

ORDER SHEET
IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

C. P. No. D –249 of 2024

Date	Order with signature of Judge
------	-------------------------------

Before:
Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Arbab Ali Hakro

Petitioner: **Areeb J Habib s/o Javed Habib** through
Mr. Ameet Kumar, Advocate

Respondent No.1: M/s Sukkur Beverages Pvt. Ltd
through Mr. Imtiaz Ali Abbasi,
Advocate

Respondent No.2: Through Ahmed Ali Shahani, AAG

Date of hearing: 28.03.2024

Date of Order: 24.04.2024

ORDER

ARBAB ALI HAKRO, J: Petitioner has invoked this Court's Jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, challenging the Order dated February 22nd, 2024, passed by the learned Additional District Judge-II (MCAC), Sukkur, in Revision Application No. 67 of 2023. The impugned Order upheld the decision of September 21st 2023, rendered by the III-Senior Civil Judge, Sukkur, in F.C. Suit No.51 of 2020. That decision dismissed the Petitioner's application filed pursuant to Section 12(2) of the Civil Procedure Code, 1908. Consequently, the Petitioner's Revision Application was also dismissed.

2. Precisely, the facts of the case as narrated in this Petition are that respondent No.1 instituted F.C. Suit no.51 of 2020 for

Declaration, Recovery of Amount of Rs.5,594,100/- and Permanent Injunction against the Petitioner asserting that the plaintiff company entered into contract with the Petitioner on 30.01.2020, to carry out specific civil works in respect of flooring at respondent No.1's bottling plant in Sukkur. Regarding the above contract, the Petitioner received payment through several cheques totalling Rs.49,00,000/-. However, from the beginning, the work style and progress were not seen as satisfactory, and the Petitioner failed to complete his work as per terms and conditions of the contract mentioned above despite respondent No.1 reminded it to do so by sending emails and legal notice. Hence he filed the suit.

3. The trial court issued summons to the petitioner/defendant through courier service. However, the Petitioner refused to receive them twice. Ultimately, the trial court issued the summons through substituted service by way of publication in the daily newspaper, Jang Karachi. Despite this, the Petitioner did not come forward to contest the suit. Therefore, the trial court debarred him from filing a written statement and ordered to proceed ex parte.

4. Subsequently, the suit filed by respondent No.1/the plaintiff was decreed ex parte vide judgment dated 30.9.2021 by the trial court, followed by a decree dated 30.9.2021. According to the Petitioner, he learned about the ex parte decree when, on 16.4.2022, the watchman handed him the notice of the execution application filed by respondent No.1/plaintiff. He then filed an application under Order IX Rule 13, read with Section 12(2), C.P.C., before the trial court, alleging that the ex parte decree was obtained by respondent No.1/the plaintiff through fraud and misrepresentation of facts. However, subsequently, the Petitioner withdrew the prayer under the provision of Order IX Rule 13 C.P.C. and pursued the application under Section 12(2) C.P.C. by filing a statement. The above application was contested by respondent No.1/the plaintiff, and it was dismissed by

the trial court. A revision preferred against the same was also dismissed, hence this Petition.

5. At the outset, learned Counsel representing the Petitioner submits that learned lower Courts below erroneously applied the wrong standard and passed impugned ex-parte judgment and decree; that learned both Courts below did not appreciate the facts and laws involved in the case; that contract forming the subject matter was entered into between the Respondent and the SMC and not with the present Petitioner, hence the suit was wrongly instituted against it and thereby fraud has been committed by obtaining ex-parte judgment and decree against it; that Respondent No.1 filed suit for declaration, recovery of amount Rs.55,94,100/- and permanent injunction as Respondent No.1 issued cheques in favour of New Port Engineering. In the last, he prayed that instant petitions may be allowed and that both judgments and decrees would be liable to be set aside in the interest of justice.

6. Learned Counsel representing respondent No.1 submits that impugned judgments and decrees passed by both Courts are proper and well reasoned. It is contended that before filing the suit, the respondent issued a legal notice to the petitioner, which was duly replied; besides aspect of service upon the petitioners through all modes, including publication, and weightless assertion regarding fraud or misrepresentation, it is clear that petitioner has no case. It is further submitted that despite knowledge of the institution of the suit, the petitioner deliberately avoided contesting the same. Lastly, he prayed that the instant petition may be dismissed as no interference is required by this Court to disturb the concurrent findings of the courts below.

