IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision No. S – 61 of 2001

Hassano Mahar & others v.

Dr. Muhammad Yaqoob (deceased) through his legal heirs & others

Date of hearing: **22-11-2021**

Date of announcement: **21-03-2022**

M/s Mukesh Kumar G. Karara and Jamshed Ahmed Faiz, Advocates for the Applicants.
Mr. Abdul Naeem assisted by Mr. Faisal Naeem, Advocates for Respondents No.1-a(i), 1-a(ii) and 2.
Mr. Ahmed Ali Shahani, Assistant Advocate General Sindh.

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J U D G M E N T

Muhammad Junaid Ghaffar, J. **–** Through this Civil Revision, the Applicants have impugned judgment and decree dated 04-05-2001 and 16-06-2001, respectively, passed by the 1st Additional District Judge, Ghotki in Civil Appeal No.45 of 2000 (***Dr. Muhammad Yaqoob & others v. Province of Sindh & others***), whereby judgment and decree dated 19-04-2000 and 24-04-2000, respectively, passed by the Senior Civil Judge, Ghotki in F.C. Suit No.44 of 1981 (*Dr. Muhammad Yakoob & others v. Province of Sindh & others*), through which the private Respondents' Suit was dismissed, has been set aside by decreeing the said Suit.

2. Learned Counsel for the Applicant has contended that the Appellate Court was not justified in upsetting the finding of the trial Court which was based on proper appreciation of evidence; that the land was never granted under the provisions of the Colonization of Land Act, 1912; but was given to the private respondents pursuant to an open auction, whereas, they had failed to pay the installments; hence, was cancelled as per the terms and conditions of the auction; that no notice was required to be issued to them in terms of section 24 of the Act, as pleaded as they were not allotees or haris of the land but purchasers in auction; that the suit was time barred; that they had also availed alternate remedy before the revenue department and suddenly abated the same and then filed a Suit which was barred not maintainable under Section 172 of the Land Revenue Act, 1967; that the land of the private respondents had been cancelled way back in 1973 and

was then allotted in 1977 to more than 28 different parties by way of separate and independent allotment orders; hence, one Suit against all these Applicants / defendants was incompetent; that the relief being asked for was discretionary and considering the fact that after cancellation of land it was allotted to various parties, whereas, the Suit being time barred was filed belatedly, therefore, the discretionary relief can always be refused by the Courts in such circumstances; hence, the Revision Application merits consideration and be allowed by setting aside the impugned judgment of the Appellate Court. Learned Counsel for private Respondents has supported the impugned judgment of the Appellate Court and has contended that no notice as required under section 24 of the Act was ever issued; that official respondents kept on promising that installments would be shifted; that land could not have been cancelled in such manner; that the all actions of the official Respondents were without jurisdiction and corum non-judice; hence, the bar contained in the Land Revenue Act, 1967, does not apply and Civil Court can always be approached; therefore, the Revision does not merit any consideration and is liable to be dismissed.

3. Heard both the learned Counsel and perused the record. It appears that the private Respondents filed a Suit for declaration and injunction, and sought the following relief(s):

> *i) Declare the action and orders of the defendant No:2 and 2-A regarding cancellation of the grant of the plaintiffs in Pano Akil and its subsequent disposal in favour of the defendant No.4 to 31 as illegal, ultravires and malafide of the provisions of land grant policy and as such in effective on the rights of the plaintiffs in the said auction lots.*
>
> *ii) Restrain the defendants No:3 to 31 by way of permanent injunction from interfering with the peaceful cultivating possession of the plaintiffs over auction lots No:9,11 and 12 of deh Roophar Taluka Pano Akil, District Sukkur.*
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> *iii) Direct the defendant No:2 and 2-A by way of mandatory injunction to restore the cancelled grant of the plaintiffs in their names as a consequence of the above declaration and to accept payment of Malkano instalments.*

4. After exchange of pleadings, the learned Trial Court settled the following amended issues:

> *1. Whether the plaintiffs had purchased the suit land mentioned in paragraph No:1 of the plaint in open auction in the year 1967-68 on consideration of Rs.17000/- Rs.40171/- Rs.13211-33 respectively and remaining payments was to be made in four instalments?*
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> *2. Whether the plaintiffs failed to pay remaining instalments as such the land granted to them was cancelled vide order dated 18.5.1971 and 16.6.1973 respectively?*

3. *Whether a show cause notice as required u/s 24 of the Colonization of Government Land was mandatory, if so, what is its effect?*

4. *Whether the orders dated 16.6.1973 and 18.5.1971 passed by Colonization Officer Gudu Barrage Sukkur are illegal malafide and without jurisdiction?*

5. *Whether the order passed by learned Additional Commissioner dated 12.4.1981 and order passed by Colonization Officer dated 9.7.1980 were illegal, malafide and without jurisdiction?*

6. *Whether suit filed by the plaintiff is barred by law of limitation?*

7. *Whether this court has got no jurisdiction to entertain the suit under section 36 of the Colonization Act?*

8. *Whether the plaintiffs are entitled to the relief as prayed for?*

9. *What should the decree be?*

5. Thereafter, through judgment dated 19-04-2000, the learned Trial Court was pleased to dismiss the Suit filed by the private Respondents by giving following observations:

> **"***ISSUE NO:1.*
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> *In my humble view the burden was upon shoulder of the plaintiffs to prove that they have purchased the suit land mentioned in paragraph No.1 of the plaint in open auction in the year 1967-68 on consideration of Rs.17000/- 40171/- and 13211-33 respectively and remaining payment was to be paid in four installments. The plaintiff examined one of the legal heirs of Dr. Muhammad Yakoob namely Munir Ahmed who has stated before the court, that the suit land were allotted to his father and uncle the plaintiff No.1 and 2 in the year 1968 by way of purchase in open auction from Guddu Barrage and plaintiffs deposited one fourth of sale consideration at the same time before the concerned authority. The remaining amount was to be paid in four equal instalments. The plaintiff has not produced the order of the auction by which the lands were granted to the plaintiffs. According to the plaintiff the remaining amount of sale price was to be paid in four equal instalments, whereas according to defendants No.1 and 2 the remaining sale consideration was to be paid in 3 equal instalments, as such under the law the burden of proof lies upon the shoulders of the plaintiffs to establish that there were four instalments for the payment of remaining sale price by the plaintiff. Since the plaintiff has withheld the documents executed between them and the defendant No.2 and has not produced the same before the court nor has shown any reason for not producing the same before the court, as such presumption goes against them that the remaining auction price if the suit land was to be paid in 3 equal instalments as alleged by the defendants No.1 & 2 and not in four instalments as alleged by the plaintiff regarding payment of remaining auction amount. For the reasons mentioned above, I am of the humble view that remaining sale consideration was to be paid in 3 instalments by the plaintiffs as such, my answer on issue No.1 is being not proved.*
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> *ISSUE NO:2 & 3.*
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> *……*

I have considered the contentions advanced by learned counsel for the parties and have carefully gone through the R & Ps of the case and it appears that the plaintiff has not produced any copy of the order by which the suit lands were purchased by them in auction, before the court nor has shown any reason for non-production of the above said document before the court at the time when their evidence was recorded by the court or at the time when evidence of them was recorded by the court. In my humble view it was duty of the plaintiff to establish that the order dated 18.5.1971 and 16.6.1973, passed by the Colonization Officer were without service of any show cause notice to them. In my humble view by withholding the plaintiff the above said document create a serious doubt in the mind of the court that notice as required u/s 24 of the Colonization of the Government land was to be issued and served to the plaintiffs and that is the reason that they have not produced copy of above said order before the court.

Anyhow, I have gone through the case law cited by learned counsel for the plaintiff and in my humble view the principle laid down therein are not fully applicable in the instant case with the simple reason that the plaintiff was not a tenant within the meaning of section 3 of the Colonization of Government Land Act 1912, which read as follows:

Section-3. *DEFINITION- In this Act, unless there is something repugnant in the subject or context, "Tenant" means any person holding land in a colony as a tenant of (Government) and includes the predecessors and successors in interest of a tenant.*

From bare reading of above said definition clause of the Colonization of Government Land Act, it is very much clear that the plaintiff's case does not cover under section 3 of the Act as such, mandatory notice as required u/s 24 of the Act 1912 was not necessary in the instant case before passing of order on the simple reason that the plaintiffs were purchaser of the suit lands by the defendant in an open auction and no proprietary right were accrued to the plaintiff in respect of the suit land as they were required, to deposit the instalments of auction money of the suit land according to terms and conditions of the auction transaction. As I have already hold that the plaintiff have intentionally withhold the document of auction transaction executed by the plaintiffs as such the legal presumption goes against the plaintiff as provided under Qanoon-i-Shahadat order 1984.

The learned counsel for the plaintiff has submitted that no such order was passed by any of the authority and there is only a note mentioned on Form-A by the Colonization Officer as such the plaintiff was unable to get copy of the same.

I do not agree with the contentions of learned counsel for the plaintiffs with the simple reason that there is note on Form-A produced by the plaintiff as Exh.232-P-I, P-II and P-III which clearly shows a note and remarks of the Colonization Officer about passing of the order communicated to him vide order NO:4661 dated 16.6.1973 and 1555 dated 18.5.1971 as such it was duty of the plaintiff to apply to the concerned authorities for grant of certified copy of the same, but the plaintiffs failed to discharge their duty. In my humble view if there was no any order passed by any authority as alleged by the learned counsel for the plaintiffs the plaintiff should apply to the court for calling orders and record in respect of suit land from the competent authority but the plaintiff intentionally did not do so as such the presumption goes against plaintiffs that there was an order passed by the authorities as mentioned in Ex.232-P-II to P-III and the plaintiff intentionally withhold the same. The legal presumption in the case is that the Colonization Officer has passed

the above said order after observing all legal formalities as provided under the colonization of Government Land Act, until and unless contrary is proved by the plaintiffs. The plaintiffs failed to produce any positive evidence either oral or documentary showing that no such compliance was made by the Colonization Officer while passing order dated 18.5.1971 and 16.6.1973 respectively, as such my answer on issue No:2 is in affirmative whereas my answer on issue No:3 is being not proved.

ISSUE NO:4,5,6 & 7.

In my humble view these issues are interconnected to each other, as such, I would like to deal and discuss them together. In my humble view it was duty of the plaintiffs to prove that the order dated 16.6.1973 and 18.5.1971, passed by Colonization Officer were illegal, malafide and without jurisdiction. The plaintiffs in their pleading has alleged malafide on the part of Government Official while discharging their official duties and when one of the legal heirs of the plaintiff NO:1 namely Munir Ahmed examined himself before the court he did not alleged any malafide on the part of Govt: official which discharging their official duties. In my humble view it is the duty of the plaintiffs to alleged the instances or malafide on the part of the Government official in discharging their official duties. In the instant case, neither the plaintiffs nor their witnesses have alleged any malafide on the part of Colonization Officer of Additional Commissioner while passing orders dt: 18.5.1971 and 16.6.1973 is discharge of their official duties and mere allegation of the plaintiffs on the part of Government official that they had acted illegally and malafidely will not sufficient to discharge the burden lies upon their shoulders under the law until the same is proved by the plaintiffs by way of some of positive evidence either oral or documentary. In the instant case no any positive evidence either in the shape of document or his shape of oral testimony has been produced by the plaintiffs which prima facie lead the court to the conclusion that the Government official have acted illegally and malafidely or without jurisdiction while discharging their official duty. In my humble view the jurisdiction of civil court is barred u/s 172 of the Land Revenue Act. In order to appreciate the provisions of law I would like to reproduce the same which leads as follows:-

