IN THE HIGH COURT OF SINDH AT KARACHI

Constitutional Petition No.D-1809 of 2006

Before:
Mr. Justice Nadeem Akhtar &
Mr. Justice Muhammad Iqbal Kalhoro

Date of Hearing: 27.10.2014.

Petitioners, Government of Sindh & another, through Mr. Meeran Muhammad Shah, Additional Advocate General of Sindh (AAG).

None for the respondents.

JUDGMENT

MUHAMMAD IQBAL KALHORO, J:-This Constitutional Petition is directed against the order dated 24th August, 2006, passed by the learned District Judge, Karachi East, whereby the Civil Revision Application No.47/2005 filed by the petitioners was dismissed.

2. The relevant facts, in brief, are that respondent No.1 (hereinafter referred to as "the respondent") had filed the suit bearing No.1186/1999 for recovery of Rs.3,15,738/- against the petitioners stating therein that the respondent, an Engineering Company ,working as the government contractor, had entered into an agreement with the petitioners to carry out certain kind of engineering work awarded to it from time to time. It completed and finalized all the projects within the schedule in accordance with the terms of the contract, nonetheless the petitioners failed to pay the aforementioned amount towards the final bill. The petitioners in their written statement admitted the respondent's claim to the tune of Rs.2,15,737/-. However, the remaining claim of Rs.1,00,000/- towards refilling of excavated earth was disputed and denied by them. Learned trial Court decreed the suit under Order XII

Rule 6 CPC to the extent of admitted claim viz. Rs.2,15,737/- but refused to proceed further with the case on the balance claim. The respondent moved an application before the learned trial Court for proceeding with the suit on the un-admitted claim of Rs.1,00,000/- but the same was also dismissed. In the wake of above, a Civil Revision Application No.45/2001 was filed by the respondent before the learned District Judge, Karachi East, which was allowed with the consent of the parties and the suit was remanded to the learned trial Court for proceeding with it in terms of disputed amount. The parties were also directed to appear before the learned trial Court on 18th February, 2003. Before the learned trial Court, however, none appeared on behalf of the petitioners in pursuance of such directions. The learned trial Court framed the following issues for resolving the controversy between the parties:

1) *Whether the plaintiff is entitled to claim Rs.1,00,000/-?*

2) *What should the decree be?*

The respondent filed an affidavit-in-evidence of its witness but no one turned up for the petitioners to cross examine him or to lead any evidence in their support, hence, the learned trial Court decreed the suit for the balance claim of Rs.1,00,000/- with no order as to costs. The petitioners after coming to know about the judgment and decree, filed an application under Section 12(2) CPC challenging the same which, however, was dismissed by the learned trial Court vide order dated 21st January, 2005. The said order was called into question by the petitioners in Civil Revision Application No.47/2005 but the same also met the similar fate through the impugned order.

3. The petitioners, being dissatisfied with the said order, preferred the instant petition before this Court.

4. Mr. Meeran Muhammad Shah, learned AAG appearing for the petitioners contended that the impugned judgment and decree were obtained by the respondent by playing fraud, as there was no supporting evidence in favour of the claim made in respect of the remaining amount to justify decreeing the suit; the learned trial Court had not taken into account the grounds urged by the petitioners regarding the fact that after remand of the case no intimation was received by them for their appearance before the Court to controvert the claim of the respondent; a fair opportunity had not been given to the petitioners to lead the evidence in support of their contentions, therefore the impugned and decree were illegal, of no legal effect and not binding upon the petitioners; learned revisional Court was not able to appreciate properly that in case the impugned judgment and decree was allowed to hold field, it would amount to miscarriage of justice as there was no evidence in favour of the respondent to prove its claim of balance amount. He lastly prayed for setting aside the order in question and remanding the case to the learned trial Court for deciding it afresh after affording a fair opportunity of audience to the petitioners.

5. We have given our due consideration to the contentions advanced by the learned AAG at length, and have gone through the material placed on the record.

