

THE HIGH COURT OF SINDH, KARACHI

J.M. No. 45 of 2019

[Al-Habib Coop. Housing Society Ltd. versus Shamim Barlas]

Applicant : Al-Habib Coop. Housing Society Ltd.,
through Mr. Nadir Khan Burdi,
Advocate.

Respondent 1 : Mrs. Shamim Barlas through
Ms. Saima Jamil, Advocate.

Respondent 2 : Nemo.

Date of hearing : 13-02-2020.

Date of decision : 05-05-2020.

ORDER

Adnan Iqbal Chaudhry J. - By this application under section 12(2) CPC, Al-Habib Cooperative Housing Society, acting through its Administrator, has challenged the *ex-parte* judgment and decree dated 09-05-2008 passed in Suit No. 424/2006 whereby the Respondent was awarded damages as prayed, amounting to Rs. 100 million along with 14% markup, as against the said Society.

2. In the suit, the Respondent/Plaintiff averred that on 26-05-1986 she had been allotted a plot measuring 400 square yards (suit plot) by Al-Habib Cooperative Housing Society (the Society) against payment of Rs. 40,000/-; that in 2001 she discovered that the suit plot was unlawfully leased by the Society to one Muhammad Mobeen; that the Respondent then initiated proceedings against the Society under the Cooperative Societies Act, 1925; that an Award dated 12-08-2002 under section 54 of the said Act was passed in favor of the Respondent and the Society was directed to deliver physical possession of the suit plot to the Respondent with a further direction to initiate proceedings for cancelling the lease of the suit plot unlawfully granted by the Society to another; that to enforce the Award, the Respondent filed Execution No. 33/2003 before the Senior Civil Judge Malir; that one Muhammad Khalid filed objections to the

said Execution as the son and legal heir of Muhammad Mobeen to whom the Society had leased the suit plot; that in the meantime the Society filed a statement dated 13-08-2005 that in compliance of the Award it had delivered peaceful possession of the suit plot to the Respondent and thus Execution No. 33/2003 was disposed of on 05-09-2005. In filing suit before this Court the Respondent averred that possession of the suit plot was never actually delivered over to her by the Society, and hence on account of mental agony, the Respondent/Plaintiff prayed for damages of Rs. 100 million with 14% markup both from the Society and Muhammad Mobeen.

3. The suit abated against Muhammad Mobeen *vide* order dated 11-10-2007. On 17-12-2007 the Society was declared *ex-parte* and eventually the impugned judgment and decree were passed. The Respondent filed Execution No. 33/2008 against the Society for recovering the decretal amount (not to be confused with the above Execution No. 33/2003 filed before the Senior Civil Judge Malir). Number of plots in the Society were attached at the instance of the Respondent/decree-holder. It transpired that the plots so attached were held by other members of the Society, and thus around 50 such allottees filed objections to Execution No. 33/2008. Order dated 26-11-2008 passed in the Execution shows that the Court was perturbed by the fact that the Society remained oblivious to the proceedings and sought the assistance of the Advocate General who informed the Court that the Society was under the management of an Administrator, Mr. Muhammad Ali. The Court therefore summoned Mr. Muhammad Ali, but he expressed ignorance of the proceedings. Subsequently, one Mr. Iqbal Hussain Channa appeared in the Execution as the superseding Administrator of the Society. On 03-06-2010, Mr. Channa informed the Court that he too had ceased to be Administrator in April 2010 when he handed over charge of the Society to the elected management whose Secretary was one Mr. Mehtab Alam. Therefore, notice of Execution No. 33/2008 was then issued to Mehtab Alam but the record does not show that he ever appeared before the Court.

4. In the meanwhile, certain complaints against the Society were taken up by the Supreme Court of Pakistan as Human Rights Case No. 12509-S/2011. A report thereat was submitted by the Government of Sindh alleging mismanagement and corruption in the affairs of the Society. The Supreme Court referred the matter for a probe *vide* order dated 18-08-2016, and in furtherance thereof, the Sindh Cooperative Housing Authority appointed one Mr. Mansoor Ahmed Siddiqi as Administrator of the Society *vide* notification dated 22-12-2016, who then proceeded to file this J.M. under section 12(2) CPC.

