

ORDER SHEET
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT HYDERABAD

R.A No.111 of 1999

Date of Hearing : 30.11.2018

Applicant : Muhammad Sharif through
Mr. Abdul Jabbar Hashmani, Advocate

Respondent : Mian Sajjad Ahmed through
Mr. Hanif Arain, Advocate who is called absent.

Law under discussion:

- (1) Transfer of Property Act, 1882
- (2) Registration Act, 1908
- (3) Civil Procedure Code, 1908 (CPC)
- (4) Sindh Land Revenue Act, 1967.

Case law cited by the Applicants' Counsel

- (1) Abdul Latif v. Punjab Province and others (1995 CLC 408)
- (2) Muhammad Arif v. Rahim Khan and others (K.L.R. 1994 Civil Cases 573)
- (3) Javed Raza v. Razi Ahmed and another (K.L.R. 1991 Labour & Service Cases 280)
- (4) Syed Bahadar Ali Shah v. Syed Maryam Gillani etc (K.L.R. 1992 Civil Cases 147).

Case law relied upon by the Respondent's Advocate

Other Precedents:

- (1) Zulfiqar Ali Mubashar v. Muhammad Mumtaz Alam (PLD 2013 Sindh 327)
- (2) (M/s. Al-Badar Timber and another v. United Bank of Pakistan Ltd, and others) 1996 CLC 73
- (3) Haji Muhammad Younis v. Mst. Jameela (1994 CLC 151 (Karachi).

ORDER

MUHAMMAD FAISAL KAMAL ALAM, J.- The Applicant through this Revision Application, has challenged the Orders dated 21.4.1999 passed in Civil Appeal No. 06 of 1998 which was preferred against the Order dated 28.8.1998 passed by the learned Trial Court in F.C. Suit No. 05 of 1994 (New No.07 of 1995), dismissing the Application filed by the present Applicant against the ex-parte Judgment and Decree in the above Suit, instituted by the present Respondent. The Applicant has prayed that both the above impugned decisions / Orders be set-aside.

2. On 30.11.2018, the matter was heard at length and the following short Order was passed allowing the instant Revision Petition:

“ No one is present on behalf of the Respondent. The learned Counsel for the Applicant has seriously objected to the absence of the Respondent’s side and referred to earlier Court diaries. On 19.04.2018, no one was present on behalf of the Respondent but the Applicant’s Counsel was present. On 09.04.2018, the adjournment was granted by consent of both the parties but yet no one on behalf of the Respondent was in attendance on the next date. On 13.03.2018 only Applicant’s side was present but none from the Respondent. Today, the learned Counsel for the Applicant has concluded his arguments.

The question involved in the present matter is that of a Property admittedly owned by the present Applicant. On 03.06.1999, this Court suspended the operation of the impugned judgments till the decision of the present Revision Application and restrained the Respondents from alienating and transferring the subject Property.

Admittedly, the present Applicant (Muhammad Sharif) is the owner of an Agricultural Land, falling in Survey Nos.197/2,3; 196/1, 344 and 188/3, 11, admeasuring 20-00 acres and 30 ghuntas, situated in Deh Langhi, Taluka Samaro, which is called as Suit Property. The Respondents filed a suit for foreclosure and redemption before the Court below (plaint is at Page-21 of the Court file) and obtained the exparte judgment and decree, which was challenged by the present Applicant by filing an application under Order IX Rule 13 CPC, which was also dismissed for the grounds mentioned in the impugned order dated 28.08.1998, which was though challenged in Appeal but without any success. The decision is given on the basis of a Mortgage Deed (purportedly), which the present Applicant denies to have executed. Original document has been submitted by the Respondent’s side in this Revision and on its examination, the mortgage deed appears to be a non-registered document. Learned Counsel for the Applicant has questioned the impugned decision on a further ground that in terms of Order 34, Rule 2 of CPC, relating to Mortgage Decrees, the preliminary decree should have been passed, which admittedly was not passed in the present matter.

