Judgment Sheet

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Rev. Application No.S-153 of 2020

Applicants	:	Abdul Jabbar & others through Mr. Tariq G. Hanif Mangi, Advocate
Respondent	:	Ghulam Rasool, through Mr. Mian Mumtaz Rabbani, Advocate
Date of hearing	:	**02.10.2023**
Date of Decision	:	**20.10.2023**

J U D G M E N T

ARBAB ALI HAKRO, J.- Through this Civil Revision Application under Section 115, the Civil Procedure Code 1908 ("**the Code**"), the applicants have impugned Judgment 06.10.2020, passed by District Judge Ghotki ("**the appellate Court**") in Civil Misc: Appeal No.05 of 2016, whereby, the Order dated 19.5.2016 passed by Senior Civil Judge, Mirpur Mathelo ("**the Executing Court**") in Execution Application No.01 of 2013, through which the Execution Application was allowed has been maintained by dismissing the Civil Misc: Appeal.

2. Briefly stated, the facts of the case are that the respondent instituted a suit for Possession under Section 9 of the Specific Relief Act, 1877, against the applicants, which was decreed by the trial Court vide Judgment and decree dated 04.11.2009. The applicants preferred Civil Revision Application No.03 of 2010 before the Revisional Court against the above Judgment and decree, which was contested by the respondent. However, said Civil Revision Application was dismissed in default/non-prosecution vide Order dated 12.12.2012. Thereafter, the respondent filed an execution

application on 04.03.2013 against the applicants for implementation of Judgment and decree dated 04.11.2009. The applicants filed objections to the Execution Application on 30.5.2013 with the contention that the execution application is time-barred and is liable to be dismissed. The Executing Court, after hearing the parties, allowed the Execution Application vide Order dated 19.5.2016. Feeling aggrieved, the applicants preferred Civil Misc: Appeal No.05 of 2016, which was dismissed by the appellate Court, and the Order passed by the executing Court was maintained vide impugned Judgment dated 06.10.2020.

3. At the very outset, the learned counsel representing the applicants contended that the Judgment dated 06.10.2020 and order dated 19.05.2016 is illegal, unlawful and unwarranted under the law; that respondent filed an execution application on 04.03.2013 beyond the limitation period as provided under Article 181 of the Limitation Act 1908; it is argued that civil revision application No.03 of 2010 was not decided on merits as it was dismissed in default and execution application is time-barred; Lastly, he contended that both the Courts below committed illegality and exercised the jurisdiction illegally while allowing execution application of respondent. In support of his contention, he has relied upon the case law reported as **2013 SCMR 5**, **2002 CLD 1454**, **1996 SCMR 759**, **2008 CLC 197**, **2020 YLR 979** and **2009 SCMR 589**.

4. Conversely, the learned counsel for respondent supported the impugned Judgment and Order passed by both the courts below and submitted that the execution application is filed within the limitation period after the dismissal of the revision application as it was in continuation of the suit when the right to apply accrued as provided under Article 181 of the Limitation Act 1908, therefore, prayed for dismissal of the revision Application. In support of his contention, he has relied

upon the case law reported as **2003 SCMR 436**, **1992 SCMR 241**, **2013 YLR 226**, **2001 CLC 1769**.

5. The arguments have been heard at length, and the available record, including case law, relied upon by the learned counsel for the parties. I have also scrutinized the exactness and meticulousness of the Judgment and Order of both the Courts below with a fair opportunity of the audience to the learned counsel for the applicants to satisfy me as to what has acted by the Courts below in the exercise of their jurisdiction either illegally or with material irregularity.

