IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE MUSHIR ALAM
MR. JUSTICE MAQBOOL BAQAR

CIVIL PETITION NO. 1965 OF 2019
On appeal from the judgment dated passed 03.05.2019 by the Lahore High Court Lahore in C.R.1339/2017)

Jubilee General Insurance Co. Ltd, Karachi ***...Petitioner(s)***

VERSUS

Ravi Steel Company, Lahore ***...Respondent(s)***

For the petitioner(s): Mr. Hamid Khan, Sr. ASC a/w Barrister Rana Tariq, Legal Advisor

For the respondent(s): Mr. Zaheer-ud-Din Babar, ASC

Date of Hearing: 09.10.2019

JUDGMENT

Mushir Alam, J.— Present Petitioner, Jubilee General Insurance Co. Limited, Karachi (*hereinafter the 'insurer')* have impugned the three (3) Member Bench judgement of Lahore High Court dated 3.5.2019, which decided by majority of 2:1, in C.R. No.1339 of 2017, that insurer, after exhausting ultimate remedy in review jurisdiction of Apex Court by re-agitating judgment of the learned Insurance Tribunal dated 03.10.2012 through application under section 12(2) CPC on a ground that even though defense of limitation was available but was not raised. Therefore, the application made is not maintainable and order dismissing application under section 12(2) CPC was passed by the learned trial Court was upheld through impugned judgment.

2. Facts in brief are that the respondent-Ravi Steel Company a property concern *(hereinafter referred to as the 'insured')* insured consignment of two *'furnace shell' (herein after referred to as 'insured goods')* destined for Kazakhstan under *"Marine Cargo Policy"* dated 18.6.2005 *(Ex-A-2),* issued by the Petitioner-*Insurer.* The *insured goods*, en-route to Kazakhstan were damaged, the incident was reported promptly to the *insurer* on 5.9.2005 and the claim was lodged with *insurer* on 9.9.2005 *(Ex-A-4)*. All documents as required by the *insurer* for processing the claim and assessing the damages were furnished through *Ex-A-4 to Ex-A-6.* To assess the loss/damage, '*insurer*' appointed a Surveyor on 23.9.2005 *(Ex-A-8)* and it is matter of record that based on surveyor's *report (which was not supplied though demanded by the assured nor produced in evidence)*, the *insurer* repudiated the claim on 19.08.2008 *(Ex-A-9),* which prompted the *insured* to file a claim under *section 122 of the Insurance Ordinance, 2000*, *(hereinafter referred to as Ordinance, 2000)* for the recovery of *sum assured* along with *liquidated damages* in terms of Section 188 of the Ordinance, 2000, before the learned Insurance Tribunal, Lahore on 11.11.2008. The claim was contested on merits, reply was filed, issues were framed, evidence was led by both the parties. Claim Application was allowed by the learned Insurance Tribunal on 3.10.2012 for the sum assured together with liquidated damages as provided for under *section 118 of the Ordinance, 2000 "Calculated at the rate of five (5) percent on high base rate"* till realization. Petitioner belatedly filed Regular First Appeal No.992 of 2012 under Section 124 of the *Ordinance, 2000* which was dismissed on 6.4.2016, which was challenged before this Court

through Civil Petition No.1287-L of 2016, which was dismissed on 29.6.2016 and so also Civil Review Petition No.26-L of 2016 met the same fate *vide* order 24.01.2017.

