

Judgment Sheet

IN THE LAHORE HIGH COURT,
LAHORE

(JUDICIAL DEPARTMENT)

C.M.No.72-C of 2010 in RSA No.146 of 2006

Government of Pakistan through Secretary Ministry of Housing and Works

Vs.

Muhammad Anwar Khan, etc.

JUDGMENT

Date of Hearing	26.06.2023
Applicant by:	Mian Khalid Habib Elahi, Advocate.
Respondent No.1 by:	Mr. Manzoor Hussain Dogar, Advocate.
Respondents No.2 to 5	Mr. Waqar Saeed Khan, Assistant Advocate General.

MUHAMMAD RAZA QURESHI, J. This is an Application under Section 12(2) of the Code of Civil Procedure, 1908 (the “CPC”) calling into question the legality, validity and propriety of the Judgment and Decree dated 15.12.2006 passed by this Court in Regular Second Appeal No.146 of 2006, which was filed against the Judgment and Decree dated 18.03.2006 passed by learned Additional District Judge, Mianwali being Appellate Court and Judgment and Decree dated 14.06.2005 passed by learned Senior Civil Judge, Mianwali, being Trial Court.

2. The instant Application has been filed on behalf of Federation of Pakistan through Secretary, Ministry of Housing and Works, Islamabad. The contention of the Applicant is that Suit for recovery of an amount of Rs.347,562.70 along with 20% compound interest and damages of

Rs.200,000/- was not maintainable. According to learned counsel for the Applicant, the Suit was filed on 23.06.1999 by Muhammad Anwar Khan (“**Respondent No.1**”) against Government officials, namely, (i) Secretary Works Division Pak PWD Central Islamabad, (ii) Director General Pakistan PWD Central, Islamabad, (iii) Chief Engineer Central Zone (C.Z.) Pak PWD Islamabad and (iv) Executive Engineer Pak PWD Central Division Sargodha impleaded in the Suit as Defendants No.1 to 4. According to learned counsel, admittedly though the afore-referred Government officials were impleaded but Federation of Pakistan through its Secretary was never impleaded in the Suit, whereas in terms of Section 79 of the CPC, the Suit could have only been filed by impleading Federation of Pakistan as a party. Reliance in this regard has been placed upon the judgments reported as Province of the Punjab through Member Board of Revenue, (Residual Properties), Lahore and others vs. Muhammad Hussain through legal heirs and others (PLD 1993 SC 147), Government of Balochistan, CWPP&H Department and others vs. Nawabzada Mir Tariq Hussain Khan Magsi and others (2010 SCMR 115) and Secretary, B. & R., Government of West Pakistan and 4 others vs. Fazal Ali Khan (PLD 1971 Karachi 625).

3. Seeking support from judgments referred *supra*, learned counsel for the Applicant submits that it was erroneous to sue officers of Federation, that too by mentioning their official title whereas the mandate of law commands that they could have only been sued through Pakistan. Further contends that the Appeals filed by official Respondents No.2 to 5 having no nexus with the relevant Department, was collusive

and fraudulent as they had no legal competence or capacity to file any Appeal against the Judgment and Decree passed by the Trial Court, therefore, the subsequent Appeals before the District Court and this Court were incompetent and not maintainable. Reliance in this regard is placed upon the Judgment reported as Rehmat Ali vs. Additional Deputy Commissioner and others (1990 ALD 222(1)), therefore, according to learned counsel, the proceedings throughout were sham, illegal, based upon misrepresentation and the Judgments and Decrees throughout suffered from want of jurisdiction and are liable to be recalled in exercise of powers under Section 12(2) of the CPC.

4. Conversely, learned counsel for Respondent No.1 submits that Suit was filed by Respondent No.1 on account of breach of terms of contract dated 24.06.1996 and Respondent No.1 sought recovery of amount along with compound interest and damages and institution of Suit against the official Respondents was maintainable as it was inconsequential whether Federation of Pakistan was impleaded in the Suit or not. Learned counsel contends that the Judgment and Decree was passed by Trial Court on 14.06.2005 and thereagainst the official Respondents filed an Appeal, which was dismissed through Judgment and Decree dated 18.03.2006 passed by the Appellate Court being barred by time. The said official Respondents filed Regular Second Appeal before this Court and this Court through Order dated 15.12.2006 also dismissed the Appeal in *limine* by holding that Appellate Court rightly dismissed the Appeal being barred by time. One of the official Respondents, instead of assailing the Order passed by this Court before

C.M.No.72-C of 2010 in RSA No.146 of 2006

the Supreme Court of Pakistan rather preferred to file a Writ Petition in his personal name, which was dismissed in *limine* on 18.03.2009 being not maintainable. Thereafter, the said individual filed an Intra Court Appeal, which was also dismissed on 01.04.2009. The said Order was assailed before the Supreme Court of Pakistan through C.P.No.858-L/2009, which was also dismissed through Order dated 10.11.2009, therefore, according to learned counsel, the Impugned Judgment and Decree has attained finality up till the Supreme Court of Pakistan and Application under Section 12(2) of the CPC is not maintainable and if it was to be instituted, the same was expected to be filed before the Supreme Court of Pakistan.

