

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

C. P. No. D – 510 of 2006

(Muhammad Shamim & others v. Mst. Suraiya Khanum through her LRs & others)

Hearing of Case

- 1.For orders on CMA 6026/20
- 2.For hearing of CMA 892/2007
- 3.For hearing of CMA 1273/2006
- 4.For hearing of Main Case

Before:

**Mr. Justice Muhammad Junaid Ghaffar
Mr. Justice Zulfiqar Ali Sangi**

Date of Hearing: **22-02-2022**

Date of Order: **17-03-2022**

Mr. Nishad Ali Shaikh, Associate of Mr. A.M Mobeen Khan, Advocate for the Petitioners.

Mr. Ahmed Ali Shahani, Assistant Advocate General-Sindh.

ORDER

Muhammad Junaid Ghaffar, J. – Through this Constitutional Petition, the Petitioners have impugned Judgment dated 24.04.2006, passed by 3rd Additional District Judge, Sukkur, in Civil Revision No.05 of 2001 (**Muhammad Aleemuddin and others v. Mst. Suraiya Khanum and another**), whereby while dismissing the Civil Revision as being time barred, Order dated 13.12.2000, passed by 2nd Senior Civil Judge, Sukkur on an Application under Section 12(2) CPC in F.C Suit No.11 of 1990 (**Mst. Suraiya Khanum v. Muhammad Aleemuddin and others**) filed by the Petitioners, has been maintained through which the said Application was dismissed.

2. All learned Counsel for the parties have filed their written arguments, which have been perused by us. Perusal of the record reflects that the Respondent No.1 had filed F.C Suit No.11 of 1990 for mandatory injunction against the predecessor-in-interest of the Petitioners, wherein after issuance of summons, an Application was filed under Order 23 Rule 3 CPC for passing of a compromise decree, which was allowed and accepted vide Order dated 27.01.1990. The Petitioners being aggrieved with such decree filed an Application under Section 12(2) CPC, as above, which stands dismissed and the Civil Revision has also failed.

3. Insofar as the impugned Judgment of the Revisional Court is concerned, the same appears to have been decided merely as being time barred and has not discussed or decided the issue on merits. To that, it may be observed though, ordinarily, in matters wherein, any case is time barred the Courts have always followed a strict view, whereas, delay of each day has to be explained for seeking condonation of limitation; but at the same time, when it is a case wherein Civil Revisional jurisdiction under section 115 C.P.C. is being exercised by the Court, this aspect has to be looked into with a somewhat different view. The same is premised on the fact that the Courts exercising Revisional Jurisdiction has a vast discretion as compared to any other proceedings coming up before the said Court. The consistent view is that the Court is never robbed of its *suo motu* jurisdiction only for the reason that a Revision Application requesting invoking of such jurisdiction is filed beyond the period prescribed thereunder. It has been further settled that revisional jurisdiction is corrective and supervisory in nature; hence, no harm would be caused if the Court seized of a revision petition exercises its *suo motu* jurisdiction to correct the errors of jurisdiction committed by the courts below. Such fact and the powers of the Courts can be ascertained from the plain language used in Section 115 of CPC and the intention of the legislature, whereas, exercise of this jurisdiction if allowed to go into the spiral of technicalities and restrictions of limitation, the very purpose behind conferring such jurisdiction would be defeated. The Hon'ble Supreme Court through a five-member bench in the case reported as **Hafeez Ahmed and others Vs. Civil Judge, Lahore and others (PLD 2012 SC 400)**, has settled this aspect of the matter and has put the controversy at rest in the following terms: -

15. In all the judgments cited and discussed above it has been held that revision petition filed under section 115 of the Code is liable to be dismissed if filed beyond ninety days and that section 5 and section 12(2) of the Limitation Act are not applicable but it does not appear to be correct in view of the discussion made above, except to the extent of Section 5 of the Limitation Act. *It is however, significant to note that in none of these judgments, the part of the provision relating to the exercise of suo motu jurisdiction by the revisional court has either been argued or adverted to except in the judgment rendered in the case of Province of Punjab through Collector and others v. Muhammad Farooq and others (supra). In the aforesaid judgment, no doubt, this Court held that section 12(2) of the Limitation Act is not applicable yet it did not approve of dismissal of a revision petition on the score of limitation. It, instead, appreciated the decision on merits in the exercise of suo motu jurisdiction of such Court, if, the conditions sine qua non for such exercise are satisfied.*

16.

