

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Qazi Faez Isa
Mr. Justice Sardar Tariq Masood

CIVIL APPEAL NO. 20 OF 2014

(Against the judgment dated 06.05.2013 passed by Peshawar High Court, Peshawar in C.R. No. 221 of 2012)

Administrator Municipal Corporation, Peshawar

Appellant

Versus

Taimoor Hussain Amin and others

Respondents

For the appellants(s):

Mr. Sabah ud Din Khattak, ASC
Mr. Adam Khan, AOR (Absent)
Muhammad Sadiq, Superintendent

For the applicant:

(CMA No. 1199/2015)

Mr. Babar Awan, Sr. ASC
Syed Rifaqat Hussain Shah, AOR

Respondent No. 1:

Mr. Muhammad Junaid Akhtar, ASC

Respondent No. 2:

Mr. Laiq Khan Swati, ASC
Mr. Tariq Aziz, AOR

Respondent No. 3:

Ex parte

Date of Hearing:

11.02.2020

JUDGMENT

Qazi Faez Isa, J. Respondent Nos. 1 and 2 ("**the Plaintiffs**") filed a suit on 21st April 2011 stating that they had purchased, *vide* sale mutation No. 8482 attested on 11th January 2008, property measuring 1 *kanal* and 10 *marlas*, bearing *khasra* No. 172, situated in Mouza Tukhra No.1, Peshawar City ("**the Property**"). Four functionaries of the Municipal Corporation, Peshawar ("**Corporation**") were arrayed as defendants. However, the persons from whom the Plaintiffs bought the Property were not joined as parties. The Plaintiffs sought a declaration that they were the owners of the Property, sought its possession from the 'illegal possession' of the Corporation and recovery of twenty thousand rupees per month from the Corporation. The Corporation filed its written statement wherein it denied that the Property was purchased by the Plaintiffs and stated that it was owned by the Corporation (and before it came into existence by its predecessor in interest,

the Municipal Committee Peshawar) and shops had been constructed by it and the Corporation received rent from the tenants of these shops.

2. The learned Civil Judge-III, Peshawar decreed the suit *vide* judgment and decree dated 21st April 2011 primarily on the ground that the Corporation had not established its ownership of the Property and by placing reliance on the said sale mutation No. 8482. The Corporation preferred an appeal however the learned Additional District Judge, *vide* judgment dated 19th December 2011, dismissed it. Thereafter, against the two concurrent judgments of the Subordinate Courts, a civil revision was filed before the High Court under section 115 of the Code of Civil Procedure ("**Code**") which was dismissed through the impugned judgment dated 6th May 2013 on the ground that "*revisional jurisdiction is very limited*" and that concurrent findings cannot be upset even if a different view of the matter can be taken. Leave was granted *vide* order dated 2nd January 2014 and parties were directed to maintain status quo.

3. With the instant appeal, the appellant Corporation filed Civil Miscellaneous Application No. 7959 of 2013 seeking permission to bring on record documents showing ownership of the Property since the year 1895 of the Municipal Committee Peshawar and then of the Corporation. On 3rd December 2019 a fresh notice in respect of this Application was issued and the respondents were permitted to file concise statement opposing it, but they did not do so.

4. Civil Miscellaneous Application No. 1199 of 2015 was filed by Khurram Zar, seeking to be impleaded as a necessary party on the ground that the Property was purchased through open auction by his father Mir Wali in the year 1961 and Mir Wali had in turn transferred it to his son Khurram Zar, therefore, Khurram Zar should have been arrayed as a party before the Trial Court, the Appellate Court and the Revisional Court. An application under section 12(2) of the Code was submitted by Khurram Zar before the High Court which was disposed of by the learned Judge saying that as the Revision had already been decided by the High Court and as its judgment had been assailed before the Supreme Court therefore an application be submitted either before the Supreme Court or the Trial Court. Consequently, Khurram Zar filed the said CMA No. 1199 of 2015 under

Order V Rule 2(2) of the Supreme Court Rules, 1980 read with Order I Rule 10 of the Code. Khurram Zar has filed another application (Civil Miscellaneous Application No. 1928 of 2015) to bring on record the transfer of title from his father Mir Wali to himself.

