

**IN THE SUPREME COURT OF PAKISTAN**

(Appellate Jurisdiction)

**PRESENT:**

MR. JUSTICE IJAZ UL AHSAN

MR. JUSTICE YAHYA AFRIDI

(AFR)

**Civil Petition No.3772 of 2019**

*Against judgment dated 29.08.2019 of Lahore  
High Court, Multan Bench, Multan, passed in  
Civil Revision No.1202-D of 2003.*

Muhammad Yousaf & others

**Petitioner(s)**

**VERSUS**

Nazeer Ahmed Khan (decd) through LRs, etc

**Respondent(s)**

For the Petitioner(s):

Syed Muhammad Ali Gillani, ASC  
Ch. Akhtar Ali, AOR

For the Respondent(s):

Ch. Arshad Ali, ASC/AOR

Date of hearing:

12.08.2021

**ORDER**

**IJAZ UL AHSAN, J-**. The petitioners seek leave to appeal against a judgment of the Lahore High Court, Multan Bench, Multan, dated 29.08.2019. Through the impugned judgment, a Revision Petition (C.R.No.1202-D of 2003) filed by the Respondents was disposed of by directing that the original suit instituted by the Respondents would stand dismissed as withdrawn with liberty to file a fresh one which remedy on being availed will be dealt with in accordance with law.

2. Briefly stated the facts necessary for disposal of this *lis* are that Farzand Ali, father of Respondent No.1

(Nazir Ahmed Khan) migrated to Pakistan after partition of the subcontinent. He filed a claim for his abandoned land in India. After verification of his claim bearing No.4380, an agricultural land against 487 units was allotted to him in Chak No.134/9-L and against the remaining 187 units, agricultural land was allotted to him in Chak No.25/9-L, Tehsil & District Sahiwal. The said Farzand Ali appointed Muhammad Ameer as his general attorney. On the basis of such general power of attorney, Muhammad Ameer transferred the land situated in Chak No.125/9-L, in favour of Mst. Parveen Noon (Respondent No.2) vide mutation No.43 dated 26.11.1968. Respondent No.2 was allegedly a relative of Muzaffar Qadir, the then Deputy Commissioner, Sahiwal. As such, an inquiry was initiated against the said Deputy Commissioner regarding allotment of the land. A notice in respect of the said inquiry was also served upon Farzand Ali, but he did not opt to appear and subsequently the inquiry proceedings were dropped. Further, it was alleged that said Farzand Ali also came to know about allotment of the land in his favour on an application submitted by some informer, but he did not take any action or interest nor did he make any claim in respect of said land during his life time. The land purchased by Respondent No.2 was surrendered by her

in favour of the Federal Land Commission vide mutation No.18 dated 20.05.1978. Such land was later allotted to Khadim Hussain and Jaffar Hussain, petitioners No.5 & 6, respectively.

3. It appears from the record that Farzand Ali died in the year 1978. The power of attorney attested by him was witnessed by his son Bashir Ahmad, who also happened to be marginal witness of power of attorney. He never raised any objection regarding validity of the same. Respondent No.1 (*Nazeer Ahmad Khan*) after the death of his father (*Farzand Ali*) instituted a suit for possession on 20.01.1979 of the land originally allotted to his father. Neither any mutation, order or proceedings were challenged nor any declaration regarding cancellation of the power of attorney in favour of Muhammad Ameer was sought by him. Even, the Federal Land Commission in whose favour the land in question was surrendered by Mst. Parveen Noon was not arrayed as a party in the suit. Bashir Ahmad, the other son of Farzand Ali did not join Respondent No.1 in filing of the suit rather he was impleaded as a defendant therein. He died during pendency of the suit and his legal heirs were impleaded who did not support the claim of Respondent No.1 and were proceeded ex-parte.

4. After recording evidence of the parties, the suit was dismissed by the trial Court, vide judgment & decree dated 01.06.2000. The appeal filed against such judgment & decree was also dismissed, vide judgment & decree dated 28.07.2003. Thereafter, a Civil Revision was filed in the Lahore High Court, Multan Bench, Multan. This was disposed of vide impugned judgment dated 29.08.2019 in the terms noted above. Hence, this petition.

