

IN THE HIGH COURT OF SINDH, KARACHI
C.P. No. D-1264 of 2022

Present:

Justice Zafar Ahmed Rajput

Justice Arshad Hussain Khan

Petitioner : Ishteaque Ahmed s/o Muhammad Israr, through his 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 : VIIth Additional District Judge, East Karachi (*Nemo*)

Respondent No.4 : 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 the following relief: -

- i. *After calling and perusing record and report of the Suit No.621 of 1997 (Ishteaque Ahmed Verses M/s. Khurshid Construction Company Private Limited) and Execution No.01 of 1999 from the Court of Vth Senior Civil Judge, District East, Karachi; declare the order dated 16.11.2000 of the trial court is liable to be set-aside having no legal effect and void ab initio.*
- ii. *Declare and hold that the Execution Application No. 01 of 1999 (Ishteaque Ahmed 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 Shop No. 8 in Khurshid fancy, Plot No.9, Block-3, Bihar Muslim Co-operative Housing Society, Sharafabad, Karachi in name of the Petitioner or his nominee.*
- iv. *Permanently and pending disposal of this petition, restrain the Respondent No.4, 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. 621 of 1997 against the Respondent No.4

seeking declaration, injunction, specific performance of contract and damages in respect of shop bearing No. 8, 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. 01 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; however, the said application was also dismissed vide order dated 13.11.2019, against which the Petitioner filed Civil Revision No. 40 of 2020, which was dismissed by the learned VIIth Additional District Judge, Karachi- East, vide order dated 08.02.2021; hence, the Petitioner has filed the instant Petition.

3. Notice of the instant Petition was issued to Respondents No. 1 to 4. On 03.06.2022, one Syed Khursheed Ahmed, claiming to be the Ex-Managing Director of Respondent No. 4, 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 the order dismissing the execution application, which had already been allowed by the executing Court itself, is patently illegal and amounts to an abuse of the process of law; that both the executing Court and the appellate Court failed to appreciate that Execution Application No. 01 of 1999 had already been allowed vide order dated 27.08.1999, whereby the respondent No. 4 was directed to execute the sale deed and, in the event of his failure to do so, Nazir of the Court was required to execute the same in accordance with law; that pursuant to the aforesaid order, the office of the executing Court was directed to issue a letter/notice to the judgment-debtor, and the requisite costs for issuance thereof had already been deposited with the office; however, owing to an inadvertent lapse on the part of the Court office, the said letter/notice was never issued to the judgment-debtor; that the omission was

wholly attributable to the Court office but the executing Court proceeded to dismiss the execution application for non-compliance; as such, the Petitioner was made to suffer for a default which was neither occasioned by him nor within his control, but was attributable to the office of the Court itself; that it is a settled principle of law that no litigant can be made to suffer on account of any act, omission, or default of the Court or its office; however, the Petitioner has been made to suffer precisely on account of the failure of the Court office to issue the requisite letter/notice to the judgment-debtor; that it is settled law that a decree passed by a competent Civil Court cannot be defeated or rendered nugatory merely by dismissal of 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, C.P.C., which relates exclusively to the determination of an attachment and has no application to the facts and circumstances of the present case; that it is settled law that once a decree-holder has invoked execution of a decree within the period prescribed by law, it becomes the duty and obligation of the executing Court to ensure its complete enforcement and satisfaction and in the event of the decree-holder's failure to appear before the executing Court, the appropriate course is to adjourn the execution proceedings sine die, rather than dismiss the execution application without ensuring complete satisfaction of the decree; that it is also a well-settled proposition of law that limitation does not operate so as to perpetuate or validate an illegal order; as such, sole reliance upon the orders dated 16.11.2000 and 16.05.2006 is misconceived and legally unsustainable, particularly where the petitioner seeks correction of an order alleged to have been passed without lawful authority and in circumstances attributable to the default of the Court office; that the petitioner has acquired a valuable and vested right in the suit property by virtue of the declaratory decree passed in his favour by the Trial Court, whereby he has already been declared the owner of the suit property; hence, in such circumstances, execution of the sale deed in his favour was merely a ministerial act to be performed in furtherance of the decree by the Nazir of the Court and could not lawfully be defeated on account of a default attributable to the Court office itself.

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

6. At the outset, it may be observed that the order dated 16.11.2000, whereby Execution Application No. 01 of 1999 was dismissed for default, was never been

independently challenged by the petitioner before any appellate or revisional forum at the relevant time. It was only the subsequent application seeking reopening of the execution proceedings that was dismissed vide order dated 13.11.2019. Aggrieved thereof, the Petitioner preferred Civil Revision No. 40 of 2020, which was dismissed by the VIIth Additional District Judge, Karachi- East, vide order dated 08.02.2021. The said order, having been passed by a competent revisional forum upon consideration of the very grounds now sought to be re-agitated, was never assailed further through any appropriate remedy available in law and has, therefore, attained finality.

7. It is settled law that the constitutional jurisdiction of this Court cannot be invoked as a substitute for, or as a further tier of, appellate or revisional jurisdiction against an order passed by a competent civil court, particularly where the Petitioner has already availed of and exhausted the remedy of revision on the self-same grounds. This Court, while exercising constitutional jurisdiction, does not sit as a further court of appeal over the orders or concurrent findings of the courts below. Interference would ordinarily be warranted only where there is a clear want or excess of jurisdiction, the proceedings are coram non judice, or a patent illegality or material irregularity is apparent on the face of the record. No such jurisdictional defect or patent illegality has been demonstrated in the instant case.

8. As regards the contention that limitation does not run against an illegal order, the proposition, even if accepted as a general principle, does not advance the Petitioner's case in the facts and circumstances of the present matter. The order dated 16.11.2000 was never challenged at the relevant time on the specific ground now urged, namely, that the default was attributable to the Court's office. Moreover, the matter was subsequently examined by the revisional Court, which found no illegality warranting interference. The plea of illegality, therefore, cannot be invoked as a means of reopening, after more than two decades, a controversy which has already been considered by a competent forum and has attained finality. Furthermore, the Petitioner has failed to point out any jurisdictional defect, mala fide, or other exceptional circumstance warranting exercise of the extraordinary constitutional jurisdiction of this Court to disturb the orders passed by the executing and revisional courts, both of which declined to reopen the execution proceedings.

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

JUDGE

Athar Zai