

Judgment Sheet
PESHAWAR HIGH COURT, PESHAWAR
(Judicial Department)

Writ Petition No.3191-P/2021.

"Malik Muhammad Zahid versus Fida Muhammad and 3 others"

J U D G M E N T

For Petitioner: **Mr. Arshad Jamal Qureshi, Advocate.**

For Respondents: **Nemo.**

Date of hearing: **03.08.2021.**

MUHAMMAD NAEEM ANWAR, I.- Fida Muhammad, respondent No. 1 filed an application bearing No.13/RC, on 16.03.2013 for ejectment, against Haji Tariq Mehmood, respondent No.2, of the plot/*Karkhana Tuff Tiles*, situated at Ring Road near Pishtakhara Chowk, Peshawar, for default in payment of monthly rent & for recovery of Rs. 49,995 as outstanding rent alongwith monthly rent @ Rs. 3333/- per month, before Rent Controller, Peshawar. Respondent No.2 did not appear, being properly served, was proceeded ex-parte, and after recoding of ex-parte evidence, the application was allowed on 15.01.2013. Decree holder filed an application for execution against judgment debtor however, one Muhammad Ayaz son of Amanullah has filed an objection petition under order XXI rules 100, 101 & 103 read with section 47 CPC with the contention that respondent No. 1/decree holder is the owner of 18 Marla whereas Malik Zahid Hussain (petitioner of the instant petition) is the owner of 50 Marla. That the possession of the decreed property was handed over to Nawaz Khan by the father of decree holder on rent with further permission to lease it out to anyone on rent, who had

transferred his leasehold rights to Haji Tariq Mehmood (judgment debtor)/respondent No.2 for the period of 5 years however, during the tenancy period the possession of decreed property was handed over to respondent No.1 thereafter, all the joint owners rented out the decreed property alongwith remaining shares to him for a period of 10 years through rent deed dated 24.10.2012 and he is running his business with the name of "*Karsaaz Tuff Pure Center*" thus, he is in lawful possession of the decreed property but was not impleaded in the ejectment application, and that the decree is the result of connivance of respondents therefore, execution petition entitles dismissal. Objection petition was contested by decree holder whereas rest of the parties of objection petition have submitted their cognovit, nonetheless, the objection petition was dismissed on 14.12.2013 by the executing Court. Muhammad Ayaz/objector filed an appeal against the order of dismissal of his objection petition but the same too was dismissed by the learned Additional District Judge-XII, Peshawar of 10.12.2016.

02. After dismissal of objection petition of Muhammad Ayaz wherein the petitioner was a party, who has submitted his cognovit, the petitioner alongwith his father filed objection petition by challenging the decree in rent petition No. 23/RC dated 15/01/2013. In his application they have taken almost the same pleas which were the contents of objection petition of Muhammad Ayaz. It was contested by decree holder and on 06.02.2018, their objection petition was dismissed by the

learned Rent Controller. They have assailed the order before appellate court, however, their appeal was dismissed by the learned Additional District Judge-XI on 23.05.2019. They approached this Court through their Writ Petition No. 3532-P of 2019, which was dismissed by this Court on 02.10.2020, against which CPLA is pending adjudication before Hon'ble Supreme Court. After dismissal of objection petition filed by petitioner and his father not only by the learned Rent Controller, Appellate Court and by this Court, firstly, they have assailed the dismissal of their objection before Supreme Court and secondly, the petitioner has filed an application under section 12(2) C.P.C by challenging the decree in rent case No. 13/RC dated 15.01.2013, on the ground of fraud and misrepresentation of facts. The petitioner's application was dismissed by the learned Rent Controller on 12.03.2021 with the cost of Rs. 10,000/- against which his civil revision (CR) No. 38/CR was dismissed by the learned Additional District Judge-V, Peshawar on 09.07.2021, hence this petition.

03. Learned counsel for petitioner contended that when the petitioner is the joint owner of decreed property and he has raised serious questions of misrepresentation of facts and fraud then in such an eventuality, the *lis* could only be decided after recording of pro & contra evidence. He while referring Para No.8 of the judgment of this Court rendered in Writ Petition No. 3532-P dated 02.10.2020 agued that their objection petition was dismissed on the sole ground that order dated 15.01.2013 has

not been assailed therefore, in order to meet the legal requirement, the petitioner has rightly filed the application under section 12(2) C.P.C, and as per law, the petitioner should have been afforded an opportunity to prove his contentions. Lastly, he added that dismissal of objection petition of petitioner and his father and that of Muhammad Ayaz is not a hurdle for petitioner for filing of application under section 12(2) C.P.C as in the former, he assailed the execution petition while by latter he has impugned the basic decree in rent case No. 13/RC of 15.01.2013. In support of his submissions, he referred 2007 SCMR 818, 2011 CLC 452, PLD 1985 SC 191, PLD 1975 SC 331, 2014 SCMR 1694, 2019NCLC 2016, 2019 CLC 847, 2019 CLC 1841, 2015 CLC 931.

