IN THE HIGH COURT OF SINDH AT KARACHI

2nd APPEAL No.48 of 2006

Present: Mr. Justice Irfan Saadat Khan
Mr. Justice Zafar Ahmed Rajput

Appellant	:	Shahzaibul Hasan Khan through Mr. Muhammad Khalid, advocate.
Respondents	:	Mian Muhammad Ahmed (Nemo).
Applicants No. 1 & 2	:	Saeed-ul-Hasan Khan & Mst. Majida Sultana through Mr. Mr. Muhammad Ali Waris Lari, advocate.
Date of hearing	:	25.05.2016
Date of order	:	25.05.2016

O R D E R

ZAFAR AHMED RAJPUT, J :- By means of this application (C.M.A. No. 583/2015), the applicants Saeed-ul-Hasan Khan and Mst. Majida Sultana seek review of the order dated 12.10.2015, whereby C.M.A. No. 339 of 2011, filed by the said applicants for the review of the order dated 26.11.2010 was dismissed.

2. Precisely, the facts of the case are that the Suit bearing No. 575 of 1997, filed by the respondent herein against the appellant for the release of deed of relinquishment, possession and permanent injunction in respect of immovable property bearing No. 14/2, situated in Block No.3-C, Nazimabad, Karachi was dismissed by the IVth Senior Civil Judge, Karachi-Central, vide judgment and decree dated 15.12.2001, while the Rent Case No. 458 of 1997, filed by appellant

against the respondent for his ejectment from the shop bearing private No. 2, situated in the said premises was allowed by the 1st Rent Controller, Karachi-Central, vide judgment dated 07.09.2000. Thereafter, the respondent impugned both the judgments in Civil Appeal No.01 of 2002 and F.R.A. No. 336 of 2001, respectively, before the Court of learned District Judge, Karachi-Central, wherein the parties entered into a compromise by agreeing that the respondent shall deposit a sum of Rs. 20,00,000/= and the appellant will execute Sale Deed in respect of suit property. The said civil appeal and First Rent Appeal were; therefore, disposed of in terms of compromise by the District Judge, Karachi-Central, vide order dated 10.07.2002.

3. Later on, the present applicants, namely, *Saeed-ul-Hasan Khan and Mst. Majida Sultana,* filed a civil Suit being No. 975 of 2002 for declaration, injunction and specific performance of agreement against the present appellant and respondents in this Court on its original civil jurisdiction, wherein they also filed C.M.A. No. 6666 of 2002, which was allowed by the learned Single Judge of this Court, vide order dated **18.02.2003**. The operative part of the order is reproduced as under:-

> *"9. In this suit the Plaintiffs have prayed that the court may declare them to be co-owners and co-sharers to the extent of 40% of the property i.e. Plot No. 2, Row No. 14, Sub-Block C, Nazimabad No.3, Karachi. The Defendant No. 2 has no objection to the same as according to the Defendant No.2's counsel since the dispute between the Defendants No. 1 and 2 has been resolved through the compromise and an amount of Rs.20,00,000/- towards sale consideration has been deposited in the court, therefore, the plaintiffs would be entitled to 40% share in the suit property and as the property has been sold out*

and sale consideration had been deposited in the court, therefore, they would be well within their rights to make an application for withdrawal of their 40% share out of the said sale consideration deposited in court.

The order dated **18.02.2003** was challenged by the present appellant in High Court Appeal No. 158 of 2003, which was dismissed by the learned Division Bench of this Court, vide order dated 19.08.2004. Thereafter, the appellant filed CPLA No. 718-K/2004, which was also dismissed by the Hon'ble Supreme Court of Pakistan, vide order dated 09.01.2006. In the meantime, when applicants were contesting the aforesaid CPLA before the Hon'ble Supreme Court of Pakistan, their civil Suit bearing No. 975 of 2002 was dismissed by the learned Single Judge of this Court, vide order dated 07.03.2005.

