

HIGH COURT OF AZAD JAMMU AND KASHMIR

Civil Miscellaneous No.07/2019;

Date of institution. 24.01.2019;

Date of hearing. 25.04.2024;

Date of decision. 03.05.2024.

Khadim Hussain S/o Muhammad Afsar, caste Arain R/o Private Abadi Near Water Tank Sector B/4 Kalyal Tehsil & District Mirpur, Presently residing in U.K.

..... Applicant

VERSUS

1. Abid Hussain S/o Ameer Hussain, R/o Nai Abadi Sangot Near Tube Well No.1 Tehsil & District Mirpur;
2. Arshad Mehmood S/o Chaudhary Muhammad Shafi;
3. Imran Arshad S/o Arshad Mehmood, R/o House No.35 Sector C/1 Mirpur;
4. Municipal Corporation Mirpur through Administrator Municipal Corporation Mirpur;
5. Administrator Municipal Corporation Mirpur;
6. Estate Officer Municipal Corporation Mirpur.

.... Respondents

APPLICATION UNDER SECTION 12(2) CPC

Before:- Justice Chaudhary Khalid Rasheed, J.

PRESENT:

Chaudhary Muhammad Siddique, Advocate for the applicant.

M/S Chaudhary Riaz Ahmed Alam and Farooq Minhas, Advocates for respondents.

JUDGMENT:

The captioned application has been filed under section 12(2) CPC for setting aside compromise decree passed by this court dated 30.07.2016.

Precise facts forming background of the instant application are, Abid Hussain respondent No.1 herein filed a suit on 17.09.2015 for specific performance of contract dated 04.02.2008 against Arshad Mehmood and others in the Court of District Judge Mirpur wherein, it was pleaded that Arshad Mehmood being attorney of Khadim Hussain applicant herein agreed to sell plot No.51 situated at sub Sector C/1 Mirpur Azad Kashmir to plaintiff Abid Hussain for the consideration of Rs.1,30,00,000/- vide agreement to sell dated 04.02.2008 and received whole consideration amount, however now he has refused to get registered sale deed, hence requested that suit may be decreed.

Nobody turned up on behalf of defendants despite service of summons, hence were proceeded ex-parte, after recording ex-parte evidence of the plaintiff, the learned District Judge Mirpur heard ex-parte arguments and dismissed the suit for want of proof vide its ex-parte judgment and decree dated 02.01.2016. Feeling aggrieved, Abid Hussain filed an appeal before this Court against the judgment and decree dated 02.01.2016. Respondent No.1 appeared before the Court and got recorded his statement that he has got no objection if the appeal is accepted. In view of the statement of respondent No.1

Muhammad Ashraf, this Court accepted appeal and decreed the suit vide its impugned judgment and decree dated 30.07.2016. Applicant Khadim Hussain has assailed compromised decree dated 30.07.2016 through captioned application under section 12(2) CPC on the ground that the decree dated 30.07.2016 has been obtained by practicing fraud and mis-representation. Respondents have filed objections on the application. In the light of the pleadings of the parties on 17.10.2019 this Court framed following issues:-

- 1- کیا درخواست ہذا اندر میعاد ہے؟ بذمہ سائل۔
 - 2- کیا درخواست ہذا بدوں بنائے جانے ضروری فریق مقدمہ ناقابل رفتار ہے۔ اگر ہاں تو کس طرح؟ بذمہ مسؤلان۔
 - 3- کیا سائل اصول اسٹاپل کے تحت درخواست دائر کرنے کا مجاز نہ ہے۔ اگر ہاں تو کس طرح؟ بذمہ مسؤلان۔
 - 4- کیا درخواست ہذا بدوں اختیار اجنبی شخص کی جانب سے دائر کی گئی ہے۔ اگر ہاں تو کس طرح؟ بذمہ مسؤلان۔
 - 5- کیا ڈگری مصدرہ 30.07.2016 دھوکہ دہی و فراڈ سے حاصل کی گئی ہے۔ اگر ہاں تو کس طرح؟ بذمہ سائل۔
- داد رسی۔؟ "

The learned counsel for the parties have been provided opportunity to lead evidence.

Applicant produced Abdul Khaliq Tabassum (Assistant) Record Keeper Collector District Mirpur, who deposed that attestation dated 05.12.2018 Exh.PC as per record has been issued from the office of Deputy Commissioner Mirpur which relates to plots No.33/C and 61 situated in sector C/1 Mirpur. He further deposed that power of attorney on behalf of applicant Khadim Hussain was endorsed on 09.07.2002.