5. The arguments of learned counsel for the parties have been heard and record has been perused with their able assistance. The primary question emanating from the proceedings seeking determination by this Court is maintainability of the subject matter Application under Section 12(2) of the CPC before this Court.

6. At the outset, it is observed that the contention of learned counsel for the Respondent No.1 that Judgment and Decree passed by Trial Court has attained finality up till the Supreme Court of Pakistan is inherently flawed as the proceedings out of Writ Petition went upto the Supreme Court were barred by law on two grounds; *firstly*, the Petitioner therein, namely, Mushtaq Hussain Bukhari had neither personal nor official capacity to initiate those proceedings against the Judgment and Decree passed by the Trial Court, that is why, his Writ Petition was

C.M.No.72-C of 2010 in RSA No.146 of 2006

dismissed in *limine* being not maintainable. *Secondly*, the Intra Court Appeal was dismissed thereagainst on the ground that appellate proceedings had already taken place and same was not maintainable and barred by law in terms of Section 3(2) of the Law Reforms Ordinance, 1972 and the Supreme Court through Order dated 10.11.2009 had upheld the Order passed in Intra Court Appeal. Therefore, it cannot be argued before this Court that Judgment and Decree had attained finality up till the Supreme Court of Pakistan.

7. The Suit filed by the Respondent No.1 without impleading Federation of Pakistan appears to be inherently defective in terms of Section 79 of the CPC as well as judgments referred *supra*, therefore, the Applicant's contention seems to be persuasive that any Appeal filed by official Respondents in their official or personal capacity against the Judgment and Decree passed by the Trial Court were hit by ***Rehmat Ali's case supra***.

8. Now adverting to the main question as to the maintainability of an application under Section 12(2) of the CPC, certainly, where a person challenges the validity of a judgment, decree or order on the plea of fraud, misrepresentation or want of jurisdiction, he shall seek his remedy by making an application to the court which had passed the final judgment, decree or order and not by a separate Suit. In view of the aforesaid position of law, it is to be determined that in the instant case, which Court shall be considered to have passed the final judgment and decree. Under the law, a judgment and decree passed by the trial court is

appealable before the higher forum or court of appeal. Once the court of appeal adjudicates the controversy on point of law, fact or both and affirms, amends, varies or reverses the judgment and decree passed by the trial court, the realizable or executable judgment and decree is the one passed by the appellate court. It is simple for the reason that the judgment and decree passed by the trial court stands absorbed into the judgment and decree passed by the appellate court and the moment the judgment, decree or order is engrossed by higher forum's judgment, decree or order the one passed by the lower court or forum in hierarchy losses its identity as it is swallowed by the deliberation of law or fact appreciated by the higher forum and the judgment, decree or order stands merged into judgment, decree or order passed by the appellate forum. Reliance in this regard is placed upon the judgment reported as F.A.Khan vs. The Government of Pakistan (PLD 1964 SC 520), Maulvi Abdul Qayyum vs. Syed Ali Asghar Shah and 5 others (1992 SCMR 241) and Khawaja Muhammad Yousaf vs. Federal Government through Secretary, Ministry of Kashmir Affairs and Northern Areas (1999 SCMR 1516). The concept of doctrine of merger has more elaborately and authoritatively been explained in the judgment reported as Nasarullah Khan and others vs. Mukhtar-ul-Hassan and others (PLD 2013 SC 478) where Supreme Court held that 'merger' of a judgment, decree or order means "*that it is integrated, implanted, inculcated, infixd and instilled into decree of the higher forum and becomes the decree/order of the later forum for all legal intents and implications.*"

9. Therefore, in cases where a remedy of appeal/revision is provided against a judgment, order and decree, or a remedy of writ is availed, the appellate/revisional/constitutional forum records reasons on the consideration of the issues of law and/or fact and the judgment, decree or order of the subordinate court/forum will merge into the decision of the appellate court etc. irrespective of the fact that such judgment reverses, varies or affirms the decision of the subordinate court/forum and its decision will be operative and capable of enforcement on the principle of merger and the application under Section 12(2) of the CPC will be maintainable before the appellate/revisional/ constitutional forum, as the case may be. This will be the situation where an appeal/revision/constitutional petition is accepted and judgment etc. is reversed, varied, modified or affirmed on merits.

