

Stereo.HCJDA 38.
Judgment Sheet
LAHORE HIGH COURT
RAWALPINDI BENCH RAWALPINDI
JUDICIAL DEPARTMENT

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CIVIL REVISION NO.689-D of 2012

SULTAN KHAN and another

Versus

MUHAMMAD NAWAZ (deceased) Through his Legal Heirs and others

JUDGMENT

Date of hearing: 22.10.2024

Petitioners by: Mr. Muhammad Amir Butt,
Advocate.

Respondents by: Ex-parte.

MIRZA VIQAS RAUF, J. This petition under Section 115 of the Code of Civil Procedure (V of 1908) stems from the judgment and decree dated 15th May, 2012 handed down by learned Additional District Judge, Chakwal, whereby he while allowing the appeal preferred by Muhammad Nawaz, predecessor-in-interest of respondents No.1A to 1D (hereinafter referred to as “**deceased respondent**”) set aside the judgment and decree dated 2nd December, 2010 passed by the learned Civil Judge Class-I, Chakwal by virtue of which suit for possession instituted by **deceased respondent** was dismissed.

2. Facts forming background of this petition are that **deceased respondent** instituted a suit for possession in respect of land measuring 8 Marla bearing Khasra No.746 Khatooni No.526 Khewat No.168 situated in village Hastal Tehsil and District Chakwal, averring therein that he is owner in possession of the suit land but

about one and an half year ago the petitioners and respondents No.2 to 5 forcibly took over the possession whereafter he moved an application to the revenue officer for conducting of demarcation proceedings, wherein it was found that the petitioners and respondents No.2 to 5 encroached upon his property. It was claimed in the suit that though **deceased respondent** requested them to hand over the possession of the suit land but they refused. Suit was resisted by the petitioners by asserting that their predecessor-in-interest namely Ghulam Qadir purchased land measuring 2 Kanal 10 Marla forming part of Khasra No.745 from Feroz Din through registered sale deed in the year 1977 but the possession was handed over from Khasra Nos.746 as well as 745. Suit was resisted on various grounds including limitation. From the divergent pleadings of the parties multiple issues were framed by the learned Civil Judge and on culmination of trial, suit was dismissed by way of judgment and decree dated 2nd December, 2010. Feeling dissatisfied an appeal was preferred by the **deceased respondent** before the learned Additional District Judge, Chakwal. During the pendency of appeal, the **deceased respondent** passed away and respondents No.1A to respondents No.1D were impleaded as his legal representatives. The appeal was ultimately allowed through judgment and decree dated 15th May, 2012 and resultantly suit was decreed to the effect that respondents No.1A to 1D are entitled to get the vacant possession of 5 Marla of land from the petitioners and 3 Marla of land from respondents No.2 to 5 from Khasra No.746, hence this petition under Section 115 of the Code of Civil Procedure (V of 1908).

3. This petition was admitted for regular hearing by way of order dated 18th September, 2012 and notice was issued to the respondents but they failed to appear and were proceeded against ex-parte as a result of which it was directed to be placed for ex-parte hearing.

4. Learned counsel for the petitioners contended that suit instituted by the **deceased respondent** was not maintainable and as such it was rightly dismissed by the trial court initially. It is contended that the appellate court without adverting to the material

pieces of evidence drawn a contra view, which renders the impugned judgment nullity in the eyes of law. Learned counsel emphatically argued that suit was clearly barred by time but the question of limitation has not been attended properly by the appellate court, which by itself is sufficient to set at naught the impugned judgment. It is argued by learned counsel that without seeking declaration of title suit for possession was not maintainable. Placed reliance on MUHAMMAD IQBAL versus MATI UR REHMAN and others (2022 SCMR 859), WAZIR KHAN and others versus QUTAB DIN and others (PLD 2009 Supreme Court 95) and SULTAN MAHMOOD SHAH through L.Rs. and others versus MUHAMMAD DIN and 2 others (2005 SCMR 1872).

