

**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD**

CP No. D- 676 of 2009

Present:-

Mr. Justice Nadeem Akhtar

Mr. Justice Adnan-ul-Karim Memon

Date of hearing:

& decision:

29.10.2019

Petitioner:

Abdul Salam and others through Mr. Jhamat Jethanand, Advocate.

Respondents 1 to 3:

Jan Ali, Shan Ali and Mst. Shahana through Mr. Abdul Ghafoor Hakro, Advocate.

Respondent No.4:

Senior Member Board of Revenue through Mr. Allah Bachayo Soomro, Addl.A.G.

ORDER

ADNAN-UL-KARIM MEMON, J:- Through the captioned petition, the petitioners have prayed that the impugned order dated 12.9.2009 passed by the Senior Member Board of Revenue (SMBR) may be set-aside, whereby he allowed Suo Moto Reference by setting aside the order dated 11.6.2008 passed by Deputy District Officer (Revenue) Sindhri and subsequent orders passed by the District Officer (Revenue) and the Executive District Officer (Revenue) Mirpurkhas, leaving the parties to approach proper forum, if they feel aggrieved.

2. Case of the Petitioners is that in the year 2007, they submitted an application to the District Co-ordination Officer Mirpurkhas for partition of their agricultural land jointly held by them and other co-sharers in Deh Talho, Taluka Sindhri, District Mirpurkhas, on the premise that one of their brother namely Ali Khan Junejo refused to participate in partition of the subject land. However, the Deputy District Officer (Revenue) Sindhri vide order dated 11.6.2008 allowed the partition, which is speaking order, consequently their respective shares were mutated in the record of rights vide revenue entry No. 55 dated 17.6.2008. The aforesaid order was assailed by the private respondents in Revenue Appeal ; but the same was affirmed by the District Officer Revenue vide order dated 04.12.2008, and the Revision Application was also dismissed by the Executive District Officer (Revenue) vide order dated 18.2.2009. The private respondents being aggrieved by and dissatisfied with the aforesaid decisions filed F.C. Suit No. 25 of 2008 before learned Senior Civil Judge Tando Adam, whereby they challenged the

partition as well as the appellate and revisional orders passed by the Revenue authorities; that during pendency of the subject suit, Regional Revenue Officer Mirpurkhas submitted Suo Moto Reference before SMBR, who vide impugned order 12.09.2009 allowed the reference by setting aside the orders passed by Deputy District Officer Sindhri, District Officer and Executive District Officer (Revenue) Mirpurkhas. The petitioners being aggrieved by and dissatisfied with the aforesaid order passed by the SMBR filed the instant petition on 12.10.2009.

3. Mr. Jhamat Jethanand, learned Counsel for the petitioners submitted that the impugned order dated 12.9.2009 passed by SMBR is nullity in law and is liable to be reversed; that there was no ground to take Suo Moto action to upset the decisions of partition of the agricultural land of the private parties, in which no Government interest was involved; that learned SMBR deliberately neglected to lay off his hands when he came to know that learned Civil Court had passed ad-interim order dated 30.7.2009; that the impugned order violates the interim order passed by learned Civil Court; that learned SMBR failed to appreciate that order of partition had already been implemented by mutating the record of right in favour of parties; that none of the parties had disputed the authenticity, legality and veracity of aforesaid entries; that the private respondent filed frivolous and time barred suit to prevent the partition; that mere filing of suit did not in any manner oust the jurisdiction of revenue authorities; that under Section 141 of the Land Revenue Act, the Revenue Officer is competent to even decide the question of title while deciding the partition application. The suo moto proceedings initiated by learned SMBR are abuse of process of law and without any justification. He lastly prayed for allowing the instant petition.

4. Conversely, Mr. Abdul Ghafoor Hakro learned Counsel for the private respondents submits that the application for partition was moved by one Imran Junejo, who is not party to the present petition and petitioner No.2 had not moved the application for partition. He further submits that D.C.O had no jurisdiction to partition agricultural land and he illegally partitioned the land and sanctioned entries in the revenue record; that the transfer, gift and title of the property to the partition were disputed and objections were raised, therefore, the petitioners ought to have approached the civil court for determination of the right and title of the subject property; that there is Ginning Factory, Petrol Pump, Residential building and colony situated at the subject land and it was not agricultural land; therefore, same cannot be partitioned by the revenue authorities. He prayed for dismissal of instant petition.

5. We have heard the parties at length and have perused the material available on record.

6. The primary questions in the present proceedings are whether the Senior Member Board of Revenue had the jurisdiction to initiate suo-moto proceedings and set-aside the private partition orders passed by the Revenue Officers subordinate to him? And whether the Senior Member Board of Revenue (BOR) had jurisdiction relating to the matters brought before him in presence of pendency of suit on the subject matter and adjudicate?

7. To appreciate the aforesaid propositions, we have noticed that this Court vide order dated 13.10.2009 directed the parties to maintain status-quo. The learned trial Court also passed ad-interim order on 30.7.2009 for a period of six months, but the Senior Member Board of Revenue continued to proceed with the suo moto proceedings and finally set-aside the orders passed by the revenue officers subordinate to him vide impugned order dated 12.9.2009, which prima facie suggest that he did not comply with the orders passed by the learned trial Court and prima-facie, the proceedings initiated by the Senior Member Board of Revenue (BOR) after the status-quo order dated 30.7.2009 passed by learned trial court, is of no legal effect and consequence.

