

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR
(Judicial Department)

C.R.No.980-P of 2019 with C.M.No.1221-P
of 2019.

Date of hearing: 20.09.2019.

Mr.Ajmal K.Mohmand, advocate for petitioner.

JUDGMENT

MUHAMMAD NAEEM ANWAR, J.- By this single judgment, I intend to dispose of C.Rs No.980-P, 981-P and 982-P of 2019 as they involve common question of law and fact and are directed against the judgment dated 22.05.2019 passed by learned Additional District Judge-X, Peshawar, whereby petitions No.30/12(2), 32/12(2) and 34/12(2) of 2018 under section 12(2) of the Civil Procedure Code, 1908 were dismissed.

2. Brief but relevant facts are that present petitioner alongwith respondents No.7 and 8 have purchased the properties through three different deeds No.2955 dated 29.07.2004, 2998 dated 03.08.2004 and 2931 dated 28.07.2004, which were preempted by one Abdur Rauf predecessor-in-interest of respondents No.1 to 5 and

respondents i to vii. All the three suits were hotly contested by filing written statement, wherein, legal and factual objections were taken and resultantly same were dismissed through three separate judgments. The then preemptor has preferred three different appeals bearing No.75/13, 76/13 and 77/13 of 2011 on 05.11.2011 before learned appellate court. During pendency of appeals, a compromise was effected between the parties of aforementioned three appeals, whereby Haji Muhammad Amin, while appearing before the learned appellate court, has got recorded a statement, being the attorney for rest of the vendees, that a compromise had been effected and the vendees have received the sale consideration and as such had got no objection on acceptance of appeals. The statement was recorded and resultantly all the three appeals were accepted and the suits were decreed on 04.06.2012. Present petitioner, feeling himself aggrieved, had challenged the validity of judgments and decrees dated 04.06.2012 through three different applications filed under section 12 (2) of the Civil Procedure Code, 1908 on the

ground of fraud and misrepresentation of facts. The applications were properly replied and at the end same were dismissed through separate orders dated 22.05.2019. The present petitioner has question the judgment of learned Additional District Judge-X, Peshawar through instant and connected revision petitions.

3. Learned counsel for petitioner contended that the judgments and decrees dated 04.06.2012 are result of fraud and misrepresentation of fact and want of jurisdiction. He also added that he was never informed in respect of so-called compromise by his agent/attorney i.e. respondent No.7. Moreso, Haji Muhammad Amin/respondent No.7 had exceeded from the powers given to him through special power of attorney and as such was legally duty bound to inform him before entering into any such compromise. He went on to say that he was never informed regarding the institution of the suit and institution of appeal, which resulted into grave miscarriage of justice. He also submitted that respondents No.1 to 5, predecessor-in-

interest of respondents (i to vii) and Haji Muhammad Amin/respondent No.7 (attorney) had collusively entered into a compromise and his valuable property was snatched. He also added that the legal requirement i.e. specific permission should have been sought from him before entering into a compromise with preemptor Abdur Rauf (predecessor-in-interest of respondents No.1 to 5 and respondents (i to vii)). It was also pleaded by the worthy counsel for petitioner that the power of attorney, which was given by the petitioner to Muhammad Amin, during pendency of suit before learned trial court, was later on revoked by the petitioner. He also added that the applications of the petitioner could not be dismissed without recording of evidence as the same involve intricate question of law and fact, which could only be resolved after recording of evidence of the respective parties, in order to reach at proper conclusion. He also argued that Haji Muhammad Amin/respondent No.7, respondents No.1 to 5 and predecessor-in-interest of respondents (i to vii) with their collusion inter-se had deprived him from his

valuable rights connected with the disputed property.

4. I have heard learned counsel for petitioner and gone through the record.

5. Admittedly, present petitioner has executed power of attorney in favour of Haji Muhammad Amin (respondent No.7) for the purpose of defending the suit before the learned trial court, on the basis of which the suits instituted by respondents No.1 to 5 and respondents (i to vii) were contested and ultimately all the three suits were dismissed, against which the appeals were filed, which remained pending adjudication before the learned appellate court. Though learned counsel for petitioner had contended that the special power of attorneys, which were earlier given by the petitioner to Haji Muhammad Amin/respondent No.7, were revoked, however, he has not been able to point out any such document, which could be considered for the purpose of revocation of powers as were given to Haji Muhammad Amin. Learned counsel mainly focused his submissions that the factum of fraud and misrepresentation of fact requires recording

of evidence and the learned lower court by not directing the parties to record their pro and contra evidence had committed an illegality. In order to determine the fate of application under section 12 (2) C.P.C. as submitted by the petitioner before the learned appellate court, it is necessary to reproduce Section 12 (2) C.P.C., which reads as under:-

S.12(2). “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”.

6. The petitioner was duty bound to plead, to explain and to mention the mode and manner in which the fraud was played before the court and facts were misrepresented. While going through the contents of application, it seems that not only the factum of fraud but also misrepresentation as well, has not been particularly given in the application. The only

fact, which was alleged, that at the time of compromise before the learned court of appeal, he was not informed and no special permission was taken from him. No doubt, in ordinary circumstances, the attorney is required to get the special permission from the principal whenever an act is based upon the powers so delegated to the principal but when the powers as delegated by the principal to the attorney were not disputed rather the existence of the power with the attorney is explicitly admitted by the principal, then in such circumstances seeking of special permission from the principal is not inevitable. Code of Civil Procedure, 1908 explains the provision of Order VI Rule 4, which is to the following effect:-

Order VI R.4.- “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 forms aforesaid, particulars (with dates

and items if necessary) shall be stated in the pleading”.

