

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR
Civil R.A.No.S- 142 of 2010

Date of hearing	Order With Signature Of Judge.
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- 1.For hearing of CMA 486-2010.
- 2.For hearing of main case.

Mr. Mohammad Nawaz Soomro Advocate for applicant.
Syed Jaffar Ali Shah Advocate for respondent.

Date of Hearing: 05-09-2018.
Date of Judgment: 14-09-2018.

J U D G M E N T

NAZAR AKBAR J., The applicant/plaintiff has filed instant Civil Revision Application against the concurrent findings of dismissal of suit No.21 of 1999 (New No.366 of 2006) by the trial court and his appeal No.42 of 2010 by the court of 2nd Additional District Judge, Khrairpur.

2. The brief facts relevant for disposal of the instant civil Revision Application are that the applicant/plaintiff filed a suit for declaration and possession of Sikni plot measuring 29 x 5 (145 sq.ft) having been purchased from Mir Abid Raza son of Mir Ghulam Raza Talpur in the sum of Rs. 7250/- through sale agreement dated **09.05.1992**. He averred that the respondent/defendant is quarreling type person and he forcibly occupied the suit plot by dispossessing the plaintiff about **three months back** and raised the walls and amalgamated the plot with his own plot without any right and title, hence applicant filed suit for declaration, possession and consequential relief of permanent injunction.

3. The Respondent/defendant contested the suit by filing written statement, wherein he alleged that his brother Nazar Hussain had purchased

a plot measuring 3800 sq.ft from Mir Abid Raza on payment of Rs.2000/- in the year 1976.

4. Learned trial court from the pleadings of the parties framed the following issues:

1. Whether the suit is not maintainable according to law?.
2. Who is owner of the suit plot?.
3. Whether the defendant has forcibly and illegally occupied the suit plot by dispossessing the plaintiff?.
4. Whether the plaintiff is entitled to the relief claimed?.
5. What should the decree be?.

The plaintiff led his evidence by examining himself at Exh.14, he produced agreement of sale at Exh.15. He also examined three witnesses namely (1) Muhammad Ramzan PW-2 at Exh.16, (2) Abid Ali PW-3 at Exh.17 and (3) Mir Abid Raza PW-4 at Exh.20. The witnesses were not cross examined and initially their cross was treated Nil. The applicant closed his side for evidence in **February, 2001**.

5. The plaintiff during pendency of suit on **4.5.2002** filed an statement/application for withdrawing prayer clause No1. It is reproduced as under:

“It is submitted that Plaintiff withdraw the relief of Declaration as made in para No.11(i) of the suit and his suit be treated as under section 9 of the Specific Relief Act as mentioned in Para No.5 of the suit that Plaintiff has been dispossessed forcibly and illegally within six months from the disputed plot, of filing of the suit”.

On **17.5.2002**, the respondent/defendant has received copy of above application, but the respondent did not file objections therefore, the learned trial court has been pleased to pass the following order:-

“The other side has not filed objections. Sufficient time given. Application therefore allowed, as prayed”.

Then after about 8 years in 2009 applicant's witnesses were re-called for cross examination in 2009 and they were cross examined. Thereafter, the defendant/respondent led his evidence. He examined himself as DW-1 at Exh.70 and only one witness, namely, Abdul Latif as DW-2 at Exh.71.

6. The trial court after hearing the learned counsel for the parties by judgment and decree dated 21.01.2010 and 27.01.2010 respectively dismissed Civil Suit No. 21 of 1999 (new No. 366 of 2006) holding that both the parties have no valid documents of suit property and, therefore, the suit is not maintainable. The plaintiff challenged the said judgment and decree through Civil Appeal No.42 of 2010 and the learned Appellate Court after notice to the respondent and hearing the parties framed the following points for determination in appeal:

- i. Whether the respondent/defendant is in illegal occupation of the plot claimed by the appellant/plaintiff?.
- ii. Whether the suit is not maintainable.
- iii. What should the decree be?.

The learned appellate court after hearing the learned counsel appearing for the parties answered both the points in affirmative and dismissed the appeal and maintained the judgment and decree of the trial court. Thereafter, the applicant has preferred the instant Civil Revision Application against the findings of the two courts below only on the issue of maintainability of the suit and his entitlement for restoration of possession under **Section 9** of the SRA, 1877 and the other issues were decided against the respondent.

7. This civil revision was admitted for regular hearing on **16.09.2010** for consideration of the following ground:-

“During pendency of suit prayer with regard to declaration was withdrawn and suit proceeded but trial court as well as appellate court did not appreciate that it was suit under section 9 of the Specific Relief Act, in which court has to consider forcible dispossession within a period of six months.”

8. I have heard learned counsel for the applicant as well as respondent and have thoroughly examined the record and proceedings of civil suit as well as appellate court. Respondent has not filed any counter-affidavit to the instant Revision Application and record shows that even in the appellate court the respondent has not filed any objections to the memo of civil appeal No. 42 of 2010.