10. The exception to this rule is where an appeal/revision/writ petition is not disposed of on merits, but on some grounds other than on merits, the exception to the rule of merger comes into field. The rule of merger becomes inapplicable where an appeal etc. has been dismissed on technical ground, such as dismissal for non-prosecution, lack of jurisdiction, lack of competence, barred by law or barred by time. In such a case where controversy falls within the noted exceptions, the forum for an application under Section 12(2) of the CPC is the one against whose decision the matter has come and been disposed of in the above manner by the higher forum.

11. In the judgment reported as Sahabzadi Maharanisa and another vs. Mst. Ghulam Sugarn and another (PLD 2016 SC 358), the Supreme Court of Pakistan amongst others framed question No.(ii) in paragraph 8 of the judgment as that “*Where an appeal/revision/writ is not disposed of on merits but on some other grounds*”, what will be the fate under principles of merger for determination of forum to file an application under Section 12(2) of the CPC and in paragraph 9 concluded as under:

(ii) *In the situation mentioned at serial No.(ii) above, there are certain exceptions to the rule of merger which (rule) shall not apply, where an appeal etc. has been dismissed:- (i) for non-prosecution; (ii) for lack of jurisdiction; (iii) for lack of competence/ maintainability; (iv) as barred by law; (v) as barred by time; (vi) withdrawal of the matter by the party; (vii) for lack of locus standi; (viii) decided on the basis of a compromise, if the very basis of the compromise by the party to the lis or even a stranger showing prejudice to his rights is not under challenge on the ground of fraud; (ix) is rendered infructuous or disposed of as having borne fruit; (x) abatement; (xi) where the writ is dismissed on the ground of availability of alternate remedy; (xii) where the writ is dismissed on the point of laches. It may be mentioned that such exceptions shall also be attracted to the decision(s) of the Supreme Court, where applicable. However where the case falls within the noted exceptions the forum for an application under Section 12(2) of the C.P.C. is the one against whose decision the matter has come and been disposed of in the above manner by the higher forum;*

[emphasis supplied]

12. Now applying the legal position in the facts and circumstances of the instant case, the first forum which passed defective Judgment and Decree was the Trial Court. The said Judgment and Decree was assailed before the lower Appellate Court through an incompetent Appeal, which dismissed the said Appeal on different ground i.e. being barred by time and when the said Order of lower Appellate Court was assailed before

this Court in a time barred Regular Second Appeal, the Judgment passed by the Appellate Court declaring the Appeal filed by the official Respondents being barred by time, the rule of merger became inapplicable as the Judgment and Decree passed by the Trial Court actually never merged into Order/Judgment passed by the lower Appellate Court as it neither adjudicated controversy on fact nor on law and dismissed the Appeal being barred by time and likewise, before this Court which upheld the Order passed by the lower Appellate Court. Therefore, the final and only Court which passed the Judgment on merits in terms of Section 12(2) of the CPC is not this Court rather it is the Trial Court/Civil Court as the Judgment and Decree passed by it never merged into Judgment/Order passed by the lower Appellate Court or this Court.

13. Therefore, it is held that the instant Application under section 12(2) though maintainable but was not to be instituted before this Court, rather it should have been instituted before the Trial Court, which is the sole forum who determined merits of the case and was never reversed, modified or affirmed on merits by any subsequent forum and the case of the Applicant clearly falls under the exceptions contained in paragraph No.9 (ii) of *Sahabzadi Maharunisa's case supra*.

14. It is needless to mention that the Applicant in view of clear position of law under Section 79 of the CPC and judgments referred *supra* has an independent remedy under Section 47 of the CPC to question and challenge the executability of the subject matter Judgment

C.M.No.72-C of 2010 in RSA No.146 of 2006

and Decree passed by the Trial Court against Federation of Pakistan as the Suit filed by the Respondent No.1 was defective in its form and substance.

15. Since this Court has held that instant Application under Section 12(2) of the CPC is not maintainable before this Court, therefore, the same is **returned** to the Applicant/Federation of Pakistan under Order VII rule 10 of the CPC for the reasons and grounds discussed in the preceding paragraphs for its presentation before the Trial Court. If the Applicant files instant application along with an application seeking condonation of delay, the Court seized with the matter shall seek guidance from judgment reported as Abid Kamal vs. Muddassar Mustafa and others (2000 SCMR 900) and shall sympathetically consider request for condonation of delay in filing of the application, because the Applicant consumed some time in pursuing proceedings before this Court.

16. Application is **Returned**.

**(MUHAMMAD RAZA QURESHI)
JUDGE**

Approved for Reporting.

JUDGE

Syed Zameer