

JUDGEMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Civil Revision No.410 of 2016.

Nomad Art Gallery Center.

Vs.

Capital Development Authority through its Chairman.

Petitioner's by. Sajjad Haider Malik, Advocate.
Respondent's by. Tariq Mehmood Jahangiri, Advocate
Date of hearing. 10.01.2017.

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Aamer Farooq, J.- Through instant petition under Section 115 of Civil Procedure Code, 1908 (CPC), the petitioner assails order dated 11.11.2016 whereby appeal filed by the respondent against order dated 29.07.2016 was allowed.

02. The facts, in brief, are that the respondent i.e. Capital Development Authority (CDA) granted license to the petitioner with respect to shops No.A & B, Market No.1, Saidpur Model Village, Islamabad (**hereinafter called the Property**). The petitioner filed a suit for declaration, permanent and mandatory injunction to the effect that declaration be made in favour of the plaintiff that notice dated 13.06.2016, issued by the respondent, is ineffective and permanently restrain the respondent from doing any act which is against the interests of the petitioner. Alongwith the suit an application for interim relief was also filed. Learned Trial Court vide order dated

23.06.2016 issued notice to the respondent and meanwhile granted status quo. The respondent meanwhile took the possession of the property in question. The petitioner filed an application under Order XXXIX Rule 2 (3) C.P.C. as well as an application for restoration of possession. The learned Trial Court vide order dated 29.07.2016 ordered restoration of possession to the petitioner vis-a-vis the property. The respondent filed appeal before the District Court (West), Islamabad against the referred order which was allowed vide the order assailed in the instant petition.

03. Learned counsel for the petitioner, inter alia, submitted that there is no provision in the license granted by the respondent that it can take possession of the property; that there is no violation of the terms & conditions of the license on part of the petitioner which calls for taking over of possession of the property by respondent; that entire action on part of the respondent is based on malafide; that the property was sealed by the respondent after passing of the status quo order by the learned Trial Court.

04. The learned counsel for the respondent, inter alia, submitted that the property was sealed by the respondent before grant of interim relief by the learned Trial Court; that the petitioner violated the terms & conditions of the license, therefore, the property was sealed; that the learned Trial Court exercised the jurisdiction with material irregularity inasmuch as it failed to determine whether notice was issued and received by the respondent in respect of the status quo

order. It was also submitted that the respondent did not know about grant of status quo order by the learned Trial Court.

05. In response to the query of the Court regarding maintainability of the appeal before the District Court (West), Islamabad, the learned Counsel for the respondent submitted that it is trite law that lis should not be decided on technicalities rather be adjudicated on merits. It was further contended that under the Code of Civil Procedure the appeal could have been converted into revision by the Appellate Court. In this behalf reliance was placed on cases titled "Bsty. Basan Bi & 2 others v. Additional District Judge-V (East), Islamabad etc."(**2016 CLC 1111**), "Muhammad Qasim Khan v. Mst. Mehbooba & 6 others"(**1991 SCMR 515**) and "Ali Hussain v. Rafiquddin & 9 others"(**PLD 1977 Lahore-418**).

06. I have gone through the documents lodged on record and heard the learned counsels for the respective parties. The questions which need adjudication in the instant petition in light of the facts and circumstances mentioned above are; firstly, whether the appeal filed by the respondent was maintainable before the District Court (West), Islamabad against order dated 29.07.2016? and secondly, whether the learned Trial Court could have ordered the restoration of the possession without determining the fact that the respondent was aware of passing of the status quo order?

07. The law governing the appealable orders is provided in Section 104 and Order XLIII Rule 1 C.P.C. The bare perusal of the referred provisions show that no appeal lies against order passed by the Court for restoration of the possession. The

Court granting an injunctive relief does have the jurisdiction to restore the possession of a property in case the same is taken away in violation of the injunctive order; however the said jurisdiction is exercised under the inherent powers of the Court. In this behalf reliance is placed on case titled "Bakhtawar etc. v. Amin etc." (1980 SCMR 89). In the referred judgment August Supreme Court of Pakistan observed as follows:

"It is well settled that when by contravening an injunction order the party against whom the order is passed has done something for its own advantage to disadvantage of the other party, it is open to the Court under its inherent jurisdiction to bring back the party to a position where it originally stood, as if the order had not been contravened. The exercise of this inherent power is based on the principle that no party can be allowed to take advantage of his own wrong in spite of the order to the contrary passed by the court. See Ayyammal and another v. Thangavelu Padayachi (A I R 1950 Mad. 317); Maharaj Bahadur Singh v. A. H. Forbes (A I R 1922 Pat. 382), Tile State of Bihar v. Usha Devi and another (A I R 1956 Pat. 455) and Magna and another v. Rustam and another (A I R 1963 Raj. 3)".