Muhammad Mobeen has been erroneously arrayed as a respondent in this J.M. Since the impugned decree is not against Muhammad Mobeen, his name is deleted from this J.M.

5. At the hearing, Mr. Nadir Burdi, learned counsel for the Applicant confined the challenge on grounds of fraud and misrepresentation. He submitted that the Respondent was not a lay person but had remained in the managing committee of the Society in 2001 and yet the address of the Society provided in the plaint was *ex-facie* incorrect and the Society was deliberately kept from service of the suit; that though the Respondent subsequently filed different addresses of the Society, none of them was the correct address; that though service of summons of the suit was held good on Mr. Muhammad Ali, the Administrator of the Society, he became Administrator only on 24-06-2006 and the summon allegedly received by him did not bear his name, designation or seal of the Society; and that in Execution No. 33/2008, Mr. Muhammad Ali had stated that he was unaware of the suit.

6. Mr. Nadir Burdi submitted further that the *ex-parte* judgment had also been obtained by fraud by suppressing true facts. He pointed to para 17 of the memo of the J.M. to highlight the facts viz., that the dispute between the Respondent and the Society had already been adjudicated under section 54 of the Cooperative Societies Act, 1925 culminating in an Award directing the Society to deliver possession of the suit plot to the Respondent; that in the Execution

filed by the Respondent before the Senior Civil Judge Malir to enforce the said Award, both the Respondent and the Society had filed separate statements in writing on 13-08-2005 to state that the Society had delivered possession of the suit plot to the Respondent and thus the matter came to an end. Learned counsel submitted that once the Respondent admitted that she had taken possession of the suit plot from the Society, the subsequent suit for damages on account of non-possession was clearly fraudulent.

7. On the other hand, Ms. Saima Jamil, learned counsel for the Respondent drew attention to the fact that copies of the said Award, the statement dated 13-08-2005 filed by the Society in the Execution before the Senior Civil Judge Malir, and the order dated 05-09-2005 passed thereon to dispose of the said Execution, all had been filed with the plaint and had also been noted in the impugned judgment, and therefore, she submitted that the question of suppression of facts did not arise. She submitted that the suit was filed inasmuch as the Society had not actually delivered possession of the suit plot to the Respondent. She submitted with vehemence that this application under section 12(2) CPC was hopelessly time-barred. She submitted that the record of Execution No. 33/2008 shows that the erstwhile Administrator of the Society, Mr. Muhammad Ali, had entered appearance in the said Execution as early as 11-02-2009 and thus it cannot be said that the Society did not have earlier knowledge of the impugned judgment and decree.

8. Rebutting the objection of time-bar, Mr. Nadir Burdi submitted that the previous Administrators of the Society remained unaware of details as their mandate was confined to the holding of elections of the Society. He submitted that since the present Administrator of the Society, Mr. Mansoor Ahmed Siddiqi had been appointed in furtherance of orders passed by the Supreme Court of Pakistan, he was given a larger mandate; that he took charge of the Society on 18-09-2017, and that is when he discovered that the impugned judgment had been obtained by fraud; and that in the circumstances, limitation would run from the date of knowledge of the fraud. He

submitted that nonetheless an application under section 5 of the Limitation Act, 1908 for condoning delay, if any, had been moved by way of abundant caution.

9. Heard the learned counsel and perused the record.

The address of the Society given in the plaint was as follows:

*“Al-Habib Cooperative Housing Society,
KDA Scheme No.33, behind Mehran Restaurant,
House No.862, Street No.27/C, Mehmoodabad – 5 ½ ,
Karachi, through Secretary.”*

That address was clearly incorrect as Mehmoodabad is not in KDA Scheme No. 33. Therefore, summons to the Society returned unserved, and on 01-06-2006 the Additional Registrar noted that the address of the Society provided in the plaint was incorrect.