6. Before dilating upon the merits of the case, it would suffice to say that the scope of Revisional jurisdiction of the High Court is limited, especially when there are concurrent findings of Courts below. There are numerous case laws on this point. However, if any, can be made to the case of **Mst. FAHEEMAN BEGUM (DECEASED) THROUGH L.RS AND OTHERS VS. ISLAM-UD-DIN (DECEASED) THROUGH L.RS AND OTHERS**, reported in **2023 SCMR 1402**, in which Apex Court has held as under: -

> *"If the concurrent findings recorded by the lower fora are found to be in violation of law, or based on misreading or non-reading of evidence, then they cannot be treated as being so sacrosanct or sanctified that cannot be reversed by the High Court in revisional jurisdiction which is pre-eminently corrective and supervisory in nature. In fact, the Court in its revisional jurisdiction under section 115 of the Code of Civil Procedure, 1908 ("C.P.C."), can even exercise its suo motu jurisdiction to correct any jurisdictive errors committed by a subordinate Court to ensure strict adherence to the safe administration of justice. The jurisdiction vested in the High Court under section 115, C.P.C. is to satisfy and reassure that the Order is within its jurisdiction; the case is not one in which the Court ought to exercise jurisdiction and, in abstaining from exercising jurisdiction, the Court has not acted illegally or in breach of some provision of law, or with material irregularity, or by committing some error of procedure in the course of the trial which affected the ultimate decision. The scope of revisional jurisdiction is restricted to the extent of misreading or non-reading of evidence, jurisdictional error or an illegality in the Judgment of the nature which may have a material effect on the result of the case, or if the conclusion drawn therein is perverse or conflicting to the law."*

Similarly, in the case of **HAJI WAJDAD V. PROVINCIAL GOVERNMENT THROUGH SECRETARY BOARD OF REVENUE GOVERNMENT OF BALOCHISTAN, QUETTA AND OTHERS reported in 2020 SCMR 2046**, it was held by the Apex Court that:

> *"There is no cavil to the principle that the Revisional Court, while exercising its jurisdiction under section 115 of the Civil Procedure Code, 1908 ("C.P.C."), as a rule is not to upset the concurrent findings of fact recorded by the two courts below. This principle is essentially premised on the touchstone that the appellate Court is the last Court of deciding disputed questions of facts. However, the above principle is not absolute, and there may be circumstances warranting exception to the above rule, as provided under section 115, C.P.C. gross misreading or non-reading of evidence on the record; or when the courts below had acted in exercise of its jurisdiction illegally or with material irregularity".*

7. The main issue in the instant Revision Application involves determining the appropriate limitation and method for filing the first execution application. Either from the date when the original decree was passed or from the date when the Revision Application was dismissed. (Even if original decree is neither suspended nor ultimately modified). It is an admitted fact that the suit filed by the respondent/decree holder was decreed vide Judgment and decree dated 04.11.2009. The applicants/judgment debtors assailed the said Judgment by filing a civil revision before the Revisional Court; however, it was dismissed in default for non-prosecution vide Order dated 12.12.2012. Thereafter, an Execution Application was filed by the respondent/decree holder on 04.03.2013. The fate of the instant Revision revolves around the resolution of the question of law as to whether the application of the respondent/decree holder filed for implementation of the decree was governed by Section 48 of the Code or Article 181 of the Limitation Act, 1908. Before embarking upon the controversy between the parties, it would be conducive to reproduce above both provisions of Section

48 of the Code and Article 181 of the Limitation Act, hereunder: -

> ***Section 48 of the C.P.C.*** *Execution barred in certain cases.-(1) where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiry of six years from-*
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> *(a) the date of the decree sought to be executed, or*
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> *(b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.*
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> *(2) Nothing in this section shall be deemed-*
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> *(a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of six years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within six years immediately before the date of the application; or*
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> *(b) to limit or otherwise affect the operation of Article 183 of the First Schedule to the Limitation Act, 1908".*

THE FIRST SCHEDULE

THIRD DIVISION: APPLICATIONS		
Description of application.	***Period of limitation.***	***Time from which period begins to run.***
181.*-Applications for which no period of limitation is provided elsewhere in this schedule or by section 48 of the Code of Civil Procedure, 1908.*	*(Subs. by the Repealing and Amending Act, 1923 (11 of 1923), for "Ditto".)[Three years]*	*When the right to apply accrues.*

