IN THE HIGH COURT OF SINDH, AT KARACHI

Present:
Yousuf Ali Sayeed and
Abdul Mobeen Lakho, JJ

C.P No. D-08 of 1991

Zulfiqar Ali Agha & others.....Petitioners

Vs.

Evacuee Trust Property Board & others.....Respondents

Salahuddin Ahmed, Advocate for the Petitioner
Rizwana Ismail, Advocate for the Respondent No.5.
Obaid-ur-Rehman, Advocate for Respondents Nos. 30 & 31.
Basil Nabi Malik, Advocate for the Respondents Nos. 32 & 33.
Abdul Jalil Zubedi, Asstt. Advocate General, Sindh.

Date of hearing : 10.12.2025

ORDER

YOUSUF ALI SAYEED, J. - This Petition was allowed through an Order made by a learned Division Bench on 27.08.2003, with the reasons being set out in the Judgment that followed on 02.12.2003, as affirmed on appeal by the Supreme Court on 16.02.2018, with CMA No. 3164/21 then being filed by the Respondents Nos. 32 and 33 (the "**Applicants**") under Section 12 (2) CPC, impugning that Judgment.

2. The maintainability of the Application before this Court was brought into question as far back as in terms of the Order dated 13.08.2021, which reads as follows:

> "Learned counsel for the Petitioner has raised an objection with regard to maintainability of application filed under Section 12(2) CPC, and submits that in terms of judgment of Hon'ble Supreme Court reported in PLD 2016 Supreme Court 358 (Sahabzadi Maharunisa and another v. Mst. Ghulam Sughran and another), the application under Section 12(2) CPC has to be filed before the forum which has passed the final judgment. Learned counsel for applicant has disputed this position and submits that in view of large number of judgments of Hon'ble Supreme Court, an application under Section 12(2) CPC may be filed before the forum which has passed the initial judgment and decree. Learned counsel for Petitioner requests for time to assist this Court in this regard and file a reply, if any, to the listed application before next date of hearing with advance copy to learned counsel for applicant."

3. Learned counsel for the parties were *ad-idem* that this question ought to be determined prior to this Court dwelling into the merits of the Application, and the competing arguments advanced on behalf of the Applicants and Petitioners remained confined to that aspect accordingly.

4. In that context, it falls to be considered that in *Maharunisa*, while considering the Doctrine of Meger, a three-member Bench of the Supreme Court determined the question of the proper forum for S.12(2) applications, with the summation of the matter being as follows:

> "8. In order to sum up the discussion on the subject, we find that the following are the situations (with certain exceptions) which would be relevant to the determination of the final court within the purview of Section 12(2) of the C.P.C:-
>
> (i) Where an appeal/revision/writ is accepted, the judgment etc. is reversed, varied, modified or affirmed;
>
> (ii) Where an appeal/revision/writ is not disposed of on merits but on some other grounds;

(iii) Where direct appeals or those after the grant of leave are allowed or dismissed and the judgment etc. of the learned High Court(s)/Tribunals or special forums below has been varied, altered, reversed or affirmed by this Court;

(iv) Where the petition(s) for leave to appeal under the Constitution is declined;

9. With respect to these four situations, our conclusion is as under:-

(i) In the cases where the remedy of appeal/revision is provided against a judgment etc. or a remedy of writ is availed, the appellate/revisional/constitutional forum records reasons on the consideration of the issues of law and/or fact the judgment etc. of the subordinate court/forum will merge into the decision of the appellate court etc. irrespective of the fact that such judgment reverses, varies or affirms the decision of the subordinate court/forum and its decision will be operative and capable of enforcement on the principle of merger, the application under Section 12(2) of the C.P.C. will be maintainable before the appellate/revisional/constitutional forum (High Court, District Court, Tribunal or Special Court as the case may be);

(ii) In the situation mentioned at serial No.(ii) above, there are certain exceptions to the rule of merger which (rule) shall not apply, where an appeal etc. has been dismissed:- (i) for non-prosecution; (ii) for lack of jurisdiction; (iii) for lack of competence/maintainability; (iv) as barred by law; (v) as barred by time; (vi) withdrawal of the matter by the party; (vii) for lack of locus standi; (viii) decided on the basis of a compromise, if the very basis of the compromise by the party to the lis or even a stranger showing prejudice to his rights is not under challenge on the ground of fraud; (ix) is rendered infructuous or disposed of as having borne fruit; (x) abatement; (xi) where the writ is dismissed on the ground of availability of alternate remedy; (xii) where the writ is dismissed on the point of laches. It may be mentioned that such exceptions shall also be attracted to the decision(s) of the Supreme Court, where applicable. However where the case falls within the noted exceptions the forum for an application under Section 12(2) of the C.P.C. is the one against whose decision the matter has come and been disposed of in the above manner by the higher forum;

