

Order Sheet
**IN THE HIGH COURT OF SINDH, CIRCUIT COURT
LARKANA**

Constitutional Petition No. D- 637 of 2014.

Present:
Mr. Justice Khadim Hussain Shaikh
Mr. Justice Arshad Hussain Khan

Petitioners : Mst. Noor Jehan & others
Through Mr. Syed Zamir Ali Shah, Advocate
Respondent No.1 : Miss Shahnaz through Mr. Abdul Khaliq
Bughio, Advocate.
Respondent No.2to4 : P.O Sindh & others through Mr. Abdl Hamid
Bhurgri, Addl. A.G.
Date of hearing : 25.09.2019

ORDER.

ARSHAD HUSSAIN KHAN, J. Through instant Constitutional Petition, the Petitioners/Defendants have challenged the order dated 07.05.2014 passed by learned 2nd Additional District Judge, Mehar, in Civil Revision Application No.8 of 2014 Re: Mst.Noor Jahan & others v. Miss Shahnaz & others, whereby the order impugned therein dated 25.01.2014, passed by learned Executing Court i.e. Senior Civil Judge, Mehar in Execution application No.6 of 2012 ordering execution of Judgment and Decree of the trial Court, despite pendency of Civil Revision Application No. 67 of 2012 re: Mst. Noor Jahan & others v. Mst.Shahnaz before this Court against the Judgments and Decrees passed by two Courts below, was upheld.

2. Briefly the facts of the present case are that the respondent No.1/Plaintiff filed suit for declaration, possession, mesne profit and permanent injunction, claiming therein that she and Petitioners No.1 and 2 are sisters interse; their father namely Muhammad Yaqoob left the agricultural land total admeasuring 38-20 acres situated in Deh Nari Tapa Nari Taluka Mehar. Muhammad Yaqoob expired in the year 1997 leaving behind three girls (respondent No.1 and petitioners 1 and 2). Respondent No.1 was minor at the time of death of her father. Besides, three daughters, [late] Muhammad Yaqoob also left one widow namely Mst.Naimat Khatoon who was real mother of petitioners No.1 and 2 whereas the mother of Respondent No.1 namely Mst. Mukhtiar Begum

being second wife of [late] Muhammad Yaqoob was divorced by the deceased during his life time. It was also the claim of respondent No.1 in the suit that she, being one of the real daughters/legal heirs of [late] Muhammad Yaqoob, is entitled to 12-33 acres of land as her share in the deceased property. However, she was only given 2.00 Acres of land whereas rest of the land was in possession of the petitioner No.1 and 2 who in collusion of Zahid Hussain, Riaz Hussain and Ayaz Hussain succeeded to get the entry in their favour in the revenue records. Respondent No.1/Plaintiff through her attorney, being minor at the relevant time, filed application before the Deputy Commissioner, Dadu against the said entry. The Deputy Commissioner, Dadu, on the application of respondent No.1, though ordered partition and direction was also given to petitioners No.1 and 2 as well as to Zahid Hussain, Riaz Hussain and Ayaz Hussain to hand over the possession of the land to respondent No.1 but since respondent No.1 was minor at that time, therefore, neither the *khata* was changed nor was possession handed over to respondent No.1. Initially the petitioners No. 1 and 2, though gave some produce of the lands to respondent No.1, however, subsequently they stopped the same. Respondent No.1 though approached the petitioners No.1 and 2 as well as Zahid Hussain and others for her due share in the land but they denied. Consequently, respondent No.1 filed suit bearing F.C. Suit No. 06 of 2010 before the Court of Senior Civil Judge, Mehar. The said suit was subsequently decreed in favour of respondent No.1 and against the said judgment and decree the petitioners preferred Civil Appeal No. 05 of 2012 which was subsequently dismissed by the IInd Additional District Judge, Mehar vide its judgment and decree dated 11.10.2012 and 17.10.2012. The said judgment and decree were subsequently challenged by the present petitioner in Civil Revision bearing No. 67 of 2012 before this Court. However, during the pendency of the said revision application, the executing Court vide its order 25.01.2014 allowed the Execution Application No. 06 of 2012 filed by respondent for execution of judgment and decree. The petitioners challenged the said order of the executing Court in Civil Revision Application No. 08 of 2014, before the learned District Judge, Dadu. The said revision application was also dismissed vide order dated 07.05.2014. The petitioners, having been aggrieved by the said order, filed the present constitutional petition.

