JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
ABBOTTABAD BENCH.
(*Judicial Department*)

C.R No. 326-A/2011

Muhammad Fareed……
(Petitioner)

vs

Banaras Khan etc.....…….....
(Respondents)

Present: *Haji Sabir Hussain Tanoli, Advocate for the petitioner.*

Mr. Imtaiz Khan Jadoon for respondent No. 40 (Ishaq Khan).

Mr. Sajjad Ahmed Abbasi, Advocate for rest of the respondents.

Date of hearing: 10.10.2022

JUDGMENT

WIQAR AHMAD, J.- This order is directed to dispose of this and the connected civil revision bearing No. 387-A/2011 as both the petitions arise out of same impugned order.

2. Petitioners of both the civil revisions were plaintiffs in the suit for declaration to the effect that property bearing Khasra No. 75 and 77 measuring 523 Kanals 19 Marlas situated within the Revenue Estate of Banda Qazi, Abbottabad was their exclusive ownership in the light of judgments

earlier passed by the Civil Court and maintained up to august Supreme Court of Pakistan especially when they had deposited compensation thereof in the light of notification No. 25026/REV B/168 F dated 20.12.1989 and thus defendants/respondents had got no rights whatsoever, in the suit property. Petitioners also challenged mutations No. 3976, 4037, 4046 and 4359 claiming that same were ineffective upon their rights.

3. Defendants were summoned by the civil court, who filed their written statement, wherein they besides other legal and factual objections, mainly asserted that the suit was hit by principal of *res-judicata*. Learned trial Court framed issues, recorded pro and contra evidence and vide judgment and decree dated 08.12.2009, dismissed the suit. Petitioners filed an appeal against said judgment of learned civil Court, which was also dismissed vide judgment dated 07.04.2011 of learned Additional District Judge-III, Abbottabad. Feeling aggrieved there-from, petitioners have filed revision petitions before this

Court against concurrent findings of the two Courts below.

4. I have heard arguments of learned counsel for the petitioners in Civil Revision No. 326-A/2011 while learned counsel for the petitioners in civil Revision No. 387-A/2011 did not appear before the Court. Petitioners in said civil revision again requested for adjournment but their request was turned down as they had already availed numerous opportunities but could not produce their counsel for arguments. Arguments of learned counsel for the respondents were also heard and record perused.

5. Perusal of record reveals that plaint of petitioners filed before the learned civil Court was dismissed as being barred by principle of *res-judicata*. In earlier suit filed by them bearing No. 221/1 of 1981, petitioner had prayed for grant of decree in respect of 523 Kanals and 19 of land in same Khasra numbers, claiming to be their entitlement, arising out of their occupancy rights earlier held over said area by their predecessors. The learned civil Court after a full dress trial, had

found that they had not been entitled to ownership of 523 Kanals 19 Marlas and their suit had been decreed to the extent of 248 Kanals vide judgment and decree dated 17.02.1988. Appeals were filed against said judgment and decree which were pending before the learned Additional District & Sessions Judge, Abbottabad, when a development took place outside the Court, on the basis of which petitioners in the instant suit were claiming accrual of fresh cause of action. Predecessor of the petitioner had filed an application for allowing him to deposit amount of compensation under Section 4 of the North-West Frontier Province Tenancy Act, 1950, in light of notification No. 25026/Rev IV/168 F dated 20.12.1989. The application was allowed on 17.06.1990 which order was brought in evidence of suit in hand as Ex PW-5/8. Petitioners claimed that this factum of deposit of additional amount had made them entitled to 523-Kanals 19 Marlas for which they had claimed declaration for the second time in the instant suit. It is admitted that basic claim of petitioners was arising from their capacity as occupancy tenants. On promulgation of NWFP

