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**IN THE COURT OF SAMI ULLAH, CIVIL JUDGE-I,
ORAKZAI (AT BABER MELA).**

Civil suit No 1/12(2) of 2022
Date of institution 13.01.2022
Date of decision 23.06.2023

Muhammad Roshan S/O Muhammad Amin
Resident of Mali Khel, District Orakzai, presently residing in Islamabad.

..... (Plaintiff)

Versus

1. **Gul Payo Khan S/o Habib Ullah Khan, resident of Qoam Beland Khel, Tappa Lodhyani Khel, Speen Thal, District Orakzai.**
 2. **Zera Deen S/o Izat Khan**
 3. **Naiz Deen S/o Izat Khan**
- Both residents of Qoam Meel Khel, Tappa Mali Khel, Tehsil Shoa Shamali Waziristan.**

.....(Defendants)

PETITION UNDER SECTION 12 (2) C.P.C

JUDGMENT:

1. This order will dispose of an instant 12(2) CPC petition filed by the petitioner Muhammad Roshan against the respondents Gul Payo Khan, Zera Deen and Naiz Deen.
2. Brief facts of the instant 12(2) CPC petition are that the petitioners impugned the judgement and decree dated: 12.06.2021 in suit No.59/1 of 2021. The applicant claimed that he is owner in

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possession of the disputed property which was decreed in favour of respondents through consent decree. That the consent decree is passed based on fraudulent joint statement and misrepresentation. There was misrepresentation before the court and the decree is obtained on fraud.

3. The respondents were summoned through process of the court, who appeared in the court and contested the instant 12(2) CPC on various legal as well as factual grounds by submitting written reply.
4. Out of the divergent pleadings of the parties the following amended issues were framed.

ISSUES:

1. *Whether the Applicant has got a cause of action?*
2. *Whether the applicant has sold the suit property to respondent No.02 vide sale deed dated: 14.11.2019?*
3. *Whether the suit property is in possession of the applicant?*
4. *Whether the consent decree dated: 12.06.2021 in suit No. 59/1 of 2021 was obtained through fraud and misrepresentation and liable to be set aside?*

Relief.

5. After framing of issues both the parties were directed to lead evidence, whereupon, petitioners produced Muhammad Aftab S/O Muhammad as PW-1 and thereafter closed the evidence.

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6. In rebuttal, the respondents produced and examined Zera Deen S/O Izat Khan as DW-1, Kausar Ullah S/O Zera Din as DW-2 & Usman Khan S/O Sabeel Khan as DW-3, Gul Payo Khan S/O Habib Ullah Khan as DW-4, Muhammad Rehman S/O Mehal Khan as DW-5, Awal Khan S/O Gul Hadeen as DW-6, Muhammad Noor Khan S/O Gul Kaye as DW-7, Adil Shah S/O Jalat Khan as DW-8 & Yar Khan S/O Gul Khan and thereafter closed their evidence.

7. Arguments heard and record perused. The issue wise findings are as under: -

Issue No.1.

- **Whether the Applicant has got a cause of action?**

8. The petitioners have challenged the validity of consent judgment & decree dated 12.06.2021 on the ground of fraud and misrepresentation under Section 12(2) C.P.C, which is permissible and competent under the law. Hence, the petitioners have got cause of action to file the instant petition. Issue is decided in positive.

Issue No.3 & 4.

- *Whether the suit property is in possession of the applicant?*
- *Whether the consent decree dated: 12.06.2021 in suit No. 59/1 of 2021 was obtained through fraud and misrepresentation and liable to be set aside?*

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9. Both the issues are interlinked therefore, taken together for discussion. The onus to prove the issues was on the petitioner.

Petitioner in support of his stance and contention produced Muhammad Aftab as PW-01, who has power of attorney in the instant petition and recorded his statement. The essence of the statement of the said PW which helped in deciding the issue is as under.

10. The said PW recorded his examination in chief in support of the stance and contention of the plaintiff and said that the petitioner has never sold the suit property to anyone and the sale deed through which consent decree was obtained is bogus. He recorded in his statement that the suit property is in their possession. The said PW recorded in his cross examination that he doesn't know defendant No.1 namely Gul Payo Khan. However, he admitted later in his cross examination that Gul Payo Khan is cousin of his father. He also admitted in his cross examination that he doesn't have any witness to prove fraud on behalf of the respondents. Furthermore, the perusal of case file reveals that two consent decrees were passed by the court concerned on the suit property. It is pertinent to mention here that the second consent decree which is currently in field, is not impugned through this petition.

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11. It is well settled law that when a person alleges fraud or misrepresentation and seeking relief from the court, then he is duty bound to prove the elements of fraud and misrepresentation by producing unimpeachable, impartial and confidence inspiring

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evidence because mere allegations in the petition cannot partake proof required under the law.

Reliance is placed on the judgments passed by the august appellate courts in PLD 2015 Sindh 457, 2018 YLR 1945 and 2001 CLC 1514.

