Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

CIVIL REVISION NO. 01 OF 2021

Dr. Muhammad Hafeez Abbasi, etc.

Vs

Ali Asgar alias Aksar Khan

PETITIONERS BY: Mr. Muhammad Wajid Hussain Mughal, Advocate.

RESPONDENT BY: Ch. Asif Irfan, Advocate.

DATE OF HEARING**:** 04.06.2021.

==========

BABAR SATTAR, J.- The petitioner is aggrieved by order of the learned Additional District Judge dated 12.01.2021 pursuant to which he set aside order dated 02.10.2020 passed by the learned Civil Judge in relation to application under Order XXXIX Rules 1 and 2 of the Civil Procedure Code, 1908 **("CPC")** filed in a suit for possession under section 9 of the Specific Relief Act, 1877 **("Act").**

2. Learned counsel for the petitioners stated that the subject matter of suit is possession of suit property. That the respondent filed a suit under section 9 of the Act, seeking remedy for recovery of adverse possession. That the respondent's application

filed under Order XXXIX Rules 1 and 2 of CPC was dismissed by the learned trial Court vide order dated 02.10.2020 on the basis that the plaintiff/respondent has failed to establish possession of the suit property or the defendants/petitioners adversely enjoying the possession. The learned counsel for the petitioners further stated that it was the petitioners who established possession of the suit property as of 03.05.2019 on the basis of Bailiff's report appointed by the learned trial Court in the suit in which the petitioners were defendants No.1, 2 and 5. The learned counsel for the petitioners further stated that this is a third round of litigation in relation to the subject matter of this revision petition. That the learned Additional District Judge dismissed the appeal against order of the learned Civil Judge dated 02.10.2020, by short order dated 12.01.2021. But that subsequently a detailed order of the same date was issued accepting the appeal and setting aside the order dated 02.10.2020. The learned counsel further contended that the passage of short order dismissing the appeal from passage of subsequently detailed order on the same date admitting appeal and setting aside the order of the learned Civil Court was a material irregularity floating on the surface of the record. He further submitted that the learned Civil Court had correctly appreciated the law in relation to a suit for possession under section 9 of the Act, wherein the question of title is not to be considered and the court only needs to look into the question of possession and dispossession within a prescribed time period. That from the reasoning of the impugned order, it was manifest that the learned Additional District Judge misapplied himself on questions of law and took into account irrelevant considerations

such as the respondent's purported propriety rights in relation to the suit property.

3. The learned counsel for the respondent submitted that conflicting orders passed by the learned Additional District Judge on the same date can be explained as a typographical error but preference is to be given to the detailed order that included the reasoning of the court. And that it is settled law that no party is to suffer due to the actions of a court and consequently the fact that two conflicting orders were passed on the same date could not be held against the respondent. The learned counsel for the respondent then took this Court through the details of the litigation history between the parties which need not to be reproduced here as it is not germane to the question of law before this Court. His main contention on the merits of the case was that the respondent is claiming a right in relation to the suit property on the basis of a certified copy of record of rights. That presumption of truth attached to such record and it was to be given priority over the bailiff's report that was given weight by the learned Civil Court to conclude that the petitioners were in possession of the suit property and consequently the respondent had no *prima facie* case which led the learned Civil Court to dismiss the respondent's application under Orde XXXIX Rules 1 and 2 of CPC.

4. On 24.05.2021, this Court passed the following order:

> "While writing the judgment this Court feels that it needs further assistance from the learned counsel of the parties in

relation to proviso of section 9 of the Specific Relief Act, 1877 which states the following:

> *"No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed."*

In view of the said proviso, this Court would like the learned counsel for the parties to assist on the following questions:

(i) Was the appeal, the order in which has resulted in the instant revision petition, competent in the first place?

(ii) Does the order in relation to an application under Order XXXIX Rule 1 and 2 filed in a suit for possession under section 9 of the Specific Relief Act fall within the definition of "any order" referred to in the afore cited proviso of section 9 of the Specific Relief Act?