04. Arguments heard and record perused.

05. No doubt, the law has provided a remedy for an aggrieved person to challenge the order, judgment and decree of the Court which is the result of fraud and misrepresentation of facts by filing an application under section 12 (2) C.P.C before the Court, which passed the final order, judgment or decree, when fresh suit is barred with an object to prevent delay being caused in expeditious disposal of execution petition by making frivolous and *malafide* objections thereto. In the application under section 12(2) C.P.C, the petitioner contends that he is the joint owner of the decreed property, this was the plea of Muhammad Ayaz (*objector, whose objection petition has already been dismissed*) and the present petitioner being party in the

array of respondents, has submitted his cognovit but objection petition and appeal thereagainst has been failed. Again, this was the plea of petitioner in his earlier objection petition, which has been dismissed by the Rent Controller, appellate Court and even by this Court, now CPLA is pending before Hon'ble Supreme Court. Secondly, perusal of record reveals that execution petition was filed and consigned to record room after its proper satisfaction therefore, the factum of joint possession of execution of decree in rent case has come to an end and in such circumstances Rent Controller could do nothing with the plea of an alleged joint owner. The claim of the petitioner of being the owner of 50 Marla in the property measuring 68 Marla would not be decided by the Rent Controller rather, the Rent Controller cannot enter into the sphere of title. The simple matter, before the Rent Controller, was that the tenant has defaulted in payment of rent, against whom, a decree for ejectment was passed and executed.

06. Moreover, record suggests that the objection petition of present petitioner was not dismissed on the technical grounds rather after discussing its maintainability, learned appellate Court has rendered the findings that when the objection of Muhammad Ayaz with the similar plea has been dismissed and the same was not challenged either by Muhammad Ayaz or by the petitioner despite the fact that he was party to the objection petition, the findings recorded in that petition has attained finality. When the petitioner has challenged the order of

dismissal of his objection petition before this Court, the writ petition was dismissed with the following observations: -

“Even otherwise, it tis the claim of present petitioner that one Muhammad Ayaz is a tenant under them in the said property; however, similar objection petition of said Muhammad Ayaz has already been dismissed by the executing court. Thus, re-agitating the same matter in the same manner is not legally correct”.

07. The judgment of this Court has been assailed by the petitioner before the apex Court which is still pending adjudication. Now, this is the third time when the same plea was repeated firstly, by Muhammad Ayaz, secondly, by the petitioner in his objection petition and thirdly, through his application under section 12(2). In the objection petition of Muhammad Ayaz, though the petitioner was arrayed as respondent, however, he has not only accepted the claim of Muhammad Ayaz but also alleged to be the owner of 50 Marla of the property. After dismissal of objection petition of Muhammad Ayaz, petitioner himself filed an objection petition, which is pending before the apex Court. The central point of all the petitions was one and the same that the decree of rent petition dated 15.01.2013 is the result of fraud and collusion, except the modus operandi, as earlier there were objection petitions and now application under section 12(2) C.P.C. It is an established principle of law that what cannot be done directly cannot be done indirectly. Reference can be made to the case of **“Muhammad Hanif Abbasi versus Imran Khan Niazi and others”** (PLD 2018 SC 189). Reliance can also be placed on the

case law reported as (2020 SCMR 2129). In the case of “Muhammad Saleem Ullah Khan and others vs. Additional District Judge, Gujranwala and others” (PLD 2005 SC 511) it was held that “There can be no cavil to the legal position that the judgments of the superior Courts in Constitutional jurisdiction on the questions of law or facts have binding force and the parties are not allowed to reopen the settled issues, directly or indirectly”. Underline for emphasis.

08. Turning to the next contention that the application was dismissed summarily, without recording of evidence, suffice it to say that there is no cavil with the proposition that framing of issue and recording of evidence in every application under section 12(2) C.P.C is neither the legal requirement nor sine qua non for the Court. It depends upon the circumstances of the case, in which the application under section 12(2) is filed, as to whether the application can or cannot be decided without recording of evidence and framing of issues or to fix it for pro and contra evidence. Wisdom is drawn from the case titled “Mst. Amina Bibi through General Attorney vs. Nasrullah & others” reported in (2000 SCMR 296) wherein it was held: -

“8. Be that as it may, while dealing with the allegations under section 12(2), C.P.C., it is not incumbent upon the Court that it must, in all circumstances, frame issues, record evidence and follow the procedure prescribed for decision of the suit as held in Amiran Bibi v. Muhammad Ramzan (1999 SCMR 1334). In the instant case, we have gone through the application under section 12(2), C.P.C., moved by the petitioner and the material available on record. In view of the facts and circumstances of the case and the judicial orders passed up to this Court during the protracted litigation, the application filed by the petitioner under section

12(2), C.P.C., was liable to be dismissed without formulating issues and recording evidence of the parties”.

