

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

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CIVIL REVISION NO.661-D of 2017

PAKISTAN RAILWAYS Through its Senior General Manager and 2 others

Versus

MISRI KHAN & COMPANY Through Misri Khan (deceased) Through His
Legal Heirs

JUDGMENT

Date of hearing: 06.12.2023

Petitioners by: Mr. Muhammad Siddique Awan,
Advocate.

Respondents by: Mr. Zaheer Ahmed Qadri,
Advocate.

MIRZA VIQAS RAUF, J. This petition under Section 115 of the Code of Civil Procedure (V of 1908) (hereinafter referred to as “C.P.C.”) arises out of judgment and decree dated 22nd February, 2017, whereby the learned Additional District Judge, Rawalpindi, while dismissing the appeal preferred by the petitioners affirmed the judgment and decree dated 25th June, 2010 passed by the learned Civil Judge Class-I, Rawalpindi.

2. Brief facts forming background of this petition are that Pakistan Railways (“petitioners”) invited tender for purchase of building material from the registered contractors. The respondent being the registered government contractor submitted quotations with rates and being the lowest one, he was awarded contract for supply of building material worth of Rs.31,65,640/-. On account of dispute the respondent instituted a suit for recovery of Rs.31,65,640/- with the averments that he had though supplied the

building material according to the specification but the petitioners did not release the outstanding amount. Suit was contested by the petitioners on various grounds including the limitation. From the divergent pleadings of the parties learned Civil Judge Class-I, Rawalpindi framed necessary issues and then recorded evidence of both the sides. Suit was ultimately decreed *vide* judgment dated 25th June, 2010. Feeling dissatisfied both the sides preferred their respective appeals before the learned Additional District Judge, Rawalpindi but same were dismissed *vide* judgment and decree dated 22nd February, 2017, hence this petition.

3. This petition is though still at pre-admission stage but in view of its pendency since 2017 both the sides have agreed to treat the same as *pacca* case and decide it as such.

4. Learned counsel for the petitioners contended that claim of the respondent was barred by time and though issue No.10 was framed to this effect but both the courts did not properly attend the same. Learned counsel submitted that in terms of Article 56 of the Limitation Act, 1908 it was incumbent upon the respondent to institute the suit within three years from the date of work done. It is argued with vehemence that judgments of the courts below are though concurrent but are the outcome of gross misreading and non-reading of evidence. In order to supplement his contentions, learned counsel placed reliance on SHIFAATULLAH QURESHI versus FEDERATION OF PAKISTAN through Secretary/Chairman, Railways, Ministry of Railways (Railway Board), Islamabad (1999 CLC 364) and SUALEH SONS (PRIVATE) LIMITED versus KARACHI DEVELOPMENT AUTHORITY (1997 CLC 893).

5. Conversely, learned counsel for the respondent submitted that suit was instituted well within time as previously the respondent approached the Federal Ombudsman and time consumed in the said proceedings would be excluded. He added that even otherwise Article 115 of the Limitation Act, 1908 would apply to the facts and circumstances of the case. Learned counsel maintained that there are concurrent findings of facts and the petitioners have failed to point out any gross misreading and non-reading of evidence on the part of

any of the courts below. Placed reliance on MUHAMMAD JAHANGIR, PROPRIETOR QADEER BROTHERS versus EXECUTIVE ENGINEER and another (1999 MLD 788).

6. Heard. Record perused.

7. As per claim of the respondent he was awarded three contracts by the petitioners for supply of building material total amounting to Rs.31,65,640/-. It is the stance of the respondent that he though supplied the building material in terms of the contracts but his amount was withheld by the petitioners without any lawful excuse. Entering into the contracts is not disputed by the petitioners but it is pleaded that the respondent while in league with the officials of Railways committed some irregularities, which were detected by the General Manager Pakistan Railways, who constituted a high level committee for making probe and in the said proceedings, it was established that the respondent embezzled the funds of Pakistan Railways.

