

IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT: MR. JUSTICE SALAHUDDIN PANHWAR

SUIT NO.300/1988

Plaintiffs : Ume-Aiman & others,
Defendants : Muhammad Yousuf & others,

.....

SUIT NO.796/2007

Plaintiffs : Jamilur Rehman & another,
Defendants : Ume-Aiman and others,

.....

SUIT NO.979/2007

Plaintiffs : Mohammad Aslam Siddiqui & another,
Defendants : Shamimuddin & others,

.....

SUIT NO.628/2010

Plaintiff : Mst. Shahina Begum,
Defendants : Ume-Aiman & others,

.....

SUIT NO.1273/2013

Plaintiffs : Muhammad Arif & another,
Defendants : Mohammad Zaheem & others,

.....

Appearance:

Mr. Fasihuddin, advocate for plaintiff in Suit No.628/2010 and for defendant No.12 in Suit No.300/1988.

Mr. Agha Zafar Ahmed advocate for plaintiff in Suit No.796/2007 and for interveners in Suit No.300/1988.

Mr. Haider Imam Rizvi and Mr. Danish Nayyar, advocates for plaintiff in Suit No.979/2007.

Mr. Mushtaq A. Memon, advocate for plaintiff in Suit No.300/1988 and for defendants No.1 to 4, 6 to 9, 11, 22, 23, 25, 26, 27 & 29 in Suit No.979/2007.

Mr. Izhar Alam Farooqui, advocate for defendants in Suits No.300/1988 & 796/2007 and for intervener in Suit No.979/2007.

Ms. Sana Akram Minhas, advocate defendants No.1 to 44 in Suit No.796/2007, for defendants No.1 to 44 in Suit No.628/2010 and for defendants No.5(i) to 5(Ixxxviii) in Suit No.1273/2013.

Mr. Ravi R. Pinjani, advocate for legal heir of Muhammad Yasin(applicant)/intervener in Suit No.1273/2013.

M/s. Nasreen Sehto, Ms. Ascho Marzia Begum and Shamsher A. Khan Azeemi, State Counsel.

Date of hearing : 18th, 25th & 28th May; and 11th, 25th & 30th November, 2015.

Date of announcement : 10.02.2016.

ORDER

This order will dispose of applications under Order VII Rule 11 CPC in all suits except Suit No.300/1988.

2. Brief facts of Suit No.796/2007 are that late Abdul Rehman uncle of plaintiffs herein alongwith his family and late Abdul Jalil with his family including plaintiffs were in possession of the premises No.G/2, on ground floor of the property bearing No.JM-120, VII-D/118, known as 30-Mirza Khalij Baig Road, Karachi, *as tenant and used* to pay rent to the *Custodian* as property being Evacuee property; that by order of Settlement Commissioner Karachi dated 03.08.1960 passed under the Displaced Person (Compensation & Rehabilitation) Act 1958, subject premises was transferred

to *deceased Abdul Rehman for sum of Rs.20,280/-* which was paid, followed by PTD dated 13.09.1961 and mutation whereafter deceased Abdul Rehman orally gifted the subject property to his brother Abdul Jalil on 28.10.1984 who in turn gifted the same orally on 10.10.1996 to his sons (plaintiffs) and confirmed by Declaration of Gift dated 28.01.1997 and mutated in their favour who are bonafide owners; that in June 2002 defendant No.59 threatened to take over possession on ground of having been appointed receiver by this Court in Suit No.300/1988 filed by defendants NO.1 to 44 against defendants No.45 to 58; thereafter on application under Order 40 Rule 1 (2) R/W Section 12(2) CPC filed by plaintiffs by order dated 26.06.2002 this Court directed defendant No.59 to maintain status quo and restraining them from third party interest; that plaintiffs were not party to Suit NO.300/1988 which remained pending before this Court wherein plaintiffs were allowed two months' time to file their own suit for adjudication of their rights claimed in the property; thus inter alia plaintiffs prayed for declaration that plaintiffs are in possession as owners of subject premises and for issuance of permanent injunction accordingly.