5. I have heard learned counsel for the petitioners at considerable length and also perused the record.

6. Suit was in terms of Section 8 of the Specific Relief Act, 1877 wherein it is claimed by the **deceased respondent** that he is owner in possession of the suit land and the petitioners have dispossessed him forcibly about one and half year ago qua which he also got demarcated the suit land wherein it is found that the petitioners have encroached upon the same. Contrary to this, it is the stance of the petitioners that their predecessor-in-interest namely Ghulam Qadir purchased the property measuring 2 Kanal 10 Marla from Feroz-ud-Din son of Fazal Din through registered sale deed in the year 1977 whereafter they raised construction in the shape of residential houses. It is also asserted that at the time of purchase though it was mentioned that the property forms part of Khasra No.745 but at site possession was delivered from Khasra Nos.745 & 746 as the vendor (**deceased respondent**) was owner in both the Khasra numbers.

7. From the respective pleadings of the parties it is manifestly clear that the parties are not in dispute to the effect that **deceased respondent** purchased the property forming part of Khasra No.746 and he is a lawful owner of the same. It is also not in dispute that the predecessor-in-interest of the petitioners have purchased the property from Khasra No.745 but as per their stance after the execution of sale deed the possession was handed over to the vendee from Khasra

No.745 as well as Khasra No.746 as the vendor was owner in both the Khasras. The petitioners are thus not throwing any serious challenge to the title of the **deceased respondent**. In this backdrop objection of learned counsel for the petitioners with regard to maintainability of suit for possession is without any due force. Needless to observe that a person is only obliged to seek declaration when somebody is interested to deny his legal right or character as ordained in Section 42 of the Specific Relief Act, 1877, which is not the case here.

8. Suit is mainly resisted by the petitioners on account of limitation regarding which issue No.1 was framed. It evinces from the record that suit was initially dismissed and issue of limitation was also decided against the **deceased respondent**. In appeal, learned Additional District Judge while dealing with the question of limitation held the suit within time on the ground that the **deceased respondent** purchased land from the legal heirs of Feroz Din in the year 2001 and possession was also delivered to him in pursuance to which mutation was also sanctioned as is evident from Exhibit-P5 but the encroachment of the petitioners came to his notice and knowledge in the year 2002, after the demarcation proceedings, whereafter he instituted the suit which is well within time. Above all it is noticed that petitioners admittedly do not possess any title regarding property situated in Khasra No.746. In other words, the petitioners are occupying the property owned by **deceased respondent** unauthorizedly. Needless to observe that the petitioners' act of occupying the suit property illegally and unlawfully would amount to give recurring cause to the **deceased respondent**.

9. As already mentioned hereinabove that it is the stance of the petitioners that their predecessor-in-interest namely Ghulam Qadir purchased the property through registered sale deed in the year 1997 from Khasra No.745 but as the vendor was also owner in Khasra No.746, so possession was handed over to the vendee in both the Khasras and since then they are peacefully enjoying it. Needless to mention that when once it is established that the petitioners are not

the owners of the suit property which is forming part of Khasra No.746, so they can only be termed as trespassers or in adverse possession. The term “adverse possession” is defined in various law dictionaries as under :-

Black's Law Dictionary Tenth Edition

adverse possession. (18c) **1.** The enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and is continuous, exclusive, hostile, open, and notorious. • In Louisiana, it is the detention or enjoyment of a corporeal thing with the intent to hold it as one's own. La. Civ. Code art. 3421. — Also termed *adverse dominion*. Cf. PRESCRIPTION (5).

Webster's New World Law Dictionary

adverse possession n. A method of acquiring title to real estate by actually, continuously, and openly occupying the property for an uninterrupted amount of time to the exclusion of all others and in defiance of the real owner's rights. The required period of occupancy, as well as other possible conditions, are set by statute.

KJ Aiyar Judicial Dictionary 16th Edition

Adverse possession. Possession of (usually of land) which is inconsistent with the right of a person who claims to be the true owner. Trespass does not constitute adverse possession. There must be real possession accompanied by intent to possess. It must be 'adverse' to the owner and must not be permissive.