3. Learned Counsel for the petitioner during the course of his arguments while reiterating the contents of the memo of petitioner has contended that orders impugned in the present proceedings are bad on the facts and law, hence untenable in law. Learned counsel for the petitioners has argued that the Execution Application was filed during pendency of Appeal U/S 96 CPC in which Decree of the trial Court was sought to be satisfied; the Judgments and Decrees of two Courts below were already assailed before this Court by filing Civil Revision Application, which was pending, hence the impugned orders of two Courts below passed in Execution Application during the pendency of the Revision Application are not sustainable in the eyes of law; the petitioners filed objections U/S 47 of CPC before learned Executing Court, but the same was ignored and kept aside illegally and unlawfully although certain questions were raised as to the maintainability and validity of execution of decree passed by the learned trial Court; learned Executing Court has passed the impugned orders merely on the ground that no stay order is passed by this Court in the afore said Civil Revision pending. Learned counsel also pointed out that the Decree and Judgment of the trial Court have been assailed by various other persons by filing their application U/S 12(2) CPC as they were also owners of suit property by virtue of registered sale deeds but they were not made party in the suit. On all these scores, learned counsel for the petitioners urged that the impugned orders passed by the learned two Courts below are liable to be set aside.

4. Conversely, learned counsel for respondent No.1, in his arguments supporting the impugned orders, has contended that the orders impugned in the present proceedings are well within the four corners of law and hence do not warrant any interference by this Court in the present proceedings. Further contended that the present petition, as has been framed and submitted, is not maintainable on the point of facts. Lastly, argued that the petition is liable to be dismissed.

5. Learned Additional Advocate General appearing on behalf of respondents No.2 to 4, while supporting the impugned orders, opposed the instant petition.

6. We have heard learned counsel for the parties, perused the documents available on the record as well as the relevant laws on the point.

7. From the perusal of the record, it transpires that the learned trial court out of the pleadings of parties framed twelve (12) issues where after considering the evidence available on the record passed the judgment and decree, decreeing the suit No.06 of 2010. The petitioner challenged the above said judgment and decree in civil appeal No. 05 of 2012, which was dismissed on merits, thereafter, the petitioners challenged the concurrent findings of the fact in Civil Revision No. 67 of 2012 which remained pending, in the meanwhile respondent No.1 filed execution application bearing No. 06 of 2012 seeking execution of the judgment and decree passed in her favour, which was allowed by Executing Court vide its order dated 25.01.2014. The said order was subsequently challenged in Civil Revision Application bearing No. 08 of 2014 before learned District Judge, Mehar, who after hearing the counsel for the parties dismissed the said revision application, vide its order dated 07.05.2014. The order of the Executing Court as well as the learned lower Revisional Court are impugned in the present constitutional petition.

8. The precise ground that petitioners have taken for filing of the present petition was/is that learned Executing Court during the pendency of the Civil Revision petition preferred against the Judgment and Decree of the trial Court as well learned lower Appellate Court, allowed the execution application.

9. Before going into further discussion, here it would be appropriate to discuss the scope of civil revision. It is well settled that revision is a matter between the higher and subordinate Courts and the right to move an application in this respect by the Applicant is merely a privilege. The provisions of Section 115, C.P.C., have been divided into two parts; first part enumerates the conditions, under which, the Court can interfere and the second part specify the type of orders which are susceptible to revision. The legislature in their wisdom have couched section 115, C.P.C., in the following language:-

"S.115. Revision:---(1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High

Court and in which no appeal lies thereto, and if such subordinate Court appears...

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,"

the High Court may make such order in the case as it thinks fit.

[Provided that, where a person makes an application under subsection he shall, in support of such application, furnish copies of the pleading, documents and order of the subordinate Court. and the High Court shall, except for reasons to be recorded, dispose of such application without calling for the record of the subordinate Court.]