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It is well settled that inspite of specific ouster of jurisdiction of civil court, the civil courts being the courts of natural justice are competent to see legality and proprietary of orders passed by Government functionaries in discharging of their official duties and whenever the courts comes to the conclusion that the order passed by any Govt. official was illegal mala fide or without jurisdiction, the civil court will come to the aid of the party and can declare action of the Government official to be malafide or without jurisdiction. In the instant case, the plaintiffs have failed to prove any mala fide as already observed in the above para, as such, I am of the humble view that the jurisdiction of court was barred u/s 172 of the Sindh Land Revenue Act.

Furthermore, Section 9 of the CPC empowers civil courts to take cognizance of any matter unless jurisdiction of the civil court is specifically or impliedly been barred under any provision of law. In the instant case, as I have already observed that jurisdiction of the court is barred u/s 172 of the Land Revenue Act, as such the suit is not maintainable u/s 9 of the CPC.

Now I will examine whether the suit in order to see whether it is time barred or not. Admittedly the orders were passed by the C.O dated 18.5.1971 and 16.6.1973 but the present suit is filed by the plaintiff on 18.3.1981.

In my humble view under article 120 of the limitation Act a suit for declaration can be filed within a period of 6 years from the date of order or from the date of knowledge of the order. In the instant suit, admitted the plaintiffs in para No:6 of their plaint has mentioned that after some time it was learnt that the lands purchased by the plaintiffs in open auction 1967-68 was being included in the schedule for fresh disposal as a consequence of cancellation of the grant of the plaintiffs without any prior notice or intimation and without waiting for the decision by the Board of Revenue regarding shifting of instalments and as such they approached to the defendant No.2 with the request that the land purchased by them should not be included in the schedule for fresh disposal and accordingly the defendant No.2 had issued letter dated 2.3.1975 to the effect that the land could not be included in the schedule until after expiry of four years period after cancellation of grant.

From the averments of above said paragraph of the plaint it is very much clear that the plaintiffs were in knowledge of order of cancellation of the suit land passed by defendant No:2 as well as inclusion of the suit land in the schedule for fresh disposal. According to the plaintiffs the defendant No.2/C.O issued a letter dated 2.3.1975 whereby he intimated that the cancelled land cannot be included in the schedule for fresh allotment until a period of 4 years expire but the plaintiffs failed to produce said letter before the court as such has failed to prove the allegation levelled by them in the plaint. For arguments sake, if it is admitted that the plaintiff came to know about cancellation of suit land and the defendant No.2 issued a letter dated 2.3.1975 then the cause of action for filing the instant suit start running w.e.f 2.3.1975 and the instant suit was filed on 18.3.1981 as such was beyond 6 years as proved under article 120 of the Limitation Act. According to own contentions of the plaintiffs they had knowledge of cancellation of the suit land. Furthermore, perusal of entire pleading as well as prayer clause of the plaint of the plaintiff it appears that plaintiff has not specifically sought declaration about the orders passed by the Colonization Officer, perhaps the plaintiff wanted to take benefit of not mentioning the dates of the orders challenged before the court as they fully knew that the orders challenged before the court were hopelessly barred by the law of limitation as such they intentionally did not mention the dates of the order passed by the Colonization Officer in the prayer clause of their plaint.

I have gone through the Exh.232-H to 232-Q and it appears that all these documents produced by the plaintiffs are attested copies of the documents. In my humble view these documents are inadmissible in evidence. In my humble view the plaintiff was required to prove his allegation by producing primary evidence which has been defined in article 73 of the Qanoon-e-Shahadat u/a 74 of the Qanoon-e-Shahadat, secondary evidence has been defined and article 76 provides the cases in which secondary evidence relating to the document may be given but the plaintiff has failed to fulfil the condition before producing the secondary evidence as required u/a 76 of the Qanoon-e-Shahadat as such these documents are struck of from consideration as are not in accordance with Qanoon-e-Shahadat order 1984. It will not be out of place to mention here that the plaintiff has produced Exh.232-I,J,K,K-L & M. These are copies of the correspondent issued by Secretary, to the Government of Sindh, to the Colonization Officer and other Government official but these documents are simple copies without any seal and signature of the authority and were not taken out by mechanical process as provided under sub clause (ii) of article 74 of the Qanoon-e-Shahadat order 1984, as such, these documents are excluded from consideration.

For the foregoing reasons I am of the humble view that the plaintiff has failed to discharge their burden of proof lies upon their shoulder under the law that the orders dated 16.6.1973 and 18.5.1971 passed by the Colonization Officer, Gudu Barrage are illegal malafide or without jurisdiction. The plaintiff also failed to establish that the order dated 12.4.1981, passed by Additional Commissioner Sukkur and order dated 9.7.1980 passed by Colonization Officer were also illegal, malafide and without jurisdiction. On the contrary I am of the view that the suit of the plaintiff is hopelessly barred under the land of limitation as well as suit of the plaintiff is not maintainable as jurisdiction of the Civil Court is ousted u/s 172 of the Land Revenue Act, as well as u/s 9 of CPC. It is well settled that every suit filed beyond the period of limitation prescribed under first schedule of the Limitation Act, is liable to be dismissed though the limitation is not taken as a plea by the other side as after expiry of period of limitation a valuable right has been accrued to the other party which can only be sanctioned by the court if cogent reasons are shown by the party. In view of the above my answer on issues NO:4 and 5 is being not proved, whereas my answer on issue No:6 and 7 is in affirmative.

