

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Present:-

Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Zulfiqar Ali Sangi

C.P No.D-376 of 2014

Abdul Hakim Shah. PETITIONER.

Versus

Abdul Hakeem and others. RESPONDENTS.

Date of hearing: 18.09.2019 and 01.10.2019

Date of decision: 01.10.2019

Mr. Muhammad Hamayoon Khan along with M/s Mengal
Meghwar and Kashif Majeed, Advocates for petitioner.

Mr. Irfan Ahmed Qureshi, Advocate for respondent No.1.

Mr. Allah Bachayo Soomro, A.A.G.

-:-:-

ORDER

This order will dispose of the petition in hand. As per facts, respondent No.1 (Abdul Hakeem) filed a 1st Class Suit No.225 of 1990, against the petitioner and respondent No.2, Gulistan-e-Akbar Housing Enterprises, for specific performance of contract, cancellation of sale deed in favour of petitioner and injunction. He has alleged in his suit that he had booked a bungalow bearing No.C/74/2, Phase-II, 100 Sq. Yds., the suit property, in Gulistan-e-Akbar Housing Enterprises, respondent No.2, and has paid an amount of Rs.77000/- against total cost of Rs.1,00,000/- in addition to a bank loan of Rs.60,000/-. Respondent No.2 was required to complete the bungalow in the year 1985, but failed and subsequently in the year 1989 handed over possession of said bungalow to him (respondent No.1) for finishing purpose at his own cost. Meanwhile, respondent No.2 executed a sale deed in favour of petitioner in respect of the said bungalow, who threatened him of dispossession prompting him to file the above suit. Neither petitioner nor respondent No.2 contested said suit and it was decreed exparte vide judgment dated 06.01.1993 and decree drawn on 09.01.1993. Thereafter respondent No.1 filed an execution

application on which learned executing court passed an order dated 28.02.2003 to the following effect:

“Case called. Advocate for D.H present. None present for JD. No objections filed on execution application. Since the J.D has failed to execute the sale deed in favour of D.H. therefore order the Nazir of this court to execute the sale deed in respect of suit property in favour of D.H. on behalf of J.D No.1 on payment deposit remaining sale consideration if any and other charges with the Nazir of this court after performing all the legal formalities.”

But subsequently, on 09.10.2006 the executing court dismissed the execution application in non-prosecution due to non-compliance of the directions contained in above order. On 13.03.2012, respondent No.1 filed an application u/s 151, C.P.C for recalling the said order dated 09.10.2006, but it was dismissed vide order dated 16.03.2012, which led him to file Revision Application No.64/2012. Said Revision Application has been disposed of vide impugned order, whereby order dated 16.03.2012, passed on application of respondent No.1 u/s 151, C.P.C, has been set aside and he has been directed to deposit stamps / sale deed within one month.

Learned counsel for petitioner has argued that the impugned order is based on misreading of pleadings and misinterpretation of law; that the same is void ab initio, misconceived and is not sustainable in law; that the learned revisional court has not considered that the application u/s 151, C.P.C of respondent No.1 was time barred u/s 48, C.P.C, which prescribes a period of six (6) years for filing a fresh execution application; that it was misconstrued by the revisional court that vide order dated 28.02.2003, the execution application of respondent No.1 has been allowed and the matter was pending only for ministerial purpose such as deposit of sale consideration, etc.; that application u/s 151 C.P.C was not maintainable and incompetent in view of provisions of section 48, C.P.C, which permits the decree holder to file a fresh application within a period of six (6) years; and that the findings of revisional court are in conflict with the scheme provided under section 48, C.P.C and Article-181 of the Limitation Act, 1908. In support of his arguments learned Counsel has relied upon the case law reported in 2007 SCMR 351 and PLD 1985 60.

On the other hand, learned Counsel for respondent No.1 has contended that the execution application had already been allowed in terms of order dated 28.02.2003, and only for execution of sale deed for which the Nazir of the court was directed to act accordingly the matter was kept pending and meanwhile the father of respondent No.1 fell ill for whose treatment and care respondent No.1 had gone to his native village and could not attend the court. He has further contended that dismissal of execution application in non-prosecution for

nonproduction of certain documents was not justified and that the execution application cannot be dismissed in non-prosecution.

We have heard learned counsel for the parties and perused the material available on record, which reflects that the petitioner was defendant No.2 in the original suit filed in the court of IInd Senior Civil Judge, Hyderabad and respondent No.2 was defendant No.1. But neither of them contested the suit or filed a written statement to safeguard their interest or right, if any, despite they were duly served. Resultantly, the suit was decreed exparte as prayed. In the subsequent execution application also neither of them appeared to contest the same nor filed any objection as is reflected from the order dated 28.02.2003, when the executing court recording absence of J.Ds and non-filing of the objections on their behalf ordered the Nazir of the court to execute sale deed in favour of respondent No.1 in respect of suit property on behalf of J.D on payment of deposit of remaining sale consideration and other charges etc., if any, and deferred the matter for such proceedings. Thereafter on 09.10.2006, the said court finding the decree holder and his advocate absent dismissed the execution application. The order dated 28.02.2003 shows that the execution application had virtually been allowed and only for execution of sale deed and for depositing the remaining charges, if any, or sale consideration, which is of ministerial nature, the matter was deferred. The record does not reflect that thereafter Nazir of the court, who was directed to execute sale deed in favour of respondent No.1, had ever issued any notice to respondent No.1 for appearance before him for the said purpose or he had called upon him through any process to make good of the remaining sale consideration or charges, if any, for the purpose of executing the sale deed. In absence of any notice or summon to respondent No.1, to appear before the Nazir of the court for execution of the sale deed the execution application, which had already stood allowed, could not have been dismissed for noncompliance or for that matter for non-prosecution.

We in such circumstances cannot differ with contentions of learned Counsel for respondent No.1 that once the execution application stood allowed vide order dated 28.02.2003, the only proceedings to be undertaken in respect of execution of sale deed were ministerial in nature for which there was no need to file a fresh execution application in terms of section 48, C.P.C and hence the provision thereunder or limitation provided therein was not attracted. The order dated 09.10.2006, whereby the execution application was dismissed in non-prosecution, being untenable in law in the facts and circumstances as discussed above would not be allowed to hamper fruit of a decree earned by respondent No.1 on any technical ground such as one agitated by learned Counsel for the petitioner here. It has not been disputed that respondent No.1 is in possession of

the suit property since 1989, in pursuance to a contract with respondent No.2, and during subsistence of such contract the suit property was sold by it to the petitioner, and such sale deed has been cancelled by the judgment and decree passed in faovur of respondent No.1 against which no appeal was filed by the petitioner.

In the said backdrop we asked learned Counsel for the petitioner how the petitioner could maintain this petition when admittedly he did not contest the original suit and never filed his written statement objecting to the claims made by respondent No.1, nor he filed any appeal against the judgment and decree, he could not offer any satisfactory reply and was unable to dispel the view that the petitioner after his failure to contest the suit has disintitiled himself from raising the dispute on merits in constitutional petition. The effect of his omission to contest the suit or file a written statement or even file a regular appeal against the judgment and decree of the trial court would be that now it is not open to him to impugn the finding of revisional court even on any question of law. The relief under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, is discretionary and could not be extended to the petitioner in these facts and circumstances where he has not been able to establish his bonafide and a right having been suppressed illegally by the impugned order. We, therefore, see no merits in this Constitutional Petition and dismiss it accordingly. These are the reasons of our short order passed on 01.10.2019.

JUDGE

JUDGE

Ali Haider.