Tenancy Act, 1950, their predecessor had deposited amount of compensation as required under Section 4 of the ibid Act. Vide judgment and decree dated 07.12.1953, they had been declared to have acquired ownership of the land in respect of which they were having possessory rights. Appeal had also been filed there against and in the judgment in appeal dated 06.03.1991 they had finally been held to be owners in property in dispute to the extent of 248 Kanals and 7 Marlas. In the suit brought in the year 1981, same claim has been upheld again on the basis of earlier judgment and they had been declared owners to the extent of 248 Kanals 7 Marlas which judgment had been upheld up to the honourable Supreme Court of Pakistan, declaring their entitlement to the extent of 248 Kanals 7 Marlas. In this respect a part of judgment of learned Additional District Judge, Abbottabad dated 06.03.1991, in civil appeals No. 23/13, 24/13 and 25/13 of 1988, may be reproduced herewith being relevant to the issue in hand;

> *"So far the contention advanced by Gulzaman etc. regarding the grant of decree to the extent of 248 Kanals 7 Mls is*

> *concerned, has got some weight in it and rightly so because the learned trial judge as per judgment appealed against, on its page 10 (discussion under issues 1, 6 and 8) has admitted their ownership to the afore-said quantum but it appears that while concluding his arguments he omitted to grant even the admitted quantum of their ownership by dismissing their claim which has already been admitted and decided in their favour and up-held in judgment of appeal No. 60 dated 31.8.55(after the modification of the shares) and appeal No. 33 decided on 21.1.57. Therefore, in view of his discussion the learned trial judge was supposed besides keeping intact the share of heirs of Kala deceased (as per due shares in the judgment delivered on case file No. 229 decided on 7.12.53) he should also have granted the decree in favour of Gulzaman etc. to the extent of 248 kanals 7 Marlas."*

To same effect, judgment was delivered by this Court on 20.04.1995 in Civil Revision No. 74 of 1991, and by the honourable Supreme Court of Pakistan on 19.06.1996 in CP No. 543/95.

6. Learned counsel for the petitioners contended that the suit in hand had been based upon a cause of action which had accrued to

plaintiffs/ petitioners subsequently i.e. on 17.06.1990 for the reason that effect of subsequent deposit of amount for getting additional rights of ownership in land in which predecessor in interest of petitioners had remained occupancy tenant, had neither remained in issue nor same had been decided by a competent court law. The subsequent suit was, therefore claimed not hit by principle of *res-judicata*.

7. Learned counsel for the respondents submitted in rebuttal that it was during pendency of the appeals in earlier suit filed by the petitioners, that they had collusively deposited the amount of compensation through an order, obtained from low ranking revenue officer but even that deposit was after the cut off date mentioned in "***Qazalbash Waqf & others Vs. Chief Land Commissioner, Punjab, Lahore and others"*** reported as *PLD 1990 SC 99* and therefore, suit of the plaintiff/petitioner had rightly be held to be barred by law.

8. The learned civil Court while treating the subsequent suit barred by law, has recorded the following observations:-

"The previous suit Ex PW.5/2 was between the same parties and upon the same subject matter and the controversy between the parties has been decided upto the August Supreme Court of Pakistan. The present suit between the same parties and upon the same subject matter is hit by the principle of resjudicata. It is evident from the record that the judgment of Honourable Supreme Court of Pakistan Ex PW.6/4 was passed on 19.6.1996 and the plaintiffs instead of filing executing petition, instituted the present suit on 192.1997 which is hit by principle of resjudicata. In the present suit the plaintiffs claim the ownership of suit property on the basis of judgment and decree and notification No. 25026/RE B IV/168 F Dated 20.12.1989 and order of Collector dated 17.6.1990. The claim of plaintiff on the basis of judgment and decree has already been finalized. As for as claim of plaintiffs on the basis of notification and order of collector is concerned, that claim was available to the plaintiffs before passing of judgment and decree of learned Additional District Judge, Atd, but, the plaintiffs neither agitated this claim before the first appellate court nor before the Honourable High Court as well as August Supreme Court of

> *Pakistan till final decision dated: 19.6.1996. This claim of plaintiffs operates as constructive resjudicata."*