5. The learned ASC for the petitioners submits that the impugned order passed by the Lahore High Court in exercise of its revisional Jurisdiction is not only in violation of Order 23 Rule 1, CPC but is patently in excess of jurisdiction vesting in the High Court while acting as the revisional Court. He maintains that permission to file a fresh suit cannot be granted where the defect in the original suit goes to the root of the case and in any event a fresh suit by adding new parties and seeking a different relief cannot be allowed to be instituted decades after filing of the original suit. He submits that by the time the suit of the Respondents reached the revisional Court 48 years had already elapsed in litigation and by not commenting on the fact that the suit would patently be barred by limitation, the High Court has ignored an express provision of order 23

Rule 1, CPC which categorically provides that in any fresh suit instituted on permission granted under order 23 Rule 1, CPC the plaintiff shall be bound by the Law of Limitation in the same manner as if the first suit had never been instituted. He finally submits that a condition precedent for exercising powers under order 23 Rule 1, CPC is that a suit which failed due to some formal defect can be allowed to be re-filed after removing such "formal defect" in the interest of justice. He further submits that the suit of the Respondents did not suffer from any "formal defect". He maintains that there were patent and inherent defects in the suit touching the merits of the case therefore permission to withdraw the same amounts to granting permission to file a fresh and different suit, seek a totally different relief by impleading more and different parties which cannot be granted. He finally argues that the High Court fell into error in setting aside the detailed and well reasoned judgments of the trial Court as well as the Appellate Court and passed the impugned judgment which is not in consonance with the relevant principles of law and amounts to condemning the petitioners to go through the agony of another protracted round of litigation potentially spanning over decades for no fault on their part.

6. The learned counsel for the Respondents on the other hand has supported the impugned judgment.

7. We have heard the learned counsel for the parties and gone through the record. It appears that Farzand Ali and some others were co-sharers in a property. Farzand Ali on 09.11.1968 through a registered general power of attorney appointed one Muhammad Ameer as his general attorney. In such capacity, he as well as other sharers transferred their property vide mutation No.43 dated 20.11.1968 in favour of Mst. Parveen Noon (*Respondent No.2*). Respondent No.1 (*Nazeer Ahmed Khan*) is one of the sons of Farzand Ali. He after the death of his father without seeking cancellation of the aforementioned power of attorney as well as the relevant mutations filed a suit for possession under Section 8 of the Specific Relief Act, 1877. The record also indicates that his surviving brother Bashir Ahmad did not join him as one of the plaintiffs and was arrayed as a defendant in the suit despite being necessary parties. Another necessary party namely the Federal Land Commission was not arrayed as a defendant either. At the same time, Muhammad Ameer who was acting as attorney of Farzand Ali and the other co-vendors were not impleaded in the suit. In view of the fact that where even the basic documents were not

challenged, which continued to hold the field and on the basis of such documents proprietary and possessory right, title and interest in the property stood transferred and was duly acted upon in all relevant records, a simple suit for possession was not maintainable and was rightly dismissed by the trial Court, vide judgment & decree dated 01.06.2000 for the said reason. This judgment and decree was correctly upheld by the Appellate Court vide judgment & decree dated 28.07.2003.

8. We note that in granting permission to withdraw the suit to file a fresh one, the High Court has relied upon the provisions of Order 23 Rule 1, CPC. Before proceeding with the matter, it would be useful to reproduce Order 23 Rules 1, CPC which reads as follows:

*"1. Withdrawal of suit of abandonment of part of claim. (1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.*

*(2) Where the Court is satisfied*

*(a) that a suit must fail by reason of some formal defect, or*

*(b) that there are other sufficient grounds for allowing the plaintiff to claim,*

*it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of claim.*

*(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission*

*referred to in sub-rule (2), he shall be liable for such costs as a Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.*

*(4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others.*

In terms of the aforementioned provisions of the Code of Civil Procedure, a plaintiff who wishes to withdraw his suit with permission to file a fresh suit must show that there was a formal defect in the suit which can result in failure of the same. In the instant case, the record does not show that any application for said purpose was moved before the High Court nor was any formal defect appears to have been identified or asserted before the learned High Court. Further, where a defect is removable or rectifiable by amendment of the plaint, permission to file a fresh suit cannot be granted. Finally, where a defect which goes to the root of the case and is not merely a formal defect, permission to file a fresh suit would amount to allowing the plaintiff to retrace his steps plug the loopholes in the earlier suit and file a different case with different/additional parties and a totally different relief. These to our mind are not steps that could by any stretch of the language be termed as removal of formal defect. See Muhammad Boota v. Member (Revenue), Board of Revenue (PLD 2003 SC



**979)**, Muhammad Kazim Ziauddin Durrani v. Muhammad Asim Fakharuddin Durrani **(2001 SCMR 148)**, Amjad Rashid Khan Malik v. Shahida Naeem Malik **(1992 SCMR 485)** and Ali Muhammad v. Rahmatullah **(1990 SCMR 913)**. As such, neither the suit can be permitted to be withdrawn nor permission to file a fresh suit be granted on that score.

