

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

R.A. No. 254 of 2010

Applicants : Through Mr. Pirbhulal-u-Goklani, Advocate.
 Respondent No.1 : Lutufullah present in person.
 Respondents 2 to 5 : Through Mr. Wali Muhammad Jamari, Asst.A.G
 along with Javed Ahmed AXEN Kazi Ahmed.
 Dates of hearing : 09.12.2019, 16.12.2019 & 20.12.2019
 Date of decision : 20.12.2019.

ORDER

ADNAN-UL-KARIM MEMON, J:- Basically the applicants are asking for setting aside the judgment and decree dated 31.05.2010 passed by learned 2nd Additional District Judge, Shaheed Benazirabad, in Civil Appeal No.22 of 2003 whereby the judgment and decree dated 04.01.2003 and 07.01.2003 passed by learned 2nd Senior Civil Judge, Shaheed Benazirabad in F.C. Suit No.171 of 1996 was set-aside.

2. Case of the applicants is that they filed F.C Suit No.171 of 1996 against the respondent No.1 for Declaration & Injunction on the premise that they are *Khatedars* and their agriculture land admeasuring 14-28 acres in Deh Chariro Taluka Daulatpur District Nawabshah, is being irrigated through watercourse No.4R Malwah Distry. The predecessor in interest of respondents 5 to 10 namely Hidayatullah Arain was granted land measuring about 33-26 acres from U.A. S.No.254 from Barrage department which is / was D-Class land, which is evident from *Ghat-wadh* Form. According to policy and Standing Order dated 23.07.1997 of Government of Sindh no irrigation water can be sanctioned or given for D-class land but respondents 5 to 10 approached the official respondents for grant of irrigation water from water course 4-R Malwah Distry and they allowed in violation of standing order and against the government policy whereby the water supply of applicants and other *khatedars* on same water course have been curtailed as the respondents have neither sanctioned extra water nor enhanced the size of module of water course. The applicants resisted by raising hue and cry but all their efforts went in vain, therefore, they being aggrieved by and dissatisfied with the aforesaid actions of the official respondents filed the aforesaid suit. The learned trial Court in order to adjudicate the matter between the parties framed following issues:-

- i. Whether the land owned by defendants No.5 to 10 was granted to them by Barrage Department is land of D-class and as such no irrigation water can be sanctioned as per policy of the government?
- ii. Whether grant of irrigation water to the mentioned of the para No.5 of the plaint by the defendants No.2 to 4 is in contravention policy of government without lawful authority, illegal and malafide also un-warranted under the law?
- iii. Whether the defendants No.2 to 4 have already sanctioned irrigation water for the lands mentioned in para No.5 of the plaint before in favour of late Haji Hidayatullah, the predecessor of defendants No.5 to 10? If so what is its effect?
- iv. Whether the suit of plaintiff is hit by provision of section 42 of Specific Relief Act and it is not maintainable under the law?
- v. Whether the plaintiff has accrued cause of action to file the present suit?
- vi. Whether the suit of plaintiff is bad for mis-joinder and non-joinder of necessary parties?
- vii. Whether plaintiff is entitled for any relief claimed for?
- viii. What should the decree be?

3. The learned trial court after careful examination of the parties and evidence decided the aforesaid issues in favour of applicants vide impugned judgment and decree. The respondent No.1 being aggrieved by and dissatisfied with the aforesaid Judgment and Decree preferred statutory Appeal, which was allowed vide Judgment and Decree dated 31.05.2010. Against the aforesaid judgments and decrees, the applicants have filed the instant Revision Application before this Court on 30.08.2010.

4. Mr. Pirbhulal-u-Goklani, learned counsel representing the applicants has mainly argued that the judgment and decree of the appellate Court is in utter disregard of the mandatory provision of Order XLI Rule 31 and Order XX Rule 5 CPC; that it was necessary for the appellate Court to record its findings on each issue by discussing relevant evidence adduced by the parties; that while deciding a particular issue, the Court is required to take into consideration and discuss the relevant piece of evidence having direct nexus with that specific point and record reasons justifying its findings thereon; that the above criterion of the judgment that is required by Order XX Rule 4 and 5 CPC must be adhered to, so that the rights of the parties in relation to controversy in the suit are conclusively determined and as such the judgment and decree of the appellate court is nullity in the eyes of law; that the appellate Court has erroneously held that there is no proof that the land is D-Class and in this respect the appellate Court has not considered

the evidence of Canal Assistant; that learned appellate Court has not appreciated that there was no proof on record that the land was granted prior to 1977; that the judgment and decree of the appellate court is contrary to the law and facts; that the judgment and decree of the appellate Court is based upon misreading / non-reading of evidence, as such, instant revision application may be allowed and the judgment and decree of appellate court may be set-aside.

5. Mr. Wali Muhammad Jamari, learned Assistant Advocate General representing the official respondents has referred to the comments filed on behalf of respondents 4 and 5 and argued that there is no sanction order issued by the irrigation department and there is not provision in Rohri Canal, hence both the parties are not entitled for any water supply to the D-class land as per rules. However he concedes that both the parties are getting water supply to their lands.