Similarly, Section 42 of the Land Revenue Act was also not complied with.

Both the Courts below failed to appreciate that the above mortgage deed is not a registered document. It is an established principle of law that even while passing an ex parte decision, claim of Plaintiff is to be evaluated and judicial mind is to be applied to the facts of the case and relief claimed.

The Appellate Court has decided the matter without framing Points for Determination as required under Order 41, Rule 31 of CPC. The detailed reasons will be followed but in view of the short discussion hereinabove, this Revision Application is allowed. Both the judgments are set-aside and the case is remanded to the learned Trial Court for deciding the same afresh after giving opportunity to the present Applicant, who is Defendant in Suit No.07 of 1995, to contest the same.”

3. The relevant undisputed facts for deciding the present Revision Application is that the controversy relates to an agricultural property falling in Survey Nos. 197/2,3; 196/1,3,4 and 188/3 and 11, admeasuring 20-13 Acres, situated in Deh Langhi Taluka Samaro, owned by the present Applicant

4. The above mentioned suit for foreclosure of above suit property was instituted by the present Respondent (Mian Sajid Ahmed) on the basis of a Mortgage Deed, exhibit (Ex.23) dated 9.3.1993, claimed to have been executed by the present Applicant, though the latter vehemently disputes this position.

5. The learned Trial Court passed the ex-parte Judgment dated 11.4.1995, Annexure `F` with the present Revision Petition which comprises of only two pages; consequently, the Suit of the present Respondent was decreed as prayed, because the present Applicant did not contest the same, despite service of notice. It is relevant to reproduce the prayer clause of the Suit which is also mentioned in the above ex-parte judgment_

- “ i. That this honourable Court may be pleased to fore-close the suit land.*
- ii. That this honourable Court may be pleased to declare the plaintiff as owner of the suit property on the basis of terms and conditions of mortgage deed which 3 months of mortgage expired and defendant is no more owner of the suit property.*
- iii. That this Hon’ble Court may be pleased to grant Permanent injunction against defendant prohibiting and restraining him from forcibly dispossessing the plaintiff from the suit land by himself or through his agents, servants, or any other agency whosoever in any manner.*
- iv. Cost of the suit be borne by the defendant.*

v. *Any other relief this Hon'ble Court deem fit and proper may be awarded to the plaintiff."*

6. Mr. Abdul Jabbar Hashmani, learned counsel for the present Applicant has challenged both the impugned Judgments (aforementioned) on number of grounds, which have already been mentioned in the aforesaid short Order dated 30.11.2018, reproduced in the preceding paragraphs.

7. The Respondent has preferred his Objections to the present Civil Revision Application on 20.1.2013, that is, four (4) years after filing of this Revision Application. Obviously, the Respondent side has defended both the impugned decisions and reiterated their stance that since the present Applicant deliberately did not contest the Civil Suit below; therefore, the ex-parte decision has been given in accordance with law. The objection of Respondent has also stated that the Application preferred by the Applicant under Order IX Rule 13 of CPC, for setting aside the ex-parte Judgment and Decree, was hopelessly time barred as it was preferred after almost two years, for which the present Applicant could not give any plausible reason. The Respondent side has taken the stance (in his Objections) that after publication of Court Notice in Sindhi Newspaper `Ibrat` all the modes of service of notice were exhausted and there was no justification for the present Applicant to remain absent.

8. Arguments heard, and the record has been considered.

9. The learned Trial Court has passed the impugned Judgment dated 11.4.1995 followed by the decree of the same date. The entire claim of the private Respondent (herein) has been admitted, which means, that besides foreclosing the suit land without passing the preliminary decree as enjoined by Rule 2 of Order XXXIV of CPC, straight away the decree was passed, coupled with a declaration that the above property vests in the Respondent as owner.

