

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

**R.A. No. 149 of 2015**

**Ali Ahmed & others**

Applicants: through Mr. Muhammad Nawaz B. Jamali,  
Advocate.

**Khamoon**

Respondent: through Mr. Jagdesh R. Mullani, Advocate.

Date of hearing: 04.11.2019

Date of decision: 18.11.2019

**J U D G M E N T**

**ADNAN-UL-KARIM MEMON, J.:-** The Applicants are asking for setting aside the Judgment and Decree dated 25.08.2014 passed by learned Senior Civil Judge Badin in F.C Suit No. 83 of 2013 (*Re-Khamoon v. Ali Ahmed & others*) as well as Judgment and Decree dated 22.05.2015 passed by learned District Judge, Badin, in Civil Appeal No.76 of 2014 (*Re- Ali Ahmed and others v. Khamoon*), whereby the learned District Judge while dismissing the aforesaid Civil Appeal has maintained the Judgment & Decree passed by learned trial Court.

2. Brief facts of the case, as per pleadings of the parties, are that Respondent/Plaintiff (Khamoon) filed F.C Suit No.83 of 2013 against the applicants for possession and mesne profit in the Court of Senior Civil Judge, Badin, alleging therein that an area of 3-00 acres out of Block No.25/4, situated in Deh Dasti, Taluka and District Badin was purchased by him from the original owner in year 1994, (the suit land). The applicants forcibly occupied the suit land in year 2006 on basis of false, fabricated and managed documents. However, the suit was hotly contested by the applicants before Senior Civil Judge, Badin, and learned trial Court while facing the divergent pleas of the parties, captured the disputed area of pleadings and framed the following issues:-

- i. Whether the suit is time barred?
- ii. Whether the plaintiff is entitled for possession of the suit land?
- iii. Whether the plaintiff is entitled for mesne profit?

- iv. Whether the plaintiff is entitled to relief claimed?
- v. What should the decree be?

3. Learned trial Court after careful examination of the parties and evidence decided the aforesaid issues in favour of Respondent/ Plaintiff vide the impugned Judgment and Decree. The applicants being aggrieved by and dissatisfied with the aforesaid Judgment and Decree preferred statutory Civil Appeal No. 76 of 2014, which too was dismissed by learned District Judge, Badin, vide Judgment and Decree dated 22.05.2015. The Applicants have now filed the instant Revision Application before this Court on 20.8.2015.

4. Mr. Muhammad Nawaz B. Jamali, learned Counsel for the Applicants, has mainly contended the impugned Judgments passed by learned Courts below are full of errors, based upon misreading and non-reading of evidence; that the findings of learned Courts below are arbitrary and perverse; that the averments of Applicants made in the affidavit in evidence / examination-in-chief were not considered in the impugned Judgments; therefore, both the Judgments are nullity in the eyes of law; that both learned Courts below have failed to appreciate the material aspects of the case; that learned trial Court has wrongly held that the applicants are in possession of the suit land for which the respondent / plaintiff even has neither produced any authentic witness of revenue department to show whether the land of the respondent/plaintiff has been occupied or not, nor any demarcation was ever made, the findings of learned trial Court only state that the defendants / applicants had filed Suit No.109 of 2006 for declaration, which does not mean that they were in possession of the Suit land, as such the judgments of both the Courts below are liable to be set-aside; that both learned Courts below have failed to appreciate the law involved in the matter; that learned Appellate Court has failed to examine Mukhtiarkar to ascertain the factual position of the subject land; that learned Appellate Court failed to consider the grounds of Appeal agitated by the Applicants; that both learned Courts below have failed to appreciate that the very suit of the Respondent was not maintainable under the law before learned trial Court; therefore, both the Judgments cannot be sustained on this score alone. Learned Counsel for the applicants added that that both learned Courts below , while passing the impugned judgments have ignored the following aspects

of case apparent on the face of record, which cast doubt over the respondent's story:-