8. The former delineates a time constraint of six years, whereas the latter stipulates a maximum duration of three years within which an application for the execution of the decree must be filed. There is no cavil with the proposition that where a limitation period is provided for any legal proceedings in the Limitation Act or anywhere else in the Statute, then recourse may not be made to the provisions of Article 181 of the First Schedule of the Limitation Act. The wording of Article 181 is clear itself to the extent of the

specific period of limitation prescribed by the provisions of the Limitation Act and Section 48 of the Code, but this cannot be limited to the Limitation Act or Section 48 of the Code, rather applies wherever period of limitation is provided for instituting any legal proceedings under any provision of a Statute. But the case of the respondent/decree holder is not the one covered by Section 48 of the Code, as it provides that no order for execution of the decree shall be made upon any fresh application presented after the expiration of the six years from the date of the decree sought to be executed. The words "any fresh application" are of utmost importance, which means an application filed in a situation when the decree-holder had first applied for execution of the decree but the decree or its part remained unsatisfied due to any reason, including filing of appeal, Revision or other proceedings which may have caused stay or disposal of the first application. In such a situation, if a fresh application is filed, it would be governed according to the regime provided for in Section 48 of the Code. The first execution application would, therefore, be governed by Article 181 of the Limitation Act, which provides a period of three years for filing an application for execution of the decree. In the case of ***Hassan Khan Durrani v. Mehboob Khan (1987 CLC 2185)***, it was held by this Court that:

> *"The consensus of these authorities clearly is that section 48 of the C.P.C. only refers to the outside period of limitation but otherwise an application for execution of a decree is to be governed by the provisions of the Limitation Act. Art. 181 being the residuary Article, therefore, governs all such applications which do not fall within the ambit of Art 183. The argument of Mr. J. H. Rahimtoola that such applications are to be governed by Section 48 of the C.P.C. appears to be without substance. In fact section 48, C.P.C. does not provide for any period of limitation within which the decree-holder must first apply for execution of a decree".*

The said Judgment passed by this Court was upheld by the Supreme Court of Pakistan in the Case of ***Mahboob Khan v. Hassan Khan Durrani (PLD 1990 Supreme Court 778),*** wherein it was held by the Apex Court of Pakistan as follows;

> *"The position that emerges from the above discussion is that, as already stated, the first application for execution of a decree would be governed by the residuary Article 181 and the rest of the applications made, thereafter, will be governed by the six years time limit prescribed by section 48. Although the original purpose underlying section 48, read along with Articles 181 and 182 of the Limitation Act, before the amendment of the law was to provide maximum limit of time for execution of a decree. But in the changed position as a result of Law Reforms Ordinance, the only effect of section 48 would be to provide limitation for subsequent execution applications after the first one. The result would be that if no application at all is made within the period prescribed by Article 181, the execution application made, thereafter, would be barred under the said Article and as such there would be no occasion to avail of the benefits of the extended time provided by section 48, C.P.C. In other words once an application for execution is made within time so prescribed, any number of applications for execution can be presented within the six years period from the date of decree. This construction, in my opinion is the only construction that can be placed on the consequent legal position arising out of the amendments made by the omission of Article 182 and substitution of six years period in section 48, C.P.C. Otherwise the provisions for repeated applications every three years or taking steps in aid of execution provided for in Article 182, having disappeared, section 48 would become redundant and ineffective.*
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> [emphasis supplied]

In the case of ***Mian Akbar Hussain v. Mst. Aishabai and others (PLD 1991 Supreme Court 985)***, it was held by the Apex Court that:

> *"Article 183 provides a period of limitation of six years for enforcing a judgment, decree or order from any High Court in the exercise of its `ordinary original civil jurisdiction'. Therefore it is the nature of jurisdiction exercised by the High Court of Sindh which will determine the applicability of the Articles. In the light of the Judgment of the Court quoted above Article 183 cannot be applied. Therefore either Article 181 or 182 will be applicable. In both the cases the period of limitation is three years. It is not the case of the respondents that the right to enforce the decree arises from a date other than the date of decree. Therefore the execution application should have been filed within a period of three years from the date of judgment/decree".*

Reliance in this respect is also placed on the judgments in the case of **National Bank of Pakistan v. Mian Aziz-ud-Din** reported as **1996 SCMR 759**, in the case of **House**

Building Finance Corporation of Pakistan v. Rana Muhammad Iqbal through LRs "2007 SCMR 1929".

