

IN THE HIGH COURT OF SINDH, KARACHI
C.P. No. D-1263 of 2022

Present:

Justice Zafar Ahmed Rajput

Justice Arshad Hussain Khan

Petitioner : Shamima Khatoon w/o Muhammad Izhar,
through her Attorney Reshma Sultana Farahnaz,
through Mr. Zubair Ahmed Abro, Advocate.

Respondent No.1 : Sindh through the Secretary Law and Justice
Department (*Nemo*)

Respondent No.2 : Vth Senior Civil Judge, East Karachi (*Nemo*)

Respondent No.3 : M/s. Khurshid Construction Company (Pvt.)
Ltd. (*Nemo*)

Date of hearing : 20.01.2025

Date of order : 20.01.2025

ORDER

ZAFAR AHMED RAJPUT, J:- Through the instant Constitutional Petition, the Petitioner, *inter-alia*, seeks following relief: -

- i. *After calling and perusing record and report of the Suit No.622 of 1997 (Shamima Khatoon Verses M/s. Khurshid Construction Company Private Limited) and Execution No.02 of 1999 from the Court of Vth Senior Civil Judge, District East, Karachi; declare order of the executing court dismissing execution application No. 02 of 1999, is liable to be dismissed set-aside having no legal effect and void ab initio.*
- ii. *Declare and hold that the Execution Application No. 2 of 1999 (Shamima Khatoon versus M/s. Khurshid Construction Company Pvt. Limited) is still pending adjourned sine die.*
- iii. *Direct Nazir of the trial Court to comply with the order dated 27.08.1999 of the trial Court and transfer the Shops No. 11/3, 11/4, 11/5 and 5 in Khurshid fancy, Plot No.9, Block-3, Bihar Muslim Co-operative Housing Society, Sharafabad, Karachi in name of the Petitioner or her nominee.*
- iv. *Permanently and pending disposal of this petition, restrain the Respondent No.3, their officers and agents from creating third party interest in the property.*

2. Briefly stated facts of the case, as divulged in the memo of Petition, are that the Petitioner filed Civil Suit No. 622 of 1997 against the Respondent No.3 seeking declaration, injunction, specific performance of contract and damages in

respect of four shops bearing Nos. 11/3, 11/4, 11/5 and 5, located at Khurshid Fancy, Plot No. 9, Block-3, Bihar Muslim Co-operative Housing Society, Sharafabad, Karachi (**“subject property”**), which was decreed in favour of the Petitioner by the Trial Court vide judgment dated 03.12.1998 and decree dated 09.12.1998; that the Petitioner then filed Execution Application No. 02 of 1999 seeking execution of the decree, which was allowed by the Executing Court vide order dated 27.08.1999, directing the Nazir of the Court to execute the sale deed in favour of the Petitioner in accordance with law; however, on 16.11.2000, the execution application was dismissed for default, non-prosecution, and non-compliance with the order dated 27.08.1999; that the Petitioner then filed an application under Order IX, rule 9, CPC, before the Executing Court seeking restoration of the execution application, which was dismissed, vide order dated 16.05.2006; thereafter, the Petitioner approached the Executing Court by filing an application for reopening of the execution proceedings and issuance of a letter for compliance. During the course of such proceedings, it transpired that the relevant court file had gone missing and, despite efforts to trace the same, remained untraceable; hence, the Petitioner has filed the instant Petition.

3. Notice of the instant Petition was issued to Respondents No. 1 to 3. On 03.06.2022, one Syed Khursheed Ahmed, claiming to be the Ex-Managing Director of Respondent No. 3, appeared before this Court and sought time to file a statement/objection. However, thereafter, he neither appeared before the Court nor filed any statement or objections.