10. On 19-09-2006, the Respondent filed a statement in the suit to serve the Society through its recently appointed Administrator, Mr. Muhammad Ali at *“Scheme No.33, Behind Mehran Restaurant, Gulzar-e-Hijri, Super Highway, Karachi.”* Per the bailiff’s report dated 16-11-2006, the premises was closed. Summons were again issued on 24-11-2006 both at the Mehmoodabad address mentioned in the plaint and at the Super Highway address. Per the bailiff’s report dated 22-01-2007, both addresses could not be traced. Summons were then issued to the Society on 06-04-2007 at the Super Highway address. This time the bailiff’s report dated 19-04-2007 stated that summons were received by Mr. Muhammad Ali as Administrator of the Society. Therefore, the Additional Registrar held service good leading to *ex-parte* proceedings against the Society. However, as pointed out by Mr. Nadir Burdi, the receipt of the summons dated 06-04-2007 does not reveal any name or designation, nor does it bear the seal of the Society. In Execution No. 33/2008, Mr. Muhammad Ali, the Administrator of the Society, had filed a statement dated 11-02-2009 and an affidavit dated 08-04-2009 pleading ignorance of the proceedings. I have compared the signature on the summons with the signatures of Muhammad Ali on his statement and affidavit that he filed in Execution No. 33/2008 and find that the signature on the

summons are completely different from Mohammad Ali's signatures. Therefore, it was indeed misrepresented to the Court that summons of the suit had been received by Mr. Muhammad Ali, the Administrator of the Society. There being no other report of service, it is apparent that the Society was never served with summons of the suit.

11. Adverting now to the Applicant's allegation that the impugned judgment and decree had been obtained by fraud by suppressing certain facts, Ms. Saima Jamil was right to submit that the plaintiff had annexed the copy of the Award passed in favor of the Respondent under section 54 of the Cooperative Societies Act, copy of the Society's statement dated 13-09-2005 in Execution No. 33/2003 before the Senior Civil Judge Malir, and copy of the disposal order of that Execution, and that those facts had also been noticed in the impugned judgment as well. However, what was not annexed with the plaintiff was the Respondent's own statement dated 13-09-2005 that she had filed in Execution No. 33/2003 before the Senior Civil Judge Malir whereby she had acknowledged that she had received peaceful possession of the suit plot from the Society and that she did not wish to proceed further with the Execution. I agree with Mr. Nadir Burdi that the Respondent's acknowledgment in writing that pursuant to the Award she had received possession of the suit plot from the Society, was a material document which gives a different complexion to the matter inasmuch as, the case set up in the plaintiff was essentially to say that the Court should not believe the Society's statement of delivery of possession. In her counter-affidavit, the Respondent has not disputed her statement dated 13-09-2005 filed before the Senior Civil Judge Malir, nor has she given any reason for omitting such document from the suit. Therefore, subject to the question of limitation discussed *infra*, this J.M. does not require the recording of evidence for its determination. The suppression of a document from the Court which could well have come in the way of the impugned judgment, so also the misrepresentation that the Society had been served with summons of the suit, are sufficient to conclude that the

impugned judgment and decree are the result of fraud played on the Court.

12. The more formidable objection to this J.M. is that it is time-barred. The impugned decree was drawn-up on 22-05-2008 whereas this J.M. was filed on 03-07-2018. Limitation for an application under section 12(2) CPC is governed by Article 181 of the Limitation Act, 1908, which provides for a period of three years from the date “when the right to apply accrues”. That right to apply would accrue when the impugned judgment and decree were passed. However, by virtue of section 3 of the Limitation Act, the period prescribed in the First Schedule to the Limitation Act is subject *inter alia* to section 18 of the said Act which reads as follows:

“18. **Effect of fraud.** Where any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded, or where any document necessary to establish such right has been fraudulently concealed from him, the time limited for instituting a suit or making an application--

- (a) against the person guilty of the fraud or accessory thereto, or
- (b) against any person claiming through him otherwise than in good faith and for a valuable consideration,

shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production.”