Whereas “trespass” is defined as under :-

Black's Law Dictionary Tenth Edition

trespass (tres-pes or tres-pas), *n.* (13c) **1.** An unlawful act committed against the person or property of another; esp., wrongful entry on another's real property. Cf. *unlawful entry* under ENTRY (1). **2.** At common law, a lawsuit for injuries resulting from an unlawful act of this kind. • The lawsuit was instituted by a writ of trespass. **3.** *Archaic.* MISDEMEANOR. — **trespass, vb.** — **trespassory** (tres-pe-sor-ee), *adj.*

Webster's New World Law Dictionary

trespass 1 n. An illegal act committed against another's person or property; especially entering upon another's land without the owner's permission. **2 n.** In common law, a legal suit for injuries resulting from an instance of the first definition. **3 v.** To enter upon property without permission, either actual or constructive.

trespass on the case. A common-law precursor to today's negligence, nuisance, and business torts, it was a suit to remedy injury to person or property not resulting directly from the defendant's conduct but a later consequence of same.

KJ Aiyar Judicial Dictionary Sixteenth Edition

Trespass. The act of breaking into computers or networks either without authorization or in excess of one's authorization. A forcible entry on the land of another with strong hand and against the will of the owner constitutes a trespass.

After having an overview of the definition of terms “Adverse Possession” and “trespass” given in various law dictionaries when claim of petitioners is examined, there remains no cavil that they are not claiming protection of their possession on the plea of “Adverse Possession”. In this way when the petitioners have no title to the suit property they can only be termed as “trespassers”.

10. Before moving further it would not be out of context to mention here that initially adverse possession was duly recognized by law and it was protected under Section 28 and Article 144 of the Limitation Act, 1908 but both these provisions were declared repugnant as against the injunctions of Islam in the case of مقبول احمد بنام حکومت پاکستان (1991 SCMR 2063). The relevant extract from the same is reproduced below :-

”۳۶۔ خلاصہ یہ ہے کہ لیمٹیشن ایکٹ کی دفعہ ۲۸ نے غیر منقولہ جائیداد کے قبضے کو منقولہ جائیداد اور دوسرے مقدمات سے الگ کر کے اس میں عدالتی چارہ جوئی کو ختم کرنے کے ساتھ ساتھ جس طرح حق ہی کو ختم کر دیا ہے، وہ قرآن و سنت کے احکام سے متصادم ہے، قرآن و سنت کے احکام کا تقاضہ یہ ہے کہ جس طرح منقولہ جائیداد اور قرضوں میں میعاد سماعت گزرنے کے بعد بھی حق بذات خود باقی رہتا ہے، اسی طرح غیر منقولہ جائیداد میں بھی یہ حق باقی رہنا ضروری ہے اور مخالفانہ قبضے (Adverse Possession) کے ذریعے جائز ملکیت کے حصول کا جو تصور اس دفعہ میں دیا گیا ہے، وہ قرآن و سنت کے احکام کے قطعی خلاف ہے۔

۳۷۔ اپیل کنندہ نے لیمٹیشن ایکٹ کے پہلے شیڈول میں آرٹیکل ۱۴۴ کو بھی دفعہ ۲۸ کے ساتھ چیلنج کیا ہے اور اس کو بھی قرآن و سنت سے متصادم قرار دینے کی درخواست کی ہے، لیکن میں سمجھتا ہوں کہ شیڈول کا آرٹیکل ۱۴۴ درحقیقت قبضے کی واپسی سے متعلق مقدمات کے لئے بارہ سال کی میعاد سماعت اور اس میعاد کا نقطہ آغاز بتانے کے لئے وضع کیا گیا ہے اس میں بذات خود قبضہ مخالفانہ کے ذریعے مالک کے حق کے خاتمے یا ناجائز قابض کی ملکیت ثابت ہو جانے کا کوئی حکم موجود نہیں ہے، یہ آرٹیکل درحقیقت اس وقت قرآن و سنت کے احکام کے خلاف نتائج پیدا کرتا ہے جب اس ایکٹ کی دفعہ ۲۸ کی روشنی میں پڑھا جائے، لیکن اگر دفعہ ۱۲۸ ایکٹ میں موجود نہ ہو تو یہ آرٹیکل محض سادہ میعاد سماعت کے بیان پر مشتمل ہے، جس کے بارے میں یہ قرار دے چکا ہوں کہ وہ اس عدالت کے دائرہ اختیار سے باہر ہے اور اس میں کوئی شرعی خرابی بھی نہیں ہے، لہذا اگر دفعہ ۲۸ قانون کا