“If the party alleges fraud without bringing essential facts on record in proof of the same, then mere pleading ignorance or lack of knowledge simpliciter to make it a ground for moving court is not sufficient to dislodge sanctity which is otherwise attached to judicial proceedings” (PLD 2015 Sindh 457)

Non-participation of applicant in the proceedings cannot be regarded as fraud or misrepresentation on the part of respondents or even lack of jurisdiction of the court. Courts below were justified to dismiss the application of the petitioner under section 12(2), CPC. (2018 YLR 1945)

In the absence of sufficient and convincing evidence on record showing that decree was procured by fraud or same was false and fictitious, it should not be set aside. (2001 CLC 1514)

In the instant petition the petitioners have miserably failed to prove that the impugned decree dated 12.06.2021, was obtained due to fraud and misrepresentation. The plaintiff has not brought on record convincing evidence which could corroborate his stance. On the other hand, keeping in view the preponderance of evidence, the respondents have established that the suit property

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was sold by the petitioner through deed dated 14.11.2019 (fully detailed in issue no.02)

13. Hence, in the light of above discussion, it can safely be held that the petitioner has not proved the element of fraud, misrepresentation or want of jurisdiction through convincing evidence. Moreover, there is nothing available on record which suggests that the suit property is in possession of the petitioner. Resultantly, the issues are decided in negative and against the petitioners.

Issue No.2.

- *Whether the applicant has sold the suit property to respondent No.02 vide sale deed dated: 14.11.2019?*

14. Respondents in their reply of the instant petition have contended that the suit property was sold by the petitioner to the one namely Zahoor Udeen who is respondent No.2 in the instant petition through sale deed dated 14.11.2019. That the suit property was further sold to respondent No.1 through sale deed dated 29.05.2021. The onus to prove issue No.2 was on the respondents. Respondents in order prove their stance, produced as many as 09 DWs. However, after recording cross examination of three DWs, the respondents closed their evidence. The essence of respondent's evidence is as under.

15. Zahoor Udeen appeared as DW-01 and recorded his statement, in which he stated in examination in chief that the petitioner has sold

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twenty-six (26) Kanals land situated in Biland Khel, Orakzai in consideration of Rs.3380000/- through sale deed dated 14.11.2019. The sale deed is Ex.DW-1/1. Further stated that for two years, DW-01 had possession of the suit property, after which he has sold the same to the one Gul Payo Khan. Lengthy cross examination of the said was recorded, however, nothing incriminating to the stance of the respondents were brought on record. The said DW further strengthen his stance in the cross examination by giving details of the said sale agreement and deed.

16. Kausar Ullah appeared as DW-02 and recorded in his examination in chief that he is marginal witness of the sale deed dated 14.11.2019, which is Ex.DW-1/1. In conformity with statement of DW-01, DW-02 also stated that the sale deed was written at Thall, District Hangu by Muhammad Dawood, petition writer, in presence of Muhammad Roshan and other witnesses. Lengthy cross examination of the said DW was recorded, however, nothing incriminating to the stance of the respondents were brought on record. The said DW also recorded in his cross examination that he had cultivated the disputed property while they had the possession. Needless to mention that the suit property was further sold to respondent No.1 by respondent No.2.

17. Usman Khan appeared as DW-03 and recorded in his examination in chief that he is marginal witness of the sale deed dated 14.11.2019, which is Ex.DW-1/1 by which the petitioner had sold the disputed property to respondent No.2. The cross examination

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of the said DW further strengthened the stance of the respondents by giving details in response to the questions put before him regarding the sale agreement and deed.

18. The statements of the respondent's witnesses brought the facts before the court, mentioned here in after, which provided reason for deciding the issue in their favor. Firstly, the witnesses were consistent in their statement that the petitioner had sold the suit property to the respondent No.2 Vide sale deed date 14.11.2019 which is Ex.DW-1/1. Secondly, the respondents had produced two marginal witnesses of the sale deed and exhibited the said sale deed in their evidence. Thirdly, the DWs in their statement had stated that the possession of the disputed property was handed over to respondent No.2 after the sale deed was finalized. Fourthly, the disputed property has been sold multiple times after the petitioner had sold to respondent No.2. Moreover, perusal of case file reveals that another consent decree dated 13.12.2021 was also obtained, which is currently in field, however, the same is not impugned through the instant petition.

19. Keeping in view the above discussion, it is held that respondents produced cogent, convincing and reliable evidence in support of their claim, therefore, issue No.02 is decided in favor of respondents based on their evidence.

Relief.


20. As sequel of my above issue wise findings, it can safely be held that the preponderance of evidence heavily lies in favour of the

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respondents. Resultantly, the petition under 12(2) C.P.C stands **Rejected**. Issue No.1 is decided accordingly. Costs shall follow the events.


21. File be consigned to record room after its necessary completion and compilation.

Announced:
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CERTIFICATE

Certified that this judgment consists of Nine (09) pages. Each and every page has been read over, corrected and signed by me where ever necessary.


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