

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.D-1855 of 2014

Date	Order with Signature of Judge
	Present: Mr. Justice Irfan Saadat Khan Mr. Justice Nazar Akbar
Petitioner :	Bashiruddin Through Mr. Muhammad Hanif Kashmiri, Advocate.
Respondent No.1 :	Mst. Jamila Bano Natalwala, Through Mr. Muhammad Khalid, Advocate
Respondent No.2 :	The Ist Senior Civil Judge, Karachi Central (Nemo).
Respondent No.3 :	The IVth Addl. District Judge Karachi Central (Nemo).
Date of hearing :	10.10.2017.
Date of order :	25.10.2017

J U D G M E N T

NAZAR AKBAR, J: - The petitioner through this Constitution Petition has challenged orders dated **21.4.2012** and order dated **31.12.2013** respectively passed by Ist Senior Civil Judge Central Karachi, whereby an Execution Application No.09/2009 in Suit No.1074/1979 was allowed and writ of possession had been issued. The petitioner has also impugned an earlier order dated **29.11.2011** passed by the IVth Additional District & Session Judge Karachi whereby Civil Revision No.52/2010 against the order of dismissal of execution application has been allowed in presence of the petitioner.

2. Brief facts of the petition are that respondent No.1 (Mst. Jamila Bano Natalwala) filed Civil Suit No.1074/1979 for

declaration and possession against petitioner in respect of property bearing House No.716, Block-16, Federal "B" Area, Karachi. The same was decreed on 11.7.1991. The petitioner assailed the judgment in Civil Appeal No.67/1991 and his appeal was partly allowed by judgment dated **29.8.1996** and the operative part of the appellate judgment is as follows:-

"As I have held under issues No.5 and 6 and 9, that appellant is owner of super structure and respondent is owner of the plot and the possession of the appellant over the plot is of a licensee of the plot and owner of the super structure, hence appeal is partly allowed and the Judgment and decree of the trial Court are set aside. The respondent can get the possession of the entire building after making payment of the super structure. Let the Commissioner be appointed with consultation of the parties advocate to determine the present market value of the super structure. Let the preliminary decree be framed accordingly. In the circumstances of the cases, I pass no order as to costs".

3. The petitioner never preferred any appeal against the aforesaid judgment and continued to be in possession of the plot despite the fact that it was declared that he is owner of only superstructure on the suit plot as licensee and respondent No.1 is the owner of the plot. But respondent No.1 had filed a Revision **Application No.58/1997** against the appellate decree. Her Revision was dismissed for non-prosecution on 19.10.2001 and she came to know about it on **21.10.2009**. Thus, she filed execution on **17.11.2009**. The said execution application was dismissed by the Ist Senior Civil Judge Central Karachi by order dated **08.10.2010** on the ground that the same was time barred. Respondent No.1 has preferred **Civil Revision No.52/2010** against the dismissal of her execution application which was allowed by IVth Additional District & Session Judge Central, Karachi by order dated **29.11.2011** in presence of learned counsel

for the respective parties. The petitioner did not challenge the said order dated 29.11.2011 and appeared in execution No.09/2009 before the Court of 1st Senior Civil Judge Central, Karachi which was subsequently allowed by order dated **21.4.2012**. The executing Court prior to issue writ of possession dated **31.12.2013** has ensured deposit of the value of superstructure on the suit plot for the petitioner and an amount of Rs.800,000/- toward value of superstructure is lying with the Nazir of executing court. On **01.01.2014** in execution of the judgment and decree after payment of cost of superstructure in Court by respondent No.1, the possession of the suit property has been handed over to her. The judgment and decree in suit No.1074/1979 stand fully satisfied and after more than 90 days the petitioner has filed instant petition on **10.4.2014**. Respondent No.1 has filed objections to this petition in which all the above facts have been admitted and in addition the respondent No.1 has also placed on record copy of Constitution Petition earlier filed by the petitioner bearing C.P. No.5578/2013 challenging the order dated **26.11.2013** passed by District and Sessions Judge Central, Karachi in **C.R No.26/2013** whereby the order dated **18.7.2013** of 1st Senior Civil Judge Central, Karachi determining the value of superstructure at Rs.800,000/- was upheld. The said petition against the concurrent finding of executing Court dated **18.7.2013** and first appellate Court dated **26.11.2013** was dismissed on **15.12.2014** for non-prosecution after one year of satisfaction of decree.

4. We have heard learned counsel for the parties and perused the R&Ps of trial Courts which include record of **Civil Revision No.52/2010** filed by respondent No.1 against the order of

Executing Court dated **8.10.2010** dismissing execution which was allowed and record of **Civil Revision No.26/2013** filed by the petitioner against the order of Executing Court dated **18.7.2013** which was dismissed prior to the satisfaction of judgment and decree on **01.1.2014** (para-9 of petition).