In B. F. Yarghese v. Joseph Thomas (A I R 1957 Trav.-Co. 286) where the Court had already passed a temporary injunction against the defendants but the subsequent action of the plaintiffs in interfering with the subject-matter tended to discredit the temporary injunction, it was held that the Court was justified in granting a temporary injunction at the instance of the defendants ordering the plaintiffs to restore the status quo."

Similar view was taken by the Hon'ble Supreme Court of Pakistan in case titled "Muhammad Sabir Khan v. Rahim

Bakhsh & 16 others” (**PLD 2002 SC 303**). In the referred judgment it was observed as follows:

“Court can exercise its powers under Section 151 to prevent abuse of its process and creative measures could be taken against wrong dowers to uphold and maintain the majesty of law.”

08. The learned Trial Court, in the instant case, ordered restoration of possession on the assumption that possession was taken over by the respondent on the date of passing of the impugned order. In light of the case law, mentioned above, it is clear that the Court can order status quo ante under its inherent jurisdiction under Section 151 C.P.C., however, the said provision of law is not appealable. It is settled proposition that appeal is a substantive right and can only be exercised if available. The non-availability of such right or invocation of the same when it is not available could not be regarded as a mere technicality. In case titled “Ali Hussain v. Rafiquddin & 9 others” (**PLD 1977 Lahore-418**). The Hon’ble Lahore High Court held that order passed under Section 151 C.P.C. is not appealable. In view of above, appeal filed by the respondent before the District Court (West), Islamabad was not maintainable.

09. The injunctive order passed by a Court is not operative unless the other side against whom the order has been passed is served with the same. Reliance is placed on case titled “M/s Hakimuddin Harmusji & sons v. Ghafoor Textile Mills” (**PLD 1978 Karachi 152**). In the said judgment the Hon’ble Sindh High Court observed as follows:

“The nature and incidents of an order of stay as understood in our judicial system is that it is addressed and binds a subordinate Court or Tribunal. Whereas an injunction is essentially directed against and enjoins a party to the proceeding from doing or from omitting to do certain acts. The former binds the subordinate Court or Tribunal from proceeding further in It pending proceeding or from executing an order parsed by itself. In the latter case the effect of injunction is to bind the parties. This essential distinction has assumed great importance in relation to the operation of the two types of orders. The judicial consensus holds that an order of stay takes effect immediately on being passed even if it is not brought to the notice of the subordinate Court or Tribunal, whereas an injunction order becomes operative upon being served on the party against which it is directed.”

In the instant case perusal of order passed by the learned Trial Court shows that it has deferred the adjudication of the issue whether the respondent had knowledge of the interim order but proceeded to restore the possession. The learned Trial Court had only the jurisdiction to restore possession if injunctive order had been violated and violation can only be attributed to the respondent if it was aware of the same. Hence the grant of restoration of possession could not have been made unless it was first adjudicated whether respondent had the knowledge of the status quo order. On the basis of the above position of law order dated 29.07.2016 is not tenable.

10. Since the appeal filed by the respondent was not maintainable, as mentioned above, therefore, in case if order dated 29.07.2016 is left intact the same would be unjustifiable as it is a wrong exercise of jurisdiction by the learned Trial Court. In such like circumstances this Court under Section 115 C.P.C. has suo moto power to correct any illegality/

jurisdictional error under its supervisory jurisdiction. Reliance is placed on case titled "Mst. V. Member Board of Revenue"(1996 SCMR 1755). The Hon'ble Supreme Court of Pakistan in this judgment observed as follows:

"12. In the latest case reported in 1993 SCMR 647 this Court has taken a view that "Courts will ordinarily decline to exercise revisional jurisdiction wherein alternative remedy is available but this rule should not be regarded as an inflexible rule to be followed rigidly without exception because in special circumstances of a case, a departure from the said rule could be justified.

13. In the case reported in PLD 1975 SC 678 this Court has taken definite view that the provisional powers of High Court though circumscribed by conditions of excess of jurisdiction, failure to exercise jurisdiction, illegal exercise of jurisdiction, is nevertheless very vast and corresponds to a remedy of certiorari and in fact goes beyond that at least in two respects inasmuch as: Firstly, its discretionary jurisdiction may be invoked by the Court suo motu, and secondly, the Court "may make such order in the case as it thinks fit."

Moreover this Court in case titled "Federal Board of Intermediate & Secondary Education v. Azam Ali Khan" (C.R.No.231/2016) vide judgement dated 23.12.2016 observed as follows:

" The mere fact the appeal against such a judgment and decree was dismissed on the ground of limitation, will not pose as an obstacle before a revisional court to set it aside in exercise of its suo moto revisional jurisdiction. In holding so, I am fortified by the law laid down in the following judgments:-

(i) In the case of Muhammad Swaleh Vs. M/s. United Grain & Fodder Agencies (PLD 1964 SC 97), it has *inter alia* been held that the period of limitation for a revision

petition *"will not stand in the way of the exercise of revisional power for these powers can be exercised suo motu."* Furthermore, it was held that once the High Court is seized of a case in the exercise of its revisional jurisdiction it can in accordance with section 115 C.P. C., make such order in the case as it thinks fit.