Applicant also produced Abdul Rehman, Record Keeper Municipal Corporation Mirpur who deposed that transfer order of plot No.51 situated in sub section C/1 Mirpur in favour of Imran Arshad dated 15.08.2012 Exh.PA is correct as per record.

Adnan Khurshid S/o Sardar Muhammad Khurshid Khan, witness of applicant stated that on 05.12.2018, he was serving as Deputy Commissioner Mirpur and on the application of Raja Hastum Khan he issued verification Exh.PC and his signature Exh.PC/1 are correct.

Applicant further produced Muhammad Rafique, Junior Clerk copy writer who deposed that Mr. Muhammad Siddique Chaudhary Advocate filed an application before Mohtamim Naqool for issuance of certified copy of agreement dated 04.02.2008, whereupon he went to the office of Notary Public Raja Anwaar Saqlain multiple times for the production of the concerned register but the concerned register was not produced and he made report on the application accordingly.

Hastam Khan, attorney of applicant appeared in the Court, recorded his statement and supported contents of application.

Upon completion of evidence of the applicant, learned counsel for respondents No.2 and 3 got recorded his statement and got exhibited several documents. Haroon-ur-Rasheed Shahzad S/o Abdul Majeed, Zaffar Iqbal, Abid Hussain S/o Ameer Hussain Boota were produced by respondent No.1 as witnesses. Arguments were heard pro and contra.

The learned counsel for the applicant vehemently argued that in the suit filed for specific performance of contract, in appeal filed before this Court wrong address of the applicant was mentioned and respondents by practicing fraud succeeded to get summon the applicant through substituted service, hence, the applicant was not properly served rather the decree has been obtained by mentioned wrong address of the applicant. The learned counsel further argued that power of attorney of the applicant has been tempered and in place of plot of No.61, plot No.51 was incorporated by tampering the same while plot No.51 is a commercial property but in the power of attorney the same is mentioned as a house. The learned counsel further contended with vehemence that the attorney transferred land through a gift deed in favour of his son without taking special permission from the principal thus, the sale deed is void ab-initio and coram non judice. The learned counsel also stated that the

consideration amount has not been received by the owner of the property hence, on this ground too, it is established that sale deed is based on cheating and deception. The learned counsel also argued that Tahir Mehmood produced by the applicant recorded his statement on 16.10.2018 and deposed that he pays rent of the shop to Arshad defendant whereas the alleged agreement was executed on 04.02.2008 which is sufficient proof of the fact that till date the rent is receiving by Arshad defendant and alleged agreement to sell was a forged and fabricated pursuit. The learned counsel further submitted that pivotal portions of statement of witnesses produced by applicant remained unchallenged during cross-examination thus would be deemed as admitted, he contended that agreement to sell does not bestow any right hence, the decree obtained by respondents is defective, respondents did not appear before the Court to record their statement rather advocates representing them got recording their statements and under law statement of an advocate alone has got no legal value. The learned counsel also stated that the statement of Ch. Riaz Alam, Advocate for the respondents No.2 and 03, has been recorded without taking oath hence, the same cannot be considered under section 5 of the Oath Act, the impugned appeal has been decided merely on

the basis of compromise while under law the Court is bound to decide a case after scrutiny of the record and by pondering the relevant law on the subject. He placed his reliance on the following case laws:

1. 2012 SCR 367;
2. 2015 YLR 1092;
3. PLD 1996 Peshawar 86;
4. 2009 SCR 71;
5. 1997 SCMR 1811;
6. 2016 SCR 830;
7. 2009 SCR 38;
8. PLD 2021 Lahore 678;
9. PLD 2014 Lahore 417;
10. 2018 YLR 2295;
11. 2019 YLR 2423;

Chaudhary Riaz Ahmed Alam, the learned counsel for the respondents No.2 and 3 argued that the impugned order is appealable but the petitioner instead of assailing the same through an appeal before the next higher forum has filed the captioned application under section 12(2) CPC which does not cover the scope of section 12(2) CPC, he also contended that no fraud, forgery or misrepresentation has been alleged in the application which are necessary ingredients for filing an application under section 12(2) CPC hence, on this sole ground the application entails dismissal. The learned counsel claimed that petitioner obtained the certified copy of the power of attorney through his counsel Chaudhary Muhammad Siddique

but presented his suit after four years by imposing the allegation of tampering. He also stated that applicant never appeared before any court of law rather the whole proceedings are being taken by Hastam Khan who has got no nexus with the in hand controversy whatsoever as he was not empowered to file an application under section 12(2) CPC thus on this solitary ground the application entails to show the door. The learned counsel primarily pressed into service that the instant matter is not a case of misrepresentation as respondent/ applicant was properly served. In support of his contentions he has placed reliance on following case laws:-

1. 2006 SCR 88;
2. 2020 CLC 1491;
3. 2004 SCR 352;
4. 2023 YLR 355.

