

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

CASE NO. : C.R. NO.204-2014

Syed Altaf Hussain Shah etc.

Vs.

Multi Professional Cooperative Housing Society etc.

Petitioners by : Mr. Muhammad Munir Peracha, Advocate
Mr. Nauman Munir Peracha, Advocate
Mr. Shakil-ur-Rehman, Advocate
Respondents by : Mr. Wajid Hussain Mughal, Advocate
Date of hearing : 07.10.2019

AAMER FAROOQ J. The predecessor-in-interest of the petitioners filed a Suit for Possession through Pre-emption against respondents Nos.2 to 4 with respect to property measuring 16-kanals 14-marlas bearing Khasra Nos.379, 380 & 381 situated in the estate of Golra Sharif, Islamabad. The suit was filed under the Punjab Pre-emption Act, 1913. The suit was decided in favour of predecessor-in-interest of petitioners vide judgment and decree dated 12.04.1987 by Civil Court, Islamabad. Appeal was preferred by respondents Nos.2 to 4 and during course of proceedings therein, a statement was made by the learned counsel appearing on behalf of respondents No.2 to 4 that if the amount is increased from Rs.32,400/- to Rs.47,400/-, he shall not press the appeal. The matter was decided by modification of judgment and decree of the learned trial court vide judgment and decree dated 11.10.1987. Subsequently, the land was acquired by Capital Development Authority and respondents No.2 to 4 sold the land measuring 23-kanals 9-marlas to Mst.Umat-ul-Zohra/respondent No.2. In this behalf, acquisition was made on 02.03.1986 and plots were allotted to Mst. Umat-ul-Zohra in Sector E-11, Islamabad. After intimation of judgment and decree to CDA,

letter dated 02.10.1988 was issued, whereby 53 shares were allotted to petitioners in Sector E-11, Islamabad. An agreement to sell was executed by predecessor-in-interest of petitioners on 02.12.1995, whereby he agreed to sell his 53 shares to respondent No.1 for a consideration of Rs.47,20,000/-. In the year 2004, the matter was also investigated by NAB and during course of investigation, the petitioners entered into plea bargain and returned sum of Rs.47,20,000/- to respondent No.1. Upon return of money, the predecessor-in-interest of petitioners filed W.P. No.2271-2008 before this Court for return of the suit land which was dismissed vide order dated 24.02.2012. The matter went up to the Hon'ble Supreme Court of Pakistan, where Civil Petition for Leave to Appeal bearing No.754-2012 was filed, wherein it was observed that petitioners can avail appropriate remedy by way of civil suit. Meanwhile, respondent No.1 filed an application under section 12(2) CPC for setting aside consent judgment and decree dated 12.04.1987. The said application was though held to be barred by limitation yet learned appellate court, in exercise of powers under section 151 CPC, set aside the judgments and decree dated 12.04.1987 and 11.10.1987, hence civil revision.

2. Learned counsel for the petitioners, *inter alia*, contended that application under section 12(2) CPC, filed by respondent No.1, was barred by limitation. It was further contended that respondent No.1 had no *locus standi* to file the application. It was contended that even otherwise, suit filed by the petitioners was rightly filed and predecessor-in-interest of the petitioners was entitled to the decree under the Islamic Law of Pre-emption. In support of contention, learned counsel placed reliance on cases reported as 'Sher Baz Khan and others Vs. Additional District

Judge and 3-others' (2016 YLR 452), 'Mehr Moman Khan Vs. Ghulam Abbas and 3-others' (2001 SCMR 1979), 'Umar Din and Another Vs. Muhammad Sadiq Hussain and 15-others' (1993 SCMR 1089), 'Sarfraz Vs. Muhammad Aslam Khan and Another' (2001 SCMR 1062) and 'Darvesh Ali Vs. Munir Khan and Others' (2001 CLC 1431).

3. Learned counsel for respondent No.1, *inter alia*, contended that judgment and decree passed by learned trial court on 10.04.1987 was void and nullity in light of law laid down by Hon'ble Supreme Court of Pakistan in case reported as 'Government of NWFP through Secretary Law Department Vs. Malik Said Kamal Shah' (PLD 1986 Supreme Court 360). It was submitted that under section 151 CPC, the court had ample powers to revisit any mistake or error. It was also submitted that it is trite law that no limitation runs against a void order. Reliance was also placed on cases reported as 'Darvesh Ali Vs. Munir Khan and Others' (2001 CLC 1431), 'Mst. Fehmida Khatoon Vs. Additional Deputy Commissioner (Consolidation), Lahore and Another' (PLD 1975 Lahore 942), 'Mst. Zaira Khatoon Vs. Mst. Kishwar Jamal' (2009 MLD 67), 'Ghulam Hamdani Vs. Muhammad Iqbal and 9-others' (1991 SCMR 1668) and 'Allah Ditta Vs. Mst. Khurshid Bibi' (1995 SCMR 1203).

4. Arguments advanced by learned counsels for the parties have been heard and the documents, placed on record, examined with their able assistance.

5. Before embarking upon discussion on arguments advanced by learned counsel for the parties, it is pertinent to observe that notices were issued to respondents No.2 to 4, but no one entered appearance on their behalf, hence they were proceeded against *exparte*. Moreover, the

background of the case, leading to filing of instant civil revision, has already been spelt out in detail hereinabove therefore need not be reproduced.

