

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

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| Date | Order with signature of the Judge |
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Present:

Mr. Justice Muhammad Iqbal Kalhoro.
Mr. Justice Muhammad Osman Ali Hadi .

C.P.No.D-3900 of 2017

Mst. Shehnaz Khatoon Petitioner

Vs.

Jam Ikram Khan Dharejo,
Minister Cooperation, Govt. of Sindh & others Respondents.

10.03.2025.

Mr. Abdul Qadir Khan, Advocate for petitioner
Mr. Muhammad Hisham Mahar, AAG

ORDER

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MUHAMMAD IQBAL KALHORO J: This constitution petition has been filed against an order dated 10.03.2017 passed by respondent No.1, Minister for Cooperation, Govt. of Sindh dismissing SO(T)6(5) of 2005, Appeal No.05/2005, ABN No.141 of 1993 filed by the petitioner against an order dated 11.01.2005 passed by learned Registrar Cooperative Societies Sindh, at Karachi dismissing an application filed by the petitioner u/s 12(2) CPC against an award dated 17.04.1994, whereby respondent No.2, declared here as exparte vide order dated 18.10.2017, was declared as a rightful owner of a plot bearing No.264/H, Block 6, PECHS Karachi admeasuring 200 Sq.Yds.

2. The case of petitioner is that the said plot originally given to PECHS, was allotted to one Muhammad Zubair Siddiqui, who sold out the same to Noor Muhammad vide sale agreement dated 21.04.1990 followed by a registered power of attorney dated 21.04.1990 with physical possession and original title documents handed over to him. The said Noor Muhammad constructed a house: ground plus two stories as per approved plan. From him, the petitioner purchased the said plot vide irrevocable sale agreement dated 25.04.1998 followed by a registered power of attorney in favour of her son Kashif Ahmed. In due course physical possession of the house was handed over to the petitioner along with original title documents. Subsequently, on 10.07.1998 petitioner was ejected from the house by a bailiff of civil court in compliance of execution application No.13/1996 of ABN No.141/1993 which was filed by respondent No.2 after obtaining an exparte award from a nominee of respondent No.5, the Registrar, Cooperative Societies, for an open plot

admeasuring 200 Sq. Yds; whereas the plot purchased by the petitioner is 155.55 Sq. Yds with ground plus two storey building; the predecessor in interest of petitioner namely Noor Muhammad was not made party in ABN proceedings, though he was a necessary party. The original allottee of plot namely Muhammad Zubair Siddiqui was never served either with summons of ABN case as his wrong address was given and upon which service was held good. The respondent was neither allottee of said plot nor he had any cause of action to file ABN case against original allottee Muhammad Zubair Siddiqui. These facts, learned counsel for petitioner has reiterated in his arguments and has relied upon 2017 SCMR 316, PLD 1969 SC 65, 1989 CLC 2117 and PLD 1999 Lahore 462.

3. The respondent No.1 has already been declared *exparte* as stated above. Learned AAG has supported the impugned order.

4. We have perused the impugned order which shows that respondent No.1 had filed Arbitration proceedings /case against PECHS and Muhammad Zubair, predecessor-in-interest of the petitioner. The matter was entrusted to one Syed Farooq Ali, Registrar's nominee for adjudication. He issued the process for appearance of the parties but Muhammad Zubair, could not be served. Finally, substitute service by way of publication was ordered but to no avail, hence the award dated 17.04.1994 was passed and in execution of which, the possession was taken away from the petitioner and handed over to respondent No.2.

5. Thereafter, the petitioner filed various applications before the Executing Court seeking restoration of her possession but her applications were dismissed vide order dated 30.10.2002 against which, she filed a civil appeal No.06/2003 but the same was also dismissed in non-prosecution. Ultimately, she filed an application u/s 12(2) CPC which was dismissed by respondent No.5, the Registrar Cooperative Societies Sindh on 11.01.2005 which order was assailed by her before respondent No.1 Minister for Cooperation, Govt. of Sindh, resulting in the impugned order.

