

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

C.P No. D-105 of 2020

[Muhib Ali Vs. The State]

**PRESENT: Mr. Justice Muhammad Saleem Jessar
Mr. Justice Adnan-ul-Karim Memon**

Petitioner Muhib Ali (since Deceased), through his legal Heirs Muhammad Bux & Others	:	Through Mr. Abdul Rehman A. Bhutto, Advocate
The State	:	Through Mr. Abdul Waris Bhutto, Assistant Advocate General, Sindh along with Mr. Muhammad Aslam Magsi, Mukhtiarkar, Mehar
Respondents No.1 to 3	:	Through Mr. Ali Azhar Tunio, Advocate
Date of hearing	:	19.03.2025
Date of Judgment	:	16.04.2025
Date of Announcement	:	23.04.2025

JUDGMENT

Muhammad Saleem Jessar, J.- Through this constitutional petition, the petitioners are challenging the order dated June 29, 2010, passed by the Additional District Judge Mehar. This order overturned the Senior Civil Judge Mehar's order of August 22, 2007, which had dismissed the application filed by respondents Muhammad Yousuf and others under Section 12(2) of the Civil Procedure Code of 1908 (CPC).

2. Brief facts of the case are that petitioner Muhib Ali filed a suit for specific performance, permanent injunction, and cancellation of a sale deed dated 01.11.2004 against Usman Solangi and others. He claimed Usman, father of respondents Yousuf and others, owned 3-30 acres out of Survey No.201, in Deh Durbo and agreed on 14.03.2004 to sell it to him for Rs. 200,000. A written agreement, attested in Dadu, recorded Rs. 100,000 as earnest money received by Usman. The remaining Rs. 100,000 was to be paid in two installments, with the final Rs. 50,000 due on 10.10.2007, after which Usman would execute the sale deed. Muhib Ali stated he paid the full amount to Usman, but Usman delayed the registration and demanded more money, ultimately refusing to execute the deed, leading to the suit. The suit was decided ex parte in Muhib Ali's favor, and he filed an execution application. Upon returning from Saudi Arabia, the respondents, Yousuf and others, received notice of this application and applied Section 12(2) CPC in the trial court. They alleged they were residing in Saudi Arabia and that Muhib Ali and their brother colluded to fraudulently obtain the judgment and decree behind their backs. The trial court dismissed their application. The respondents then challenged this dismissal in Revision Applications, which were allowed by the impugned order. Muhib Ali now challenges this revisional order in the current constitutional petition.

3. Muhib Ali originally filed this constitutional petition on July 19, 2010. Following his death, his legal heirs were brought on record through an amended title filed on December 19, 2016.

4. We have heard learned counsel for the parties as well as learned Assistant A.G. appearing for the State and have perused the material available on the record.

5. The petitioners' counsel stated that the original defendant, Usman Solangi, had filed a written statement and an amended version in 2005 and 2006. After his death, his legal heirs were joined, and their attorney appeared in court on 23.09.2006 before disappearing. Consequently, the trial court proceeded ex parte, framed issues, recorded evidence, and decreed the suit on 30.11.2006. The petitioners' execution application was also granted on 28.04.2010. Subsequently, the respondents filed two applications under Section 12(2) CPC, which were dismissed on 22.08.2007. The respondents then filed

revision applications, which the Additional District Judge Mehar allowed, remanding the case for recording evidence from both parties. The counsel argued that the respondents should have filed an application under Order IX Rule 13 CPC to set aside the ex parte decree, and their direct application under Section 12(2) CPC, based on fraud and misrepresentation, was not maintainable since their attorney had appeared. Therefore, the revisional court's decision was incorrect and caused injustice. He requested the court to allow the petition, set aside the impugned order, and uphold the ex parte decree and the execution order. He admitted the petitioners are not in possession of the disputed land, as they were dispossessed during the litigation. He further submitted that the petitioners' sale agreement with the respondents was dated 14.03.2004, while respondents Nos. 1 and 2 allegedly purchased the land from respondent No. 3 on 01.11.2004, implying the petitioners were illegally dispossessed by them.