- i) Suit filed by the respondent for possession of immoveable property was time barred.
- ii) No issue of alleged dispossession of the suit land was framed, even Respondent failed to substantiate his claim of dispossession of the subject land as no time date and manner has been disclosed in the memo of plaint or even evidence, as no witness was produced in support of his claim.
- iii) No measurement/demarcation of the subject land has taken place, whether the subject land falls within the area of sanctioned village or otherwise.
- iv) Report of Mukhtiarkar Badin was called by the appellate court, based on measurement of the subject land with the consent of the parties but he was not examined; rather this piece of evidence was withheld.
- v) Respondent failed to prove the amount of mesne profit as he failed to produce any cogent evidence to substantiate his claim and other prayer.
- vi) Respondent admitted in examination-in-chief that due to litigation he did not file suit for possession.
- vii) Respondent admitted in cross examination that suit land has not been demarcated by revenue department or settlement department.
- viii) Respondent deliberately did not join Mukhtiarkar Badin as party in the suit.
- ix) The issue could be easily resolved if the evidence of Mukhtiarkar concerned is recorded and demarcation of the subject property is ordered.

He lastly prayed for setting aside both the Judgments rendered by learned Courts below.

5. Conversely, Mr. Jagdesh R. Mullani, learned Counsel for the respondent has supported the impugned Judgments passed by the Courts below and contended that the captioned Revision Application is liable to be dismissed; that there are concurrent findings recorded by the competent forums / courts below under the law and the grounds raised in the instant Revision Application are untenable; that both the aforesaid Judgments are passed within the parameters of law; that instant Revision Application is frivolous and misleading as there are concurrent findings by the Courts below; that learned trial Court after recording evidence passed just, proper and fair Judgment and Decree in the case and held entitlement of the Respondent; that learned Appellate Court after hearing Counsel for the parties passed the Judgment in favour of Respondent. However, the Applicants have now approached this Court by filing the instant

Revision Application. He lastly prayed for dismissal of instant Revision Application.

6. I have heard learned Counsel for the parties at considerable length and also perused the record available before me.

7. The case of the Applicants is that they filed Suit No.109/2006 in the Court of Senior Civil Judge, Badin, for declaration, mandatory and permanent injunction against the respondent and others. The said Suit was dismissed by learned trial Court vide Judgment and Decree dated 31.3.2011. The applicants preferred Civil Appeal No.62/2011 against the aforesaid Judgment and Decree, which was also dismissed by learned 2<sup>nd</sup> Additional District Judge, Badin, vide Judgment and Decree dated 5.12.2012 and the applicants did not prefer second appeal. However, the respondent (Khamoon) filed F.C. Suit No.83/2013 in the Court of Senior Civil Judge, Badin, against the applicants for possession and mesne profits, which was contested. However, learned trial Court decreed the suit vide judgment and decree dated 25.8.2014. The applicant filed Civil Appeal No 76 of 2014 in the Court of District Judge, Badin, which was also dismissed vide judgment and decree dated 2.5.2015. The main ground raised in the instant Revision Application is that they are not in possession of an area of 03-00 acres out of Block No.25/4, situated at Deh Dasti, Taluka Badin and they are residing at a distance of 120 feet away from the suit land. However, learned trial Court belied their statement on the premise that the applicants had filed Suit No.109/2006 that the subject suit land is coming within 20 chains of village Budho Dasti, which plea is contradictory in both the pleadings.

8. I have scanned the evidence of respondent, which explicitly shows that he purchased the suit land through registered sale deed in the year 1994 which was mutated in revenue record vide mutation entry No.103, sanctioned on 20.2.1995. In rebuttal, applicant Ali Ahmed deposed that village Budho Dasti is situated 120 feet away from the suit land and no demarcation has been made to ascertain the factual position of the suit land, claimed by the respondent. He, however, agreed to the proposition that if their houses come within the area of respondent's land, they would certainly vacate the same subject to proper measurement. The applicant admitted that his five Pakka and four Katcha houses are situated in the Asaish land for

village. Record reflects that learned Appellate Court directed the Mukhtiarkar Badin to conduct demarcation of the subject suit land. The report of Mukhtiarkar discloses that an area of 0-16 ghuntas out of Block No.25/5, relate to respondent, were found occupied in the houses of the applicants' party. However, the applicants' party agreed to surrender the aforesaid area out of Survey No.144 to the respondent on intervention of Nekmards. Finding of learned Appellate Court, on the aforesaid issue, clarifies the position as under:-