(iii) In the event that the appeal from which the instant revision has arisen is deemed to be incompetent in view of section 9 of the Specific Relief Act, can the instant revision petition be deemed to be writ petition for purposes of Article 199 of the Constitution?"

5. In responding to questions raised by this Court, the learned counsel for the petitioners contended that no appeal was competent against an order passed in a suit under section 9 of the Act. He relied on Jahangir Singh Vs. Hira Singh and others (A.I.R 1917 Lahore 21), Kanai Lal Ghose Vs. Jatindra Nath Chandra (A.I.R 1918 Calcutta 925) and Tassadaq Hussain Naqvi Vs Seth Muhammad Ismail and others (1987 MLD 2616). He submitted that there was one exception to the rule which was stated in Foujmal Manaji Vs. Bikhibai and another (A.I.R 1937 Sind 161) that after an order was passed, which was void and without jurisdiction being beyond four corners of an order that

can be passed in a suit under section 9 of the Act, such order being void order would be deemed not to have been passed under section 9 of the Act and would be appealable. He submitted that this narrow exception was relied upon by the learned Balochistan High Court in Sardar Imam Bakhsh and 3 others Vs. Mir Yar Muhammad Khan Rind and another (1993 CLC 1556) wherein receiver had been appointed for collection of mesne profit and that this exception was not attracted in the present case. He then contended that the order of the learned Civil Court was not passed in independent proceedings or suit but was passed in a suit under section 9 of the Act and proviso to section 9 that prohibits an appeal against such order would therefore be attracted. In relation to other questions posed by the Court, he relied on Mehar Dad Vs. Settlement and Rehabilitation Commissioner, Lahore Division, Lahore (PLD 1974 SC 193) and Muhammad Ayub Vs Obaidullah (1999 SCMR 394) to support the proposition that a revision could be treated as a writ in an appropriate case and he further relied on Ch. Gulzar Khan Vs. Saghir Ahmed (2004 MLD 402) and Anjuman Jamia Masjid Shuhda through Senior Vice-President Vs. Province of Punjab through District Officer (R), Sahiwal (2006 YLR 1363) for the argument that a void order could be challenged in a writ petition.

6. The learned counsel for the respondent candidly submitted that question of maintainability of appeal had been overlooked by the parties as well as the learned Additional District Judge. He further submitted that an objection to jurisdiction ought to be

determined at the earliest possible, particularly in view of section 21 of CPC and he relied on Sher Ali and 20 others Vs. The Manager, P.I.D.C Collieries Quetta (PLD 1973 Quetta 35). He further submitted that a revision could be converted into a writ by the court in the event that the request was made by the petitioner and that in the instant case no such request had been made.

7. It is apparent from the proviso of section 9 of the Act reproduced in order dated 24.05.2021 (para. 5 of the judgment) that no appeal or review lies from an order or decree passed in a suit instituted under section 9 of the Act. Let us reproduce excerpts of the relevant case law in this regard:

(I). Jahangir Singh Vs. Hira Singh and others (A.I.R 1917 Lahore 21)

"The order of the Court of first instance was admittedly made in execution of a decree passed under S. 9 of the Specific Relief Act; and as the decree itself was not appealable, the said order was not open to appeal to the higher Court. The learned District Judge consequently acted without jurisdiction in entertaining and adjudicating upon the appeal. This proposition of law is absolutely clear and if any authority were needed, I would refer to a judgment of this Court reported as Mohfuz Ali v. Birji Nand Kerat."

(II) Nawabzada Muhammad Umer Khan Vs. Muhammad Asif and others (PLD 1964 (W.P.) Peshawar 157).