(iii) In the cases of reversal or modification of the judgment of the High Court(s), Tribunal(s) or Special Courts before this Court, or those affirmed in appeal (where the matter does not fall within the exceptions)

> the judgment of the Supreme Court shall be deemed to be final for moving an appropriate application on the plea of lack of jurisdiction, misrepresentation and fraud;
>
> (iv) In the cases where leave is declined by this Court, the judgment etc. of the lower fora will remain intact and final and will not merge into the leave refusing order, for the purposes of an application under Section 12(2) of the C.P.C. which can only be filed before the last forum i.e. the learned High Court(s) if the matter has been decided in the appellate/revisional/writ jurisdiction by the said court, or if the matter has come to this Court directly for leave from a Tribunal/Special Court (see Article 212 of the Constitution). However where the petition for leave to appeal has been dismissed with detailed reasons and a thorough decision of the questions of law and fact has been made, the judgment of the High Court(s)/Tribunal will though not merge into the order of the Supreme Court yet in order to avoid a ludicrous situation that once a question of law and fact has been elaborately and explicitly dealt with by this Court in the leave refusing order and the court below may not be in a position to adjudicate upon those points without commenting on the order/reasons of the Supreme Court and to reopen the matter, an application in the nature of Section 12(2) of the C.P.C. can be filed before this Court, leaving it to the absolute discretion of this Court to either decide such application itself or send the matter to the lower fora for the decision;

5. Learned counsel for the Petitioner relied upon the *Maharunisa* judgment in and submitted that the matter was covered under Paragraph 9(iii) thereof, as the Judgment of this Court had been affirmed by the Supreme Court through a detailed reasoned judgment. Conversely, learned counsel for the Respondents, whilst acknowledging that this was so, nonetheless argued that *Maharunisa* ought not to be followed, as according to him the matter had been decided *per incurium*, as the Bench had departed from the earlier binding judgment rendered by a Bench of co-equal strength in the case of Joydeb Agarwala v. Baitulmal Karkhana Ltd PLD 1965 SC 37.

6. In developing that argument, he contended that the learned Bench in *Mahrunisa* had erred in following the principle laid down in the case reported as F. A. Khan v. The Government of Pakistan PLD 1964 SC 520, where the underlying proposition had been one concerning the law of limitation and where the judgment was that of a two-member Bench, whereas the judgment in *Agarwala*, being that of a Bench of co-equal strength, enunciated that where a judgment and decree were affirmed without modification by a higher forum, the Doctrine of Merger would not be attracted. He submitted that in the line of case law that flowed from *Agarwala*, a 'Bottom-to-Top' rule had been laid down for determining the forum that had delivered the final judgment/decree, which would be the court of first instance, unless the judgment/decree had been reversed/modified by a higher forum. He argued that while considering the Agarwala case, the Bench in *Mahrunisa* could not have departed from the principle laid down therein or declared that judgment to be *per incurium*, hence that judgment ought not to be followed as it was itself *per incurium* and ought to be declared as such. In that framework, he submitted that it was *Agarwala* which was binding on this Court of Sindh and ought to be followed.

7. As things stand, that principle was expounded by a three-member Bench of this Court in the case of Abdul Wahab and another v. The State 2020 PCrLJ 556, as follows:

> "38. What is meant by giving a decision per incurium is giving a decision when a case or a statute has not been brought to the attention of the court and they have given the decision in ignorance or forgetfulness of the existence of that case or that statute or forgetfulness of some inconsistent statutory provision or of some authority binding on the court, so that in such cases some part of the decision or some step in the reasoning on which it was based on that account is demonstrably wrong. See Nirmal Jeet Kaur's case (2004 SCC 558 AT 565 para 21), 1131], Cassell and Co Ltd. 's case (LR 1972 AC 1027 at 1107, 1113, 1131, Watson's case (AELR 1947 (2) 193 at 196), Morelle Ltd.'s case (LR 1955 QB 379 at 380), Elmer Ltd.'s

> case (Weekly Law Reports 1988 (3) 867 at 875 and 878) Bristol Aeroplane Co.'s case (AELR 1944 (2) 293 at page 294) and Morelle Ltd.'s case (AELR 1955 (1) 708).
>
> 39. The ratio of the aforesaid judgments is that once the Court has come to the conclusion that the judgment was delivered per-incuriam then the Court is not bound to follow such decision on the well known principle that the judgment itself is without jurisdiction and per-incuriam therefore, it deserves to be over-ruled at the earliest opportunity. In such situation, it is the duty and obligation of the apex Court to rectify it. The law has to be developed gradually by the interpretation of the Constitution then it will effect the whole nation, therefore, this Court, as mentioned above, is bound to review such judgments to put the nation on the right path as it is the duty and obligation of the Court in view of Articles 4, 5(2) read with Articles 189 and 190 of the Constitution".

