Form No: HCJD/C-121

JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

Writ Petition No.1557 of 2020

Muhammad Jamil and 03 others.

Versus

Raja Muhammad and 03 others.

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Petitioners By	:	Mr. Asif Irfan, Advocate.
Respondents By	:	Mian Abdul Razzaq, Advocate.
Date of Hearing	:	18.03.2021.

*****

TARIQ MEHMOOD JAHANGIRI, J. – The petitioners have filed the instant writ petition with the following prayer:-

> ***"In the light of above stated facts and circumstances, it is, therefore, respectfully prayed that the impugned order dated 13.11.2019 may kindly be set aside by giving directions to Trial Court to decide the petition of the petitioners U/O 21 Rule 32 C.P.C. after proper trial in the best interest of justice.***
>
> ***Any other relief which this Honourable Court deems appropriate may also be awarded."***

2. The facts, leading to the filing of instant petition, are that the petitioners filed a suit for declaration and permanent injunction against Faiz Akbar, deceased, predecessor-in-interest of respondents No.1 to 3. In the said suit, the petitioners contended that they were owners in possession of land measuring 04-Kanals comprising of Khasra No.2633/3 Min, situated in the revenue estate of Phulgran, Tehsil & District,

Islamabad, which was initially owned by predecessor-in-interest of the petitioners, who transferred the same in the names of petitioners through Mutation No.5204, dated 01.03.1997. It was further claimed that the respondents have no concern whatsoever with the suit land and they intend to intervene into peaceful possession of the petitioners over the suit land to grab the same without any lawful justification, hence prayed for a decree for declaration of their proprietary rights and for permanent injunction restraining the respondents from intervening into the possession of petitioners.

3. The respondents appeared and contested the suit by way of submitting written statement. Out of divergent pleadings of the parties issues were framed, evidence of both the parties was recorded and suit filed by the petitioners was decreed, vide judgment and decree dated 30.10.2018. On the next date of passing of the decree, the respondents tried to intervene into peaceful possession of the petitioners, so the petitioners filed a petition under Order XXI Rule 32 C.P.C. read with Section 151 C.P.C. before the learned Civil Court. The petitioners also filed a petition for appointment of Local Commission. The petition under Order XXI Rule 32 C.P.C. was contested by the respondents and consequently the learned Civil Judge has dismissed the petition, vide order dated 13.11.2019.

4. That the petitioners assailed order dated 13.11.2019, by filing revision petition before the learned District Judge, Islamabad, who dismissed the same, vide order dated 05.03.2020 with the observations that due to the latest amendments in C.P.C., the revision petition filed under Section 115 C.P.C. was not maintainable. Hence, the instant writ petition.

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5. Learned counsel for the petitioners, *inter-alia*, contended that the impugned order has been passed against law and facts of the case; that the learned Civil Court has failed to frame issues and has not recorded the evidence to resolve the controversy between the parties. Learned counsel for the petitioners further contended that the learned Trial Court has exercised the jurisdiction not vested with it and the impugned order is suffering from infirmity, illegality of approach, irregularity of procedure and has prayed for setting aside of the impugned order.

6. Conversely, learned counsel for the respondents has controverted the arguments made by learned counsel for the petitioners and submitted that the impugned order has been passed strictly in accordance with law, the instant writ petition is badly hit by the principles of *laches* as the petitioners availed the remedy in the wrong forum and filed the instant petition after more than 6 months and has prayed that the instant writ petition be dismissed.

7. Arguments advanced by learned counsel for the parties have been heard and the documents placed on record have been examined with their able assistance.

8. The facts, leading to the filing of instant petition, have been mentioned hereinabove, therefore, need not be reproduced.

9. Section 75 C.P.C. empowers the Court to issue a commission (a) to examine any person; (b) to make a local investigation; (c) to examine or adjust accounts; or (d) to make a partition. Order XXVI Rule 9 C.P.C. also provides that in any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, etc. may issue a commission to such person as it thinks

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fit directing him to make such investigation and to report thereon to the Court.