10. The Application for setting aside of ex parte decree was filed on 26.7.1997 and in paragraph-3 whereof it has been specifically pleaded by the present Applicant that he came to know about the decree fifteen (15) days back (from the time of filing of the above Application), when he visited the Revenue Officials for the purpose to dispose of the subject property. It has been specifically averred in paragraph-4 (of the Application under Order IX, Rule 13 of CPC), that the court's summons were never served upon the present Applicant and the service made through publication in daily `Ibrat` in its issue of 23.7.1994, was not a proper service because the newspaper is in Sindhi language, whereas, the Applicant

(herein) does not know Sindhi language but only conversant with Urdu and Punjabi languages. In the aforesaid Application the present Appellant has taken the specific objection with regard to maintainability of the afore-referred Suit (instituted by the Respondent), while further mentioning that possession of the land has always remained with present Applicant. In paragraph-8 of the Application the factum of mortgaging the subject property has been categorically disputed.

11. The said Application was contested by the Respondent before the Trial Court while reiterating that in fact the present Applicant had executed the mortgage deed in question which has been produced in the evidence by the Respondent as exhibit (Ex.23) and original whereof has also been produced by the Respondent with his Objection in the present proceeding. The present Applicant has filed affidavit in rejoinder (before the Trial Court) to the Counter Affidavit and reiterated his stance which he has taken in the above Application. The learned Trial Court after hearing the parties passed the Order dated 28.8.1998, rejecting the Application filed by present Appellant under order IX Rule 13 of CPC. The reasons weighed with the learned Trial Court was that Service through publication was properly affected and therefore there was no justification to set aside the ex parte judgment and decree. It has been further held that the Application under order IX Rule 13 was time barred as it was preferred after 27 months from the date of passing of the ex parte judgment and decree.

12. The above Order was challenged in Appeal by the present Applicant but without any success. The impugned judgment dated 21.4.1999 handed down by the learned Appellate Court (below) has been produced in the present proceeding as Annexure `L` (passed in Civil Miscellaneous Appeal No. 6 of 1998).

Scrutiny of the Judgment of the Appellate Court leads to the conclusion that the learned Appellate Court also did not consider one of the basic objections of the present Applicant about the maintainability of the Suit and the factum of the mortgage deed, which admittedly is an unregistered document. The learned Appellate Court dismissed the Appeal and maintained the impugned judgment of the learned Trial Court, primarily for the reason that after publication of Court Notice in the Newspaper, the service was properly affected and since the present Applicant did not contest the matter which resulted in passing of the impugned ex parte judgment and decree, which though was challenged by way of Application under Order IX Rule 13 of CPC, but the same was preferred after more than 2 years; hence time barred, thus, the Order dated 28.8.1998, of the learned Trial Court

is unexceptionable. Interestingly the learned Appellate Court has made an observation with regard to a careless litigant in comparison with a vigilant and careful litigant, but at the same time, both the Courts below completely failed to appreciate that even if a matter is proceeding ex parte, it is the obligation of a Court to see that whether or not the claimant / plaintiff, in the instant case, the present Respondent, is entitled to any relief or remedy or not.

13. Admittedly, the present Respondent brought the above suit for foreclosure and it was mandatory that a preliminary decree is to be passed. There is complete procedure given in Rules 2 and 4 of Order XXXIV of CPC which has a reason and logic; that, when a preliminary decree is passed and an exact amount is determined which is payable by the mortgagor (purportedly the appellant) to the mortgagee (purportedly the Respondent), then a six (6) months period is further provided to settle or pay off that amount before the Suit is finally decreed. If the amount so determined by the Court is paid by the mortgagor / defendant to the plaintiff / mortgagee then the latter (plaintiff / mortgagee) shall re-transfer the mortgaged property to the defendant mortgagor in terms of aforesaid Rule 2 of Order XXXIV. Under sub-rule 2 of Rule 2 (ibid), the Court in its discretion may extend the time for payment of the amount. Once this process is completed only *then*, the Court can pass a final decree in foreclosure suit, debarring the defendant / mortgagor from all rights to redeem the mortgaged property. Undisputedly, this mandatory procedure was never adopted by the learned Trial Court and was completely overlooked by the learned Appellate Court. The logic for following the above procedure is that the debtor / mortgagor should be given a fair chance to settle the liability and redeem (get back) his / her mortgaged property. One of the objects of the above provision is to create a balance in the transaction between the creditor and debtor. The effect of the impugned decisions handed down by the Courts below is that the above balance in transaction created by the legislature has been done away with, to the utmost disadvantage of the present Applicant, who is even categorically disputing the execution of purported mortgage deed.