3. From the record it appears that in the intervening period when First Regular Appeal No.992 of 2012 was pending before the High Court, execution application was filed by the *insured*, which was resisted by the *insurer,* through Objection Petition, on the ground, *inter alia,* that the original *Insurance Claim* was time barred and few days later *i.e.* on 15.12.2012 chose to challenge the order of the Insurance Tribunal dated 03.10.2012 through yet another channel by invoking *section 12(2) CPC* on 15.12.2012 *(pages 103-116)* on grounds *inter-alia* that: *i) the claim was patently barred by time;* and ii) *want of jurisdiction,* beside on merits. It is a matter of record that before the RFA No. 992 of 2012 could be decided, Objection Petition was dismissed on 20.5.2016, which order was not challenged any further and it attained finality. It is a matter of record that the application under section 12(2) CPC was kept pending, which fact was not disclosed before the learned High Court when the RFA No. 992 of 2012 was heard and dismissed on 6.4.2016, such fact was also not disclosed in CPLA No. 1287-L of 2016, which was dismissed on 29.6.2016, Civil Review Petition No.26-L of 2016 filed met the same fate vide order dated 24.01.2017.

4. After exhausting two remedies against the order of the Insurance Tribunal dated 3.10.2012, one right up to review jurisdiction of this Court, as noted above and second through channel of objection, and having failed throughout, the Petitioner

resorted to challenge the very order of the Insurance Tribunal by resurrecting the application under section 12(2) CPC, which application was dismissed on merits by the learned Insurance Tribunal, vide order dated 8.3.2017 on the ground, *inter alia,* that Objection Petition on similar facts and grounds was dismissed by the learned Tribunal observing that *"from the contents of application and from perusal of the record available before this Tribunal, the element of fraud, misrepresentation or want of jurisdiction in terms of section 12(2) CPC are missing"* vide order dated 08.03.2017 which order was maintained in Civil Revision No.3093 of 2016 by a majority of 2**:**1 by the learned Bench of the Lahore High Court *vide* judgement dated 3.5.2019 impugned before us.

5. Mr. Hamid Khan, learned Sr. ASC for the petitioner contended that scope and parameters of Section 12(2) CPC are different. According to him, the petitioner in *RFA No. 992 of 2012* was non-suited on the ground of limitation. According to him original insurance claim of the respondent was also hit by limitation, which aspect of the matter was not considered by the learned Insurance Tribunal and so also by the bench of the Lahore High Court. According to learned ASC, the contingency to file insurance claim was reported on 9.9.2005, limitation to file insurance claim under Article 86 (b) of the Limitation Act, 1908 is three years from '*the date of occurrence causing loss*', the Insurance Claim Application under *section 122 of the Ordinance 2000,* was filed on 11.11.2008, which was delayed by two months. It was urged that it was duty of the Insurance Tribunal under Section 3 of the Limitation Act to dismiss the Claim Application outright. It was

argued that the learned Insurance Tribunal could not have assumed the jurisdiction to entertain a time barred claim. It was next urged that the insurer being bailee had no insurable interest.

6. Learned Sr. ASC for the petitioner next urged that when multiple remedies against a judgement, decision or an order are available then exhausting one remedy, does not bar other legal remedies, which could always be pressed into in service one after the other irrespective of outcome of one remedy. According to him, reliance in the impugned judgment on the case cited as *Trading Corporation of Pakistan* ***vs***. *Devan Sugar Mills Limited & others* (**PLD 2018 Supreme Court 828)** is also misplaced. According to him, the case of *Maharunisa & another* ***vs***. *Ghulam Sughran & another* **(PLD 2016 Supreme Court 358)**, as relied upon by learned minority Judge was apt and to the point. It was, therefore, urged that petitioner was well within its right to challenge the order of learned Insurance Tribunal under Section 12 (2) CPC, which is separate, distinct and coextensive remedy could be invoked independently and successively to assail order of the Insurance Tribunal on different grounds of defence including limitation, which though available were not raised nor adjudicated in first set of defence at trial.

