

IN THE HIGH COURT OF SINDH KARACHI

Present:

Mr. Justice Adnan Iqbal Chaudhry
Mr. Justice Abdul Mubeen Lakho

C.P. No. D-473 of 2019

[Enayatullah & another v. The XIth Additional District Judge and others]

Petitioners : Enayatullah and Zikar Shah through
Mr. Muhammad Mushtaq Qadri, Advocate.

Respondents 1,2&5: Nemo.

Respondents 3 & 4: Muhammad Shafique Awan and
Muhammad Ashraf Awan through Javaid
Ahmed Rajput, Advocate.

Dates of hearing : 15-10-2024

Date of Decision : 15-10-2024

ORDER

Adnan Iqbal Chaudhry J. - The Petitioners are aggrieved of order dated 09.01.2017 passed by the Senior Civil Judge dismissing their application under section 12(2) CPC for setting aside judgment/decree dated 29.01.2015 passed in Suit No. 156/2012; followed by order dated 04.01.2019 passed by the Additional Sessions Judge dismissing the Petitioners' civil revision.

2. The suit was filed by the Respondents 3 and 4 (plaintiffs) pleading that though they were co-owners of the suit property along with their brother, the Respondent No.5 (defendant No.3), having inherited the same from their late father Taj Muhammad, the Respondent No.5 proceeded to deliver possession thereof to the Petitioners (defendants 1 and 2) to the exclusion of the Respondents 3 and 4. The plaintiffs therefore prayed for a declaration of their title, and for partition of the suit property amongst the brothers. The suit was decreed *ex-parte*.

3. The Petitioners moved an application under section 12(2) CPC for setting aside the judgment/decree. Per the Petitioners, the suit

was collusive between the Respondents 3 to 5 (brothers) who did not disclose to the court that they had sold the suit property to the Petitioners and then did not serve the Petitioners with summons of the suit. The application was however dismissed by the trial court, and as narrated above, the dismissal was maintained by the revisional court.

4. Heard learned counsel and perused the record.

5. The documents relied upon by the Petitioners include (a) mutation letter of the suit property in favor of the Respondents 3 to 5; (b) registered sale deed dated 30.05.2009 said to have been executed by the Respondent No.5 in favour of the Petitioner No.2; and (c) *Iqrarnama* dated 19.08.2009 said to have been executed by the spouse of the Respondent No.4 acknowledging sale proceeds of the suit property on behalf of the Respondents 3 and 4 as they were in prison at that time. While that *Iqrarnama* is not an instrument of transfer of immovable property, the registered sale deed dated 30.05.2009 between the Respondent No.5 as co-owner and the Petitioner No.2 as vendee, is such an instrument. Though the Respondent No.5 as co-owner was not competent to convey the entire suit property, however in view of section 44 of the Transfer of Property Act, 1882 he could have conveyed his share in the suit property subject of course to the restriction contained in that provision.

6. Learned counsel for the Respondents 3 and 4 submits that the sale deed relied upon by the Petitioners is a fabricated document. But then, the fact of the matter remains that none of the Courts below have even noticed such sale deed let alone tested its authenticity. If that sale deed is found to be genuine, then at least the Petitioner No.2 stands as a co-owner of the suit property alongside the Respondents 3 and 4 and the decree against him cannot be sustained. The impugned orders are therefore perverse.

7. In view of the foregoing, the order dated 04.01.2019 passed on Civil Revision No. 11/2017, and the order dated 09.01.2017 passed in Suit No. 156/2012 on the Petitioner's application under section 12(2) CPC, are set-aside. The application under section 12(2) CPC stands revived. The learned Senior Civil Judge shall decide the same afresh after permitting the Petitioners to place on record the documents on which they rely, and if need be after recording evidence.

Petition is allowed as above.

JUDGE

JUDGE

Karachi
Dated: 15-10-2024