09. No doubt, the application under section 12(2) C.P.C. is required to be treated like that of a suit, issues to be framed and evidence to be recorded but in cases wherein, from the very outset, it is established that the application filed under Section 12(2), C.P.C. is legally not maintainable, the same can be dismissed in a summary manner without framing of issues and recording of evidence. Recently, the Supreme Court in the case of **“Farman Ullah vs. Latif-Ur-Rehman” (2015 SCMR 1708)** has observed that it depends upon the nature of controversy between the parties and the pleadings, however, the Court can decide the application without framing of issues and recording of evidence. Earlier, in the case of **“Nazir Ahmad vs. Muhammad Sharif and others” (2001 SCMR 46)**, while considering the cases of “Ghulam Muhammad v. M. Ahmad Khan and others” (1993 SCMR 662) “Amiran Bibi and others v. Muhammad Ramzan and others” (1999 SCMR 1334) and “Mrs. Amina Bibi through General Attorney v. Nasrullah and others” (2000 SCMR 296) it was held that non-framing of issues and non-recording of evidence for the decision on the application under S.12(2), C.P.C. was not a condition precedent in the matter.

10. Yet, another legal aspect of the matter is the limitation in filing of application under section 12(2) C.P.C; though, there is no specific Article for filing of an application under the provision

of section 12(2) C.P.C, therefore, any application filed on the ground of misrepresentation of fact, fraud and want of jurisdiction shall be treated under Article 181 of the Limitation Act, 1908, which reads as:

181. Applications for which no period of limitation is provided elsewhere in this schedule or by section 48 of the Code of Civil Procedure, 1908.	Three years	When the right to apply accrues.
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11. A look at above reproduced Article manifests that the period of limitation shall reckon from the date of knowledge, for which, the petitioner has got the knowledge of decree when Muhammad Ayaz has filed as objection petition by impleading the petitioner as a party in the array of respondents and the petitioner has filed the cognovit to the objection of Muhammad Ayaz but has not challenged the decree dated 15.01.2013. it appears from record that Muhammad Ayaz filed his objection on 30.09.2013, whereas the application under section 12(2) C.P.C has been filed by the petitioner on 13.03.2021, after more than 8 years from the date of decree and after more than 7 years from the date of knowledge therefore, the same was hopelessly time barred. It is pertinent to mention that petitioner has submitted an application under section 5 of limitation Act, 1908 for condonation of delay but the grounds taken therein are that the order passed in rent application in nullity in the eye of law therefore, no limitation runs for filing of application under section 12(2) C.P.C. Whereas in any such application one who seeks condonation is required to explain the delay of each and

every day but no such exercise was done by the petitioner. It is well settled principle of law that limitation runs even against void order. The Hon'ble Supreme Court in the case of **"Muhammad Sharif and others vs. MCB Bank Limited and others"** (2021 SCMR 1158) has held that:

"The law is by now settled that limitation against a void order would run from the date of knowledge which has to be explicitly pleaded.¹ In the instant case, in all the objection petitions that were filed, the petitioners did not state the date when they obtained knowledge of the alleged void order. In these circumstances, the petitioners cannot legally take this stance and that too at this belated stage".

Reference can also be made to the case law reported as **"Haji Wajdad vs. Provincial Government through secretary Board of Revenue Government of Baluchistan and others"** (2020 SCMR 2046).

12. Insofar as the case law of case titled **"Muhammad Tariq Khan vs. Khawaja Muhammad Asami and others"** (2007 SCMR 818) & **"Mirza Allah Rakha vs Faheem-ud-Din Aziz and 10 others"** (2011 CLC 452) could only be relevant when the applicant of Order XXI Rule 99 C.P.C could have proven his possession justifiably, similarly, the applicant of Rule 100 & 101 could have proved that they were dispossessed illegally and without any justification from the property, his possession could be restored. Muhammad Ayaz was the applicant of Rule 100 & 101 C.P.C but for the reason best known to him he has not challenged the order of dismissal of his objection and that of appeal. For convenience Rule 99 of Order XXI is reproduced as under:

“99. Resistance or obstruction by bona fide claimant. Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment debtor, the Court shall make an order dismissing the application”.

13. Remedy for restoration of possession for a person who was illegally dispossessed from the decreed property has been provided under Rule 100 & 101, which are reproduced as under:

“100. Dispossession by decree holder or purchaser. (1) Where any person other than the judgment debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

101. Bona fide claimant to be restored to possession. Where the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgement debtor, it shall direct that the applicant be put into possession of the property.”

14. Though, Muhammad Ayaz has alleged to be in possession of decreed property and the petitioner has admitted the contents of objection petition but not only his petition but appeal thereagainst has also been dismissed and being not challenged, that order has attained finality. It is now well settled that an issue decided against a party, if not challenged, shall attained the finality. Reliance in this regard is placed on the cases reported as **“Muhammad Aslam and 2 others v. Syed**

Muhammad Azeem Shah (1996 SCMR 1862) and **Kanwal Nain v. Fateh Khan** (PLD 1983 SC 53). Not only the objector i.e., Muhammad Ayaz but the petitioner could have challenged the order of dismissal of objection petition but none have assailed the same. Therefore, the case law relied upon by the petitioner is not applicable to the matter in hand.

15. Learned counsel for petitioner has not been able to point out any illegality or jurisdictional defect in the orders impugned therefore, for the reasons discussed above, instant petition being without substance is hereby dismissed however with no order as to cost.

Announced.
03.08.2021.

J U D G E