

IN THE HIGH COURT OF SINDH AT KARACHI

Revision Application No.243 of 1989

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

Applicant No.1 : Deputy Commissioner, Thatta:
Applicant No.2 : Mukhtiarkar,
Taluka Mirpur Sakro District Thatta,
Through Syed Alley Maqobool, Addl. Advocate
General Sindh.
Respondent : Karim Bux s/o Muhammad Ishaque
through Mr. K.B. Bhutto, Advocate.
Date of hearing: : 21.12.2015 & 05.01.2016

ORDER

Nazar Akbar, J. This revision application has arisen out of dismissal of applicants' Civil Appeal No.24/1988 by the Court of District & Sessions Judge, Thatta whereby exparte judgment and decree passed by the Senior Civil Judge, Thatta in suit No.25/1987 filed by the Respondent was maintained.

2. The brief facts of the case are that on **15.3.1987** the Respondent, Karim Bux, filed suit No.25/1987 for declaration and permanent injunction alongwith application for temporary injunction in respect of plot No.2/A situated in Ghullamullah Town, Mirpur Sakro, against Deputy Commissioner, Thatta and Mukhtiarkar, Taluka Mirpur Sakro District Thatta,. He has prayed for the following relief(s) in the suit:-

- a) That the order of the Defendant No.1 dated 8.3.1987 for the measurement correction of the plot No.2/A from 14105 to 1410 sq.feet is illegal, malafide, wrong, void and without jurisdiction and may be declared so.
- b) That the suit plot bearing No.2/A admeasuring 14105 sq. feet situated in Ghullamullah town, Taluka Mirpur-Sakro, District Thatta may be declared as admeasuring 14105 sq. feet as measurement as per Village Form II and sketch of Settlement Department.
- c) The Defendants, their agents, servants representatives or any other person claiming them be restrained not to change the measurement of the plot No.2/a admeasuring 14105 sq. feet till the disposal of the suit.
- d) The costs of the suit.
- e) Any other relief which this Hon'ble Court deems fit and proper.

3. On **25.3.1987** Applicant No.1, Deputy Commissioner filed objection / counter affidavit to the injunction application (Ex.10). The Respondent filed rejoinder to the said objection (Ex-11), available at page 99 and 107 of R & P. The trial Court by order dated **07.4.1987** dismissed the injunction application and the Respondent preferred Civil Misc. Appeal **No.16/1987** and R&P was called by the Sessions Judge. The appeal was allowed by the District Judge by order dated **29.7.1987** and the R&P was returned to the learned Trial Court on **14.10.1987**. However, the appellants/defendants could not file written statement within time and therefore, as per late diary dated **27.1.1988**, the Respondent/Plaintiff filed an application under **Order 8 Rule 10 CPC** (Ex-17). On **27.2.1988** the applicants /defendants filed objections (Ex-19) to the said application. The trial Court by order dated **12.4.1988** while dismissing an adjournment application filed by the applicants/defendants ordered the case to proceed exparte and the Respondent/Plaintiff within four days i.e. on **16.04.1988**, filed affidavit in exparte proof (Ex-23). The applicants/defendants on the same day filed application under **Order 9 Rule 9 CPC** (Ex-24), for recalling order dated **12.4.1988**, whereby the case was ordered to proceed exparte against the Defendants on the ground that the delay in filing of written statement was due to the fact that Government sanction was required for the defense of the suit which was received on **14.4.1988**. The Respondents on **20.4.1988** filed objection (Ex-19) to the application under Order 9 Rule 9 CPC. On the same day i.e **20.4.1988** the Applicants/Defendants placed on record duly sworn written statement which is available at page 191 of R&P. However, by order dated **27.4.1988** the application under Order 9 Rule 9 was dismissed. The trial Court ultimately decreed the suit on **30.4.1988** on the basis of affidavit-in-exparte proof which was already filed on 16.4.1988.

