

HIGH COURT OF SINDH KARACHI

IInd Appeal No.210 of 2022

[Mst. Syeeda Nafeesa Tahir versus Mst. Mahmooda Farooqi & another]

Appellant : Through M/s Ahmed Ali Hussain and
Muhammad Mustafa Mamdani advocates

Respondent No.1 : None present

Respondent No.2 : Through M/s Mayhar Kazi and Zahid Ali Sahito
advocates

Date of hearing : 06.12.2023, 11.12.2023 & 20.12.2023

Date of decision : 09.05.2024

J U D G M E N T

KAUSAR SULTANA HUSSAIN J.- This second appeal has been filed against the concurrent findings of two Courts below recorded on applications under Section 12(2) and Order 1 Rule 10 C.P.C. Respondent No.2 preferred application under Section 12(2) CPC against the compromise Order dated 09.05.2005 and Decree dated 14.05.2005 passed by learned VIth Senior Civil Judge Karachi East (**Trial Court**) in Suit No.1480 of 2004 [*Re: Mst. Syeda Nafeesa Tahira versus Mst. Mahmooda Farooqi*] alongwith application under Order 1 Rule 10 CPC, which were allowed vide Order dated 31.05.2014 thereby aforesaid compromise Order and Decree were set aside and respondent No.2 was impleaded as party. Being aggrieved with and dissatisfied by the Order dated 31.05.2014 the appellant/deGREE holder preferred Civil Appeal No.116 of 2014 before learned 9th Additional District Judge (MCTC) Karachi East (**1st Appellate Court**) but the same was dismissed vide Judgment dated 11.10.2022. For sake of reference the Judgment and Order passed by learned trial Court as well as 1st Appellate Court on applications under Section 12(2) and Order 1 Rule 10 CPC are hereinafter referred to as impugned Judgment and Order.

2. Briefs facts of the matter are that appellant/plaintiff instituted Civil Suit bearing No.1480 of 2004 before learned trial Court for specific performance of contract against respondent No.1 in respect of property bearing No.2/S/125 admeasuring 317 sq. yards situated at Block-2 Pakistan Employees Cooperative Housing Society Karachi (**subject property**). During pendency of said suit the plaintiff and alleged attorney of respondent No.1/defendant filed an application under Order XXIII Rule 3 CPC and accordingly the aforesaid suit was decreed by means of compromise Order and Decree dated 09.05.2005 & 14.05.2005 respectively. On 01.01.2006 respondent No.2 preferred applications under Section

12(2) and Order 1 Rule 10 CPC before learned trial Court against said compromise Order and Decree on the ground that he is the owner of subject property on the basis of registered Gift Deed executed by his mother Seema Begum in his favour being attorney/sub-attorney of (i) Naeem Abid Farooqui, (ii) Mst. Mahajabeen Farooqui & (iii) Muhammad Nadeem Abid Farooqui, claiming to be sons and daughter of respondent No.1/defendant, and as such compromise Order and Decree have been obtained by misrepresentation and fraud. Notices were issued on said applications and learned trial Court out of diverging pleadings of parties framed following Issues on the application under Section 12(2) CPC:

01. *Whether the Judgment and decree obtained by the plaintiff with fraud and misrepresentation?*
02. *What should the order be?*

The parties led their evidence on aforesaid Issues and finally the learned trial Court after hearing the parties vide impugned Order dated 31.05.2014 allowed both the applications filed under Section 12(2) and Order 1 Rule 10 CPC, thereby set aside the compromise Order and Decree dated 09.05.2005 and 14.05.2005 and joined the respondent No.2 as party in aforesaid Suit for hearing and decision afresh, against impugned Order the appellant/decree holder preferred Civil Appeal No.116 of 2014 before learned 1st Appellate Court, but same was dismissed vide impugned Judgment dated 11.10.2022, hence this second appeal.

3. Learned counsel for the appellant/plaintiff argued that respondent No.2 claimed ownership rights on the subject property on the basis of alleged gift deed executed by his mother in his favour being attorney of alleged legal heirs of respondent No.1 but respondent No.1 was unmarried as such question of execution of general power of attorney by her legal heirs in favour of mother of respondent No.2 does not arise at all; that even otherwise the alleged general power of attorney does not contain gift clause; that respondent No.1 appeared before the learned trial Court and stated that she is unmarried. The crux of arguments advanced by learned counsel for the appellant is that since the respondent No.2 has no right/entitlement over the subject property as such the application under Section 12(2) CPC is not maintainable and liable to be dismissed while the compromise Order and Decree are to be restored.

4. Despite notice no one effected appearance on behalf of respondent No.1. It appears that respondent No.1 also failed to effect appearance before the learned 1st Appellate Court. Whereas counsel for respondent No.2 argued that respondent No.2 is sole and absolute owner of subject property on the basis of registered gift deed dated 22.8.1998, therefore, he is necessary party of the subject suit and the alleged attorney of respondent No.1 was not competent to compromise the suit with appellant/plaintiff; that even the alleged attorney had not attached the power

of attorney with written statement and/or compromise application and that compromise Order and decree were obtained by misrepresentation and fraud without impleading respondent No.2 as party, hence both Courts below rightly set aside the compromise Order and decree and restored the suit to its original position. He prayed for dismissal of captioned appeal.

5. Arguments heard and record perused.

6. Perusal of record shows that plaintiff had instituted the aforesaid suit in respect of subject property for specific performance of contract against respondent No.1 only and during pendency of suit one Azhar Javed appeared before the learned trial Court being alleged attorney of respondent No.1/defendant and then application under Order XXIII Rule 3 was filed and suit was decreed by means of compromise decree vide Order and Decree dated 09.05.2005 & 14.05.2005, however, the said alleged attorney had not produced general power of attorney before the learned trial Court. Whereas from the documents produced by respondent No.2 it reveals that said respondent had acquired the ownership rights in respect of subject property by means of alleged registered Gift Deed dated 22.08.1998, which is even prior to filing of suit by the plaintiff. During course of arguments learned counsel for the appellant though argued that the alleged gift deed was executed in favour of respondent No.2 by his mother while showing herself as attorney of alleged sons and daughter of respondent No.1 whereas respondent No.1 was unmarried, however, all these claims and counter claims are factual in nature and cannot be decided without recording of evidence.

7. Since the respondent No.2 is claiming ownership rights in respect of subject property on the basis of registered document even prior to filing of subject suit by the appellant/plaintiff, as such he was proper and necessary party in the said suit, therefore, both Courts below have rightly allowed the applications filed by respondent No.2 under Section 12(2) and Order 1 Rule 10 CPC against the compromise decree passed in subject suit. The impugned Judgment and Order passed by Courts below are well reasoned and require no interference by this Court. Accordingly captioned appeal stands dismissed being no merit.

JUDGE

Faheem/PA