

IN THE HIGH COURT OF SINDH, KARACHI

C.M.A. No.11655/2017
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IN

Suit No.1506 of 2008

Applicant/Defendant: Planning & Development Department,
Government of Sindh, Karachi
through Mr. Sarwar Khan, Additional
Advocate General, Sindh.

Respondent/Plaintiff: M/s MICON Mining & Industrial Consultant,
through Mirza Sarfraz Ahmed, Advocate.

Date of hearing: 30.05.2018

Date of decision: 28.07.2018

ORDER

KHADIM HUSSAIN TUNIO, J. By this single order I intend to dispose of the above captioned Misc. Applications. C.M.A. No. 11656 of 2017 has been filed by applicant, seeking review of the judgment dated 05.05.2017 and decree dated 13.05.2017 whereby suit for declaration, damages & recovery of Rs.140.1 million filed by the plaintiff M/s MICON Mining & Industrial Consultant has partly been decreed with costs and interest at the rate of 6% per annum from the date of its filing and partly dismissed the same to the extent of damages. Whereas C.M.A No. 11655 of 2017 is under section 5 of the Limitation Act, 1908 to condone the delay in filing of the review application.

2. The facts, in brief are that the plaintiff M/s MICON Mining & Industrial Consultant instituted Suit No. 1506 of 2008 against the applicant/defendant for declaration/damages and recovery of an amount of Rs.140.1 million, alleging therein that he was appointed as consultant for consultancy work through agreement and 8 works were awarded to him and he submitted bills amounting to Rs.231,46,437/- which were not

paid despite many reminders. It is also alleged that he ultimately submitted complaint before the Ombudsman who directed the applicant/defendant to make the payment of Rs.201,59,527/- vide order dated 01.08.1999. The applicant/defendant filed review petition against the said order, which was allowed and respondent/plaintiff questioned the legality of review order dated 04.05.2006 through C.P No. D-50 of 2003 which was disposed of. Thereafter respondent/plaintiff being dissatisfied with the order passed by this court filed CPLA No. 257-K/2006 where the leave was refused by the Hon'ble Apex Court vide order dated 19.07.2006. Be that as it may, it was maintained by the plaintiff that an amount of Rs.231,46,437/- was outstanding against the defendants.

3. Defendant No. 1 entered against and filed written statement, controverting the assertions made by the plaintiff. It was alleged that the defendants acted strictly in accordance with terms and conditions of agreement. However, the defendant No. 2 did not file any written statement separately, but defendant No. 1 filed his written statement separately wherein he has stated that the authority has become defunct with effect from August 2003, its employees have been absorbed in various departments of Govt. of Sindh.

4. Out of the pleadings of the parties, the following issues were framed by this court:-

1. *Whether the plaintiff or defendant No. 1 has committed any breach of the agreement?*
2. *Whether the defendant No. 1 has unlawfully cancelled the contract.*
3. *Whether the plaintiff has suffered any loss and/or due to non-payment of the plaintiff's bills?*
4. *Whether the defendant No. 1 is liable to pay any amount to the plaintiff?*
5. *What is the effect of order/decision dated 10.08.1999 of the learned provincial Ombudsman?*
6. *What should the decree be?*

5. In order to prove the case, the respective parties adduced their evidence and respective sides were closed.

6. Learned Additional Advocate General in support of these applications has argued that this Court while rendering the judgment under review has ignored the material evidence in shape of Ex.D/1 to D/5, the prejudice was caused to the defendant which is further apparent on the face of the judgment and decree, the said error has material bearing on the face of the case; that exaggerated claim of the plaintiff has been allowed without looking into the available record; that written statement of defendant, review petition and the review order passed by the learned Ombudsman were available on the case file through ExD/1 to D/5 but these documents have not been considered by this Court while passing the impugned judgment & decree which is an apparent mistake and error of law as well as of fact on the face of the judgment & decree; that plaintiff attempted to suppress material facts which have been falsified by his own affidavit. As for the point that this application for review is time barred, he argued that the judgment was reserved by this Court on 08.02.2017 and the same was announced on 05.05.2017 but no notice for announcement of judgment was issued to him. And to establish the said factum he referred to the affidavit of applicant filed in support of his application for condonation of delay. He further stated that even otherwise no limitation runs against the void orders, and since the judgment under view is void, his application for review, therefore, cannot be dismissed being time barred. In support of his contentions, he has placed reliance on caselaw reported as **PLD 1970 SC 1, PLD 1991 SC 905, PLD 2005 SC 311, PLD 2002 SC 208, AIR 2008 SC 1315, PLD 1971 SC 124, 2014 CLC 1392, 2015 SCMR 380, 2017 CLD 451, 2017 YLR 1199, PLD 1977 SC 102, 2002 SCMR 1004, 2010 SCMR 36, 2011 SCMR 345, 2009 MLD 1311, 1983 PLD SC 46, 1983 SCMR 254, 1988 CLC 1807, 1991 SCMR 1149, 2015 SCMR 795, 2016 CLC 1047, 2013 CKC 640, 2011 CLC 1303, 1976 PLD SC 37, PLD 1975 Lahore 942, PLD 1953 FC 1, PLD 1961 Karachi 565, PLD 1975 Karachi 944, PLD 1995 Karachi 577 & PLD 2017 SC 207.**

7. On the other hand learned counsel for respondent/plaintiff mainly questioned maintainability of this application on the ground of limitation.