The question before this Court in instant proceedings is whether the factum of deposit of additional compensation during pendency of appeals in earlier suit, was clothing the petitioners with a fresh cause of action and whether their subsequent suit was not barred by principle of *res-judicata*? In this respect it is important that in suit filed in the year 1953 as well as in suit filed in the year 1981, plaintiffs/petitioners or their predecessor had claimed their entitlement to the extent of 523-Kanals 19 Marlas. Core question in those suits were determination of rights of plaintiffs in respect of their entitlement to 523 Kanals 19 Marlas of the disputed land. Establishment of right of ownership in both the suits were subject to determination of certain questions which included;

a. *whether the respective plaintiffs in the case or their predecessors have been occupancy tenants in the property;*
b. *what was the extent and measurement of land in respect of which they were found having rights as occupancy tenants;*

c. *whether they had fulfilled the conditions of Section 04 of Tenancy Act, 1950 in the shape of deposit of compensation?*

9. The Courts while seized with claims of petitioners and determination of these basic questions, had finally held (in appeal), that they had acquired ownership to the extent of 248 Kanals 7 Marlas and their claim to the extent of area beyond said measurement had been turned down, in the suits instituted by them in the year 1953. Same was the case in the suit filed in the year 1981 when they had brought another suit and same had been decreed to said effect vide judgment dated 17.02.1988 of civil Court which order had been maintained till august Supreme Court of Pakistan. The core question for determination in instant suit filed on 19.02.1997 was also same which is apparent from the very heading of their plaint. As stated earlier, their question of entitlement was not only dependent on deposit of amount of compensation under Section 4 of the Tenancy Act, 1950 but before that they were under obligations to have established that they had been occupying the land as occupancy tenants. All the three questions

had been determined by courts in two rounds of litigations where-after, petitioners had been found entitled to 248 Kanals and 7 Marlas land and their claim to the extent of 523 Kanals and 19 Marlas had not been allowed as prayed for.

10. Notification No. 25026/RE B IV/168 F dated 20.12.1989 had in-fact been issued for giving rights to those genuine occupancy tenants who had been in possession of land and entitled for acquiring ownership in light of Section 4 of the Tenancy Act, 1950, but had not been able to deposit the compensation in time. Said notification was not at all applicable to the case of petitioners as they had deposited the amount of compensation earlier and had obtained ownership of the land under their predecessor. This notification or factum of deposit of amount in a surreptitious manner, on the order of a revenue officer, was not sufficient to give petitioners a fresh cause of action. The order was obtained and amount of compensation was deposited in a surreptitious manner for the reasons that at that time their appeals were pending before the Courts at Abbottabad where respondents had

been fully contesting the case with them for the last almost a decade, but they had not made them party to their application nor had the revenue officer conducted any inquiry or had send notices to the aggrieved persons. The Revenue officer had not even tried to search record of his own office to know whether or not the applicants before him had been those persons who had not deposited the amount of compensation as required under Section 4 of the Tenancy Act and whether or not they were entitled to benefits under notification dated 20.12.1989. The Revenue Officer had not tried to make himself aware of earlier litigation and its culmination. He had also not bothered to know whether or not any litigation was pending at the relevant time.

11. At the time when the predecessor of petitioners/plaintiffs was depositing the compensation for acquiring the purported benefit of notification dated 20.12.1989, their appeal was pending before the District Courts. It is well established principle that appeal is continuation of the original suit. We can therefore, say with

reference to context of the case that their suit was pending before the Court. If they had acquired any additional interest or right in the property which was in dispute before the Court, they could have brought this fact on record by amending the suit or could have withdrawn the suit with permission to file fresh one. They had not chosen said course and had rather kept the order and receipt of deposit of compensation under the rug, continuing litigation for same rights before the Courts. In same litigation, not only District Courts but this Court as well as august Supreme Court of Pakistan had delivered its judgment finally determining that petitioners were entitled to 248 Kanals and 7 Marlas of land.

