ORDER SHEET

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

C. P. No. D –3364 of 2016

Date	Order with signature of Judge
	Before: **Mr. Justice Muhammad Iqbal Kalhoro** **Mr. Justice Arbab Ali Hakro**
Petitioners:	**Syed Mouj Ali Shah and another** Through M/s.Bhajandas Tejwani, and Mehmood Baloch, Advocates
Respondent No.1(a to e):	Muhammad Ismail (deceased) and others through Mr. Muhammad Shabbir Khanzada, advocate
Respondent No.1(a-5):	Muhammad Adnan Khan through Mr. Sohail Ahmed Khoso, advocate
Respondent No.2(iv):	Pir Abrar Ali through Muhammad Rehan Khan Durrani, advocate
Respondent No.2(i) & (a to e):	Pir Nasiruddin (deceased) and others through Mr. Faheem Majeed Memon, advocate
Respondent No.5:	Nemo.
Province of Sindh:	Through **Mr. Ahmed Ali Shahani, A.A.G**., Assistant Advocate General
Date of hearings:	29.08.2023 & 12.09.2023
Date of Order:	05.10.2023

ORDER

ARBAB ALI HAKRO, J: Through this petition, the Petitioners have sought the following relief(s):-

a) *To declare that impugned Order dated 25.05.2016 (Annexure-A), passed by the Court of learned District Judge Naushahro Feroze/ Respondent No.4, is illegal, malafide, quorum non-judice, in excess of authority and jurisdiction and merits to be declared as such and/or to be set aside/ or set at naught and the Order of the trial Court dated 17.05.2013, merits to be restored and maintained to its original position.*

b) *To declare that the Order dated 17.05.2013, passed by the learned Senior Civil Judge Naushahro Feroze (Trial Court) on Application under Section 12(2) C.P.C., filed by the Respondent No.1 in Suit No.5/1982, is legal, in accordance with well-established principles laid down by Superior Courts and in consonance with all cannons of justice, equity, fair play and binding the same does not require any interference by the learned District Judge Naushahro Feroze/ Respondent No.4, as aforesaid.*

c) *The impugned Order passed by the Court of learned District Judge Naushahro Feroze/ Respondent No.4 merits to be quashed and / recalled and / set aside and the judgment and decree in question passed by the earlier Trial Courts, merits to remain intact, and/ or to be restored to its original position.*

d) *Suspend the operation of impugned Order dated 25.05.2016 (Annexure-A) passed by the Court of learned District Judge, Naushahro Feroze."*

2. Precisely, the facts of the case as narrated in this petition are that on 30.08.1982, predecessor-in-interest of the petitioners (Pir Irshad Ali s/o Pir Anwaruddin) instituted F.C. Suit No.5 of 1982, for declaration and permanent injunction against Respondent No.1 and during proceedings of the suit, Respondent No.1 was declared *exparte* vide order dated 01.07.1985 and thereafter the suit was decreed vide judgment and decree dated 28.07.1988 & 30.07.1988, respectively. Against that on 13.02.1998, an application under Section 12(2) CPC ('**the Code**') was filed by Respondent No.1 before the Court of Senior Civil Judge, Naushahro Feroze ('**the trial Court**'), challenging therein judgment and decree passed in aforesaid suit on the ground of fraud, misrepresentation and concealment of facts; that his wrong/incorrect address was shown in the title of plaint, thus no notice was served upon him and at that relevant time he was in Saudi Arabia for the purpose of his service.

3. The said application was contested by Respondent No.2 (i to iv) by filing a counter affidavit denying the facts pleaded in the said application, which was dismissed by the trial Court vide Order dated 30.6.1998. Thereafter against that Order, the attorney of Respondent No.1 preferred Civil Appeal No.41 of 1998 before District Judge Naushahro Feroze, which was allowed, and the case was remanded back to the trial Court for deciding the same by affording opportunity to the parties to lead evidence. Being aggrieved, Respondent No.2(i to vi) filed C.P. No.924/1999, which too was dismissed.

4. After remand, the application under Section 12(2) of the Code filed by the attorney of Respondent No.1, after a full-fledged trial, was dismissed vide Order dated 06.06.2002 and against that order, Respondent No.1 preferred Civil Revision No.16/2002 before the District Judge, which was allowed vide order dated 13.12.2004 passed by Additional District Judge, Naushahro Feroze and the matter was remanded again to trial Court for deciding the same on merits. That Order, present petitioners and Respondents No.2 & 3, assailed by filing Constitution Petition No.364 of 2005, which was disposed of vide order dated 01.09.2005 by maintaining Order dated 13.12.2004.

