

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

Review-Petition No.03-M/2023 in C.R No.594-M/2011

Sher Shah and others Vs. Bahadur Sher and others

Present: Mr. Aurangzeb, Advocate for Petitioners.
M/S. Shah Salam Khan for the legal heirs of Mahi Talat.
Mr. Faial Khan, Advocate for respondent No.1
Mr., Majid Khan, Advocate for Respondent No.3.

Date of hearing: 15.05.2023.

JUDGMENT

MUHAMMAD NAEEM ANWAR, J. Through instant review petition filed u/s 114 read with Order XLVII Rule 1 of the Code of Civil Procedure, 1908 (C.P.C), the petitioners are seeking review/reversal of judgment dated 11.04.2022 rendered by this Court in C.R No.594-M/2011, on the ground that during pending adjudication of the civil revision after its institution, a compromise was affected between the petitioners (applicants) of C.R No. 594-M/2011 except Bahadur Sher (the than petitioner No.1) and the respondents, on 09.04.2013 & 02.12.2014, which were given effect on 09.04.2013 vide Ex.PA (settlement made by the then petitioners with respondents No.1/1 to 1/9) and on 02.12.2014 vide PHC-1, on acceptance whereof, C.R No.594-M/2011 was dismissed as withdrawn to the extent of all the petitioners except petitioner No.1 Bahadur Sher (the present respondent No.1), as such, after dismissal of their petition in terms of compromise deeds Ex.PA and PHC-1, C.R No.594-M/2011 remained pending adjudication before this Court

only to the extent of the then petitioner No.1 Bahadur Sher, (the present respondent No.1), but at the time of arguments neither the Court was apprised by respondent No.1 Bahadur Sher (petitioner No.1 of C.R) nor by the respondents as the factum of compromise is not reflecting in the judgment of this Court dated 11.04.2022, so, the error in the judgment of this Court is floating on surface of the record, which resulted into dismissal of the C.R No.594-M/201, in toto, by upholding the findings of both the learned Courts below instead of settlement made through the afore-mentioned two compromise deeds (Ex.PA and PHC-1) amongst the parties already accepted by this Court during pending adjudication of the matter and being based upon the settlement, C.R No.594-M/2011 was withdrawn by the applicants (the petitioners of C.R except petitioner No.1).

2. Arguments heard and record perused.

3. At the very outset, Mr. Faisal Khan, Advocate representing respondent No.1 and Mr. Majid Khan, Advocate representing respondent No.3 raised a preliminary objection that the instant review petition is barred by time in terms of Article 162 of the Limitation Act, 1908, which provides the limitation of 20 days from the date of order/ judgment while the petition in hand has been filed by the applicants on 12.01.2023, which requires summarily dismissal. Since, the contention of applicants was that they have got the knowledge of the decision of this Court in C.R No.594-M/2011 when served with a notice by the learned executing Court, in the executing petition filed

by the legal heirs of Mst. Mahe Talat (respondents No.1/1 to 1/9), then they applied for obtaining attested copies of the judgment of this Court dated 11.04.2022 and thereafter filed the instant review petition, thus, for deciding the question of limitation, it was relevant to go through from the order sheets of the execution petition pending before the learned executing Court, as such, the applicants and respondents No. 6 to 13 were directed to place on file the attested copies of the order sheets of the execution petition or to come up alongwith the relevant record for proper determination regarding the preliminary objection of learned counsel for respondents No.1 & 3 (petitioner No.1 and respondent No.2 of C.R No.594-M/2011).

4. In pursuance of the directions of this Court, the applicants through C.M No. 849-M/2023 submitted the documents i.e., the attested copies of the order sheets of the learned executing Court w.e.f. 23.05.2022 to 06.05.2023 alongwith copy of power of attorney. During the course of arguments, learned counsel for respondents No.6 to 13 and respondent No.3 also produced attested copies of the order sheets of the execution petition alongwith execution petition and unattested copies of the judgment of the learned lower Court. Since, the documents so produced by the three sets of parties, i.e., respondent No.1, respondents No.3 and respondents No.6 to 13, are necessary for just decision of the instant review petition, therefore, the application (C.M No.489-M/2023) is allowed and the documents so produced by the respondents are placed on record for proper

determination of the question of limitation qua filing of the instant review petition.

