Order Sheet

IN THE HIGH COURT OF SINDH, KARACHI

Const. Petition No.4622/2023
[Ghulam Sakina through LRs vs. Mst. Shahida & Ors]

Date	Order with signature of Judge

PRESENT:
Mr. Justice Zafar Ahmed Rajput
Mr. Justice Arshad Hussain Khan

Petitioner	Through M/s Darakhshan Jahan, Zameer Ahmed Bhutto and Ghulam Mustafa Hingorjo, Advocates
Respondent	Nemo for the Respondents.
Date of Hearing:	15.01.2025
Date of Decision	15.01.2025

ARSHAD HUSSAIN KHAN, J: The petitioner through instant constitutional petition has assailed the orders; **(i)** dated 21.08.2023, passed by learned Additional District & Sessions Judge-VII Karachi, South, [the **"revisional court"**] whereby Civil Revision Application No.33/2022 filed by the petitioner, against the order dated 09.12.2019, was dismissed and **(ii)** dated 09.12.2019, passed by VIIth Senior Civil Judge Karachi, South [the **"trial court"**] whereby application under Section 12(2) CPC, filed by the present petitioner against the judgment and decree dated 23.12.2009 in suit No.643 of 2003 was dismissed, with the prayer that both the aforesaid orders may be set aside and the case may be remanded back for a decision afresh.

2. Concisely, the facts giving rise to the present constitutional petition are that the petitioner-Mst. Ghulam Sakina claims to be the allottee of an Appartment No.912, situated at 9th Floor in the project namely; Marine Drive, Block-2, Clifton, Karachi [the **"suit property"**] and upon receiving full and final payment, respondent No.2, a builder/ construction company, handed over the physical possession of the apartment on 03.02.1995. It has also been stated that after taking the physical possession of the property, the petitioner many times approached to respondent No.2- builder for execution of the sub-lease of the property in her name but respondent No.2 always kept her on false hopes. Subsequently, the petitioner came to know that respondent No.2 had made duplicate file of the suit property in the

name of Mst. Shahida Pervaiz- respondent No.1. After coming to know such fact the petitioner filed civil suit bearing No.08/2009 against respondent Nos.1 and 2, which was dismissed on 29.09.2015, against the said judgment, the petitioner filed appeal bearing No.131/2015, which was allowed vide order 4.12.2017 by IX Additional District Judge Karachi (South). Respondent No.2 challenged the said order in Revision Application No. 32 of 2018, which is still pending adjudication before this Court. It has been further stated that respondents No.1 had also filed suit No.643/2003 collusively against respondent No.2, to usurp the suit property, which was lawfully acquired by the petitioner. It has also been stated that respondent No.1 [Mrs. Shahida Pervez] deliberately did not implead the present petitioner as party in the said suit and got decree, on the basis of fake and forged documents and by misleading the court, in her favour behind the back of the petitioner, who is in possession of the suit property since 1995. Subsequently, respondent No.1 also filed execution application bearing No.07 of 2012. The petitioners after coming to know the judgment and decree passed in suit No. 643 of 2003 as well as execution proceedings thereof filed application under section 12(2) CPC challenging the judgment and decree which application was dismissed, vide order 09.12.2019 against which the revision application No. 33 of 2022 was preferred by the petitioners that too was dismissed by VII Additional District Judge, Karachi (South) vide order dated 21.08.2023 the petitioner impugned the said revisional order as well as the order of the trial court dated 09.12.2019 in the present proceedings.

3. In the present case, notices to the respondents were issued on 28.11.2023, and the same were repeated on 18.01.2024, 22.04.2024, 12.08.2024. Eventually, Mr. Murtaza Hussain Advocate put his appearance and undertook to file Vakalatnama on behalf of respondent No.1 but he did not turn up. Respondent No.2 remained unserved though notices were issued.

4. Learned counsel for the petitioner has argued that the orders impugned herein are not sustainable in law as the same have been passed by the trial court as well as revisional court without applying their judicial mind. It is argued that the revisional court while

