

IN THE HIGH COURT OF SINDH AT KARACHI

C.P.No.D-3369 of 2010

Ahmed Khan

Versus

Mst. Bilqees & others

BEFORE:

Mr. Justice Mushir Alam, CJ

Mr. Justice Mohammad Shafi Siddiqui

Date of Hearing: 08.11.2012

Petitioners: Through Mr. Nazir Ahmed Advocate

Respondent No.1 Through Mr. Mr. Moiz Ahmed Advocate.

Respondent Nos.2&3: Through Mr. Adnan Karim Assistant A.G

J U D G M E N T

Muhammad Shafi Siddiqui, J.- Impugned here are the orders dated 27.4.2010 passed by the IIIrd Senior Civil Judge, Karachi (East) and 10.11.2010 passed by the Ist Additional District & Sessions Judge, Karachi (East).

Brief facts of the case are that the petitioner has filed Suit No. 1292/2004 which was decreed ex-parte. Subsequently the respondent No.1 filed application under section 12(2) CPC which was heard and the parties were directed to lead evidence in pursuance thereof.

Pursuant to the evidence being recorded to decide application under section 12(2) CPC, it is contended by the learned Counsel that the order declining to reopen the side was not warranted by law and facts and the dictate of justice demands that the pending applications [12(2) CPC] be disposed of on merits rather than technical knockout. He submits that the impugned orders were passed and based on personal reasons, annoyance and anger as the petitioner has moved transfer application on account of tampering the dairies and date of hearings when for the first time the side of the petitioner was closed. He submitted that the side of the petitioner was closed while the matter of the transfer of the case was subjudiced before the Hon'ble apex Court and on account of non-availability of Bench, the same was not heard. He submitted that there are no plausible and cogent reasons in the impugned orders and hence they have preferred this petition.

On the other hand, learned Counsel for the respondent No.1 has filed a detail counter affidavit wherein he submitted that the respondent No.1 who is the owner of the subject plot left Karachi for USA with intimation to the concerned society not to transfer the suit property to anyone till she returns from USA. It is submitted that after her return from USA for the first time, on enquiry from the PIA Cooperative Housing Society, she came to know about the pendency of the suit and its disposal under the forged and fabricated documents. Pursuant to which respondent No.1 filed appropriate proceedings under section 12(2) CPC against the exparte proceedings and the learned trial Court was pleased to direct the parties to lead the evidence on the issues framed on the respondent's application under section 12(2) CPC. On 31.5.2008 the respondent was cross examined by the petitioner's Counsel after taking several adjournments. Learned Counsel submits that on 24.9.2008 the case was adjourned to 18.9.2008 but the petitioner was neither present nor sent any intimation but the trial Court was pleased to adjourn the case as a last chance for 04.11.2008. Since on 04.11.2008 the petitioner again failed to appear due to strike of Karachi Bar Association, the matter was adjourned to 22.11.2008. On 22.11.2008 the petitioner filed an application for adjournment although final chance was given to the petitioner on the previous date i.e. 18.10.2008. On 16.12.2009 again the petitioner failed and got it adjourned to 17.1.2010. On 17.1.2010 again the matter was adjourned on application under section 151 CPC to 28.1.2010 and in this way the matter kept on adjourning for one reason or the other.

That the first time the petitioner's side was closed on 28.1.2009 after seeking six unreasonable adjournments and was reopened on 07.11.2009. Learned Counsel further submits that second time the side was closed on 17.12.2009 after seeking 15 further adjournments and as such, he has not approached the Court with clean hands. Learned Counsel submits the application for reopening the side was rightly dismissed by the trial Court which was challenged by the petitioner through a revision application before the Ist Additional District Judge, Karachi (East) which too met the same fate.

We have heard the learned Counsel and perused the record. It appears that initially the petitioner obtained the ex-parte orders against the respondents purportedly in pursuance of agreement to sell which was disputed by the respondent No.1 as she claims that the petitioner forged signature on this agreement as she was out of country on the crucial dates and time. Though the petitioner appears to be vigilant while the suit remained uncontested by the petitioner, however, after filing of the application under section 12(2) CPC apparently revealing fraud committed by the petitioner, the petitioner failed to appear and to proceed with the case particularly with the application under section 12(2) CPC and has frequently moved urgent applications as well as application for transfer of the case. The transfer application was dismissed by the appellate Court, this Court as well as by the apex Court and no Court ever granted any stay with regard to the proceedings regarding application under

section 12(2) CPC. It is revealed through the diary sheets filed by the learned Counsel for the respondent that the learned Counsel for the petitioner and the petitioner himself has not left a single opportunity to seek adjournment. It is an admitted fact that for the first time the side was closed on 28.1.2009 which side was reopened on 07.4.2009. The petitioner did not stop here and continued with the same modus operandi and before the trial Court closed his side on 17.12.2009 second time, he sought 15 more adjournments. The conduct of the petitioner reveals through these diary sheets proved that there can be no second opinion that the petitioner is avoiding the proceedings. Learned trial Court had granted enough opportunities initially when he was given six adjournments when his side was closed. The second indulgence was granted when his side was reopened. Further indulgences were granted when he was granted adjournment on 15 more occasions before his side was closed second time on 17.12.2009.

Off course the dictate of justice demands that the matter should be decided on merits rather than technical knock out but the petitioner with this frame of mind and conduct deserves no indulgence and equity. Indulgence is to be granted to those who remain vigilant and not for indolent. There appears to be a concurrent findings on these facts by the trial Court as well as by the revisional Court. These concurrent findings can be challenged only if there was any point of jurisdiction or if the order is wholly void or coram-non-judice but certainly not on the ground that the petitioner

deserves sympathy as he requested for the disposal of the case on merits. These reliefs cannot be granted putting the respondent at huge cost and misery who had to travel from U.S.A. The two orders impugned here appear to have been passed on sound principle of law and the same are not open to challenge under the constitutional jurisdiction.

These are the reasons for dismissing this petition by short order on 08.11.2012.

Judge

Chief Justice