9. We also notice that in the instant case, both parties had completed their evidence and the case had been decided on merits by the trial as well as the Appellate Court. The request for withdrawal was made after decades before the revisional Court which appears to be an attempt on the part of the Respondents to retrace their steps, plug gaps and loopholes in evidence and take a second shot at the relief that two Courts of fact had denied. In the facts and circumstance of the instant case, non-joinder and mis-joinder of the parties could not be used as a ground for conditional withdrawal of the suit and failure to seek declaration and cancellation was an inherent and fatal defect which could not be allowed to be cured at such belated stage.

10. The term formal defect that has not been defined in the Code of Civil Procedure, its plain meaning in the context that the word has been used in the CPC

appears to be that such defect should be only on the point of form of the suit. It appears to connote every kind of defect which does not affect the merits of the case. However, if the defect is material and substantial and affects the merits of the case or goes to the root of the claim it cannot be termed as a formal defect within the scope and meaning of sub clause (a) of Rule 1(2) of Order 23, CPC. A perusal of the impugned judgment passed by the High Court does not show which formal defects were pointed out to the Court that persuaded it to not only allow withdrawal but also to grant permission to file a fresh suit. Unfortunately, the order of the High Court is also silent on that score which leads us to believe that no such formal defect was pointed out by the Respondents. It is clear and obvious to us that the suit of the Respondent suffered from a fatal defect. He filed a suit for possession without seeking a declaration of title, knowing that the property in question stood transferred on the basis of registered instrument. The suit was in our opinion stillborn from its very inception as it was not competent. See Province of the Punjab v. Ghazanfar Ali Shah (2017 SCMR 172), Sultan Mehmood Shah v. Din Muhammad (2005 SCMR 1872) and Muhammad Aslam v. Ferozi (PLD 2001 SC 213). It therefore follows that if the suit was inherently and technically defective, the

defect could not be termed as a mere formal defect. If the Respondent lingered it on for 40 years he has nobody but himself to blame and cannot be presented with the bonus of filing a fresh suit 40 years later. Nothing could be more unjust.

11. Order 23 Rule 1 (2), CPC also provides that the limitation for filing of the suit would start from the date when the original suit was instituted and it cannot start from the date when the permission was granted for filing of the fresh suit. The present suit appears to have been filed initially on 20.01.1979 and it was alleged that even at that time, it was barred by time. Even if limitation is computed from the said date i.e. 20.01.1979 (*the date of institution of the first suit*) permission could not have been granted because more than 40 years had elapsed between the alleged cause of action on the basis of which the suit was filed and the date when the suit was actually filed.

12. That being so, a fresh suit on the basis of permission granted by the Court would obviously be filed 40 years later and the lapse of 40 years between the time that cause of action arose and filing of the fresh suit cannot be condoned on the basis that a "formal defect" was suddenly discovered in the High Court. The

judgment of the High Court is silent on the said question which appears to have escaped notice of the Court. We are in no manner of doubt that a fresh suit, if filed pursuant to the impugned judgment of the High Court would be barred by time by 4 decades. It would be unjust and unfair to force the parties to go through the agony of the motions of yet another unnecessary round of litigation if the question of limitation (*which in the facts and circumstances of this case is essentially a fait accompli*) is left to be decided by the trial Court. It would doubtlessly be an exercise in futility and would provide a rope to the Respondents to drag the petitioners into further arduous and agonizing rounds of litigation without there being any end to their miseries in the foreseeable future. Nothing could, in our opinion, be more inequitable and unjust.

13. The jurisdiction of the High Court as a Revisional Court is limited to examining the question if the lower *fora* have, (a) exercised jurisdiction not vested in it by law or, (b) have failed to exercise jurisdiction so vested or, (c) have acted in exercise of its jurisdiction illegally and with material irregularity. Perusal of the impugned judgment of the High Court shows that it proceeds beyond the jurisdictional powers and parameters of the High Court in its Revisional

Jurisdiction and is therefore in our opinion not sustainable.

14. For reasons recorded above, we convert this petition into an appeal and allow the same. The impugned judgment of the High Court dated 29.08.2019 is accordingly set aside and the judgments & decrees of the trial Court as well as the Appellate Court dated 01.06.2000 and 28.07.2003 respectively are restored, affirmed and reiterated.

**Judge**

**Judge**

**ISLAMABAD, THE**

12<sup>th</sup> of August, 2021

ZR/\*

**Not Approved For Reporting**