

**JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR
(Judicial Department)
C.R No.386-P/2018**

Meshiat-ur-Rahman and others Vs. Fazal Rauf and others.

Present: **M/S. Mian Iftikhar Jan and Asghar Shah, Advocates for
Petitioners.**
Haji Fayaz Ali Khan, Advocate for Respondents.

Date of hearing: **22.07.2024**

JUDGEMENT

MUHAMMAD NAEEM ANWAR, J.-Impugned through instant petition filed u/s 115 of the Code of Civil Procedure, 1908 (C.P.C) is the order of the learned Additional District Judge-III, Nowshera dated 03.03.2018, whereby on acceptance of the application of respondent No.1 filed u/s 12 (2) C.P.C in Objection Petition/ Reference No.13/4 of 2012 decided on 15.05.2012, the learned Referee Court has not only set aside its judgment dated 15.05.2012 but has also dismissed the reference/ objection of Tasleem Khan, the predecessor in interest of the petitioners.

2. Brief facts of the instant petition are that Qazi Abdur Rauf, the father of respondent No.1, has allegedly entered into sale transaction with Zulfiqar Ahmad s/o Haji Haleem Gul, appointed him (Zulfiqar Ahmad) as his general attorney through deed No.106/4 attested on 30.07.1988 and said general attorney has transferred the property in favour of Tasleem Khan s/o Firdos Khan r/o Manki Sharif, Tehsil and District Nowshera for consideration of Rs.9,00,000/- through deed dated 03.05.1997. As per contents of the objection petition No.13/4 of 2012, the property was acquired for AFV Range Nowshera through award No.195-98 dated 21.04.1999. Tasleem Khan, the predecessor in interest of the present petitioners, considering himself as owner of the property on the strength of deed in his favour executed through general attorney by Abdur Rauf, filed objection/ reference u/s 30 of the Land

Acquisition Act, 1894 (**the Act of 1894**) seeking apportionment of the acquired land. His reference was allowed by the learned Referee Court and he was held exclusively entitled for payment of compensation in respect of the property measuring 32-kanal and 15-marla bearing *khasra* Nos. 13, 25, 29 & 30 through judgment and decree dated 15.05.2012. The respondent No.1 Fazal Rauf has filed an application u/s 12 (2) C.P.C in reference/ objection No.13/4 of 2012 decided by the learned Referee Court on 15.05.2012 with averment that it transpired to him from the inspection of revenue record that through fraud and misrepresentation of facts and with collusion of Tasleem Khan, the predecessor in interest of the petitioners, has succeeded in procuring an order in his favour. It was further averred that award dated 21.04.1999 remained the subject matter of the litigation for the purpose of enhancement of the compensation which was decided on 14.07.2010, the respondent of his objection petition has filed R.F.A No.161 of 2011 but neither Tasleem Khan nor his legal heirs have filed any application for their impleadment in said reference. It was also averred that his father Abdur Rauf s/o Abdul Manaf has died on 11.12.1996, as such, Zulfiqar Ahmad remained no more his general attorney and thus execution of the deed dated 03.05.1997 was the result of fraud, against the law, against the facts and without consideration, hence the filing of objection petition No.13/4 by the predecessor in interest of the present petitioners was against the law, wherein the facts were misrepresented the decree was obtained by playing fraud and collusion. The application was resisted by the petitioners on different legal and factual objections. After hearing the parties, the learned Additional District Judge-III, Nowshera has not only accepted the application of the respondent No.1 u/s 12 (2) C.P.C but has also dismissed the objection/ reference No/13/4 of the 2012 of the petitioners by setting aside the judgment and decree of the learned Referee Court dated 15.05.2012, hence, this petition.

3. Arguments heard and record perused.

4. It is by now settled law that the application u/s 12 (2) C.P.C can be decided without framing of issues and recording of evidence and it is not sine qua non to frame issues and record evidence in each case rather it depends upon the facts of each case. Rel: "*Amina Bibi through General Attorney Vs. Nasrullah and others*" (2000 SCMR 296), "*Mst. Sabiran Bibi and others Vs. Ahmad Khan and others*" (2008 SCMR 226), "*Ghulam Muhammad versus Ahmed Khan*" (1993 SCMR 662) and "*Warrich Zarai Corporation Vs. F.M.C Limited (Pvt) Ltd*" (2006 SCMR 531). The general principle is that on the acceptance of application filed under section 12(2) C.P.C, the suit is revived for providing the parties an opportunity to prove their respective contentions. The object and philosophy of the insertion of sub section 2 to section 12 of Civil Procedure Code, 1908 on one hand is to provide a remedy to the aggrieved party to redress his grievance and on the other hand to bring the parties in a position to prove their respective pleas against each other, on acceptance of the application filed under section 12(2) C.P.C. This controversy came before the Sindh High Court in the case of *Mst. Shahana Ali vs. Syed Muhammad Haris Jaffari and 3 others* (PLD Karachi 366) wherein it was observed that:

"While deciding application under section 12(2) of the Civil Procedure Code, the Court has to see whether the impugned order, judgment or decree has been passed at the back of the applicant without notice to him and the right that the applicant asserts in the subject-matter of dispute is legally enforceable right and has not become barred by time. In other words, had the suit been pending and the applicant had applied to be joined as a party in the suit, the Court would have considered him to be a necessary party. Thus, the Court has to first see that the impugned order, judgment or decree passed in a suit at the back of an applicant has taken away applicants right to contest the claim of the plaintiff. If a person's rights are being infringed in proceedings in which he was either not made a party or even if was made a party was not duly served with the summons and therefore was not given the opportunity of being heard with regard to

his claim in the subject-matter of dispute. Once the applicant establishes this, it is sufficient enough reason to grant him the relief provided under section 12(2) of the Civil Procedure Code. The applicant does not have to first establish in absolute terms his entitlement in the subject-matter of dispute before his application under section 12(2) of the Civil Procedure Code could be allowed. Burdening the applicant to such an extent would amount to converting an application filed under section 12(2) of the Civil Procedure Code into a regular suit. The application filed under section 12(2) of the Civil Procedure Code cannot proceed as if it is a regular suit. There cannot be a regular trial at the stage of deciding the application filed under section 12(2) of the Civil Procedure Code. It is only when the application under section 12(2) of the Civil Procedure Code is allowed and the order, judgment or decree is set aside, and the applicant is joined as a party to the suit that he would be required to contest the claim of the plaintiff and establish his entitlement in the subject-matter of dispute. Thus, only after the application under section 12(2) of the Civil Procedure Code is allowed and the suit is revived that the respective rights and entitlements of the parties in the subject-matter of dispute would be determined.”

5. Baluchistan High Court in the case of *Muhammad Umar and others vs. Hamid Hamza and 4 others* (2017 CLC 699) has held that:

“The learned counsel for the respondent No.4 submitted that since there was sufficient material on record, therefore, the trial Court while deciding the application under section 12(2), C.P.C. has rightly not revived the suit. This contention of the learned counsel for the respondent No.4 is not tenable, because if the Court finds that a judgment and decree has been obtained or alleged to have been obtained on the basis of fraud and misrepresentation, on acceptance of the same, the suit of the plaintiff shall automatically stand revived and the applicant (under section 12(2), C.P.C.) will file his written statement and then joint issue on the merit of the case, however, the trial Court is also competent to pass an order in view of Order VII, Rule 10, C.P.C. in case the Court lacks jurisdiction of the original suit, however, when there is controversy of facts or of law between the parties in the main suit while accepting the application under section 12(2), C.P.C., the suit cannot be dismissed, but the Court after revival of the suit shall proceed the matter by impleading the applicant

(under section 12(2), C.P.C.) as a party and then after providing opportunity to the parties decide the case on merits.”

Hon’ble Supreme Court in the case of Haji Farman Ullah vs. Latif-ur-Rehman (2015 SCMR 1708), after discussing the object of application filed under section 12(2) C.P.C, has observed that:

“If after the contest of the application under section 12(2), C.P.C., the court comes to the conclusion that the decree did suffer from vice as is stipulated by the section, it shall accept the same and as a general and ordinary rule and matter of course, the suit of the plaintiff shall stand revived and thereby give a chance to the defendant (the applicant under section 12(2)) to file his written statement, for the purposes of setting up his defence in the main suit. Thereafter, the case shall be tried and decided on its own merits per the law prescribed for a suit (after the revival thereof). It is in very exceptional, special and extra-ordinary circumstances where e.g. the plaintiff does not disclose a cause of action or is barred under the law, that while accepting the application (under the provisions of section 12(2), C.P.C.), the court may also reject the plaintiff or even dismiss the suit for want of jurisdiction, where the jurisdiction of the court is clearly and undoubtedly barred under the law and there is no valid reason to revive and try the suit which the court otherwise has no jurisdiction to entertain and adjudicate upon. In this context, it may be pertinent to mention that in appropriate cases of want of jurisdiction, the court while accepting the application under section 12(2), C.P.C. may order for the return of the plaintiff under Order VII, Rule 10, C.P.C. so that the matter is tried by a court of competent jurisdiction. But where there is a controversy of facts or of law between the parties in the main suit, while accepting the application (under section 12(2), C.P.C.), the suit cannot and should not be dismissed.”

