IN THE HIGH COURT OF SINDH, AT KARACHI

C. P. No. D-4940 of 2021

Present:
Ahmed Ali M. Shaikh, CJ
and Yousuf Ali Sayeed, J

Petitioner	:	Zeba Ilyas through Abdul Wajid Wyne, Advocate.
Respondents No.1&2.	:	Karachi Metropolitan Corporation (KMC) through Syed Hassan M. Abidi, Advocate.
Respondents No.3&4.	:	Nemo.
Date of hearing	:	21.09.2022.

ORDER

YOUSUF ALI SAYEED, J. - The Petitioner has invoked the jurisdiction of this Court under Article 199 of the Constitution, impugning the Order dated 26.04.2021 made by the learned Additional District & Sessions Judge-XIIth/Model Civil Appellate Court, District South, Karachi, dismissing Civil Revision Application No.15/2021 that had been filed by her against the Order of the learned IIIrd Senior Civil Judge, Karachi, South, dated 27.01.2021, whereby Execution Application No.06/2019 emanating from Suit No.925/2000 was dismissed as being time barred.

2. The underlying facts, to the extent relevant for present purposes, is that the aforesaid Suit filed by the Petitioner culminated in dismissal at first instance, prompting the Petitioner to file Civil Appeal No.162/2009 before the learned VIIth Additional District Judge Karachi, where judgment was entered in her favour on 30.05.2011, with the impugned judgment and decree being set aside and the Suit decreed as prayed. The Appellate Decree was then drawn up accordingly on 04.07.2011. Thereafter, the Respondent filed Civil Revision Application No.217/2011 before this Court, which was dismissed on 18.09.2018, without any interim order for stay or suspension of the Appellate Decree having ever been made during pendency of the matter. It is in that backdrop that the Execution Application came to be filed by the Petitioner on 20.04.2019.

3. Learned counsel for the Petitioner argued that the fora below had failed to appreciate that the Execution Application had been filed within time, as, according to him, the relevant period under Article 181 of the Limitation Act, 1908, was to be reckoned with reference to the date of dismissal of the Civil Revision rather than the date of the Appellate Decree in view of the Doctrine of Merger and the principle laid down in the judgments of the Honourable Supreme Court in the cases reported as Maulvi Abdul Qayyum v. Ali Asghar Shah 1992 SCMR 241 and Muhammad Nazir v. Qaiser Ali Khan 2003 SCMR 436, as well as a judgment of the Peshawar High Court in the case reported as Muhammad Umar Gul v. Ikram Ullah Khan 1997 MLD 1917.

4. Conversely, learned counsel for the Respondent opposed the submission while also relying on the case of Abdul Qayyum (Supra), as well as another judgment of the Apex Court in the case reported as Bakhtiar Ahmed v. Mst. Shamim Akhtar & others 2013 SCMR 5, while pointing out that the Revision had been dismissed for non-prosecution and during pendency thereof the Revisional Court had not suspended or stayed the operation of the Appellate Decree, which accordingly remained executable throughout.

5. We have heard and considered the arguments advanced in the matter. As the protagonists have both sought to rely on the case of Abdul Qayyum (Supra), it would be appropriate to reproduce the particular passages from the judgment that were identified by either counsel as being of relevance. Firstly, at page 246 of the Judgment, the Apex Court observed as follows:

> "It appears that in holding that the period of limitation for execution of the decree commenced from the date of the decision by the Appellate Court, the rule that the decree of the Court of first instance, merged into the decree of Appellate Court, which alone can be executed, was not present to the mind of the learned Judge. It is to be remembered that till such time, an appeal or revision from a decree is not filed, or such proceedings are pending but no stay order has been issued, such decree remains capable of execution but when the Court of last instance passes the decree only that decree can be executed, irrespective of the fact, that the decree of the lower Court is affirmed, reversed or modified."

Then, at page 248 of the judgment, it was observed further that:

> "The distinction between the remedy by way of appeal and revision is not unknown. The appeal is the continuation of original proceedings before the higher forum for the purposes of testing the soundness of the decision of the lower Court. On the other hand, the remedy of revision is discretionary and the revisional Court has to proceed under certain limitations in interfering with the judgment and decree of the lower Court, but both on filing the appeal or revision, as the same may be, the decree of the lower Court is put in jeopardy. Indeed the correction of error in the proceedings of the Court below, is common characteristic of both the remedies. The concept of acceptance of appeal is that the lower Court has failed to pass the decree which should have been passed. The same object is achieved when a revision from the decree of the lower Court is accepted. Thus, in a way revisional jurisdiction partakes of appellate jurisdiction."

Finally, at Page 249, after examining certain judgments emanating from different Courts, it was held that

> "These judicial announcements leave no room for doubt that for the purpose of execution the rule of merger equally applies to the decree passed in exercise of revisional jurisdiction. This issue may also be examined from another angle. Take the case of a suit, which is dismissed by the trial Court and with this dismissal the First Appellate Court does not interfere, but it is decreed by the revisional Court. There should be no doubt that the decree of the Court of revision can well be executed. So far as executability of a final decree is concerned, does it make any difference, if the decree of the First Appellate Court is affirmed by the revisional Court? It will be sheer contradiction in terms if the decree is held enforceable when the suit is decreed for the first time by the revisional Court, but regarded as incapable of execution if its decree is that of the affirmation of the decree of the lower Court, and moreso when Article 181, unlike Article 182, which has disappeared from the Statute Book, does not refer either to decree of the Appellate Court or revisional Court but anchors the commencement of period of limitation on the accruel of right to apply and such right legitimately arises when revision against the decision of the lower Court is, one way or other, disposed of."

6. The case of the Petitioner turns on the assertion that the doctrine of merger extends to the proceedings of the revisional forum, and that as the Appellate Decree merged into the final order/judgment of the revisional Court, the period of limitation begins to run from the date of disposal of the Revision Application.

7. However, from reading of the judgment in the case of Abdul Qayyum (supra), it is apparent that in that matter the proceedings before the revisional forum were determined on merits and culminated in a decree being drawn up, with the execution application that was preferred being in relation to that decree. By contrast, the situation is completely different in the matter at hand, in as much as the Revision was dismissed on 18.09.2018 for non-prosecution and no order had been made during the proceedings for stay or suspension of the Appellate Decree. As such, the doctrine of merger sought to be relied upon by the Petitioner would not apply and if any authority is required in that regard one may look to the case of Abdul Qayyum (supra) itself, where it was observed that "there are some exceptions to the rule of merger, for instance, there will be no merger on the rejection of the appeal under Order 41, rule 10 or dismissal in default under Order 41, rule 17 (see Balakanat v. Mst. Munni Dail (AIR 1914 PC 65) or when appeal is withdrawn or abates". More recently, in yet another judgment of the Honourable Supreme Court in the case reported as Sahabzadi Maharunisa and another v. Mst. Ghulam Sughran and another PLD 2016 Supreme Court 358, it was held in the same vein that where a matter is not decided on merits, but is disposed of in some other manner, such as for non-prosecution, the doctrine of merger would not apply.

8. That being, so the Petition is found to be devoid of force and stands dismissed accordingly.

JUDGE

CHIEF JUSTICE

Karachi.
Dated: 11.11.2022