

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

C. P. No. D-1200 of 2020

Present:

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

Petitioner : Waseemuddin, through
Muhammad Aziz Khan,
Advocate.

Respondent No.1 : Naeemuddin, through
Muhammad Khalid,
Advocate.

Respondents No.2 & 3 : Nemo

Date of hearing : 26.09.2022.

ORDER

YOUSUF ALI SAYEED, J. - The Petitioner has invoked the jurisdiction of this Court under Article 199 of the Constitution, essentially seeking a declaration that the Judgment and Decree rendered in favour of the Respondent No.1 by the learned IVth Senior Civil Judge, Karachi, East on 09.01.2015 in Civil Suit No.556/2013 (hereinafter referred to as the “**J&D**” and the “**Civil Suit**” respectively), has merged into the Order dated 22.10.2019 made in the ensuing 2nd Appeal No.143/2017 (the “**Subject Order**”), hence is not executable until the decision of Suit No.447/2015 filed by the Petitioner, which presently remains pending before this Court on the Original Side, with it also having been sought that the proceedings in ensuing Execution No.09/2015 (the “**Execution**”) for enforcement of the J&D be stayed accordingly and possession of the Petitioner in relation to the property that was the subject matter of the Suit be restored to him.

2. The Petitioner and Respondent No.1 are brothers, espousing rival claims to House No.79-B, Block-02, PECHS, Karachi. The chequered history of their dispute is that the latter had filed the Civil Suit in respect of that property seeking a declaration as to his ownership thereof and his entitlement to its possession, with consequential relief being sought as against the former for the handing over of two portions constructed thereon as well as payment of mesne profit at the rate of Rs.100,000/- per month from November 2011 till delivery of possession. That Suit came to be decreed on 09.01.2015, whereafter the Petitioner filed Civil Appeal No.17/2015 before the Court of the VIIth Additional District Judge, Karachi, East, as well as Suit No.447/2015 before this Court on the Original Side. Upon that Appeal being allowed, the Respondent No.1 filed 2nd Appeal No.55/2015, which culminated in the matter being remanded for reconsideration to the first Appellate Court, with the Civil Appeal then coming to be dismissed vide judgment dated 11.07.2016. The Petitioner then resorted to 2nd Appeal No.71/2016, which was allowed vide an Order dated 15.03.2017, with the matter being remanded yet again but only for the Civil Appeal to once again be dismissed on 19.10.2017. Thereafter, the Petitioner filed yet another 2nd Appeal, bearing No.143/2017, which was disposed off by consent vide the Subject Order.
3. As the Subject Order forms the crux of the case sought to be advanced by the Petitioner, it would be expedient to reproduce the operative part thereof, which reads as follows:-

“...After arguing the case to some extent both the learned counsel for parties agreed to the disposal of instant 2nd Appeal however, without prejudice to their contentions/pleas raised in Civil Suit No.447 of 2015 [Waseemuddin s/o Shaikh Azeemuddin and another vs. Mr. Naseemuddin and 8 others], filed by the present Appellant, before this Court for ‘declaration’, ‘cancellation of documents’, ‘partition’, ‘administration’, ‘recovery of dues’, ‘damages’ and ‘permanent injunction’, which suit, as agreed, to be decided on its’ own merits and in accordance with law.

Under circumstances, by consent, the instant 2nd Appeal stands disposed of along with pending application[s], however, without prejudice to the contentions/pleas raised by the parties in Civil Suit No.447 of 2015, which suit as agreed, to be decided on its merits and strictly in accordance with law.

2nd Appeal stand disposed of along with the pending application[s].”

