

22/22

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

MR. JUSTICE SARDAR TARIQ MASOOD
MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI
MR. JUSTICE JAMAL KHAN MANDOKHAIL

AFR

Civil Petition No. 1540 of 2018

(On appeal from the order of the Lahore High Court, Lahore dated 12.03.2018 passed in W.P. No. 10068 of 2012)

Muhammad Arif Chattha & others

Petitioner(s)

Versus

The learned Addl. District Judge, Gujranwala & others

.....Respondent(s)

For the Petitioners:

Mr. Khalid Ishaq, ASC
Syed Rifaqat Hussain Shah,
AOR

For Resp. Nos. 3,5,6,8,10,11,
13 to 17:

Agha Muhammad Ali, ASC
Ch. Akhtar Ali, AOR

Date of hearing:

11.02.2022

ORDER

Jamal Khan Mandokhail, J.- The respondents filed a suit for possession through pre-emption, which was decreed in second appeal bearing RSA No. 53 of 1988 by the learned Lahore High Court, Lahore, vide judgment and decree dated 5th July, 2001 (**the decree**), which were upheld by this Court in CPLA No. 3072-L of 2001 on 21st March 2006. Since the judgment and decree of the learned High Court were not suspended by this Court, therefore, the respondents filed an application on 18th October, 2001 for execution of the decree, before the Senior Civil Judge, Gujranwala. The said execution application was dismissed on 28th September 2002, by the Executing Court due to non-prosecution as well as for non-submission of process fee. Subsequently, the respondents filed second execution petition on 21st March, 2009 for execution of the decree before the court of the Senior Civil Judge. The petitioners filed objections that the execution application was

barred by time as it has been filed after a period of six years from the date of the decree, as provided by section 48 of the Code of Civil Procedure (**CPC**). It was also urged that since the earlier application filed by the respondents was dismissed, therefore, the second execution application was not maintainable on this score as well. The Executing Court rejected the objections of the petitioners on 14.06.2011. Against the said order, the petitioners filed a revision petition, which too was dismissed on 4th April 2012. Feeling aggrieved, a constitution petition was filed before the learned Lahore High Court, Lahore, which was also dismissed on 12th March 2018, hence this petition for leave to appeal.

2. The learned counsel for the petitioners stated that section 48 of the CPC provides a period of six years for filing of second execution application from the date of a decree, sought to be executed. According to him, since the decree was passed on 5th July 2001, which remained in the field during the pendency of the CPLA, but the second execution application has been filed on 21st March 2009, therefore, it was hopelessly time barred. He added that the earlier application filed by the respondents was dismissed, therefore, being a past and closed transaction, the second execution application was not maintainable, but the learned High Court has ignored these legal aspects.

3. Learned counsel for the respondents contended that the first execution application was not decided on merits, rather it was disposed of for non-prosecution, therefore, the second application filed by the respondents was a continuation of the first one, therefore, the provisions of section 48 of the CPC do not attract.

4. Heard the learned counsel for the parties and have gone through the record. The first question for decision is whether the second execution application filed by the respondents was not within time as provided by section 48 of the CPC, which reads as under:

"48. Execution barred in certain cases.---(1) *Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of six years from - -*

(a) *the date of the decree sought to be executed, or*

(b) *where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.*

(2) - - - - -."

5. According to sub section 1 clause (a) of section 48, no order for execution of a decree shall be made upon any fresh application presented after the expiry of six years from the date of the decree sought to be executed. At the same time, clause (b) of section 48 provides that where the decree directs payment of money or the delivery of any property to be made at a certain date or at recurring periods, the limitation would run from the date of default in making the payment or delivery of any property, in respect of which the applicant seeks execution. Thus, if a decree, sought to be executed, is conditional, specifying the date for performance of certain act(s), the period for execution of the same shall be reckoned from the date of default of performance of the act(s), mentioned in the decree, instead of counting from the date of passing of the decree. In other cases, second application shall be filed within the period prescribed by section 48 of the CPC, which period shall be counted from the date of the decree.