Thus, in cases where the applicant establishes that he was prevented by fraud from acting earlier, then section 18 of the Limitation Act, 1908 would come to his aid to make limitation run from the date when fraud became known to the applicant.¹

13. In paras 10, 11 and 13 of the application, the Applicant states that though he was appointed Administrator of the Society vide notification dated 22-12-2016 (Annexure C-2), he was prevented from taking charge of the Society by the ex-management (Annexure C-3); that he managed to take charge of the Society only on 18-09-2017 (Annexure D-2); that thereafter he came to know of Execution No. 33/2008 started making inquiries into the matter. Nonetheless,

¹ See *Allah Bakhsh v. Irshad Begum* (1986 SCMR 1496).

limitation computed even from 22-12-2016, when Mr. Mansoor Ahmed Siddiqui was appointed as Administrator, would make this J.M. within time. However, the argument of learned counsel for the Respondent was that the Society would be deemed to have acquired knowledge of the impugned decree at least on 11-02-2009 when its previous Administrator appeared in Execution No. 33/2008, and therefore even applying section 18 of the Limitation Act, the J.M. is still time-barred

14. The chronology of events gleaned from Execution No. 33/2008 are as follows. Execution No. 33/2008 for enforcement of the impugned decree was filed by the Respondent on 25-06-2008. But despite having knowledge of the Administrator and the relevant address, the Respondent still provided in the Execution that address of the JD/Society that was originally mentioned in the plaint, viz. the Mehmoodabad address, which the Respondent knew to be the wrong address. The order dated 26-11-2008 passed in Execution No. 33/2008 shows that when Mr. Muhammad Ali appeared in the Execution on 11-02-2009 as Administrator of the Society, it was not on receipt of notice of the Execution but on being summoned by the Court on its own motion through the Additional Advocate General. Muhammad Ali expressed ignorance of the proceedings. That is apparent from his statement dated 11-02-2009 and his affidavit dated 08-04-2009 filed in Execution No. 33/2008. His letter dated 03-07-2006 addressed to Registrar Cooperative Societies complains that he was not given the record of the Society by the ex-Secretary of the Society. However, after a month of stepping into Execution No. 33/2008, i.e., vide notification dated 12-03-2009 issued by the Sindh Cooperative Housing Authority, Muhammad Ali was substituted as Administrator by one Iqbal Hussain Channa, and that is also recorded in the order dated 19-03-2009 passed in the Execution. On 03-06-2010, Iqbal Hussain Channa informed the Executing Court that he too had ceased to be Administrator of the Society in April 2010 when he had handed over charge of the Society to an elected management whose Secretary was Mehtab Alam. Thereafter notices of the Execution were sent to Mehtab Alam but he did not enter

appearance in the Execution. The records shows that none of such notices were sent to the known address of the Society, nor does any notice bear receipt by seal of the Society. That is why by order dated 23-12-2016, notice of the Execution was ordered to be served on the Society by way of publication.

15. The question that is posed is whether in the circumstances discussed in para 14 above, when the previous Administrator or management of the Society acquired knowledge of the impugned decree when they appeared in Execution No. 33/2008, was that by itself, or ought to be taken as knowledge within the meaning of section 18 of the Limitation Act, that the decree had been obtained by fraud ?

16. One of the earliest cases on the above question is *Rahimbhoy Habibbhoy v. Charles Agnew Turner*, (1893) 17 Bom. 341, decided by the Judicial Committee of the Privy Council on section 18 of the erstwhile Indian Limitation Act, 1877, and subsequently discussed along with other precedents by a Full Bench of the Calcutta High Court in *Biman Chandra Datta v. Promotha Nath Ghose* (AIR 1922 Cal 157) as follows:

“The principle is, perhaps, best stated in the words of Westbury, L.C. in *Rolfe v. Gregory* (1865) 4 De G. J. 576: 3. Cas. 274 : 11 Jur. (n.s.) 98 : 12 L.T. 162 : 13 W. K. 855 : 46 E, E. 1012 PC : 146 R Rule 463 ‘When the remedy is given on the ground of fraud, it is governed by this important principle, that the right of the party defrauded is not affected by lapse of time, or, generally speaking, by anything done or omitted to be done, so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed.’ This was quoted with approval by Lord James in delivering the opinion of the Judicial Committee in *Built Coal Mining Co. v. Qsborre* (1899) A. C. 351 : 68 L. J. P. C.49 : 50 L. T 440 : 47 W.R. 545 : 15 T.L.R. 257., where he added: ‘the contention on behalf of the appellants that the statute is a bar until the wrongdoer is proved to have taken active measures in order to prevent detection is opposed to common sense as well as to the principles of equity.’ To this must be added further the valuable statement by Lord Hobhouse in *Rahimbhoy Habibbhoy v. Charles Agnew Turner* (4) : ‘When a man has committed a fraud, and has got property thereby, it is for him to show that the person injured by his fraud and suing to recover the property has had clear and definite knowledge of those facts which constitute the fraud at a time which is too remote to allow him to bring the suit.’ The true position then is that where a suit is on the face of it barred, it is for

