

KHYBER PAKHTUNKHWA SERVICE TRIBUNAL, PESHAWAR

BEFORE: **KALIM ARSHAD KHAN ... CHAIRMAN**
SALAH-UD-DIN ... MEMBER (Judicial)

Application No.688/2023

In

Service Appeal No.983/2004

Date of presentation of Application.....26.09.2023

Date of Hearing.....08.12.2023

Date of Decision.....08.12.2023

1. **The Chief Minister**, Khyber Pakhtunkhwa, Peshawar.
2. **The Chief Secretary**, Government of Khyber Pakhtunkhwa, Peshawar.
3. **The Secretary** Industries, Commerce, Minerals Development, Labour and Technical Education Department, Khyber Pakhtunkhwa, Peshawar.
4. **The Director General**, Mines and Minerals, Khyber Pakhtunkhwa, Peshawar.(*Applicants*)

Versus

1. **Muhammad Akbar Khan**, Ex-Deputy Director, Mines and Minerals Department, Khyber Pakhtunkhwa, Peshawar through his legal heirs..
2. **Farzana Shah**, daughter
3. **Asad Akbar** (Son)
4. **Saad Akbar** (Son).(*Respondents*)

Present:

Asad Ali Khan, Assistant Advocate General.....For the Applicants

Syed Nauman Ali Bukhari, Advocate.....For the respondents

.....

APPLICATION UNDER SECTION 12(2) OF THE CODE OF THE CIVIL PROCEDURE, 1908 FOR SETTING ASIDE THE JUDGMENT/ORDER DATED 14.09.2021 OF THIS TRIBUNAL IN SERVICE APPEAL NO.983/2004 ON THE GROUND THAT SAME HAS BEEN OBTAINED THROUGH FRAUD AND MISREPRESENTATION OF FACTS AND ALSO ON THE PREMISE THAT THIS TRIBUNAL HAD NO JURISDICTION TO ENTERTAIN THE APPEAL



JUDGMENT

KALIM ARSHAD KHAN CHAIRMAN: This is an application moved under section 12(2) of the Code of Civil Procedure, 1908 against the judgment dated 14.09.2021 passed by this Tribunal.

2. The application is mainly on the grounds that the appellant (respondent herein) had died during the pendency of the appeal, therefore, the proceedings in the appeal had to abate; that Judgment was obtained through fraudulent means and misrepresentation; that Judgment dated 14.09.2021 was contrary to law and facts and same had been passed without taking into account the true facts of the case. It was also contended that the appellant had died during the pendency of appeal and as such his appeal had abated, whereafter, the Tribunal had no jurisdiction to further proceed with the matter.

3. We have heard the learned AAG for the applicants and learned counsel for the respondents.

4. It is at the very outset observed that the application is shown to have been signed by four persons, the name of none of the signatories is found under the signature and only the designations are mentioned. Signatures of the Applicants No.1, 2 & 3 are by the same person and it is not known as to who had signed on behalf of the three Applicants. The affidavit is signed by one Said Muhammad showing himself to be Superintendent (Litigation) BS-17 but with no authorization in his favour by any of the Applicants. True that the defect is curable at a later stage by filing proper authorization or putting signature and names of the persons/applicants signing the petition but the defect could not have been cured till writing of this judgment.



5. It is worth mentioning here that earlier an objection petition was filed in implementation application, by the applicants on the same grounds, which was considered by the Tribunal on 28.09.2023 and it was observed that the objection petition did not seem to hold ground. So that was disposed of that way.

6. We have been informed that the Applicants have also filed CPLA against the same judgment of the Tribunal, in the Supreme Court of Pakistan, which is stated to be still pending.

7. We may reproduce section 12(2) of the Code of Civil Procedure, 1908 as under:

*"12. Bar to further suit. (1).....
(2) Where a person challenges the validity of a judgment, decree or order on the plea of fraud, mis-representation or want of jurisdiction, he shall seek his remedy by making an application to the Court which passed the final judgment, decree or order and not by a separate suit."*

The provisions of the above subsection mandate that plea of fraud and misrepresentation are pre-conditions and have to be specifically described by the party, alleging these, in detail in the application under S. 12(2) CPC. But when we see the application that does not contain any element of fraud, misrepresentation or jurisdictional error.