4. Citing the Subject Order, the Petitioner had moved an Application before the Executing Court, seeking that the proceedings of the Execution be adjourned sine-die. However, that Application was dismissed on 25.01.2020, with the Petitioner having then filed Civil Revision Application No.34/2020, which also came to be dismissed vide an Order dated 15.02.2020. Thereafter, two Applications were filed in the disposed of 2nd Appeal No.143/2017, eliciting stay of the Execution as well as restoration of possession, being the very ends now sought to be attained through this Petition. Those Applications came up before the learned Single Judge who had made the Subject Order, and were dismissed on 14.07.2020 as being ‘misconceived’ and ‘misleading’. Thereafter, the Petitioner challenged such dismissal before the Honourable Supreme Court through Civil Petition No.459-K of 2020, which also failed to bear fruit, being dismissed on 22.10.2020 in the following terms:-

“The main proceedings, namely, second appeal filed by the appellant was disposed of on 22.10.2019 by consent. The dispositive order also disposed of the pending applications. However, for some reasons, three pending applications got listed for hearing on 14.07.2020 which were dismissed as being misconceived and also misleading. Without any pending proceedings/lis there was no basis on which miscellaneous applications could be heard and determined.

The present petition against the impugned order dated 14.07.2020 is therefore without merit. Consequently, this petition is dismissed and leave to appeal is refused.”

5. We have been informed that an Application under Section 12(2) CPC has since been filed against the Subject Order in 2nd Appeal No.143/2017, and remains pending.

6. Proceeding with his submissions, learned counsel for the Petitioner sought to contend with reference to the substance of his prayer that the J&D had merged into the Subject Order, the effect of which was that the Execution ought to remain in abeyance until final outcome of Suit No.447/2015 filed by the Petitioner. It was argued that this is what was intended at the time that the proceedings had unfolded before the learned Single Judge on the date that the Subject Order was made, but the aspect of the Execution being stayed had inadvertently not found mention therein.

7. For his part, learned counsel for the Respondent No.1 opposed the Petition. He argued that the Doctrine of Merger was inapplicable to the case and was of little relevance as the Subject Order was silent as to stay of the Execution, since such a consequence had not been in contemplation of the parties.

8. Having considered the arguments advanced in the backdrop of the case, it is evident that the very argument of the J&D having merged into the Subject Order had been raised before the Executing Court while seeking *sine die* adjournment of the Execution, and was dispelled vide the Order dated 25.01.2020 with reference to the judgment of the Honourable Supreme Court, being the case reported as Sahabzadi Maharunisa and another v. Mst. Ghulam Sughran and another PLD 2016 SC 358, the relevant excerpt from which reads as follows:-

“...there are certain **exceptions** to the rule of merger which (*rule*) shall not apply, where an appeal etc. has been dismissed:- (i) for non-prosecution; (ii) for lack of jurisdiction; (iii) for lack of competence/maintainability; (iv) as barred by law; (v) as barred by time; (vi) withdrawal of the matter by the party; (vii) for lack of *locus standi*; (viii) decided on the basis of a compromise, if the very basis of the compromise by the party to the *lis* or even a stranger showing prejudice to his rights is not under challenge on the ground of fraud; (ix) is rendered infructuous or disposed of as having borne fruit; (x) abatement; (xi) where the writ is dismissed on the ground of availability of alternate remedy; (xii) where the writ is dismissed on the point of *laches*.”

9. Furthermore, as to the contention that the true intent of the parties had inadvertently not been properly encapsulated in the Subject Order, any notions that may conceivably have been harboured in that regard stand set at naught in view of the Order made by the learned Single Judge on 14.07.2020, dismissing the subsequent applications of the Petitioner.

10. As such, we are of the view that in the instant case, where there has been no determination by the 2nd Appellate Court as such, the Doctrine of Merger would not apply, which is even otherwise of no relevance as the wording of the Subject Order does not support the connotation sought to be placed thereon by the Petitioner.

11. Under the circumstances, we concur with the assessment of the fora below that the Subject Order has no bearing on the Execution and see no error or infirmity in the Order of the Executing Court refusing to stay that proceeding. That being so, we find the Petition to be misconceived and devoid of merit, hence dismiss the same accordingly, with costs of Rs. 25,000/- to be deposited by the Petitioner towards the Prime Ministers Flood Relief Fund within 7 days of the announcement of this Order and the receipt submitted before the office.

JUDGE

CHIEF JUSTICE

Karachi.
Dated:03.10.2022