"4. It will be seen that the last part of section 9 expressly prohibits an appeal from any order or decree passed in any suit instituted under this section. The power of review is also similarly taken away in respect of any such order or decree. The intention of the Legislature clearly seems to be to give finality to orders and decrees passed in suits under this section. And the reason is not far to seek. The

section provides a quick remedy for the recovery of possession, where a person is dispossessed of immovable property, otherwise than in due course of law. The plaintiff is not required to establish his title to the property and he can succeed by merely showing previous possession and wrongful dispossession. In other words, the object of the section is clearly to discourage forcible dispossession. The proceedings under this section do not constitute a bar against either of the parties suing to establish his title to the property and to recover possession thereof. Thus the party adversely affected in a suit under section 9 of the Specific Relief Act has an alternative remedy by way of a regular suit for establishing title and recovering possession. It is clear, therefore, that any order passed in appeal, against the express provisions of law, as contained in the last part of section 9, must be held to be without jurisdiction and a nullity in the eye of law.

5. There are some authorities in which it has been held that a revision lies to the High Court under section 115 of the Civil Procedure Code in respect of an order or decree made in a suit under section 9 of the Specific Relief Act (See Suraj Bali Tewarti v. Kandhalya Bakhsh Singh (A I R 1932 Oudh 39); Badar ul Zaman v. Firm Haji Faizullah Abdullah (A I R 1938 All. 635); K. S. Abdullah Khan v. Faizullah Khan (P L D 1950 Pesh. 35) and Rusmat Ali v. Rammat Ali (P L D 1952 Dacca 89), but all of them proceed on the clear understanding that section 9 prohibits an appeal or review. It is clear, therefore, that an appeal is not permitted under section 9 of the Specific Relief Act on any ground whatsoever."

(III) Ashiq Hussain and others Vs. Khuda Bakhsh (1985 MLD 1243).

"The appeal, admittedly, was incompetent and the impugned order as such was nothing but a nullity in law. The impugned order, as such is not binding on the learned trial Court as is held in Muhammad Umar Khan Vs. Muhammad Asif and other PLD 1964 Pesh. 15."

(IV) Tassadaq Hussain Naqvi Vs Seth Muhammad Ismail and others (1987 MLD 2616).

"5. The appeal filed contrary to the prohibition contained in section 9 of the Specific Relief Act was not entertainable and 'there is no' jurisdiction available to the Additional District Judge for being exercised therein. The appeal should have been declined to be entertained. Ignorance of the Additional District Judge about the very law whereunder this litigation had originated is only deplorable and whereas he was expected to have applied a judicial mind before passing the order impugned herein, it is surprising that he has not considered it necessary to even go through this short section in spite of the objection to the competence of the appeal clearly raised in the petition which he has purported to decide."

(V) Late Mst. Majeedan through Legal Heirs and another Vs. Late Muhammad Naseem through Legal Heirs and another (2001 SCMR 345)

"7. We have also dilated upon the question as to whether appeal or revision is competent in such-like cases. The impugned order passed by learned Single Judge seems somewhat contradictory on this point. It is worth-mentioning here at this juncture that section 9 itself provides: "That no appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed". It is well settled by now that "A revision lies to the High Court under section 115 of the Civil Procedure Code in respect of an order or decree made in a suit under section 9 of the Specific Relief Act (1983 PSC 158 + PLD 1964 Pesh. 157 + 16 DLR (W.P.) 164 + PLD 1950 Pesh. 35 + PLD 1952 Dacca 89. But as in a suit under section 9 an aggrieved party institute a suit on the basis of title, interference in revision has been generally declined even though section 9 does not exclude the remedy by way of revision altogether. (1991 MLD 1046 + PLD 1952 Dacca 89 + AIR 1953 Assam 158 + 72 Mad. L.W. 361).