ISSUE NO:8 & 9.

*In view of my findings on factual as well as on the point of law, discuss in detail in the foregoing issues, I am of the considered view that the plaintiffs are not entitled to any relief whatsoever, with the result their suit stands dismissed with no order as to costs.***"**

6. The private Respondents being aggrieved filed an Appeal, and through impugned judgment, the judgment of the Trial Court has been set aside and their Suit has been decreed, against which the present Applicants have filed this Civil Revision Application. The findings of the Appellate Court read as under:

"*I have given thoughtful consideration to the arguments advanced by counsel for the parties, have gone through the R & Ps and also perused the case law cited by them.*

As regards the issue No.1, the respondents have themselves immedialy grant of land in dispute in favour of the appellants. The only question for determination was whether the auction price was to be paid in four equal installments or three equal installments. The learned Senior Civil Judge, had shifted the burden of proving the grant of land on the plaintiff, which was not correct. The grant of land in favour of the appellants/plaintiffs is admitted. The dispute regarding number of installments was raised by the respondents No.1 & 2. It is admitted by the advocate for the respondents No.4 to 31, that this issue was framed on the pleading of respondents No.1 & 2, therefore, it was for them to prove the same of auction price, but they have not adduced any evidence, as such, the appellants cannot be penalized for the same. The observation of the learned trial court, that by not producing the original order of land grant, the appellants have not discharged their liability was not correct, as the respondents No.1 & 2, were required to produce the same. The appellants have produce the bid sheets to prove the grant of land in their favour. Therefore, the findings of the learned Senior Civil Judge, on issue No.1 are reversed.

As regards the issue 2 and 3, the learned Senior Civil Judge, has held that the appellants had failed pay the remaining installments, therefore, the land granted to them was cancelled vide order dated

18.5.1971, and 16.6.1973 and show cause notice as required u/s 24 of the Colonization of Government land Act was not mandatory. The observation of the learned Senior Civil Judge are not correct. The appellants in their evidence had proved that they had been making applications for possession of the entire land and for providing water supply for the land. The learned Senior Civil Judge has differentiated the status of the appellant, stating that they do not come within the definition of tenant. In my humble opinion the learned Senior Civil Judge had not correctly defined the word tenant and has wrongly held that section 24 of the Colonization of the Government Lands Act, does not apply to the case of the present appellants. Even otherwise, the principles of natural justice require that before cancelling the grant of land, the notice should have been issued to the appellants. The learned Senior Civil Judge, as based his finding on the nonproduction of the auction order holding that without the said orders terms and condition of the grant cannot be looked in to and therefore, it was for the appellant to prove that the notice was required to be issued before cancellation of grant land. As discussed earlier the production of auction order was the burden to be discharged by the respondents No.1 & 2, who had remained aloof from the trial after filing written statement. The presumption of the learned Senior Civil Judge that the withholding of the documents would put adverse effect on the case of appellants is not correct. Admittedly, the notice was not issued to the appellants, regarding cancellation of the grant land, therefore, it cannot be expected from them to have knowledge of the cancellation.

In such circumstances, I am of the humble opinion that the notice for cancelling the land grant was mandatory and it is the appellants have been making application for extension of time for payment of installments, therefore, they cannot be said to have failed to pay the remaining installments.

Finding of the learned Senior Civil Judge, on the issues No.2 & 3 are therefore reversed.

As regard the issues No.4,5,6 and 7 the learned Senior Civil Judge has decided them jointly as according to him they are interconnected. The issue No.4 and 5 relate to the orders dated 16.6.73, 18.5.71 of the Colonization Officer Gudu barrage and order dated 12.4.1981 of the Additional Commissioner Sukkur and 9.7.1980 of the Colonization Officer, which are held to be legal and within jurisdiction.

As discussed in the preceding paragraph, the land grant was cancelled without issuing notice, therefore the orders for cancelling the land grants were passed with malafide and the same were as such illegal and without Jurisdiction. Similarly, the subsequent orders passed on the basis of the earlier orders also become illegal, void and without jurisdiction, as it is well settled law that any order passed on malafide and illegal order is itself illegal and without jurisdiction.

Issue No.6, is regarding the point of limitation, the learned Senior Civil Judge, has held the suit to be barred under the limitation law holding that the orders were passed by the Colonization Officer, on 18.5.1971 and 16.6.1973 whereas the suit was filed on 18.3.1981. He has further held that, even it is admitted that the plaintiff came to know about cancellation of suit land on 2.3.1975, yet the suit was time barred. In my humble opinion the limitation for filing the suit would start from the date the orders dated 12.4.1981 and 9.7.80 were passed by the Additional Commission Sukkur and Colonization Officer respectively. Since, the above orders have been held to be illegal and without jurisdiction, therefore, the suit is also within limitation and not time barred.

In view of my above discussion the findings on issues No.4,5 and 6 are reversed.