3. Plaintiffs in Suit No.979/2007 pleaded that they are lawful owners of Plot No.530/1-A and 530/1-B, Survey Sheet No.GRE (Custodian Survey No.VII, AE, Survey Sheet No.345), Deap Chand Ojha Road, New Town, Karachi, respectively, total measuring 1384 sq. yards, by virtue of two registered Sale Deeds dated 03.06.1998 against consideration, purchased from Ahmed Raza Khan and Raza Imam and others; that defendants No.1 to 45 legal heirs of one late Haji Ghulam Aulia who claimed properties in Suit No.300/1988; that suit properties were *evacuee properties and were allotted*; that subsequently a dispute arose between Munshi Raza Khan and one Mst.

Qamar Jehan Begum who claimed to have sharing physical possession of suit properties with Munshi Raza Khan which matter was finally and amicably settled at the then High Court of West Pakistan; that plaintiffs on coming to know about Suit 300/1988 in 2002 on service of notice by Official Assignee, filed application under section 151 CPC and one under Order I Rule 10 CPC whereon this Court restrained the Official Assignee from taking over possession of suit properties however on expiry of above restraining order, some unknown persons started threatening; that plaintiffs have delivered physical possession of properties to M/s. Total PARCO Pakistan after memorandum of understanding with them on 02.06.2001 for setting up petroleum service station at suit properties; with above contentions plaintiffs inter alia prayed for declaration that suit properties were rightly, legally sold to late Munshi Raza Khan by Settlement Department vide Sale Deed dated 11.01.1961 which was subsequently corrected vide Rectification Deed dated 30.08.1961 for that plaintiffs are legal and lawful owners of the same and accordingly for permanent injunction.

4. Case set out in Suit No.628/2010 is that plaintiff is owner and in possession of premises No.G1 & G3, on the property bearing No.JM-120, VII-D/118, known as Mirza Khalij Baig Road, Karachi, admeasuring 577.50 sq. yards vide Conveyance Deed dated 26.04.1998 executed between plaintiff and legal heirs of *Sheikh Ahmed Seoni and Shaikh Zaheer Ahmed Seoni, in whose names the property was mutated as per Form VII (Annexure-L)*; that subject property was purchased by plaintiff after completing all formalities viz. calling objections from general public; that subsequently mutation was effected in favour of plaintiff; that plaintiff enjoyed the suit property as lawful and legal owner till dispossession by the Official Assignee/defendant

No.56 appointed by this Court in Suit NO.300/1988 when plaintiff was out of city and subject property was under lock of plaintiff as well plaintiff was not even party to that suit; that it was found that this Court by order dated 12.02.2002 passed in aforesaid suit appointed defendant No.56 as commissioner to recover rent of properties which also included the subject premises of plaintiff and by consent order 18.04.2002 same defendant was appointed receiver followed by order dated 03.06.2002 authorizing same defendant to take over possession of the property by breaking open the lock; that thereafter on application under Order 1 Rule 10 CPC filed by plaintiff, this Court by order dated 23.04.2007 impleaded the plaintiff as party to that suit and further directed Official Assignee/defendant No.59 not to dispossessed the plaintiff from suit property for period of two months and set at liberty to file her own suit for adjudication of her rights claimed in the property, with the same order subject property was unsealed and possession was delivered to plaintiff; that the PTO dated 01.02.1960 issued in favour of late Shaikh Nasir Ahmed Seoni and transfer order dated 07.01.1975 issued in favour of Shaikh Nasir Ahmed Seoni and Shaikh Zaheer Ahmed Seoni under Displaced Persons (Compensation & Rehabilitation) Act 1958 was not challenged by defendants No.1 to 56 in any proceedings hence attained finality therefore plaintiff can not be dispossessed; thus plaintiff has *inter alia* prayed for declaration that she is in possession as lawful owner of subject premises, and that Custodian of Evacuee Property has no right or *locus standi* to pass order dated 27.06.1974 or any order after issuance of PTO in favour of plaintiff by Settlement Department after having become *functus officio*, and for issuance of permanent injunction accordingly.