10. In the instant case, the allegation of the petitioners is that the respondents have taken possession of their land illegally. To resolve the said dispute, the petitioners themselves filed a petition for appointment of Local Commission. So the *Naib Tehsildar* of the area was appointed as Local Commission, who filed his report after inspection of the site. Report filed by Local Commission reflected that the parties were in possession of land to the extent of their shares. Admittedly, the parties were co-sharers in the same *Shamlat Khasra* Numbers. The report of commission, who was appointed on application of the petitioners, was submitted in the Court on 23.09.2019. Learned Trial Court granted three opportunities for filing of objections on the report of Local Commission. On 06.11.2019, learned counsel for the petitioners has made a statement in the Court that he does not intend to file objections on the report. So after hearing both the parties, the learned Civil Judge has dismissed the petition under Order XXI Rule 32 C.P.C. filed by the petitioners with the observation to file a suit for legal partition of the land before the competent forum.

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11. Order XXVI Rule 10 (2) C.P.C. provides that **"Report and depositions to be evidence in suit**. "Commissioner may be examined in person. The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, **with the permission of the Court**, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation." But in the instant matter, the petitioners have neither filed any objections nor filed any petition in the Court for

examining the Commissioner. Now at this stage, the petitioners cannot take a contrary / conflicting stance that impugned order should not have been passed on the basis of report of the Local Commission.

12. The writ petition has been filed after more than six months as the petitioners were pursuing the matter in the wrong forum, hence the instant petition is badly hit by the principles of *laches*. In the case titled *"Ahmed and 25 others VS. Ghama and 5 others"* reported as ***(2005 SCMR 119)***, it is held by the Hon'ble Supreme Court of Pakistan that *"there is no cavil with the proposition that existence of laches is sufficient for dismissal in limine of petition"*. It is further held that *"We have absolutely no hesitation in our mind that the petitioners failed to pursue their case vigilantly, vigorously and woke up from the deep slumber after 108 days which cannot be ignored without sufficient justification which is badly lacking in this case*". The same principle is followed in ***"2016 SCMR 183"***, ***"PLD 2016 SC 872"***, ***"2019 SCMR 1720"*** and ***"PLD 2016 SC 514"***.

13. It is settled principle of law enunciated by the Hon'ble Supreme Court of Pakistan in case reported as *"Water and Power Development Authority"* ***(1988 SCMR 1354)***, wherein it is held that *"it is well settled that after the prescribed period of limitation has elapsed, the door of justice is closed and no plea of injustice, hardship or ignorance can be of any avail unless the delay is properly explained and accounted for"*. The same law has been laid down in the recent authoritative judgment of Larger Bench of the Honb'le Supreme Court of Pakistan in case reported as *"Khushi Muhammad and others V. Mst. Fazal Bibi and other"* ***(PLD 2016 SC 872)***.

14. It is well settled that *certiorari* is only available to quash a decision for an error of law. It can also be issued for correcting errors of jurisdiction when an inferior Court or a tribunal acts without jurisdiction or in excess of its jurisdiction, or fails to exercise its jurisdiction or where the

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Court or a tribunal acts illegally in exercise of its undoubted jurisdiction and it decides a matter in violation of the principle of natural justice. The High Court issuing a writ of *certiorari* acts in exercise of supervisory and not appellate jurisdiction. The High Court in exercise of its writ jurisdiction will not review the findings of fact reached by the inferior Court or a tribunal. Reliance may be made to the following case laws:-

(i) In the case of ***"Owais Shams Durrani and others Vs. Vice-Chancellor, Bacha Khan University, Charsadda and another" (2020 SCMR 1041),*** wherein it is held by the Hon'ble Supreme Court that ***"It is trite that where a citizen seeks relief in constitutional jurisdiction he must point to a right statutory or constitutional which vests in him and has been denied in violation of the law."***

(ii) In the case of ***"Amjad Khan Vs. Muhammad Irshad (deceased) trough legal heirs." (2020 SCMR 2155),*** wherein it is held by the Hon'ble Supreme Court that ***"it is by now a settled principle of law that the High Courts must not exercise their constitutional jurisdiction in order to interfere with the discretion exercised by lower courts unless the same suffers from jurisdictional, factual or legal errors. In other words, such interference would be justified in cases where the impugned order has been passed without jurisdiction or is based on misreading or non-reading of evidence, or is not in accordance with the law. If none of these errors is present, the High Courts must not exercise their constitutional jurisdiction to interfere with the findings of lower courts merely because it reached a different conclusion as to the controversy than the latter. In this regard, reference can be made to a collective reading of Mst. Mobin Fatima V. Muhammad Yamin (PLD 2006 SC 214) and Nadira Shahzad V. Mubashir Ahmad (1995 SCMR 1419)."***

