

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Muhammad Faisal Kamal Alam

Mr. Justice Jawad Akbar Sarwana.

C. P. No. D – 6071 of 2024

Petitioner: Major ® Tariq Lodhi through Attorney
Rahim Bux Maitlo, Through Mr. Izhar
Alam Farooqui, Advocate.

v.

Respondent No.1: Mst. Asma Burney,
Nemo.

Respondent No.2: The Learned Ist Senior Civil Judge
South Karachi,
Nemo.

Respondent No.3: XII Additional District Judge South
Karachi,
Nemo.

Date of hearing: 12.05.2025.

Date of Announcement: 05.06.2025

J U D G M E N T

JAWAD AKBAR SARWANA, J.: The Petitioner/Judgment-Debtor (“JD”), Major ® Tariq Lodhi is aggrieved by the Orders passed by the two Forums below, which dismissed his Application under Order XXI Rule 26 CPC read with Section 151 CPC, declining to adjust/setoff the decree being enforced against him by the Executing Court for recovery of mesne profit, etc. against his counterclaim comprising of alleged taxes and charges paid by him, maintenance, repair and renovations and other expenses incurred, earnest money accruing from an alleged sale transaction and other installment/part-payments made by him, etc. – all concerning the

Suit Property.¹ He is aggrieved that his counterclaim mandated the framing of issues and the recording of evidence, which request was rejected by the Executing Court. As such, he has invoked the Constitutional jurisdiction of the High Court under Article 199(1)(a)(ii) of the Constitution of the Islamic Republic of Pakistan, contending that the impugned Orders passed by the two forums below, that is, the Revisional Court's Order dated 11.10.2024,² and the Executing Court's Order dated 15.05.2024,³ are "without authority" and of "no legal effect."

2. A brief background of this dispute is that originally Khalida Jillani and her two grandchildren, namely, (i) Asma Burney wife of Asim Burney (ne Asma Abid d/o Abid Hassan), and (ii) Sana Asad daughter of Asad Mohsin,⁴ were initially all co-owners, each having one-third of the shares in the Suit Property.⁵ Thereafter, by way of a Deed of Release registered on 21.09.2020, Khalida Jillani, transferred 1/3rd of her share in the Suit Property to her granddaughter, Asma Burney (ne Asma Abid).⁶ Thus, when Asma Burney filed Execution proceedings against the petitioner/JD, she owned two-thirds of the Suit Property shares, notwithstanding that Khalida Jillani also passed away, and the whereabouts of Sana Asad apparently remain unknown.

3. Earlier, co-owner Khalida Jillani had filed Suit No. 1911/2003 against the petitioner for possession, recovery of mesne profits,

1 The Suit Property in this dispute refers to the Apartment No.A/3, Ground Floor, Block A, Bath Island Apartments, Bath Island, Clifton, Karachi.

2 Available on pages 23-35 of the petition

3 Available on pages 267-275 of the petition

4 According to paragraph 3 of the Written Statement filed by the petitioner/JD's in Suit No.1911/2003 (available at page 95 of the petition), "[t]he Plaintiff [Khalida Jillani] executed the Agreement on her own behalf and on behalf of Miss Sana Asad and Miss Asma Abid. She represented to the Defendant that they were the Co-Owners...." In paragraph 4 of the Affidavit in Evidence filed by the petitioner/JD in Suit No.1911/2003 (available on page 171 of the petition), he has stated that, "The Plaintiff [Khalida Jillani] represented to me that she is the Sole and Absolute Owner of the Flat and that she is the Natural Guardian of her two grand-daughters, namely Sana Asad d/o Asad Mohsin and Asma Abid d/o Abid Hassan and have full Authority to sell the said flat."

5 Indenture of Sub-Lease dated 27.11.1988 is available on pages 73-91 of the petition.

6 Paragraph 11 of the Revisional Court's Order dated 11.10.2024, available on pages 23-35, relevant page 33

and a permanent injunction,⁷ which was initially dismissed vide Judgment and Decree dated 10.08.2011 and 20.08.2011.⁸ In the same year, that is, 2011, the petitioner/JD filed Suit No. 1159/2011⁹ against co-owner Khalida Jillani for specific performance based on an Agreement of Sale.¹⁰ Litigation ensued between the parties up to the Supreme Court of Pakistan, with the Apex Court finally deciding each lis, separately. In Khalida Jillani's Suit No. 1911/2003, the Supreme Court, vide its Order dated 30.10.2024,¹¹ upheld the Judgment and Decree dated 12.03.2019 passed by the Sindh High Court in the IInd Appeal No. 64/2013,¹² setting aside the Trial Court's Judgment and Decree, and the IInd Appellate Court's Order granting possession of the Suit Property to Khalida Jillani as well as awarding her mesne profit, etc., against the petitioner/JD. Meanwhile, in the petitioner/JD's Suit No. 1159/2011, Khalida Jillani filed an application under Order VII Rule 11 CPC, which the Trial Court dismissed; however, subsequently the Revisional Court allowed the said application and rejected the plaint filed by petitioner/JD in Suit No.1159/2011. The said Order rejecting the plaint was upheld by the High Court and the rejection was confirmed by the Apex Court Judgment dated 19.06.2018.¹³

4. Yet despite the above the petitioner/JD did not stop his challenges and in the Execution proceedings filed by Asma Burney (ne Asma Abid), Ex. Application No.01/2022,¹⁴ he challenged the locus standi of Asma Burney on the grounds that she was not a party in the earlier litigation, i.e. Suit Nos.1911/2003 and 1159/2011, and that she had to prove her case and could not step

⁷ Available on pages 57-71 of the petition.