9. Learned counsel for applicant has contended that while deciding question of maintainability of suit, both courts below have failed to apply judicial mind to the provisions of **section 9** of the Specific Relief Act, 1877 (hereinafter SRA, 1877). He further contended that learned appellate court on the basis of evidence produced by plaintiff has held that the respondent is in illegal occupation of the suit property as the respondent/defendant has failed to justify his possession over the suit property. He further contended that the trial court while deciding issue No.2 had held that parties have no valid title documents of the suit property, yet both courts below dismissed the suit as not maintainable as the courts were required to pass a decree of declaration under **Section 42** SRA, 1877. Both the courts below failed to appreciate that the plaintiff was seeking re-possession of the suit property under **section 9** of the SRA, 1877 and the prayer for declaration of title has already been withdrawn. He further contended that possession of the plaintiff over suit property has been established through direct evidence since the admitted owner of the suit property namely Mir Abid Raza (PW 4) in his evidence had stated on oath that he had put the applicant/plaintiff

in possession when he sold the suit property through a written agreement of sale to the applicant. Two other witnesses namely Muhammad Ramzan and Abid Ali, who appeared in court as witness on **19.02.2001**, have categorically stated on oath that possession of the defendant over suit property is illegal and defendant has forcibly occupied the suit plot later on. Such statements on oath have not been shaken in the cross-examination which took place after almost nine years on **28.09,2009**, when the witnesses were recalled for the purpose of cross-examination on the application of respondent whose counsel has failed to cross-examine the said witnesses in the year 2001. All the witnesses in cross-examination have denied the suggestion that plaintiff has never remained in possession of the suit property as well as suggestion that the defendant has purchased the suit property from Mir Abid Raza. Learned counsel for the applicant has contended that Mir Abid Raza has denied that he has sold the suit property to the respondent. He has further contended that direct evidence of forcible dispossession has come on record which has been totally ignored by the courts below only because courts below have failed to read the application filed by the plaintiff that suit be treated as suit for recovery of possession of suit property under **section 9** of the Specific Relief Act, 1877. It is reproduced for convenience:-

9. **Suit by person dispossessed by immovable property.—**

It any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit recover possession thereof notwithstanding any other title that may be set up in such suit.

Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

No suit under this section shall be brought against the Federal Government or any Provincial Government.

No appeal shall lie from any order or decree passed and instituted under this section, nor shall any review of any such order or decree be allowed.

He has referred to the impugned judgments of the two courts below in support of his contention that both the courts below have **not** referred to the application/statement available at page-81 of this Civil Revision and the order passed thereon that the suit shall be treated as a suit under **section 9** of the Specific Relief Act, 1877. The said application and order passed thereon is reproduced in para-5 of this judgment.

12. Learned counsel for the respondent/defendant in rebuttal has contended that the respondent is in possession of the suit property since 1976 and the applicant/plaintiff has not been able to prove possession. In support of his contention he relied on the averment of his written statement that his brother Nazar Hussain under an oral agreement has purchased the suit property. He has contended that trial court in the discussion on issues No.1&2 has observed that attesting marginal witnesses of sale agreement were not examined by the applicant and, therefore, sale agreement was not proved. The learned trial court has concluded that mere agreement of sale does not confer any right or title in the immovable property. Learned counsel for the respondent has contended that one of the witnesses has stated in cross examination that respondent is in possession since July, 1998 and the suit was filed in 1999 and, therefore, it was beyond six month time. He has further contended that subsequently the respondent has got the registered lease of suit property.

13. Regarding possession of the applicant, suffice it to note that the plaintiff has very elaborately described the suit property measuring 145 sq. ft. by showing it bounded by north, south, east and west and he was in possession of suit property. The defendant in his written statement has not

even alleged that there is any ambiguity in the description of the suit property rather he has claimed the same was orally purchased by defendant's brother in the year 1976 for consideration of Rs.2000/-. The applicant has filed suit for plot measuring 145 sq. ft. and the respondent claims that he has purchased 380 sq. ft. plot from the same seller/owner. Record shows that same seller/owner of the suit property Mir Abid Raza was produced by applicant as his witness No.4 on **19.2.2001** and he has categorically stated as under:-

“I see Exh.15 which bears my signature. I also delivered its possession to the plaintiff. The defendant forcibly occupied the suit plot later on”.

The above evidence has already demolished the case of the respondent/defendant and burden was shifted on him to prove his possession of the suit property prior to the date of dispossession alleged by the applicant in his plaint. The defendant has even failed to produce his own brother Nazar Hussain in support of his contention that his brother Nazar Hussain has purchased suit property in the year 1976 from Mir Abid Raza through an oral agreement. He has not been able to establish his claim even by producing any witness of oral agreement or payment of sale consideration to the owner/seller. The contention of respondent that plaintiff/applicant has not been able to prove his possession is contrary to record.