4. The applicants preferred an appeal against the exparte decree which was also dismissed by order dated **27.8.1988**. The applicants have preferred this revision application against the findings of both the Courts.

5. I have heard learned counsel for the applicants and the Respondent. I have also minutely examined the record and proceedings of the Courts. The only basis for

decreeing the suit was failure of the applicants/defendants to file their written statement within time and the operative part of the order of the Sr. Civil Judge is reproduced below.

On **16.4.1988** the Plaintiff filed his affidavit in exparte proof. Today the learned counsel for the Plaintiff and Defendants (A.G.P) are present. I have also heard their arguments. In his affidavit in exparte proof the Plaintiff has repeated the same facts as given in the plaint, hence there is no need to repeat them here again.

I have gone through the record of the case. It is contended by the learned A.G.P. that the documents produced by the Plaintiff are all false and fabricated on which the Plaintiff is relying upon. In my humble opinion without evidence it cannot be ascertained that the documents in hand of Plaintiff are false. The documents and their authenticity unless proved contrary cannot be doubted. **The Plaintiff has produced a numerous documents in support of his version which are issued by the various public departments. The said documents are all old documents. There is nothing in rebuttal to the oral as well as documentary evidence produced by the Plaintiff in support of his contention.** Consequently, I decree the suit as prayed leaving the parties to bear their own costs.

The above findings have been mechanically endorsed by the learned District Judge Thatta in appeal No.24 of 1988 when in the order of dismissal of appeal, after narrating the facts which I have also purposely reproduced in this judgment, the learned Ist Appellate Court held that;

“there was sufficient evidence produced by the Plaintiff in support of his case which was not rebutted by the Defendant and therefore, suit was rightly decreed in favour of the Plaintiff”.

6. Learned counsel for the Respondent in support of the impugned orders has made only two submissions that this being a civil revision, concurrent findings of the Courts below cannot be interfered by this Court. His other contention was that no evidence was required in the present case since the trial Court has decreed the suit in terms of **Order VIII Rule 10 CPC**. On the second contention raised by him, he has not relied on any case law. When the Court asked him to supplement his arguments with any case law his reply was that the provisions of **Order VIII Rule 10 CPC** are self-explanatory. The provision does not require recording of evidence for pronouncement of judgment on failure of the Defendant to file written statement. In the facts of the case, the contention of the counsel for respondent appears to be misconceived. The learned Court in terms of **Order VIII Rule 10 CPC** had two

options and it had opted for alternate / second option. The first option was to “pronounce the judgment” straightaway and the second option was to pass “any other order in relation to the suit it thinks fit”. The trial Court on **12.4.1988** when dismissed an adjournment application filed by the applicants also debarred them from filing written statement and thereby ordered to proceed *exparte* against them with directions to the Respondent / Plaintiff to file *Exparte* affidavit-in-evidence. The Order of the trial Court dated 12.4.1988 does not reflect the exercise of powers of pronouncing the judgment in terms of Order 8 Rule 10 CPC. The judgment appears to be a decision based on the evidence as both the Courts below have observed that the “**oral and documentary evidence was produced by the respondent/plaintiff**”.

7. The observation of the trial Court that “*there was nothing in rebuttal to the oral as well as documentary evidence produced by the Plaintiff*” was 100% contrary to record. I have also examined the R&P and find that learned trial Court has decreed the suit without even examining the Plaintiff/respondent on oath and the originals of the said documents were never filed by the Respondent/Plaintiff with the plaint or his affidavit in *exparte* proof. The evidence is defined by **Article 2(c)** of the **Qanun-e-Shahdat Order, 1984**. It is reproduced below:-

“**Evidence**” means and includes—

- (1) All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence;
- (2) All documents produced for the inspection of the Court; such documents are called documentary evidence;

The evidence is produced by making a statement on oath by the Plaintiff before the Court and it is called examination-in-chief of the witness. Such statement is subject to cross-examination, if any, once the cross examination is completed or declared nil for whatever reason, the statement so recorded by the Court becomes oral evidence. The documentary evidence is produced by deliver of documents to the Court during examination-in-chief and even cross examination and marked as exhibits by the Court before taking on record for consideration as proof in support or against either party. Mere filing of an *exparte* proof by an affidavit is not production of evidence.