7. Mr. Zaheer-ud-Din Babar, learned counsel appearing on behalf of the respondent '*insured',* supports the impugned judgment. It was urged that, insurance claim was lodged with the *insurer* promptly, on 9.9.2006 *(Ex-A-4).* The claim was not refuted and surveyor was appointed by the insurer to assess the loss. According to him, it was the Petitioner/Insurer who delayed in

settlement of claim beyond 90 day as required under Section 118 of the Ordinance, 2000 law and without providing any survey report, belatedly refuted the claim on 19.2.2008. It was urged that the Insurer was very much party to the proceedings before the Insurance Tribunal and has contested the claim up to Review jurisdiction of this august Court, and cannot collaterally challenge the very judgment dated 3.10.2012 of the Insurance Tribunal under section 12(2) CPC raising ground *inter-alia* of limitation. Learned ASC for the Respondent urged that the Petitioner kept the *insurer* on false hope and adopted misleading and deceptive conduct amounting to fraud that prevented the *insured* to approach the Insurance Tribunal earlier and that they cannot be allowed to take benefit of such misleading and deceptive conduct. It was contended that abandoning plea of limitation at trial also amounts to waiver, as under facts and circumstances, question of limitation was mixed question of facts. Had it been raised at the earliest opportunity at the trial, *insurer* would be in a position to contest and defend such a dishonest plea. It was argued that present case is fully covered on all fours by dicta laid down in a case reported as *Trading Corporation of Pakistan* **(Supra)**, wherein this Court expounded '*doctrine of election of remedy*' and concluded that when out of multiple available remedy one of the remedy is invoked and exhausted a party cannot be allowed to hop and shop another remedy which may be available. Therefore, impugned judgment by majority of 2**:**1 rightly dismissed the application under Section 12 (2) CPC, calls for no exception.

8. Having heard the arguments and perused the record, attending the challenge of the learned counsel for the Petitioner on

the ground of limitation. It is a matter of record that contingency of damaged to the *'insured goods'* occurred and was reported during the currency of insurance policy promptly to the *insurer* on 9.9.2006. *Insurer* did not repudiate the insurance claim but, to assess the loss appointed the surveyor on 7.9.2006. *(Ex-A-9)* In terms of Section 118 of the Insurance Ordinance, 2000 *insurer* is obligated to, scrutinize, settle and pay the insurance claim within a period of 90 days from the date on which payment becomes due, or when the beneficiary of insurance claim, complete papers for claiming the payment due under the insurance policy. It is evident from the record that all the documents, as required by the *Insurer* to scrutinize, settle and pay the insurance claim were provided by the *Insurer* on 13.10.2005 (*Ex-A-5*) and 26.9.2005 *(Ex. A-6).* It is a matter of record even that the *Insurer,* through letter dated 23.10.2005 (*Ex-A-13)* alongwith detail of damage caused, informed the *Insurer*, that survey has been carried out by the surveyor yet the claim was not paid and the Petitioner, *Insurer* took its time to repudiate the claim as late as on 19.2.2008 i.e. more than two and a half year as against 90 days as required under section 118 of the *Ordinance, 2000.* Common law principle of **"***utmost good faith***"** *(also recognized as 'Uberrimae Fidei'*) has received statutory recognition, under Section 75 of the Insurance Ordinance 2000*;* it means that every person who enters into a contract *(of insurance)* has a legal obligation to act with *utmost good faith* towards each other and parties *(to insurance)* contract are required to deal with each other in an honest and upright manner, disclose all material facts to each other and not to take unfair advantage over another person or to fulfill a promise to act,

even when some legal technicality is not fulfilled. (s*ee section 76 ibid also)* Additionally, *Insurer* is obligated not to engage in a misleading or deceptive conduct that may put the *insured* or beneficiary of Insurance Policy into a disadvantageous position (*see section 76 ibid*). Even ambiguities in insurance policies are construed in favour of the *insured (Section 77 ibid).*