8. As to the contention of the Applicants that the proceedings, in the main service appeal (983/2004), had abated on the death of the appellant, we may refer to the opinion No.25585/AG dated 02.06.2023, given by the learned Advocate General Khyber Pakhtunkhwa, wherein the learned Advocate General



had reproduced the extract from the judgment of Supreme Court reported as 2023 SCMR 46. The portion of the judgment is as under:

"The Service Tribunal after taking into consideration the facts and circumstances of each case separately and to alleviate the miseries of the bereaved family, may continue the pending appeal only to examine and decided whether any monetary relief such as lawful pending dues are payable or if any lawful claim lodged by the civil servant in his lifetime which is subject of the appeal in which cause of action survives despite his death including pensionary benefits, gratuity or provident fund etc if permissible and applicable under the law and rules to the deceased. However, the facts of the present case are quite distinguishable and the Tribunal could not entertain appeal which was originally filed widow herself after the death of civil servant and it was not a case of impleading the legal heirs in any pending appeal to ensure the payment of full and final settlement of dues."

9. The above judgment pertained to an appeal filed by the widow of a deceased civil servant after his death but in the instant matter the civil servant had himself filed appeal before the Tribunal in his lifetime. Admittedly the appellant of this matter had died during the pendency of appeal, whereafter, his legal heirs were arrayed as parties. According to Service Appeal No.983/2004, originally filed by the appellant, Muhammad Akbar Khan himself, during his lifetime, on his involvement and then conviction in a NAB case, he was awarded major penalty of dismissal from service. Vide the judgment of this

Tribunal dated 14.09.2021, in Service Appeal No.983/2004, his dismissal was set aside and because he had died by then, therefore, the Tribunal held that his posthumous reinstatement would be ordered and he would be treated to have died during service. The department was thus required to have considered the deceased appellant to have died during his service, thereby granting what were to be granted to such an employee's legal heirs, who had actually died during service. The objection of the Applicants to this extent is thus frivolous and ill-founded.

10. Strange enough to observe that the Law Secretary Khyber Pakhtunkhwa, (Ms. Shagufta Naveed) vide paragraphs 26 & 27 of the note parts, attached with the petition, while completely ignoring the facts that if more than one remedies are available to a person then only one could be availed, has opined filing of this application under section 12(2) CPC challenging the validity of judgment dated 14.09.2021 and simultaneously an objection petition under section 47 of the CPC. The Law Secretary has also lost sight of the fact that a CPLA had also been filed in the Supreme Court of Pakistan against the same Judgment of the Tribunal. The Law Secretary seems to have misguided and mislead the provincial government by asking it to resort to unnecessary and frivolous multifarious litigation by availing all the available remedies for no fruitful purpose thereby wasting the time, public money and delaying the implementation of the judgment. Filing of objection petition and this application, both, aim at thwarting the implementation of the judgment of the Tribunal, especially, when the judgment already challenged in the Supreme Court of Pakistan in CPLA. The Law Secretary being a very responsible officer



is not expected to render such flimsy, misguiding opinions compelling the government to enter into unnecessary and frivolous litigation at the state's exchequer. It is reiterated that the judgment debtor has only two options with him. That is either to implement the judgment in its true spirit or to have the judgment suspended from the Supreme Court, as the Applicants/judgment debtors have already filed CPLA.

11. When the Applicants had already filed CPLA against the judgment (14.09.2021) of the Tribunal and have also earlier filed an objection petition under section 47 of the Code of Civil Procedure, 1908 then this application under section 12(2) of the Code of Civil Procedure, 1908 is the last and third remedy simultaneously availed against the same judgment of the Tribunal, whereas when there are more than one remedies available to a person, he could avail only one of the those and could not go for the second or more remedies. Reliance is placed on the judgment of the Supreme Court of Pakistan reported as 2021 SCMR 1617 titled "*JS Bank Limited, Karachi and others versus Province of Punjab through Secretary Food, Lahore and others*" wherein the Supreme Court has held as under:

"As we have noted supra in the light of "Trading Corporation of Pakistan v. Devan Sugar Mills Limited and others" (PLD 2018 SC 828), it was petitioners' responsibility to be clear in their mind as regards to what remedy was available to them under the law. Relevant portion from Para No. 11 of the said judgment is reproduced:-

