

IN THE HIGH COURT OF SINDH AT KARACHI

H.C.A. NO.147 of 2014

**PRESENT: MR. JUSTICE NADEEM AKHTAR, &
MR. JUSTICE MUHAMMAD IQBAL KALHORO,**

Appellant : Mrs. Rubab through her Attorney,
Abbas Ali Hyder, represented by Mr. Nawab
Mirza, Advocate.

Respondent : Aftab Ahmed and others.

Date of hearing : 21.01.2015.

ORDER

MUHAMMAD IQBAL KALHORO, J: This order shall dispose of instant appeal impugning the order dated 16.4.2014 passed by the learned Single Judge of this Court on an application moved under section 12(2) CPC by the appellant in Suit No.302/2005 against the order dated 15.12.2010 whereby her name from the array of legal heirs of deceased Dr.Mrs. Jehan Ara Abbas was dropped.

The facts, in brief, are that deceased Ms. Jehan Ara Abbas filed Civil Suit No. 302 of 2005 for administration of the estates, declaration, partition, possession and payment of amount of plaintiff's share and injunction in respect of the deceased Dr. Syeda Hussan Ara Abbas w/o Aftab Ahmed d/o late Dr. Syed Ghulam Abbas. During pendency of the suit, she died. After her death, an application to bring on record her legal heirs was filed wherein besides respondent No.8 namely Mohammad Laeeq Khan, the name of appellant was mentioned as her legal heir. The defendants in the

suit to the extent of appellant contested the said application as she was said to be the adopted daughter of the deceased plaintiff. The appellant's counsel (Mr. Mirza Sarfaraz Ahmed) had conceded that the objection of defendants in respect of the appellant was valid. In view of such statement, the said application was granted by ordering to bring the name of Mohammad Laeeq Khan being husband of the deceased, on record as plaintiff in place of deceased.

The appellant, however, being aggrieved by the said order, filed the application under section 12(2) read with section 151 CPC before the learned trial court that was dismissed through the impugned order.

The learned counsel for the appellant contends that learned trial court has failed to advert to the material available on the record which clearly establishes the statutes of the appellant as legal heir of the deceased plaintiff namely Mst. Jahan Ara. He also contends that the appellant is not the adopted daughter of the deceased plaintiff as is borne out of her educational record and other certificates, which though were attached alongwith the application but the same have not been considered by the learned trial court. He further submits that the order dated 15.12.2010 was obtained through fraud and misrepresentation as such is liable to be set aside.

We have heard the learned counsel and perused the material available on the record. The impugned order reflects that during pendency of the application under section 12(2) CPC, a consent order was passed by the learned Single Judge on 15.12.2011 for conducting DNA test on the person of the appellant to resolve the

issue and to determine her status as being daughter of deceased Mst. Jehan Ara Abbas and respondent No.8, Mohammad Laeeq Khan. The object of the test was to facilitate and justify her impleadment as plaintiff in the capacity of legal heir of deceased plaintiff Mst. Jehan Ara Abbas who had originally filed the suit. The result, it appears from the impugned order, came against the appellant as she was excluded from being the biological daughter of Mohammad Laeeq Khan. The result obtained through a reliable scientific method, however, did not satisfy the appellant and yet she pressed adjudication of her application on merits. After considering the merits of her application, the learned Single Judge has been pleased to dismiss the same vide impugned order as stated above.

The appellant in paras No.1 and 7 of her affidavit, filed in support of her application, has alleged fraud and misrepresentation by which, according to her, the order dated 15.12.2010 was obtained against her whereby her name from the array of legal heirs of the deceased plaintiff was dropped and the name of respondent No.8 was brought on the record in the place of the deceased plaintiff. She however, in her entire affidavit has not specifically stated as to who has practiced fraud or caused misrepresentation with the bad intention to prejudice against her status to be the legal heir of the deceased plaintiff. She has not remotely suggested in her affidavit that her counsel (Mr. Mirza Sarfarz Ahmed) was either in league or in collusion with the defendants to give consent for dropping her name from the array of legal heirs. In absence of anything concrete supporting the allegations of fraud and misrepresentation, mere bald and wild assertions thereof would not provide a cogent ground to

reverse the consent findings recorded by the learned trial court. In the present case, more particularly, the counsel for the appellant had given consent for conducting DNA test upon the appellant during pendency of her application under section 12(2) CPC. If the result of the test had come in positive in her favour, the same would have established unequivocally her to be the legal heir of the deceased Mst. Jehan Ara Abbas who happened to be wife of the respondent No.8. Meaning thereby the vires of order dated 15.12.2010 would have substantially been neutralized and grievance of the appellant stood redressed. So once the appellant agreed on that arrangement to ward off the adverse repercussions of the order in question in the application under section 12(2) CPC, she under the law was estopped to press her application on merits on the ground of fraud and misrepresentation later on, as no one could be allowed to blow hot and cold at the one and same time. During the arguments, learned counsel for the appellant has failed to point out any substantial evidence to establish the factum or element of fraud and misrepresentation played out in obtaining the order against the appellant. It is not out of place to state here that under the law the full particulars of fraud and misrepresentation are required to be given in the application with the supporting evidence to establish *ex facie* the plea of fraud and misrepresentation. The Court would proceed to examine such application if it is alleged that during the proceedings in the Court the fraud or misrepresentation has been practiced. The provisions under section 12(2) CPC would not be attracted when the fraud or misrepresentation is not alleged in connection with the pending proceedings. A consent order, which is consciously assented, by the parties or their counsel cannot be

normally interfered with unless it is brought through reliable evidence which is apparent on the face of the record that the same was obtained by practicing fraud and misrepresentation. The facts of the present case do not speak out any particulars of fraud or misrepresentation, as alleged by the appellant, to have been practiced upon her. Nor the application under section 12(2) CPC gives out the necessary and requisite details of fraud and misrepresentation as required by the law. As observed above, the learned counsel for the appellant has also failed to point out the factum of alleged fraud and misrepresentation having been practiced in obtaining the order dated 15.12.2010, which admittedly was passed with the consent of the counsel of the appellant. Besides, no illegality in the impugned order has been argued out by the learned counsel for the appellant to justify its reversal.

Consequently, the instant appeal is dismissed in *limine* with no order as to costs. The appellant, however, would be at liberty to avail her remedy before the proper forum, if so advised.

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