9. It is true that limitation to file Insurance Claim arising under the Insurance Policy before the Insurance Tribunal is not provided for under the *Ordinance, 2000*, however *three years* period is provided for under *Article 86 (b) of the Limitation Act*, 1908 against '*the occurrence causing the loss' on the policy of insurance "when the sum insured is payable after proof of the loss has been given to or received by the insure".* Indeed, in adversarial proceedings a litigant has to cross the barrier of limitation, before his rights are adjudicated. Like Order II Rule (2) CPC mandates the Plaintiff to include the whole claim and seek all reliefs in a suit to which he is entitled, where a plaintiff omits to sue in respect of the portion so omitted to claim any relief to which he may be entitled, he cannot, except by leave of the Court, afterwards sue for any relief so omitted. Cumulative effect of Order VI Rule 4 CPC read with Order VIII Rule 2 and other enabling provisions, by same stroke requires that the *"defendant must raise"* in written statement and specifically and particularly plead *"all matters, which show that the suit not to be maintainable or that the transaction is either void or voidable in point in law, and all such grounds of defence as, if not raised, would be likely to take opposite party by surprise or would raise issues of facts not arising out of the plaint as for instance fraud, limitation, release, payment, performance or facts showing*

illegality."(Order VIII Rule 2 CPC) plea of *misrepresentation*, *fraud*, *breach of trust, willful default or undue influence, and in all other cases in which particulars may be necessary" (Order 6 R 4 ibid).* These rules of prudence require both the plaintiff and defendant to plead all facts that may constitute cause of action for any relief and for the defendant which may constitute a defence to specifically refute any claim on merits as well raising specific defense denouncing claim on the assertions of *fraud, limitation, release, payment, performance or facts showing illegality.* Unless such particulars are specifically pleaded in the plaint or in written statement as a defence other party may it be plaintiff or defendant would have no opportunity to controvert the same, as neither the issue could be framed nor, evidence could ordinarily be allowed to be raised or led at trial or attended in further appeals or revisions as the case may be. Failure to raise such plea at the first opportunity *(either in plaint or written statement as the case may be)* to assert any right or claim any relief where such rights and relief is founded on such assertion or raising such plea as a defence to contest and or controvert any such claim may well amount and be successfully be defeated on doctrine of constructive *res-judicata*, in subsequent proceedings (see *Explanation IV* to section 11 CPC and *Mst. Kulsoom and 6 others* ***vs.*** *Mrs. Marium and 6 others* ***(1988 CLC 870***, para 5**)**.

10. In addition to doctrine of *constructive res-judicata*, doctrine of *equitable estoppel* having received statutory recognition under Article 114 of the *Qanun-e-Shahadat Order, 1984* is gainfully applied in Insurance matter where the *insurer* uses the tool of surveyor, assessors and or investigators to investigate into claim of

loss and assessment of damages and induce the *insured* to believe that the claim will be paid and or settled once the survey, assessment or investigation into loss or damages is completed in due course and then belatedly, refutes the claim putting the *insured* at disadvantage to bring claim within limitation. In all fairness, in such circumstances the *insurer* may be equitably estopped from raising plea of limitation as a defense to the Insurance claim in Court of law. In case in hand plea of limitation was not raised in the first set of proceedings. *(those interested may gainfully see In US jurisdiction where analogues provision contained in section 623 of California Evidence Code was propounded in a case Irwin* ***vs.*** *Department of Veteran's Affairs,* **[498 U.S. 89,96 (1990)]** *"An estoppel against a limitations defense usually 'arises as a result of some conduct by the defendant, relied on by the plaintiff, which induces the belated filing of the action Spray, Gould & Bowers* ***vs.*** *Associated Int'l Ins. Co.,* **[71 Cal. App.4th 1260, 1268 (1999)].** *Where an insurer is responsible for concealing the existence of an insured's cause of action, Courts of this State have found that the insurer may be estopped from asserting statutory and contractual limitation periods, (there are plethora of authorities on the point including* ***Vu, [26 Cal.4th at 1152]****, Hydro-Mill Co., Inc****. vs.*** *Hayward Tilton & Rolapp Ins. Assoc., Inc.,* ***[115 Cal. App. 4th 1145****,* ***1165-66 (2004)*** *and more recently from Indian jurisdiction National Insurance Co. Ltd* ***vs.*** *Hindustan Safety Glass Works Ltd.* ***[2017] 5 SCC 776 paragraph 17 & 18).***

