

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Civil Revision No. S – 22 of 1999

Ghulam Hyder Mahar v. Illahi Bux Mahar and others

Date of hearing: 04-10-2021

Date of announcement: 29-10-2021

Mr. Abdul Rahman Baloch, Advocate for the Applicant.
Mr. Zulfiqar Ali Naich, Assistant Advocate General Sindh.

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J U D G M E N T

Muhammad Junaid Ghaffar, J. – Through this Civil Revision, the Applicant has impugned judgment dated 03-02-1999 passed in Civil Appeal No.11 of 1997 by the IInd Additional District Judge, Shikarpur, whereby the judgment dated 07-05-1997 passed by the IInd Senior Civil Judge, Shikarpur in F.C. Suit No.115 of 1993 (149 of 1991), through which the Suit of the Applicant was decreed, has been set aside.

2. Learned Counsel for the Applicant due to his inability has not argued the case but has relied upon his written arguments, which precisely are premised on the fact that the Applicant was in possession of the disputed plot since 19 years, whereas, notwithstanding the fact that the land in question was owned by the Central Government, nobody had turned up to defend the case; hence, the Plaintiff was entitled to retain possession till such time the application for grant of land filed by the Applicant is decided otherwise. It has been prayed to set aside the impugned judgment and to restore the judgment of the Trial Court.

3. On the other hand, nobody has turned up on behalf of the private Respondent, whereas, service was affected upon such Respondent through publication, therefore, matter has been heard and is being decided on the basis of available record.

4. It appears that the Applicant had filed a Suit for declaration, permanent and mandatory seeking the following prayer(s):

- i. *To declare that all actions taken or intended to be taken in wake of dispossession the plaintiff from plot in suit, are absolutely void, illegal,*

arbitrary, malafide, without legal form, without jurisdiction and nullity in law.

- ii. *To restrain the defendants permanently from interfering with the possession of the plaintiff by themselves or through any other agency.*
- iii. *To grant the mandatory injunction, directing the def: No: 3 for removing of his door opening in suit plot.*
- iv. *To award the cost of this suit.*
- v. *To grant any other equitable relief as may be deemed fit and necessary under the circumstances.*

5. The learned Trial Court, after exchange of pleadings, settled the following issues:

1. *Whether the suit property Govt: property?*
2. *Whether the suit property is in possession of the plaintiff and since when?*
3. *Whether the suit property is allotted to the plaintiff?*
4. *Whether the defendants trying to dispossess the plaintiff?*
5. *Whether the suit is not maintainable under the law?*
6. *Whether the suit is barred by section 42, 55, 56 of Specific Relief Act?*
7. *Whether the plaintiff is entitled to the reliefs claimed?*
8. *What should the decree be?*

6. Insofar as Issue No.1 is concerned, the learned trial Court in unequivocal terms held that the property in dispute is Government property, whereas, in respect of Issue No.3 it was observed that *“from the evidence of the plaintiff as well as of the defendant, it transpires that the disputed plot has not yet allotted to plaintiff or to the defendant, this issue is answered in negative”*. However, despite these findings against the very claim of the Applicant / Plaintiff, all other issues as above were answered in favour of the Applicant and the Suit was decreed as prayed.

7. Respondent No.1, being aggrieved, filed an Appeal and the learned Appellate Court through impugned judgment has been pleased to set aside the Trial Court’s judgment. The relevant finding of the learned Appellate Court is as under:

“I have considered the above submissions and have gone through the R & Ps of the case. It is an admitted fact that the disputed plot belongs to Government. According to Para No:2 of the memo of plaint the disputed plot belongs to Central Govt: but surprisingly enough neither the Central Government nor any officer of Central Government has been made party in the suit. The case of the respondent No:1 as set

out in the memo of plaint and pleaded in his evidence is that he is in possession of the disputed plot since last 19 years prior to filing of the suit and that for it's allotment he has moved application to the Deputy Commissioner, Shikarpur, which is still pending. It is thus clear that he has no legal right, title and interest in the disputed plot. The case of the appellant is also on the same footing. The appellant too as stated by him has applied for the allotment of the disputed plot. In a case of Muhammad Yakoob versus the Province of Punjab & Others, it has been held:

“The plea of the petitioners that they should not be dispossessed otherwise than in due course of law can only succeed if they are able to show their title in the property or any right by which their possession can be recognized in law. This requirement is obviously lacking in the present case. For instance, a tress passer can not file a suit before the Civil Court to protect his illegal and unauthorized occupation. In these circumstances both the lower courts have rightly held against the present petitioners. In another case of Civil Aviation Authority v/s M/s Data International & Others PLD-1993-Karachi-700, it has been held that plaintiff having no right or title in suit property, suit filed by him was barred U/s 42 Specific Relief Act.

The respondent No:1 in his plaint stated that some of the portion of the disputed plot was forcibly occupied by appellant. Pir Muhammad Mahar the witness of respondent No:1 in his evidence deposed that the defendant No:3 (appellant) had demolished the Kacha structure of plaintiff (respondent No:1) standing in the suit plot and constructed shop which created dispute between the parties. The respondent No:1 in his evidence deposed that during the pendency of the suit the appellant constructed two shops and shifted his outer gate inside the disputed plot and used bricks and wooden beams at the disputed plot. He in his cross-examination stated and on the intervention of military authorities the possession was handed-over to him, he, however, failed to produce any evidence to the effect that the possession of disputed plot was restored to him by military authorities. In any case it has come in evidence that respondent No:1 was out of possession. In the case of Inayat Ali v/s Muhammad @ Tota 1993-MLD-2367, it has been held that suit for declaration by plaintiff who was not in possession of land in question, suit for mere declaration without seeking possession was not competent.

The simple perusal of the R&Ps reveals that both the parties have no legal right, title and interest in the disputed plot. The case of the appellant as well as of respondent No:1 is that they had applied for allotment of the disputed land to the Deputy Commissioner, Shikarpur. Mere fact that they had applied for the allotment in no way create any right, title and interest in their favour in respect of the disputed plot.

For the afore-said reasons, I am of the considered view that the suit filed by respondent No:1 was not maintainable and barred U/s: 42 of Specific Relief Act and the learned trial court has committed illegality in decreeing the suit in favour of the respondent No:1. Accordingly, the appeal is allowed and the impugned judgment and decree are set aside and the suit filed by respondent No:1 is dismissed. There shall be no order as to costs.”

8. From perusal of the record and the aforesaid findings of the learned Appellate Court, it appears that admittedly the Applicant had only sought a declaration of possession which in absence of a title could not have been granted. In the Plaint and the pleadings, it has come on record that the land

in fact was owned by the *Central Government*, whereas, the learned Trial Court also held so, and it was merely an application for allotment of the land filed by the Applicant which was pending and by some means the possession was claimed. At the same time, it further appears that the application of Respondent No.1 in respect of the same land was also pending. The learned Trial Court without adverting to this very moot question that without seeking a declaration to any title or entitlement, can a mere Suit for possession could be maintained and whether the claimed relief could be granted in view of the provisions of section 42¹ of The Specific Relief Act; has apparently erred in decreeing the Suit. It is also not understandable as to how a suit for possession had been filed without seeking declaration in respect of title². Once it had come on record that the owner of the land was neither the Applicant nor Respondent No.1, then taking up other irrelevant issues and the evidence led on the same including the claim regarding possession was not required to be adjudicated upon as both the Applicant and Respondent No.1 never claimed ownership on the basis of any title or any other instrument. There is no cavil to the proposition that if the title of the property is in dispute, the simple suit for permanent injunction or possession, without seeking declaration of title, would not be maintainable³. Their only claim was to the effect that their applications for allotment of land were pending. This has no basis; nor it could be used as a title or in any manner could be accepted for seeking a declaration of possession. It appears that the dispute was between the Applicant and respondent No.1 regarding use and encroachment of the land, which both of them never owned. Form of suit also does not appear to be proper when the title of the property admittedly vested in Central Government⁴.

