition.

3. Heard learned counsel and perused the record.

4. The fraud alleged by the Petitioner under section 12(2) CPC was that the Respondent No.1 colluded with the bailiff to show that the Petitioner was served with summons of Suit No. 1273/2015 when in fact he was not served, and hence played a fraud upon the court in obtaining an *ex-parte* judgment and decree against the Petitioner. The trial court framed issues and recorded evidence to determine the fraud alleged, but found the allegation to be unfounded.

5. It was not the Petitioner's case that his address mentioned by the Respondent No.1 in Suit No. 1273/2015 was incorrect, but that no summons at all were received by him at that address; that summons published in the newspaper were not within his knowledge; and that all reports of service relied upon by the Respondent No.1 were fabricated. In support of his submissions, learned counsel relies upon the bailiff's report on summons dated 24-11-2015 which report states that the Petitioner's address could not be located.

6. The finding of the courts below that service besides publication had in fact been effected upon the Petitioner is not based on the bailiff's report on the summons dated 24-11-2015, but on subsequent reports. As per the bailiff's report dated 18-01-2016 (page 139), the address of the Petitioner was located on the pointation of the Respondent No.1 where the Petitioner's spouse informed that the Petitioner was not at home and she refused to receive summons on his behalf. As per the bailiff's report dated 17-02-2016 (page 143), again the Petitioner's spouse emerged and refused to receive summons and therefore those were duly pasted at the Petitioner's door in the presence of witnesses.

7. When confronted with the aforementioned reports of service, learned counsel submits that both such reports were fabricated by the bailiff in collusion with the Respondent No.1. But then, while leading evidence on his application under section 12(2) CPC, the Petitioner made no attempt to summon the bailiff to confront him with said reports, nor the persons who had witnessed the pasting. Suffice to state that burden of proving fraud was on the Petitioner and he failed to adduce cogent evidence to prove that allegation. Resultantly, there is no misreading of evidence by the courts below so as to warrant interference with concurrent findings of fact against the Petitioner. The petition is therefore dismissed in *limine* alongwith pending application(s).

JUDGE

JUDGE

SHABAN*