

IN THE HIGH COURT OF SINDH, KARACHI

C.P. NO. D- 6306 OF 2016

PRESENT:**MR. JUSTICE NADEEM AKHTAR****MR. JUSTICE ARSHAD HUSSAIN KHAN**

Petitioners: Zahid Khan and another
Through Mr. Ghulam Jilani, advocate

Respondents: Karachi Municipal Corporation & others

Date of hearing & short orders: 30.11.2016

Date of judgment / reasons: 13.12.2016

JUDGMENT

ARSHAD HUSSAIN KHAN, J. The petitioner through the instant constitutional petition has challenged the order dated 05.10.2016 passed by learned court of 1ST Additional District and Session Judge Karachi (East) in Civil Revision bearing No.50/2015, upholding the Judgment and Decree passed 1ST Senior Civil Judge Karachi (East) in Civil Suit No.1131 of 2014 dated 10.03.2015, with the following prayers:-

“It is, therefore, prayed that this Hon’ble Court may be pleased to set-aside the impugned Order dated: 05.10.2016, judgment passed by respondent No.6 and decree the suit of the petitioners to the extent of Plot No.50 as well i.e. Plot No.49 & 50, measuring 130 Sq. Yards each, situated in Area 43-B, Korangi No.5½, Karachi. The petition is preferred in the interest of justice.”

2. Brief facts leading to the filing of the present petition as averred there in are that petitioner No.1 is in physical possession of Commercial Plots No.49 and 50, each measuring 130 Sq. Yds., situated in area 43-B, Korangi No.5½, since 1993/1994 and running his business of cement blocks/thalla in the name and style of “Zahid Block Works”, for which KMC has issued Trade License which is being extended from time to time. It is further averred that petitioner No.2, in the year 1994 purchased Plot No.49 on 28.07.1994 in public auction conducted by KDA under the signature of Assistant Director Recovery KDA. The said petitioner paid initial 25% of bid

amount to the extent of Rs.65,325/- and whereas the remaining amount towards cost of the plot, as per terms and conditions of the said auction proceedings, was to be paid within three months. The petitioner No.2 after the payment of said 25% initial amount, sold out the Plot No.49 to petitioner No.1 for a total sale consideration of Rs.70,000/- through an agreement of sale dated 15.12.2005. Thereafter, for the purpose of finalizing the sale transaction between the parties, petitioner No.1, on behalf of petitioner No.2, made an application to the DDO, Commercial Cell for payment of outstanding dues in respect of Plot No.49 and issuance of allotment order, Site Plan, possession letter upon which the concerned department issued Challan of Rs.1,96,000/- which amount was paid by the petitioner in Faisal Bank Branch Karachi but despite repeated requests and demands of the petitioner, the concerned department of respondent No.1 neglected and failed to issue the requisite documents and for one reason or another has been unnecessary delayed. Consequently, petitioner No.1, in order to regularize his physical possession over the plots in question, having no other option filed civil suit No.1131 of 2014 against respondents No.1 to 4, for declaration, preventive and mandatory injunction before the 1ST Senior Civil Judge, Karachi East, with the following prayers:

- “(i) To declare that the Plaintiffs being in physical possession since 1993/1994, the Plaintiff No.1 is entitled to get the suit plots No.49 & 50, measuring 130 Sq. Yards each, situated in Area 43-B, Korangi No.5½ Karachi, regularized and leased in his name from the Defendant No.1, 2 and 3.
- (ii) Prohibitory Injunction thereby restraining the defendant No.1, 2 and 3 from disposal of the suit plots No.49 & 50, measuring 130 Sq. Yards each, situated in Area 43-B, Korangi No.5½ Karachi, by way of auction and also restrain the defendants from disposing the plaintiff No.1 from suit plot, forcibly, without due course of law and creating any third party interest therein.
- (iii) A Mandatory injunction directing respondent No.1, 2 and 3, concerned staff to issue documents concerning the suit No. 49, measuring 130 Sq. Yards situated in Area 43-B, Korangi No.5 ½ Karachi, enabling her to fulfill her contractual obligation by recording her statement/no objection for transfer of the said plot in favour of plaintiff No.1.

- (iv) Any other further/better relief that this Honourable Court may deem fit and proper may also be awarded.
- (v) costs of this suit.”