6. Respondent No.1 namely Lutufullah who is present in person has refuted the claim of applicants and learned A.A.G. and supported the judgment and decree passed by learned appellate court and referred to various documents available in the case file and attempted to justify distribution of water supply to his land; that his land is not classified as D-class land; that this court vide order dated 1.9.2010 disposed of his petition No. 878 of 2010 on the undertaking of Executive Engineer Dad Division District Shaheed Benazirabad that "petitioner's land is being supplied water from water course 4R Malwah Distry and that in case the petitioner is not receiving water from the said watercourse the same will be provided to him and all obstruction in this regard will be removed"; that the official respondents cannot circumvent the undertaking given to this court and take summersault at this stage; he also referred the site inspection report dated 10.1.2011 called by this court vide order dated 30.12.2010 in C.P No.878 of 2010; he referred to the letter dated 4.4.1969 and submitted that an area of 33-26 acres from U.A No.254 was transferred to his father on the same terms and conditions vide sanction letter dated 27.3.1969; that the subject land has status of Qabooli land which factum is endorsed by the Commissioner Sukkur Division vide order dated 27.7.2000; that he is entitled for distribution of water supply to his lands as per share list prepared by the Irrigation department. In support of his contention, he relied upon the order dated 24.1.2019 passed by Honourable Supreme Court in C.P No. 888-K of 2018 (Lutufullah vs. Haji Abdul Hadi) and submitted that the Revision Application No. 187 of 2010 filed by Haji Abdul Hadi was remitted by this court to the appellate court for decision afresh within 60 days. He being

aggrieved by the aforesaid decision approached the Honorable Supreme Court whereby his petition was dismissed. He submitted that the applicants have no legal character to seek such type of preposterous and nonsensical declaration in which their legal character is not involved; that under Section 42 of the Specific Relief Act any person entitled to any legal character or to any right as to any property may institute a suit against any person denying his title to such character or right only then the court in its discretion may make a declaration that he is so entitled; that the object of Section 42 is to express indefinite terms the kind of cases in which declaration of right, apart from other relief may be granted; that no declaration can be allowed unless it is brought within the four corners of this Section which follows that a person who has no right to sue either because he has no legal character or right in any property cannot bring a suit for declaration; that the applicants have approached this Court with unclean hands and finally prayed for the dismissal of instant Revision Application.

7. I have heard the parties at considerable length and also reviewed the record available before me.

8. It appears from the record that Respondent No.1 owns agricultural land admeasuring 33-26 acres in Deh Chariro, Taluka Daulatpur District Shaheed Benazirabad settled on water course 4R Ex-Malwah Distry.

9. Question which agitates the controversy at hand could be reduced to whether the subject land is classified as 'D' class land as per classification register and there is ban on water supply to 'D' class land by the Government of Sindh? Prima-facie the letter dated 4.4.1969 available on record explicitly show that an area of 33-26 acres from U.A No.254 was transferred to the father of respondent No.1 on the same terms and conditions vide sanction letter dated 27.3.1969 issued by the competent authority of irrigation department and the subject land has been shown to have acquired the status of Qabooli land which factum is endorsed by the Commissioner Sukkur Division vide order dated 27.7.2000.

10. In the light of aforesaid factual position of the case, as well as orders passed by this Court on the subject issue coupled with site inspection report the question raised hereinabove is answered.

11. On the issue of supply of water to the lands of the parties, I have gone through various provisions of Sindh Irrigation Act, which provide that sanctioned watercourses were personal properties of individual landowners,

who were required to construct and maintain them from their own resources in terms of Sindh Irrigation Act. However, no authority has been conferred upon all these persons to utilize water more than their sanctioned share as per the share list, which the Irrigation Department shall ensure. Further, I have noticed that Section 16 of Sindh Irrigation Act requires that any person with the permission of duly empowered Canal Officer may construct watercourse on the land after obtaining consent of owners of the land. Under Section 17 of the Act, land may even be acquired to enable a person to construct the watercourse to irrigate his land and it may also cause to be constructed by the Canal Officer; but all expenses have to be borne by the person applying for construction of watercourse. Any person desirous of obtaining the benefit of such watercourse may also apply for joint ownership thereof and upon paying his share in construction can be benefited. Section 21 of the Act, however, deals with the rights and obligations of owners of watercourses and apart from requiring them to maintain them, confers upon such owners a right to have supply of water on such terms as prescribed in the relevant Rules.

12. A perusal of record and consideration of contentions of the parties raised has persuaded me to believe that the issue involved in the present proceedings is distribution of water to the lands of both the parties in accordance with Sindh Irrigation Act. Distribution of water according to its availability in equitable manner without discrimination to sanctioned channels in accordance with Sindh Irrigation Act is responsibility of Irrigation Department, Government of Sindh.

13. I have noted that there are three (03) Barrages in Sindh Province viz. Guddu, Sukkur and Kotri, which provide required water to the lands in Sindh. The only issue as stated above is equitable distribution of irrigation water by the Irrigation Department. I expect that the official respondents to perform their duties in conformity with policy of equitable distribution of water and under the said cover, regular vigilance shall be made by them.

14. I do not see any enforceable right of the applicants to maintain this revision application. Besides this, the issues raised have already been settled by the appellate court which this Court cannot attend, while exercising revisional jurisdiction. The Irrigation Law has provided mechanism to get the share coupled with that policy of the government and this court cannot substitute it.

15. For the aforesaid reasons, I do not see any merit in this Revision Application which is dismissed along with pending application(s).

16. Before parting with this order, I direct the competent authority of official respondents that the issue of supply of water to the lands of applicants and private respondents shall be made as per their share if they at all are entitled under the law, after appropriate proceedings in case if they approach them.

JUDGE

Fahad Memon