8. Leaving aside the respective claim of both the sides it is noticed that suit was mainly resisted by the petitioners on the ground that it is barred by time. To this effect issue No.10 was though framed, however, the trial court while deciding the issue of limitation held that since the default was committed by the petitioners in payment of disputed amount, so they cannot take refuge under the law of limitation, which in no way can be termed as a legal approach. On the other hand, while dealing with the question of limitation the appellate court relied upon Article 115 of the Limitation Act, 1908 (hereinafter referred to as “Act, 1908”) and held the suit within time. The moot point thus before this Court is as to ***“which provision of the “Act, 1908” would apply to the facts and circumstances of the case”***.

9. Before pondering upon core issue, it would be apt to have a glimpse of Articles 56 & 115 of the “Act, 1908”, which are reproduced below :-

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| 56. | <u>For the price of work done</u> by the plaintiff for the defendant at his request, where no time has been fixed for payment. | Three years | <u>When work</u> <u>is done.</u> |
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| 115. | <u>For compensation</u> <u>for the breach of any</u> contract, express or implied, not in writing registered and not herein specially provided for. | Three years | <u>When the contract is</u> <u>broken</u> , or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases. |
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(Underlining supplied for emphasis)

From the bare reading of the above referred provisions of law it is manifestly clear that for the claim relating to the price of work done, suit is to be governed by Article 56 of the “Act, 1908” whereas Article 115 of the Act *ibid* caters the suit for compensation for the breach of any contract, express or implied, not in writing registered and not therein specially provided for in the Act.

10. Admittedly the contract was awarded in the year 1999. The respondent in the first instance laid his grievance before the Federal Ombudsman on 12th January, 2000 in the shape of complaint, who allowed the complaint and directed the petitioners to make immediate payment by way of order dated 06th March, 2000. The petitioners being aggrieved challenged the order of the Federal Ombudsman before the President of Pakistan, who allowed the representation by way of order dated 26th October, 2000 and the respondent was directed to approach the Civil Court. Suit was then instituted on 16th March, 2006. The question which now emanates is as to ***“whether time consumed before the Federal Ombudsman can be excluded from being counted towards the limitation for instituting the suit under Section 14 of the “Act, 1908”.”***

11. For ready reference and convenience Section 14 of the “Act 1908” is reproduced below :-

“14. Exclusion of time of proceeding bona fide in Court without jurisdiction. (1) In computing the period of limitation prescribed for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding whether in a Court of first instance or in a Court of appeal, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.”

It clearly manifests from the bare reading of the above referred provision of law that a plaintiff can only claim exclusion of the time from being counted *qua* limitation if he has been prosecuting with due diligence another civil proceedings either in a court of first instance or in a court of appeal against the defendant.

12. The proceedings before the Federal Ombudsman cannot be termed as civil proceedings at all, so Section 14 of the “Act, 1908” would not come to the rescue of the respondent. Reference to this effect can be made to SHIFAATULLAH QURESHI versus FEDERATION OF PAKISTAN through Secretary/Chairman, Railways, Ministry of Railways (Railway Board), Islamabad (1999 CLC 364). The relevant extract from the same is reproduced below :-

“11. The necessary conditions for applying provisions of section 14 of the Limitation Act came up for consideration before a Division Bench of this Court in *Kilachand Devehchand & Co. (Private) Ltd. v. Messrs Sh. Mian Muhammad Allahbux* PLD 1962 Kar. 510. The question in that case was as to whether the time started running from the date of the first award and whether the period spent in making the first award a rule of the Court and thereafter, time spent in pursuing the application for the execution of the decree is to be counted. The appeal against the order of a learned Single Judge of this Court was allowed and it was held as follows:-----

"It will be seen, therefore, that section 14 of the Limitation Act comes into play if the following conditions are fulfilled:

- (a) That the plaintiff has been prosecuting another civil proceeding against the defendant;
- (b) that he has been prosecuting it with due diligence;
- (c) that this proceeding is founded upon the same cause of action;
- (d) that it is prosecuted in good faith; and
- (e) that it does not bear fruit because the Court is unable to entertain it due to defect of jurisdiction or other cause of alike nature."