> *The learned Senior Civil Judge, has held that jurisdiction of court was barred u/s 172 Sindh Land Revenue Act, therefore, suit was not maintainable u/s 9 of the CPC. Issue No.7, is whether the court has got no jurisdiction to entertain the suit u/s 36 of Colonization Act. This issue has not been discussed by the learned Senior Civil Judge in his judgment. Therefore, his finding that the suit is barred u/s 172 of the Sindh Land Revenue Act, is set aside.*
>
> *In view of the above discussion on the issues I am of the humble opinion that plaintiffs/appellants are entitled to the reliefs claimed by them, therefore, the judgment and decree are set aside and the suit of the plaintiffs/appellants is hereby decreed with no orders as to costs.***"**

7. Perusal of the record reflects that there are various legal as well factual issues involved in the matter and the first and the foremost issue is regarding the very maintainability of the Suit being barred or otherwise under the Land Revenue Act, 1967; the delay, if any, involved in filing such Suit, and whether it was time barred; and that whether any notice was required to be issued in terms of section 24 of the Act before cancellation of the land originally granted to the predecessor-in-interest of the private Respondents.

8. As to the case of private Respondents that the cancellation of the land vide order(s) dated 18-05-1971 & 16.6.1973 was without notice and was in violation of Section 24 of the Colonization of Government Land Act, 1912; it is not in dispute that the land in question was purchased by the private Respondents in an open auction in the year 1967-68 against consideration, which was to be paid in four installments. Out of which, one installment was deposited, and though it is disputed by both the parties that whether three or four more remaining installments were to be paid; however, this dispute is not relevant, as admittedly, the balance amount of the auction proceedings was never paid. The main attack by the private Respondents' side is that notwithstanding the admitted default in timely payment of the installments, the land could not have been cancelled until a notice showing cause was issued, which has not been done; hence, Section 24 of the Act in question has been violated.

9. On the other hand, the Applicants' case is that the land in question was not to be dealt with under the Colonization Act; hence, Section 24 ibid would not apply as it was not a grant of land to a *hari*, but was a purchase through auction, and therefore, was to be governed by the terms of the auction and so also by relevant Standing Orders issued from time to time. Insofar as the private Respondents are concerned, they had failed to produce any document regarding the auction and its terms and conditions,

but on the other hand, the official Respondents have reproduced the contents of the terms and conditions of the auction in their written statement, wherein it has been provided as follows:

> **"IN THE EVENT OF DEFAULT IN PAYMENT OF ANY INSTALLMENTS OF MALKANO ON THE DUE DATE, THE GRANT SHALL STAND FORFEITED WITHOUT NOTICE AND ALL THE SUMS DEPOSITED IN PART PAYMENT OF THE OCCUPANCY PRICE SHALL ALSO BE FORFEITED TO GOVERNMENT."**

10. Perusal of the aforesaid terms and conditions of the auction in question clearly reflects that in case of default, land could have been cancelled or reclaimed without any notice. The contention of the Applicants' Counsel also appears to be correct and justified that this is not a grant of any land to a *hari* or a tenant under the Colonization Act; hence, Section 24 of the Colonization Act would not apply. It would be advantageous to refer to the said provision which reads as under;

> **24. Power of imposing penalties for breaches of conditions**. - When the Collector is satisfied that a tenant in possession of land has committed a breach of the conditions of his tenancy, he may, after giving the tenancy an opportunity to appear and state his objections-
>
> (a) impose on the tenant a penalty not exceeding one hundred rupees; or
> (b) order the resumption of the tenancy :
>
> Provided that if the breach is capable of rectification, the Collector shall not impose any penalty or order the resumption of the tenancy unless he has issued a written notice requiring the tenant to rectify the breach within a reasonable time, not being less than one month, to be stated in the notice and the tenant has failed to comply with such notice.

The said provision very clearly states that it is only applicable in case of *grant of land to a tenant*, and admittedly, the private Respondents were auction purchasers and not tenants. In that case any shelter under this provision on behalf of the Respondents is uncalled for. No notice as claimed was required to be issued to them, whereas, the default stands admitted on their part as pleaded in the plaint that a request was made to shift the instalments to later dates. This controversy was settled in almost identical facts regarding applicability of Section 24 ibid and cancellation of a land without notice upon default in payment of installments by a learned Single Judge of this Court in the case of *Abdullah Khan through his L.Rs v. Member Judicial, Board of Revenue and 4 others* (**1987 CLC 994**). The facts were more or less similar, as in that case also, the issue of Court's jurisdiction; the order of cancellation being lawful or not; the suit being time barred or not were also involved. In that case also, a declaration was sought

in the suit that cancellation of grant and imposition of fine were illegal, and the Court went on to hold that the said relief was barred under Section 172 of the Land Revenue Act, 1967, as the Revenue Officer was fully competent to cancel such grant. Standing Order No.10-A was also dealt with, which is specifically notified regarding cancellation policy, and as to the competency and jurisdiction of a Civil Court in such matters, the following observation of the Court is relevant:

> **"***In the case of Province of West Pakistan v. Haji Muhammad Juman and another P L D 1960 (W.P.) Kar. 908, Qadeeruddin Ahmed, J. (as he then was) held that civil Courts cannot sit in judgment over the decisions of the Revenue Officers acting in exercise of their jurisdiction. It was further observed that so long as a question is decided within the limits of a jurisdiction, it is material, from jurisdiction point of view, whether the decision is right or wrong. Civil Courts can check errors of usurpation of power made by Revenue Courts or officers but not the errors of their judgments, which could be done within the hierarchy on the Revenue side. View expressed above was subsequently reiterated in the case of Abdul Ghafar and others v. Government of West Pakistan and others P L D 1963 Kar. 215. It was further held there in that order of Revenue Authority alleged to have been passed on mis-appreciation of evidence could not be made subject-matter of dispute in a civil Court.***"**