12. Now the question is, whether the plaintiffs were having the opportunity of raising this new ground as additional ground of their attack? The answer is that they had got full opportunity of bringing this fact before the Court and making it a ground of their attack. When they had failed in doing so, the learned civil Court has rightly held their subsequent suit barred by

principle of constructive *res-judicata* as per Explanation 4 of Section 11 of the CPC read with Order 2 Rule 2 CPC.

13. In the case of "***State Bank of Pakistan through Governor and another Vs Imtiaz Ali Khan and others***" reported as 2012 SCMR 280, honourable Supreme Court of Pakistan has held that if a party had not chosen to ask for a relief which was available to it, same cannot be sought in subsequent proceedings. Relevant findings of the apex Court are reproduced as under:-

> *"It is well settled law that party once approaching the Court for seeking relief shall seek all the relief to which it thinks is entitled to and if such relief, even if available but not asked for, cannot be claimed by filing a subsequent legal proceedings as it would fall within the mischief of constructive res judicata. On this ground as well the respondents were not entitled to any relief as it has been handed down to them through the impugned judgment."*

Similarly, in the case of "***Jubilee General Insurance Co. Ltd. Karachi vs. Ravi Steel***

Company, Lahore" reported as ***PLD 2020 SC 324***

hon'ble Supreme Court of Pakistan, has also held:-

> *"Indeed, in adversarial proceedings a litigant has to cross the barrier of limitation, before his rights are adjudicated. Like Order II, Rule (2) C.P.C. mandates the Plaintiff to include the whole claim and seek all reliefs in a suit to which he is entitled, where a plaintiff omits to sue in respect of the portion so omitted to claim any relief to which he may be entitled, he cannot, except by leave of the Court, afterwards sue for any relief so omitted. Cumulative effect of Order VI, Rule 4 C.P.C. read with Order VIII, Rule 2 and other enabling provisions, by same stroke requires that the "defendant must raise" in written statement and specifically and particularly plead "all matters, which show that the suit not to be maintainable or that the transaction is either void or voidable in point in law, and all such grounds of defence as, if not raised, would be likely to take opposite party by surprise or would raise issues of facts not arising out of the plaint as for instance fraud, limitation, release, payment, performance or facts showing illegality. "(Order VIII, Rule 2 C.P.C.) plea of misrepresentation, fraud, breach of trust, willful default or undue*

influence, and in all other cases in which particulars may be necessary" (Order VI, R 4 ibid). These rules of prudence require both the plaintiff and defendant to plead all facts that may constitute cause of action for any relief and for the defendant which may constitute a defence to specifically refute any claim on merits as well raising specific defense denouncing claim on the assertions of fraud, limitation, release, payment, performance or facts showing illegality. Unless such particulars are specifically pleaded in the plaint or in written statement as a defence other party may it be plaintiff or defendant would have no opportunity to controvert the same, as neither the issue could be framed nor, evidence could ordinarily be allowed to be raised or led at trial or attended in further appeals or revisions as the case may be. Failure to raise such plea at the first opportunity (either in plaint or written statement as the case may be) to assert any right or claim any relief where such rights and relief is founded on such assertion or raising such plea as a defence to contest and or controvert any such claim may well amount and be successfully be defeated on doctrine of constructive res judicata, in subsequent proceedings".

14. Even where section 11 of the CPC is not applicable *stricto-senso*, general principles of doctrine of *resjudicata* may be pressed in service so as to get rid of a suit whereby a party try to re-agitate and reopen an already decided matter. Honourable Supreme Court of Pakistan in the case of "***Muhammad Akhtar Vs. Abdul Hadi***" reported as 1981 SCMR 878, had applied the principle of *resjudicata* to case of a tenant who had started second round of litigation by filing a suit when in first round of litigation, he had been adjudged as a tenant while second party to the litigation as a transferee and owner of the property in dispute in said case. Further reliance in this respect may also be placed on the judgment of honourable Lahore High Court, in the case of "***Shahzad Hussain Vs. Hajira Bibi"*** reported as PLD 1990 Lahore 222.