5. In addition to the above, record of C.R No.594-M/2011 titled "Bahadur Sher and others Vs. Mst. Gul Talat (late) through legal heirs and others" decided by this Court 11.04.2022 on was also requisitioned and is available before the Court. As respondent No.1 (Bahadur Sher) and respondent No.3 (Mst. Khurshid Begum) represented through her attorney resisted the instant review petition on the ground of limitation, therefore, they were asked about the factum of compromise affected between the then petitioners except petitioner No.1 and respondents including respondents No.3 of the instant petition, reflection whereof has properly been made in the order sheets of C.R No.594-M/2011 on 09.04.2023, wherein Mr. Khair-ur-Rahman, the then attorney for petitioners alongwith Mr. Sardar Zulfiqar, Advocate appeared and Mr. Akhtar Munir Khan, Advocate alongwith Mr. Waqar Ahmad, attorney for respondents No.1/1 to 1/9 alongwith Mr. Nisar Ahmad, the respondent No.1/1 appeared before the Court and admitted the factum of compromise. They have acknowledged the rights of the applicants/petitioners over the disputed property and as such Ex.PA was accepted to the extent of respondents No.1/1 to 1/9. Similarly, on 02.12.2014, Mr. Majid Khan, the special for respondent No.3 of the instant petition alongwith Mr. Akhtar Munir Khan, Advocate appeared before this Court, compromise deed was placed on record as PHC-1, Mr. Majid Khan,

special attorney for the then respondent (the present respondent No.3) confirmed the factum of compromise between the parties except petitioner No.1 (present respondent No.1 Bahadur Sher). The compromise deed (PHC-1) was allowed being confirmed by all concerned and, on the basis, whereof, C.R No.594-M/2011 was dismissed as withdrawn to the extent of the then petitioners except petitioner No.1. Both the learned counsel for respondent No.1 Bahadur Sher (petitioner of C.R No.594-M/2011) and respondent No.3 could not deny from the settlement so arrived between the parties, as they were. The objection of Mr. Majid Khan, Advocate representing respondent No.3 was to the effect that since the law has provided the limitation of 20 days from date of order/ judgment, therefore, the instant review petition being filed after expiry of the requisite time could not be considered for revival of C.R No.594-M/2011 decided by this Court on 11.04.2022. Likewise, Mr. Faisal Khan, Advocate representing the respondent No.1 namely Bahadur Sher also admitted the factum of compromise but submitted at the bar that from the judgment rendered in the Civil Revision, certain valuable rights have been accrued in favour of respondent No.1 and respondent No.3 of the instant petition, thus, C.R No.594-M/2011 cannot be revived/ restored.

6. It is pertinent to mention that the instant review petition was filed alongwith C.M No.107-M/2023 u/s 5 of the Limitation Act, 1908 seeking condonation of the delay and both the contesting respondents

in support of their submissions referred to Para No.3 of the application and submitted that the review petition is time barred. Admittedly, on 11.04.2022 except respondent No.1 Bahadur Sher, none from the then petitioners was before the Court and it was obvious that the respondents have entered into a compromise with them and the rights of the then petitioners except petitioner No.1 were admitted by the respondents, therefore, the questions that wherefrom the limitation would run against the applicants for restoration of the C.R No.594-M/2011 and review of the judgment and whether the application u/s 5 of the Limitation Act could justify the condonation of delay in filing of the review petition? require resolution. Article 162 provides 20 days limitation for filing of review of the judgment of this Court from the date of the order. Since, the applicants were not before the Court at the time of hearing of C.R No.594-M/2011 and it was averred by them in their application u/s 5 of the Limitation Act, 1908 that being served with notice issued from the executing Court, they have got the knowledge of an order in C.R No.594-M/2011, for obtaining attested copies whereof they applied and after its delivery, this review petition was filed by them. It is indisputable that C.R No.594-M/2011 was requiring its disposal only to the extent of the contesting petitioner namely Bahadur Sher (respondent No.1). It is also not disputed that through order under review, the settled rights of the applicants were once again analyzed by this Court on the basis of the evidence on the record. Thus, the