5. Mr. Sabah-ud-Din Khattak, the learned counsel representing the appellant Corporation, states that the plaint had relied upon sale mutation No. 8482 (Exhibit PW-1/4) but the Plaintiffs did not mention and disclose from whom they had purchased the Property nor provided the particulars of the title of the purported sellers. By referring to mutation No. 8482, the learned counsel submits that the Plaintiffs are shown to have purchased the Property on 11th January 2008 for a sale consideration of six million rupees from Qazi Qamar-ud-Din, Abida Khatoon and Jamila Bano ("**the Sellers**") who are respectively the son and daughters of the late Nizam-ud-Din. Serial No. 7665, which was stated to be an extract from the mutation register (Exhibit PW-1/1) and on which the Plaintiffs relied showed that the said Nazim-ud-Din got 4 *kanals* and 11 *marlas* of land pursuant to "RL-II" and letter dated 3rd April 1972 of the Assistant Secretary of the Board of Revenue, however, the learned counsel submits, the said documentation was not produced nor was it established that the land given to Nazim-ud-Din was the same as the Property. The learned counsel further states that the Plaintiffs did not array the Sellers who were necessary parties; did not disclose the particulars of sale; did not produce the sale agreement/deed in their favour; did not bring on record proof of payment of sale consideration to the Sellers and did not produce the title documents of the Sellers. The possession of the Property admittedly throughout remained with the Corporation and the Corporation was receiving rent from the shops constructed on the Property which strongly indicated the Corporation's ownership of the Property even if their Application through which the documents showing the Corporation's proof of ownership is not granted by this Court, the learned counsel said concluding his submissions.

6. Messrs Muhammad Junaid Akhtar and Laiq Khan Swati, the learned counsel for respondent Nos. 1 and 2 respectively, support the impugned judgment and state that the learned Judge of the High Court was right in upholding the two concurrent judgments of the Subordinate Courts; that the matter was not one that could have been agitated before the High Court in

its revisional jurisdiction; that the Plaintiffs were the *bona fide* purchasers for value without notice of the subject property; that the Corporation had till date not assailed the sale mutation No. 8482 which continues to stand in favour of the Plaintiffs and that as per the Corporation's own record the Plaintiffs are shown owners of the Property.

7. Mr. Babar Awan, learned counsel representing Khurram Zar, states that Khurram Zar's father Mir Wali was the successful bidder in an open auction and was issued Permanent Transfer Deed dated 15th August 1961 in respect of the Property, and that Mir Wali transferred the Property to his son on 14th January 1961, therefore, Khurram Zar was a necessary party to the suit filed by the Plaintiffs but was not joined as a party thereto, and he was also not arrayed as a respondent in the Appeal and nor in the Revision.

8. We have heard the leaned counsel for the parties and with their assistance examined the documents on record. It would be appropriate to first attend to the Civil Miscellaneous Application No. 1199 of 2015 submitted by Khurram Zar because if it is allowed all three judgments will have to be set aside and the matter remanded to the Trial Court for decision afresh after hearing Khurram Zar.

9. Khurram Zar claims that his father was the successful bidder when the Property was auctioned and he acquired title to it from his father when he transferred it to him. The purported auction and transfer is stated to have taken place in June 1961, however, neither the purported original owner (Mir Wali) nor his son Khurram Zar agitated their rights in respect of the Property till the filing of the application under section 12(2) of the Code before the High Court on 5th August 2013. For fifty-two years Khurram Zar remained silent. Khurram Zar offers no explanation for his inexplicable forbearance. After a period of fifty-two years he seeks enforcement of any rights which have become time-barred. Moreover, from the documents attached with his applications it can not be discerned that the land purchased in auction is the same as the Property. We specifically inquired from Mr. Babar Awan whether he has any document to connect the auctioned land with the Property and the learned counsel states that save the documents already filed no other document is available. The documents of the auction have also not been filed to consider both the genuineness of

the auction and to ascertain the particulars of the auctioned land and whether it is the same as the Property. CMA Nos. 1199 and 1928 of 2015 are therefore dismissed.

10. As regards CMA No. 7959 of 2013 and the documents sought to be brought on record through this application by the Corporation we are of the opinion that this Appeal can be decided without considering these documents. In doing so we would also avoid the controversy whether these documents could be introduced at this juncture. CMA No. 7959 of 2013 is accordingly disposed of. We may however observe that it is regrettable that these documents were not exhibited at the relevant time by the concerned officer/officials of the Corporation and this neglect we shall discuss further after determining the merits of this Appeal.