dismissing the Revision Application on the point of limitation has failed to consider the grounds agitated by the petitioner in her application for condonation of delay under Section 5 of the Limitation Act. It is further argued that the trial court while dismissing the application under section 12(2) CPC on the point of limitation has also acted illegally and with material irregularity as it has failed to consider that limitation is not applicable on the application of 12(2) CPC as the application was filed on the ground of fraud and misrepresentation. It is also argued that the trial court has not discussed the particulars of fraud and only decided the application on the point of limitation without considering the fact that respondent No.1 was bound to implead the petitioner as necessary party in her suit. It is further argued that the trial court as well as the revisional court have failed to take into account that without impleading the necessary party no effective decree could be passed. She has further contended that respondent No.1 despite having knowledge that the petitioner is in possession of the property deliberately did not implead the petitioner in the suit and through fraud and misrepresentation obtained the judgment and decree, which are not sustainable in the eye of law and liable to be set aside. It is urged that the trial court has passed the impugned order and has failed to exercise the jurisdiction so vested in it and dismissed the application in violation of Maxim *Ex dolo malo non oritur acted* (No right of action can have its origin in fraud). It is argued that the revisional court while passing the impugned order has also failed to take into account that civil revision can be entertained even after the time given in the Statute according to the principles set by the Supreme Court of Pakistan in its various decisions. It is argued that both the courts below while passing the impugned orders have failed to consider the material facts that in respect of the suit property, both the parties have got the decrees in their favour. Lastly, it is argued that the impugned orders are untenable in law, as such, the same are liable to be set aside and the case may be remanded back for decision afresh in the interest of justice. In support of her contention, she has relied upon the case law reported as Orient Coating And Finishing Mills (Pvt.) Ltd Faisalabad vs. Collector, Customs, Excise and Sales Tax (Appeals) [2012 PTD (Trib.) 637], Hafeez Ahmad and others vs. Civil Judge, Lahore and others [PLD 2012 SC 400], Faqir Ali and others vs. Sakina

Bibi and others [PLD 2022 SC 85] and Khan Bahadur Khan vs. Khan Malook Khan [PLD 2022 SC 482].

5. We have heard learned counsel for the petitioner, perused the material available on the record and the relevant laws.

From perusal of the impugned order dated 09.12.2019 whereby application under Section 12(2) CPC was dismissed, it appears that the trial court has observed that the Applicant [Mst. Sakina] was well within the knowledge of the proceedings of Suit 643/2003, which was decreed, vide judgment and decree dated 23.12.2009, however, despite having knowledge, the application under Section 12(2) CPC was filed by the applicant / petitioner on 02.04.2019, more than nine (09) years after passing of the judgment and decree, which is hopelessly time barred. The petitioner challenged the aforesaid order in Civil Revision Application No. 33 of 2022 after a delay of 26 months (780) days. Resultantly, the same was also dismissed through the impugned order dated 21.08.2023. From perusal of the said order, it appears that learned VII Additional District Judge while deciding the said Revision Application has observed as follows :

> *4. Further, before moving to merit/de-merit of the application, it is observed that the present revision application is apparently time barred………. The order impugned is dated 09.12.2019 while the revision has been filed on 23.02.2022 after a delay of 26 months. The ground within application under Section 05 of the Limitation Act, 1908, as provided by the applicant side is that the applicant was busy in proceedings of another application before learned trial court in terms of application under order XXI Rule 99 CPC hence could not file the Revision in time…….. It is a fact that only ground for condonation the delay of 26 months in filing of revision application, which ought to be filed within period of 90 days from the date of order, is the pendency of another application of applicant side. This ground in my humble opinion is not tenable in the eyes of law to strike out the limitation otherwise involved in the case…… Therefore, the contention that due to pendency of another application the applicant could not have filed the revision within the time period prescribed is devoid of credence……For what has been discussed above, I am of the humble view that instant revision application is time barred and application under Section 05 of the Limitation Act 1908 filed for condonation of delay in filing revision suffers from providing a cogent reason which could sufficiently explain the delay and reason as provided is not tenable in the eyes of law. Resultantly, the application under Section 05 of the Limitation Act 1908 stands dismissed. As a result, thereof, the in hand revision application, virtue above reasons stands dismissed as well.*

6. Precisely, the case of the petitioner is that the trail court as well the revisional court have wrongly held that the application under

section 12(2) CPC and the Revision Application filed by the petitioner challenging the dismissal of application under section 12 (2) CPC were barred by limitation. Insofar as the contention of learned counsel for the petitioner that limitation would not apply to the order obtained through fraud and misrepresentation is concerned, the same appears to be a sheer misconception as the period of limitation for filing an application under section 12(2), CPC is governed by Article 181 of the Limitation Act, which provides maximum timeframe of three years to challenge the validity of a judgment, decree or order on the plea of fraud, misrepresentation or want of jurisdiction. Record also reflects that respondent No.1 herein after becoming the party in suit No. 222 of 2004 of the present petitioner, filed her written statement on 10.05.2004 wherein it has been specifically mentioned about pendency of Suit No. 643 of 2003, however, the petitioner did not bother to get himself joined to defend her interest in the property. Suit No. 643/2003 filed by respondent No.1 was decreed, vide judgment and decree dated 23.12.2009, however, the petitioner despite having knowledge of the said suit as well as the judgment and decree passed therein, filed application under Section 12(2) CPC on 02.04.2019, after a lapse of more than nine (09) years of passing the judgment and decree.

