

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE.
JUDICIAL DEPARTMENT.

Civil Revision No.185/2017.

Hazoor Muhammad
vs.
Raqia Begum (deceased) through L.Rs.

Date of Hearing	26.09.2019.
Petitioner by	Mr. Abdul Majeed-III, Advocate.
Respondents by	Mr. Mazhar Hayat, Advocate.

MUHAMMAD AMEER BHATTI, J:- Through this single judgment, I intend to decide Civil Revision No.185/2017 and Civil Revision No.186/2017 having involved common question of law and fact as both these matters have arisen from one and same judgment dated 14.12.2016 whereby the learned Addl. District Judge dismissed the application under Section 12(2), C.P.C., filed on behalf of the petitioner for setting-aside the order dated 11.09.2014 through which petitioner's appeal was withdrawn.

2. Brief facts of the case are that a suit for confirmation of possession through specific performance instituted by the petitioner was dismissed on 25.02.2014 by the learned Civil Judge, against which he preferred an appeal, during pendency whereof, petitioner-appellant in presence of learned counsels for the parties got recorded his statement and thereby withdrew the appeal, which accordingly was dismissed as withdrawn vide order dated 11.09.2014. After about 5½ months of passing of said order i.e. on

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26.02.2015 the petitioner moved an application under Section 12(2), C.P.C. for seeking setting-aside of withdrawal order on the ground of misrepresentation and fraud. This application was contested by the respondents, however, the learned Additional District Judge dismissed the application under Section 12(2), C.P.C. vide order dated 14.12.2016; hence this revision petition.

3. Learned counsel for the petitioner contends that the order impugned is unsustainable in the eye of law. It is further contended that the Court, seized of the matter, has not provided any opportunity to the petitioner to lead evidence regarding stance taken in his application under Section 12(2), C.P.C. which was mandatory inasmuch as the withdrawal order itself depicts that the appeal was withdrawn as the matter was referred to the Arbitrator, appointed with mutual consent of the parties outside the Court. It is further added that petitioner's application under Section 12(2), C.P.C. could not be dismissed summarily without adopting the procedure provided in law;, hence the order impugned is liable to be set-aside.

4. On the other hand, learned counsel for the respondents contends that the order impugned is in consonance with law as the same was passed with free consent of the petitioner that too in presence of his learned counsel; hence calls for no interference.

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5. I have heard learned counsels for the parties and gone through the record.

6. It was specifically alleged in the application under Section 12(2), C.P.C. that appeal was withdrawn on respondents' assurance concerning settlement of dispute between the parties outside the Court through Arbitrator(s), resiling therefrom constrained the petitioner to file the instant application for recalling/setting-aside of appeal's withdrawal order procured by committing fraud and misrepresentation, though it was outside the Court but his statement was recorded in presence of the learned counsels for the parties and no objection was raised about cause of withdrawal of appeal narrated in statement regarding settlement of dispute outside the Court and all these facts, alleged by the petitioner/applicant in his application, could only be proved by recording evidence, which opportunity had not been provided contrary to settled law enunciated in numerous judgments wherein it was held that disputed questions raised through an application under Section 12(2), C.P.C. must have been decided after recording evidence of the parties but in this case neither any issue was framed nor the parties were provided any opportunity to lead evidence so as to substantiate their stance taken in the said application particularizing fraud.

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7. It is although settled law that when disputed questions of facts relating to the parties irrespective of Court proceedings, have been raised, not only framing of issues is essential but recording of evidence is also obligatory to prove the factual dispute raised in the application under Section 12(2), C.P.C. but at the same time it is not imperative to hold trial despite no substance of fraud and misrepresentation is flowing from the application under Section 12(2) C.P.C. In this context I am fortified from the ratio decidendi laid down by this Court in Muhammad Altaf v. District Judge and 3 others 2016 YLR 1191 (Lahore) wherein it was held that:-

“Although it is not always necessary to frame the issues in an application under Section 12(2) C.P.C, but it does not mean that issues in such like application should not be framed at all. If serious questions of facts and law are involved in the application, which could not be decided without evidence, then issues should be framed, evidence should be recorded and then the matter should be decided”.

In Lahore Development Authority through Director General v. Arif Manzoor Qureshi and others (2006 SCMR 1530 it was held that:-

“From the very nature of the allegations of the petitioner summary disposal of the application under Section 12(2), C.P.C. was not justified. In the facts and circumstances of the case, it was necessary for the trial Court to have framed necessary issues and recorded evidence of the parties particularly when the judgment and decree, dated 22-7-1998 had also

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been passed without recording evidence of the parties”.

Warraich Zarai Corporation vs. F.M.C. United (Pvt)., Ltd. (2006 SCMR 531), Muhammad Nawaz Khan vs. Muhammad Khan and 2 others (2002 SCMR 2003), Muhammad Akram Malik vs. Dr. Ghulam Rabbani and others (PLD 2006 Supreme Court 773) and Mst. Gul Nasreen and 2 others vs. Mir Zaman and 4 others (2019 CLC 847) are also referred.

8. The learned Addl. District Judge while summarily dismissing application of the petitioner vide impugned order, instead of emphasizing the fact of presence of petitioner’s learned counsel and his embossing thumb impression ought to have granted opportunity to prove the stance taken in the application of petitioner that withdrawal of appeal was with consent of the respondents to settle the dispute outside the Court through Arbitrator(s) from which they resiled, noticeable disputed questions of fact, to my mind, were necessarily be allowed to be proved by leading some cogent and unimpeachable evidence but by not granting that opportunity to the petitioner, obviously has committed material illegality and irregularity; hence it is held that the petitioner was deprived of his legitimate right to lead evidence in order to prove the stance taken in his application.

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Considering this material illegality floating on the surface of record, I being satisfied have left with no option except to declare that the learned Additional District Judge has failed to exercise his prime obligation to frame issue(s) after receipt of written reply on behalf of respondents so that the parties could lead their evidence. Therefore, obviously this petition is **accepted**, consequent whereof, the order dated 14.12.2016 is hereby set-aside with the result that the application under Section 12(2), C.P.C. filed by the petitioner shall be deemed to be pending before the learned Addl. District Judge who shall re-adjudicate the same after framing issue(s) and recording evidence of the parties.

9. Parties are directed to appear before the learned District Judge, Faisalabad on 18.10.2019 who shall take on this matter either himself or entrust it to any learned Addl. District Judge for adjudication who shall conclude the proceedings within a period of three months from the date of entrustment of case.

10. This petition stands **accepted and case remanded**.

(MUHAMMAD AMEER BHATTI)
JUDGE.

Approved for reporting

JUDGE.

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