9. The first application for execution of the decree can be filed within three years under Article 181 of the Limitation Act 1908. The decree, in this case, was admittedly passed on 04.11.2009. As no application for execution was moved within three years, the application out of which the present litigation has arisen was the first execution application before the Executing Court, and the limitation provided in Section 48 of the Code would not apply in the present case as Section 48 would apply to any subsequent application for execution.

10. It is a settled principle of law that a decree never dies, but the restrictions of limitation always became a barrier for the enforcement of a decree to be executed after the prescribed limitation. The other contention of the learned counsel for the respondent/decree holder is that the Revision Application was filed by the applicants/judgment debtors before the Revisional Court and that was decided on 12.12.2012; therefore, the respondent/decree holder filed the execution application on 04.3.2013, before the Executing Court within time because the Revision is a continuation of suit. The said argument of the learned counsel for the respondent/decree holder is without substance. No doubt the respondent/judgment debtor also filed a Revision Application No.03 of 2010 against the Judgment and decree dated 04.11.2009 passed by the trial Court before the Revisional Court, but that was dismissed in non-prosecution, and admittedly, there was neither stay order nor the operation of Judgment and decree of the trial Court was suspended. The Apex Court has clinched the said controversy in the case of **Bakhtiar Ahmed v. Mst. Shamim Akhtar and others (2013 SCMR 5)** while observing that where stay is granted by the appellate

revisional Court, time can be granted in filing execution petition till such period the decree remained under suspension, but where no stay or leave to appeal was granted by the Supreme Court, the period of limitation would run from the decree passed by the High Court and no extension of time can be granted. The relevant observation given in Paragraphs Nos.7, 8 and 9, which are reproduced hereunder:-

> "*7. So far as the contention that the decree passed by the High Court has been merged into the Judgment of this Court, it may be mentioned here that Supreme Court is not a court of appeal but a constitutional court, and no stay was granted by his Court, therefore, the case-law cited by the learned counsel for the petitioner is not applicable to the case in hand is distinguishable.*
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> *8. The question for consideration in the case of Maulvi Abdul Qayyum v. Syed Ali Asghar Shah and others (1992 SCMR 241) cited by the learned counsel for the petitioner was whether the period of limitation would start from the date of original or appellate decree in which Judgment of trial Court remained under suspension, or the one passed by the High Court in Revision where no such suspension of the judgments of both the Courts were ordered. This Court has held that:-*
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> *"5. It may be recalled that, according to the High Court time started from the date when the First Appellate Court passed the decree. It is manifest from the impugned Order that the reason which influenced the decision of the learned Single Judge is synchronizing the accrual of right to apply within the meaning of Article 181 with the date of the decree of the First Appellate Court, and not with that of the High Court, is that the First Appellate Court had stayed the execution of the decree and the stay order ceased to be operative on the dismissal of the appeal, but no such prohibitory order was issued in Revision by the High Court. Obviously, the learned Single Judge was conscious of the provision of section 15 of the Limitation Act whereunder in computing the period of limitation for execution of a decree, the time during which the execution proceedings remained suspended has to be excluded, meaning thereby that despite the decree of the Appellate Court, the decree passed by the trial Court continued to maintain it identity and was capable of execution. Quite advantageously, reference here, may be made to Order XLI, rule 5, C.P.C., which provides that mere filing of an appeal does not operate as a stay of the decree appealed from. The Appellate Court, is however, empowered to order the stay of the execution of such decree. Seemingly, the object of this rule is that the decree-holder is not deprived of the relief to which he has been found entitled by the Court and at the same time to ensure that by execution of the decree the appeal is not rendered infructuous. It appears that in holding that the period of*

limitation for execution of the decree commenced from the date of the decision by the Appellate Court, the rule that the decree of the Court of first instance, merged into the decree of Appellate Court, which alone can be executed, was not present to the mind of the learned Judge. It is to be remembered that till such time, an appeal or Revision from a decree is not filed, or such proceedings are pending but no stay order has been issued, such decree remains capable of execution but when the Court of last instance passes the decree only that decree can be executed, irrespective of the fact, that the decree of the lower Court is affirmed, reversed or modified.

