

**IN THE HIGH COURT OF SINDH,
AT KARACHI**

Present:

Ahmed Ali M. Shaikh, CJ
Yousuf Ali Sayeed, J

C. P. No. D-3257 of 2015

Petitioner : Cyrus R. Cowasjee through R.F
Virjee, Advocate.

Respondent No.3. : Tariq Khan in person.
Muhammad Shahryar Mahar, AAG.

Date of hearing : 29.03.2023.

ORDER

YOUSUF ALI SAYEED, J. The Petitioner has invoked the jurisdiction of this Court under Article 199 of the Constitution, seeking to assert his claim of ownership in respect of an immovable property bearing Flat No. F/1-S-E, 1st Floor, Mules Mansion, Keamari, Karachi (the “**Subject Property**”) as against the Respondent No.3.

2. Succinctly, stated that the Petitioner had apparently filed Civil Suit No.875 of 2008 (the “**Suit**”) in the Court of the IInd Senior Civil Judge Karachi West, asserting his claim on the ground of being a co-owner of the Subject Property and seeking a declaration that the Respondent No.3 was a trespasser in illegal occupation thereof, and to recover its possession from him along with mesne profits.

3. The Suit apparently proceeded ex-parte, with the Petitioner filing his Affidavit in ex-parte proof; however came to be dismissed vide a Judgment dated 13.04.2011 as it was held that the Petitioner could not prove his ownership or otherwise demonstrate his claim.

4. The Petitioner did not prefer an appeal, instead moved an Application under Section 151 CPC after lapse of the period of limitation prescribed for availing the appellate remedy, seeking that the judgment be reviewed. That application was dismissed vide an Order dated 21.12.2011, with Civil Revision No. 13 of 2012 preferred before the IIIrd Additional District Judge, Karachi West against that Order also culminating in dismissal through an Order dated 05.03.2015, the relevant excerpt of which reads as follow:-

“It is also matter of record the learned trial court passed the Ex-Parte Judgment on 13.04.2011 and the suit was dismissed filed by the applicant. Thereafter, the counsel for the applicant filed application u/s 151 CPC before learned trial court on 10.10.2011 with prayer to review in the judgment and correct order be passed. The learned trial court on 21.12.2011 passed the order which is reproduced as under:-

It transpires that the plaintiff filed suit for declaration, permanent injunction and possession against the defendant. It is fact that the defendant failed to appear before this court and declared as Ex Parte. Thereafter Ex-Parte Judgment was announced by this court on 13.04.2011 and the suit was dismissed. Thereafter, counsel for the plaintiff filed instant application on 10.10.2011 with prayer to review in the judgment and correct order be passed.

As far as Ex-Parte Judgment in favour of plaintiff is concerned if the defendant was failed to appear before the court it does not mean the suit should be have been decided in favour of the plaintiff. The burden lies upon plaintiff to prove his own case which he failed to do so. This court categorically discussed in the Judgment dated 13.04.2011. The learned counsel for the plaintiff should have challenged that judgment before the Hon'ble Appellate Court instead of filing this application. In

these circumstances I am of the view instance application is not maintainable, I therefore, dismiss this application with no order as to cost.

It is also matter of record that the learned trial court passed ex-parte judgment on 13.04.2011 and the suit was dismissed, thereafter the learned counsel for the applicant should have challenged that judgment and decree before the Appellate Court and he intentionally filed application u/s 151 CPC before the learned trial court with the delay about of 06 months as time barred and filed this civil revision application on 22.03.2012.

In the light of the above referred settled law, I am of the view that the learned trial court vide order dated 21.12.2011 decided application u/s 151 CPC, which is appealable order and no revision lies against an order, therefore this revision application is not competent / maintainable, therefore I hereby dismiss the same, with no order as to cost.”

5. Proceeding with his submissions, learned counsel for the Petitioner sought to argue that as the Suit had been undefended by the Respondent No.3, the same necessarily ought to have been decreed, and as the Petitioner was confident that such a result would inevitably follow, he had not kept a vigil on the outcome, hence was initially unaware of the dismissal but upon coming to know thereof had then moved the Application under Section 151 eliciting remedial action, however the trial Court and Revisional forum had failed to appreciate the error and had maintained the dismissal. In order to bolster that argument, learned counsel submitted that Suit No. 874 of 2008 had been filed by the same Petitioner against another party in respect of another premises in the very same building and had been decreed despite proceeding under identical circumstances, hence it was evident that the Judgment and Decree in the Suit warranted correction. He prayed that the Petition be allowed so as to overrule the orders of fora below and to declare the Petitioner's ownership of the Subject Property and order that possession thereof be restored to him.

6. Conversely, the Respondent No.3 strongly opposed the Petition and submitted that the Application under Section 151 CPC was inherently misconceived and had even otherwise been filed as belatedly as 10.10.2011, more than 6 months after dismissal of the Suit. He argued that the Petitioner was not a co-owner of the Subject Property and submitted that he (i.e. the Respondent No.3) was in possession thereof in pursuance of a Sale Agreement dated 03.09.1974 through which his late father had purchased the same from one Ali Zaman for total consideration of Rs.12,500/-, which had been paid in full. With reference to Suit No.874 of 2008, it was pointed out that the Judgment rendered in that matter had subsequently been set-aside on appeal, and on query posed to counsel for the Petitioner as to whether that was the case, he conceded that it was so.

7. Having heard and considered the arguments advanced in light of the material on record, we are of the view that the Petitioner is the architect of his own misery for if he felt aggrieved by the Judgment rendered in the Suit, he ought to have availed the right of appeal provided under the law rather than squandering that opportunity and belatedly resorting to the Application under Section 151, which inevitably met its fate. No reasonable ground has been advanced to show why the appellate remedy was not availed and the plea taken reflects nothing but neglect and indolence on the part of the Petitioner in pursuing his claim. Needless to say, the rival claims of the parties in respect of the Subject Property cannot even otherwise be determined by this Court in the instant proceedings.

8. The Petition accordingly stand dismissed, with no order as to costs.

Judge

Chief Justice

TariqAli/PA