12. In the case of *Messrs Haroon Textile Mills Ltd. v. Allah Ditta* PLD 1972 Kar. 57, a suit for damages was filed by the respondent, who was an employee of the appellant and who developed asthma while serving in the appellants' Company. Earlier, the respondent initiated proceedings under the Workmen's Compensation Act, 1923, which was terminated by the judgment of this Court in Appeal No.94 of 1964 disposed

of on 9th September, 1965, whereafter he filed the suit. Objection was raised that the suit is barred under Article 22 of the Limitation Act. It was held by a Division Bench of this Court that filing of an application with the Factory Inspector for claim in tort can by no stretch of argument be said to be a bona fide proceedings fit for the condonation of the delay under section 14 of the Limitation Act. The rule laid down in the case of Kilachand Devechand (supra) was followed in the case of Asmy Trading Company v. Shahadra Ltd. PLD 1975 Kar. 209 where it was held that the plaintiff was not prosecuting the suit in the lower Court with due diligence and in good faith as the said plaintiff failed to serve a prior notice on the Registrar which omission was held to be a clear case of lack of diligence. By now, it is well-settled that in order to avail of the provisions of section 14 of the Limitation Act, the plaintiff must show that he was diligently pursuing another civil proceedings whether in the Court of first instance or in a Court of appeal against the same party bona fide and that the Court for defect of jurisdiction or other cause of like nature was unable to entertain the same. (see Imdad Ali and 4 others v. Abdul Rashid and 6 others 1983 CLC 1346.”

13. In the case of WAPDA through Authorised Attorney and 4 others versus Messrs CRESCENT GROUP OF SERVICES through Authorised Person and others (PLD 2013 Lahore 221) this Court while dealing with similar proposition held as under :-

“7. So far as the legal contentions are concerned. For recovery of amount in lieu of work done, Article 56 of the Limitation Act is applicable and that the proceedings before Wafaqi Mohtasib are concerned. As Wafaqi Mohtasib is not a court, therefore the benefit of section 14 of the Limitation Act can also not be given to a person, who consumes any time before Wafaqi Mohtasib. Therefore, I fully agree with the arguments advanced by learned counsel for the appellants. I find that benefit of section 14 of the Limitation Act, 1908 cannot be claimed by a person who consumed time before Wafaqi Mohtasib as Wafaqi Mohtasib is not a Court, therefore time consumed there cannot be excluded from the prescribed period for filing of a lis.”

14. So far judgment in the case of *Muhammad Jahangir’s supra* is concerned, it is observed that though while dealing with the issue relating to the recovery of balance amount and the security it was held by this Court that in the circumstances Article 115 of the “Act, 1908” would come into play being the residuary article but even if we proceed on the same premises the cause of action clearly accrued to the respondent when he approached the Federal Ombudsman through complaint in the year 2000. In that eventuality too suit should have been instituted in the year 2003 but it is not so.

15. There are though concurrent findings of facts recorded by both the courts below but such findings are clearly the outcome of gross misreading and non-reading of evidence. The scope of revisional jurisdiction is hedged in Section 115 of “C.P.C.” and though ordinarily concurrent findings of facts are not disturbed but such findings are neither sacrosanct nor it is an inflexible rule that despite observing material flaws, the revisional court will abdicate to exercise its jurisdiction. The judgments passed by the courts below are not based on proper appraisal of evidence and the learned Civil Judge, while decreeing the suit of the respondent has grossly misread the evidence as already noted hereinabove. The appellate court in the circumstances, while upholding the judgment and decree of trial court thus committed a material irregularity. This Court under Section 115 of “C.P.C.” is thus obliged and fully competent to correct such error in exercise of its revisional jurisdiction. Needless to observe that when once it is established on the record that concurrent findings are fraught with legal infirmities, it becomes the bounden duty of court exercising revisional powers to curb and stifle such illegalities and material irregularities. Reference in this respect, if needed, can be made to *Malik MUHAMMAD KHAQAN versus TRUSTEES OF THE PORT OF KARACHI (KPT) and another* (2008 SCMR 428) and *IMAM DIN and 4 others versus BASHIR AHMED and 10 others* (PLD 2005 Supreme Court 418).

16. For the foregoing reasons, the instant petition is **allowed**, impugned judgments and decrees are set aside, as a result thereof, suit instituted by the respondent shall stand **dismissed** with no order as to costs.

(MIRZA VIQAS RAUF)
JUDGE

APPROVED FOR REPORTING

JUDGE