حصہ نہ رہے، تو پھر آرٹیکل ۱۴۴ کے باقی رہنے سے محض اس آرٹیکل کی بنیاد پر قبضہ مخالفانہ (Adverse Possession) کے ذریعے ملکیت کا حصول اور اصل مالک کی ملکیت کا خاتمہ ممکن نہیں رہے گا۔ لہذا دفعہ ۲۸ کے قرآن و سنت سے متصادم اور بے اثر قرار پا جانے کے بعد پہلے شیڈول کے آرٹیکل ۱۴۴ کو قرآن و سنت سے متصادم قرار دینے کی کوئی ضرورت میرے نزدیک باقی نہیں رہتی۔“

11. In the above backdrop it would not be out of context to observe that with the afflux of time illegal possession upon the property of the other, irrespective of howsoever it is long, would not extinguish the ownership of the actual owner and validate the possession of trespasser. Reference to this effect can be made to the case of MUHAMMAD ZAMAN versus NAZIR AHMED and 2 others (2003 CLC 1628) wherein this Court held as under :-

“4. Now according to the reasoning of the learned lower Courts the petitioner has not proved his possession over the said property nor has he proved his dispossession by the respondents in the year 1985. Now whereas the learned trial Court has found the suit to be barred by time without reference to any provision of Limitation Act. The learned Appellate Court has referred to Articles 142 and 144 of the Schedule to the Limitation Act, 1908. Under Article 142 the prescribed period of 12 years for a suit for possession is to commence from the date of dispossession or discontinuation of possession. Under Article 144 the prescribed period of 12 years is to commence from a point of time when the possession of the defendant in the suit becomes adverse to the plaintiff. Now going by the findings of the learned lower Courts that the petitioner never took possession of the land under the said decree, Article 142 would not apply. As there is no question of dispossession or discontinuation of possession while a plaintiff is in possession. This leaves Article 144. Under this provision the starting point of limitation is when the possession of the defendant becomes adverse to the plaintiff. The finding of the learned lower Courts is that possession of the respondent is not adverse. This being so, they have acted without jurisdiction in holding the suit to be barred by time.

5. Now according to the said case of Mahboob Khan cited by the learned counsel for the respondents it has been held that the limitation for a first application for execution of a decree is three years as prescribed in Article 181 of the Limitation Act, 1908. To my mind the said proposition is not involved in this case where we are dealing with the limitation for suit for possession. However, the judgment in the case of Alam Din alias Alam Sher and 3 others cited by learned counsel does deal with a suit for possession. Now the learned counsel particularly relies on the following observations of the Honourable Court in para. 18 of the judgment at page 10 of the report:-

"We think that it is no practically a settled law that if a person with title fails to sue for possession or execute the decree for possession or declaration which he has in his favour for twelve years, the person holding such a property adversely to the true owner for more than twelve years, after the decree or

dispossession of the owner, becomes full owner in extinguishing the title of the true owner. (underlining is mine). Now it will be seen that their Lordships also insisted that the possession has to be adverse to the true owner in order to extinguish his title by prescription. In the present case, as held by me above, it is an interpartes finding that possession of the respondent has never been adverse.

6. Thus the possession of the respondents not being adverse, whatever the length of said possession may be, it will not result in extinguishment of the title of the petitioner. Needless to state that so long as the title vests in the petitioner he is entitled to get the possession of the land on the basis of the same.”

12. In somewhat similar facts and circumstances Peshawar High Court in the case of Malik MUHAMMAD HUSSAIN versus SAADULLAH KHAN (2014 CLC 311) held as under :-

“10. The plea of the petitioner that being trespasser he has the protection of law is not tenable as law does not come to the rescue of a person who on the one hand, violates a law and seeks refuge behind an other for the protection of his unlawful interest. Reliance is placed on 1968 SCMR 1286 whereby leave was refused by the Supreme Court of Pakistan from a judgment of High Court in which the High Court had declined to interfere with the orders of settlement authorities on the view that a trespasser was neither entitled to the transfer of a house under the Displaced Persons (Compensation and Rehabilitation) Act nor competent to move the High Court in the exercise of its constitutional jurisdiction. (Underlining supplied).