(iii) In the case of ***"President, All Pakistan Women Association, Peshawar Cantt V. Muhammad Akbar Awan***

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and others." (2020 SCMR 260), wherein it is held by the Hon'ble Supreme Court that ***"It is settled law that when the Statute does not provide the right of appeal against certain orders, the same cannot be challenged by invoking the constitutional jurisdiction of the High Court in order to gain a similar objective. Where a Statute has expressly barred a remedy which is not available to a party under the Statute, it cannot be sought indirectly by resort to the constitutional jurisdiction of the High Court. The High Courts exercising constitutional jurisdiction must be fully cognizant and conscious of this Rule and strictly adhere to the same in the interest of advancing the policy of law and delivering expeditious justice in accordance with the law and the Constitution. Even otherwise, constitutional jurisdiction is equitable and discretionary in nature and should not be exercised to defeat or bypass the purpose of a validly enacted statutory provision."***

(iv) In the case of ***"Jurist Foundation through Chairman V. Federal Government through Secretary, Ministry of Defence and others." (PLD 2020 SC 1)***, wherein it is held by the Hon'ble Supreme Court that ***"Judicial review must, therefore, remain strictly judicial and in its exercise Judges must take care not to intrude upon the domain of the other branches of Government. Judicial restraint, in this perspective, is essential to the continuance of rule of law, and for the continued public confidence in the political impartiality of the judiciary and the voluntary respect for the law as laid down and applied by the Courts."***

(v) In the case of ***"Chief Executive MEPCO and others. V. Muhammad Fazil and others." (2019 SCMR 919),*** wherein it is held by the Hon'ble Supreme Court that ***"where the Court or the Tribunal has jurisdiction and it determines specific question of fact or even of law, unless patent legal defect or material irregularity is pointed out, such determination cannot ordinarily be***

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interfered with by the High Court while exercising jurisdiction under Article 199 of the Constitution."

(vi) In the case of ***"Chairman, NAB V. Muhammad Usman and others." (PLD 2018 SC 28),*** wherein it is held by the Hon'ble Supreme Court that ***"the powers of judicial review vested in High Court under Article 199 of the Constitution is no doubt a great weapon in the Judge's hands however, the same shall not be exercised in a case where discretion is exercised by the subordinate Court / Tribunal in a fair and just manner without violating or disregarding statutory provision of law, likely to occasion the failure of justice. Ordinarily such extraordinary jurisdiction shall not be exercised at random and in routine manner. The following case law is reproduced for the guidance of the learned Judges of the High Court for future course of action:***

> ***(i)*** *Brig. (Rtd.) Imtiaz Ahmed v. Government of Pakistan, through Secretary, Interior Division, Islamabad (1994 SCMR 2142).*
>
> ***(ii)*** *Shahnaz Begum v. The Hon'ble Judges of the High Court of Sindh and Balochistan (PLD 1971 SC 677).*
>
> ***(iii)*** *Malik Shaukat Ali Dogar v. Ghulam Qasim Khan Khakwani (PLD 1994 SC 281)."*

(vii) In the case of ***"Shajar Islam V. Muhammad Siddique and 2 others." (PLD 2007 SC 45),*** wherein it is held by the Hon'ble Supreme Court that ***"the High Court in exercise of its constitutional jurisdiction is not supposed to interfere in the findings on the controversial question of facts based on evidence even if such finding is erroneous. The scope of the judicial review of the High Court under Article 199 of the Constitution in such cases, is limited to the extent of misreading or non-reading of evidence or if the finding is based on no evidence which may cause miscarriage of justice but it is not proper for the High Court to disturb the finding of fact through reappraisal of evidence in writ jurisdiction or exercise this jurisdiction as a substitute of revision or appeal."***

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15. The learned counsel for the petitioners made no submission on the point as to how the impugned order is consequence of an error of law or without jurisdiction or in excess of jurisdiction.

16. It has become common for the learned counsel to argue the petitions seeking issuance of writs of *certiorari* as if they are arguing the appeals. This practice must be stopped as the same is not in consonance with the well settled principles for hearing and deciding petitions seeking the issuance of writs of *certiorari.*

17. Finding no jurisdictional infirmity in the order passed by the learned Senior Civil Judge-II, Islamabad, the instant writ petition is <u>dismissed being meritless</u>.

(TARIQ MEHMOOD JAHANGIRI)
JUDGE

Announced in Open Court this 24th day of March, 2021.

JUDGE

M. Zaheer Janjua

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