6. In a case where the pre-emption suit is allowed, the decree must be drawn in accordance with the procedure provided by Order 20 Rule 14 of the CPC, which is as under:

"14. Decree in pre-emption suit. - -(1) *Where the Court decrees a claim to pre-emption in respect of a*

particular sale of property and the purchase-money has not been paid into Court, the decree shall - -

(a) specify a day on or before which the purchase-money shall be so paid, and

(b) direct that on payment into Court of such purchase-money, together with the costs (if any) decreed against the plaintiff, on or before the day referred to in clause (a), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs.

(2) ----- ”

7. The provision of Order 20 Rule 14 of the CPC are mandatory in nature. The decree for pre-emption is a conditional decree, wherein, the plaintiff/decreed holder has to fulfill two conditions; he has to deposit in Court (i) the purchase-money together with the cost, if any, decreed against him and (ii) the deposit must be made on or before the date fixed by the Court. This provision of the CPC contains a penal consequence of dismissal of the suit, in case the plaintiff/decreed holder fails to make payment of the purchase-money in Court on or before the date fixed in the decree. Once, the plaintiff/decreed holder performs his part of obligation as per the directions contained in the decree, then he automatically becomes owner of the property, as such, he becomes entitled for possession. At the same time, the concerned revenue authorities are bound to implement the decree for the purpose of record of right, without an order from an Executing Court. However, in case the authorities concerned fail to do the needful, then the decree holder can file an application for execution of the decree. In such circumstances, the time for the purpose of limitation would be reckoned from the date of default in performance of obligation by the authorities.

8. Besides, a pre-emption decree imposes reciprocal obligation on both the sides. Thus, after performance of part of obligation by the decree-holder, it is then the responsibility of the

defendant/judgment debtor to deliver possession of the property to the decree holder. In case of failure to deliver possession of the property, a pre-emption decree can be executed through an application, which shall be made within the period prescribed by Article 181 of the Limitation Act. It is only after the first application is made, the subsequent application can be filed within the period provided by section 84 of the CPC. The time for filing of subsequent execution application shall be reckoned from the date of delivery of possession, specifically mentioned in the decree sought to be executed. In case, no date for the delivery of possession is mentioned in the decree, the period of limitation would then be counted from the date of default in making delivery of possession of property.

9. Now coming to the issue in hand, it is important to mention here that the learned High Court in its decree dated 5th July 2001 directed the decree holders to deposit the amount within a period of one month. There is no mention of the date in the decree, with regard to the delivery of possession of the land, subject matter of the decree. We have been informed that the respondents/decreed holders have deposited the purchase-amount in Court in time. If it is so, the decree holders have fulfilled their part of the obligation. It was, therefore, the responsibility of the petitioners/judgment debtors to deliver possession of the property to the decree holders, but they have committed default in making delivery of possession. Under such circumstances, the period of limitation for filing of execution application shall be counted from the date of default in making delivery of possession by the judgment debtors to the decree holders, instead of the date of the decree. Hence, the objection of limitation has rightly been overruled by the learned High Court.

10. Next objection of the petitioners was with regard to maintainability of the second application, because of dismissal of the earlier one. Section 48 permits the decree holder to file number of subsequent application(s), provided that the same is/are being filed within a period prescribed therein; and subject to the

principle of *res judicata*. As far as the period of limitation for filing of subsequent application is concerned, detail in this behalf has already been given above. Admittedly, the earlier application for execution of the decree filed by the respondents was though in time, but was dismissed in default and for non-prosecution, rather than on merits, therefore, the decree remained unsatisfied. Had the earlier application been disposed of on merits, then of course, the subsequent applications would not have been competent. Therefore, the subsequent application filed by the respondents was quite competent. The objection so raised by the petitioners has since no substance in it, therefore, the learned High Court has rightly turned down the same. The learned counsel for the petitioners has not been able to make out a case for the grant of leave.

Thus, for the foregoing reasons, this petition is dismissed and leave to appeal is refused.

Islamabad,
11.02.2022

APPROVED FOR REPORTING

K.Anees/-