7. Learned A.A.G. submits that no illegality or infirmity as alleged by the Petitioner in the impugned orders appears; hence, the same is sustainable under the law.

8. We have heard learned Counsel for the parties, perused the record with their assistance, and taken guidance from case law submitted by them.

9. In the application under Section 12(2) C.P.C., the Petitioner contends that respondent No.1 obtained the ex parte judgment and decree through fraudulent means and misrepresentation of facts without properly including him as a party in the suit. The Petitioner, serving as a director, had previously entered into an agreement with respondent No.1. However, in the proceedings of the suit, the Petitioner was erroneously named as a defendant by respondent No.1, an act allegedly carried out with malicious intent.

10. Upon meticulous examination of the contract/agreement, it is discernable that Newport Engineering (SMC-PVT) Ltd had entered into the agreement, represented through its Owner, Mr Areeb J Habib. The title of the plaint, upon scrutiny, has revealed that the Petitioner was arrayed as a defendant in the following manner: "Areeb J Habib, Newport Engineering (SMC-Pvt) Ltd, 41-C, 2nd Floor main Khayaban-e-Bukhari, D.H.A Phase-VI Karachi". The contract was executed by Newport Engineering (SMC-PVT) Ltd, which is referred to as the "Contractor". The company is represented through its owner, Mr. Areeb J. Habib. This implies that the company, not Mr. Habib personally, is the party to the contract. The suit was filed against Areeb J Habib Newport Engineering (SMC-Pvt) Ltd. Here, it appears that the suit is filed against both Mr Areeb J Habib and Newport Engineering (SMC-Pvt) Ltd. In the title of the plaint, there is only a missing phrase, "through its owner". In our view, this is a mere technicality and does not constitute fraud or misrepresentation of facts as envisaged under Section 12(2) C.P.C. Therefore, the absence of the phrase "through its owner" does not materially affect the validity of the plaint or the proceedings.

11. In the matter at hand, it is evident that the learned Counsel for the Petitioner has not been able to convincingly demonstrate the alleged fraud and misrepresentation purportedly committed by respondent No.1 in obtaining the impugned judgments and decree. The Counsel has not provided substantial evidence or arguments to establish that the judgment was procured through fraud or that any misrepresentation was involved. Furthermore, the Counsel has not shown that the Court that passed the said judgment and decree was not competent to do so. These fundamental prerequisites must be conclusively proven for the invocation of jurisdiction under Section 12(2) C.P.C. The Section stipulates that any party aggrieved by a decree or judgment can seek its nullification if it can be shown that the decree was induced by fraud or was passed by a court not competent to pass it. Without such proof, the exercise of jurisdiction under this Section cannot be justified. Therefore, the Petitioner's case lacks the necessary legal grounds for application of Section 12(2) C.P.C. in this instance. The remedy enshrined in Section 12(2) C.P.C is specifically designed for individuals who were not parties to the proceedings or, if they were not duly served with summons or notice, resulting in a judgment, decree, or order being issued against him as if they had been properly served. The application of Section 12(2) is narrowly tailored to circumstances where the person against whom a judgment, decree, or order has been made was unaware of the proceedings. In contrast, a party who has engaged in the legal process or, having been served, opted not to participate, is barred from seeking relief under Section 12(2). Such parties are required to pursue established legal remedies such as Appeal, Revision, Review, or Petition for Leave to Appeal, in accordance with statutory provisions.

12. The privilege of invoking Section 12(2) is not available to a litigant who, by his own neglect, has been adjudicated in absentia. Moreover, a party who had the opportunity to contest a decision

through appellate channels is estopped later from challenging the decision's legitimacy under Section 12(2) on the basis of fraud, misrepresentation, or jurisdictional error. The utility of Section 12(2) cannot be permitted to serve as a vehicle for assailing the validity of a decision when the avenues of Appeal, Revision, Review, or Petition for Leave to Appeal were accessible but were either abandoned due to the effluxion of time or consciously waived. This principle is encapsulated by this Court, as exemplified in the case of **Tanveer Siddiqui and another v. Muhammad Rashid** (2010 YLR 1851).

12. For the reasons stated above, the Petitioner has not succeeded in establishing a case of illegality or jurisdictional error in the decisions challenged in the writ petition, which would warrant this Court's intervention under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. Consequently, this writ petition is dismissed due to its lack of merit. Each party shall bear their its costs.

JUDGE

Faisal Mumtaz/PS

JUDGE