Admittedly none of the documents available on the Court file were produced by the respondent/plaintiff with oral evidence. Only photocopies were filed with the plaintiff and the two Courts by treating the photocopies of documents as evidence in favour of the Plaintiff acted in derogation of **Section 70 & 72** of the Qanun-e-Shahdat, Order, 1984, whereby photocopies are not supposed to be admissible in evidence. The trial Court did not ask the Plaintiff to even place on record original of the same. When confronted with the situation that it was a case of no evidence the learned counsel for the respondent sought time and the case was adjourned to **21.12.2015 at 8:30 a.m**” in the hope that originals will be shown at least to this Court. Therefore, after hearing the learned counsel on **21.12.2015**, the following orders were passed:-

21.12.2015

Arguments heard. Reserved for Judgment. The Respondent No.1, present in Court, is directed to produce original Sale Deed and if he gets certified copy he should also produce photo copy of the original which is available with him. He is also directed to produce original Permanent Transfer Order. Let the same be produced on or before **05.01.2016** and after examining the original / photo copy of Sale Deed order will be passed on merits.

8. The Respondent in compliance of the order reproduced above appeared on **04.1.2016** and showed his inability to produce even true certified copy or photocopy of the sale deed from his own record in respect of suit Plot No. 2/A showing an area of **14105** sq. feet situated in Ghullamullah Town, Taluka Mirpur-Sakro, District Thatta. However, he has placed on record a certificate issued by Sub-Registrar Thatta dated **30.11.2015** showing that the record were burnt on **02.01.2008** and therefore no certified copy or verification of documents of suit plot could be issued by the said office. It is pertinent to mention here that the suit was filed on **15.3.1987** and affidavit in exparte proof was filed on **16.4.1988** and by that time record was intact in the office of the sub-Registrar Thatta and original sale-deed and PTO issued by the Settlement Commissioner Sindh were supposed to be in possession of the Respondent/Plaintiff. The Plaintiff has not filed original of any of the documents mentioned in the plaint, namely:-

- (i) sale deed No.156 dated 1.6.1980 which was supposed to be the basic document in support of his claim

- (ii) certificate of verification of index No. II available in the office of Sub- Registrar Thatta 1972 to 1982;
- (iii) another certificate said to have been issued by Chairman Union Council Ghulamullah Town Taluka Mirpur-Sakro, District Thatta,
- (iv) Original of the so called sketch,
- (v) hand written letter of Mukhtairkar dated **15.7.1986**,
- (vi) Original of the order of Deputy Commissioner dated **08.3.1987** sought to be declared null and void and without jurisdiction.

The Respondent/Plaintiff not only failed to file originals of above documents, he has suppressed/concealed the two very important documents which were available with him. These documents were:-

1. Permanent Transfer Order dated **30.12.1966** in favour of Ali Muhammad.
2. Letters of Deputy Settlement Commissioner dated 28.11.1984 addressed to Respondent/Plaintiff confirming the area of suit plot mentioned in PTO and rejecting the request of Respondent.

9. The record shows that the documents which were concealed by the respondent were placed on record by the Deputy Commissioner with his counter affidavit to the application under order XXXIX Rule 1 & 2 CPC by way of objection. It was specifically pointed out in the said objections that the Deputy Settlement Commissioner Thatta by letter dated **24.11.1984** has already informed the Respondent / Plaintiff that actual area transferred to the first allottee namely Ali Muhammad from whom the Plaintiff had purchased the plot was measuring only **1410 sq. feet** and not **14105 sq.feet**, copy of the Original Transfer Order was also filed with counter affidavit / objection. Therefore, the Plaintiff at least alongwith his affidavit-in-evidence should have filed original PTO obtained by him from the previous owner to confirm that the original allottee Ali Muhammad has acquired an area **14105 sq.ft.** The Plaintiff has not filed the original or even photocopy of the permanent transfer order (PTO) issued by the Settlement Commissioner in favour of Ali Muhammad from whom he has purchased the suit plot. He has not even

mentioned in his plaint about the existence of PTO issued by the Settlement Department to the original allottee.

