

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Const. Petition No.D-1090 of 2023

Present

Mr. Justice Muhammad Iqbal Kalhoro

Mr. Justice Arbab Ali Hakro

Petitioner : Bashir Ahmed through his legal heirs,
Through, M/s Noor Hassan Malik and
Anwar Ali Lohar, Advocates

Respondents No.1&2 : Ali Bux & Wajid Sibgatullah,
Through Mr. Tariq G Hanif Mangi
Advocate

Respondents No.3-7 : Mukhtiarkar Khangarh and others
through Mr. Ahmed Ali Shahani,
Assistant Advocate General

Date of hearing : 16.04.2024

Date of Decision : 15.05.2024

ORDER

ARBAB ALI HAKRO, J.- Invoking the jurisdiction of this Court under Article 199 of the Constitution of Pakistan, 1973, the petitioner has challenged the legality of the Order dated 07th June 2023, passed by the Court of Additional District Judge-III Ghotki, referred to herein as “**the Revisional Court**”, as well as the Order dated 19th November 2021, passed by the Court of Senior Civil Judge, Ghotki, hereinafter referred to as “**the Trial Court**”. Both judicial pronouncements dismissed the petitioner’s application under Order IX Rule 13 of the Code of Civil Procedure, 1908, referred to as “**C.P.C**”.

2. Respondent No.1/plaintiff Ali Bux filed F.C Suit No.78 of 2016 against the predecessor Petitioners/defendant Bashir Ahmed, seeking Declaration, Possession, Mesne Profit, and Permanent Injunction, with the following prayers:

- a) *To declare that registered sale deed No.1365 dated 26.07.2013 and of Deh QazirBadal Tapo Chhawani Taluka Khangarhare managed, engineered, forged and fake documents prepared collusively in back and behind the plaintiff, as the plaintiff is lawful owner of above said land by virtue of purchase through agreement of sale dated 03.02.2003 and since then he is in peaceful possession.*
- b) *To cancel the registered sale deed No.11365 dated 26.07.2013 and revenue entry No.20 dated 06.11.2013 Deh Qazir Badal Tapo Chhawani Taluka Khangarh managed fraudulently in the name of defendant No.2.*
- c) *To restrain the defendant No.2 by way of permanent injunction from dispossessing the plaintiff from suit land and defendant No.2, may also be restrained from selling, alienating or transferring the suit land to else one except the plaintiff in order to save multiplicity of litigation.*
- d) *To restrain the defendants No.3 to 5 from issuing sale certificate or registering the document/ registered sale deed in respect of the suit land in favour of any person other than the plaintiff.*
- e) *To grant any other equitable relief which this Honourable Court deems fit and proper under the circumstances of the suit.*
- f) *To award costs of the suit.*
- g) *Any other Relief.*

3. Upon service of summons of the above suit, the petitioner filed Written Statement and F.C Suit No.188 of 2016 against the respondents/defendants, seeking Specific Performance of Contract and Permanent Injunction. In this suit, upon service of summons, respondent No.1 and 2 filed their Written Statements. Subsequently, both suits were consolidated. F.C Suit No.78/2016 was treated as the leading suit, and F.C Suit No.188/2016 was treated as the subsequent suit. The trial Court framed the consolidated issues and directed the parties to adduce evidence in support of their respective claims. Thereafter, the petitioner's predecessor stopped appearing before the trial Court, neither cross-examined respondent No.1 nor adduced evidence to prove his claim. However, respondent No.1 adduced his evidence. Finally, the trial Court proceeded ex parte against the petitioner and subsequently, by its consolidated judgment dated 07th September 2020 and Decree dated 12th September 2020, decreed the leading F.C Suit No.78 of 2016, filed by respondent No.1, and dismissed the subsequent F.C Suit No.188/2016, filed by the predecessor of the Petitioners.

4. In the face of adversity, the petitioner's predecessor, feeling aggrieved, moved an application under Order IX Rule 13 C.P.C., seeking to overturn the ex parte Judgment dated 7th September 2020 and the Decree dated 12th September 2020. The basis of his stance was that in May 2018, when his relatives accused him of "KARO KARI", a grave allegation. Fearing for his life, he found it necessary to go into hiding at a secure location, which rendered him unable to appear before the Court. Respondent No.1 opposed the application, presenting objections as a Counter Affidavit. After carefully considering the matter, the trial Court dismissed the application, as stated in its Order dated 19th November 2021. Undeterred, the petitioner sought to challenge this decision by filing a Revision Application before the Revisional Court. Unfortunately, this attempt was unsuccessful. As a result, the petitioner has brought the matter before this Court, challenging both the orders through the present writ petition.

5. Learned Counsel for the petitioner's legal heirs, at the outset, contends that concurrent findings recorded by Courts below are based on presumption and assumption without considering the material available on record; besides misconceived and misconstrued the law and facts involved in the matter; that proper opportunity of hearing was not afforded to the petitioners to defend their case before trial Court without examining/recording evidence of witnesses and straightaway passed the impugned judgment and decree by dismissing an application under Order 9 Rule 13 CPC; that there was a dispute with the relatives and the petitioners had shifted to an unknown place hence could not proceed and the learned trial Court passed ex-parte judgment and decree without considering such factual aspect of the case; that it is well-settled law that no one can be condemned unheard and the law favours adjudication on merit rather on technicalities. In the end, he submits that an instant petition may be allowed by setting

aside the impugned judgment and decree along with the Order passed by both Courts below in the interest of justice.