14. The other contention of learned counsel for the respondent/defendant that he has subsequently purchased suit property through registered sale deed is misconceived since it was not his case in the pleadings and he has not produced so-called registered sale deed in evidence to be rebutted by the applicant. In the written statement, he has not pleaded ownership of the suit property on the basis of registered sale deed nor he has assailed the finding of trial court on issue No.2 that “**he has no valid document**” as

well as finding of appellate court that “**he is in illegal occupation of suit property**” despite the fact that he has allegedly claimed registered document of a subsequent date. A plea not taken by a party in his pleading cannot be examined by the Revisional Court to set aside concurrent findings of facts. It is pertinent to mention that the finding of the trial court on issue No.2 that who is owner of the suit property was against both the parties. Finding No.2 in civil suit is as follows:

“In view of above discussion, I am of the humble opinion that the parties could not prove through valid and documentary evidence that who is owner of the suit property. Therefore issue No.2 is answered as not proved”.

The above finding of the trial court was also against the respondent/defendant since claim of the defendant in the written statement that his brother has purchased suit property from said Mir Abid Raza in the year 1976 through oral agreement was not accepted by the court. The respondent has not challenged the above findings of the trial Court which was directly against his claim in written statement. However, the suit was dismissed as not maintainable and, therefore, issue Nos. 3 and 4 were decided against applicant/plaintiff. The applicant has challenged the findings on maintainability and denial of consequential relief(s) in **Civil appeal No.42 of 2010**. Again the appellate court while deciding point No.1 held that the respondent/defendant is in illegal occupation of the suit property but appellate court also maintained the order of dismissal of suit on the issue of its maintainability. Then again the respondent has **not** challenged the finding of appellate court against him that he is in illegal occupation of the suit property. The plaintiff/applicant through the instant Revision Application challenged the findings of appellate court as well as trial court. The findings of the trial court and the appellate court that the respondent is

neither having valid title documents and that he is in illegal occupation of the suit property have attained finality. By an subsequently created documents the finding of court cannot be set aside. Nor a document which was withheld or not relied upon by the party can be a basis for setting aside concurrent finding of two courts.

15. In the given facts of the case, the trial court's finding to the effect that both the parties have failed to establish that who is owner is also contrary to the record and to some extent even law of Transfer of Property. The claim of the plaintiff that he has purchased the suit property through an agreement of sale has been admitted by the owner of the suit property when the owner appeared in the witness box and accepted the sale. However, it cannot be disputed that mere agreement of sale does not confer title on the buyer. There is difference between transfer of ownership which can be done under **section 54** of Transfer of Property Act, 1882 (TPA, 1882) and creation of a marketable title. One can still be lawful occupier of immovable property under a written agreement of sale without title document and such possession and ownership rights are protected under **Section 53A** of the Transfer of Property Act, 1882. It reads as follows:-

53-A. Part performance.—Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonably certainty,

and the transferee, has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has, performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the suit property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

16. The agreement of sale was proved since owner has admitted it. The civil suits are decided on the basis of preponderance of evidence. In the case in hand the evidence produced by the applicant/plaintiff in support of his claim of possession of the suit property since 1992 was confirmed by the owner of the suit property when on oath he stated that he had put the applicant in possession of the suit property in part performance of sale agreement. Two independent witnesses have also supported his version on oath. As against the evidence of plaintiff, the respondent/ defendant failed to establish his contrary claim agitated in his written statement that he has entered in the suit property in 1976 and it was purchased by his brother from the owner/seller of the suit property. Even brother did not support him. However, both the courts below have failed to appreciate that it was a suit for possession of immovable property by a person who was dispossessed without his consent and, therefore, the court was not supposed to examine the title of the suit property to maintain the suit. Mere dispossession without consent of aggrieved party was enough to maintain the suit under **section 9** of the Specific Relief Act, 1877.

17. In view of above facts it is established from the record that both the courts below have failed to appreciate evidence on record and provision of

section 9 of the Specific Relief Act, 1877 while dismissing the suit of the plaintiff as not maintainable. The inescapable conclusion of the above discussion as well as case laws relied upon by learned counsel for applicant is that this civil Revision Application is allowed and the impugned judgments of both the courts below are set-aside. The suit of the applicant/plaintiff is decreed to the extent that he was illegally dispossessed from the suit premises by the defendant and, therefore, respondent/defendant is directed to put the applicant in possession of suit property measuring 145 sq.ft as described in para-3 of the pliant. This exercise shall be done within 30 days from today and if the applicant is required to file execution on failure of the defendant to hand over possession of suit property within 30 days, the executing court on receiving Execution Application shall decide the same within a period of 03-months, as this case has already consumed almost 20-years, mostly on account of delaying tactics on the part of the respondent. The applicant is also entitled to the cost throughout.

JUDGE