inconsistency and error are floating on the surface of the record that earlier the applicants/petitioners were allowed to leave the Court with their rights admitted by the respondents through compromise. whereas, through the judgment under review the impugned orders of C.R No.594-M/2011 were upheld, consequent to its dismissal.

7. Adverting to the contention of the applicants that they were served with a notice issued by the Executing Court and appeared therein. Respondent No.3 strenuously opposed the instant review application on the ground that when they appeared before the executing Court, they have got knowledge of the judgment under review. This contention of learned counsel for respondent No.3 and of respondent No.1 (Bahadur Sher) is misconceived. I am of the considered view that for getting the proper knowledge of the judgment under review, the petitioners have applied for its attested copies when same were handed over to them, they preferred the instant review application within the period of 20 days. Even otherwise, the law requires that matters must be decided on merits rather than on technicalities.

8. No doubt, the jurisdiction of this Court u/s 114 read with order XLVII C.P.C is limited and this Court cannot sit as a Court of appeal against its own judgment, however, when the judgment itself appears to be suffering from inherent defect, which in the instant matter is floating on the surface of the record, inconsistent and self-repelling from earlier orders where a compromise was affected with the then

petitioners (except respondent No.1) and the respondents. During the course of arguments, learned counsel for the legal heirs of Mst. Mahi Talat, who have filed the execution petition before the executing Court, admitted it at the bar that at the time of hearing of C.R No.594-M/2011, this Court was not apprised regarding the earlier settlement arrived at between the parties. Mr. Majid Khan, special attorney for respondent No.3 contended that he had brought all the facts into the notice of the Court regarding the earlier compromise affected between the petitioners/applicants and respondents, however, there is no such reference of the settlement made between the parties in the earlier round of litigation before this Court.

9. Turning to the merits of the instant review application. The then petitioners (now applicants) were bestowed with certain rights when their stance was admitted by respondent No.3 and similarly through compromise with rest of the respondents, thus, C.R No.594-M/2011 was dismissed as withdrawn to the extent of all petitioners except petitioner namely Sher Bahadur. The dismissal order was conditioned with the settlement incorporated in PHC-1 and Ex.PA, thus, their absence was justified from the Court on the date when the C.R No.594-M/2011 was heard and dismissed. C.R No.594-M/2011 was requiring disposal to the extent of rights of the then petitioner No.1 (now respondent No.1) because amongst rest of the then petitioners and respondents the adjustment of the properties had already been taken place and for decision of C.R No.594-M/2011 in contravention

of the earlier orders sheets, the applicants/ petitioners were required to be served with a notice. This is the accidental slip/ clerical error, from which, the judgment under review is suffering and this Court has got powers to review its judgment/ order as manifest on the record that the referred to above aspect of dismissal of C.R on the basis of compromise was overlooked in the judgment, which has caused serious prejudice to the case of applicants on merits. Reliance is placed on the case of "Commissioner of Income Tax, Peshawar vs. Messrs. Gul Cooking Oil and Vegetable Ghee (PVT) Limited and others" (2008 PTD 169).

10. Therefore, for the reasons discussed above, the instant review petition is allowed, judgment and decree of this Court dated 11.04.2022 in C.R No.594-M/2011 is set aside. Consequently, C.R No.594-M/2011 is hereby restored/revived under its old number. Office is directed to fix the C.R within a month, after proper service of all the concerned.

Date of Announcement
15.05.2023

Date of Announcement
19.05.2023



JUDGE

office
20/5/2023
WK