6. The instant petition has been filed by the petitioners mainly on the ground that after remand of the case to the learned trial Court, vide order dated 16th February, 2003, by the learned District Judge, Karachi East, no intimation or Court motion notice was sent to them for their

appearance before the learned trial Court, thus they could not appear before the trial Court and it led to an ex-parte judgment against them. In view of the learned AAG, it constituted misrepresentation of facts and practicing fraud by the respondent in terms of Section 12(2) CPC as such the impugned judgment and decree were not sustainable under the law and were liable to be set aside. In order to appreciate the contention of the learned AAG, we find it pertinent to reproduce here Section 12(2) CPC for ready reference:-

> ***Section 12(2) CPC :*** *Where a person challenges the validity of a judgment, decree or order on the plea of fraud, mis-representation 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.*

7. A bare perusal of the above provision of law evinces that an application under Section 12(2) CPC would lie to challenge the validity of the judgment, decree or order of a Civil Court only on the grounds of fraud, misrepresentation or want of jurisdiction. The said provision is neither in nature of an alternate remedy nor is substitute of an appeal. In the application filed by the petitioners under Section 12(2) CPC the grounds expounded are confined only to non issuance of the intimation notices to them by the learned trial Court after the case was remanded to it. In addition to above, the petitioners have also claimed that the respondent had no evidence in its possession to establish subject amount outstanding against them, therefore, the judgment and decree would be said to have been obtained by practicing fraud and misrepresentation, which were liable to be set aside on that sole ground and additionally on the score of them being passed on the back of the petitioners. The grounds so urged by the petitioners are beyond the scope of subsection (2) of Section 12 CPC, wherein only the allegations of fraud, misrepresentation and defect of jurisdiction accompanied with all the

necessary particulars are required to be pressed to question the validity of judicial pronouncements. Any other ground, as is the case in hand, may be hitting the merits of a given case but would not be considered relevant or qualified to topsy-turvy the judicial findings in terms of section 12 (2) CPC. The respondent could not be held responsible for the apathy and carelessness demonstrated by the petitioners to their cause pending before the learned trial Court of which they were admittedly in knowledge. Simply by moving an application on the grounds of fraud and misrepresentation to cover their negligence to pursue the matter and to make an attempt to neutralize the vires of the judgment subsisting against them, would not protect them from the repercussion which are bound to follow them. As a matter of fact in absence of any convincing evidence suggesting so, no misrepresentation or fraud could be alleged to have been contrived by the respondent to obtain a decision in its favour, which came into being mainly due to failure of the petitioners to put up appearance before the Court in pursuance of directions. The facts borne out of the record manifest that, while remanding the case, the learned District Judge, Karachi East, vide his order dated 16th January, 2003, in Civil Revision Application No.45/2001, had directed both the parties to appear before the learned trial Court on 18th February, 2003. The said order since was passed in presence of both the parties, it was not required under any law to issue fresh notice to the petitioners for their appearance before the Court, as it was their own responsibility to remain vigilant to contest the matter in accordance with their claim and their failure to do so had left no option with the Court but to decree the suit in favour of the respondent on the basis of material placed before it, which included, but was not limited to, evidence in the shape of an affidavit by the respondent’s witness, who was neither cross examined by the

petitioners nor subsequently any evidence was led by them to refute it and place their case in juxtaposition whereof. The responsibility, if any, for the adverse order against the petitioners exclusively lies on their shoulders, as they failed to keep in touch with the track of the suit in line with the call of their duty which enjoin upon them to maintain a high degree of diligence in the matters pending before the Court. The reason of the impugned judgment holding field against the petitioners can be traced in their own lethargic approach towards their cause. The law does not help an indolent who sleeps over his rights.

8. Having discussed above, we still like to examine in some detail the provisions of Section 12 (2) CPC in the context of present case to determine its applicability. The plea of fraud and misrepresentation which are the pre-conditions have to be specifically stated by the party in detail in its application under Section 12(2) CPC so that the other party opposing it could stand before it in its own way. The law requires that whenever the practice of fraud and misrepresentation is alleged by a party, the particulars of fraud or misrepresentation with all the necessary details have to be mentioned in the pleadings. The burden to prove the factum of fraud or misrepresentation would always be upon the person who alleges the same; unless it is so apparent that its ingredients could be discerned floating on the face of the record. The active concealment and suppression of facts in words and deeds is in fact an elementary and fundamental ingredient of the fraud which could not be inferred or proved by mere making some assertions in this regard, rather it must be proved through strong, independent and convincing evidence that it has been practiced in respect of the order in question. If a party alleges a fraud without, however, bringing the essential facts on record in proof of the same, then mere pleading ignorance or lack of knowledge simpliciter