6. Mr. Ali Azhar Tunio, representing respondents No. 1, 2, and 3, argued that his clients were residing in Saudi Arabia and thus unable to contest the case. Regarding the petitioners' claim based on the sale agreement, Mr. Tunio pointed out that Muhammad Usman, the deceased father of the respondents, had, in his written statement, denied executing the agreement and receiving any payment. He contended that the petition lacked merit and the revisional court's order was lawful. He requested the court to remand the case to the trial court for recording evidence from both sides and deciding based on that evidence, citing the case of *Mrs. Anis Haider and others vs. S. Amir Haider and others* (2008 SCMR 236).

7. The learned Assistant Advocate General (AAG) for Sindh stated that the dispute concerns private parties, and the government will abide by the Court's decision. The Mukhtiarkar, Taluka Mehar, present in court, submitted a chronological statement confirming that the suit land is recorded in the names of respondents No. 1 and 2, Khalid Hussain and Muhammad, who are also in possession of the property.

8. First, we will address the legal submissions raised by the parties. The petitioners' counsel challenges the maintainability of the respondents' application under Section 12(2) of the Civil Procedure Code (CPC). He argues that the respondents should have challenged the ex parte decree under Order

IX Rule 13 CPC instead. To clarify this legal point, the relevant texts of these two provisions are reproduced below:

Section 12(2) CPC:

"Where a person challenges the validity of a judgment, decree or order on the plea of fraud, misrepresentation or want of jurisdiction, he shall seek his remedy by making an application to the Court which passed the final judgment, decree or order and not by a separate suit."

Order IX Rule 13 CPC:

"In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;¹ provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also: ² Provided further that no decree passed ex parte shall be set aside merely on the ground of any irregularity in the service of summons, if the Court is satisfied for reason to be accorded, that the defendant had knowledge of the date of hearing in sufficient time to appear on that date and answer the claim."

9. A simple reading of these two legal provisions reveals that they offer distinct remedies. Order IX Rule 13 CPC addresses situations where an ex parte decree is issued against a defendant. It specifies that if the court is convinced that the summons was not properly served or that the defendant had a valid reason for not appearing, the court can set aside the ex parte decree. The emphasis here appears to be on improper service of summons or a sufficient cause preventing the defendant's appearance. Notably, this section makes no mention of an ex parte decree obtained through fraud, misrepresentation, or passed by a court lacking jurisdiction.

10. In contrast, Section 12(2) CPC specifically addresses the setting aside of a decree that is alleged to have been obtained through fraud, misrepresentation, or passed by a court lacking the necessary jurisdiction.

11. The legislature's enactment of two distinct legal provisions for setting aside a decree indicates its intention to provide separate remedies for different scenarios. When a decree's validity is challenged based on fraud, misrepresentation, or lack of jurisdiction of the court that passed it, the

specific remedy is to invoke Section 12(2) of the Civil Procedure Code (CPC). Conversely, when a competent court passes an ex parte decree due to a defendant's non-appearance despite proper service of summons, that defendant can seek relief under Order IX Rule 13 CPC by satisfying the court that the summons was not duly served or that a sufficient cause prevented their appearance. However, if the defendant's contention is that the decree was obtained through fraud or misrepresentation, the exclusive and appropriate remedy is an application under Section 12(2) CPC. Otherwise, the existence of a separate Section 12(2) CPC alongside a seemingly similar provision like Order IX Rule 13 CPC would be without purpose and render Section 12(2) redundant.

12. In this regard, our attention is drawn to the case of AZMAT DEEN Vs. DISTRICT JUDGE, HATTIAN BALA, AZAD KASHMIR and 12 others (2018 C L C 40 [High Court (AJ&K)]), which held as follows:

"7. The main proposition in the instant case is, whether the learned Court below was competent to reject the application under Order VII, rule 11 of C.P.C. and whether, it was mandatory for the petitioner, herein, to avail the remedy provided under Order IX, rule 13 of C.P.C. instead of moving an application under Section 12(2), C.P.C., when it is alleged in the application that by practicing fraud upon the Court or through misrepresentation a decree was obtained by a party, then the Court is quite competent to set the same at naught, irrespective of the fact, whether, the decree was passed ex parte or otherwise the grounds of setting aside an ex parte decree under Order IX, rule 13, C.P.C. are quite different than those mentioned in section 12(2) of C.P.C.. Under Order IX, rule 13 of C.P.C., the applicant/defendant has to show a sufficient cause for his absence from the Court and if the Court comes to the conclusion that the absence of the defendant, against whom, the decree was passed was not willful or deliberate, after service of summons or he was not duly served with the summons, then, the Court can set aside the ex parte decree but in the later case, under section 12(2) of C.P.C., if it is found that a decree was passed by the Court without jurisdiction or some fraud has been practiced upon the Court or through misrepresentation, the questioned decree was obtained by a party, then, the Court shall set it aside by invoking the powers under the said section."

13. We also refer to an unreported order dated September 7, 2009, from a Division Bench of this Court in C.P. No. D-2114 of 2008. In that case, the respondent No. 1 had their suit for Declaration and Permanent Injunction against the petitioner decreed on August 25, 1993. Similar to the present situation, the defendant in that case submitted a Written Statement on

December 25, 1993, after service of notice. However, they then chose not to participate in further proceedings until after the respondent No. 1's witnesses had testified and judgment was delivered. Subsequently, on August 30, 2003, during execution proceedings, the defendant filed an application under Section 12(2) CPC in the Court of Civil Judge, Malir, Karachi, which was opposed. This application was dismissed on July 1, 2004, solely because it was filed during execution proceedings and thus deemed not maintainable. Aggrieved by this, the petitioner filed Appeal No. 3/2004 in the Court of District Judge, Malir, Karachi, which was also dismissed on September 1, 2008. This dismissal was challenged in a Constitutional Petition, where it was held:

“9. In our opinion, in his application under Section 12(2), CPC the petitioner has raised substantial questions falling within the scope of Section 12(2), CPC, which permit a party to challenge any decision, judgment or decree on the basis of fraud, misrepresentation of facts or want of jurisdiction. In such circumstances, the order dated 01.07.2004, rejecting the application under Section 12(2), CPC was patently illegal. The appellate Court, which has dismissed the Civil Appeal No.3/2004 by its impugned order dated 01.09.2008, also fell in error by making observations that failure of the petitioner to challenge the judgment and decree has debarred him from filing of application under Section 12(2), CPC, which has its own independent scope.”

14. Considering the aforementioned legal precedents, the plea and legal objection raised by the petitioners lack merit and cannot be sustained.

15. Another crucial legal point is the conflict between the petitioners' unregistered Sale Agreement dated March 14, 2004, and the respondents' registered Sale Deed dated November 1, 2004. Superior Courts have consistently held that a registered document takes precedence over an unregistered one. In Mst. QAIF UL WARA SAJJAD through Attorney Vs. HABIB BANK LIMITED and 2 others (2016 CLD 1828 [Sindh]), a Division Bench of this Court, stated that ownership cannot be claimed based on a sale agreement, which doesn't confer title, citing Wajid Ali Khan v. Sheikh Murtaza Ali and 2 others (2003 SCMR 1416). The court further emphasized the sanctity of registered documents and the need for strong evidence to challenge their genuineness, referencing Mirza Muhammad Sharif and 2 others v. Mst. Nawab Bibi and 4 others (1993 SCMR 462). Similarly, in FAHIM SAEED Vs. Mst. YASMEEN and 3 others (2018 CLC 478 [Sindh]), another Division Bench reiterated the presumption of truth attached to registered documents under

Article 129(e) of the Qanun-e-Shahadat Order, 1984, citing Muhammad Ali and 25 others v. Hassan Muhammad and 06 others (PLD 1994 SC 245) and Fazal Mahmood v. Sardar Khan and 03 others (PLD 1996 Karachi 475).

16. Given these precedents, the registered Sale Deed relied upon by the respondents holds more legal weight than the petitioners' unregistered sale agreement. Furthermore, the petitioners failed to produce the original sale agreement in the trial court during the ex parte proceedings, claiming it was misplaced without detailing any subsequent efforts to recover it. The trial court should not have granted an ex parte decree based solely on a photocopy, especially when the alleged executor, Muhammad Usman (deceased father of the respondents), had vehemently denied its execution in his written statement.

