

IN THE HIGH COURT OF SINDH AT KARACHI

HCA NO. 103 / 1988

Appellants: **Zaki Hassan and others through Mr. Salahuddin Ahmed along with Mr. Nadeem Ahmed Advocates.**

Respondents: **Mst. Hajra Bai Mohammad through L.Rs. through Mr. Asim Mansoor Khan along with Mr. Muhammad Maaz Saqib Advocates.**

- 1) *For hearing of CMA No. 1032/2019.*
- 2) *For hearing of Review Application No. 03/2019.*
- 3) *For hearing of CMA No. 1033/2019.*

Date of hearing: **30.09.2019**

Date of order: **30.09.2019**

O R D E R

Muhammad Junaid Ghaffar, J. The listed application(s) in this High Court Appeal have been placed before this single bench pursuant to Office Note dated 05.04.2019 and orders of the Hon'ble Chief Justice dated 11.04.2019, as one of the applications at Serial No.2 bearing CMA No.03/2019 is for review of Judgment dated 19.01.2016, whereas, the other learned Member of the bench is no more available as he has been elevated to the Hon'ble Supreme Court, and therefore, in terms of Order 47 Rule 5 CPC, it has to be decided by the available member of the said bench. Application at serial No.1 is for condonation of delay in filing of the Review Application, whereas, at serial No. 3 is an application for grant of stay.

2. Learned Counsel for the Appellants submits that the Appeal was dismissed on 19.01.2016, whereas, the order in question has attained finality and was not further impugned before the Hon'ble Supreme Court. However, when the Nazir's office was approached for return of the amount deposited by the Respondent, it transpired that the said amount was not properly invested and this has resulted in a

fresh cause for filing of the Review Application. He further submits that the Nazir's final report is dated 27.02.2019, whereas, the Review Application in question was filed on 20.03.2019 and therefore, it is within limitation and the delay, if any, must be condoned. According to him, vide order dated 11.01.1989 the amount deposited by the Respondent was supposed to be invested in Khas Deposit Certificates; however, the same was done much belatedly in the year 2015 and has thus, deprived the Appellant from the profits which could have been accrued and would have been an adequate compensation for the Appellant in view of the dismissal of the Appeal. He further submits that if this fact was known to the Court while passing the Judgment dated 19.01.2016, then the order would have been otherwise, and therefore, this entitles the Appellant to seek review in these terms so as to get full compensation and the profit on the invested amount. In support he has relied upon *Petrosin Corporation Pvt. Ltd. and another V. OGDC through Managing Director* (PLD 2011 SC 235), *Mst. Mehmooda begum V. Syed Hassan Sajjad and 2 others* (PLD 2010 SC 952), *Muhammad Hussain and others V. Dr. Zahoor Alam* (2010 SCMR 286), *Muhammad Iqbal V. Mehboob Alam* (2015 SCMR 21), *Messrs Pioneer housing Society Pvt. Limited V. Messrs Babar & Company and 2 others* (PLD 1999 Lahore 193), and *Muhammad Ashiq Khan V. Muhammad Sharif and others* (2016 SCMR 1248).

3. On the other hand, learned Counsel for the Respondent submits that firstly, the report of Nazir to the extent that the amount was not properly invested was very much before the Court when the judgment in review was passed, hence, it is not a fresh ground as contended. He further submits that in February 2017 one of the Appellants who is the legal heir of deceased filed an application under Section 12(2) CPC bearing CMA No.737/2017 and in supporting affidavit he has disclosed such fact that the amount has not been properly invested and thereafter, on 07.11.2017 the application was withdrawn and was accordingly dismissed as not pressed; hence, according to him, the Appellant(s) now cannot say that this new fact, on the basis of which the review is being justified, has only come in his knowledge after Nazir's report dated 27.02.2019. Therefore according to him, the review application is hopelessly time barred

and the delay cannot be condoned. He further contends that by filing a review, a party cannot seek reopening of the entire case, whereas, the Respondent cannot be penalized for any action on the part of the Court. He has further argued that all along the Appellant has enjoyed possession despite deposit of balance sale consideration and in fact the possession is still with the Appellant; therefore, no case for earning any profit, even otherwise is made out, whereas, the Respondent is contesting the grant of any profits to the Appellant in the execution proceedings. In support he has relied upon *Mrs. Shahida Nasreen V. Abdul Rahim Seth* (1987 CLC 1744), *Shaikh Muhammad Taqi V. Muhammad Anwar Khan Ghauri* (1983 CLC 1085), *Messrs Walia Steel Industries PLC V. Messrs SAGA Shipping and Trading Corporation Ltd. and others* (PLD 2019 Sindh 22), *Habib Bank Ltd. V. Bashir Ahmed and others* (2019 SCMR 362), *Haji Muhammad Zaman Khan V. Member, Board of Revenue Punjab and others* (2014 SCMR 164), *Government of Punjab and others V. Aamir Zahoor ul Haq and others* (PLD 2016 SC 421) and *Engineers Study Forum (Registered) and another V. Federation of Pakistan and others* (2016 SCMR 1961).