5. Plaintiffs of Suit No.1273/2013 have come with the contentions that plaintiff No.1 and defendant No.1 are legal heirs of late *Mst. Khurshid Hashmi wife of late Hashmatullah and plaintiff No.2 and defendants No.2(i) to (iv) are legal heirs of late Muhammad Yasin and defendants No.3(i) to (ix) are legal heirs of late Abul Mohsin*, all of whom are in joint possession and owner of Plot No.A.M. 281, Artillery Maidan Quarter, Abdullah Haroon Road, Karachi, admeasuring 690 sq. yards having acquired under a Permanent Transfer Order dated 13.06.1974 issued by defendant No.7, this Permanent Transfer Order as well earlier Provisional Transfer Order were in favour and joint ownership of late Mohammad Yasin and M/s. International Trade Agency - a partnership concern between late Abul Mohsin and late Mst. Khurshid Hashmi; that Balram Diyaldas obtained the suit property in 1945 from the then government and at the time when he left Pakistan in 1948/1949 some installments towards the sale consideration were unpaid; that in 1948 plaintiff's predecessors entered into agreement of sale of suit property for Rs.60,000/- with Diyaldas and made partial payment of purchase price and obtained possession and started raising construction; that on application of plaintiffs and defendants No.3's predecessors Deputy Settlement Commissioner in 1960 declared that predecessors of plaintiffs are entitled to transfer of suit property then Ministry of Rehabilitation issued a provisional transfer order No.08114 dated 05.11.1960 in favour of predecessors of plaintiffs followed by permanent transfer order (annexure C) and duly recorded in Evacuee Property registers; that defendants No.4(i) to (xxxi) are legal heirs of late Muhammad Haji Ishaq while defendants No.5(i) to (xciv) are legal heirs of late Haji Ghulam Aulia, late Mohammad Haji Ishaq predecessor of defendants No.4 claimed to have been owner of

approximately 11,00,000 sq. yards of land in and around Delhi and claimed to have entered into agreement of exchange in 1951 of his properties in India with properties which includes ones of Balram Diyaldas and Bhai Partap Diyaldas and thus purports to include the suit property in respect whereof the said agreement of exchange expressly notes that out of the premium paid to government under said indenture of lease 9 installments remained to be paid besides rent of Rs.15/- per year payable in two half yearly installments; that outstanding payments were never been made on account of Balram Diyaldas or any of the defendants No.4 and 5, that title of Balram Diyaldas itself remains defective and was never completely effected let alone the title of the defendants No.4 and 5 who claim to derive their title by virtue of claimed exchange of lands inter alia with Balram Diyaldas; that indenture of lease in favour of Balram Diyaldas if any stands automatically canceled inter alia in terms of the Colonization of Government Lands Act 1912 and Ordinance XV of 1949 and Act No.XII of 1957; that late Haji Ishaq applied for confirmation of agreement of exchange in 1951/1952 which application was rejected at all forums from Deputy Custodian Evacuee Properties upto the West Pakistan High Court however in Letters Patent Appeal No.26/1958 matter was remanded back to Addition Custodian wherein plaintiffs' predecessors in title joined the proceedings, raised legal objections to confirmation of agreement of exchange and finally the Additional Custodian vide order dated 28.02.1974 again rejected application of Haji Ishaq, the Custodian of Evacuee Properties Sindh however on Revision Application No.52/1974 confirmed the agreement of exchange vide order dated 26.07.1974 whereupon *predecessors of plaintiffs filed CP Nos.1256 and 1429 of 1974 before this Court against order referred to above which petition was*

dismissed vide a common order dated 20.06.1984 followed by filing of civil appeal Nos.251-K to 255-K of 1986 before Supreme Court which were dismissed vide order dated 20.12.1990; that it is pointed out that during entire proceedings noted above no finding has ever been given in respect of the subject provisional and permanent transfer orders, that subsequent proceedings in this Court as well before Supreme Court were merely those pertaining to judicial review of the orders of the Custodian regarding confirmation of agreement of exchange; that result of litigation with regard to subject confirmation did not per se invalidate the title conferred upon plaintiffs, neither did it act as a declaration of title in favour of late Haji Ishaq, it merely confirmed that an agreement of exchange as claimed had been entered into and confirmation does not obviate requirements of Registration Act 1908 for compulsory registration; that on 16.08.2013 plaintiffs learnt about a suit bearing No.300/1988 and immediately plaintiff No.1 on 23.08.2013 filed application under Order 1 Rule 10 CPC while plaintiff No.2 is filing application to become party to said suit at the time of institution of present suit; with above pleas, plaintiffs prayed *inter alia* for declaration that plaintiffs and defendants No.1, 2 and 3 are joint owners of subject plot and for restraining the defendants from interfering with the possession of plaintiffs over suit property; and alternatively, without prejudice to their claims being lawful owners of suit property if, which is denied, the Court is of the view that plaintiffs alongwith defendants No.1, 2 and 3 are not or shall not remain lawful owners of suit property, then for declaration that defendants No.6 and 7 are entitled to allotment of an alternate plot of equivalent value to the suit property in a suitable location, in

favour of the plaintiffs and defendants No.1, 2 and 3 and for issuance of direction to defendants No.6 and 7 accordingly.