11. The Plaintiffs claimed that they had purchased the Property from the Sellers for six million rupees through sale mutation No. 8482, which was attested on 11th January 2008. However, they did not array the Sellers as parties to the suit. Evidence of the payment of the sale consideration was also not produced. Admittedly, despite their purported purchase of the Property its possession remained with the Corporation which continued to receive rent from the shops constructed on the Property. The Plaintiffs did not offer any explanation why they bought the Property when neither its physical nor constructive possession was delivered to them by the Sellers, nor was the right to collect rent from the tenants of the shops given to them. At the time of the purported sale, subsequently and throughout rent was received by the Corporation and at no stage was it received either by the Plaintiffs, the purported Sellers or Nizam-ud-Din. The Plaintiffs also did not establish the entitlement of Nizam-ud-din to the Property. They did not summon any official/officer from the Settlement Department which had purportedly issued the said 'RL-II' and letter nor produced the documentation of ownership in favour of Nizam-ud-Din or his successors-in-interest, the Sellers. The learned Civil Judge-III, Peshawar unfortunately disregarded all these shortcomings; he also placed the burden of proof on the Corporation and decreed the suit because the Corporation had failed to establish its ownership of the Property. The fact that the Corporation did not properly defend the suit is evident from the fact that it considered it necessary to file the abovementioned CMA No.7959 of 2013, seeking to file in this Court

documents attached therewith, documents which should have been filed and exhibited in the suit. The Corporation also did not seek to bring *additional evidence* before the Appellate Court (Order XLI Rule 27 of the Code). However, such failure of the Corporation does not help the Plaintiffs, whose case had to succeed on its own merits, and not on account of any shortcoming in the Corporation's defence.

12. The *burden of proof* lay on the Plaintiffs (Articles 117, 118 and 119 of the Qanun-e-Shahadat Order, 1984) to prove, firstly, that the Property was bought by them, secondly, that they had bought it from the Sellers and, thirdly, that the Sellers were its owners, however, the Plaintiffs did not establish any of this. The Plaintiffs simply relied on sale mutation No. 8482, however, this mutation was denied by the Corporation therefore the Plaintiffs, the beneficiary of the purported sale, had to establish the original sale transaction; a well established principle and referred to in a number precedents of this Court, some of these cases (prior to the judgment of the judgment dated 21st April 2011 of the learned Civil Judge) are: *Muhammad Akram v Altaf Ahmad* (PLD 2003 Supreme Court 688), *Fida Muhammad v Murid Sakina* (2004 SCMR 1043), *Muhammad Hussain v Wahid Bakhsh* (2004 SCMR 1137), *Arshad Khan v Resham Jan* (2005 SCMR 1859), *Muhammad Afzal v Matloob Hussain* (PLD 2006 Supreme Court 84) and *Abdul Rasheed v Manzoor Ahmad* (PLD 2007 Supreme Court 287); all these precedents were disregarded by the learned Civil Judge.

13. There was yet another aspect of the case which was overlooked by the learned Civil Judge. Article 126 of the Qanun-e-Shahadat Order provides that, when another "*is in possession [of property], the burden of proving that he is not the owner is on the person who affirms that he is not the owner.*" In this case the Plaintiffs themselves alleged that the Corporation was in possession and receiving rent from its tenants. The Corporation had constructed shops on the Property and was receiving rent for years from the tenants of the said shops. There was thus sufficient evidence on record to raise the presumption of the Corporation's ownership of the Property. The Plaintiffs also offered no explanation why they bought the Property without receiving its physical or constructive possession nor made any effort to receive rent from the tenants to whom the shops constructed on the Property were rented out by the Corporation.

14. The mistakes committed by the learned Civil Judge were sustained by the learned Judge hearing the Corporation's Appeal and then by the learned Judge of the High Court when hearing the Corporation's Revision. The learned Judge of the High Court also erred by holding that the case did not fall within the parameters of section 115 of the Code. Section 115 also empowers the High Court "*to make such order in a case*" in which a subordinate Court has, "*acted in the exercise of its jurisdiction illegally or with material irregularity*". The illegalities and material irregularities committed by the learned Civil Judge have already been enumerated above.