11. Since the Petitioner/defendant did not raise the bar of limitation, in the written statement, before the Insurance Tribunal at trial, which in the given circumstances is a mixed question of

fact and law and the same not having been raised, the Respondent/Plaintiff had no occasion to meet such challenge in earlier set of proceeding that culminated in his favour up to this Court in Review jurisdiction. Having failed to obtain any favourable order in the first complete cycle of remedy up to apex Court and having failed in its attempt in second challenge by way of objections to the execution, the Petitioner is not only estopped to seek annulment of judgment of Insurance Tribunal collaterally by adopting another or alternate channel of remedy to question the judgment of Insurance Tribunal on the ground of limitation by way of an application under section 12 (2) CPC, which ground, though available at trial was not raised could not be allowed to be raised in a collateral challenge.

12. Even otherwise, it is by now well entrenched in our jurisprudence that where multiple remedies are available against any order judgement and or decision than it is the prerogative of the suitor to elect and pursue one out of the several hierarchy or channel of remedies. A suiter having availed and exhausted one of the several hierarchy or channel of remedy, doctrine of *constructive res-judicata*, as discussed above debars him to adopt one after another hierarchy, course or channel of remedies. In case in hand Petitioner having challenged unsuccessfully the order of Insurance Tribunal up to this Court, then unsuccessfully availed second channel of remedy by challenging the Order of Insurance Tribunal through objection petition before the executing Court under section 47 CPC, which order too has attained finality and now invoked third hierarchy of remedy by way of application under section 12 (2) CPC. In somewhat similar circumstances, in the case

of *Trading Corporation of Pakistan* **(***Supra***)**. It was held in para-8 at page-833 as follows:

> *"The moment suitor intends to commence any legal action to enforce any right and or invoke a remedy to set right a wrong or to vindicate an injury, he has to elect and or choose from amongst host of actions or remedies available under the law. The choice to initiate and pursue one out of host of available concurrent or co-existent proceeding/actions or remedy from a forum of competent jurisdiction vest with the suitor. Once choice is exercised and election is made then a suitor is prohibited from launching another proceeding to seek a relief or remedy contrary to what could be claimed and or achieved by adopting other proceeding/action and or remedy, which in legal parlance is recognized as doctrine of election, which doctrine is culled by the courts of law from the well-recognized principles of waiver and or abandonment of a known right, claim, privilege or relief as contained in Order II, rule (2) C.P.C., principles of estoppel as embodied in Article 114 of the Qanun-e-Shahadat Order 1984 and principles of res-judicata as articulated in section 11, C.P.C. and its explanations. Doctrine of election apply both to the original proceedings/action as well as to defenses and so also to challenge the outcome on culmination of such original proceedings/action, in the form of order or judgment/decree (for illustration it may be noted that multiple remedies are available against possible outcome in the form of an order/judgment/decree etc. emanating from proceedings of civil nature, which could be challenged/defended under Order IX, rule 13 (if proceedings are ex-parte), section 47 (objection to execution), section 114 (byway of review of an order), section 115 (revision), under Order XXI, rules 99 to 103 C.P.C. and section 96 C.P.C. (appeal against the order/ judgment) etc. Though there is no bar to concurrently invoke more than one remedy at the same time against an ex-parte order/ judgment. However, once election or choice from amongst two or more available remedy is made and exhausted, judgment debtor cannot ordinarily be permitted subsequent to venture into other concurrently or coexisting available remedies."*

13. Accordingly, no exception to the finding of the Bench of the High Court is called for. Instant petition is dismissed and leave to appeal is declined. The above are the reasons for our short order of even date, which reads as follow:

> *"For reasons to be recorded later, this petition is dismissed and leave declined."*

JUDGE

JUDGE

ISLAMABAD
9th October, 2019
*arshed/**

Approved for Reporting