9. Notwithstanding the above, it is also an admitted position that the Applicant was not holding any title on the suit property and it was only an anticipated order which according to the Applicant was required to be passed on his application of allotment, and therefore, the suit is open to another objection. According to Section 42 only that person can maintain a suit for declaration who is entitled to any legal character or to any right as

¹ Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief; provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to so.

² Muhammad Aslam v Mst. Ferozi (PLD 2001 SC 213)

³ Sultan Mahmood Shah v Muhammad Din (2005 SCMR 1872)

⁴ Province of Punjab v Syed Ghazanfar Ali Shah (2017 SCMR 172)

to any property. This means that the character or the right which the plaintiff claims and which is denied or threatened by the other side must exist at the time of the suit and should not be the character or right that is to come into existence at some future time⁵. This was in effect a suit for a declaration, not with respect to an existing right, but with respect to some possible anticipated right which even otherwise was never granted in the 19 years' period during which allegedly the Applicant was in possession. Per settled law a Suit on such right cannot be entertained in terms of section 42 of the Specific Relief Act, 1877, as at the time of filing of the Suit, the Applicant was not holding any title to seek the relief as prayed for. In fact, what the Applicant wanted was to obtain an affirmative declaration that he may have a right to claim or own the property upon grant of his pending application, and till such time the said right is granted, his possession be affirmed as being legal by way of a declaratory decree. In other words, he has asked for a declaration not of an existing right but of chance or possibility of acquiring a right in the future. The character or right within the contemplation of s.42 *ibid*, which the Applicant / Plaintiff asserts or claims, and which is allegedly being denied by the other side must exist at the time of filing of the Suit for such a declaration and should not be the character or right that is to come into existence at some later stage. It is also a settled law that no declaration of an abstract right can be granted; howsoever, practical it may be to do so. The learned trial Court after coming to a definitive conclusion that the land in question is a Government land; ought not to have exercised any discretion in the matter, as it is not a matter of absolute right to obtain a declaratory decree; rather it is a discretionary relief and could have been refused in the given facts of the case in hand. This power of granting a discretionary relief should be exercised with care, caution and circumspection. Such power ought not to be exercised where the relief claimed would be unlawful. The Courts have always been slow and reluctant in granting such relief(s) of declaration as to future or reversionary rights. It is also relevant to take note that the entire relief claimed in the Suit was against private Respondent, and was specifically regarding an injunction and or declaration to retain possession. Therefore, even if any other relief as provided in the proviso to section 42 of the Specific Relief Act, 1877, could have been claimed or granted, the same must be the other relief against the private Respondent. And admittedly, the relief to title of the property owned by the Government could not be sought against that

⁵ AIR 1944 Lahore 110 Ahmad Yar Khan Vs.Haji Khan and Ors

Respondent, as the further relief in the said proviso, is the relief in relation to the legal character or right to any property to which a party is otherwise entitled and which is being denied by any other party. It must always be a relief appropriate to and contingent on the right of title asserted in the Suit.

10. The learned Appellate Court was fully justified in observing that once the Applicant had no legal title or interest in the disputed land, the case of the Applicant as well as of respondent No.1 regarding pendency of any allotment application in no way could create right, title or interest so as to seek a declaration or even possession of the property. The Appellate Court was fully justified in setting aside the impugned judgment of the Trial Court.

11. In view of hereinabove facts and circumstances of this case, the Applicant has failed to point out any illegality or misreading or non-reading on the part of the Appellate Court, whereas, the learned Trial Court after coming to the conclusion that land in dispute was Government property had seriously erred in decreeing the suit, which order was rightly set-aside by the Appellate Court; therefore, the impugned order appears to be correct in law; hence, this Civil Revision Application fails and is hereby **dismissed**.

Dated: 29-10-2021

Abdul Basit

J U D G E