*“The plaintiff examined himself at Ex. 16 stated that he purchased the suit land through registered sale deed in the year, 1994. He was in possession of the same but the appellants have illegally occupied the suit land. He has also stated that the defendants filed suit for declaration that the suit No.109 of 2006 for the declaration that the suit land comes within 20 chains of village Budho Dasti. During cross examination, the evidence of the plaintiff has not been denied and challenged, therefore, it has been proved by the plaintiff that he is lawful owner of the suit land and the defendants-appellants have illegally occupied the suit land, hence the plaintiff/respondent is entitled for possession and mesne profit. Moreover, by the consent of the parties, the Mukhtiarkar (Revenue) Badin carried out the measurement showing an area of 0-16 ghuntas out of block No.25/5 but the suit land if has not clarify that how many area of B.No.25/4, hence the same is not proper. This point is therefore, answered in Affirmative.”*

9. Prima-facie, the case requires resolution of the dispute between the parties over the subject land, which is only possible by way of proper demarcation of the suit land, through Revenue officials which has not been done by both the courts below. It appears that learned trial Court has non-suited the applicants on the basis of findings of facts in Suit No.109 of 2006, therefore it is expedient to have a glance on it, which explicitly show that Mukhtiarkar concerned was examined in the proceedings arising out of Suit No. 109 of 2006, who deposed that he conducted measurement and found that the houses of applicants and others were existing in Block No.25/4. He further deposed that Block 25/4 (3-00) acres comes within 20 chain of Village of the applicants. From the preceding paragraph, apparently, there is no absolute admission on the part of applicants' party with regard to possession of the subject land as portrayed in the impugned orders; however learned trial court has taken contrary view, in the light of decision passed in Suit No. 109 of 2006. In my view it would have been better for learned trial court to at least examine Mukhtiarkar, Badin, in order to ascertain the factual position of the suit land. Mere reliance was not sufficient, however, learned appellate court took pains to call report of Mukhtiarkar concerned with regard to factual position of the subject land, who

submitted his report, but the same was discarded on the analogy that the report does not pertain to Block No. 24/4, without examining him on the issue whether the respondent was really dispossessed from the subject land by the applicants or otherwise, if yes, what area they had occupied and since when, but nothing could be done to resolve the controversy in time, even learned appellate court failed to order the demarcation of the subject land to ascertain what area was in possession of the applicants for further proceedings.

10. In my view, Report of Mukhtiarkar at the appellate stage, cannot be a substitute of evidence, he ought to have been examined before learned Appellate court on the issue that how much area of Block No.25/4 was occupied in houses, thus caused grave miscarriage of justice; the findings of learned Appellate Court are not based on sound reasoning.

11. In my view, learned Appellate Court while recording findings on facts has misread the evidence, and has ignored material piece of evidence as discussed in the preceding paragraph thus committed material irregularity, as such, requires interference by this Court in exercise of revisional jurisdiction, which is primarily meant for correcting error of law committed by sub-ordinate Courts.

12. For the aforesaid facts and reasons, I have come to the conclusion that there is merit in this Revision Application which is allowed, resultantly the Judgment and Decree dated 22.05.2015 passed by learned District Judge, Badin, in Civil Appeal No. 76 of 2014 (Re- Ali Ahmed and others v. Khamoon), is set-aside, with direction to learned Appellate Court to examine Mukhtiarkar concerned, after demarcation of the subject land strictly in accordance with law and take decision afresh within a period of one month, which shall commence from the date of communication of this judgment.

13. The instant Revision Application stands disposed of in the above terms.

**JUDGE**

**\*FahadMemon\***