17. Now question arises whether suo motu jurisdiction under section 115 of the Code could be exercised by the High Court or the District Court in a case where a revision petition has been filed after the period of limitation prescribed therefore. The answer to this question depends on the discretion of the Court because exercise of revisional jurisdiction in any form is discretionary. ***Such Court may exercise suo motu jurisdiction if the conditions for its exercise are satisfied it is never robbed of its suo motu jurisdiction simply because the petition invoking such jurisdiction is filed beyond the period prescribed therefore, such petition could be treated as information even if it suffers from procedural lapses or loopholes.*** Revisional jurisdiction is pre-eminently corrective and supervisory, ***therefore, there is absolutely no harm if the Court seized of a revision petition, exercises its suo motu jurisdiction to correct the errors of the jurisdiction committed by a subordinate Court. This is what can be gathered from the language used in Section 115 of the Code and this is what was intended by the legislature, legislating it.*** If this jurisdiction is allowed to go into the spiral of technicalities and fetters of limitation, the purpose behind conferring it on the Court shall not only be defeated but the words providing therefore, would be reduced to dead letters. It is too known to be reiterated that the proper place of procedure is to provide stepping stones and not stumbling blocks in the way of administration of justice. Since the proceedings before a revisional Court is a proceeding between the Court and Court, for ensuring strict adherence to law and safe administration of justice, exercise of suo motu jurisdiction may not be conveniently avoided or overlooked altogether. ***The Court exercising such jurisdiction would fail in its duty if it finds an illegality or material irregularity in the judgment of a subordinate Court and yet dismissed it on technical grounds.....***

Very recently, once again the Hon'ble Supreme Court in the case of ***Chief Executive, PESCO Department, Government of Khyber Pakhtunkhwa, Peshawar and others Vs. Afnan Khan and another*** **Civil Appeal No.443 /2021** has again reiterated the same principle by following the case of ***Hafeez Ahmed*** (Supra). In this present matter for the reasons to follow in respect of the merits of the case, it apparently reflects that the Appellate Court has failed to exercise proper jurisdiction by non-suiting the petitioners on limitation, whereas, even if the Revision was time barred, delay ought to have been condoned as it was a fit case to exercise suo motu jurisdiction under Section 115 CPC. Accordingly, the delay in filing of the Revision before the Revisional Court stands condoned. As a consequence, thereof; ordinarily, the matter ought to have been remanded to the said Court for recording its findings on merits; however, the petition is pending before this Court since 2006, and therefore, remand of the matter at this stage would not foster quick dispensation of justice, in any manner, whereas, the entire record and relevant material is now before this Court including the conduct of the trial Court is dismissing the application under section 12(2) CPC; and therefore, while exercising this Constitutional jurisdiction we intend to decide the matter on its own merits instead of remanding it to the Revisional Court.

4. Insofar as the Judgment of the Trial Court on the application under Section 12(2) CPC is concerned, it appears that again the same has been passed without appreciating the record available before the Trial Court. It is a matter of fact that the Application was first entertained and two issues were settled by the Trial Court for deciding the Application under Section 12(2) CPC, which reads as under:

1. Whether the respondents in collusion with each other obtained a decree dated 27.1.1990 by fraud by mis-representation facts?

2. What should the order be?

5. As to the allegation of fraud and misrepresentation, it appears that the Suit of the Respondent No.1 was filed against the predecessor-in-interest of the Petitioners through an attorney, namely, Gul Muhammad, who happens to be the real brother of the Plaintiff / Respondent No.1. The precise case of the Petitioners and their predecessor-in-interest was that said Gul Muhammad was never their attorney; hence he was not competent to either defend the Suit on their behalf; nor to enter into any compromise. It further appears that the said Suit was only for mandatory injunction without seeking any declaration and as per paragraph-1 of the Plaint, it was averred by Respondent No.1 that her late husband Haji Bashir had purchased the properties from Defendant No.2/ Petitioner No.1 and the father of the Petitioner No.1 on the basis of agreement to sale where after possession was handed over. It was further averred that late Bashir Ahmed then gifted these properties to her / Respondent No.1 and she exercised full rights of ownership on such properties. It was further averred that Respondent No.1 being helpless widow requested the Defendants for giving a declaration of gift so that the City Survey record may be mutated in her favour; whereas, Defendants who had shifted to Karachi had appointed Gul Muhammad, her brother as an attorney. The said Respondent No.1 entered into the witness box while opposing the application under section 12(2) CPC, and was extensively cross-examined by the Petitioners' Counsel and it would be advantageous to refer to such cross-examination, which reads as under:

"Cross to Mr. A. M Mobeen Khan Advocate for the Applicant

It is correct that property bearing: D-1252 was owned by Muhammad Shamin. The property bearing D-1251 owned by Alimuddin. It is correct that agreement of sale was signed by my husband Haji Bashir Ahmed and Alimuddin in respect of property D-1251. I do not

remember the date of agreement of sale. I do not remember the amount of sale consideration was Rs.40,000/-. Part payment was made by my husband. **It is correct that registered deed was not executed according to the sale agreement. It is correct that the sale deed was not executed according to sale agreement in respect of D-1252. It is correct that possession of these two properties was not handed over to Bashir Ahmed at the time of execution of sale agreement.** It is correct that we had filed suit before Ist. Senior Civil Judge, Sukkur bearing S.No.11/1990. It is not correct that I have written in my plaint that the possession was handed over to Bashir Ahmed immediately on execution of the sale agreement. Note (subjection of Mr. Abdul Rehman Shaikh is that the contents of the document cannot be confronted). (Objection of Mr. A-M-Mobeen Khan is that the plaint in this case has not been exhibited and proceedings under section 12(2) hence witness can be confronted. It is correct that the suit property is situated in center of the city and valuable property. It is incorrect to suggest that the owner of the property had agreed to sale the suit property D-1252 to Mst. Razia in the consideration of Rs.80,000/-. It is incorrect to suggest that the upper portion of the suit property was handed over to Mst. Razia. I know Dr. Assad. He is son of Alimuddin. **It is correct that Dr. Asad was attorney of Muhammad Shamin and Alimuddin but I do not know other facts.** It is incorrect to suggest that Dr. Asad had made contract with Mst. Raiza. It is incorrect to suggest that Dr. Asad had made contract with Mst. Razia in respect of property 1251 on behalf of Alimuddin. I do not know about the registered sale deed between Dr. Asad and Mst. Razia and possession was not handed over to Mst. Razia. It is correct that Mst. Razia is in possession of both the properties of upper portion with force. It is incorrect to suggest that Mst. Razia had not forcibly occupied the upper portion of both the properties. **It is correct that Alimuddin, Muhammad shamin and Asad have been shifted to Karachi.** It is incorrect to suggest that the ground floor of both the properties were locked by the owner before proceeding to Karachi. It is incorrect to suggest that Ali Nawaz had taken possession of ground floor of property D-1251 in absence of Alimuddin. I know Gul Muhammad who is my brother. It is incorrect to suggest that Gul Muhammad had illegally occupied the ground floor of D-1252 in absence of the owner. **It is correct that we had filed suit in the Court of Ist. Senior Civil Judge, Sukkur on 21-1-1990. It is correct that in that defendant was Alimuddin and Shamimuddin. It is correct that Gul Muhammad was shown attorney of defendant 1 and 2 in their suit. I had submitted power of attorney with the plaint in my suit because my brother Gul Muhammad had obtained said power of attorney from defendant No.1 and 2. Gul Muhammad had obtained power of attorney from defendant No.1 and 2 for mutation the khata but not defending the suit.** It is incorrect to suggest that defendant No.1 and 2 had given power of attorney to Gul Muhammad. It is incorrect to suggest that the power of attorney in favour of Gul Muhammad was forged one. It is incorrect to suggest that I know Asad was already the attorney of the defendants 1 and 2. Gul Muhammad produced the power of attorney which he had received only one power of attorney had been received by Gul Muhammad from the defendants. Voluntarily says that other power of attorney was received by Gul Muhammad from defendants. It is incorrect to suggest that defendant No.1 and 2 had not given any power of attorney to Gul Muhammad. It is incorrect to suggest I had shown attorney of the defendants 1 and 2 in the plaint fraudulently that defendant could not know about this case. It is incorrect to suggest that the defendants were in knowledge of the suit or decree of the suit. It is incorrect to suggest that Gul Muhammad had submitted power of attorney in the present suit with fraud and defendants 1 and 2 had not given him power of attorney. **It is correct that Gul Muhammad had come with me at the time of institution of the suit.** It is incorrect to suggest that Gul Muhammad had himself