3. It is also averred that respondents No.1 to 3 (defendants No.1 to 3 in said suit) were served and memo of appearance was also filed on behalf of respondents 2 to 3 by their advocate but thereafter no one appeared for the said respondents/defendants. Subsequently, despite sufficient opportunities when the said respondents failed to file the written statement, the said respondents were debarred from filing the written statement. Consequently, the case was ordered to be proceeded ex-parte against said respondents/ defendants. Thereafter, petitioners were directed to file their affidavit-in-exparte proof. Accordingly, petitioner No.1, who was also attorney of petitioner No.2, filed his affidavit-in-exparte proof on 13.02.2015 and in support of their stance in case produced various documents as Exh. P/2 to P/12. Thereafter, the trial court, after hearing the counsel for the petitioners, passed the judgment and decree only to the extent of Plot No.49, measuring 130 sq. yards, situated in area 43-B, Korangi No.5½, Karachi, whereas the prayer in respect of petitioners in respect of adjacent plot No.50, measuring 130 Sq. Yds. was declined by the court. The said judgment and decree was challenged by the petitioners in Civil Revision No.50/2015 before the 1ST Additional District and Sessions Judge Karachi (East) [respondent No.5 herein] who after hearing learned counsel for both the sides passed the impugned order dismissing the said revision application. Hence the present petition.

4. Learned counsel for the petitioners has contended that the impugned order is against the law as well as the facts of the case and same is liable to be set aside to the extent of Plot No.50. Further contended that the appellate Court failed to apply its judicial mind in the circumstances of the case as it is an admitted position that both Plots No.49 and 50 measuring 130 sq. yds., each are adjacent to each other and both are in physical possession of petitioner No.1, therefore being in continuous physical possession and use of petitioner No.1, he is also entitled to a decree in respect of Plot No.50. He has also contended that there is no denial of the fact that all the respondents were duly served with the process of

the Court and number of adjournments were given to file their written statements, but the respondents / defendants particularly defendants 1 and 4 (in the said suit) being concerned with the suit plot did not turn up to rebut the claim of the petitioners, therefore, the learned appellate Court ought to have allowed the revision application and should have decreed the suit in respect of Plot No.50.

5. We have heard learned counsel for the petitioners and perused the record which transpires that the learned trial Court after considering the evidence available on record passed the judgment and decree, relevant portion whereof for the sake of ready reference is reproduced as under:-

“It may be noted that the plaintiffs in the entire plaint nowhere stated single word regarding plot No.50, measuring 130 square yards, situated in Area 43-B, Korangi No. 5 ½, Karachi, from whom he purchased the same and also failed to point out how he is in possession of the above said plot. It may be further noted that the plaintiff No.1 has also failed to produce single document in respect of above said plot to prove that he is owner of the same and all the documentary evidence, exhibited by plaintiff No.1 during his evidence are in respect of Plot No.49.

In view of above circumstances, the suit of plaintiff is decreed according to the prayer clauses to the extent of plot No.49 measuring 130 Square yards, situated in Area 43-B, Korangi No.5 ½ , Karachi, with no order as to cost.”

6. The petitioners instead of filing civil appeal against the judgment and decree had chosen to file civil revision before the 1ST Additional District and Session judge Karachi (East) which was dismissed by the learned ADJ vide order dated 05.10.2016, impugned in the instant proceedings. The relevant portions of the said order are reproduced as under:-

“9. From the record it appears that the impugned judgment and decree was passed on 10.03.2015 and 16.03.2015, respectively, the appellant have applied for the certified true copies of the same on 27.05.2015, with a delay of about two months and 10 days. If the applicants are so aggrieved with the said judgment and decree, they ought to have file the appeal against the said judgment and decree with in time but while seeing the position that the appeal will be time barred, the applicants have challenged the said judgment and decree by filing the instant civil revision. Further, the learned trial court has based the impugned judgment and decree, in the light of contents of plaint of the suit filed by the applicants themselves.

10. During the arguments, the applicants have not disclosed any illegality or irregularity in the impugned judgment and decree, passed by the learned 1st Senior Civil Judge, Karachi (East). The scope of Section 115 is very limited and in provisional jurisdiction of this court the prayer of the applicants cannot be entertained, as such the contention of the learned counsel for the respondents have some force and therefore, the revision application filed by the applicants is not maintainable.