10. The contention of learned counsel for the respondent that no evidence was required is contrary to the record since the plaintiff was directed to file affidavit-in-exparte proof. It is not legally tenable either, since the Court even in exercise of powers under **Order VIII Rule 10 CPC** is not supposed to be oblivion of its duty to examine the correctness, veracity and truth of the claim of the plaintiff set out in the plaint. It is not necessary that the judgment should always be in favour of plaintiff in an arbitrary manner in case of default by the defendants. It is the settled principle of law that the parties approaching to the Court should succeed on the merits of their own case and not on account of weaknesses of other side. The requirement of evidence cannot be ignored by the Courts in the name of pronouncing the judgment under Order VIII Rule 10 CPC. To sum-up the discussion on the judicial obligation on Courts and the requirements of a judgment even in terms of Order 8 Rule 10 CPC, I rely on the observations of superior Courts in the following three case laws:-

(i) In the case of Nisar Ahmed and others v. Habib Bank Ltd. (**1980 CLC 981**) the Lahore High Court held that:-

“The provision of striking off defence requires greater care on the part of a Court, as it shuts out one party to defend itself and point out defects in the case of the other party, leaving the Court virtually at the mercy of the latter to do justice between the two parties. In the present case, after striking out the defence of the Defendants-appellants, the learned trial Court purported to act under Order VIII, Rule 10 and decreed the suit of the Plaintiff-Bank. No doubt, the later provision allows that when one party fails to file written statement after having been required to do so, **the Court may pronounce judgment against him but the important point to note is that the Court may pronounce “judgment”, and judgment does not mean decreeing the suit ipsi dixit without any proof whatsoever**”.

(ii) In the case of Haji Muhammad Moosa and another v. Provincial Government of Baluchistan (**1986 CLC 2951**) the Balochistan High Court observed that:-

“It may be seen that in the event of Defendant’s failure to file written statement within specified time the trial Court enjoys jurisdiction either to pronounce judgment or to make such order as it deems fit. In this matter it appears that trial Court was inclined to pronounce judgment. But factually no comments on the merits of the case were at all made. Evidently without giving any reasoning or even indicating application of mind the suit has been decreed. Word “decree” has been defined in Section 2(2) of Civil Procedure Code, whereas procedure for passing judgment is explained in Order XX of C.P.C. Obviously for a proper judgment and decree **there**

has to be formal expression of the Court conclusively determining matter in controversy which should be essentially based on sound judicial grounds in the light of available record”.

(iii) In the case of *Malik Muhammad Saeed v. Mian Muhammad Sadiq* (1985 MLD 1440), the Lahore High Court observed as follows:

“15. After giving our anxious consideration to the matter in the above light, we are of the opinion that it is inherent in the very process of dispensation of justice that the judicial conscience of the Court must be satisfied about the genuineness of the case set by the Plaintiff approaching the Civil Court in the proceedings for discovery of truth and in order to obviate chances of unscrupulous litigants getting away with ill merited judgments or decrees which would amount to negation of justice and defeat the very purpose of law. **It follows that a judgment that is based on no evidence whatsoever on the merits of the case would be illegal. It cannot also be overlooked that there are no words to be found in Order VIII, Rule 10 C.P.C doing away with absolute requirement of the Evidence Act.**

11. The other equally important legal aspect of this case which both the Courts below have failed to appreciate is that the suit was filed against the Deputy Commissioner, Thatta and Mukhtiarkar Mirpur Sakro without impleading the Government of Sindh. Both the Defendants were government functionaries and not the Government by themselves. They were acting/discharging their respective duties for and on behalf of the Provincial Government. The suit should have been dismissed by the trial Court on account of non-compliance of mandatory provision of **Section 79** of CPC. In this context, I am fortified with the following two judgments of Hon’ble Supreme Court reported

- (1) *Divisional Forest Officer, Afforestation Division, Sanghar at Khipro v. Khan through Legal Heirs and 10 others* (2008 SCMR 442)
- (2) *Government of Balochistan, CWPP&H Department and others v. Nawabzada Mir Tariq Hussain Khan Magsi and others* (2010 SCMR 115).