received the summons of the case from the Court within two days. It is incorrect to suggest that Gul Muhammad had given false statement and obtained decree with fraud. It is incorrect to suggest that compromise application filed by the Gul Muhammad and learned advocate for the plaintiff with malafide intention. It is incorrect to suggest that the compromise application was filed to deprive the actual owners of the suit property. I do not remember date when I obtained the decree from the Court. It is incorrect to suggest that I had played fraud and misrepresentation and obtain the decree from the court by suppression of facts. It is correct that after obtaining the decree from the court I had changed the khata of the suit properties in my favour. It is incorrect to suggest that the defendants had sold the suit properties to Bashir Ahmed or Bashir Ahmed had gifted the suit properties to me. It is incorrect to suggest that I was not in possession of the suit properties. The gift deed was in writing. It is incorrect to suggest that there was no gift deed in writing or orally. Bashir Ahmed had two wives namely Khursheed Begum and I. About 22 years back I was married with Bashir Ahmed. Before marriage with Bashir Ahmed I had one daughter and two sons namely, Khalda Parveen, Muhammad Safdar and Sikandar. The name of my previous husband is Ghulam Sabbir. Mr. A-M-Mobeen Khan filed a Suit on behalf of myself against Mst. Khursheed and others in the Court of Senior Civil Judge, Sukkur. It is incorrect to suggest that these suit properties are not mentioned in that suit. Note. During the cross Mr. A-M-Mobeen Khan has moved an application under Order 8 Rule 18 CPC, therefore, cross is reserved.”

6. From perusal of the aforesaid cross-examination of Respondent No.1, it appears that the learned trial Court has miserably failed to appreciate the facts as available before it. There are various admissions on the part of the Plaintiff / Respondent No.1 which apparently raises serious doubts as to her conduct in obtaining a compromise decree. She admits that no registered sale deed was ever executed pursuant to the sale agreement in favour of her husband. In that case, how and in what manner, any gift could have been executed either oral or in writing by the late husband of the Respondent No.1 and on what basis the very Suit was filed and that too merely for a mandatory injunction without seeking any prayer for declaration. It is settled law that no right could be claimed on the basis of an agreement of sale. There is no cavil to the proposition that if the title of the property is in dispute, the simple suit for permanent injunction or possession, without seeking declaration of title, would not be maintainable¹. At the most, deceased husband ought to have filed Suit for specific performance if there was any agreement. That was not done admittedly by the deceased husband of Respondent No.1. Even Respondent No.1 never filed any Suit for specific performance against the present Petitioners; rather chose to file a Suit for mandatory injunction on the ground that the properties had already been gifted by her late husband to her, whereas, there is neither any gift deed on record nor the case as

¹ Sultan Mahmood Shah v Muhammad Din (2005 SCMR 1872)

set-up has been so. If there was a gift as claimed, then a Suit for execution or declaration of the gift deed ought to have been filed; instead of a Suit only for a mandatory injunction, and that too against the present Petitioners who had nothing to do with the alleged gift as claimed. However, since the said Suit is not before this Court; nor a judgment on its merits and maintainability has been passed; this Court cannot dilate upon any further except that even if the Petitioners fail in their effort to have the compromise judgment and decree set-aside on the grounds so raised by them; the compromise judgment and decree in this case, even otherwise, neither could have been passed by the learned trial Court as being beyond the very scope of the Suit itself; nor there was any occasion to refuse its setting aside when brought before it.

7. It further appears that Respondent No.1 in her cross-examination, admits that Gul Muhammad, the attorney through whom the present Petitioners/predecessor-in-interest were sued, was her real brother. She further admits *that the said attorney was only empowered for mutation of the properties but not for defending the Suit properties*. She has further admitted that the said attorney had come with her at the time of institution of the Suit. After going through the aforesaid cross-examination of Respondent No.1, there appears to be no doubt in our minds that insofar as the very institution of the Suit by the Respondent No.1; suing the Petitioners through an attorney, who is her real brother is concerned; it is nothing but a fraud and misrepresentation played with the Court itself. How did the trial Court could have held that the said Defendants had been properly served through an attorney who admittedly is a real brother of the Plaintiff. Such aspect of the case was required to be looked into with utmost care and vigilance by the trial Court, once fraud was alleged by the Petitioners and sufficient evidence was brought before the said Court. Similarly, the said attorney thereafter immediately entered into a compromise application; whereas, the Court was required to see and examine that whether firstly the attorney was competent to defend the Suit on their behalf, and secondly, even if so, whether he could enter into a compromise with the Plaintiff/Respondent No.1, whereby properties owned by the Petitioners/Defendants were being transferred to the Respondent No.1; and thirdly, whether the said compromise was within the very scope of the pleadings and the material available before the Court. The Trial Court which has decided the application in hand after