17. Even in ex parte proceedings, the Civil Court cannot simply rely on the plaintiff's assertions and evidence. It must thoroughly examine all factual and legal aspects of the case and pass a well-reasoned, 'speaking order' with findings on all relevant points. In this case, the trial court's ex parte judgment appears to have merely reiterated the plaintiff's contents and the plaintiff's ex parte evidence in a cursory manner, without proper legal and factual scrutiny, which is not legally permissible. The length of the judgment repeating the plaintiff's claims is insufficient; the court must provide its analysis and findings. The trial court's judgment suggests it decreed the suit mainly because the defendants/respondents did not challenge the plaintiff's evidence. The relevant excerpt from the trial court's judgment states:

“The evidence adduced on behalf of the plaintiff has remained unchallenged and un rebutted, and therefore, under the circumstances, his evidence as it is to be believed, and he has been able to prove the execution of the agreement.”

18. The trial Court failed to address the written and amended written statements of the deceased Muhammad Usman, the original owner, who vehemently denied executing the sale agreement and receiving any payment, claiming his signatures were forged. Although signature comparison should have occurred during the trial, a preliminary look reveals a clear difference: the alleged sale agreement has "Usman" in Sindhi, while the written statements show "Mohammad Usman" in Sindhi, with even slight variations in the word "Usman." In our view, the trial court should have legally verified

the disputed signature. Instead, the decree was issued hastily and mechanically. Superior Courts disapprove of such ex parte decrees based solely on the plaintiff's assertions, emphasizing the need for the Court to examine all relevant legal and factual aspects, even in ex parte proceedings. In NIAZ MUHAMMAD Vs. Abdul Rahman (PLD 2015 Peshawar 90), it was held that a decree for a substantial amount passed without discussing the ex parte evidence or providing reasons, disregarding procedure and law, is unacceptable. A judgment must be reasoned and reflect a proper reading of the record. The failure to discuss exhibited documents or examine the process server was deemed a non-reading and misreading of evidence, rendering the decree legally unsound. Recording evidence was mandatory. Similarly, MUHAMMAD YOUNAS AMIN through General Attorney Vs. ABDUL MAJEED through L.Rs. and others (2020 M L D 562 [Lahore]) held that a decree based on a newspaper proclamation without proper attempts at personal service or a reasoned order explaining the lack of such efforts, and without examining the process server's report for compliance with Order V Rule 17 CPC, is flawed. An order for publication cannot be made without adhering to these prerequisites. Citing Syed Muhammad Anwar, Advocate v. Sheikh Abdul Haq (1985 SCMR 1228), the court noted that a publication order made without fulfilling the requirements of Order V Rules 17, 18, and 19 CPC is legally untenable, invalidating the subsequent ex parte decree. The Additional District Judge in that case correctly considered all relevant factors, emphasizing the primary duty of the court to provide a hearing opportunity and that no one should be condemned unheard, rightly setting aside the decree under Section 12(2) CPC.

19. It is crucial to remember that superior Courts consistently favor deciding cases on their merits, rather than dismissing it on based on technicalities. In this instance, remanding the case to the trial Court for a fresh trial will provide both parties with a full opportunity to present and prove their respective claims, thus ensuring no prejudice to either side.

20. In conclusion, we find no legal error or flaw in the revisional Court's order that warrants intervention by this Court under its extraordinary constitutional jurisdiction. Therefore, this constitutional petition is dismissed, and the revisional Court's order for remand is upheld. The trial Court is directed to provide both parties with an adequate opportunity to present their

respective evidence. Given the lengthy duration of this matter, the trial of the suit should be expedited and preferably concluded within six (06) months from the date of receiving this judgment. This petition stands disposed of in the aforesaid terms.

Let a copy of judgment along with R&Ps be sent to the trial Court as well as appellate Court, for compliance. Learned Addl. Registrar is directed to ensure compliance.

JUDGE

JUDGE

Larkana
Dated. 23.04.2025
Approved for Reporting