15. Another aspect of the case was the development of obtaining an order from EAC and deposit of amount of compensation in compliance thereof, had taken place in respect of the property which was in dispute before District Court right at the time. Such a development would also be

covered by principle of *lis-pendens*. The principle of *lis-pendens* is based upon the principle of equity, saying *"ut lite pendent nihil innoveture"*. The maxim can be translated to the effect that nothing new should be introduced during pendency of a litigation. We also find said principle embodied in Section 52 of the Transfer of Property Act, 1982 which read as;-

> *"During the pendency in any Court having authority in Pakistan or established beyond the limits of Pakistan by the Central Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.*
>
> *Explanation:---For the purpose of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of*

> *competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."*

16. Hon'ble Supreme Court of Pakistan, while giving its judgment in the case of "***Muhammad Ashraf Butt Vs. Muhammad Asif Bhatti"*** (**PLD 2011 SC 905**), has quoted a para from the judgment delivered in the case of "Tilton V. Cofield, (93 U.S. 168, 23 L.Ed, 858)" and held that rule of *lis-pendens* unambiguously prescribed that rights of a party to suit, who ultimately succeeded in the matter, were not to be affected in any manner whatsoever, on ground of alienation and that the transferee of the property would acquire titled to the property subject to final outcome of the lis. Observations given in the case of Tilton vs. Cofield, may also be reproduced hereunder with benefit:-

> *"The doctrine of lis pendens is that real property, when it has been put in litigation by a suit in equity, in which it is specifically described, will, if the suit is prosecuted with vigilance, be bound by the final decree,*

notwithstanding any intermediate alienation; and one who intermeddles with property in litigation does so at his peril and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party from the outset".

17. Similarly, hon'ble Supreme Court of Pakistan, while giving its judgment in the case of "***Mst. Tabassum Shaheen Vs. Mst. Uzma Rahat and others***" reported as *2012 SCMR 983*, has also held;-

"*The afore-referred provision enshrines the age old and well established principle of equity that ut lite pendente nihil innovetur (pending litigation nothing new should be introduced) and stipulates that pendente lite parties to litigation wherein right to immovable property is in question, no party can alienate or otherwise deal with such property to the detriment of his opponent. Any transfer so made would be hit by this Section. The doctrine by now is recognized both in law and equity and underpins the rationale that no action or suit would succeed if alienations made during pendency of proceedings in the said suit or action were allowed to prevail. The effect of such alienation would be that the plaintiff*

> *would be defeated by defendants alienating the suit property before the judgment or decree and the former would be obliged to initiate de novo proceedings and that too with lurking fear that he could again be defeated by the same trick. The doctrine of lis pendens in pith and substance is not only based on equity but also at good conscience and justice."*

18. It is also necessary to be explained here that operation of doctrine of *pendent lite* cannot be held limited to a transaction of sale and purchase only. Applicability of the general principle *pendent lite* would also include other developments that take place in respect of same property which is subject matter of a dispute before the Court of law provided such a development would have a substantial bearing on decision of the case, had the matter been brought to the notice of Court. The express wording to Section 52 of the Transfer of Property Act, 1982, wherein it is stated "*the property could not be transferred or otherwise dealt by any part to the suit or proceedings so as to affect the rights of any party thereto under any decree or order which may be made therein"* are significant in this respect, particularly, the wordings "or otherwise dealt with".

19. In the instant case, the order whereby petitioner had been claiming ownership could not be termed to be a transaction of sale but through said order, the property which had been subject matter of litigation directly, was tried to be *dealt with otherwise* and same was not only without authority of the Court, but had also been kept concealed therefrom. The order so procured from the Revenue Officer, as well as the compensation deposited in accordance with said order, would therefore, also be covered by wording "*otherwise dealt with*". Same would be squarely hit by doctrine of lis-pendens.

20. In the light of what has been discussed above, this and the connected petition were found divested of merits, which stand dismissed.

Announced
Dt: 10.10.2022

J U D G E

*Tufail. /**