Thus, only in exceptional circumstances i.e., when after acceptance of application if it appears that the Court wherein the suit was filed by the plaintiff lacks the jurisdiction or in exceptional cases that the suit is barred by law or by limitation provided in the statute under which the suit was filed (as in preemption cases) may order the dismissal of suit or return of plaintiff under order VII rule

10 C.P.C, otherwise in all the cases, the suit shall revive automatically. The prayer of the applicant was that the judgement & order in reference No. No/13/4 of the 2012 may be set-aside, he be impleaded in the reference and thereafter it may be decided on merits. The question as to whether the power of attorney was in field when the predecessor in interest of petitioner purchased the property, when the principal of the power of attorney died, whether the sale as alleged by the petitioner was proved in accordance with law could be resolved after the revival of reference No/13/4 of the 2012.

6. In the matter in hand, it was alleged by respondent No.1 that his predecessor in interest had died on a particular date i.e., 11.12.1996, the execution of general power of attorney in favour of Zulfiqar Ahmad was not denied, however, it was contended that on the date of death of his father, the general power of attorney was no more in the field, as such, the execution of sale deed/*iqrarnama* and transfer of the property in favour of the predecessor in interest of the petitioners was against the law and facts. It was also alleged that his objection petition/ reference for enhancement was allowed by the referee Court in his favour, wherein the predecessor in interest of the petitioners despite knowledge has never submitted any application for his impleadment. These were the questions, which were outrightly denied by the petitioners through their reply. The grievance of the respondent/ applicant through his application was that the judgment and decree in reference No.13/4 of the 2012 dated 15.05.2012 was offending his rights and repelling to the judgment of the Court, resulted into fraud and misrepresentation of facts but these facts were requiring recording of evidence. The judgment and decree in the reference filed by the respondent/ applicant, enhancement of compensation of the acquired land by considering the succession certificate of Qazi Abdur Rauf could be taken into consideration but to the extent of acceptance of the application u/s

12 (2) C.P.C and therefrom the questions (i) when the predecessor in interest of respondent No.1 died; (ii) when the succession certificate was issued; and (iii) whether the predecessor in interest of the petitioners was in knowledge of the reference/ objection filed u/s 18 of the Act of 1894 by the respondent No.1? could only be resolved after recording of evidence being disputed questions of facts.

7. There is no justification in the impugned order for dismissing the reference of the petitioners bearing No.13/4 of 2012. On acceptance of the application u/s 12 (2) C.P.C, the respondent No.1 shall be impleaded as a party in the reference of the petitioners and the questions regarding entitlement of the respondent No.1 in juxtaposition with the earlier judgment passed on the basis of the application submitted by him u/s 18 of the Act of 1894 shall be taken into consideration by the trial Court but after recording of evidence pro and contra, thus, to the extent of the application and setting aside the order in reference No.13/4, the order of the learned referee Court is correct but to the extent of dismissal of the reference No.13/4 of 2012, it is unwarranted, without any justification, proof, solid and concrete evidence either oral or documentary. Haji Fayaz Ali Khan, Advocate representing the respondent No.1 could not justify the impugned order for dismissal of reference/ objection petition No.13/4 of 2012, thus, the instant petition is partially allowed, resultantly, the impugned order is hereby modified by holding that the Reference/ Objection Petition No.13/4 of 2012 of the petitioners shall be deemed pending before the Court of learned Referee Court (Additional District Judge-III, Nowshera) where respondent No.1 shall be impleaded as a party and thereafter, the reference shall be decided by the learned Referee Court after recording of pro and contra evidence, in accordance with law. No order as to cost.

Announced
22.07.2024

Sabz Ali* (S.B)


JUDGE

HON'BLE MR. JUSTICE MUHAMMAD NAEEM ANWAR