10. It may be observed that Revisional jurisdiction of the High Court under Section 115, C.P.C., is in material respects, even more restricted than the appellate jurisdiction under Section 100, C.P.C, because judgment can be assailed through a revision petition only where it suffers from jurisdictional error of the nature set out in clause (a), (b) and (c) of section 115, C.P.C. Reliance in this regard can be placed on the case of BASHIR AHMED v. TAJA BEGUM and others (PLD 2010 SC 906). Similar view was taken by the Honourable Supreme Court of Pakistan in the case of ABDUL KHALIQ (DECEASED) through L.Rs. v. Ch. REHMAT ALI (DECEASED) through L.Rs. and others(2012 SCMR 508), wherein, inter alia, it is held as under:

“.....the limited scope of its jurisdiction under section 115, C.P.C. which is primarily meant for correction of jurisdictional defects in the proceedings or some patent illegality/ irregularity affecting the merits of the case and not merely for substituting and replacing its own findings with the findings of the appellate Court, unless the same were found to be arbitrary, perverse, fanciful and based on misreading or non-reading of material pieces of evidence, which is not the position in the case in hand.”

11. In the present case, the petitioners after having exhausted statutory remedy available to them, by way of filing civil appeal against the judgment and decree, which was dismissed by the lower appellate court, filed the civil revision before this Court in the year 2012, which remained pending without any stay order, resulting which the executing Court in the year 2014 allowed the execution application of respondent No.1. which was pending since 2012. There can be no denial to the

legal position that the Civil Procedure Code [C.P.C] recognizes the right of an aggrieved person to file an appeal but all the provision (s), relating to right of appeal, by themselves never suspend the operation of the order impugned. The procedure for getting the operation of an impugned order, suspended is not controlled by the provision(s) of appeal but is independent and separate which, the appellate Court, if satisfied, can exercise. The Code, nowhere, restricts a decree holder from filing of the execution application during pending proceeding of the appeal. The law recognizes two modes for staying of the execution proceedings, that is, one ordered by appellate Court or one ordered by the executing Court itself. It cannot be legally approved that a Decree Holder shall stand deprived from his right of seeking the execution proceeding pending disposal of the appeal and or revision as the case maybe, which may take years together even more time than the one provided for filing execution application. Since filing of appeal, in no way, can operate as a stay order over right of Decree Holder to file execution application nor by itself shall be termed as suspension of order/ decree, impugned, therefore, mere pendency of a revision application, which as observed above is merely a privilege and not a right of a party, cannot debar the executing Court from either to stop or to finally conclude the execution proceedings. In absence of stay or injunction in the appeal or revision as the case may be, the party who succeeds in the litigation should be entitled to enjoy the fruits of the decree. It is also well settled that the pendency of such a revision or appeal, as the case may be, shall not operate as a stay of the operation of the order/decree appealed against. Reliance can be place on the case of *KARAM ALI and others v. RAJA and others* [PLD 1949 Lahore 100 (FB)].

12. Besides above, the question pertaining to appreciation of facts cannot be resorted to in exercise of constitutional jurisdiction as by doing the same, it would amount to converting the petition into a revision or second appeal. A writ petition is not a substitute either of a revision or a second appeal.

13. It is now well established that Article 199 of the Constitution casts an obligation on the High Court to act in the aid of law and protects the rights within the frame work of Constitution, and if there is

any error on the point of law committed by the Courts below or the tribunal or their decision takes no notice of any pertinent provision of law, then obviously this Court may exercise constitutional jurisdiction subject to the non-availability of any alternate remedy under the law. This extra ordinary jurisdiction of High Court may be invoked to encounter and collide with extraordinary situation. This Constitutional jurisdiction 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 vested in them or non-exercise of jurisdiction vested in them. The jurisdiction conferred under Article 199 of the Constitution is discretionary with the objects to foster justice in 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 Court 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. Reliance is placed on the case Muslim Commercial Bank Ltd. through Attorney v. Abdul Waheed Abro and 2 others (2015 PLC 259).

14. Reverting to the case in hand, the judgment and decree passed by the learned trial Court against the present petitioners was subsequently upheld by the learned lower Appellate Court and subsequently the execution of the said decree has also been allowed against which the present petitioners filed revision application which too was dismissed, thus the concurrent finding of fact cannot be questioned in the present petition as the constitution petition cannot be considered as appeal against the orders passed by first Appellate Court and the revisionary Court. Furthermore, learned counsel for the Petitioners could not point out any error and or any illegality, infirmity or jurisdictional error in the impugned orders, which could warrant interference by this Court in extra ordinary jurisdiction of High Court.

15. In the circumstances of the case, we are of the view that the orders impugned herein are well reasoned which is apt to the facts,

circumstances and law. Hence, the present petition being devoid of merit is dismissed.

Judge

Judge

Larkana

Dated : -10-2019.