6. We have seen that application filed by the petitioner u/s 12(2) CPC was dismissed by respondent No.5 on the ground that petitioner had filed earlier some application for the same relief on identical facts which she failed to pull off. Hence, the second application, may be under a different provision of law, but based on the same facts does not warrant consideration. It is further reflected in the order that application filed by petitioner u/s 12(2)CPC was time barred. Whereas, in the impugned order, learned Minister has observed, while

dismissing the appeal, that section 12(2) CPC is not applicable in the matters under the Cooperative Societies Act, 1925(Act, 1925). Appellant is in possession of unregistered documents; there is delay on the part of appellant and the matter is time barred; and appellant had exhausted remedy upto appellate court without any success.

7. What the two forums below have failed to consider is the fact that after having been dispossessed on 18.01.1998, the petitioner had immediately approached the civil court which had allowed execution for enforcing the award and filed an application for restoration of possession. No doubt, this application was dismissed but against which she had filed an appeal before the appellate court, dismissed on 28.01.2004 in non-prosecution. But before that she had already filed an application u/s 12(2)CPC on 22.04.2003 pleading misrepresentation of facts and fraud on the part of respondent No.2 to get award in his favour. Both the forums below conveniently overlooked the fact that from the very day when petitioner was dispossessed from the premises in compliance of writ of possession, she had been pursuing the legal remedies before the courts. It was during pendency of her appeal, when she decided to file an application u/s 12(2) CPC on the grounds of fraud and misrepresentation, therefore, limitation, if any, would be considered through the prism of such context.

8. Availing of a remedy u/s 12(2) CPC is independent of other proceedings and no doubt the limitation period for filing the same would be governed independently in exclusion of any proceedings pending but in the peculiar circumstances in line with the one in hand, when the said application has been filed on the heels of some pending proceedings seeking essentially the same relief but before the wrong forum and, say, under the wrong provision of law, innocuously, the limitation for filing of such application would be looked into sympathetically for the reasons that such applications are always rooted into the facts which are disputed between the parties. Therefore, in the cases that involve material questions of facts which need an enquiry for a decision to settle the controversy once and for all between the parties, such applications cannot be ignored on the ground of limitation without looking into the facts.

9. The award was passed against the original allottee *exparte*. Before filing of proceedings in the year 1993 for award, the original allottee had already sold out the property to one Noor Muhammad in the year 1990 and he was not made party in the case. In execution application, it was not even ensured by the executing court to see that petitioner, who was in possession of the property at

the time was served beforehand and filed objections, if any, to present her point of view. The petitioner, it appears, came to know of the award and the writ of possession in execution application, only when she was dispossessed on 18.01.1998. Her plea that award was passed in respect of a different plot admeasuring 200 Sq. Yds. than her plot admeasuring 155 Sq.Yds. was not even taken up for a consideration by the court overlooking an important fact that she had an arguable case as she was in possession of the property which required some enquiry to decide.

10. The Minister while dismissing the appeal has been influenced by the fact that section 12(2) CPC is not applicable although under the Act, 1925 it is not specifically barred. It is a well settled proposition of law that if a thing is not specifically barred under the statute, it would not be considered as such. Although the claim of the petitioner to be owner of the subject plot is based on some irrevocable sale agreement, which was not registered but the fact that she was in possession of property in terms of such agreement entailed some inquiry to determine circumstances leading to her possession of the property. The exhaustion of earlier remedy in the shape of moving some application before the executing court seeking restoration of possession or challenging the order rejecting such application before the appellate court did not bar the petitioner from filing an application u/s 12(2) CPC when it was justified on the grounds enumerated therein. Instead of being affected by the fact of filing earlier application, in our view, the Registrar and Minister should have proceeded with the matter on merits, try to puzzle out disputed facts, and decide the case accordingly instead of dismissing the application on technicalities.

11. We, therefore, find both the orders not sustainable in law and set-aside the same. Resultantly, we remand the matter to respondent No.5 to decide the application u/s 12(2) CPC afresh on merits by examining the disputed facts of the case within three months.

The petition is disposed of alongwith pending application(s).

JUDGE

JUDGE