6. Learned Counsel representing the Respondents submits that learned both lower Courts have rightly passed the impugned judgment and decree as well as Order as there is no illegality or infirmity appears therein; that petitioner chose to remain absent and asserted reason for absent due to allegation of *Karap* but no documentary evidence or otherwise has been produced by him in his claim; that the petitioner only intends to drag the respondents in false and frivolous prolong litigations. He submits that the instant petition, misconceived only to linger on the matter indefinitely, is liable to be dismissed with cost.

7. Learned AAG, while adopting the arguments advanced by learned counsel for the Respondents, supported the impugned judgment and decree as well as the Order passed by both Courts below and submitted that petitioners have failed to pinpoint any illegality or infirmity in the impugned judgment and orders require interference by this Court.

8. Upon hearing the case, the contents of the application under Order IX Rule 13 C.P.C were examined. The sole ground put forth by the Petitioner's predecessor was that in May 2018, he was falsely accused of "KARAP" by his relatives. This accusation led him to seek refuge in a safe place, making it impossible for him to appear before the trial Court. It was only in the first week of September 2020 that this matter was resolved through intervention of the local community's nekmards, allowing him to return to his village. The question that arises is whether the aforementioned circumstances could be deemed a sufficient cause that could have prevented the petitioners' predecessor from appearing before the Court when the suit was called on for hearing/evidence. Furthermore, it is imperative

to determine if these grounds could lead the trial Court to set aside the *exparte* decree.

9. The record reveals that the suit was filed in April 2016, and the Petitioner's predecessor was duly served. He filed his written statement as well as a counterclaim suit. Both suits were consolidated, and consolidated issues were framed. However, after this, the predecessor of the petitioner did not appear before the trial Court to contest the suit and lead his evidence. The other side led their evidence, and finally, the trial Court passed the *exparte* decree on 09th September 2020. The grounds taken by the predecessor of the Petitioners in his application are not tenable for several reasons. He has not disclosed nor mentioned the names of relatives and *nekmards* who levelled the allegation against him and resolved their dispute. He also failed to mention the terms and conditions on which his dispute was resolved. Moreover, he did not bother to inform the trial Court regarding the allegation of *KARAP* through his Advocate or his other family member or close relative, who was not prevented from appearing before the trial Court. Furthermore, the learned counsel for respondents No.1 & 2 placed on record the certified copy of an adjournment application filed by the predecessor of the Petitioners before the trial Court, which shows that on 13.01.2020, he appeared before the trial Court and sought adjournment. Counsel also produced certified copies of case diaries; perusal thereof reveals that on the date of hearing viz: 02.10.2018, both parties and their Advocates were present, both parties meaning the predecessor of Petitioners and respondent No.1 & 2.

10. In light of the above circumstances, the ground taken by the predecessor of the Petitioners is misconceived. It shows malafide on his part, which cannot be considered as a sufficient cause for his non-appearance/absence before the trial Court as provided under IX Rule 13 C.P.C, which allows a defendant to apply to the Court to set aside a decree passed against them in their absence, also known as an '*exparte*

decree'. This rule is invoked when the defendant was not present to represent his case when the suit was called for a hearing.

11. The term “**sufficient cause**” is crucial to this rule. It refers to an adequate and reasonable ground or circumstance that justifies the absence of the defendant during the court hearing. The interpretation of what constitutes a 'sufficient cause' is subjective and depends on the discretion of the Court. While exercising its discretion, the Court considers the bona fides of the application, the nature of the case, and the consequences of the grant or refusal of the application. In essence, 'sufficient cause' is a legal concept allowing some flexibility in the strict procedural laws to do justice. It is designed to ensure that a person is not deprived of their right to contest due to factors beyond their control. However, it is not intended to be used as a tool to bypass the law or delay proceedings. The party invoking this must show that they acted diligently and not negligently.

12. The facts discussed above indicate that the petitioners' predecessor had consciously chosen to abstain from participating in the proceedings and demonstrated non-cooperation with the Court. Consequently, he forfeited his right to seek the Court's indulgence and request the setting aside of the *ex parte* decree passed against him. His application, therefore, merited a summary dismissal as it lacked necessary material facts, was vague in all respects, and seemed to be an attempt to conceal his misdeeds and negligence. Upon scrutiny, and by the old aphorism "**nullus commodum capere potest de injuria sua propria**", the petitioners could not benefit from his wrongdoing or negligence. This principle translates to "no one can take advantage of his own wrong, " underscoring parties' legal and moral obligation to act in good faith and not benefit from their misconduct or negligence. Thus, the predecessor of the petitioner's actions and subsequent application do not warrant the setting aside the *ex parte* decree.

13. Additionally, in light of the facts presented, it is noteworthy that the trial Court passed a preliminary decree in the leading F.C Suit No.78/2016 on 7th September 2020. This decree was not challenged by the petitioners, as stipulated under Section 96 C.P.C, despite having ample time to do so within the prescribed limitation period. Under these circumstances, when the preliminary decree went unchallenged, the provisions of Section 97 C.P.C became applicable. Section 97 states: *“Appeal from final decree where no appeal from preliminary decree. Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree”*.

14. Therefore, in accordance with Section 97 C.P.C, any party aggrieved by a preliminary decree who does not appeal against it after the commencement of this Code is barred from disputing its correctness in any subsequent appeal that may be preferred from the final decree. This implies that the petitioners, having failed to challenge the preliminary decree, are now precluded from disputing its correctness in any appeal against the final decree.

15. The learned counsel for the petitioners could not establish a case for interference by this Court, to exercise its jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan. The learned counsel did not demonstrate any jurisdictional defect or overreach of jurisdiction on the part of the lower courts.

16. Given the preceding considerations, the present Constitutional petition lacks maintainability and is hereby **dismissed**.

JUDGE

JUDGE