11. Similar view was expressed in another judgment by the Supreme Court of Pakistan reported in PLD 1982 Supreme Court page 308 wherein their Lordships have that "the appellant Anjuman, on other hand had no 'legitimate' right whatsoever on the land in dispute because its status, on its own admission was only that of a trespasser. It entered into the land in question without the permission of the relevant authorities and started using it for own purpose without any authorization. (Underlining supplied)”

Even otherwise knocking out the **deceased respondent** on account of limitation would amount to give premium to the petitioners under the obsolete provisions of law i.e. Sections 28 and 144 of the Limitation Act, 1908, which have already been declared as deviant to the Quranic injunctions.

13. So far judgment in the case of *Muhammad Iqbal's* relied upon by learned counsel for the petitioners is concerned, it is observed that in the said case both the parties were litigating and canvassing their respective titles to the suit property which is not so in the present case thus the principles laid down therein are not applicable to the case at hand. Next comes the judgment in the case of *Wazir Khan's* supra, perusal whereof reveals that said judgment is

founded on entirely different facts and circumstances. Parties to the said case were raising their respective claims with regard to the suit land and challenging the vires of the mutation being outcome of fraud and misrepresentation which is not the case here. With all reverence to the principles laid down therein qua which no other opinion can be formed, it is observed that as the facts and circumstances of the present case are distinguishable, so reliance on the said judgment by learned counsel for the petitioners would be of no avail. So far judgment in the case of *Sultan Mahmood Shah supra* is concerned, it evinces therefrom that both the parties were claiming title qua the suit property whereas in the present case, the petitioners are not disputing the title of the **deceased respondent**, which is an apparent distinctive feature.

14. This petition is though arising out of divergent views of the courts below as the conclusion are contrary to each other but this Court, while exercising revisional jurisdiction is supposed to make comparative analysis of both the judgments in order to determine their validity on the touchstones of Section 115 of the Code of Civil Procedure (V of 1908). It is cardinal principle of law that in the matter of giving preference to the judgments of lower courts, while analyzing the same in exercise of revisional jurisdiction, the preference and regard is always given to the findings of the appellate court, unless those are suffering with any legal infirmity or material irregularity. Reference in this respect, if needed can safely be made to the case of MUHAMMAD NAWAZ through L.Rs versus Haji MUHAMMAD BARAN KHAN through L.Rs. and others (2013 SCMR 1300). Relevant extract from the same is reproduced herein below:-

“12.....We have also taken into consideration the judgment of the Appellate Court which is based on proper appraisal of evidence on record and the findings of the Appellate Court are to be preferred as it has been held by this Court in the cases of Madan Gopal and others vs Maran Bepari and others (PLD 1969 SC 617) that if the findings of fact reached by the first appellate Court is at variance with that of the trial Court, the former will ordinarily prevail, although it would not possess the same value or sanctity as a concurrent finding.” This view also finds support from the cases of Muhammad Shafi and others vs. Sultan Mahmood and others (2010 SCMR 827).....”

The above view also finds support from the cases of AMJAD IKRAM versus Mst. ASIYA KAUSAR and 2 others (2015 SCMR 1) and MUHAMMAD HAFEEZ and another versus DISTRICT JUDGE, KARACHI EAST and another (2008 SCMR 398).

15. After having a comparative analysis of both the judgments, I am of the firm view that the learned Additional District Judge, Chakwal has rightly interfered with the judgment passed by the learned Civil Judge, Chakwal. The petitioners have failed to point out any illegality or material irregularity in the impugned judgment, warranting interference by this Court in exercise of revisional jurisdiction so as to set at naught the impugned judgment. The instant petition thus fails and is **dismissed** with no order as to costs.

(MIRZA VIQAS RAUF)
JUDGE

Dictated
18.11.2024

Signed
02.12.2024

Announced in open Court on 02.12.2024.

JUDGE

APPROVED FOR REPORTING

JUDGE

Shahbaz Ali*