

J U D G M E N T

**IN THE PESHAWAR HIGH COURT
JUDICIAL DEPARTMENT.**

Writ Petition.....No.....67-P.....of.....2018

J U D G M E N T

Date of hearing: 24th April, 2018

Petitioner(s): (Dr. Shamim S. Majid) by Qazi Muhammad Anwar, Advocate.

Respondent(s): (Military Estate Officer etc. / respondents No.1, 4 & 5) by Mr. Javed Yousafzai, Assistant Attorney General;

(Executive Officer, Peshawar Cantt: etc. / respondents No.3 & 4) by Mr. Ihsan Ullah, Advocate &

(Mrs. Shumaila Baqar / respondent No.6) by Mr. Imtiaz Ali, Advocate.

ROOH-UL-AMIN KHAN, J.- Dr. Shamim S. Majid,

the petitioner, through the instant petition, filed under Article 187(2) of the Constitution of the Islamic Republic of Pakistan, 1973, has asked for the enforcement and giving full effect to the judgment / order dated 28.03.2016 of the Hon'ble Supreme Court of Pakistan, through a judicial officer, passed in Civil Appeal No.236-P of 2014, titled Mrs. Shumaila Baqir vs. Dr. Shamim S. Majid & others.

2. In, essence, the controversy between the private parties viz. Dr. Shamim S. Majid, the petitioner, and Mrs. Shumaila Baqar, respondent No.6, was on the driveway, as

both of them claimed it to be part and parcel and inseparable limb of their properties, for which, the petitioner, way back in the year, 2004, filed a suit against the respondents, seeking decree for mandatory and permanent injunction against the respondents to demarcate the boundaries between Bungalows No.1-A & No.1-B, Tariq Lane, Peshawar, in accordance with the site plan, annexed with the registered sale deeds dated 29.06.1988 and 28.03.1987 and also to amend the G.L.R and registered lease deeds dated 24.05.2000, 24.02.1998 and 01.02.1995 and other record, where necessary, as per letter No.74 / 131 / Lands./ ML&C / 87, dated 23.07.1995 of the Military of Defence, Rawalpindi and, in light thereof, to remove the encroachment upon an area, in the bungalow of the petitioner, by respondent No.6, fully described in the heading of the plaint, and restrain the aforesaid respondent from interference of her easement rights, privacy and ownership / possessory rights. The respondents put their appearance before the learned Trial Court and contested the suit by filing written statement and, after framing of issues and recording pro and contra evidence, the suit was dismissed vide judgment and decree dated 17.03.2010. Feeling aggrieved, the petitioner filed appeal before the learned Additional District Judge-IX, Peshawar, which was partially allowed to the extent of mandatory injunction to compel the official respondents to act upon the aforesaid letter dated 23.07.1995, vide judgment and

decree dated 08.02.2012. Not contented therewith, respondent No.6 filed civil revision before this Court, which was dismissed vide judgment dated 11.03.2013. Being dissatisfied, respondent No.6, approached the Hon'ble Supreme Court of Pakistan by filing Civil Petition No.267-P of 2013, where leave to appeal was granted, vide order dated 23.10.2014 and consequently, her Civil Appeal No.236-P of 2014 was decided by the apex Court, vide order dated 28.03.2016 in the following manner:-

A look at the site plan prepared at the time of sub-division of the plots shows that a path from the beginning to the end was 20 feet. Its sub-division, in no case, would be in the interest of any party. However, it is quite amazing to note as to how the wall intervening plots A and B was demolished which has nothing to do with the approach road. In this view of the matter, we hold that let the path remain as it is i.e. 20 feet from the beginning to the end. As far as the wall intervening plots A and B is concerned, that has to be restored together with the area found encroached on demarcation.

The appeal is disposed of in the terms mentioned above.