5. Ultimately, the trial Court after hearing the parties, in the order dated 17.05.2013, dismissing 12(2) CPC application, has come to the conclusion that neither any fraud as alleged has been committed nor any fact was misrepresented and has held that Respondent No.1 has miserably failed to establish/ prove his case. Respondent No.1 assailed the order before District Judge Naushahro Feroze, who, vide its Order dated 25.05.2016 (impugned herein) has allowed the application under Section 12(2) CPC by directing the trial Court to decide the controversy between the parties afresh, hence this petition.

6. At the very outset, learned Counsel representing the Petitioners submits that impugned Order dated 25.05.2016, passed by learned District Judge, Naushahro Feroze, in Civil Revision Application No.21 of 2013, whereby application under Section 12(2) filed by the Respondent No.1 was rejected on the ground that the same is not only misconceived as well as hopelessly time-barred as the same was filed after the lapse of 17 years is right and correct appreciation of both law and the facts; that no specific allegation of fraud and misrepresentation has been alleged; that Respondent No.1 had knowledge of the judgment and decree passed by the trial Court, which, on the face of it, appears to be speaking one

and that no such fraud was ever committed as notice was duly served upon him through publication; that without challenging the said judgment and decree by way of revisional jurisdiction, he filed an application under Section 12(2), which was rightly dismissed by learned Senior Civil Judge Naushahro Feroze, and against that Order, revision was allowed through impugned Order dated 25.05.2016, which is nothing but improper application of judicial mind hence learned Appellate Court has committed gross illegalities and irregularities while passing the impugned Order by setting aside the judgment and decree passed by learned trial Court. Lastly, he argued that the application under Section 12(2) of the Code is not maintainable as respondent No.1, who filed the above application, was a party in the suit and proper recourse for setting aside the exparte Judgment and Decree is an application under Order IX Rule 13 of the Code or appeal under Section 96 of the Code. In support of his contention, he relied upon the case law reported as **2007 SCMR 621, PLD 2001 SC 518, 2003 SCMR 1050, PLD 2002 SC 500, 2023 YLR relevant p.446, 448 B & E, 2005 CLC 525 & 2000 SCMR 296**.

7. Learned Counsel representing LRs of Respondent No.1 & 3 submits that land in question was transferred to Respondent No.3 Pir Rafiuddin, i.e. Survey No.370 of Deh Naushahro Feroze by way of a Registered Gift Deed on 29.08.1962 after obtaining permission from Deputy Commissioner Nawab Shah (now Shaheed Benazir Abad); that registered Gift deed was never challenged by the petitioners nor by Pir Irshad Ali before any forum nor prayed anywhere for its cancellation; that claim of petitioners regarding title through Pir Irshad Ali is baseless as so-called Sale Deed was also subsequent to Registered Gift Deed executed by Pir Nawal Goth to Pir Rafiuddin. He lastly argued that instant petition is not maintainable and is liable to be dismissed. At the end, he has relied upon case law reported as **2018 SCMR**

1474, 1995 PLD 423, 2007 SCMR 741, 2010 SCMR 1377 & 2011 SCMR 279.

8. On the other hand, learned Counsel for the Respondents No.2(iv), (v) & (vi) argued that both the Courts below passed the orders without affording any opportunity to the legal heirs of deceased Pir Irshad Ali, who was condemned unheard, as such orders passed are against the principles of natural justice. He further submits that deceased Respondent No.1 fully knew that the ancestors of the answering Respondent, namely Pir Irshad, who was the owner of Survey Nos.370 & 378 Deh and Taluka Naushahro Feroze, having purchased the land from its original owner, namely Pir Nawal Goth vide Registered Sale Deed, had subsequently sold Survey No.378 to Muhammad Ramzan Memon. He lastly argued that Respondent No.1 and others are responsible for committing fraud by misrepresentation; hence in the interest of justice, orders passed by the Courts may be reviewed after proper notice to all the parties. In order to strengthen his arguments, learned Counsel has relied upon numerous case law reported as **2015 CLC 1157, 2015 CLC 1428, PLD 1990 SC 76 & 1996 SCMR 158**.

9. Learned AAG submits that no illegality or infirmity, as alleged by the petitioners in the impugned order dated 25.05.2016 passed by District Judge Naushahro Feroze, in Civil Revision Application No.21/2013, appears hence the same is sustainable under the law.