6. The learned counsel for the plaintiffs *in respective suits*, did not deny the earlier round of litigation but have forcefully argued that application for rejection of their plaint is not sustainable; the plaintiffs were not the parties to the earlier round of litigation; they hold title in their favour the status whereof was never decided; they are in possession of the suit properties hence their *title* and claim of possession *thereunder* requires proper and legal adjudication before they are ordered to be parted from their such title and possession.

7. On the other hand, the counsel for the defendants argued that the title of the defendants remained under litigation upto the honourable Supreme Court of Pakistan wherein the predecessors in interest of the plaintiffs were parties hence instant suits under same title are not maintainable at all; the acts and omissions of the predecessors interests of the plaintiffs are binding upon the plaintiffs hence *resjudicata* debars the present plaintiffs from filing the instant suits; even otherwise, the instant suits are *prima facie* barred by law of limitations.

8. I have heard the respective sides and have also gone through the available material carefully. Learned counsel for plaintiff in Suit No.300/1988 and for defendants No.1 to 4, 6 to 9, 11, 22, 23, 25, 26, 27 & 29 in Suit No.979/2007 has relied upon 1995 SCMR 429; learned counsel for defendants No.1 to 44 in Suit No.s.796/2007 & 628/2010 and for defendants No.5(i) to 5(Ixxxviii) in Suit No.1273/2013 has placed reliance on 1985 CLC

395, 1997 MLD 900, 2003 MLD 828, 2006 YLR 1705, 1993 MLD 177, 1994 MLD 2345, PLD 2006 Karachi 621, 1976 SCMR 489, 1995 MLD 1846, 1996 CLC 1027, 2001 YLR 331 and 2003 CLC 200; learned counsel for defendants No.1 to 9 in Suit No.300/1988 and for intervener in Suit No.979/2007 has referred 1993 MLD 310, PLD 2010 SC 965, 1981 SCMR 878, PLD 2004 SC 178, PLD 2011 Karachi 550, 1982 CLC 68, 1999 MLD 2140, 2002 CLC 1996, 2010 CLC 610, 1996 CLC 1027, 2003 MLD 828, MLR 1996 Civil 600, 1997 MLD 472, 1982 CLC 269, 2002 YLR 2491 Lahore, PLD 2009 Lahore 389, 2014 SCMR 1059, 1993 MLD 86, PLD 1993 Lahore 390 and PLD 1995 Lahore 313; learned counsel for plaintiff in Suit No.796/2007 has relied upon PLD 2015 SC 166 (Member Board of Revenue vs. Abdul Majeed), PLD 1972 Lahore 798 (Syed Ali Iqtidar Shah Dara vs. the Custodian, Evacuee Property, West Pakistan, Lahore), 1986 CLC 433 (Hajra Begum vs. Abdul Rashid).

9. The perusal of the available record with assistance of the learned counsels for the respective sides has given rise to number of *legal propositions* to be attended before responding to the merits of the instant application which are:-

- i) *whether the term 'party' includes his / her successors;*
- ii) *whether the acts and omissions of predecessor in interests are binding upon his / her successors;*
- iii) *whether the Civil Court can entertain a suit having direct or indirect effect upon the judgment of Apex Court;*

Though the *term 'party'* is not defined by Section 2 of the Civil Procedure Code 1908 however, a reference to Section 10 and 11 of the Civil Procedure Code 1908 is *relevant* to understand the term '*party*' which read as:

"10. No Court shall in issue in a previously instituted suit between the **same parties**, or **between parties under whom they or any of them claim litigating under the same title** where such suit the Supreme Court."