4. It was after the above order of dismissal of their civil suit, the applicants moved an application on 20.04.2005 before the learned District Judge, Karachi-Central in Civil Appeal No. 01/2002 and F.R.A. No. 336/2001 for the withdrawal of 40% share from the amount of Rs.20,00,000/- deposited by the respondent with the Nazir of the Court of District Judge, Karachi-Central to fulfill his obligations towards the compromise. The appellant contested the said application on the ground that the applicants have got no right to claim any share in the amount unless they prove their right by adducing such evidence before the competent court. The learned District Judge, Karachi-Central, however, allowed the application, vide order dated 01.03.2006. This order, impugned by the appellant in this second appeal, was set aside by the learned single Judge of this Court, vide order dated 26.11.2010, observing as under:

"In this second appeal the order dated 01.3.2006 delivered by the learned District Judge (Central) Karachi has been impugned. By the said order one Saeed-ul-Hasan Khan and Mst. Majida Sultana were allowed to withdraw their 40% share out of the amount lying in balance with the Nazir of that Court on the basis of orders previously passed by the High Court on 18.2.2003 in Civil Suit No.975/2002 and maintained in High Court Appeal No. 158/2004 against which CPLA No.718-K/2004 was filed but the Hon'ble Supreme Court was not pleased to interfere with the interlocutory order which was passed pending Suit No.975/2002. This Suit No. 975/2002 was however, dismissed for non-prosecution on 07.3.2005 by this Court with the result that the interlocutory order dated 18.2.2003 merged with the order of dismissal of the suit and ceased to have any effect. However, as the impugned order had already been passed on the basis of the last order it needs to be revisited by the learned District Judge (Central) Karachi. The learned counsel for the appellant states that although Suit No. 975/2002 had already been dismissed for non-prosecution, yet it could not be pointed out to the learned District Judge (Central) when he passed the impugned order dated 01.3.2006 as at that time either the High Court Appeal or other proceedings before the Hon'ble apex court were pending.

…… Due to changed circumstances and the fact that the order dated 18.2.2003 of this court, had ceased to have any effect whatsoever due to dismissal of the suit for non-prosecution, the impugned order is set aside and the parties are directed to appear before the learned District Judge to seek re-adjudication of the application/ proceedings for grant of 40% share of Mst. Majida Sultana and Saeed-ul-Hasan Khan. The parties are directed to appear before the learned District Judge on 05.01.2011."

5. Being aggrieved by the order dated 26.11.2016, the applicants filed an application on 15.01.2011, under section 114 read with section

151 C.P.C. (C.M.A. No. 339 of 2011) praying therein for the review of the order dated 26.11.2010 and deletion of the following observation made in the said judgment:-

> *"This Suit No.975/2002 was however dismissed for non-prosecution on 7.3.2005 by this Court with the result that interlocutory order dated 18.2.2003 merged with the order of dismissal of the suit and ceased to have any effect. However, as the impugned order has already been passed on the basis of last order, it needs to be revisited by the learned District Judge, Central Karachi."*

6. This Court, vide order dated 12.10.2015, dismissed the above review application by observing as under:-

> *"It is an admitted fact that Saeed-ul-Hasan Khan and Mst. Majida Sultana were allowed to withdraw their 40% share out of the amount lying balance with the Nazir of learned trial Court on the basis of order passed by the High Court, which was maintained by the Hon'ble Supreme Court of Pakistan. The learned single Judge while passing the order dated 26.11.2010 has categorically mentioned that it is not clear that when the learned District Judge, Karachi-Central, had passed the order dated 1.3.2006, the High Court Appeal or proceedings before the Apex Court were pending or not. It is further noted that Saeed-ul-Hasan Khan and Mst. Majida Sultana had filed Suit No. 975 of 2002 claiming that they were entitled to 40% share and it is in this backdrop that the learned single Judge directed the parties to appear before the learned District Judge, as the matter requires re-adjudication. We, therefore, find no error in the said order since the matter pertains to determination of certain factual aspects and in our view the learned single Judge has rightly remanded the matter for re-adjudication and apparently no occasion requiring the said order to be reviewed has been made out by the learned counsel for the applicants. It is a settled proposition of law that the scope of review, as given*

in Section 114 of CPC, is very limited and nobody could be allowed to reargue a matter under the garb of the review."

7. It is, thereafter, this second review application has been filed by the applicants for the review of the order dated 12.10.2015, passed in review application.

8. Heard the learned counsel for the parties and perused the material available on record.

9. Mr. Muhammad Ali Waris Lari, learned counsel for the applicants, has manifested his contentions on following two propositions:

(i) that the order dated 12.10.2015 suffers from error floating on surface of the record as while maintaining the order dated 26.11.2010 this Court did not take a Judicial Notice of the fact that how the order dated 18.2.2003 merged with the order of dismissal of the Suit bearing No. 975 of 2002, filed by the applicants, and ceased to have any effect as the same was actually merged in High Court Appeal No. 158 of 2004.