8. The exception to the rule as laid out in Foujmal Manaji Vs. Bikhibai and another (A.I.R 1937 Sind 161) and Sardar Imam Bakhsh and 3 others Vs Mir Yar Muhammad Khan Rind and another (1993 CLC 1556) is not attracted in the instant matter as it is no body's case that the order passed by the learned Civil Court in disposing of application under Order XXXIX Rules 1 and 2 was not an order in a suit instituted under section 9 of the Act or that such order was void for lack of jurisdiction. It was held in Ghulam Mohy-ud-Din Vs. Additional District Judge and others (2005 YLR 1674) that while an appeal or review did not lie against any order or decree passed in a suit instituted under section 9 of the Act, a revision petition was competent. The order of the learned Civil Court dated 02.10.2020 was passed after promulgation of the Code of Civil procedure (Amendment) Act, 2020 which amended and restated section 115 of CPC and now provides the following:

> *"**115. Revision.**—Any party aggrieved by an order under section 104, passed by the Court of District Judge or Additional District Judge in an appeal against an interlocutory order passed by a Civil Judge or Senior Civil Judge, as the case may be, may within thirty days of the said order may file a revision to the High Court on an obvious mis-apprehension of law or in respect of a defect in jurisdiction."*

9. Thus, to the extent that the order of the learned Civil Judge dated 02.10.2020 suffered from an obvious mis-apprehension of law or a defect in jurisdiction, a revision was competent before this Court, but not an appeal before the District Courts. Therefore, the learned Additional District Judge had no jurisdiction to take cognizance of the order of the learned

Civil Judge in any capacity. It was held in Tassadaq Hussain Naqvi Vs Seth Muhammad Ismail and others (1987 MLD 2616) that even though an appeal was not maintainable against an order passed under section 9 of the Act, once an order had been passed in an appeal which was without jurisdiction and void in the eyes of law, a High Court could take cognizance of such order and set it aside in its revisional jurisdiction. While it has been held by the august Supreme Court in Muhammad Ayub Vs Obaidullah (1999 SCMR 394) that, *"in a fit case revision petition can be converted into constitutional petition vice versa"*. In the instant case there is no need to treat the instant revision petition as a writ as the impugned order has no doubt been passed by the learned Additional District Judge by wrongfully assuming jurisdiction as an appellate Court and such order being without jurisdiction and consequently void can be set-aside by this Court in its revisional jurisdiction. There is also no need to assume constitutional jurisdiction in the instant matter to set-aside the impugned order to enable an aggrieved party to avail the remedy of revision, as under section 115 of CPC a revision also lies before this Court.

10. It was held in Abdul Jameel Vs. Haroon (PLD 1969 Karachi 78) that a suit filed under section 9 of the Act has nothing to do with the question of title and is a summary procedure for relief to be afforded to someone deprived of actual possession. This settled law was reiterated by the august Supreme Court in Late Mst. Majeedan through Legal Heirs and another Vs. Late

Muhammad Naseem through Legal Heirs and another (2001 SCMR 345) wherein the following was held:

> *"All that is necessary is that it must be proved that the plaintiff was in possession, that he was dispossessed and that the suit has been brought within 6 months from the date of the dispossession. It is immaterial if the plaintiff was in possession and that such possession was without title and therefore, the contention as agitated on behalf of the petitioners that possession was obtained on the basis of forged allotment order cannot be considered. It is well-established legal position that "Title was not material in a suit falling under section 9 and any person who had been dispossessed, otherwise than in due course of law, could, without pleading or proving title, seek to be re-inducted into possession, even though such a relief was sought against true owner of property himself". (Sobha v. Ram Phal, AIR 1957 All. 394; Azam Khan v. The State of Pakistan and another, PLD 1957 Kar. 892; Siddiq Ahmed v. Estate Officer and another PLD 1957 Kar. 887; Riaz and another v. Razi Muhammad PLD 1979 Kar. 227 and Supercon Ltd. v. Eastern Construction Ltd., 1987 CLC 1566 ref.)"*

It was further held that:

> *"It is worth mentioning that interference in a revision in a particular case is justified if the case may have been disposed of on an obvious, misapprehension as to the legal position, or where there is some defect of jurisdiction. But where no exceptional circumstances are brought out and the only contention raised is that the finding on a question of fact is not based on adequate evidence or is erroneous, interference would not be justified. It would be going against the spirit of section 9 of the Specific Relief Act and in effect would be to convert a petition of revision into an appeal which the law expressly disallows. (1989 CLC 219 + AIR 1953 Assam 158 + 17 Cal. WN 501 (DB)]."*