6. The Hon'ble Supreme Court of Pakistan, in case reported as 'Government of NWFP through Secretary Law Department Vs. Malik Said Kamal Shah' (PLD 1986 Supreme Court 360), declared the provisions of Punjab Pre-emption Act, 1913 as well as other provincial pre-emption laws against the injunctions of Islam. In the said judgment, cut-off date was fixed as 31.07.1986 and as a result thereof, any judgment passed subsequent to 31.07.1986, on the basis of Punjab Pre-emption Act, 1913 or similar provisions, is nullity. Reliance is placed on case reported as 'Umar Din and Another Vs. Muhammad Sadiq Hussain and 15-others' (1993 SCMR 1089).

7. Respondent No.1 agreed to purchase land from petitioners and also paid a sum of Rs.47,20,000/- to them, which sum subsequently was returned by the petitioners as a result of NAB investigation. Respondent No.1 was to return the land to the petitioners which it did not and instead, in order to undo the judgment and decree passed in favour of petitioners, filed an application under section 12(2) CPC before appellate court which passed the judgment and decree dated 11.10.1987 on the basis of 'doctrine of merger'.

8. Under section 12(2) CPC, an application can be filed by a person, who is aggrieved and said person need not be a judgment debtor or a party to the proceedings, therefore, respondent No.1 could have filed the application.

9. It seems that respondent No.1 also executed transaction with respondents No.2 to 4 and paid them the sum and as a result thereof, respondents No.2 to 4 neither moved an application for setting aside judgment and decree nor appeared before this Court.

10. No specific period of limitation is provided for filing of an application under section 12(2) CPC and as a result thereof, Article 181 of the Schedule to the Limitation Act, is applicable. An application under section 12(2) CPC can be filed within three years of the date of order/judgment and decree. Learned appellate court, while deciding application under section 12(2) CPC, observed that though application is barred by limitation yet it exercised powers under section 151 CPC to set aside judgment and decree. Learned counsel for the petitioners, to substantiate his argument that application under section 12(2) *ibid* was not maintainable, has vehemently placed reliance on case reported as 'Sarfraz Vs. Muhammad Aslam Khan and Another' (2001 SCMR 1062), which holds that period of limitation for filing application under section 12(2) CPC is three years and where order is void, same has to be moved within a 'reasonable time'. The judgment and decree was passed by learned appellate court on 11.10.1987 and the agreement to sell was entered into between petitioners and respondent No.1 in 1995 hence respondent No.1 was well aware of the title acquired by the petitioners on the basis of a judgment and decree which was void and a nullity. However, since at that time, it was beneficiary of said judgment and decree, hence it decided to remain silent but when the transaction was investigated and the petitioners were made to return the amount of sale consideration received from respondent No.1, latter decided to challenge

judgment and decree in favour of predecessor-in-interest of petitioners. In view of above facts and circumstances, the observations made and the ratio settled in case reported 2001 SCMR 1062 supra, is pertinent.

11. In view of referred position, application under section 12(2) CPC filed by respondent No.1 was barred by limitation and even same was filed with deliberate delay of considerable time.

12. Learned appellate court, vide impugned order, has placed reliance on case reported as 'Mst. Fehmida Khatoon Vs. Additional Deputy Commissioner (Consolidation), Lahore and Another' (PLD 1975 Lahore 942) to set aside judgments and decree passed by learned trial court as well as learned appellate court dated 10.04.1987 & 11.10.1987, as those were in violation of law pronounced by Hon'ble Supreme Court of Pakistan in case reported as 'Government of NWFP through Secretary Law Department Vs. Malik Said Kamal Shah' (PLD 1986 Supreme Court 360).

13. Under section 151 CPC, the court in order to secure the ends of justice, can correct a mistake or set aside an order based on illegality. Reliance is placed on cases reported as 'Cotton Export Corporation of Pakistan Pvt. Ltd. Karachi Vs. M/s Awami Cotton Ginners and 7-others' (PLD 1995 Karachi 282), 'Muhammad Sadiq and others Vs. Ali Asghar Khan and others' (1995 CLC 1529), 'Muhammad Shibli Khan Vs. IU Khan, Member Board of Revenue and Another' (PLD 1976 Lahore 269), 'Aquil Lotia Vs. Daily Ausaf Karachi through Chief Editor and Another' (PLD 2007 Karachi 594) & 'Saif-ud-Din Vs. Zain-ud-Din' (PLD 1973 Karachi 210).

14. In view of above case law and the judgments relied upon, learned appellate court rightly set aside the judgment and decree dated 12.04.1987 by modifying judgment and decree dated 11.10.1987. Even-otherwise, this Court in exercise of powers under section 115 CPC has suo moto powers to correct any wrong or illegality when same comes to its notice. Reliance is placed on case reported as 'Major Muhammad Nouman Vs. Usman Habib and others' (PLD 2019 Isbd 255).

15. It is observed that judgment and decree dated 11.10.1987 was in violation of above mentioned judgment of Hon'ble Supreme Court of Pakistan, hence was not tenable. The plea, on behalf of petitioners that they were entitled to the judgment and decree under Islamic Law of Pre-emption, is without substance, as the predecessor-in-interest of the petitioners specifically pleaded the case and led evidence in light of Punjab Pre-emption Act, 1913 and not the Islamic Law. In view of above facts and circumstances, no jurisdictional error or illegality has been committed by the learned appellate court hence impugned order does not warrant any interference.

16. For the above reasons, instant petition is without merit and is accordingly dismissed.

(AAMER FAROOQ)
JUDGE

Announced in Open Court on 20.12.2019

JUDGE

Approved for reporting.

Zawar