11. The applicant's counsel in that case has also argued that if any order of cancellation is passed without notice, then it would amount to a jurisdictional defect, and therefore, a Civil Court will have jurisdiction. In this case, it has also been argued that the terms of auction were not fulfilled by the official Respondents in respect of cultivation and supply of water, therefore, it was requested that the installments be deferred and in the cited case also similar facts were discussed, and the learned Judge went on to hold as under:

> **"***Legal position stated in the case-law quoted above would not apply to the facts of the instant case for two reasons.* Firstly, there is no provision for issuance of notice at the time of cancellation of grant on the ground of non-payment of instalments. *Three 'A' Forms showing grant of land in question made to Muhammad Ismail father of Abdullah Khan are on the record as Exhs. 44/1, 2 and 3. On their back at the] foot there are printed instructions of which instruction No. 3 categorically provides that postponement of recovery of instalment can be sanctioned only by the Commissioner and when such sanction is received the dates and amounts of instalment postponed should be recorded in red ink and a note made in the remarks column of the authority therefor. This clearly shows the intention that instalments were to be paid promptly and postponement was allowed by the sanction of the Commissioner.* This instruction is to be read in conjunction with cancellation policy in Standing Order 10-A, which

> contemplates that where there is default in payment of one instalment or more, the grant becomes due for cancellation. Distinction is made only for those grantees, who have failed to pay the last instalment or part thereof and provision is made that their cancellation would be due one year after the date on which the final instalment is due. Then procedure is prescribed for cancellation once a year on 15th June. It is provided that after cancellation within one month from the date of cancellation, Barrage Mukhtiarkar shall issue notice to the grantees informing them about the cancellation of the grant. This is notice after cancellation and is not to be confused with notice before cancellation.**"**

12. In view of the above, it can be safely held that insofar as the purchase of land in question is concerned, the same was not a grant under the Colonization Act, and therefore, Section 24 (***ibid***) has no relevance. The auction terms would govern the proceedings of purchase and cancellation, and therefore, no notice was required, and the learned Trial Court was fully justified in deciding this aspect against the private Respondents, which has then been overturned by the Appellate Court, which does not appear to be a correct appreciation of law. This is also for the reason that after cancellation way back in 1973, the said land has been granted to more than twenty-eight (28) persons individually, who had no nexus or relation with each other, and therefore, at such a belated challenge to such cancellation cannot create any right in favour of the private Respondents.

13. As to maintainability of the Suit and the same being barred under section 172 of the Land Revenue Act, 1967, the law is though settled that in exceptional cases, when the impugned action is without jurisdiction and or based on mala fides, the jurisdiction of the Civil Court cannot be ousted completely, and in appropriate cases it can be exercised. However, in this case the facts are a somewhat different and it is not a question that the impugned action is without jurisdiction or is based on mala fides; hence, the Suit was competent before the Civil Court. Rather, it is a question wherein the private Respondents after initially availing the departmental remedy before the Revenue authorities under Land Revenue Act, suddenly abated the same and the filed the Suit. This tendency has been deprecated in various pronouncements of the Hon'ble Supreme Court as well as this Court. In this context it would be advantageous to refer to the judgment of the Hon'ble Supreme Court in the case of ***Commissioner of Income Tax Vs. Hamdard Dawakhana (Waqf) Karachi*** reported in **PLD 1992 SC 847**, wherein the Hon'ble Supreme Court held that such practice, in cases when statute provides alternate and efficacious remedy up to the High Court, invoking Constitutional Jurisdiction of the Courts cannot be approved or

encouraged. In the above judgment the Hon'ble Supreme Court had relied upon the following observation of the Court in C.A. NO. 79-K/1991 which was as follows:-

> "We may now revert to the question, whether the appellant was justified to file above Constitution petition against the order of the Tribunal instead of invoking section 136 of the Ordinance for making a reference to the High Court. According to Mr. Rehan Naqvi, a reference under the above provision would not have been adequate and efficacious remedy as it would have taken years before it could have been heard. The same could be true for a Constitution Petition. The tendency to bypass the remedy provided under the relevant statute and to press into service Constitutional jurisdiction of the High Court has developed lately, which is to be discouraged. However, in certain cases invoking of Constitutional jurisdiction of the High Court instead of availing of remedy provided for under the relevant statute may be justified, for example when the impugned order/action is palpably without jurisdiction and/or mala fide. To force an aggrieved person in such a case to approach the forum provided under the relevant statute may not be just and proper.
>
> In the present case, the appellant had opted to avail of the hierarchy of forums provided for under the Ordinance upto the stage of filing of appeal before the Tribunal and, therefore, it would have been proper on the part of the appellant to have invoked section 136 of the Ordinance for making a reference to the High Court instead of filing a Constitutional petition. **In our view, once a party opts to invoke the remedies provided for under the relevant statute, he cannot at his sweet will switch over to Constitutional jurisdiction of the High Court in the mid of the proceeding in the absence of any compelling and justifiable reason."**

Similarly, the same view has been followed by the Hon'ble Supreme Court in the case of ***The Commissioner of Income Tax Karachi and 2 others Vs. Messrs N.V. Philips Gloeilampenfabriaken*** reported in **PLD 1993 SC 434**. This Court in the case of ***Messrs Pak-Saudi Fertilizers Ltd. vs. Federation of Pakistan*** and others reported in **2002 PTD 679** after exhaustively examining the judgments of various Courts came to the conclusion, that a person cannot be permitted to pursue a petition before this Court and so also avail the alternate remedies at the same time. The relevant portion of the judgment is reproduced as under:-

> "In the present case the petitioner has filed the petition after finalization of the assessment order. Even the first appeal was filed by it during the pendency of its petition. Pressing into service the principle of law enunciated in Banarsi Dass (cited supra) the petition is dismissed as not maintainable. As regards the challenge to framing of the main assessment order it is clarified that nothing in this judgment shall preclude the petitioner from pursuing his departmental remedies. The appellate authorities are directed to dispose of appeals strictly in accordance with law without any instructions or directions from any superior or other authority."