11. In view of the above, I am of the view that the instant revision application is not maintainable, therefore, the same is hereby dismissed with no order as to cost.”

7. The power conferred upon the revisional Court under section 115 of the C.P.C. are confined to the conditions and eventualities where it appears that the subordinate court has exercised jurisdiction not vested in it or has failed to exercise the jurisdiction so vested or has acted in exercise of its jurisdiction illegally or with material irregularity. If the court has jurisdiction it has jurisdiction to decide one way or the other, and erroneous conclusion of law and fact can be corrected in appeal, but direct revision in civil suit will not be competent. Section 115, C.P.C. applies only to cases involving illegal assumption, non-exercise or the irregular exercise of jurisdiction. It cannot be invoked against conclusion of law or fact which do not in any way affect the jurisdiction of court. Revision and appeal are two different and distinct remedies, which are not concurrent like many other remedies. Appeal is the continuation of original suit and the appellate Court has got ample power to thrash out the entire evidence and scrutinize the available documents in the light of arguments advanced by the respective parties. On the other hand, scope of revision is limited to some illegality, material irregularity or jurisdictional defect in the impugned judgment. A bare perusal of section 115, C.P.C., clearly shows that scope of revision is limited. Reference can be made to the case of *Gul Rehman v. Gul Nawaz Khan* (2009 SCMR 589).

8. It is also well settled that the revision lies against the decision or order of subordinate court in which no appeal lies. Revision is competent only in non-appealable orders or decisions, however where appeal has been provided under the law, revision is not competent. In this context reference may be made to the case of *Municipal Committee, Bahawalpur v. Sh. Aziz Ellahi* (PLD 1970

SC 506) and Cantonment Board Rawalpindi v. Muhammad Sharif (PLD 1995 SC 472) wherein the apex court has held that decree or order passed by the trial court is appealable, revision without availing of remedy by way of such appeal was not competent.

9. It is now a well established that Article 199 of the Constitution casts an obligation on the High Court to act in the aid of law and protects the rights within the frame work of Constitution, and if there is any error on the point of law committed by the courts below or the tribunal or their decision takes no notice of any pertinent provision of law, then obviously this court may exercise Constitutional jurisdiction subject to the non-availability of any alternate remedy under the law. This extra ordinary jurisdiction of High Court may be invoked to encounter and collide with extraordinary situation. This Constitutional jurisdiction is limited to the exercise of powers in the aid of curing or making correction and rectification in the order of the courts or tribunals below passed in violation of any provision of law or as a result of exceeding their authority and jurisdiction or due to exercising jurisdiction not vested in them or non-exercise of jurisdiction vested in them. The jurisdiction conferred under Article 199 of the Constitution is discretionary with the objects to foster justice in aid of justice and not to perpetuate injustice. However, if it is found that substantial justice has been done between the parties then this discretion may not be exercised. So far as the exercise of the discretionary powers in upsetting the order passed by the court below is concerned, this court has to comprehend what illegality or irregularity and or violation of law has been committed by the courts below which caused miscarriage of justice. Reliance is placed on the case Muslim Commercial Bank Ltd. through Attorney v. Abdul Waheed Abro and 2 others (2015 PLC 259).

10. Reverting back to the case in hand, it is an admitted position that the petitioner did not prefer any appeal against the judgment and decree, which has attained finality, can not be questioned in revision. The learned 1ST Additional District Session and Judge, Karachi (East) rightly dismissed the civil revision application being not competent. Furthermore, learned counsel for the Petitioner could not point out any substantial error and or any illegality, infirmity or jurisdictional error in the impugned orders, which could warrant interference by this court in extra ordinary jurisdiction of

High Court. Furthermore, The judgments impugned herein are well reasoned and based on the evidence on record and sound principal of law. Had the revision been filed within the limitation prescribed for filing appeal, we could have considered the possibility of treating the revision as an appeal under the inherent powers of this Court, but even such indulgence cannot be shown as admittedly the revision was filed beyond the period of limitation prescribed for filing appeal.

11. The upshot of the above discussion, we are of the considered view that the present petition is not maintainable and as such the same is liable to be dismissed.

Foregoing are the reasons for our short order dated 30.11.2016, whereby the petition along with listed application was dismissed with no order as to cost.

JUDGE

JUDGE

*Jamil**