7. The statement of Haji Muhammad Amin was recorded on behalf of the principals including the applicant/petitioner in the capacity of attorney within the powers so delegated to him, whereby he has given his consent not only in respect of decreeing the suit in favour of respondents No.1 to 5 and respondents (i to vii) but also had categorically stated that he had received the sale consideration of the property. Keeping in view the factum of receipt of sale consideration regarding which, not even a single sentence was ever mentioned in the entire application but also during the course of arguments the learned counsel had not uttered even a single word either in respect of the receipt of sale consideration or otherwise, which can be considered as an admission, though evasively it is, which negates the entire stance as taken by the petitioner for the purpose of substantiating his plea in respect of the fraud.

8. As far as the fact of misrepresentation is concerned, the applicant/petitioner has not

been able to show that which were the facts which have been misrepresented before the learned appellate court at the time when the statement of his attorney was recorded.

9. Learned counsel for the petitioner during the course of arguments had admitted that the petitioner was never served with any notice, after the institution of the appeal, before learned appellate court and it was Haji Muhammad Amin, who considered himself to be the attorney and as such the facts were misrepresented before the learned appellate court. This is no ground much less the legal one, which could be considered for setting aside of a decree passed by the court of competent jurisdiction and that too on the basis of valid authority/power. Haji Muhammad Amin was equipped with powers of all the principals including the petitioner to plead as such before the court of appeal. In order to determine the powers so granted by the petitioner, the verbatim of the power of attorney would be of worth perusal:-

The contents of power of attorney transpire that it contains specific powers given by the petitioner, through validly executed power of attorney, authorizing Muhammad Amin to enter into compromise, it is not permissible for petitioner to plead otherwise when once the powers were given and admitted by himself. Reliance is placed on the case titled **Mst.Zaitoon Vs.**

Mst.Rehmi through L.Rs. (2005 MLD 978),

wherein, it is held:-

“Heard. From the record, it transpires that Mst.Zaitoon herself has signed the above compromise deed, she was also present in the Court and affirmed Mark “C/1”; besides, Kanwar Muhammad Iqbal, her admitted attorney, had also signed the said document. I am not convinced if any fraud, misrepresentation etc., has been played in obtaining the order from this Court, on the basis of Mark “C/1”. I am not impressed with the argument, that as some of the respondents have not executed Mark “C/1”, therefore, it is invalid and as such is also not binding upon Mst.Zaitoon. She admittedly has executed the same, and none for those respondents, who she claims, have not come forward to challenge the compromise or the order, therefore, it is not available to the petitioner to plead for the others”.

This argument of the petitioner could be considered valid only where no such powers, authorizing attorney to enter into compromise, were given, for the reason that power of attorney shall be strictly construed

and nothing could be read in it unless the same was specifically provided therein and the attorney was to act within the scope of the authority as it was given to him. Reliance is placed on the case titled **Nek Amal Vs. Dr.Suhail Baluch and others (2017 MLD 711)**, wherein, it is held:-

iii) That the attorney or agent has to act strictly within the mandate of the instrument itself and cannot give it any other meaning and if he does so, the same would be ineffective upon the rights of the principal.

10. Coming to the point as to whether, after submission of the application under section 12 (2) C.P.C., when the other is put on notice and have filed the reply of the application, the framing of issues and recording of evidence is sine qua non or not. This remained controversial since the addition of sub-clause 2 of Section 12 of the Civil Procedure Code, 1908 for considerable period but later on the matter has been cleared by the apex court. The wisdom to this effect is drawn from the case law reported as **2000 SCMR 296**, which is as under:-

“It is not incumbent under section 12 (2) C.P.C., that it must in all circumstances, frame issue, record evidence and follow the procedure prescribed for decision of the suit”.

11. Similar view has been taken by this court in the case of **Anwar Hayat etc. Vs. Durre Sameen etc (2012 CLC 1536)**-- (Application u/s 12 (2) C.P.C.—Non-framing of issue and non-recording of evidence by the trial court—Validity—It is not obligatory for the court to frame issues and record evidence in every case and as such an application could be decided on the basis of available evidence and available record, if considered sufficient by the court.

12. Under section 12 (2) C.P.C. before trial court alleging fraudulent representation relating to the decree passed by court—Framing of issues by the trial court—When not necessary—Where the trial court was satisfied that there was absolutely no element of fraud or misrepresentation, and no prima facie cases or reasonable ground existed for setting aside the decree in

question it had rightly declined to frame any issue or record evidence on the application u/s 12 (2) C.P.C.

13. It has been held by the apex court in the case of **Warraiach Zarraj Corporation Vs. F.M.C. United (2006 SCMR 531** that:-

“Framing of issue in every case to examine the merit of such application would certainly frustrate the object of Section 12 (2) C.P.C., which is to avoid protracted and time consuming litigation and to save the genuine decree holder from grave hardships”.

14. Interestingly, even after filing of the very application and dismissal thereof, when the petitioner came to this court through revision petition, the power of attorney as earlier given by him in favour of Haji Muhammad Amin is still intact. When learned counsel for the petitioner was confronted with the factum of existence of power of attorney, he could not wriggle out from the existence of the said power of attorney on the basis of which the entire superstructure was erected.

15. Keeping in view the applications from all the angles, coupled with the submissions of the worthy counsel for petitioner, this court is of the affirm opinion that petitioner has not been able to make out a case for remanding it to the learned appellate court on the acceptance of these revision petitions, thus, the same being without any substance are hereby dismissed in limine alongwith C.Ms. with no order as to cost.

JUDGE

Announced.

20.09.2019.

Sadiq Shah PS (SB) Hon'ble Mr. Justice Muhammad Naeem Anwar.