The same view has been followed by a Division Bench of this Court in the case of ***Arshad Hussain Vs. Collector of Customs and 2 Others***

reported in **2010 PTD 104** and ***M/s Bilal International V/s Federation of Pakistan & others*** reported as **2014 PTD 465**.

14. It is also a matter of record that the private Respondents admittedly availed the remedy under the Revenue laws and even approached the Additional Commissioner, and thereafter, once an order was passed against them, even filed an Appeal before Member Board of Revenue. Thereafter, instead of continuing with the alternate remedy, they approach the Civil Court by way of a Civil Suit. Such conduct of the private Respondents disentitles them from seeking the Civil remedy as they cannot continue with both the remedies at the same time. In that case they even cannot plead that since the actions of the official Respondents appeared mala fide to them, therefore, they can conveniently abate such proceeding in between, and once again seek relief from the Civil Court under Section 9 CPC. In that situation, the bar of jurisdiction would fully apply to their case and their conduct. The case of the private Respondents is also of election of a forum for seeking a certain relief available in law. The law in this regard is already settled that once a party has selected a legal forum for seeking any relief, then the said party cannot abate such proceedings in between and seek any other remedy for the same relief. Once that remedy was elected, then, by implication of the doctrine of election, the other remedy by way of a civil suit was barred[1].

15. As to the question of limitation as well, the private Respondents have not been able to lead any proper or confidence inspiring evidence to prove and establish that they had no knowledge of such cancellation, as apparently, their stance is contradictory and so also falls within the principle that withholding of best evidence always goes against the party doing so. The private Respondents never came up with all documents including the auction / grant orders and also concealed material facts, which can only lead to draw an inference that if such record was placed before the Court, that would have gone against them. This appears to be an admitted position that insofar as the allotment and auction of the land to the private Respondents is concerned, it was cancelled due to default in the years 1971 & in 1973 (by way of two orders dated 18.5.1971 & 16.6.1973). The private Respondents admittedly never initiated any proceedings before any legal forum; whereas, the case as setup by them is that there were some

[1] Reliance can be placed on the cases of Trading Corporation of Pakistan v. Devan Sugar Mills Ltd. (PLD 2018 SC 828); and Daan Khan v. Assistant Collector (2019 CLC 483)

promises from the official Respondents including some correspondence, hence, they were kept in hope as to their entitlement and re-allotment of the land, if any. It further appears that subsequently, purportedly on the ground that no final decision was communicated, they filed a Civil Suit bearing No.206 of 1977 in September 1977 for declaration to the effect that cancellation of their grant or auction is illegal and ultra vires. It is pertinent to note that despite being in knowledge at that point of time that not only their land stands cancelled; but it was allotted to various other parties; they did not seek the remedy of cancellation of such allotment; though even by their own conduct and admission, the limitation had started running against them. Realizing this, may be on advise, they further pleaded in the plaint in hand that some response was filed in the earlier Suit and it transpired that not only their land stands cancelled way back as above, but has also been allotted to the present Applicants in some open *katchery* on 25-09-1977; that was after four years from the cancellation date as provided in law. It further appears that subsequently, somewhere in 1981, they withdrew the earlier Suit and filed another Suit on the ground that now since the land stands allotted to someone else, a fresh Suit has to be filed and a permission was also granted. However, by filing the second Suit, now to overcome the period of limitation which in fact had started running against them since cancellation in 1973 at least; again a declaratory Suit was filed, firstly on the ground that cancellation of their land was illegal and without jurisdiction; and secondly, another declaration that the land allotted to present Applicants is liable to be cancelled. Insofar as the grant of land to the present Applicants is concerned, for that, only a Suit for cancellation was to be filed and not for a declaration to that extent. From the pleadings and the evidence of private Respondents including the cross-examination, wherein *PW Muhammad Munir (Ex. 232)* has admitted that it is correct to suggest that the Suit land were cancelled due to non-payment of installments of the Suit land in the year 1973, but the Plaintiff came to know this fact in the year 1977. Though this statement is not supported by any document or evidence, as apparently they knew that they had defaulted and kept on seeking shifting of installments; failure of which had already resulted in cancellation of their land. The said witness has also admitted that in the year 1971 for the first time my father applied for extension of time to deposit the remaining installments of the Suit land, but I do not remember on what date, the application filed by my father for extension of time to deposit the installment was rejected by Defendant No.2. It is also a matter of fact that