8. On the issue of partition of private agricultural land, in our view, an application for partition can be moved jointly by the owners of the land for partition of their share in the land if (a) at the date of the application the share is recorded as belonging to him; or (b) his right to the share has been established by a decree which is still subsisting at that date; or (c) a written acknowledgment of that right has been executed by all persons interested in the admission or denial thereof, however there is no cavil to the proposition that the Revenue Officer can refuse the application for partition until the question of title of the property is determined by the competent Civil Court having jurisdiction. In our view, none of the revenue courts, including Senior Member Board of Revenue, has jurisdiction to initiate partition proceedings, when title of the parties on the subject land is sub-judice before the Civil Court for determination. In revenue jurisprudence mutation entries in the Record of Rights are maintained for fiscal purposes and do not confer title over the land / property. Furthermore, Revenue Authorities might be able to rescind and revoke the mutation entries wrongly entered, they are not empowered to annul and set aside the orders passed by the competent civil court as in the present matter the trial Court adjudicated the matter with regard to suit land and decreed the suit of the private respondents. However,

learned appellate Court upset the decision of learned trial Court and allowed the appeal by setting aside the judgment and decree of learned trial Court and now the matter is sub-judice before this Court in IInd Appeal No.61 of 2016 and stay is operating therein; therefore, the proceedings initiated by the Senior Member Board of Revenue and the order dated 12.9.2009 passed by him are of no legal effect and consequence, when the petitioner party succeeded in setting aside the judgment and decree passed by learned Senior Civil Judge vide appellate order dated 27.8.2016 passed in civil appeal No.4 and 5 of 2015 and dismissed the aforesaid suit; thus, the order passed by Senior Member Board of Revenue Sindh, is no more in the field for the reasons alluded hereinabove. An excerpt of the appellate order is reproduced as under:-

“ Now coming to the point of official partition is concerned, the trial court framed issue No.5 in this regard, in which it was observed that the notices were not received by the plaintiff for such proceedings and it was further observed therein that the orders passed by the revenue authorities of dated 11.06.2008 and 04.12.2008 were passed at the back of the plaintiffs, as no such notices were issued to the plaintiff side. I have gone through the para No.18 of the amended plaint as well as of the main plaint which relates to the cause of action, in which it is specifically mentioned that the cause of action occurred to the plaintiff in the month of January 2008, when they received the notices from defendant Nos. 25 and 26 i.e. Mukhtiarkar Revenue Taluka Sindhri and Mukhtiarkar Revenue Taluka Jam Nawaz Ali. The availability of such para of cause of action is sufficient to show that the plaintiffs were aware about the proceedings of partition pending before the revenue authorities. It is also available in the findings of issue Nos. 05, 08 and 15 that the plaintiffs No.9 and 10 approached to the concerned revenue authorities, but they were unable to file objections due to the malafide on the part of Mukhtiarkar Revenue and the plaintiffs No. 9 and 10 also moved an application to D.D.O revenue about F.C Suit No. 24 of 2008, but the proceedings were not stopped and the partition application was allowed and it is also available in such findings that the order passed by the lower forum of revenue authorities was sou-moto set-aside by the Senior Member Board of Revenue and that order was challenged by the defendant No.1 before the Honourable High Court of Sindh in the C.P No.D-676/2009 and the order of Senior Member Board of Revenue was again suspended by the Honourable High Court of Sindh and the same is still pending. I am of the view that it was new cause of action accrued to the plaintiffs after allowing the partition proceeding by the revenue forum for which a new suit was to be filed, but the trial court by way of amendment add such new cause of action in the pending suit and it is settled principle of law that new cause of action cannot be allowed to be included in pending suit by way of amendment under Order VI rule 17 of CPC, here, I place my reliance on

2003 SCMR 542 in this regard and when the matter in this respect was pending in the Constitution proceeding before the Honourable High Court of Sindh, then such issue on the safer side be left and be decided after the observation / order passed by the Honourable High Court of Sindh. No doubt, the civil court is fully competent to decide the matter safely, than the constitutional proceedings. Therefore, I am of the view that the learned trial Judge wrongly observed on the point of partition as well.

In view of above discussion, the interference is required in the impugned judgment and decree as the learned the trial Judge while committing illegalities and irregularities passed the impugned judgment and decree, therefore, I hereby set aside the impugned judgment and decree dated 21.01.2015 and dismiss the suit of the respondents accordingly. The appeal of the appellant in hand is allowed accordingly with no order as to costs.”

9. Record reflects that the aforesaid order has been impugned in IInd Appeal No.61 of 2016 before this Court and the operation of the aforesaid order is suspended and under constitutional jurisdiction we cannot give findings on the issues involved in the aforesaid proceedings. However, the observation of this Court shall not prejudice the case of the either party in the aforesaid proceedings.

10. In view of the above, it is hereby declared that the impugned order was without lawful authority and of no legal effect. However, final rights and title of the parties in respect of the subject land shall be decided in IInd Appeal No. 61 of 2016 pending before this Court.

The captioned petition stands disposed of in the above terms with no order as to costs.

JUDGE

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