In the first case a Division Forest Officer has instituted a suit for declaration and permanent injunction. It was contested upto Supreme Court and the Hon’ble Supreme Court maintained the order of dismissal the suit in view of the provisions of **Section 79** of CPC. In the second case, like the present case a private party has instituted a suit against the government functionaries without impleading Provincial Government of Balochistan. In the cited case also the suit was decreed and the Civil

Revision against the decree was also dismissed. The Supreme Court relying on the earlier judgments titled Province of Punjab v. Muhammad Hussain (PLD 1993 SC 147) and Haji Abdul Aziz v. Government of Balochistan through Deputy Commissioner, Khuzdar (1999 SCMR 16) set aside the concurrent finding of two Courts below and dismissed the suit as not maintainable. The relevant portion from the judgment in para 3, 4 & 5 are reproduced below.

3. A bare perusal of the leave granting order, as reproduced hereinabove, would reveal that it was mainly granted to consider as to whether the suit was instituted properly pursuant to the provisions as enumerated in Article 174 of the Constitution of Islamic Republic of Pakistan, 1973 (hereinafter referred to as the Constitution) and section 79, C.P.C as admittedly the Government of Balochistan was not impleaded as party through the Secretary concerned. The question which needs determination would be as to whether without impleading the Provincial Government of Balochistan, the suit instituted by the respondents can be considered a validly instituted suit in view of the provisions as enumerated in section 79, C.P.C. which is reproduced hereinbelow for ready reference:-

“79. Suits by or against the Government.--- In a suit by or against the Government the authority to be named as Plaintiff or Defendant, as the case may be, shall be---

- (a) in the case of a suit by or against the Federal Government, Pakistan;
- (b) in the case of a suit by or against the Provincial Government, the Province;

4. The above reproduced section has been couched in a simple and plain language and there is hardly any need for its scholarly interpretation and it simply provides that a suit instituted against the Government, the authority to be named as Defendant would be the Federal Government of Pakistan or Province concerned as the case may be. No suit can be filed against Provincial Government without impleading the Province as a party and the procedural precondition is mandatory in nature and no relief can be sought without its strict compliance and such suit would not be maintainable. The provisions as enumerated in section 79, C.P.C. were discussed in case titled Province of Punjab v. Muhammad Hussain PLD 1993 SC 147, relevant portion whereof is reproduced hereinbelow for ready reference.---

“Section 79 of the C.P.C requires, and so does Article 174 of the Constitution, that all suits against the Central Government have to be filed in the name of Pakistan and against a Provincial Government in the name of Province.”

5. A similar proposition was also discussed in case title Abdul Aziz v. Government of Balochistan 1999 SCMR 16 and it was observed as follows:-

“It, no doubt, follows from the said observations that the learned Judge in Chambers could have taken notice of the fact that the