10. We have heard Counsel for the Petitioner, respondents and learned Assistant Advocate General and have perused the record with their assistance and taken guidance from case law submitted by them.

11. It is a matter of record that respondent No.2, Pir Irshad Ali (whom the petitioners claim to be their predecessors in interest), instituted the suit against respondent No.1 for Declaration and Perpetual Injunction. In the plaint, the

address of respondent No.1 was stated as "*Muhammad Ismail, son of Abdullah Pathan, Muslim, adult, r/o Naushero Feroz, District Nawabshah*". In the application under Section 12(2) of the Code, respondent No.1 claimed that his above-stated address was incorrect/wrong as he was in Saudi Arabia for the purpose of service at the time of filing of the suit and the plaintiff had obtained *exparte* Judgment and Decree wrongly, that respondent No.2 had concealed the residential address of his wife and sons, thus, by practising fraud and misrepresentation, he obtained *exparte* decree from the trial Court. It is manifest that service was never effected on the given address as it was insufficient and incomplete in all respects.

12. The main contention of learned Counsel representing the Petitioners is that the application under Section 12(2) of the Code is not maintainable as respondent No.1, who filed the above application, was a party in the suit and proper recourse for setting aside the *exparte* Judgment and Decree is an application under Order IX Rule 13 of the Code or appeal under Section 96 of the Code. Therefore, at this stage, it would be imperative to reproduce provisions of Order IX Rule 13, 12(2) and Section 96 of the Code hereunder:-

> *"**13. Setting aside decree ex parte against defendant**.—(1) In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside, and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;*
>
> *Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.*
>
> *Provided further that no decree passed ex parte shall be set aside merely on the ground of any irregularity in the service of summons, if the Court is satisfied, for reason to be record,*

> *that the defendant had knowledge of the date of hearing in sufficient time to appear on that date and answer the claim.*
> *(2)….” (emphasis added)*
> ***12(2).****Where a person challenges the validity of a judgment, decree or Order on the plea of fraud, misrepresentation or want of jurisdiction, he shall seek his remedy by making an application to the Court which passed the final judgment, decree or Order and not by a separate suit."*
> *“96.—Appeal from original decree.—(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeal from the decision of such Court.*
> *(2) An appeal may lie from an original decree passed ex parte*
> *(3) No appeal shall lie from a decree passed by the Court with consent of parties.”*

13. No doubt, remedy under section 12(2), of the Code to seek annulment of a decree on the ground of jurisdiction, misrepresentation or fraud is not the only remedy. A decree or order may be set aside through appeal, or a revision, or review, if available before the law as argued by the learned counsel for the petitioner.

14. But, before proceeding further, it is appropriate to know the meaning of the words "fraud" or "misrepresentation" used in section 12(2), of the Code in the light of the judgments of the superior Courts in Pakistan. In the case reported as "Mst. Izat Begum and another v. Kadir Bux" **(PLD 1959 Karachi 221)** fraud was defined as under: -

> "*Every representation made to a Court which is deliberately false amounts to a fraud and would vitiate a decree*"

15. In this context, reference may also be “Allah Wasaya and 5 others v. Irshad Ahmad and 4 others” **(1992 SCMR 2184)**, wherein, it was held as under: -

> "*Whenever a person intentionally deceives another with the motive having some illegal gain or advantage for himself or with the purpose of putting the person so*

> *deceived or cheated in wrongful loss and or disadvantage he is said to have committed fraud. It means and includes, inter alia, the suggestion, as a fact, of that which is not true, by one who does not believe it to be true, or the active concealment of fact by one having knowledge or belief of the fact*"

16. In this behalf, further reliance can be placed on the case reported as "Khadim Hussain v. Abid Hussain and others" **(PLD 2009 SC 419)**, wherein it was observed that bad "faith" and "fraud" are synonymous. Fraud is an intrinsic collateral act which vitiates the most solemn proceedings of Courts of Justice.

17. Now turning to misrepresentation, the August Court in its most celebrated judgment "Lahore Development Authority v. Firdous Steel Mills (Pvt.) Ltd." **(2010 SCMR 1097)**, after consulting Blacks' Law dictionary held as under:

> "*Any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. An untrue statement of fact. An incorrect or false representation. That which, if accepted, leads the mind to an apprehension of a condition other and different from that which exists. Colloquially it is understood to mean a statement made to deceive or mislead*"

18. For the purpose of subsection (2) of section 12 of the Code, the plea of collusion is as good as the plea of fraud as held in the case reported as "**Zafarullah and 3 others v. Civil Judge, Hafizabad and 3 others**" **(PLD 1984 Lahore 396)**.

