

# IN THE HIGH COURT OF SINDH, KARACHI

C. P. No.D-714 of 2016

[Zaheeruddin Qureshi v. Vth Additional District Judge East and others]

**Present:**

**Mr. Irfan Saadat Khan, J**

**Mr. Muhammad Faisal Kamal Alam, J.**

**Dates of hearing** : 12.09.2017

**Date of Decision** : 21.09.2017

**Petitioner** : Zaheeruddin Qureshi, through Mr. Raja Ali Asghar, Advocate.

**Respondent 3(a)** : Anisuddin and others through Mr. Ashfaq Ahmed, Advocate.

## **J U D G M E N T**

**Muhammad Faisal Kamal Alam, J:** Through this instant petition, the Petitioner has called in question the decision dated 06.11.2016 passed by learned Respondent No.1 while exercising revisional jurisdiction in Revision No.70 of 2012, whereby, the impugned order of 24.04.2012 passed by learned Respondent No.2 in Suit No.473 of 2004 and Execution Application No.01 of 2006 (New No.10 of 2010) has been maintained, resultantly, the Application under Section 12(2) read with Section 47, Order XXI and Section 151 of Civil Procedure Code, 1908, preferred by present Petitioner against the private Respondent No.3 (Anissudin Qureshi) and his legal heirs was dismissed.

2. On issuance of notice, a detailed objection to the main petition is filed by private Respondent No.3(a) to (d) who are the legal heirs of Respondent No.3 [since deceased].

3. Succinctly, the matter relates to rival claims in respect of a built-up property / quarter No. C-111/10, Malir Colony, Karachi (*the subject*

*property*'). As per the Petitioner, the subject property has to be distributed amongst Petitioner, Respondent No.3 (his legal heirs now) and other siblings, who were not party to the proceeding, as a common inheritance of the deceased father, namely, (late) Hafiz Sharafuddin, whereas, the stance of private Respondent No.3 was/is that the Subject Property was purchased by the latter from one (late) Abdul Hameed and it does not form part of the inheritance of deceased father of the Petitioner and grandfather of present private Respondents.

4. The present Petitioner was residing on first floor, whereas the family members of Respondent No.3 are dwelling at the ground floor of the subject property.

5. Mr. Raja Ali Asghar, learned counsel for the Petitioner, has strenuously argued that both the impugned orders of the Courts below are bad in law as the present Petitioner was not given opportunity to contest the proceeding (of Suit No.773 of 2004), filed by Respondent No.3, whereby Respondent No.3 sought eviction of present Petitioner from the Subject property, besides, claiming mesne profit.

6. On the other hand, Mr. Ashfaq Ahmed, learned counsel for Respondent No.3(a) to (d) while controverting the arguments of learned counsel for the Petitioner has argued that the present Petitioner refused to accept Court notice and the same has been mentioned in the decisions of the Courts below. He further argued that Petitioner was duly served through a publication in daily 'JASARAT' in its issue of 03.09.2004 and the service was held good by the Court on 24.09.2004 and the same fact is also mentioned in the Judgment and Decree dated 30.11.2005, which has been challenged by the Petitioner but unsuccessfully throughout. It was further contended that present Petitioner merely to frustrate the remedy of eviction

granted to Respondent No.3 and his legal heirs, initiated another round of litigation by filing a subsequent Suit No.244 of 2012, *inter alia*, seeking reliefs of Declaration, Administration, Cancellation and Permanent Injunction against the present Respondent No.3 and his legal heirs with the plea that the Subject Property is a family estate and is not exclusively owned by Respondent No.3. The said litigation also met the same fate and eventually a Hind Appeal No.25 of 2017 is *sub judice* in this Court.

7. Submissions of learned counsel for the respective parties have been considered and with their assistance record of the proceeding has been perused.

8. There are two sets of facts. The first one pertains to litigation initiated by Respondent No.3 (late Anisuddin Qureshi) that resulted in passing of Judgment and Decree in his favour, which was later challenged by Petitioner at the Execution stage, through an application under Section 12(2) of C.P.C., on the ground, that during execution proceeding only, the Petitioner came to know that Judgment has been passed against him, *inter alia*, seeking his eviction from the Subject Property. Said application was dismissed, but was impugned in Civil Miscellaneous Appeal, which was accepted by converting the same into a Civil Revision and the matter was remanded back to the learned Trial Court with certain directions that application under Section 12(2) of C.P.C. should be decided a fresh but after framing of issues and leading of evidence.

9. Hence, after framing of Issues, parties led evidence and the learned Trial Court (Respondent No.2) dismissed the Application filed under Section 12(2) of C.P.C. by Petitioner, vide order dated 24.04.2012, also impugned in instant proceeding.

10. The second set of facts relate to the litigation started by present Petitioner in the form of an independent suit, but the plaint of this subsequent Suit No.244 of 2012 was rejected by the learned Trial Court, against which a Civil Appeal No.95 of 2016 was preferred, but the same was also dismissed and finally both the decisions have been impugned in aforereferred second appeal which is *sub judice* in this Court before the concerned bench hearing such matters.

11. Pleadings of the parties, viz. Petitioner and that of Respondent No.3 and his legal heirs are available on record and the same have been thoughtfully considered. The stance of Petitioner throughout is that the subject property was owned by deceased father of Petitioner and Respondent No.3 and other two brothers and sister, namely, Amiruddin, Waziruddin and Nafeesa Begum and these persons were also residing in the subject property since 1957, but later shifted to their respective accommodations; that Respondent No.3 fraudulently got the lease of the subject property executed in his favour from Karachi Development Authority (KDA) way back in the year 1981, when the said Respondent No.3 was hardly 21 years of age, as latter was born in the year 1960; that said Respondent No.3 never disclosed this fact to others including Peitioner.