"11. No Court shall try suit or issue in which the matter directly and substantially..... in a former suit between **the same parties**, or **between parties under whom they or any of them claim, litigating under the same title**, in a Court and finally decided by such Court.."

(Underlining is provided for emphasis).

Thus, for purpose of a '*litigation*', the term '*party*' shall not be restricted to *legal heir* only but shall include '*privity*'. The term '*privity*' is defined by Black's Law Dictionary (Ninth Edition) as:

*'A person having a legal interest of **privity** in any action, matter, or property; a person who is in privity with another.'*

Reverting to the second proposition, suffice to say that a successor not only inherits rights of the deceased but the obligations *too*. One within status of *successor* cannot be a *chooser* to decide what to own and what to disown. If the second *proposition* is attempted, keeping in view the meaning of '*party*', the answer to the *second* proposition would be nothing but a *BIG YES* because the right of the later (*successor* , *including legal heir & privity*) is subject to legal maxim '*sail or sink with former*'.

10. Third proposition, needs no much debate and reference to the case of *Nazar & others v. Member (Judicial-II) BOR 2010 SCMR 1429*, would be sufficient to satisfy it wherein it is held that:-

'It is admitted fact that controversy in question has been settled between the parties up to this Court. Judgment of this Court is binding on each and every organ of the State by virtue of Articles 189 and 190 of the Constitution. It is pertinent to mention here that petitioner had not brought this fact to the tribunals below. This fact brings the case of the petitioners that petitioners' predecessor in interest had not filed application in

the review side with clean hands. Even otherwise it is settled that once the matter has been finally adjudicated by the Apex Court, then it is binding between the parties as law laid down by this Court in Pir Bakhsh's case PLD 1987 SC 145. It is settled law that judgment of the civil Court has to give due weight as compared to the order of the revenue authorities. It is also a settled that judgment of the Apex Court cannot be overridden or nullified by any executive order, a rule or a dispensation short of legislative will as law laid down by this Court in various pronouncement.

It is also settled proposition of law that Courts would not allow a judgment of the Supreme Court to be challenged even on a ground which was not taken before the Supreme Court. See State v. Mujibur Rehman Shami & 2 others PLD 1973 Lahore 1. The question of law as been settled down by this Court after considering provisions of Section 11 of CPC and Articles 189 and 201 of the Constitution that **civil Court or any other authority had no jurisdiction whatsoever to entertain any application or any civil suit qua the subject matter which had already been set at right by the Supreme Court as per law in the following judgments:**

- i) Abdul Majid's case PLD 1992 SC 146.
- ii) Murad Khan's case PLD 1983 SC 82.

(Underlining is provided for emphasis).

The above well settled principles leave nothing ambiguous that no court is *legally* competent to entertain a suit (*lis*) which shall have *effect* directly or indirectly upon the decision of honourable Supreme Court of Pakistan in respect of same subject matter. I can also add that the *privy* of a *party* of earlier round of litigation shall not come to seek re-declaration of their status and title but shall have to sail and sink with consequences of *acts & omission* of their predecessor-in-interest.

11. Now, I shall proceed further to examine the case in hand on said *touch-stone*. Let's have a look at the *legal status / character* of the present plaintiffs with reference to their own pleadings [plaint (s)]:-

'SUIT NO.1273 OF 2013'

*'The plaintiffs derive their right from **Ms. Khurshid Hashmi, Sheikh Muhammad Yasin and International Trading Agency***

SUIT NO.796 OF 2007

*'The plaintiffs derive their right from **Abdul Rehman***

SUIT NO.628 of 2010

*'The plaintiff derives her right from **Sheikh Nasir Ahmed Seoni** & **Sheikh Zaheer Ahmed Seoni***

SUIT NO.979 OF 2007

*'The plaintiffs derive their right from **Mst. Noor Jehan***

12. Now, let's see whether said *predecessors* of above plaintiffs were parties to earlier round of litigation? which *undeniably* went upto the Honourable Supreme Court of Pakistan.