Secondly, the purported mortgage deed on the basis of which the above Suit was filed is **undisputedly not a registered document**. A mortgage is defined under Section 58 of the Transfer of Property Act as transfer of interest in the property, whereas, Section 60 gives a right to the mortgagor to redeem his mortgaged property. If these provisions are read with aforementioned Rules 2 and 4 of Order XXXIV, it becomes very apparent that the object of the Statute is that a fair

opportunity must be given to the mortgagor for redeeming his mortgaged property after settlement of amount or his liability towards the mortgagee.

Thirdly, under Section 17 of the Registration Act, the mortgaged deed (purported) was required to be compulsorily registered but admittedly it was not therefore Section 49 of the Registration Act will be applicable to the facts of present case. The effect of such non-registration is that no right or interest was created in favour of present Respondent in respect of subject property.

Fourthly, transaction of the nature, if at all it was made in accordance with law, should have been intimated to the concerned Mukhtiarkar for making a necessary endorsement / entry in the record of rights, in terms of Section 42 of the Sindh Land Revenue Act, 1967, but, it was not done; entailing the requisite consequence.

Fifthly, no evidence was produced by the present Respondent (plaintiff of the above-mentioned Suit) regarding his possession or making investment, as claimed. The document with a description `Deh Jo Form IX`, which is one of the basis of Respondent's claim, only states that Rs.500 was paid on behalf of Muhammad Sharif son of Fateh Muhammad, that is the present Applicant. No evidence has been brought on record in support of the claim of Respondent.

Sixthly, the case law cited (supra) by the learned counsel for the Applicant has been considered; gist of which is that where the circumstances warrant, the limitation be condoned while deciding Application for setting aside exparte decree, and a party be given an opportunity to participate in the proceedings, in particular, where an opposite party has sought a declaratory relief.

14. The above view has been supported by number of judicial pronouncements, which are mentioned under the heading 'Other Precedents' in the opening part of this decision, crux of which is that a preliminary decree has to be passed and the procedure given under Rules 2 and 4 of the Order XXXIV of CPC should be followed; similarly, a mortgage deed of the nature is compulsorily registerable, failing which such instrument lacks legal sanctity.

15. To conclude, both the impugned decisions / Orders handed down by the learned Appellate and Trial Courts dated 21.4.1999 and 28.8.1998, respectively, as well as the exparte Judgment and Decree dated 11.4.1995, are to be set at naught because these decisions are illegal, suffers from material irregularity and the Courts below have miserably failed to exercise jurisdiction vested in them in a judicious

and proper manner, as the above mentioned decisions are given in violation of mandatory provisions of law. Similarly, if the exparte Judgment and Decree dated 11.4.1995 remains intact then it would be an abuse of process of Court and a miscarriage of justice.

16. For the above reasons the present Revision was granted by a short Order dated 30.11.2018 and the above are the detailed reasons. Consequently, both the impugned Orders and the ex parte judgment and decree dated 11.4.1995 are set-aside, being contrary to law, as well as, principle laid down in the aforementioned judicial pronouncements. The learned Trial Court will decide the matter afresh after giving opportunity to the present Applicant to contest the matter by way of filing written statement. The learned Trial Court will first decide the maintainability of the Suit. It is also necessary to observe that since the litigation is a very old one, therefore, no unnecessary adjournments will be granted and the learned Trial Court will decide the matter within four (4) months from the date of receipt of this Order.

17. It is further clarified that the interim order passed in favour of present Applicant in respect of the subject property on 3.6.1999 is confirmed and is hereby merged in this final decision.

18. Parties to bear their respective costs.

JUDGE