(ii) In the case of Town Municipal Administration Vs. Rifat Hussain (2003 CLC 1370), the respondent's suit for recovery was decreed by the learned Civil Court. The appellant's appeal against the judgment and decree was barred by time. The Honourable Peshawar High Court held as follows:-

"5. ... even though the appeal is barred by time and delay has not been explained in accordance with the requirements of law, the Courts of law cannot shut their eyes and allow injustice to reign Supreme. Leaving aside the appeal, this Court in view of the facts high-lighted above shall be constrained to exercise its suo motu revisional power to prevent the abuse of the process of the Court and consequent injustice."

(iii) In the case of Oil and Gas Development Corporation Vs. Clough Engineering Limited (2003 YLR 353), the learned Civil Court, through a composite order had decided (1) the respondent's application under Section 20 of the Arbitration Act, 1940 by referring the disputes between the parties to arbitration, and (2) the respondent's application for interim injunction under Section 41 of the Arbitration Act, 1940 read with Order XXXIX, Rules 1 and 2 of the C.P.C. The appellant had assailed the composite order deciding the said applications in one appeal. Although the order referring the disputes to arbitration was appealable under Section 39 of the Arbitration Act, 1940, the order deciding the application for interim injunction was not. Even though no revision petition had been filed against the order deciding the application for interim injunction, the Hon'ble Lahore High Court finding the said order to be *prima facie* contrary to the law laid down by the Superior Courts, *suo moto* directed the office to draw up proceedings under Section 115 of the C.P.C. It was held that the

Hon'ble High Court did not require an application to take cognizance of the matter under Section 115 C.P.C.

(iv) In the case of Mst. Bhagay Vs. Mst. Fatima Bibi (PLD 2004 Lahore 12), it has been held as follows:-

"6. ...under section 115 of the Civil Procedure Code, "the High Court may make such order in the case as it thinks fit", which means that in the exercise of supervisory jurisdiction, if a material irregularity or error of jurisdiction comes, to the notice of the Court, in the interest of justice, the Court can suo motu interfere and correct the findings of an issue."

(v) In the case of Mst. Iqbal Bibi Vs. Allah Yar (2004 YLR 1279), the Lahore High Court has held as follows:-

"8. ... Once the revisional Court comes to the conclusion that order of the trial Court suffers from legal defects, amenable to its jurisdiction under section 115, C.P.C. it, under law can act in the like manner, as the trial Court can act. No doubt scope for interference of revisional Court is narrow but once revisional Court assumes jurisdiction in accordance with law, there is no restriction on its power to pass any order, obviously, according to the settled principles known for administration of justice. My this view gets support from the alighted judgments of the Honourable Supreme Court of Pakistan in the cases Karamat Hussain and others v. Muhammad Zaman and others PLD 1987 Supreme Court 139 and Sadiq Ali v. Taj Din and others PLD 1992 Lahore 158, though revisional powers have been exercised in the case in hand as a petition by the respondent whereas those could have been exercised suo motu whenever any illegality committed by the trial Court comes to its notice. In the case of Chairman, Board of Intermediate and Secondary Education, Balochistan, Quetta and 2 others v. Maleha Ejaz and another 1995 SCMR 1060, it was observed by the Honourable Supreme Court that revisional Court has powers to set right

the judicial proceedings, wherever some illegality or irregularity committed by the Courts subordinate to it."

(vi) This Court in the case of Kiran Arif Mian Vs. Kinza Khalid (PLD 2008 Islamabad 11), has held as follows:-

"20. A High Court may exercise its revisional jurisdiction either suo motu or on an application of a person. But if a person makes an application under section 115(1), C.P.C. for invoking the revisional jurisdiction of the High Court, he has to make application within ninety days of the order sought to be revised. In my opinion, if some glaring illegality comes into the notice of the High Court, although through an application filed by a person beyond 90 days of the orders, the High Court may exercise its revisional jurisdiction. If a glaring mistake comes into the notice of the High Court, the High Court shall not ignore the same merely on the ground, that it has come to its notice through an application filed by a person beyond 90 days. The High Court may exercise suo motu revisional jurisdiction possessed by it in such a situation."

11. For the foregoing reasons, instant civil revision is allowed and order dated 11.11.2016 is set aside, however, since order dated 29.07.2016 suffers from jurisdictional error, therefore, the same is also set aside; consequently the application for restoration of possession filed by the petitioner shall be deemed to be pending before the learned Trial Court and shall be decided after determining the fact whether the notice of injunctive order was served on the respondent. In the meanwhile in case the petitioner wishes to remove its articles lying in the property it can do so by filing an appropriate

application before the learned Trial Court seeking permission
for the same.

(AAMER FAROOQ)
JUDGE

Altaf Malik

Approved for Reporting