to make it a ground for moving the Court would not be sufficient to dislodge the sanctity which is otherwise attached to the judicial proceedings. Besides, the Order VI Rule 4 CPC also requires that when the fraud is basis of any action, its particulars have to be furnished. The general allegations in this regard would not be sufficient; the facts pertaining to the fraud have to be spelt out in clear terms in the pleadings so as to meet the requirement of law. For ready reference Order VI Rule 4 CPC is reproduced hereunder:

> *Order VI, Rule 4, CPC. Particulars to be given where necessary. "In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default or undue influence and in all other cases in which particulars may be necessary beyond such as are exemplified in the form of aforesaid particulars (which dates and items if necessary) shall be stated in the plaint.*

If any case for reliance is required, the decisions in the case of Daewoo Pakistan Motorway Service Ltd. through Chief Executive Vs. Muhammad Akram (2009 MLD 750) can be cited. The Hon'ble Supreme Court of Pakistan in the case of Messrs Dadabhoy Cement Industries Ltd. and 6 others Vs. National Development Finance Corporation, Karachi (PLD 2002 Supreme Court 500), while confirming the findings of this Court in the same case on the subject point reported in 2002 CLC 166, has held in Para No.7 as under:

> *"7. As far the allegations that the compromise, decree was obtained by fraud, coercion and misrepresentation, the petitioners failed to substantiate the same as no particulars or details thereof had been given in their application under section 12(2), C.P.C. and mere allegation not supported by any material, would not invariably warrant inquiry or investigation in each case. .. .. It is settled law that where allegation of fraud is leveled, it must be specified and details thereof should be given".*

We have also taken guidance from the decision of the Hon'ble Supreme Court of Pakistan in the case of Mst. Nasira Khatoon and

another Vs. Mst. Aisha Bai and 12 others (2003 SCMR 1050). The Hon'ble Apex Court has scholarly dealt with the issue in hand, which deserves to be reproduced herein below for ready reference and elucidation:

> *"9. The concealment of material facts by a person having knowledge or belief of such facts may constitute fraud but the same must be proved through clear and convincing evidence and the burden of proof of fraud would lie on the party which alleges fraud except in a case in which the fraud is floating on the face of record. The active concealment and suppression of facts in words and deed is an essential ingredient of fraud which cannot be inferred by mere assertion rather it must be proved through strong, independent, clear and convincing evidence and the burden would be more heavier in the cases in which a long period has passed since passing of the decree or judgment under which valuable rights have accrued in favour of the opposite-party. There can be no exception to the rule of law that without bringing the essential facts on the record and the evidence in proof of the fraud the plea of ignorance and lack of knowledge simpliciter would not be sufficient to constitute fraud and dislodge the sanctity attached with the official acts and judicial proceedings. The fraud undoubtedly vitiates solemn proceedings and time would not sanctify an action of fraud and misrepresentation but no interference of fraud can be drawn merely on the basis of an oral assertion in absence of any proof of the allegation of fraud."*

9. Coming to the present case, it is evident that mere bald assertions regarding fraud have been made by the petitioner in Para No.8 of the accompanying affidavit filed along with the application under Section 12(2) CPC without furnishing the necessary details in this regard as to how and when the fraud was committed by the respondent. Without providing such details, the petitioners have admittedly failed to discharge their initial burden of referring to the basic ingredients of fraud so that the cognizance whereof could have been taken by the Court for the purpose of undertaking an enquiry into it. The other grounds taken by the petitioners in the said application are beyond the scope of Section 12(2) CPC, which cannot be looked into as mandated by the judgments of the Superior Courts on the issue time and again. The learned AAG also failed to satisfy as to why an application for setting aside the

impugned judgment and decree or an appeal challenging the same was not filed by the petitioners. Under the circumstances, we see no merits in the instant petition, which is dismissed accordingly along with the pending application.

10. Foregoing are the reasons of the short order announced by us on 27.10.2014, whereby this petition was dismissed.

JUDGE

JUDGE