

# HIGH COURT OF SINDH KARACHI

**R.A No.73 of 2023**

[Zahoor Hussain & another versus Kuldeep Kumar & another]

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Applicants : Through Mr. Muhammad Rashid Bari advocate  
Respondent No.1 : Through M/s Akash Gehani and Gurmukh Das Gehani, advocates  
Date of hearing : 15.11.2023  
Date of decision : 03.04.2024

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## **ORDER**

**KAUSAR SULTANA HUSSAIN J.-** Applicants/defendants have challenged the Order dated 05.04.2023 passed by learned VIII<sup>th</sup> Additional District Judge Karachi South [**Trial Court**], whereby their application filed under Section 12(2) CPC in Summary Suit No.85 of 2021 has been dismissed.

2. Facts of the matter, given rise to present Lis, are that respondent/plaintiff had instituted the Summary Suit No.85 of 2021 [*Kuldeep Kumar versus Zahoor Hussain & another*] before the learned trial Court for recovery of an amount of Rs.42,10,000/- on the basis of cheques, wherein both the present applicants were party/defendants. The summons were issued to present applicants/defendants but they had failed to effect appearance before the trial Court and accordingly after completion of all legal formalities ex-parte Judgment dated 14.12.2021 and Decree dated 16.12.2021 were passed as prayed. On 05.07.2022 applicants/defendants moved an application under Section 12(2) CPC before the trial Court for setting aside the above judgment and decree on the ground that same were obtained by misrepresentation and fraud. The learned trial Court after hearing the parties dismissed the said application of the applicants/defendants vide Order dated 05.04.2023 (*impugned Order*), hence this Revision Application.

3. Learned counsel for the applicants/defendants argued that impugned order suffers from legal infirmity and is not in accordance with law; that record envisages the clear and willful misrepresentation and fraud on part of the respondent/plaintiff, but learned trial Court has failed to appreciate the same; that learned trial Court has decided the application filed under Section 12(2) CPC without framing of issues and summoning the witnesses. He finally submits that impugned order may be set aside and applicants/defendants may be allowed to

defend the suit by filling Written Statement. In supports of arguments he relied upon the cases reported in (i) 2021 SCMR 829, (ii) 2019 YLR 43, (iii) SBLR 2019 Sindh 1241 (C), (iv) C.R No.363/2014 BWP, (v) 2013 MLD 1401 and (vi) 2004 YLR 1066.

4. Contrary learned counsel for the respondent/plaintiff contends that despite service of notice applicants/defendants failed to appear and defend the suit and that applicants/defendants have failed to show any element of fraud and misrepresentation, as such the application has rightly been dismissed by the trial Court. In support of arguments he relied upon the cases reported in (i) 2022 SCMR 806, (ii) 2022 SCMR 933, (iii) 2022 SCMR 1522, (iv) 2023 SCMR 476, (v) 2015 MLD 1443, (vi) 2023 SCMR 1402, (vii) 1988 CLC 242, (viii) 2006 SCMR 631 and (ix) 2021 SCMR 1575.

5. I have heard the learned counsel for the parties and have perused the material available on record.

6. Applicants/defendants are husband and wife and perusal of record reflects that trial Court had repeatedly issued summons against the applicants/defendants through all modes including through VII<sup>th</sup> and XII<sup>th</sup> Judicial Magistrates Karachi South, where applicants/defendants were facing trial. Per service report furnished by the aforesaid Judicial Magistrates the summons/notices were duly served upon the applicants/defendants, but inspite of that they had failed to effect appearance before the learned trial Court and/or file application for leave to defend the suit by themselves or through their counsel. In ground (b) of memo of captioned Revision Application it is stated by the applicants' counsel that allegedly respondent/plaintiff assured the applicants/defendants that he is withdrawing the Summary Suit as such they need not to appear before the Court. Now if the said contention of the learned counsel for the applicants/defendants is presumed to be true, same is sufficient to brush aside the element of fraud and misrepresentation, as admittedly the applicants/defendants were in knowledge of the pendency of Summary Suit against them.

7. In view of the above it is established that applicants/defendants were in due knowledge about the pendency of Summary Suit against them, therefore, they ought to have appear before the trial Court by themselves or through any pleader and/or counsel for defending the said suit, if they had any case on merit. Record also reflects that judgment and decree were passed by the trial Court on 14.12.2021 and 16.12.2021 respectively, however, the applicants/defendants,

despite having knowledge of Summary Suit, filed the application under Section 12(2) CPC on 05.07.2022 i.e after about seven (07) months, as such the said application besides lacking element of fraud and misrepresentation is also barred by time.

8. The impugned Order passed by the trial Court is well reasoned, as such same requires no interference by this Court while exercising revisional jurisdiction. Accordingly captioned Revision Application stands dismissed being meritless. The case laws relied upon by the applicants' counsel are distinguishable from the facts and circumstances of case in hand, as such same are not helpful to applicants/defendants.

JUDGE

Faheem/PA