appeal in the present case had been entertained by the Appellate Court in spite of being barred by 55 days, but it appears that the learned Judge found it necessary to address himself to a more important question as it transpired that the Plaintiff had failed to comply with the provisions of section 79, C.P.C., or Article 174 of the Constitution, both of which require that in a suit filed against the Government, the authority to be named as a Defendant is to be the Province. Since the suit was filed in the present case against the Provincial Government, the Province could be sued through the Secretary to the Government. Obviously, there had been no compliance with the said provisions when the suit was initially filed by the appellant. Unless suit is filed through a proper person, any order directing ex parte proceedings against the Defendant would be liable to challenge. Reference in this regard may be made to a judgment of this Court in *Province of the Punjab v. Muhammad Hussain* PLD 1993 SC 147, our attention to which has been invited by the learned counsel for the appellant himself. In this case, questions raised before this Court for the first time in regard to maintainability of the suit, its valuation or its being within time, which had not received due attention earlier by the Courts below were set aside and the suit filed by the Plaintiffs was dismissed as barred by limitation. Therefore, there is no doubt that the learned Judge in the High Court, while exercising revisional jurisdiction, as empowered to take notice of the defects which were apparent on the face of the record. The failure of the appellant to sue through a proper person was a defect which went to the root of the matter and, but for interference by the High Court, serious prejudice would have been caused to the respondent. Therefore, in our view, the order passed by the learned Judge in Chambers is not open to exception.

12. Yet another legal aspect of this case was that the Plaintiff has challenged an order of the Deputy Commissioner regarding the boundaries of suit plot to be maintained by the revenue authorities. The plaintiff has attempted to seek amendment in the boundaries of suit plot in the revenue record originating from record available in the office of the Settlement Commissioner Sindh and its incorporation / rectification in the office of Mukhtarkar, Taluka Mirpur Sakro, District Thatta. Such record is maintained by the Revenue Authorities in accordance with the Land Revenue Act, 1967 and the suit in the dispute of boundaries of land was barred under **Section 172** of the Land Revenue Act, 1967 as the civil Courts have no jurisdiction in the matters within the jurisdiction of Revenue Authorities. The relevant provisions of **sub Section 2 of Section 172** of Land Revenue Act, 1967 are reproduced below:-

“(2) Without prejudice to the generality of the provisions of subsection (1), a Civil Court shall not exercise jurisdiction over any of the following matters namely;

- (i) to (v)
- (vi) the correction of any entry in a Record of Rights, periodical record or register of mutations;”
- (vii) to (xii)
- (xiii) the formation of an estate or determination of its boundaries;
- (xiv) to (xix)
- (xx) any question connection with or arising out of or relating to any proceedings for the determination of boundaries of estate subject to river action under the provisions of this Act;
- (xxi) any claim regarding boundaries fixed under any of the enactments hereby repealed or any other law for the time being in force, or to set aside any order passed by a competent officer under any such law with regard to boundary marks.

Beside the above provisions barring the jurisdiction of Civil Court, the order of Deputy Commissioner dated **8.3.1987** impugned in suit was an appealable order under **Section 161** of the Land Revenue Act, 1967, since it relates to the boundaries of plot No.2/A situated in Ghulamullah Town, Taluka Mirpur Sakro, Thatta, in the revenue record. When the remedy of appeal is available under an special law, the jurisdiction of Civil Court cannot be invoked without exhausting the remedies provided in the statute itself.

13. The legal and factual aspects discussed above clearly suggest that both the Courts below have miserably failed to apply their judicial mind to the judicial requirements of law for exercising powers conferred on the Civil Courts to decide the controversies between the parties. In the case in hand, both the Courts below failed to appreciate that the suit was barred by law discussed above and on merit the plaintiff / respondents has not adduced evidence in accordance with law in support of his claim before the trial Court. The plaintiff did not even lead any oral evidence under oath in support of his claim as he never appeared in the witness box. It was a case of no evidence. The Respondent/Plaintiff has relied on the documents issued from the public functionaries and yet the Respondent/Plaintiff did not call or produce any public functionaries in the witness box to confirm the so-called documents and verify contents thereof filed by him with the plaint. Even the Chairman, Union

Council, who otherwise has no role in determining the area of land and yet he has issued a certificate, did not appear to confirm that he has issued any certificate in respect of the suit plot.

14. The crux of the above discussion is that both the Courts below have failed to exercise jurisdiction vested in them in accordance with law. Consequently the impugned judgments and decrees of the Courts below are set aside and the suit filed by the respondent is dismissed.

Karachi
Dated: _____

J U D G E

SM