4. I have heard both the learned Counsel and perused the record. The Judgment in review dated 19.01.2016 was in respect of a Judgment and Decree dated 05.07.1988 passed by a learned Single Judge of this Court, whereby, the Suit filed by the Respondent for Specific Performance of the Agreement dated 31.10.1977 in respect of property in question was decreed. It appears that pursuant to order dated 11.01.1989 in this Appeal the sale consideration of Rs. 6,55,000/- was directed to be deposited by the Respondent in the execution proceedings initiated pursuant to the judgment and decree in appeal, with further directions for its investment in Khas Deposit Certificates for a period of six months and with a further observation that the party entitled to the amount will be entitled to the profit thereon. For the present purposes, the Appellant seeks review of the judgment dated 19.01.2016 on the ground that the amount which would ultimately be given to the Appellant would only be Rs. 7,81,000/- (Principal plus profit) as reported by the Nazir and such amount is not in consonance with the present value of the property, and therefore, if the said amount would have been in the knowledge

of the Appellate Court, then perhaps, such an order would not have been passed. It is further case of the Appellant that since this is a fresh cause, which was not available earlier, therefore, the review is maintainable. However, I am unable to agree with this contention of the Appellant's Counsel as on 03.12.2015 when the matter was fixed before the Court, Nazir's report dated 02.12.2015 was considered and the following order was passed:-

“Mr. Abid S. Zuberi has partly argued out the matter. For want of time to come up on 9th December, 2015.

Mr. Asim Mansoor Khan has invited our attention to the Nazir report dated 05.11.2015, we wonder as to how the litigants' money could either be held by the Accountant General or lapsed. Nazir to place on record the supporting documents of the investment so that further directions accordingly be issued.”

5. The Nazir report dated 02.12.2015 clearly reflects that an amount of Rs. 6,55,000/- was though deposited; but has lapsed to the Government account and thereafter, in 1997 some letter was issued to the Accountant General Sindh, Karachi. This clearly reflects that this aspect of the case was before the Court when this Appeal was finally decided on 16.01.2016 and the Court was not oblivious of such fact while passing the Judgment under review. Merely, for the fact that some lesser amount is now to be received by the Appellant, for the reason that it was not properly invested, would not, ipso facto, warrant any review of the order in question. For that in my humble view, the Appellant may have its independent remedy before the Court dealing with Nazir's report at the moment, or the Executing Court, but not by way of review as suggested.

6. It further appears that one of the Appellants namely Ali Hassan (one of the legal heirs) had filed CMA No.737/2017 under Section 12(2) CPC and in Para 21 of the affidavit of the said application it was stated that, “*upon inquiry the Counsel for the applicant was informed by the office of the learned Nazir that no profit etc had accrued upon the amount deposited by the respondents (belatedly during the course of the present appeal), and that the amount of Rs. 655,000/- remained as is till date*” and therefore, the attempt to seek review appears to be an afterthought, whereas, the ground that it only came in his knowledge after the Nazir's report dated

27.02.2019 to the effect that the amount was not properly invested is bereft of any merits and is also not supported by the record placed before the Court. In fact the application also appears to be hopelessly time barred without any justifiable cause and even does not warrant condonation of delay.

7. Notwithstanding this, it is also a matter of record that all along the Appellant has enjoyed the possession of the property despite the fact that the amount in question was deposited by the Respondent for the ultimate benefit of the Appellant, and at no point of time the Appellant was agreeable to hand over the possession, and therefore, it is in fact the Respondent who has been serially prejudiced with this long litigation and as of today still is out of possession. Moreover, it was never the Appellant who approached the Court regarding the investment of the amount or not, rather, it was the respondent who agitated this issue, as his money was with the Nazir, and was not properly invested as per orders of the Court. The argument of the learned Counsel for the Appellant that a fresh cause is now before the Court and so also reliance on precedents to this effect, may not be a matter of much debate, but at the same time, it has its dependence on the peculiar facts as well. Since, the fact that Nazir's report dated 2.12.2015 was already before the Court; the Counsel for the Appellant, as an alternative, ought to have argued this point of availability of a lesser amount as compared to the current market value and the non-investment by the Nazir's officer as against the orders of the Court. However, no such plea was ever raised on behalf of the Appellant, whereas, the Court has passed the judgment in question with knowledge of the facts before it, including the Nazir's report; hence, no fresh cause is even made out. In fact if the review is allowed as suggested, then it would ultimately require the respondent to pay further amount, which in the given facts does not merit any consideration.

8. In view of hereinabove facts and circumstances, the listed applications appear to be misconceived as no case for review is made out; hence, they are hereby dismissed.

J U D G E

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