

IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD

Present:-

Mr. Justice Muhammad Faisal Kamal Alam
Mr. Justice Amjad Ali Sahito.

C.P.No.D-1613 of 2024

Date of hearing: 03.12.2024.

Date of Order: 17.12.2024.

Mr. Muhammad Arshad S. Pathan, Advocate for Petitioner along with Associate Mr. Safdar Hussain Leghri.

Mr. Qamar Mehmood Baig, Advocate for Respondent No.1.

Mr. Atta Hussain Gaddi Pathan, Advocate for Respondent No.3(i).

Mr. Allah Bachayo Soomro, Additional A.G, Sindh.

ORDER

MUHAMMAD FAISAL KAMAL ALAM, J: Through this Petition, Petitioner has challenged the Decision of the Revisional Court (at Page-473), maintaining the Order of learned Trial Court (at Page-441) whereby the Application filed by the Petitioner under Section 12(2) of C.P.C (the Application), was dismissed.

2. Subject matter of the Petition is a Residential Bungalow at Plot No.D-4, 138 admeasuring 1000 square feet, situated in Naseem Nagar Housing Scheme Phase-III, in R.S Nos.246/1 & 247, Deh Sari, Tapoo and Taluka Qasimabad, District Hyderabad, Sindh.

3. Mr. Muhammad Arshad S. Pathan, learned Counsel for the Petitioner states that the latter has purchased the subject property through a Registered

Sale Deed of 27.08.2019 (at Page-107 of the *Lis* record) from its erstwhile owner Pir Amir Ali son of Ghulam Rasool and is a bonafide purchaser for value, which right and interest cannot be adversely affected by the Respondent No.1 through a Suit proceeding initiated by her being F.C. Suit No.192/2001, without impleading the Petitioner as a Party; that both the Courts have not exercised proper jurisdiction in deciding **the Application** of the Petitioner, which illegality can be corrected in this Writ Jurisdiction. Contended that the learned Trial Court has dismissed **the Application**, inter alia, on the ground that it should have been filed before the Court which has finally decided the matter viz.the Appellate Court;has referred to the Pleadings of the above Suit of Respondent No.1, that same is seeking enforcement of Contract (purportedly of 10.11.1990) by filing the Suit in the year 2001, which is hopelessly time barred in terms of Article 113 of the Limitation Act(1908);referred the relevant Paragraph of the Written Statement filed by G. N Corporation-the present Respondent No.2, that the subject Plot, was cancelled due to persistent default in payments.Cited the following case law to augment his arguments:-

- i. PLD 1997 SC 300 [Baz Muhammad and others v. Mst. Zelekha and others].*
- ii. 2001 SCMR 1062 [Sarfray v. Muhammad Aslam Khan and another].*
- iii. 1999 SCMR 1516 [Khawaja Muhammad Yousaf v. Federal Government through Secretary, Ministry of Kashmir Affairs and Northern Areas and others].*
- iv. 203 YLR 2686 [Sikandar Ali and others v. Muhammad Sharif and others].*
- v. 1986 CLC 903 [Shabbir Hussain v. Mst. Anwar Sultan through 3 Legal Heirs].*

4. Mr. Qamar Mehmood Baig, Advocate, on behalf of the Respondent No.1 has controverted the above line of arguments of the Petitioner's Counsel and has supported both the impugned Decisions. Contended that the Respondent No.1 has a Registered Lease Deed in her favour (at Page-231 of the Lis record) which could not have been cancelled by Respondent No.2 (G. N Corporation) as is done by it, which illegality was subsequently set aside through the Judgment and Decree passed in the above Suit in favour of Respondent No.1, which is maintained upto the Appellate stage, when Civil Appeal No. 164 of 2016 filed by Respondents No.2 and 3 [Builder/ Developer] was dismissed, and is challenged in Revisional Jurisdiction of this Court in Civil Revision No.12 of 2021. Contended that the Petitioner has opted for the wrong Forum to agitate his grievance, and the said Application has rightly been dismissed through the impugned Order and Judgment, respectively. Requests that the present Petition be dismissed.

5. Mr. Atta Hussain Gaddi Pathan, Advocate, appearing for the Respondent No.2 (G. N Corporation) has stated that the Allotment in favour of Respondent No.1 was cancelled due to default in payments; has referred to Page-193 of the above Civil Revision [File], to show that even House Building Finance Corporation (HBFC) in its Decision dated 24.09.1998, concluded that Respondent No.1 had defaulted in payment of dues.

6. Arguments heard. Record perused.

7. The above Decision of HBFC coupled with an advice to both the Respondents No.1 and 2 to resolve the matter either through settlement or Court of Law, since is not the subject matter of this Constitutional Petition, therefore, we would not like to observe anything which can prejudice the proceedings of the above Civil Revision pending in this Court.

8. The impugned Order dated 02.11.2023 passed by the learned Executing Court (Trial Court) has dismissed **the said Application** on the ground that the property in question was alienated during pendency of the Execution Application after disposal of the Suit, so also such nature of Application should have been filed before the Appellate Court which has maintained the earlier Judgment and Decree (in Suit, *ibid*) of the Trial Court in favour of Respondent No.1. Finding of the impugned Order dated 02.11.2023, is erroneous on the fact; because, it did not appreciate that the subsequent sale transactions were made after the allotment of Respondent No.1 was cancelled, which fact was disclosed in the Written Statement of Respondent No.2, eventually, pursuing the Respondent No.1 to amend its plaint [in the above Suit], for impleading present Respondent No.4 [now being represented through Legal heirs], to whom the Subject Property was earlier sold. Similarly the learned Trial Court and Revisional Court have erred about the question of Forum, by ruling that **the said Application** should have been filed before the Appellate Court; because it is a settled rule in this regard, that the Application under Section 12 (2) of C.P.C is to be filed before the Court which has finally decided the Lis. Since in the earlier round of litigation the Appellate Court has maintained the Judgment and Decree passed by the Trial Court (in favour of Respondent No.1), **the Application** has been correctly filed by the Petitioner before the learned Trial Court (Executing Court). The Judgments [*supra*] cited by the Petitioner's Counsel are relevant.

In addition to the above, since the Application under Section 12(2) of C.P.C, usually, where the record is disputed, is to proceed like a Suit, therefore, even an application [under Section 12(2)] if filed before a wrong Forum, that Court can return the Application, to be filed before the Court having jurisdiction to decide the matter.

Fact of the matter is that the Petitioner is claiming his proprietary right on the basis of Sale Deed (*Supra*) which is still in the field.

9. In view of the above discussion, both the impugned Decisions suffer from illegality and cannot be sustained, and thus are set aside.

10. Result of the above is that **the Application** would be deemed to be still pending before the learned Trial Court and it is to be decided afresh, but, expeditiously, preferably within two (02) months. Any observation in this Decision is of tentative nature and will not influence the learned Court seized of the *Lis*.

JUDGE

JUDGE

Tufail