13. The perusal of the record of earlier round of litigation would show that the above persons (*predecessors of plaintiffs in said suits*) had active knowledge of that *litigation* and even remained '*parties*' in such litigation. This fact *though* not properly brought into light by referring it in the *plaints* in violation of the Order VI Rule 2 CPC, however, none of the plaintiffs has denied the fact that their *predecessors* were '*parties*' in said round of litigation. For a satisfactory response, it would be proper to refer the available material to examine the legal character of present plaintiff which shall stand *sharapas*:

'SUIT NO.1273 OF 2013'

*'The predecessors of plaintiffs of this suit i.e **Ms. Khurshid Hashmi, Sheikh Muhammad Yasin and International Trading Agency** were not only parties before Custodian*

*authority but Revision Appln.No.54/1974 was filed by **Ms. Khurshid Hashim**; while **Sh. Muhammad Yasin & International Trading agency** filed Rev. Appln.No.60 of 1974 and even continued upto Honourable Supreme Court of Pakistan;*

SUIT NO.796 OF 2007

*'The plaintiffs claim under **Abdul Rehman** who was a party before Custodian of Evacuee Property hence was in active knowledge and notice of the said litigation but not continued pressing his rights, interests and title.*

SUIT NO.628 of 2010

*'The plaintiff claims under **Sheikh Nasir Ahmed Seoni**' & **Sheikh Zaheer Ahmed Seoni** , who were party before Custodian of Evacueehence was in active knowledge and notice of the said litigation but not continued pressing his rights, interests and title.*

SUIT NO.979 OF 2007

*'The plaintiffs claim under '**Mst. Noor Jehan**'. She was not only party before Custodian Evacuee Property but also filed Rev. No.53/1974 and even continued upto Honourable Supreme Court of Pakistan.*

Worth to add here that the *earlier round* of litigation is a matter of record and fact hence *even if* not brought into complaints properly yet the notice of such *matter of record & fact* can well be examined *even* while exercising the jurisdiction Under Order VII Rule 11 C.P.C, particularly when *status of earlier round of litigation* is not denied by counsel for plaintiffs.

14. Now, I shall attend to the arguments, which have been raised by the counsel for the plaintiff(s) in order to seek an exception to answers to above proposition(s).

First was the case that title of the predecessors and that of their *privy* still holds the field and has not been adjudged *otherwise*. An answer to this shall need no much skill but shall stand satisfied with reference to the order dated 20.6.1984, passed by this Court in CP No.1256 of 1974 which is referred hereunder:-

“Mr. Akhtar Mahmood the learned counsel for the petitioner has stated that if the confirmation of exchange does not affect the right of the petitioner as the owner of the property, then he has no dispute with the Custodian’s impugned order. Mr. Mohammad Sharif and Mr. Iqbal Ahmed the learned counsel for the private respondents have stated that if the exchange is confirmed these respondents will not claim the property, but will seek their remedy for realization of compensation in terms of section 8(4) from the Government. The statement make the matter simple and **the entire exercise of the private respondent is for claiming compensation.** In any event, even on the confirmation of the exchange deed the private respondents can not claim the property as it stands acquired and vests in the Central Government. As a consequence of acquisition only compensation is to be paid to the owner or the charge holder.

Although the learned counsel for the parties restricted their arguments to the payment of compensation which depended on the confirmation of the exchange, I had to keep this matter reserved till such time other connected petitions dealing with exchange were argued. As I have maintained the order of Custodian confirming the deed of exchange petition No.1176/74 is dismissed subject to the statement and consent of the private respondents that they will have no right in the properties in dispute)in petition No.1176/74) **and on the basis of the Custodian’s impugned order they would only claim compensation which shall be decided by the appropriate authority according to law.**

In the result, petitions No.1191/74, 1256/74, 1257/74, 1429/74, 1287/74 and 1176/74 are dismissed with no order as to costs.”

(Underlining is provided for emphasis).

From the above, it becomes clear that sine the title of the predecessors of the plaintiffs was not likely to cause any harm or prejudice to the succeeding party of earlier round of litigation hence it was not necessary for them to

seek adjudication of such *title documents* within meaning of Section 39 of the *Specific Relief Act, 1877* which requires one to seek adjudication when *leaving of an instrument is likely to cause serious injury* which was / is not the case when their rights *prima facie* confined to compensation with reference to the Custodian's impugned order (*as was in said petition*).