"In this view of the matter, the impugned judgment of the learned bench of the High Court cannot be sustained. Fair trial, does not envisage recourse to successive remedies one after another against one and the same



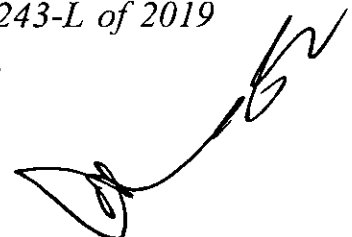
impugned order on substantially same set of facts and pleadings seeking substantially similar relief, as it would be against the doctrine of election, as expounded above. A tenant confronted with ex-parte order striking out its defence resulting in his ejectment order, quite a few remedies may be available against such order; namely Appeal under section 24 of the Cantonments Act, 1963, Application under Order IX, Rule 13 C.P.C., Application under section 12(2), C.P.C., application under Order XXI, Rules 99 to 103, C.P.C. and not the least application under section 47. C.P.C. all such remedies arm the tenant/judgment debtor to effectively resist ex-parte ejectment order passed against it. In instant case as noted above respondent-tenant, chose not to file appeal under section 24 of the Act, 1963 against the ejectment order dated 17.5.2011 but had chosen to invoke provisions of section 12(2), C.P.C. on 07.12.2011, which application was dismissed on merits by the executing Court on 7.8.20 12 and maintained by High Court on 19.8.2016. The Appellant after almost five years from date of ejectment order, ventured to invoke Section 47, C.P.C. on substantially same facts and grounds. Even if it is assumed that grounds as available under section 47, C.P.C. to question executability, discharge or satisfaction of ejectment order passed as a consequence for non-compliance of tentative order, set down different parameter to resist and defend execution of eviction order, then too, all such grounds were very much available when first application under section 12(2), C.P.C. was initially made.

Even if more than one remedies are available to the petitioners against the impugned order, they have to choose one remedy, at a time all the available remedies cannot be



pressed by the petitioners in the light of the judgment of this Court noted supra. In case in hand situation is different; one remedy was available to the petitioners, if it is their stance that ICA was competent and that has wrongly been dismissed then their petition to challenge the order of learned Division Bench was to be filed only and if they admit that the ICA was not competent then they were having a right to challenge the order of learned Single Judge dismissing their writ petitions. Invoking the jurisdiction of this Court against the order of learned Single Judge directly through a petition for leave to appeal and simultaneously challenging the order of the learned Division Bench by filing leave to appeal petition are self-contradictory.

We could have considered applications/ grounds for the condonation of delay in these petitions, keeping in view the complexity of the matter in the light of judgment of this Court reported as "Khushi Muhammad through L.Rs. and others v. Mst. Fazal Bibi and others" (PLD 2016 SC 872). However, as petitioners have chosen to avail both remedies i.e. direct petitions before this Court against the judgment of the learned Single Judge as well as they have challenged the order of learned Single Judge through ICAs. Now praying that the judgment of the learned Division Bench is not maintainable and ICAs were competent and that order be set aside. The ground taken for condonation of delay is not acceptable under the law, therefore, we are not inclined to condone delay in filing the petitions and, the same are dismissed. As C.Ms for condonation of delay stand dismissed, therefore, C.P.L.As. Nos. 1049 of 2019, 1355 of 2019, 1450 of 2019, 1683 of 2019, 1188-L of 2019 and 1243-L of 2019 also stand dismissed for being barred by time."



12. Wisdom is also derived from the judgment of Lahore High Court reported as 2022 CLC 1397 titled "*Messrs Fact Finders (PVT.) LTD. and others versus CNBC Pakistan and others*", wherein the Lahore High Court found as under:

"8. *The scheme of law is further clarified in the decision of this Court in learned Division Bench reported as "Dr. Faiza Asghar v. Nighat Nasir Sheikh and others" (PLD 2017 Lahore 884) that once a person opts, for a remedy under the general law then the remedy under Defamation Ordinance is completely barred and vice versa.*"

13. We may also seek guidance from the judgment of the Peshawar High Court reported as 2016 YLR 1901 titled "*Ghulam Sarwar versus Muhammad Javed and others*", wherein it was held as under:

"8. *In the circumstances, when the same objections raised in the earlier objection petition under Section 47, C.P.C. were held not sustainable, there was no justification to entertain and proceed with application under Section 12(2), C.P.C. containing the same allegation, and not fulfilling the essential requirement of disclosing fraud and misrepresentation in the impugned decree. Therefore, orders of both the Courts below proceed on wrong premise, and ought to be set aside. This will, hopefully, put an end to the ordeal of the petitioner who is being denied fruits of decree in his favour long ago.*"

14. We may also rely on the judgment of the Peshawar High Court reported as PLD 2018 Peshawar 154 titled "Government of N.W.F.P. through Secretary Works and Services Department Peshawar and another Versus Messrs CEMCON (Private) Ltd. through Managing Director" wherein, the Peshawar High Court held as under:



"Perusal of the record reveals that on 11.6.2005, the petitioner moved an application under section 151 C.P.C. read with other enabling provisions of law for setting aside the ex parte judgment and decree dated 16.12.2003, passed by the learned Senior Civil Judge, Peshawar, which was dismissed on merits on 19.6.2007, whereafter, on 6.5.2008, the petitioner moved an application under section 12(2) C.P.C. with similar prayer alleging that it was obtained by playing fraud. No doubt, where a suit has been decreed ex parte, various remedies are available to the aggrieved person. Firstly, an application under Order IX, Rule 13, C.P.C. secondly a review application under section 114 read with Order XLVII, C.P.C., thirdly, the appeal under section.96 C.P.C. and lastly a proceedings to set aside the decree on the ground that it was obtained by fraud, mis-representation and want of jurisdiction, etc under section 12(2), C.P.C.. Here, the petitioner has exhausted the remedy by filing an application an application under Order IX, Rule 13 C.P.C. read with other enabling provisions provided under the law, therefore, on the same ground he cannot be permitted to re-agitate the same issue by means of a fresh petition under section 12(2), C.P.C.; as the provision of section 12(2), C.P.C. are not intended to be a duplication of the proceedings provided for Order IX, Rule 13, C.P.C. In this behalf, reference may be made on the case reported as Ghulam Sarwar v. Muhammad Hassain and others (1987 SCMR 1440), wherein it was held as:--

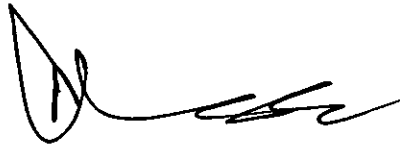
---S.12(2) & O.IX R.13---Constitution of Pakistan (1973), Art.185(3)---Ex parte decree, setting aside of---
Petitioner having failed in proceedings for setting aside ex parte decree, moved application under S.12(2), C.P.C., with similar prayer claiming that decree was fraudulently obtained---Dismissal of application challenged---Supreme Court affirmed impugned order holding that provision of S.12(2), C.P.C. were not

intended to be a duplication of proceedings provided for in O.IX, R.13, C.P.C. and refused leave to appeal.

In this respect, reliance can also be placed on the case reported as Mrs.Amna Bibi through General Attorney v. Nasrullah and others (2000 SCMR-296), wherein it was held that the petitioner having exhausted remedy by filing an application under Order IX, Rule 13 C.P.C. which could not be permitted to re-agitate the same issue by means of fresh petition under section 12(2) C.P.C."

15. For what has been discussed above we find no merits in this application and would dismiss it with costs of litigation also imposing special compensatory cost of Rs.20,000/- upon the Secretary Law for rendering opinion compelling the Government to enter into frivolous and ill-founded litigation. Consign.

16. *Pronounced in open Court at Peshawar and given under our hands and the seal of the Tribunal on this 8th day of December, 2023.*



KALIM ARSHAD KHAN
Chairman



SALAH-UD-DIN
Member (Judicial)

Mutazem Shah

ORDER

8th Dec. 2023

1. Mr. Asad Ali Khan, Assistant Advocate General for the applicants present. Syed Noman Ali Bukhari, Advocate for the respondents present.

2. Vide our detailed judgment of today placed on file, we find no merits in this application and would dismiss it with costs of litigation also imposing special compensatory cost of Rs.20,000/- upon the Secretary Law for rendering opinion compelling the Government to enter into frivolous and ill-founded litigation. Consign.

3. *Pronounced in open Court at Peshawar and given under our hands and the seal of the Tribunal on this 8th day of December, 2023.*



(Salah-ud-Din)
Member (J)



(Kalim Arshad Khan)
Chairman