According to him, this application is hopelessly time barred as it has been filed after almost 106 days. He has further argued that against the judgment and decree, a High Court Appeal could have been preferred and against the decision of the same, a direct appeal in the Hon'ble Apex Court could have been preferred under Article 184 of Const. of Islamic Republic of Pakistan, 1973, therefore present review application is not maintainable in view of class (a)(b) of sub-section 1 of Section 114 of CPC, therefore the review application is liable to be dismissed; that the said decision of the learned Ombudsman does not preclude the respondent from seeking remedy through suit; that the applicant/defendant never filed a relief for recovery of alleged amount or the amount allowed in appeal to justify their claim; that the applicant/defendant have failed to point out any misreading or non-reading of the evidence; that Ex.D/1 to D/5 are not the documentary evidence, such are only orders which are irrelevant having no relevancy with the issues involved in the suit; that instant review application is based on lies; that the applicant/defendant have committed mischief and injustice with the respondent/plaintiff, hence present review application is baseless. In support of his contentions, he has placed reliance on caselaw reported as **PLD 1997 SC 865, 2010 SCMR 1049, 2010 SCMR 1036, 2002 SCMR 1336, 1992 SCMR 1496, PLD 2014 Sindh 468, 2014 CLC 1407, 2003 SCMR 1501, PLD 2005 Karachi 164, 1981 SCMR 37, 1997 SCMR 959, 1998 SCMR 307 & 2007 SCMR 351.**

8. After hearing learned counsel of the respective parties, this court proceeded to partly decree and partly dismiss the suit of the plaintiff vide judgment and decree dated 05.05.2017 in the following terms :-

“In view of the foregoing findings recorded under Issues No. 1 to 5, suit of the plaintiff is partly decreed with costs and interest at the rate of 6% per annum from the date of its filing and partly dismissed to the extent of damages.”

9. I have heard the learned counsel for the parties and have also examined the caselaw cited at the bar. The judgment under review was passed by this Court on 05.05.2017, whereas the application for its Review

was presented on 19.08.2017, that is, after 106 days of passing of the judgment. Article 173 of the Limitation Act, 1908 provides a limitation of 90 days for review of judgment except in cases provided by Article 161 and 162 of the said Act. Article 161 is not relevant to the present case as it deals with the review of a judgment by the court of small causes or a court invested with the jurisdiction of a court of small causes. Article 162 of Limitation Act, 1908 provides limitation period of 20 days. "*For a review of judgment by a High Court in the exercise of its original jurisdiction*" from "*the date of the decree or order*". It is significant to note that Article 162 *ibid* has been made applicable specifically to cases where review is sought before High Court in its original jurisdiction and it has been made applicable not only to judgment/decreed, but also to an order passed by the High Court. In view of the limitation prescribed specifically for the review of the judgment/decreed or order of High Court, I have no hesitation in holding that the instant review application shall be governed by the Article 162 *ibid* and not by Article 173 *ibid*. I am fortified in my view by the cases of *Riaz Qasim v. Messrs. A.M.A Pvt. Ltd.* **1999 CLC 445**. In this case, it was held by learned Division Bench of this court that Article 162 *ibid* was applicable under which an application for review before the High Court could be filed within 20 days from the date of decree or order; and since application was not filed within the prescribed period, same was barred by time.

10. Adverting to the merits of the review application, the application is barred by limitation as it has been filed after expiry of 20 days, which is the prescribed period of limitation for review of order/judgment is passed by the High Court on its original jurisdiction. In reply to this preliminary objection. Per counsel for the defendant, the review application is not barred by time as Article 173 of the Limitation Act, 1908 would apply in the present case, wherein the prescribed period of limitation is 90 days. It is an admitted fact that Article 162 of the Limitation Act, 1908 specifically provides limitation of 20 days for seeking of review of judgment by High Court in the exercise of its *original jurisdiction* and therefore, Article 173 providing limitation of 90 days is not applicable as the same applies to review of judgment except in the cases provided by Arts. 161 and 162. In this respect, reliance can be placed upon cases titled as Riyaz Qasim v.

Messrs. A.M.A Pvt. Ltd. 1999 CLC 445& Sardar Ali & others v. Tehsil Nazim 2012 YLR 1686.