the original auction purchaser namely Dr. Muhammad Yakoob expired on 30.11.1999 and during the period of cancellation of the land and its allotment to the Applicants as well as filing of the Suit(s) he was alive; hence, ought to have specifically pleaded about knowledge and cause of action to maintain the same as to within time; instead vague language was used in the plaint(s). In that case, insofar as seeking cancellation of allotment / grant of the Applicants is concerned, the period of limitation was three years under Article 91 of the First Schedule to the Limitation Act, and for that, the Suit filed in 1981 appears to be time barred. Even if limitation is counted from 1977, (as no specific dates of gaining knowledge of any of the events has been pleaded or stated); the Suit was time barred. However, to overcome all this and by seeking enlargement of limitation, the subsequent Suit was titled as a Suit for declaration in respect of cancellation of their land and so also in respect of cancellation of the allotment of the Applicants. This was an attempt to seek the limitation of six years in terms of Article 120 of the First Schedule to the Limitation Act, 1908; though apparently, it was not available even for a Suit for declaration against cancellation of their land as it was done way back in 1973, whereas, they have not been able to establish that it was not in their knowledge as the burden was upon them. Per settled law once the period of limitation commences it cannot be stopped or be avoided by introducing another cause of action of relief in the Suit or even by way of reformulating it. This is provided in Section 9 of the Limitation Act, 1908. Further in terms of Order XXIII Rule (2) CPC, if any fresh Suit instituted on permission granted under the last preceding Rule (Rule 1 ibid); the plaintiff shall be bound by the law of limitation in the same manner as if the first Suit had not been instituted. Very recently, the Hon'ble Supreme Court vide order dated 24.11.2021 in Civil Petition No.1831 of 2017 (***Syed Athar Hussain Shah v Haji Muhammad Riaz and another***); has dilated upon this aspect of the matter in the following terms;

> We are now left to consider whether the third suit was saved because it had also sought a declaration of ownership of the land as submitted by the petitioner's learned counsel for which Article 120 prescribes six years' period of limitation. The Privy Council in the case of *Janki Kunwar v Ajit Singh*[2] held that the substance of the relief has to be seen, and if a relief is added for which there is a longer period of limitation it would not save the suit. That was a case in which the plaintiff had added the relief of possession of immovable property, which had 12 year's limitation, to the relief of setting aside a deed of sale, for which the period of limitation was three years under Article 91. In *Muhammad Javaid v Rashid Arshad*[3] this Court held that, '*If the main relief is time barred and the bar is not surmounted by the respondent,*

[2] 15 Cal. 58

[3] PLD 2012 Supreme Court 212, para 5, p.230G

> *the incidental and consequential relief has to go away along with it and the suit is liable to be dismissed on account of being time barred*'[4]. An examination of the petitioner's plaint makes it clear that the petitioner had primarily sought the specific performance of the agreement, then the cancellation of the sale deed and had added the declaratory relief to primarily save the third suit from the consequence of having been filed beyond the period of limitation.

16. It has also come on record that when an application was made for shifting / deferring of the installments, which was though provided in law, but insofar as the land of private Respondents is concerned, such protection was not available to them as by that time they had already defaulted and their allotment / auction of land stood cancelled. The facility of shifting of installments was only available to grants which were still existing, and though there was a default, but such land was not cancelled. The official Respondents did not immediately allot or granted the land in question to anyone else, including the Applicants until passing of four years as provided in law, and therefore, merely for the fact that belatedly the private Respondents have come with a plea that it was never in their knowledge, the allotment of the Applicants cannot be disturbed. The private Respondents ought to have been vigilant in pursuing their remedy and ought not to have slept over their rights, if any.

17. Lastly, the facts and circumstances of this case also require a discussion as to the grant of discretionary relief under the Specific Relief Act, 1877. It is not in dispute that the land was cancelled a long time ago, and thereafter, was granted to various other persons as noted hereinabove, who were also given possession and since considerable time had lapsed; whereas, even otherwise, the private Respondents have failed to make out a case on facts as well as law, hence, can in these conditions the Court must exercise its discretion under the Specific Relief Act in their favour? And the answer is a big 'No'. Admittedly, the land was cancelled much before filing of the suit or even when allegedly requests were made for shifting of installments. The right therefore, if any was non-existent at that point of time. This needs to be kept in mind as it is very crucial in the given facts in hand. Per settled law a Suit on such right cannot be entertained in terms of section 42 of the Specific Relief Act, 1877, as at the time of filing of the Suit, the Respondents were not holding any title to seek the relief as prayed for. In fact, what they wanted was to obtain an affirmative declaration

[4] Ibid, paragraph 5, page 230G

that they may have a right to claim or own the property if the allotment of the Applicants is cancelled. It is only thereafter that it could have been re-granted to them. In other words, they had asked for a declaration not of an existing right but of chance or possibility of acquiring a right in the future. The character or right within the contemplation of s.42 ibid, which the Respondents asserts or claims, and which is allegedly being denied by the other side must exist at the time of filing of the Suit for such a declaration and should not be the character or right that is to come into existence at some later stage. It is also a settled law that no declaration of an abstract right can be granted; howsoever, practical it may be to do so. The learned Appellate Court was fully aware that the land in question is now allotted to the Applicants, whereas, the conduct of the private Respondent has not been of a nature which can compel the Court to exercise its discretion in the matter, ought not to have exercised such discretion as it is not a matter of absolute right to obtain a declaratory decree; rather it is a discretionary relief and could have been refused in the given facts of the case in hand. This power of granting a discretionary relief should be exercised with care, caution and circumspection. Such power ought not to be exercised where the relief claimed would be unlawful. The Courts have always been slow and reluctant in granting such relief(s) of declaration as to future or reversionary rights. It must always be a relief appropriate to and contingent on the right of title asserted in the Suit. This is for the reason that per settled law, the discretionary relief cannot or must not always be granted even if the right so claimed is justified and proved but under given facts and circumstances, the same can be refused.

18. In view of hereinabove facts and circumstances of this case, it appears that the Appellate Court has erred in law and facts by decreeing the Suit of private Respondents and by setting aside the judgment of the Trial Court, which had in fact appreciated the law as well as facts properly, and therefore, the impugned judgment dated 04-05-2001 passed by the Appellate Court cannot be sustained; hence, the same stands set aside and the judgment and decree of the Trial Court is restored. As a consequence, thereof, this Civil Revision Application stands **allowed**.

Dated: 21.03.2022

J U D G E

Abdul Basit