12. On the other hand the stance / pleading of Respondent No.3 and his legal heirs appears to be contradictory. In their afore-referred Suit No.773 of 2004, plaint whereof is available at page-49 of the Court file, the Respondent No.3 has stated that present Petitioner was residing in the same premises and also provided his services in respect of transfer of Subject Property and in execution of lease deed and so also in construction of Subject Property, whereas, in his counter affidavit to the Application under Section 12(2) of C.P.C. preferred by the present Petitioner, the deceased

Respondent No.3 has setup a defense that the entire Subject Property was constructed by the latter (Respondent No.3) and neither the deceased father nor the present Petitioner had contributed a single paisa. Similarly, in their Written Statement filed in response to the Suit No.244 of 2012 (filed by the present Petitioner), the stance of private respondents is that the sale agreement between the deceased Anisuddin Qureshi (erstwhile Respondent No.3) and (late) Abdul Hameed together with ancillary documents could not be brought on record, because the same were burnt / destroyed, as informed by the KDA.

13. Two different Statements at Bar have been filed by the parties hereto. The private Respondents through their Statement dated 04.10.2016 have brought on record lease deed dated 07.06.1981 of the Subject Property in favour of deceased Anisuddin Qureshi, predecessor-in-interest of present Respondent No.3(a) to (d) and Transfer Order dated 30.05.1981. Both documents have been issued by the Office of KDA, but the name of transferee in the said transfer order is not mentioned. The second Statement has been filed by the Petitioner's counsel, through which certain credentials of Petitioner have been brought on record, such as his appointment letter (28.2.1970) issued by Central Excise and Land Customs Division 'I' Karachi; an extract of his pension book and documents about his retirement from government service on 04.02.2004, in order to show that the Petitioner was gainfully employed for the past many decades in a government department.

14. The Petitioner has also relied upon a Statement on oath of his deceased younger brother (Respondent No.3), which the latter had purportedly given before the concerned Union Council and extract whereof is available at page-95 of present Court file. But authenticity of this document is categorically refuted by the learned counsel for the private

Respondents. In this document, it has been acknowledged by deceased Anisuddin Qureshi, predecessor-in-interest of present private Respondents, that the Subject Property was purchased by his and Petitioner's father.

15. Mindful of the fact that in present proceeding, we cannot appraise the evidential worth of above documents, but the trial Court (Respondent No.2) could and should have undertaken such an exercise, while exercising its plenary civil jurisdiction, but it was not done. The order of the learned Trial Court, it is very much apparent, did not exercise the jurisdiction vested in it in a proper manner, rather failed to exercise the jurisdiction and its decision of 24.04.2012 is not a result of application of a judicial mind. The undisputed facts of present proceeding, as discussed above, were never taken into the account by the learned Trial Court, which should have been considered, even more when the case was remanded from the higher Court and one of the main issues is that whether or not the subject property is an inherited property. Both the learned Courts below confined themselves only to the issue that whether the said Respondent No.3 obtained the afore-referred judgment and decree in Suit No.773 of 2004 by playing fraud or misrepresentation, but, never adopted the holistic approach to the facts of present case.

16. Similarly, while passing the impugned Judgment of 06.01.2016, the Revisional Court also did not carefully address the important issues involved in this entire controversy properly. A considerable portion of impugned Judgment of learned Respondent No.1 has been consumed by the discussion pertaining to service of notice on present petitioner, of the afore-referred Suit filed by the Respondent No.3, but, the Revisional Court also did not apply its judicial mind to the material and record available before it.

17. The impugned decisions of the Courts below thus suffer from illegality, which is very much floating on surface. This has resulted in miscarriage of justice, which justifies issuance of a writ of certiorari.

18. The scope of this category of writ jurisdiction has been elucidated by the Honourable Supreme Court of Pakistan in various Judgments and particularly in the case of Saeed Ahmed v. Tariq Nazir Butt and another and Lal Dino Masih v. Mst. Sakina Jan and another reported as **1987 S C M R 220 and 1985 S C M R 1972**, respectively; it has been held, that High Court in exercise of its writ jurisdiction can interfere with the findings of facts recorded by the Courts below, when the same are contrary to the established principle of law and the evidence on record.

19. The upshot of the above is, that it would be just and fair that proper opportunity should be provided to both the parties to prove their case in accordance with law. Consequently, this petition is accepted and both the impugned orders of learned Courts below are set aside and the case is remanded to the learned trial Court for decision afresh strictly in accordance with law, but also considering the following directions:

- i) *Learned Trial Court will implead KDA (Karachi Development Authority) or any other concerned authority, which has issued the above Lease, in Suit No.773 of 2004. Present private Respondents will file an amended title of the plaint.*
- ii) *Learned trial Court will call for the relevant file and record of the Subject Property from KDA and all the originals should be kept in the custody of the Nazir (of the District Court), till the decision of the suit. A certified copy can be retained by the KDA.*
- iii) *KDA will file its reply on the affidavit, if at all necessary, to the Application under Section 12(2) of C.P.C., filed by the present*

*Petitioner. Thereafter Issues will be framed considering the nature of controversy involved and observations contained in this Judgment and parties shall lead evidence. However, it is clarified that the learned Trial Court will not be influenced by any of the observations made in present decision and will decide the matter independently on merits and preferable within a period of three months from the date of this decision. On any unnecessary adjournment to delay the suit proceeding, a cost may be imposed on the delinquent party.*

20. In the above terms, the instant petition stands disposed of.
21. Parties to bear their own costs.

**Judge**

**Judge**

**Dated: 21.09.2017.**

**Riaz Ahmed/P. S\***