15. *Second* argument is with reference to failure of serving of mandatory notice upon predecessor in interest of the plaintiff as was required under section 43 of the *Pakistan (Administration of Evacuee Property Act, 1957)* hence order passed *even* by Honourable Supreme Court in earlier round of litigation is not binding upon the present plaintiffs. I find no substance in such *plea* because non-raising of said plea in earlier round of the litigation shall, *in all senses*, cut both sides. The benefit of said failure, *if any*, was available for the predecessor in interest of the plaintiffs and if was left / abandoned by them (predecessor in interest) then the present plaintiffs, being *privy*, cannot take any exception thereof. If such plea is allowed to hold the field, it may result in giving a room for every single round of litigation to be reopened *subsequently* through fresh suit which, *in any circumstance*, cannot be stamped. The order of the honourable Supreme Court, passed in Civil Appeal No.251-K to 255-K of 1986 would reflect that *several* arguments were raised by *predecessor in interest* of the plaintiffs , as it shall stand evident from reference to operative part thereof:-

"17. It may be mentioned that in support of the appeal several arguments were addressed by the learned counsel for the appellants and these were almost the same as were submitted before the High Court as well as before the Custodian of Evacuee Property. It is....

It was next contended before the High Court on behalf of the appellants that the transaction of exchange was made at Delhi by a Muslim with hindu in respect of the property owned by him in Pakistan who had migrated to India, *and therefore, in*

view of the prohibition under the law, the application (of Haji M. Ishaq) could not be granted. In this connection reference....

The next plea raised on behalf of the appellants was that since the deed of exchange was neither executed nor registered, it could not be confirmed. This plea was also rejected

Yet another plea raised on behalf of the appellants was that the order of the Custodian dated 21.11.1954 passed in exercise of suo moto jurisdiction was illegal and without jurisdiction and therefore all the subsequent proceedings were also without lawful authority.

The next submission made by the learned counsel for the appellants before the High Court was that "no income tax certificate was filed by the respondents therefore, the exchange could not be confirmed."

(Emphasis supplied)

The above reference shall make it clear that all *available* grounds were taken by the *predecessor in interest* of the plaintiffs before this Court and even before honourable Supreme Court of Pakistan which *at the end of the day* responded by honourable Supreme Court of Pakistan:

"24. After having heard the learned counsels for the parties, we find that all the pleas before us have already been dealt with and rejected by the High Court.

There is, therefore no justification whatsoever for interference by this Court. These appeals are accordingly dismissed, but parties are leave to bear their own costs."

Therefore, I am not inclined to accept the plea of plaintiffs that non-service of the required notice be taken as a ground to start litigation *afresh* which has attained *finality* before the honourable Supreme Court of Pakistan.

16. *Lastly*, the plaintiffs seek exception of application of the judgment of honourable Supreme Court of Pakistan while referring it as *per incuriam* and has referred to the case of *Member Board of Revenue v. Abdul Majeed (PLD*

2015 SC 166). This is also with reference to notice, required by Section 43 of Pakistan (Administration of Evacuee Property) Act, 1957, therefore, it would be to have a *direct* reference to said proviso which reads as:

'43. **Appeal, revision and review.** (1) Any person aggrieved by a final order under section 20, section 22 or section 23 passed by a Deputy or Assistant Custodian may prefer an appeal to the Custodian.

(2)...

(3)...

(4)...

Provided that the Custodian shall not pass an Order revising or modifying any order affecting any person without giving such person and the Rehabilitation Authority an opportunity of being heard.

That provision does place the Custodian under a mandatory obligation to provide an opportunity of hearing but this plea is not available before the present plaintiffs because the suo-moto exercise by *Custodian* was not only raised before High Court but also before Honourable Supreme Court of Pakistan which shall stand clear from operative part of the order of Honourable Supreme Court which is:

'This plea was rejected by the High Court with reference to the provision of Ordinance as well as case law in these words:-

"It is thus clear that the Custodian has been vested with the widest possible powers of Revision and Review and he could himself initiated proceedings for suo moto revision if any fact material for determination of a case comes to his notice. In the present case although the Additional Custodian had dismissed the application which order was confirmed by the Custodian as on the material before the Additional Custodian no other order could be passed, in view of the notification the learned Custodian perhaps thought that the case required reconsideration as for an exchange in respect of agricultural property in India there did not seem to be any prohibition. **There is no bar in law that after exercising revisional power the Custodian cannot exercise his suo moto revisional jurisdiction.**"

From above, it is clear that honourable Supreme Court stamped such exercise of revisional power by Custodian as legal. Besides, the purpose of Section 43 was to give notice (knowledge) and the *predecessor in interest* of plaintiffs did acquire notice; challenged the legality of the order before all available legal fora. Not only this, but they (*predecessor in interests*) did confine their rights to *compensation* hence this plea is also of no help for the plaintiffs to seek an exception to finality of litigation of earlier round which from *all legal senses* bind the plaintiffs.

