IN THE HIGH COURT OF SINDH KARACHI

Present:
Mr. Ahmed Ali M. Shaikh, Chief Justice &
Mr. Justice Adnan Iqbal Chaudhry.

Const. Petition No. D-8576 of 2018
[Ameneed Kashif versus Moin Kamal & Others]

Petitioner	:	Ameneen Kashif son of Muhammad Yaseen Kashif through Mr. Farhan Zia Abrar, Advocate.
Respondent 1	:	Moin Kamal son of Malik Kamaluddin through Mr. Abdul Rasheed Nizamani, Advocate.
Respondents 2-4	:	Nemo.
Date of hearing	:	15-08-2023

O R D E R

Adnan Iqbal Chaudhry J. - The Petitioner is aggrieved of order dated 12-04-2018 passed by the Senior Civil Judge dismissing the Petitioner's application under section 12(2) CPC for setting aside judgment/decree in Suit No. 1319/2007; and then by order dated 26-11-2018, whereby the Additional District Judge maintained said order and dismissed Civil Revision Application No. 95/2018 filed by the Petitioner.

2. The judgment/decree in Suit No. 1319/2007, passed on 27-08-2011, was in favor of the Respondent No.1 and against the Respondent No.2 for specific performance of an agreement (booking) dated 03-07-1999 to convey the suit flat in a building constructed by the Respondent No.2 (builder). The Respondent No.2 did not file an appeal, but his father (Baqa-ur-Rehman) had filed an application under section 12(2) CPC which was dismissed, so also an appeal there against.

3. The Petitioner was not party to Suit No. 1319/2007 and emerged in 2016, five years after the decree, with an application under section 12(2) CPC at a time when the decree was under enforcement in Execution No. 17/2016. He contended that the agreement/booking of the Respondent No.1 with regards to the suit flat had been cancelled by the Respondent No.2 and the suit flat had then been allotted by the latter to the Petitioner on 08-07-2007; that he had filed Suit No. 942/2016 against the Respondent No.2 for specific performance of that allotment; that he came to know of the impugned decree when the same was disclosed by the Respondent No.2 in his written statement in Suit No. 942/2016. As mentioned first above, the Petitioner's application under section 12(2) CPC, so also his revision application, were dismissed.

4. Heard learned counsel and perused the record.

5. It was submitted by learned counsel for the Petitioner that the fraud and misrepresentation that afflicted the impugned judgment/decree was that even though it was in the knowledge of the Respondents 1 and 2 that the Petitioner was subsequent allottee of the suit plot, yet he was not made party to the suit. On the other hand, the record and proceedings reflect that it had very much been disclosed by the Respondent No.2 in his written statement that after cancelling the allotment of the Respondent No.1 he had allotted the suit flat to the Petitioner. Though the trial court did not add the Petitioner as party to the suit, it framed an issue as to the effect of the subsequent allotment made by the Respondent No.2 to the Petitioner. The trial court held that since such allotment was made by the Respondent No.2 after he was served with summons of the suit, under the doctrine of *lis pendens* (section 52, Transfer of Property Act), the subsequent allottee (Petitioner) would be bound by the decree. Therefore, this was not a case where the factum of the Petitioner's subsequent allotment was concealed from the court, and thus there was no question of any fraud or misrepresentation with or before the court.

6. The grounds taken by the Petitioner in his application under section 12(2) CPC for setting aside the judgment/decree, including the question to the finding on *lis pendens*, are all grounds that could have been considered had he filed an appeal. It is settled law that a person not party to the suit but prejudiced by the judgment/decree therein, can, with the leave of the court, file an appeal there against.[1] It is also settled law that the remedy of 12(2) CPC is not a substitute for an appeal,[2] and where the judgment/decree is challenged under 12(2) CPC instead of an appeal, the challenge is confined only to grounds of fraud, misrepresentation and/or want of jurisdiction.[3]

7. Having seen that the question of fraud, misrepresentation or want of jurisdiction did not arise in the instant case, there is no cause for interfering with the orders of the *fora* below. The petition is therefore dismissed.

JUDGE

CHIEF JUSTICE

Karachi:
Signed on 28-08-2023

Announced by & on:

[1] *H.M. Saya and Co. v. Wazir Ali Industries Ltd.* (PLD 1969 SC 65).
[2] *Happy Family Associate v. Pakistan International Trading Company* (PLD 2006 SC 226).
[3] *Dadabhoy Cement Industries Ltd. v. National Development Finance Corporation* (PLD 2002 SC 500).