4. Learned counsel for the Petitioner contended that this Court is vested with powers under Article 203 of the Constitution of the Islamic Republic of Pakistan, 1973 to exercise general superintendence over all Courts subordinate to it, including the Trial/Executing Court, and is, therefore, competent to correct the illegality committed by the Executing Court in the instant matter; that the order whereby the execution application, which had already been allowed by the Executing Court itself, was subsequently dismissed is patently illegal, without lawful authority, and amounts to an abuse of the process of law; that the Executing Court failed to appreciate that the execution application had already been allowed vide order dated 27.08.1999, whereby Respondent No.3 was directed to execute the sale deed in favour of the Petitioner and, in the event of his failure to do so, the Nazir of the Court was directed to execute the same in accordance with law; that pursuant to the aforesaid order, the office of the Executing Court was required to issue a letter/notice to Respondent No.3, and the requisite costs for issuance

thereof had already been deposited by the Petitioner; however, due to a lapse on the part of the office of the Executing Court, the said letter/notice was never issued to Respondent No.3; that the default was attributable to the Court's own office and not to the Petitioner; however, the Executing Court proceeded to dismiss the execution application for non-compliance; that it is a settled principle of law, embodied in the maxim *actus curiae neminem gravabit*, that no litigant should suffer on account of an act, omission, or default of the Court or its office; that the impugned order has subjected the Petitioner to precisely such a consequence; that it is settled law that a decree passed by a competent Civil Court cannot be permitted to be defeated or rendered nugatory merely by dismissing the corresponding execution application for default; that the Code of Civil Procedure, 1908, contains no express provision authorizing an Executing Court to dismiss an execution application for default or non-prosecution, except to the limited extent contemplated under Order XXI, rule 57, CPC, which relates exclusively to the determination of attachment and has no application to the facts and circumstances of the present case; as such, on this ground alone, the impugned order is liable to be set aside; that once a decree-holder has invoked the execution jurisdiction within the period prescribed by law, it becomes the duty of the Executing Court to ensure effective enforcement and satisfaction of the decree and, even in the event of non-appearance or non-prosecution by the decree-holder, the appropriate course for the Executing Court, particularly where the decree remains unsatisfied, is to adjourn the execution proceedings *sine die* rather than dismiss the same outright, thereby frustrating the decree-holder's accrued rights; that the Petitioner has acquired a valuable and vested right in the subject property by virtue of the declaratory decree passed in her favour by the Trial Court, whereby she has already been declared the owner of the subject property; therefore, in such circumstances, execution of the sale deed in her favour was essentially a ministerial act to be completed in implementation of the decree; as such, the Executing Court committed a material illegality in allowing such an accrued right to be defeated on account of a lapse attributable to the Court's own office.

5. We have heard the learned counsel for the Petitioner and perused the material available on record.

6. At the very outset, it may be observed that the order dismissing Execution Application No. 02 of 1999 for non-prosecution was passed on 16.11.2000. The Petitioner's subsequent application under Order IX, rule 9, CPC, seeking restoration of the said execution application, was also dismissed as far back as

16.05.2006. The instant Petition, whereby the said orders have been assailed, has been filed after a lapse of more than two decades from the order dated 16.11.2000 and over fifteen years from the order dated 16.05.2006. No plausible, much less sufficient, explanation has been furnished by the Petitioner to account for such inordinate and unexplained delay in approaching this Court. It is well-settled that the exercise of constitutional jurisdiction is discretionary in nature and is not ordinarily available to a litigant guilty of gross laches; vigilance, rather than indolence, is a prerequisite for invoking such extraordinary jurisdiction. The plea that the court file was subsequently found missing does not, by itself, explain or condone the Petitioner's prolonged silence and inaction for over two decades following the order dated 16.11.2000, particularly when the remedy of restoration had already been availed of and declined in 2006, and no further legal remedy, including an appeal or revision against the order dated 16.05.2006, was pursued thereafter for more than a decade.

7. Furthermore, the order dated 16.05.2006 whereby the application under Order IX, rule 9, CPC was dismissed, has attained finality, as the Petitioner never assailed the same through any appropriate remedy of appeal/revision available under the law at the relevant time. The Petitioner cannot, at this belated stage, be permitted to reopen or reagitate a controversy that has long since attained finality by invoking the constitutional jurisdiction of this Court as a substitute for the remedies that she failed to pursue within the prescribed or reasonable time.

8. As regards the missing court file, mere non-traceability of the record, howsoever regrettable, does not, without more, constitute a legally sustainable ground for setting aside orders that have already attained finality, nor can the subsequent non-availability of the record revive a right or remedy that stood exhausted by reason of the Petitioner's own prolonged inaction.

9. For the foregoing reasons, we find no merit in the instant Petition, which is accordingly dismissed, along with the pending application(s), with costs of Rs.50,000/- (*Rupees fifty thousand only*) to be paid by the Petitioner.

10. The above are the reasons for our short order dated 20th January, 2025.

JUDGE

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