11. The learned Additional Advocate General has taken a strong stance to the effect that review, filed by respondent, was barred by law of Limitation. It is always the demand of law to address a legal question first; therefore, I would like to examine this issue. Let's have a reference to Articles of Limitations dealing with 'review' which reads as under :-

Article-161	For a review of judgment by a Court of Small Causes or by a Court invested with the jurisdiction of a court of Small causes when exercising that jurisdiction	Fifteen days
Article-162	For a review of judgment by a High Court in the exercise of its original jurisdiction	Twenty days
Article-173	For a review of judgment except in the cases provided for by Article 161 and Article 162	Ninety days

The Article 161 specifically speaks about review of judgment of Small Causes court or a court exercising jurisdiction of Small Causes court while Article 162 is confined to judgment of High Court, if passed exercising original jurisdiction. However, the Article 173 has been made applicable to judgment(s) of other courts. It is a matter of record that review, under question, was in respect of the judgment passed by this court. The judgment of this court, in no way, fits within meaning of the Articles 161 and 173 of the Limitation Act, therefore, would fall within meaning of Article 162. It is settled by now that when a petition/suit is dismissed by the High Court in the exercise of its original jurisdiction, the application for review is governed by the provisions of Article 162 of the Limitation Act. The Article 162 of the Limitation Act provides a period of Twenty days for review. In the instant matter the review was filed within a period of 106 days.

12. Besides that, reference may also be made to Natasha Hussain v. Shabbir Hussain and 2 others, **PLD 2013 Lahore 257** and Amjad Jan and others v. Qazi Azizulhaq and others **2009 SCMR 1022**. In both these cases, also, it was held that the limitation period of 20 days prescribed in Article 162 shall apply in cases where review is sought before the High Court in its

original jurisdiction. The first mentioned case was decided by a learned division bench of the Lahore High Court. In the last mentioned case, the Hon'ble Apex Court was pleased to further hold that as the review application before the High Court was not filed within 20 days, it was liable to be dismissed. In case titled as *Imtiaz Ali v. Atta Muhammad and another*, **PLD 2008 SC 462**, the Hon'ble Supreme Court was pleased to hold that the appeal having been filed after one day of the period of Limitation had created valuable right in favour of the respondents. No sufficient cause was found for filing the appeal beyond the period of limitation and the delay of one day was not condoned by the Hon'ble Supreme Court.

13. Reverting to the submission of the learned counsel for applicant that the impugned judgment and decree being void ab initio, the question of limitation in filing the review application to challenge the validity thereafter would pale into significance, I am of the view that the arguments made by learned counsel for applicant are not sound. If his arguments are taken into their logic, there would be no need to file an application u/s 5 of the Limitation Act in the first place. On one hand, judgment and decree by this court cannot be dubbed as void and ab initio in as much, the same was passed by court of competent jurisdiction as held in the case of "*Manazah Parveen v. Basheer Ahmed and others*" (**2003 SCMR 1300**) and on the other hand, even void orders are to be challenged within limitation. There is another aspect of the case, so long as void judgment and decree continue to hold the field and are not set-aside in appropriate proceedings and produce the same results as do the valid judgment and decree.

14. By now, it is well-settled that the exercise of review jurisdiction does not mean a rehearing of the matter and that as finality attaches to the orders, a decision, even though it is erroneous per se, would not be a ground to justify its review. Accordingly, in keeping with the limits of the review jurisdiction, it is futile to reconsider the submission which converge on the merits of the decisions. I am fortified in my view by the case of *Muhammad Sharif Puri & another v. The Additional District Judge (With Powers of Settlement Commissioner, Lahore) and another* (**1985 SCMR 6**). Further reference, in this respect, is supplied to the case of *Muhammad Abbas Khan Abbasi v. Government of Pakistan* (**PLD 1984 SC 67**)

15. So far the contention of the learned A.A.G that the suit was instituted after period of 3 years, and provision of Section 3 of the Limitation Act, 1908 is mandatory in nature. From the perusal of record, it surfaces that the plaintiff filed his complaint with the provincial Ombudsman on 15.01.1997, which was allowed vide order dated 10.08.1999, review application was filed on 13.02.2001, same was allowed and order dated 15.01.1997 was set aside, thereafter plaintiff filed C.P No. 540 of 2003 before this court, which was disposed of on 04.05.2006 with the observations that *"the controversy is not confined to simple question of law, as regard the jurisdiction of Ombudsman, but a very serious factual dispute has been raised by the petitioner. In the circumstances, it would be appropriate for this court to decline jurisdiction under Article 199 of the constitution and leave it to the petitioner to pursue his remedy by way of Suit"*, then the plaintiff impugned the said order by filing Civil Petition No. 257-K of 2006 which was disposed of vide order dated 19.07.2006, thereafter plaintiff, on 30.10.2008, filed Suit No. 1506 of 2008 before this Court. Moreso, plaintiff has shown cause of action in para No. 25 of the plaint and Suit of the plaintiff was within time from the date of order of Hon'ble Apex Court and same is not barred by the provision of Section 3 of Limitation Act per Article 115 of the Limitation Act.

16. For the foregoing reasons and discussions, C.M.A No. 11656 of 2017 filed under section 114 CPC & C.M.A No. 11655 of 2017 filed under section 5 of the Limitation Act are dismissed. Parties shall bear their own costs.

JUDGE

Announced on 07.08.2018

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