19. In ordinary common parlance, collusion is defined as a secret combination, conspiracy, or concert of action between two or more persons for fraudulent or deceitful purposes.

20. In the case reported as "**Munir Ahmad Khan v. Sameeullah Khan and 7 others**" **(1986 CLC 2655)**, it was observed that:

> "*The collusion, no doubt, is a species of fraud. The collusion in judicial proceedings is a secret agreement between the two persons that one should institute a suit*

against the order in order to obtain the decision of a judicial I? tribunal for some sinister purpose".

21. It is by now settled that fraud cannot be directly proved; it has to be inferred from the surrounding circumstances. It is also a well-settled law that fraud vitiates the most solemn proceedings as held by the superior Courts of Pakistan in the following judicial pronouncements.

(i) **Lal Din and another v. Muhammad Ibrahim (1993 SCMR 710)**

(ii) **Chief Settlement Commissioner, Lahore v. Raja Mohammad Fazil Khan and others (PLD 1975 SC 331)** and

(iii) **Talib Hussain and others v. Member, Board of Revenue and others (2003 SCMR 549)**

22. When it is alleged in the application under Section 12(2) of the Code that by practising fraud upon the Court or through misrepresentation, a decree was obtained by a party, then the Court is reasonably competent to set the same at naught, irrespective of the fact, whether, the decree was passed *exparte* or otherwise the grounds of setting aside an ex parte decree under Order IX Rule 13 of the Code are quite different from those mentioned in Section 12(2) of the Code. Under Order IX Rule 13 of the Code, the party has to show sufficient cause for his absence from the Court. If the Court comes to the conclusion that the absence of the defendant, against whom the decree was passed, was not willful or deliberate, after service of summons or he was not duly served with the summons, then the Court can set aside the *exparte* decree. However, in the latter case under Section 12(2) of the Code, if it is found that the Court passed a decree without jurisdiction or some fraud has been practised upon the Court or through misrepresentation the questioned decree was obtained by a party, then, the Court shall set it aside by invoking the powers under the said Section. It is for this reason that sub-Rule (1) of Rule 13 provides that if the

summons has not been 'duly served' are quite technical and, it could even be said, to ascertain decree somewhat artificial. While this is so far the reasons already stated, this Could, on occasion, lead to a situation where, while the defendant was served for all practical purposes, he was, technically, not "duly served" and the exparte decree therefore had to be set-aside. The rigors of the requirement that the summons be "duly served" were therefore softened to some extent in 1972 by the addition of 2nd proviso to sub-Rule (1). This now requires the Court to disregard any irregularity in the service of summons, but this can only be done if the case comes within the carefully prescribed parameters of the 2nd proviso. This requires the Court to be satisfied that the defendant did have knowledge of the relevant date of hearing and that such knowledge had been acquired in sufficient time to enable him to appear before the Court. The Court must record its reasons for coming to this conclusion. It is also to be noted that the 2nd proviso only allows the Court to disregard an irregularity in the service of the summons. An absence of service cannot be ignored. In other words, if the summons has not been served at all the second proviso does not, and cannot, take effect. Furthermore, and quite obviously, the 2nd proviso cannot apply if the summons are not issued at all since there is then (by definition) a complete absence of service, and in such a situation, the question whether or not there was any irregularity in the service cannot arise. So, the contention of the learned Counsel for the Petitioners that respondent No.1 was to avail remedy by filing application Order IX Rule 13 or appeal under Section 96 of the Code is misconceived. It is also to be noted that even if a fraud is committed between the parties, the decree passed upon such fraud can be set at naught as laid down by the Apex Court in **Muhammad Aslam and Others vs Mst. Kundan Mai and others (2004 SCMR 843)**. The relevant portion of the judgment is reproduced hereunder:

> *"A bare reading of this provision would show that it was not necessary that fraud in obtaining the decree should have been played on the Court which passed the decree but if a decree had been obtained through fraud between the parties inter se by concealment of true facts, the same could also be set aside. The learned Additional District Judge while passing the Order in revision petition ignored the fact that the filing of suit by the respondents would have served no purpose, for, consequence of setting aside of the decree was that the suit in which the same was passed would be deemed to be pending and the question of validity, existence or otherwise of the Tamleek Nama was to be decided on merits inter se between the parties."*

It is not necessary that the fraud to obtain that decree should have been played on the Court which has passed the decree. If a party conceals real facts from the other party or, by misrepresentation, gets the consent of the other party, then the decree, the result of such fraud or misrepresentation, can also be set aside.