15. There is yet another aspect of the case which escaped the attention of the learned Judges whose judgments are assailed in this Appeal. The Plaintiffs asserted that they bought the Property *vide* sale mutation No. 8482, which they stated was attested on 11th January 2008, however, they filed the suit on 21st April 2011, that is, after three years, three months and nine days. The Corporation in its written statement asserted that the suit was not maintainable but did not take a specific objection that it was filed beyond the period of limitation prescribed in the first schedule to the Limitation Act, 1908. The plaintiffs actually wanted the specific performance of the purported contract through which they had allegedly bought the Property from the Sellers, though they did not specifically claim this, probably because the prescribed period of limitation *for specific performance of contract* is three years (Article 113 of the first schedule of the Limitation Act). The prescribed period of limitation for a particular type of suit cannot be avoided by not referring to the specific relief that is sought and if this is done the actual nature of the suit will have to be seen. The plaintiffs clearly sought specific performance of the contract entered into with the Sellers and / or sought compensation for the *breach* of contract as the Sellers had failed to deliver possession to them for which the prescribed period of limitation is also three years (Article 115 of the first schedule of the Limitation Act). The Plaintiffs had also sought *profits* derived from the Property, that is the rent from the tenants of the shops constructed on the property, for which the prescribed period of limitation is also three years (Article 109 of the First Schedule of the Limitation Act). The Plaintiffs also did not seek the benefit of any of the permissible *exclusion of time* or mode of *computation of period of limitation* (sections 4 to 25 of the Limitation Act). The suit was filed after

three years, therefore, it was barred by the prescribed period of limitation. Section 3 of the Limitation Act mandates that a suit "*shall be dismissed, although limitation has not been set up as a defence*". The learned Judge of the Trial Court was legally obliged to consider whether the suit was filed within, "*the period prescribed therefore by the first schedule*" (section 3, Limitation Act) but did not do so and this error was perpetuated by the Appellate Court and then by the Revisional Court.

16. The judgments of the learned Civil Judge III, Peshawar and that of the learned Additional District Judge VII, Peshawar were not sustainable in fact or law. The learned Judge of the High Court should therefore have exercised revisional powers of the High Court under section 115 of the Code as the Subordinate Courts had acted in the exercise of the jurisdiction vested in them illegally and with material irregularity as they had misplaced the burden of proof which lay on the Plaintiffs and instead placed it on the Corporation; failed to appreciate that the Plaintiffs did not produce evidence of their ownership; did not produce evidence of the ownership of the Sellers from whom they allegedly bought the Property; failed to note that the Sellers were not arrayed as parties to the suit; failed to appreciate that the Plaintiffs did not produce evidence of the payment of sale consideration; and disregarded the presumption of ownership of the Corporation which was and had been receiving rent from the tenants of the shops constructed on the Property. The High Court was also unduly impressed by the fact that the Subordinate Courts had concurrently decided in favour of the Plaintiffs, which in itself is no criteria when both the judgments were in contravention of fact and law.

17. For the reasons mentioned above, Civil Appeal No. 20/2014 is allowed, the judgments of the Subordinate Courts and the High Court are set aside and the suit filed by the Plaintiffs (the respondent Nos. 1 and 2 herein) is dismissed.

18. There is an aspect noted by us which needs to be addressed before we part with this case. This case involved an apparent attempt to grab valuable public property by two sets of persons on the basis of their unsubstantiated claims. We have already mentioned our dismay at the manner in which the Corporation defended the suit. Public properties are being lost to nefarious

elements, often times in collusion with the concerned authorities, because the applicable law is not adhered to.