In the above said cited case it was held that where stay is granted by the Appellate/Revisional Court, time can be extended for such period the decree remained under suspension. In the instant case a right has been accrued in favour of the respondent in terms of the Order of the High Court and admittedly no stay or leave to appeal was granted by this Court, as such the period of limitation would run from the decree passed by the High Court and no extension of time can be granted.

9. So far, the question that the decree of the Court of first instance is merged into the decree of Appellate Court which alone can be executed it may be stated that in the case in hand the decree was passed by the High Court being appellate/revisional Court, therefore, the time would run from the date of passing of decree by the said Court. In the instant case the right was accrued in favour of the petitioner when the decree was passed by the High Court on 17.3.2003. There being no statutory remedy of appeal or Revision available against said decree and the only remedy available was filing a petition for leave to appeal before this Court, which is a constitutional court, therefore, unless the operation of the impugned decree is suspended or the petition is converted into an appeal the petitioner cannot presume that the period of limitation has been clogged. Mere filing of petition, before this Court would not automatically enlarge the time of filing the execution application. Needless to mention here that in case relief is granted by this Court after allowing the appeal with leave of the Court then in the said eventuality the Order of this Court would merge into Order of the lower forums as such the period of limitation would start from the Order of this Court."

11. In the light of the abovementioned clear verdict, it is safely concluded that it cannot be said that the decree dated 04.11.2009, passed by the trial Court, was a continuation of the suit or merged into the Order dated 12.12.2012, passed by the Revisional Court dismissing the Revision Application in default/non-prosecution. The respondent/decree holder could file an execution application within a period of three years from the date of Judgment and decree dated

04.11.2009, passed by the trial Court, as no stay order was granted by the Revisional Court against the Judgment and decree passed by the trial Court and in that eventuality, the Executing Court, as well as the appellate Court, illegally computed the period of limitation from the date of Order of Revisional Court presumed it that Revision was the continuation of suit and have not considered that the Revision was not decided on merits as it was simply dismissed in default/non-prosecution and there was no decree.

12. Admittedly, the respondent/decree-holder had remained mum for a quite unexplained period of about four months after the expiry of the time limit provided in Article 181 of the Limitation Act, 1908, and there was no application for condonation of delay. Thus, the execution application was barred by time, and both the courts below have wrongly stretched the law of limitation in his favour. There was no legal embargo on the respondent/decree holder not to file an execution application before the Executing Court in time, even when the applicants were trying their fluke before the Revisional Court. The law of equity aids the vigilant and not those who slumber on their rights. When the decree was passed in favour of the respondent/ decree holder, he was bound under the law to have approached the trial court for its execution within three years. His conduct of remaining silent for such an inordinate and unexplained period of about four months by itself is sufficient to deprive him of the fruit of the decree in his favour.

13. No doubt, normally, this Court in revisional jurisdiction is slow in interfering in the concurrent findings of the facts recorded by the two courts below, but where there appears prima facie misreading and a departure from settled principles of law, this Court is always competent to

disturb such concurrent findings of the facts recorded by the Courts below. Accordingly, this Civil Revision is **allowed**; consequently, the Judgment dated 06.10.2020 of the appellate Court and Order dated 19.5.2016, passed by the Executing Court are hereby set aside, and the execution application filed by the respondent/ decree holder is hereby dismissed being barred under Article 181, of the Limitation Act, 1908. Parties are left to bear their costs.

J U D G E

Faisal Mumtaz/PS