the plaintiff to prove in the first instance the circumstances which would prevent the statute from having its ordinary effect. A person who, in such circumstances, desires to invoke the aid of section 18, must establish that there has been fraud and that by means of such fraud he has been kept from the knowledge of his right to sue or of the title where on it is founded. Once this is established, the burden is shifted on to the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation. Such knowledge must be clear and definite knowledge of the facts constituting the particular fraud; as Lord Hobhouse points out, it is not sufficient for the defendant to show that the plaintiff had some clues or hints which, perhaps, if vigorously and acutely followed up, might have led to a complete knowledge of the fraud."

In *Bhagwana v. Shadi* (AIR 1934 Lahore 878) it was held that mere suggestions of fraud do not amount to the knowledge contemplated under section 18 Limitation Act, and that the knowledge must be clear and definite knowledge of the facts constituting the fraud.

In *Asanulla Fakir v. Jogandara Nath Sarkar* (PLD 1961 Dacca 703) it was held that "The knowledge of the sale and the knowledge of the fraud are two different things. The knowledge of the facts constituting the fraud may include the knowledge of the sale but the mere knowledge of the sale does not include the knowledge of the facts of the fraud."

In *Najmul Haq Faraji v. Panchanan Poddar* (PLD 1968 Dacca 887) it was held that the extension of time under section 18 of the Limitation Act was available to the judgment debtor for the period as long as he is deprived of the knowledge of the real facts relating to the fraud.

17. While section 17 of the Indian Limitation Act, 1963 also considers whether the fraud could have been discovered by means of reasonable diligence, that is not a test under section 18 of the Limitation Act, 1908. Therefore, the underlined portion above of *Biman Chandra Datta* is still the considered legal position under section 18 of the Limitation Act, 1908 viz., that where the plaintiff/applicant establishes fraud, the defendant benefitting from the fraud and opposing the application of section 18, Limitation Act, must show that the plaintiff had clear and definite prior knowledge of

the facts constituting the particular fraud and not merely clues or hints of the fraud, failing which limitation will run only from the date of actual knowledge of the fraud.

18. Applying the above test of clear and definite knowledge of fraud to the facts of the instant case, even if the previous Administrator/management of the Society had acquired knowledge of the impugned judgment when they appeared in Execution No. 33/2008, that did not give them clear and definite knowledge of the fact that in obtaining the impugned judgment the Respondent had suppressed from the Court her statement dated 13-09-2005 that she had filed in the Execution before the Senior Civil Judge Malir acknowledging that she had received peaceful possession of the suit plot from the Society. Only a comparison of the record of Suit No. 424/2006 with the record of Execution No. 33/2003, the latter filed by the Respondent before the Senior Civil Judge Malir, would have revealed the fraud. The copy produced by the Applicant of the Respondent's statement dated 13-08-2005 (the suppressed document) shows that its certified copy had been obtained on 31-05-2018, which supports the Applicant's averment that the fraud was discovered by him only after he took charge of the affairs of the Society on 18-09-2017. The Respondent has not been able to demonstrate otherwise. Therefore, the Applicant is entitled to the benefit of section 18 of the Limitation Act, 1908 making this application under section 12(2) CPC within limitation.

19. Having held that this J.M. is not time-barred, and having concluded in para 11 above that the impugned judgment and decree were a result of fraud, this application under section 12(2) CPC is allowed; the judgment and decree dated 09-05-2008 and the *ex-parte* order dated 17-12-2007 passed in Suit No. 424/2006 are set-aside; and the said suit is restored to the position as it stood prior to 17-12-2007. J.M. is disposed off along with pending applications.

JUDGE

Karachi
Dated: 05-05-2020