The learned counsel for respondent No.1 filed written arguments by defending the impugned judgment, which are made part of file, hence, need not to be reiterated.

I have heard the learned counsel for the applicant as well as learned counsel for respondents No.2 & 3, mused the written arguments filed on behalf of learned counsel for the respondent No.1, gone through the record of the case with utmost care and caution.

In the light of pleadings of the parties total five issues reproduced hereinabove were framed on 17.10.2019.

Issue No.1.

During the course of arguments learned counsel for the parties have not pressed their stance to the extent of issue No.1 and also did not produce any evidence in this regard, however, it is relevant to mark that this issue is legal in nature hence, is necessary to be decided. Application is within limitation provided by Article 181 of Limitation Act as impugned decree has been passed on 30.07.2016 and application was filed on 24.01.2019, thus issue No.1 is decided in favour of the applicant.

Issue No.2.

This issue has also not been pressed by the learned counsel for respondents during the course of arguments. All the necessary parties have been impleaded in line of respondents, thus, this issue is decided against respondents.

Issue No.3.

The applicant has assailed the impugned decree on the ground of fraud and mis-representation, hence, neither any law nor any of his own act prevents him to file the same, hence, this issue is decided against respondents.

Issue No.4.

Whether the application has been filed on behalf of an unconcerned person who was not authorized to file the same. The application has been filed by applicant Khadim Hussain himself and signed power of attorney of Mr. Muhammad Siddique Chaudhary by him. He also appointed Hastam Khan as his attorney and special power of attorney was executed in favour of Hastam Khan by principal Khadim Hussain to prosecute application filed under section 12(2) CPC on 11.10.2019. Khadim Hussain revoked power of attorney dated 19.06.2002 executed in favour of Muhammad Arshad Mehmood on 15.06.2012 and executed special power of attorney in favour of Hastam Khan on 10.07.2014. The onus to prove issue No.4 was on the shoulders of respondents but respondents failed to place on record any oral or documentary proof of the fact that the application has not been filed on behalf of applicant Khadim Hussain, hence from any stretch of imagination it cannot be held that application has been presented on behalf of an unconcerned person, so issue No.4 is decided against respondents.

Issue No.5.

The core issue which is required to be resolved by this Court is issue No.5 that whether decree dated 30.07.2016 has been obtained by practicing fraud and mis-representation? (OPA).

A perusal of record reveals that Khadim Hussain applicant herein appointed Arshad Mehmood as his attorney and executed power of attorney in his favour on 19.06.2002 regarding house No.33/C and plot No.51 situated in sector C/1 Mirpur. The argument advanced by the learned counsel for applicant that Arshad Mehmood was appointed as attorney to the extent of plot No.61 and by tampering power of attorney he incorporated house No.51 in it has got no substance for the reason that Khadim Hussain filed a suit for declaration before District Judge Mirpur against Imran Arshad and others qua he sought cancellation of gift deed dated 28.04.2011 with the transfer order dated 15.08.2012 and in the said suit he himself admitted that he executed power of attorney in favour of Arshad Mehmood regarding plot No.51, hence this argument of learned counsel is repelled. After execution of power of attorney dated 19.06.2002, attorney Arshad Mehmood transferred plot No.51 in favour of his son Imran Arshad vide gift deed dated 28.04.2011 and subsequently got transferred said plot in his

favour on 15.08.2012. Khadim Hussain assailed gift deed alongwith the transfer of plot by attorney in favour of his son Imran Arshad and on behalf of Imran Arshad in favour of attorney Arshad Mehmood through a civil suit No.42/2014 filed before Additional District Judge Mirpur on 01.10.2014, subsequently, another suit for specific performance of contract was filed by one Abid Hussain on 17.09.2015 which was dropped on 02.01.2016, thus an appeal before this Court was filed on 30.03.2016, it reveals from the record that at the time of recording statement by attorney Muhammad Arshad regarding his consent for acceptance of appeal filed by Abid Hussain, the other suit filed by applicant Khadim Hussain for declaration and cancellation was subjudice before District Judge Mirpur and in the said suit the transfer of land in favour of Imran Arshad, thereafter in favour of Muhammad Arshad was assailed and power of attorney has also been revoked, hence recording statement regarding acceptance of appeal by concealing important facts from the Court is itself a fraud on behalf of respondents. My this view finds support from 2019 YLR 2423, wherein at page 2430, it has been observed as under:

“The court was kept in the dark by withholding material information and by ensuring that the defendants in the suit did not get information, respondent secured ex

parte results, which as noted supra, were nullity from beginning to end.”