recording and perusal of the evidence, has miserably failed to look into this aspect of the case. In nutshell, there was no occasion for the trial Court to first allow such a compromise based on a defective Power of Attorney; and then dismissing the application alleging fraud and misrepresentation before the Court.

8. Lastly, though it has been denied in cross-examination that Gul Muhammad, the attorney himself had received summons of the case from the court within two days' time, however, we have been assisted with the statement of the Bailiff, which is a matter of record at page-87 and 89, wherein it is stated that **“On 23.01.1990 at about 12 noon, I after identifying the attorney Gul Muhammad and myself knowing him in the Civil Court Sukkur premises delivered copy of notice and copy of application to him and obtained his signature on the original”**. This again clearly reflects that fraud was committed with the Court insofar as affecting proper service upon the Defendants / Petitioners / predecessor-in-interest is concerned, and therefore, even on this basis the compromise decree could not be sustained. All these factual aspects which are admitted facts and are a matter of record have been overlooked by the Trial Court while dismissing the Application of the Petitioners under Section 12(2) CPC. Per settled law it is the duty of the Court to administer justice in accordance with law. Courts have always been quick in setting aside such compromise decrees unless there is gross negligence on the part of the party as the Courts are there only for advancement of justice and ordinarily would not be inclined to deprive a litigant of his right². In matters relating to sale and purchase of immovable property, the role of an attorney has always been looked upon with suspicion and skepticism by the courts. It was obligatory upon the courts below to have made fuller enquiry regarding the authenticity of the alleged attorney³. As to the duty cast upon the courts in the construction of the power of attorney whereby some power has been conferred to concede and compromise a suit and so also to alienate a property; the Hon'ble Supreme Court in the case reported as ***Fida Muhammad v. Pir Muhammad Khan and others*** (**PLD 1985 SC 341**) has been pleased to hold as under;

"It is wrong to assume that every "general" Power-of-Attorney on account of the said description, means and includes the power to alienate/dispose of property of the principal. In order to achieve that object, it must contain a clear separate clause devoted

² Muhammad Ibrahim v Mehmooda (1987 CLC 1994)

³ Muhammad Hayat v Raja Ghulam Mustafa (2017 CLC 305)

to the said object. The draftsman must pay particular attention to such a clause if intended to be included in the Power-of-Attorney with a view to avoid any uncertainty or vagueness. Implied authority to alienate property, would not be readily deducible from words spoken or written which do not clearly convey the principal's knowledge, intention and consent about the same. The Courts have to be vigilant particularly when the allegation by the principal is of fraud and/or misrepresentation.

9. In view of hereinabove facts and circumstances of this case, the two impugned Judgments/orders dated 24.04.2006, passed by the Revisional Court and that of the Trial Court dated 13.12.2000, cannot be sustained and are hereby set aside. The Application under Section 12(2) CPC filed on behalf of the Petitioners/predecessor-in-interest stands allowed. The compromise Order and Decree dated 27.01.1990 is hereby recalled / set aside. The Suit stands revived and shall be deemed to have been pending before the Trial Court; whereas, the present Petitioners, being legal heirs, be brought on record by way of an amended title; who shall be permitted to file their written statement, if so desired. The trial Court shall then proceed and decide the matter in accordance with law. As to transfer of property in the name of Respondent No.1 and so also creation of third party interest, if any, is concerned; all such transfers / interests shall remain suspended and shall be subject to final outcome of the Suit in hand. Moreover, in the interregnum, all parties to maintain status quo till final decision of the Suit.

10. With these observations, this Petition stands allowed in the above terms, whereas, all pending applications stands disposed of.

Dated: 17.03.2022

J U D G E

J U D G E

Ahmad