23. So far, the contention of learned Counsel for the petitioners that no specific details of fraud have been pleaded by respondent No.1, and learned trial Court rightly observed that Respondent No.2 could not prove fraud and summons had been duly served and wife of Respondent No.2 had appeared, engaged the Counsel and moved adjournment applications; thus, in the absence of such element, application under Section 12(2) of the Code is misconceived, and revisional court illegally exercised jurisdiction. We have gone through the impugned order of the revisional Court and found a detailed discussion, particularly in paragraphs No. 13, 14, and 22, regarding fraud and misrepresentation after considering evidence produced by the parties and material available regarding the service of summons upon Respondent No.2. Thus, we find no force in the argument of learned Counsel for the Petitioners.

24. Moreover, through the impugned Order dated 25.5.2016, the Revisional Court has remanded the matter to the trial court and has not finally decided the issue on merits as such against the remand order ordinarily writ petition is not maintainable. In case of Uzma Naveed

Chaudhry and others vs. Federation of Pakistan and others (PLD 2022 SC 783), it was held by the Apex Court that:

> "*Needless to state that High Court cannot interfere, in its constitutional jurisdiction, with findings of fact recorded by the competent Courts, Tribunals or Authorities unless such findings are result of misreading and non-reading of the material evidence or based on no evidence, which amounts to an error of law and thus justifies, rather calls for, interference".*

The Apex Court in a case titled **Allah Ditta and others v. Member (Judicial), Board of Revenue and others (2018 SCMR 1177)** wherein it has been held as under:-

> *"6. Order of remand is not a final order and simply sends the matter for re-examination for the second time. It does not finally determine the claim or the rights of the parties. The forum to which the case is sent for fresh decision is free to re-examine the case and pass a fresh judgment. Against any such subsequent decision or judgment, alternate remedy is available to the parties. Further, Board of Revenue is the highest Court of appeal and revision in revenue cases and is a controlling authority in all matters connected with the administration of land, collection of land revenue, preparation of land record and other matters (See section 5 of the Board of Revenue Act, 1957). In this background the courts after having judicially examined the remand order passed by the Board of Revenue have expressed reluctance to interfere and for these reasons have maintained that Order of remand would not be amenable to writ jurisdiction (see Ramzan v. Rehabilitation Commissioner (Legal) Sarvodha (PLD 1963 Lahorc 461), Kaniz Fatima v. Board of Revenue (PLD 1973 Lahore 495) and Ghulam Rasool v. Khudai Dad (PLD 1986 Quetta 130). This is not an absolute rule. An order of remand that is facially perverse or without jurisdiction or otherwise void can be interfered with, like any other order (see Ghulam Rasool (supra)). The constitutional power to judicially review an order of remand passed by the Board of Revenue is not in any manner curtailed or abridged by the precedents cited above. Infact, the principle that emerges from the wisdom of the precedents is that, for reasons narrated above, the constitutional Court must approach and examine a remand order passed by the Board of Revenue with care and circumspection, so as to sparingly interfere with it, unless of course, the remand order is facially perverse, without jurisdiction or otherwise void. Amenability of writ jurisdiction against*

> *a remand order is in this context and subject to above conditions."*

25. Besides the above, there is another significant aspect of the matter that the present Petitioners are neither party in the suit nor in application under Section 12(2) of the Code filed by respondent No.1. However, the record reflects that the Petitioners had moved an application under Order I Rule 10 of the Code before the trial Court during the proceedings of application under Section 12(2) of the Code, which was allowed and the Petitioners were made party. Thus, it would be appropriate for the Petitioners to contest the suit on merits before the trial Court and to prove their right, title and interest over the suit land.

26. It is also a settled principle of law that Constitutional jurisdiction is discretionary in character. 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."*

27. In view of the above-stated facts and exposition of the law, it becomes clear that the address of Muhammad Ismail (respondent No.1) in the plaint was incorrect and that the *exparte* decree was obtained through fraud and misrepresentation. The learned Counsel for the petitioners has failed to point out any misreading and non-reading of evidence. Thus, the findings recorded by the Revisional Court do not warrant any interference by this Court in exercised its constitutional jurisdiction under Article 199 of the

Constitution of the Islamic Republic of Pakistan, 1973. Resultantly, the instant writ petition is dismissed, with no order as to costs.

JUDGE

Faisal Mumtaz/PS

JUDGE