8. The meaning, concept and connotation of the term had earlier been elaborated by a learned Division Bench of this Court whilst emphasizing the importance of *stare decisis* and effect of Article 189 of the Constitution in the case reported as S. Nasim Ahmed Shah and 115 others v. State Bank of Pakistan through Governor and another 2017 PTD 2029. Speaking for the Court, Muhammad Ali Mazhar, J, observed that:

> "22. The binding effect of the judgment of honourable Supreme Court is well known. Under Article 189 of the Constitution, any decision of the Supreme Court to the extent that it decides question of law or enunciates a principle of law is binding on all other courts in Pakistan. In the case of Justice Khurshid Anwar Bhinder v. Federation of Pakistan, reported in PLD 2010 SC 483, it was held that "where the Supreme Court deliberately and with the intention of settling the law, pronounces upon a question, such pronouncement is the law declared by the Supreme Court within the meaning of this Article and is binding on all courts in Pakistan. It cannot be treated as mere obiter dictum. Even obiter dictum of the Supreme Court, due to high place which the court holds in the hierarchy of courts in the country, enjoy a highly respected position as if it contains a definite expression of the Court's view on a legal principle or the meaning of law.
>
> 23. What Articles 189 and 201 of the Constitution do is to recognise and adopt the doctrine of precedent; they also seem to have accorded recognition to "one of the existing realities of life" namely that Judges make and change the law. Under Articles 189 and 201 of the Constitution, only that decision is binding which (a) decides a question of law or (b) is based upon a principle of law, or (c) enunciates a principle of law. In the

case of Union of India v. Raghubir Singh (1989) 2 SCC 754 = AIR 1989 SC 1933, the court held that "The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transactions forming part of his daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a court.

24. The doctrine of "Stare decisis" means to abide by, or to adhere to, decided cases. It is a doctrine under which a deliberate or solemn decision of court made after argument on question of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent, in the same court, or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy. This doctrine has been given constitutional recognition in Articles 189 and 201 of the Constitution. Cooley in his treatise "Constitutional Limitations", while commenting on this doctrine quotes Chancellor Kent:

> "A solemn decision upon a point of law arising in any given case becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the Judges are bound to follow that decision so long as it stands unrevised, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favour of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would, therefore, be extremely inconvenient to the public if precedents were not duly regarded and implicitly followed."

9. In that very matter, the learned Judge went on to observe that:

> “25. So far as the plea of per incuriam articulated by the respondent's counsel that while taking cognizance, earlier judgment on the point of deduction made on account of income tax was not taken into consideration, we would like to take the aid and assistance from Black's Law Dictionary, Ninth Edition to get the drift of true connotation of the expression and terminology "per incuriam":--
>
> "There is at least one exception to the rule of stare decisis. I refer to judgments rendered per incuriam. A judgment per incuriam is one which has been rendered inadvertently. Two examples come to mind: first, where the judge has forgotten to take account of a previous decision to which the doctrine of stare decisis applies. For all the care with which attorneys and judges may comb

> the case law, errare humanum est, and sometimes a judgment which clarifies a point to be settled is somehow not indexed, and is forgotten. It is in cases such as these that a judgment rendered in contradiction to a previous judgment that should have been considered binding, and in ignorance of that judgment, with no mention of it, must be deemed rendered per incuriam; thus, it has no authority. The same applies to judgments rendered in ignorance of legislation of which they should have taken account. For a judgment to be deemed per incuriam, that judgment must show that the legislation was not invoked." Louis-Philippe Pigeon, Drafting and interpreting legislation 60 (1988). "As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concern, so that in such cases some features of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can probably be held to have been decided per incuriam, must in our judgment, consistently with the stare decisis rule which is an essential part of our law, be of the rarest occurrence." Rupert Cross & J.W. Harris, Precedent in English Law 149 (4th ed. 1991).

10. In the matter at hand, it merits consideration that the case is not one of an omission, where a court has taken a divergent view from that laid down in a binding precedent while failing to consider the same. On the contrary the matter is one where the earlier judgment of the three-member Bench in *Agarwal* was fully considered by the Bench of co-equal strength in *Maharunisa* and a conscious decision was deliberately taken that the same was not to be followed. That being so, where the principle laid down by *Maharunisa* specifically addresses the question as to the forum before which the Application under S.12(2) CPC lies under the given circumstances, we are bound by that determination and it is not for this Court, with utmost respect, to second guess the approach taken so as to sit in judgment over whether the Supreme Court could or ought to have departed from an earlier precedent.

11. In view of the foregoing, CMA No. 3164/21 is found not to be maintainable and stands dismissed accordingly.

JUDGE

JUDGE