17. The meaning of *per incurium* has been insisted by counsel for plaintiffs while referring the para-17 of the case of *Member Board of Revenue (supra)* which reads as:

17. The reasons for the erroneous direction dated 20-1-1998 by the learned High Court is that the appellants failed to assist the learned Court on the factual and legal points in the case. Their parawise comments were not filed and the learned Court was kept in the dark about the appellants' stand in the case during its pendency for over four years. Accordingly, the direction dated 20-1-1998 by the learned High Court was issued on a mistaken view of the law. Such a direction is treated as given *per incurium*. The deficiency causing a *per incurium* judgment and the legal effect thereof has been explained by this Court in *Sindh High Court Bar Association v. Federation of Pakistan* (PLD 2009 SC 879) as under:

"(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 was on that account demonstrably wrong, so that in such like cases, some part of the decision, or some step in the reasoning on which it is based, is found, on that account to be demenstrably wrong. See *Nirmal Jeet Kaur's case* (2004 SCC 558 at 565 para 21, *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)."

From above, it is clear that before seeking a judgment *per incuruim* one is required to:

- i) *a case or a statute has not been brought to the attention of the court; and*
- ii) *the decision is result of ignorance or forgetfulness of the existence of that case or that statute; or*
- iii) *forgetfulness of some inconsistent statutory provision or of some authority binding on the court,*

Let's examine instant case with reference to above *touch-stone* . It is not the claim of the present plaintiffs that **a case or statute** was not brought to the attention of the Court but *plea* is the departure from requirement of *providing an opportunity* within meaning of Section 43 of Act (jurisdiction of Custodian in appeal, revision and review). Since, in earlier round of litigation the *order of Custodian* was questioned upto Honourable Supreme Court and in the last the honourable Supreme Court stamped such exercise of revisional power by Custodian as legal with reference to *sou-moto* revisional power of the *Custodian* which, *undeniably*, is dealt in Section 43 of the Act, 1957 hence it *legally* cannot be presumed by this Court that the High Court and Honourable Supreme Court while stamping such revisional exercise by *Custodian* did not know *four corners* of 'Section' under discussion before it. Therefore, I am of the clear view that meaning of the *per incuruim* does not fit in the instant case hence is not applicable. Non-service of notice *may* , at the most, be termed as a '*defect*' which even lost its substance while predecessors of the plaintiffs with *active knowledge* challenged it. Even otherwise, a '*defect*'

in procedure shall not be sufficient *alone* to out-root a fair exercise by an authority. To shoulder such view the guidance is taken from case of *Member Board of Revenue (supra)* referred by counsel for the plaintiffs, which reads as:

“24. The relevance of the said rule of fostering justice in the context of the present case is that quite apart from the legal validity of an action taken by an executive authority, its fairness and substantive propriety, deserve greater attention in the exercise of judicial review by the High Court. It goes without saying that the available evacuee property with the Notified Officer is a public property entrusted to the Government for distribution to rightful claimants under the law.Therefore, although the order dated 31.5.2008 passed by the MBR and CSC suffers from a defect , yet more importantly, it achieves a just and fair result in relation to the disposal of a public asset, namely, available evacuee property.”

(Underlining is provided for emphasis)

18. Thus, in result of the above discussion, I am of the clear and *firm* view that the plaint(s) filed by plaintiffs are not maintainable *in law* hence application(s) under Order VII Rule 11 C.P.C are allowed. As a result whereof, plaint in Suit No.1273 of 2013, plaint in Suit No.796 of 2007, plaint in Suit No.628 of 2010 and plaint in Suit No.979 of 2007 are hereby rejected under Order VII rule 11 C.P.C.

Imran/PA

JUDGE