19. At the relevant time the applicable law governing the Municipal Corporation Peshawar was the Khyber Pakhtunkhwa Local Government Ordinance, 2001 which in its section 123 provided mandatory stocktaking *"once in every year"* of *"movable and immovable properties of the concerned local government"* and a report was required to be submitted containing: *"(a) particulars of the properties held during the preceding year; (b) total value of the property, annual return there from and change in its value, if any; (c) particulars of unserviceable articles; (d) particulars of losses, if any; and (e) proposals for utilization, development and improvement during the following year."*

20. The applicable law at present is section 39 of the Khyber Pakhtunkhwa Local Government Act, 2013 (**"the Act"**), which also requires stocktaking by the City District Government Peshawar (the successor-in-interest of the Corporation) and such annual report must disclose: *"(a) particulars of the properties held during the preceding year; (b) total value of the property and annual return there from; (c) particulars of unserviceable articles and losses if any; and (d) plans for utilization, development and improvement during the following year."*

21. Previously the Municipal Corporation Peshawar and now the City District Government Peshawar has consistently failed to comply with the abovementioned mandatory statutory provisions, which is all the more regrettable since the said provisions are meant to safeguard public properties and the public interest. The representatives of the people who make laws were undoubtedly aware of the violation of section 123 of the Khyber Pakhtunkhwa Local Government Ordinance, 2001, and the non-submission of the requisite reports, therefore, they added section 41 to the Act, reproduced hereunder:

"41. Personal responsibility with regard to loss and waste. (1) Every official or servant of a local government, every member of a local council, and every person charged with administration and management of property of a local government shall be personally responsible for any loss or waste, financial or otherwise, of any property belonging to a local government which is a direct consequence of decisions

made by him personally or under his directions in violation of this Act or any other law for the time being in force or which accrues as a result of his negligence or misconduct, and shall be liable to pay such surcharge as may be determined by the respective Accounts Committee and such amount shall be recoverable as arrears of land revenue."

Unfortunately, it appears that the legislative measures taken to protect public properties continue to be disregarded and public properties are being lost. One obvious cause behind such loss is not disclosing the properties and their loss by not undertaking the requisite stocktaking and submitting reports of public properties. If the concerned authorities of the then Municipal Corporation Peshawar and now the City District Government Peshawar had properly identified the ownership of their public properties as stipulated in the referred to provisions they would have succeeded in getting the suit dismissed at the outset rather than waiting for this Appeal to be preferred before this Court.

22. We therefore avail the opportunity presented by this case and direct that, every Village, Neighbourhood, Tehsil, Town, District and City District local government should comply with section 39 of the Act and submit the requisite reports, and if there is any loss or waste of local governments' properties to taken action as mentioned in section 41 of the Act against *"every official or servant of a local government, every member of a local council, and every person charged with administration and management of property of a local government"*. This will ensure protection of public properties and provide deterrence against their *"negligence or misconduct"* and to make them liable for *"any loss or waste"*. If the Act is substituted by any other legislation the directions issued herein to protect and preserve public properties shall be deemed to have been issued with regard to similar provisions thereunder.

23. The office to send a copy of this judgment to the Chief Secretary, Khyber Pakhtunkhwa and the Secretary Local Government, Election and Rural Development Department, Khyber Pakhtunkhwa who is directed to issue written instructions to every Village, Neighbourhood, Tehsil, Town, District and City District local government and direct them to ensure compliance with sections 39 of the Act and to submit the requisite reports thereunder, with copies thereof to the said Secretary and if there is any loss

or waste of properties direct them to take action against *"every official or servant of a local government, every member of a local council, and every person charged with administration and management of property of a local government"* and to make them personally liable in terms of section 41 of the Act.

24. To further and better preserve and protect public properties and to have easy access to particulars of all public properties in the Province of Khyber Pakhtunkhwa. The Government of the Khyber Pakhtunkhwa is directed to prepare and maintain a complete physical and electronic/digital record of all public properties, which shall include, making requisite entries, if not already made, in the revenue/land record in the name of the concerned local government, and mention its area, abutment, coordinates and any other particulars for their easy identification. The record with regard to every local government's public properties must be permanently maintained by them and copies thereof kept at a centralized location by the office of the Secretary Local Government, Election and Rural Development Department Khyber Pakhtunkhwa in digital/electronic form.

25. The Chief Secretary and Secretary Local Government, Election and Rural Development Department Khyber Pakhtunkhwa to submit written confirmation under their own signatures within one month from the date of receipt of this judgment, through the Advocate-General Khyber Pakhtunkhwa, that compliance with the directions in paragraph 23 above has been made and to submit a similar report within six months that the directions in paragraph 24 above have been complied with throughout the Province of Khyber Pakhtunkhwa.

Judge

Judge

Bench-IV
Islamabad:
11.02.2020

Approved for Reporting
(Atif)