The limited scope of revision was explained in N.S. Vankatagiri Ayyangar and another v. The Hindu Religious Endowments Board

Madrass (PLD 1949 PC 26), which is a seminal case in this regard, in the following terms:

> *"This section empowers the High Court to satisfy itself upon three matters (a) that the order of the subordinate Court is within its jurisdiction; (b) that the case-is one in which the Court ought to exercise jurisdiction; and (c) that in exercising jurisdiction, the Court has not acted illegally, that is, in breach of some provision of law, or with maternal irregularity, that is, by committing some error or procedure in the course of the trial which is material in that it may have affected the ultimate decision. If the High Court is satisfied upon those three matters, it has no power to interfere because it differs, however profoundly, from the conclusion of the subordinate Court upon questions of fact or law."*

11. In the instant case the impugned order is clearly devoid of jurisdiction. This Court notes with anguish that the learned Additional District Judge did not apply judicial mind to the question of maintainability of the appeal which is apparent from plain reading of section 9 of the Act. It is also distressing that the learned Additional District Judge passed two orders on the same date, one dismissing the appeal and the other accepting it and setting aside the order of the learned Civil Judge. In the event that the dismissal order had been passed as a clerical error, the right course of action would have been to pass an amending order to correct the error in exercise of powers vested in the court under section 152 of CPC to guard the court against any allegation or perception of judicial impropriety.

12. In view of the above the impugned order is set aside being without jurisdiction and void. Given that the wrongfully assumption of the jurisdiction by the learned Additional District

Judge has consumed considerable time, this Court in exercise of its revisional jurisdiction has also considered the arguments of the parties in relation to the order passed by the learned Civil Judge to consider whether it is liable to be revised in exercise of this Court's power under section 115 of CPC as amended. Para.7 of the order of the learned Civil Judge contains the crux of the reasoning of the Civil Court that led to the dismissal of respondent's application under Order XXXIX Rules 1 and 2 states the following:

> "In order to succeed in the suit filed U/s 9, the plaintiff must prove that he was in possession of the suit property and he has been dispossessed by the defendant otherwise than in due course of law, which dispossession took place within six months of filing of the suit. No question of title can be raised or looked into in a case filed U/s 9 of the Act.
>
> *In view of above, the plaintiff is bound to prove the above mentioned pre-requisite through evidence. The pivotal question involved in the instant case is possession of the plaintiff and his dispossession which is of course subject of evidence and cannot be answered at this stage of the case. Therefore, in such circumstances, when admittedly the plaintiff is not in possession of the suit property question of irreparable loss and inconvenience does not arise at all, hence application for grant of temporary injunction stands dismissed being devoid of merits"*

13. In view of the reasoning of the learned Civil Court which has focused its attention to the question of possession and dispossession and the finding of fact that the respondent failed to establish its possession or dispossession over the suit property, this Court finds that the respondent has not made out a case that the order of the learned Civil Judge suffers from any

obvious misapprehension of law or defect in jurisdiction. In view of the law as laid down by the august Supreme Court in Late Mst. Majeedan through Legal Heirs and another Vs. Late Muhammad Naseem through Legal Heirs and another (supra), the respondent's assertion that the learned Civil Court's finding on a question of fact re possession is not based on adequate evidence, is no ground for exercise of revisional jurisdiction by this Court and interfere with the order of the learned Civil Court.

14. For the aforesaid reasons, the instant Civil Revision is **allowed**. The impugned order dated 12.01.2021 passed by the learned by the learned Additional District Judge is set aside and the order of the learned Civil Judge dated 02.10.2020 shall remain in the field. As both parties failed to consider the question of maintainability of the appeal, this Court does not deem appropriate to pass any order as to costs.

(BABAR SATTAR)
JUDGE

Announced in the open Court on 16.06.2021.

JUDGE

Saeed.