Furthermore, it is also evident from the record that in the said suit the address of Khadim Hussain was mentioned as House No.33 Sector C/1 Tehsil & District Mirpur and the same address was given in appeal, however it was in the notice of plaintiff Abid Hussain that at that time Khadim Hussain was settled in U.K. and his address in U.K. was 192 Earl Marshall Road Sheffield S4 8 LB South Yorkshire United Kingdom, which was mentioned in power of attorney executed in favour of Arshad Mehmood. It is also relevant to mark that Khadim Hussain applicant herein filed a suit for declaration and cancellation of gift deeds before Additional District Judge Mirpur on 01.10.2014 and in the suit he mentioned his address as resident of Private Abadi near Water Tank Sector B/4 Kalyal Tehsil & District Mirpur whereas during pendency of said suit Abid Hussain filed suit for specific performance of contract by mentioning address of applicant, herein, as R/o House No.33 Sector C/1 Tehsil & District Mirpur on 17.09.2015, thus it is also established from the documentary evidence that decree dated 30.07.2016 was obtained by mentioning incomplete and vague address of the applicant. The address of applicant herein given in the plaint and appeal was extremely insufficient and vague for

the purpose of service whereas the service of applicant through substituted service was ordered without adhering to the prerequisites of Order 5 CPC, hence the strong inference that the decree was obtained by fraud and misrepresentation by concealing present address of applicant herein cannot be ruled out in the peculiar circumstances of this case, thus on this score too, the impugned decree is liable to be set at naught. It is an inalienable statutory right of a party to lis to avail a fair and ample opportunity to plead and defend his cause before the Court. The defendant should be given requisite information to enable him to appear and defend the cause. Due service is a fundamental right of a person to defend his cause which is also endorsed and recognized by the principle of natural justice. The Courts are obliged to satisfy itself before deciding controversy that all the requirements of law regarding service of the summon have been strictly complied with and this responsibility becomes more inevitable when the service is not affected personally rather served through a substituted service. Reliance may be placed on PLD 2021 Lahore 678.

It is also established from the evidence led by the parties that till date Arshad Mehmood is receiving the rent of shops, hence from the statements of witnesses the stance taken

by the plaintiff/appellant Abid Hussain that possession of property was handed over to him and he constructed shops is negated. The superior Courts have held in plethora of judgments that Courts should not decide controversy between the parties merely on the basis of compromise/statement of a party rather the merits of the case should also be taken into consideration in a required legal fashion to avoid miscarriage of justice and to evade chaos.

Under section 12(2) CPC, a judgment, decree or order can be assailed on the plea of fraud, misrepresentation or want of jurisdiction before the Court who passed the impugned judgment, decree or order as no separate suit is required to be filed, thus the argument advanced by learned counsel for respondents No.2 and 3 that impugned decree was appealable, hence the application under section 12(2) CPC is not maintainable has got no plausible substance because the applicant assailed the impugned decree on the ground of fraud and misrepresentation and also proved the factum of fraud as well as misrepresentation, so this argument is hereby repelled as carries no water to hold.

It is a bedrock precept of law that a decree can be assaulted through an appeal or an application under section

12(2) CPC when fraud or misrepresentation is alleged and it is up to the party aggrieved to opt any legal action to enforce its right or to invoke a remedy to set right a wrong in order to vindicate an injury. Reliance may be placed on PLD 2018 Peshawar 154 and PLD 2021 Lahore 678.

As the applicant has substantiated in a legal fashion that the impugned decree has been acquired by practicing fraud and misrepresentation, hence the same entails to be extinguished as being anomalous, so issue No.5 is decided in favour of applicant. The case laws relied upon by the learned counsel for the respondents are not applicable in the instant matter.

Relief.

The crux and epitome of the above debate is, the captioned application is hereby accepted while setting aside the impugned judgment and decree dated 30.07.2016 passed by this Court consequently the appeal No.62/2016 titled Abid Hussain V. Muhammad Arshad and others is hereby restored to its original number which shall be placed before the Court for proper order on.....2024.

Muzaffarabad;
03.05.2024.

Approved for reporting.

JUSTICE

JUSTICE