The foresaid order of the apex Court, somehow, was not implemented in letter and spirit, and, in the meanwhile, respondent No.6 filed suit for perpetual / permanent injunction

against the petitioner and the official respondents restraining them from acting contrary to the aforesaid decision of the apex Court, which was contested by the present petitioner by way of filing an application under Order VII Rule 11, CPC for the rejection of the plaint on the ground of res-judicata as the suit on the same subject matter between the same parties was finally decided by the apex Court, mentioned above. The said application was resisted by respondent No.6 by filing written reply and, after hearing both the parties, the aforesaid application of the petitioner was accepted and accordingly, the plaint / suit of respondent No.6 was rejected by the learned Trial Court vide order dated 27.03.2017, and appeal there-against of respondent No.6 also met with the same fate, vide judgment dated 08.12.2017. Despite decision of the apex Court, referred to above, and dismissal of appeal against the order rejecting the plaint / suit of respondent No.6, the directions of the apex Court have not allegedly been honoured / complied with in letter and spirit, compelling the petitioner to approach this Court through the instant petition.

3. The gist of the arguments of the learned counsel for the petitioner is that since the apex Court has modified the judgments and decrees of the learned lower fora vide order dated 28.03.2016, therefore, this Court, under Article 187(2)

of the Constitution of the Islamic Republic of Pakistan, 1973, has the power to implement / execute the same.

4. The main thrust of the arguments of the learned counsel for respondent No.6 is that the petitioner by filing this petition has misconceived the situation as Article 187(2) of the Constitution of the Islamic Republic of Pakistan, 1973 is the supplement of Article 184 thereof and the order dated 28.03.2016 has not been passed by the apex Court in exercise of its original jurisdiction, as envisaged under Article 184 rather has been passed while exercising the jurisdiction under Article 185(3), therefore, this Court has no power either to implement or execute such very order and, for that purpose, the Court which seized of the suit of the petitioner, is competent to do so, as such, this petition is liable to be dismissed on this score alone. Placed reliance on the judgment of **Dossani Travels Pvt. Ltd & others vs. Messrs Travels Shop (Pvt) Ltd & others (PLD 2014 SC 01)**.

5. We have gone through the available record carefully and considered the submissions made by the learned counsel for the parties.

6. The moot question before us is as to whether this Court has the power to implement / execute the judgment / order dated 28.03.2016 of the apex Court or the learned Court,

which seized of the main suit is competent to do so. In the case in hand, as per available record, the suit of the petitioner by travelling through entire judicial hierarchy, was, ultimately, decided by the apex Court while exercising its jurisdiction under Article 185(3) of the Constitution of the Islamic Republic of Pakistan, 1973 as appeal against the judgment and decree, passed in revision petition against the judgment and decree, rendered in appeal, against the judgment and decree, recorded in the suit, was preferred before it. For execution of the decree, a proper mechanism has been provided in Order XXI Rule 11(2) of the CPC while under Section 37 of the Code *ibid*, provides definition of the expression “Court which passed a decree” and, by virtue thereof, the proper Court to execute the appellate decree, would only be the learned Trial Court as, in view of Clause (a) of Section 37, *ibid*, the Court of first instance has been included, where the decree has been passed in exercise of appellate jurisdiction. There is no cavil to the proposition that the decree of the Court of first instance merged into the appellate decree, which also includes a decree, passed in revision, is capable of execution by Court of first instance. The merger takes place regardless of whether the decree of the first court is affirmed, reversed or modified by the appellate, revisional or Hon’ble Supreme Court of Pakistan. We are firm in our view that for execution of the decree varied or modified

by the apex Court, the learned Trial Court has the jurisdiction to do so on original side being competent for the purpose. Article 187(2) of the Constitution of the Islamic Republic of Pakistan, 1973 cannot be read in isolation rather it has to be seen in juxtaposition with Article 184 thereof. Had the apex Court assumed / exercised its jurisdiction under Article 184 or 187(1) of the Constitution of the Islamic Republic of Pakistan, 1973, then, definitely, judgment / order, passed there-under, could be executed under Article 187(2) thereof. In this view of the matter, the petitioner by filing the instant writ petition has misconceived the situation, rather he will have the remedy under the Civil Procedure Code to approach the Court of competent jurisdiction in the prescribed mode and manner.

7. In view of the above, this petition is dismissed being not maintainable. However, the petitioner would be at liberty to approach the Court of competent jurisdiction, as hinted to above, for the redressal of her grievance, if so advised.

Announced.
24. 04. 2018

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