⁸ Available on pages 205-227 of the petition.

⁹ The docket number of the petitioner/JD's Suit is described across the several orders in the litigation at times as "Suit No.1159/2011" and "Suit No.1059/2011". In fact the references are to the same suit.

¹⁰ Copy of Agreement of Sale is available on pages 37-45 of the petition.

¹¹ Copy of Supreme Court of Pakistan Order dated 30.10.2024 in Civil Appeal No.1934/2019 available in Part-II of the petition a/w petitioner/JD Statement dated 21.04.2025 filed on 12.05.2025

¹² High Court of Sindh IInd Appeal No.64/2013 Order dated 12.03.2019 available on pages 243-247 of the petition.

¹³ Copy of Supreme Court of Pakistan Order dated 19.06.2018 in Civil Petition No.528-K/2017 available in Part-II of the petition a/w petitioner/JD Statement dated 21.04.2025 filed on 12.05.2025

¹⁴ Copy of Execution Application No.01/2021 is available on pages 249-257 of the petition.

into the execution proceedings. Additionally, he contended that as his challenge to the Judgment and Decree passed by the Sindh High Court in the IInd Appeal No. 64/2013 dated 12.03.2019 was still pending before the Supreme Court of Pakistan, therefore the Executing Court should stay and/or have stayed the execution proceedings for mesne profit until the Apex Court finally decided the subject-matter appeal. Finally, he relied on the evidence recorded in Khalida Jillani's Suit No. 1911/2003, which he argued, supported his contentions that it was an admitted position that the alleged taxes and charges, the maintenance, repair and renovations and other expenses incurred by him, the earnest money accruing from the alleged sale transaction and other installment/part-payments made by him, etc. – all concerning the Suit Property – were all admittedly paid by the petitioner/JD, therefore, the decretal amount being enforced against him was liable to be set off/adjusted against his such counterclaim.

5. Heard Counsel and perused documents available on record.

6. We are not impressed by the arguments of the Counsel for the petitioner/JD, which are also recorded and suitably addressed in the impugned Orders passed by the two forums below. As observed in the Revisional Court's Order, it was well within the knowledge of the petitioner/JD that Khalida Jillani was one of the owners of the Suit Property. The petitioner/JD's defence in the suit filed against him and in his claim was always in respect of the entire Suit Property. His claim as to his alleged title in the Suit Property never discriminated between the co-owners. Indeed, the petitioner/JD admitted in his evidence that the Suit Property had more than one owner. Her co-ownership in the Suit Property is an admitted position. Even otherwise, the assertion as to the interests of Asma Burney (ne Asma Abid) requires no evidence. Accordingly, he cannot differentiate between them at this stage. The Revisional Court has also been fair that Asma Burney, the co-owner, enforces the execution to the extent of her two-thirds share

in the Suit Property. To this end, the Revisional Court's Order, modifying the Executing Court's impugned Order dated 15.05.2024, which limited Asma Burney's claim for recovery of mesne profit to her share in the Suit Property, does not require any interference.

7. The petitioner/JD's contention that the Executing Court ought to have exercised restraint when the subject-matter was pending adjudication before the Apex Court also does not carry weight. The Judgment of the High Court was neither suspended nor any interim Orders passed by the Supreme Court to stay the execution proceedings. Indeed, the Supreme Court also dismissed the petitioner/JD's challenge on 30.10.2024.

8. Finally, coming to the last point raised by the petitioner/JD that his claims against the Suit Property had been brought on record through cogent evidence and stood admitted, the fact of the matter is that the High Court reversed the Trial Court's Judgment and Decree and the Supreme Court upheld Judgment of the High Court dismissing the Trial Court's judgment. Proceeding to pick and choose evidence from the judgment and decree that the High Court rejected, and such evidence had been relied upon by and was the stance of the petitioner/JD before the High Court, cannot come to the rescue of the petitioner/JD. The plaint filed by the petitioner/JD's in his own suit for specific performance also stands rejected by the Hon'ble Supreme Court along with the obiter dicta of the High Court in the IInd Appeal that, "the agreement [for specific performance] cannot be performed or enforced by any of the parties...."¹⁵ In the circumstances, the entire controversy stood closed and decided squarely against the petitioner/JD, leaving him with no avenues after exhausting all remedies available to him to prove his claim. There was/is no ground to raise any counterclaim at the execution stage. The petitioner/JD must face the execution

¹⁵ Available in the High Court of Sindh IInd Appeal No.64/2011 Order dated 12.03.2019 on page 245 of the Petition

proceedings as this is an almost 25-year-old dispute that needs closure.

9. Given the above observations, the petitioner/JD has failed to make out a case that the impugned Order dated 11.10.2024 passed by the XIIth Additional District Judge (Model Civil Appellate Court) [Karachi South], slightly modifying the Executing Court's Order dated 15.05.2023⁴ are "without lawful" authority and "of no legal effect". Further, neither any irregularity nor illegality has been made out against the two impugned Orders. Accordingly, we hold that the impugned Orders with the Revisional Order slightly modifying the Executing Court's Order (see paragraph 6 above), are correct and hereby maintained. Consequently, this Petition is dismissed.

JUDGE

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