(ii) that in terms of the order dated 18.02.2003 the applicants have already taken their 40% shares out of the amount lying balance with the Nazir of the Distract Judge, Karachi-Central, as such, the order could be considered, as the same was no more existed on the file of the Court, after being acted upon and; thus, this Court committed short sightedness in the matter, which merits to be reviewed.

10. Conversely, Mr. Muhammad Khalid, learned counsel for the appellant has maintained that no sufficient ground in terms of Order XLVII, Rule 4, C.P.C. has been shown by the applicants in second review application which is, in view of Order XLVII, Rule 9, C.P.C., is not maintainable in law. In support of his contention, he has relied upon the case of *Muhammad Ali V. Malik Bashir Ahmad and 2 others*, reported as **1997 SCMR 622.**

11. So far as the maintainability of this second review application is concerned, we are in agreement with the learned counsel for the appellant that a second review application against the order dated 12.10.2015, passed on a review application is not maintainable as the Order XLVII, Rule 9(1) C.P.C. itself states, *"no application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained."* Hence, on this score alone this second review application is liable to be dismissed.

12. We have, however, deliberated upon the merit of the application in the light of the contentions of learned counsel for the applicants and found both the propositions of the learned counsel as absolutely misconstrued. As regard first proposition, it may be seen that the order dated 18.02.2003 was an "interlocutory order" passed by the learned Single Judge of this High Court in Suit No. 975 of 2002, filed by the applicants, which was also maintained by the learned Division Bench of this Court in High Court Appeal No. 158 of 2003, preferred by the appellant.

13. The legislature has vested the Civil Courts with vast powers under Clause (e) of Section 94, C.P.C., to make such interlocutory

orders as may appear to the Court to be just and convenient, in order to prevent ends of justice from being defeated. An "interlocutory order", may be interpreted as one which does not finally determine a cause of action but only decides some intervening matter pertaining to the cause, and which requires further steps to be taken in order to enable the court to adjudicate the cause on the merit.

14. The interlocutory order exists on the file till final determination of the cause, even after the same being acted upon. Orders granting a temporary injunction, appointing a receiver, attaching of a property before judgment and other interlocutory orders are passed by the Court and acted upon during the proceedings of the case but the same do not exhaust; and survive on file till the final determination of the case by the trial Court. Interlocutory order exhausts or becomes merged in final order made in case and, then, become "functus officio". This principle that interlocutory orders become "functus officio" with the termination of suit in the trial court has constantly been followed by the Courts. If any case-law is required, one can see *Roshan Din v. S. M. Badruddin*, reported as **PLD 1969 Karachi 546**. The learned Single Judge of this Court, therefore, has rightly observed in the instant case that the interlocutory order dated 18.2.2003 has merged with the order of dismissal of the suit with the result that the said order has ceased to have any effect.

15. It may be observed here that the review jurisdiction as visualized by Section 114, C.P.C. is traced to Order XLVII, C.P.C., which contains the prescribed conditions and limitations in terms of the requirements of that section. Scope of review, otherwise is very limited, it is restricted to some mistake or error apparent on the face

of record, discovery of new or important matter or evidence, which, despite due diligence, was not within the knowledge of applicant, when order was passed or for any other sufficient reason. The fact that a point upon which the previous order or judgment is silent cannot be regarded as a mistake much less a mistake apparent on the record and no review is competent on such point. Similarly, where a Court after discussing the matter has arrived at a decision by process of conscious reasoning and after applying its mind and considering pros and cons of the case, no review lies on the ground of apparent mistake. Reliance in this regard may be placed upon the case of *Azad Government v. Abdullah and others*, reported as **PLD 1969 AJ&K 30**.

16. For the reasons discussed above, this second review application being devoid of merit and not maintainable in law is hereby dismissed. Since this application has been filed by the applicants frivolously and vexatiously, we impose a cost of Rs.30,000/=, which shall be deposited by the applicants jointly within fifteen (15) days hereof with the Nazir of this Court. The Nazir after receiving the amount of cost shall transmit it to High Court Clinic Funds.

17. Above are the reasons of our short order dated 25.05.2016, whereby this second review application was dismissed.

JUDGE

JUDGE

HANIF