5. The contention raised by the learned counsel for the petitioner before this court is that the earlier order dated **19.11.2011** passed by the IVth Additional District & Sessions Judge in Civil Revision No.52/2010 was without jurisdiction and void ab-initio since the learned appellate court had condoned the delay. He has contended that the order was without jurisdiction and therefore, no limitation was applicable, hence it could be impugned in this Constitution Petition after more than 03 years without even seeking condonation of delay. Learned counsel for the petitioner has relied upon the cases reported as *Yousuf Ali vs. Muhammad Aslam Zia and 2 others (PLD 1958 S.C 104)* and *Dr. Mrs. Zahida Mir vs. The Punjab Public Service Commission, Lahore through Secretary and 2 others (1992 PLC (C.S) 1010)*.

6. Learned counsel for the respondent has contended that the order dated 29.11.2011 was not void ab-initio and it was supposed to be challenged by the petitioner before submitting to the jurisdiction of the executing court in compliance of the said order whereby the execution application was revived. The petitioner having submitted to the jurisdiction of executing court in compliance of the orders after satisfaction of judgment and decree cannot claim that the order dated 29.11.2011 was without jurisdiction.

7. Learned counsel for the petitioner has not advanced any other argument and contended that once the order dated 29.11.2011 is set aside entire execution proceedings would automatically be set aside. In the first place the order said to have been void ab-initio was not a void order since learned IVth Additional District and Sessions Judge was fully competent to entertain Civil Revision No.52/2010 against the order dated 8.10.2010 passed by the Senior Civil Judge in execution No.09/2009. It is not the case of the petitioner that the learned IVth Additional District and Sessions Judge had no jurisdiction to entertain the Revision application and therefore, the order was passed by a Court of competent jurisdiction. It may be added that no arguments have been advanced by the learned counsel for the petitioner to explain that how the order was void.

8. The perusal of execution application clearly suggests that respondent No.1 came to know about dismissal of her Civil Revision No.58/1997 in 2009. This fact has been stated by respondent No.1 in column-5 of her memo of execution application and the petitioner in his objections to the execution application filed on **20.4.2010** and again on remand by impugned order dated **29.11.2011** in his fresh objections filed on **12.4.2012**, has not denied that the knowledge of dismissal of Civil Revision No.58/1997 was acquired by respondent No.1 prior to the said date. Besides, even in her Civil Revision No.52/2010 against the order dated **08.10.2010** respondent No.1 has taken this ground in the memo of Revision application and the petitioner has never disputed this fact through counter affidavit even in the said Revision and, therefore, learned Additional District and Sessions Judge was within its authority while passing an order of

condonation of delay, if any. The subsequent conduct of the petitioner himself that he had participated in the execution proceedings without being aggrieved by remand of execution further confirms that the order passed by the IVth Additional District and Sessions Judge dated 29.11.2011 has been wholeheartedly accepted by the petitioner himself. A factual statement touching merit of the case has gone un-rebutted and, therefore, on this score alone first order of executing Court dated **8.10.2010** dismissing the execution application was rightly set aside by the appellate Court in Civil Revision No.52/2010 by impugned order dated **29.11.2011**. The condonation of delay, even otherwise, is discretion of the Court and an exercise of discretion by a Court of law does not render the order 'void'.

9. In fact petitioner is aggrieved by the orders passed by the learned Senior Civil Judge whereby execution was allowed and possession has been taken away from him and he has approached this Court directly by challenging the said orders passed by learned Senior Civil Judge without first approaching the appellate/ revisional forum available under the law. The petitioner himself has challenged an earlier order of executing Court dated **18.7.2013** in Civil Revision No.26/2013 subsequent to the orders of IVth Additional District and Sessions Judge dated **29.11.2011** and after dismissal of said Civil Revision No.26/2013, he has filed constitutional petition bearing C.P No.5578/2013. Therefore, before approaching this Court on being aggrieved by these two orders dated **21.4.2012** and **31.12.2013** passed by learned Senior Civil Judge, the petitioner should have first availed the remedy of appeal/revision before the Court of District and Sessions Judge.

This petition against the order of executing Court is, therefore, not maintainable.

10. In view of the above discussion, neither the order was void ab-initio nor it could be impugned after it has been merged in the final disposal of the execution proceedings on the satisfaction of the judgment and decree by the executing Court. The petition is, therefore, dismissed having no merit.

JUDGE

JUDGE

Karachi,
Dated: 25-10-2017