It may be observed that Section 3 of the Limitation Act enjoins responsibility upon the court to see that proceedings initiated in the form of suit, appeal or application, are within the period of limitation, prescribed thereof by the 1st Schedule of the Limitation Act, even if it has not been set up as defence.[1]

7. In the present case, it is an admitted position that an application under Section 12(2) CPC was filed after a lapse of more than nine (09) years of passing of the judgment and decree that too without offering any explanation for the inordinate delay in filing of such application. It is well settled that delay defeats equity and that equity aids the vigilance and not the indolent. In the case of Muhammad Hussain v Settlement and Rehabilitation Commissioner [1975 SCMR 304] the explanation founded on misconception was not accepted and it was observed that in civil matters a valuable right accrues to the other side

[1] United Bank Limited and others v. Noor-Un-Nisa and others [2015 SCMR 380].

by laps of time and it is necessary that each day's delay should be necessarily explained. Similar principle was laid down in the case of Muhammad Saeed v Shaukat Ali [1982 SCMR 285] calling upon the appellant to explain each day's delay.

It may also be observed that after expiry of the limitation a vested right is created in favour of respondent No.1 and once limitation starts running no subsequent event could stop the same.[2] Furthermore, it is also a settled law that limitation is not a mere technicality or a hyper technicality rather once limitation expires, a right accrues in favour of the other side by operation of law which cannot lightly be taken away.[3] In the instant case, neither the petitioner's application was in time nor she sought any condonation for an inordinate delay in filing the application under section 12 (2) CPC, as such, the same was rightly dismissed by the trail court.

8. With regard to the contention of learned counsel that the revisional court while dismissing the Revision Application has failed to take into account the fact that the petitioner was pursuing other remedy resulting which she could not file the revision in time and the said delay could be condoned under application of Limitation Act, it appears, from the record, that the Revision Application No. 33 of 2022 challenging the order 09.12.2019, passed on the application under section 12 (2) CPC, was filed after a delay of more than two years along with an application under section 5 of Limitation Act seeking condonation of delay. When, learned counsel for the petitioner, was confronted with regard to the maintainability of application under Section 5 of the Limitation Act, 1908, in civil revision application filed under section 115, C.P.C., in view of section 29(2) of the Limitation Act 1908, she failed to give any plausible explanation.

9. Before going into further discussion, it would be conducive to reproduce section 29 of the Limitation Act, 1908 herein below:

> 29. Savings.---[(1) -----------------------.
> (2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefore by the First Schedule, the provisions of section 3 shall apply, as if such period were prescribed therefore in that Schedule,

[2] *Commissioner of Income Tax v. Rais Pir Ahmad Khan* [1981 SCMR 37]
[3] Asad Ali and 9 others v. The Bank of Punjab and others [PLD 2020 Supreme Court 736]

and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law---

(a) the provisions contained in section 4, sections 9 to 18, and section 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law; and

(b) the remaining provisions of the Act shall not apply.

10. The supreme Court of Pakistan in the case of *Allah Dino and another v. Muhammad Shah and others*" [**2001 SCMR 286],** while dilating upon the applicability of section 5 of the Limitation Act in civil revision under section 115 of CPC, inter alia, has held as under:

> *"5……….There is no cavil with the argument that if the Statute governing the proceedings does not prescribe period of limitation, the proceedings instituted thereunder shall be controlled by the Limitation Act as a Whole. But where the law under which proceedings have been launched prescribes itself a period of limitation like under section 115, C.P.C. then benefit of section 5 of the Limitation Act cannot be availed unless it has been made applicable as per section 29(2) of the Limitation Act."*

11. In the case of Hafeez Ahmad and others v. Civil Judge, Lahore and others [PLD 2012 SC 400] the Supreme Court of Pakistan, inter alia, has held as under:

> *"10. ………………..The Code of Civil Procedure as held above despite being a general law, is a special law within the terms of section 29 of the Act. We, therefore, hold that section 4, sections 9 to 18 and section 22 of the Limitation Act would be applicable even to a petition filed under section 115 of the Code. Any time consumed for obtaining certified copies of pleadings, documents and order required in support of such petition would thus be excluded. It may, however, be made clear that section 5 of the Limitation Act shall not be applicable to such petition as it does not find mention in section 29 of the Limitation Act."*

12. In another case of Khan Bahudar Khan v. Khan Malook Khan [PLD 2022 SC 482], the supreme court of Pakistan while endorsing the view of case of Hafeez Ahmed (Supra), inter alia, has held as under:

> *"7. The learned counsel articulated that though the revision application was time barred but it could have been considered as information to the High Court for invoking suo motu jurisdiction despite delay in approaching the Court. We do not subscribe this perception and theory within the precincts of the facts and circumstances of the present lis mainly for the reason that if the institution of a revision application on the application of a party is left open ended without regulating the conditions to apply or without respecting the period of limitation specified for it, or even laying an information without any gauge of a regulated timeline, then it will create serious chaos and turmoil with no end and the litigation between the parties will never set at rest and the*

tool or weapon of laying information beyond the limitation period will be used to enjoy an unlimited luxury of litigation to settle personal grudges actuated by malice as a sword of Damocles hanging over the head of other side. This approach or frame of mind will bring forth a multiplicity of litigation and proceedings that will be tantamount to granting an unbridled license to every litigant to file a revision application in this fashion as an information at any time, irrespective of the relevant period of limitation or with laches at his whims and leisure nonetheless, the case is made out or not for exercising suo motu jurisdiction will not only seriously damage and deteriorate the very purpose of providing the safety valve or cutoff date of limitation but will also turn into an aftermath of rendering the rigors of limitation redundant and superfluous, adding together, the grave contravention of doctrine of finality, primarily focused on long-lasting and time-honored philosophy by means of legal maxim "Interest reipublicae ut sit finis litium" which recapitulates that "in the interest of the society as a whole, the litigation must come to an end" or "it is in the interest of the State that there should be an end to litigation".

8. All the more so the case of Hafeez Ahmad (supra) unequivocally makes obvious that this Court has not outrightly shelved or abandoned the condition of limitation for revision application rather it was held that the question depends on the discretion of the Court because the exercise of revisional jurisdiction in any form is discretionary and the Court may exercise suo motu jurisdiction if the conditions for its exercise are satisfied. Nothing has been placed before this Court to show that the petitioner took a plea before the High Court to treat the Revision Application as information due to some alleged grave illegality or irregularity committed by the courts below. The aforesaid judgment has deciphered us that, even in the above dictum, it was not the intention or spirit of the judgment that in all circumstance or come what may the High Court or District Court should consider every time barred revision as an information but the exercise of jurisdiction based on the prescribed parameters of revisional jurisdiction which is meant to cure and rectify serious illegality or irregularity which was not available in the case in hand in the wisdom of learned High Court for exercising suo motu jurisdiction by treating time barred revision as an information."

In view of the above, it is crystal clear that section 5 of the Limitation Act (condonation of delay) is not applicable to the revision petition under section 115 of CPC, as such, the time barred revision application filed by the petitioner before the revisional court was not maintainable and thus was rightly dismissed.

13. It is well settled that the jurisdiction of this Court conferred under Article 199 of the Constitution is limited to the exercise of powers in the aid of curing or making correction and rectification in the order of the courts or tribunals below passed in violation of any provision of law or as a result of exceeding their authority and jurisdiction or due to exercising jurisdiction not vesting in them or non-

exercise of jurisdiction vested in them. Furthermore, this constitutional jurisdiction is discretionary with the objects to foster justice in the aid of justice and not to perpetuate injustice. However, if it is found that substantial justice has been done between the parties then this discretion may not be exercised. So far as the exercise of the discretionary powers in upsetting the order passed by the courts below is concerned, this Court has to comprehend what illegality or irregularity and/or violation of law has been committed by the courts below which caused miscarriage of justice.[4]

14. In the instant case learned counsel for the petitioner has failed to point out any error and/or any illegality, in the impugned orders, which could warrant interference by this Court in extra ordinary jurisdiction of High Court, hence the present constitutional petition is liable to be dismissed.

Foregoing are the reasons for our short order dated 15.01.2025, whereby this petition along with listed application was dismissed with no order as to cost.

JUDGE

JUDGE

Jamil**

[4] *Muslim Commercial Bank Ltd. through Attorney v. Abdul Waheed Abro and 2 others* [2015 PLC 259].