IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Civil Revision No. S – 67 of 2004

(Mehrab Khan & others vs. Muhammad Aslam & others)

Date of hearing: 25-10-2021
Date of Order: 25-10-2021

Mr. Raj Kumar D. Rajput Advocate for the Applicants
Mr. Ghulam Shabbeer Shar Advocate for the Respondents

JUDGMENT

Muhammad Junaid Ghaffar, J. – Through this Civil Revision, the Applicants have impugned judgment dated 20.05.2004 passed by 2nd Additional District Judge, Khairpur in Civil Appeal No.61/2004 whereby the appeal has been allowed while setting-aside the judgment dated 03.09.2002 passed by 2nd Senior Civil Judge, Khairpur in F.C Suit No.14/1997 through which the Suit of the Applicants was decreed.

2. Learned Counsel for the Applicants submits that the Appellate Court has decided the matter on presumption inasmuch as reliance has been placed on some *FIRs* regarding alleged dispossession of the Respondents, whereas, neither the *FIRs* were produced in a lawful manner; nor it has been brought on record that as to what happened finally in the said FIRs; that the Respondents had failed to establish their ownership, whereas, the Plaintiffs ownership and the revenue record and its entry is admitted; that the Appellate Court altered the issue but never permitted the Applicants either to lead additional evidence or in the alternative; neither remanded the matter to the trial Court; hence, the judgment of the Appellate Court suffers from illegalities and is liable to be set-aside.

3. On the other hand, Learned Counsel for the private Respondents submits that the revenue entry as per evidence was found dubious; hence no reliance could be placed on the same, and therefore, the Appellate Court was justified in setting-aside the judgment of the trial Court.

4. I have heard both the learned counsel and perused the record.

5. It appears that the Applicants filed a Suit for declaration and permanent injunction, seeking the following prayers;-

(i) This Hon'ble Court may be pleased to declare that the plaintiffs are bonafide, rightful and legal owners of the suit land having been inherited from their father late Qadir Bakhsh and the defendants have no rights to interfere with their peaceful possession and enjoyment over the suit land in any manner.

(ii) To grant permanent injunction thereby restraining the defendants and others claiming through them from directly or indirectly interfering with the peaceful and rightful possession and enjoyment of the plaintiffs over the suit land in any manner.

(iii) To award costs of the suit and other relief which may deem fit and proper.

6. The learned trial Court settled the following issues;-

1. Whether the suit is time barred?
2. Whether the suit survey numbers do not belong to the father of the plaintiffs?

2. Whether the Foti Khata Badal vide entry No.415 dated 17.07.1981 is illegal in respect of the land in suit?

3. Whether the plaintiffs are in peaceful possession and enjoyment of the suit land?

4. Whether the defendants had not managed to get S.No.358(5-02) Acres entered in their name through fraud?

6. What should the decree be?

7. The relevant issues are issues No.2, 3 and 4 and the findings of the trial Court on all these issues is as follows; -

"Issue No.2; -

The burden to prove this issue lies upon the defendants. The learned counsel for the defendants argued that the suit land was originally owned by their ancestors Waryam. He further argued that the defendants have inherited the suit land from ancestors. He further argued that the suit land was not owned by the father of the plaintiffs namely Qadir Bux and the claim of the plaintiffs over the suit land is false and baseless. On the other hand the learned counsel for the plaintiffs has argued that the suit land originally belongs to the father of the plaintiffs namely Qadir Bux. He further argued that after the death of Qadir Bux the plaintiffs have inherited the suit land. I have considered the submissions of the learned counsels for the parties and have gone through the case file. The defendant No.3 Muhammad Waryam has deposed that the suit land was originally owned by his grand-father Waryam and the name of his grant-father was entered in enquiry conducted by the enquiry officer Khairpur State and they are legal heirs of Waryam and their names are entered in the revenue record. The defendant No.5 has produced the entries of revenue record from Ex.78 to 82. The perusal of documents at Ex.78 to 82 reveals that none of the documents produced by the defendant No.3 in respect of the suit land in the name of their grand-father Waryam, though the documents at Ex.78 to 82 shows the entries in the revenue record in respect of the suit land in the names of defendants, but since the defendants claims their title over the suit land from their grand-father Waryam, but not a single document has been produced by

the defendants to show that the suit land was originally owned by Waryam. The mention of name of Waryam in the enquiry does not create title or ownership of Waryam in respect of the suit land. The defendant Mohammad Waryam in his cross-examination has admitted that he has not produced mutation record in the name of his real grand-father. He has further admitted that he has produced mutation entry in the name of Shah Muhammad and Gul Hassan who are not his real grand-fathers. The defendants have examined Tapedar namely Mohammad Ali who in his cross-examination admitted that entry No.415 as per their record in respect of the suit land is in the names of the plaintiffs. However, he has deposed that this entry is doubtful. He has further deposed that word suspicious mentioned in the entry does not bear signature of any officer. He has further deposed that the pass book in respect of the suit land was issued in the names of the plaintiffs who have mortgaged the suit land with Agriculture Development Bank of Pakistan (ADBP) which is still mortgaged.

From the evidence produced by the defendants it appears that the defendants have failed to bring on record that the suit land was originally owned by their grand-father Waryam and not by father of the plaintiffs. The plaintiff Mehrab has deposed that the suit land was initially in the name of his father who has expired 50 years ago. He further deposed that after the death of his father the mutation was effected in the revenue record. He further deposed that he has already produced such record in this case. The entry No.415 from the revenue record produced by the plaintiff reveals that the suit land was originally entered in the name of Qadir Bux son of Muhammad and after the death of Qadir Bux the Foti Khata was changed in the names of the plaintiffs. The plaintiff was cross-examined at length by advocate for the defendants, but his evidence cannot be shattered on this point.

In view of above discussion and documentary evidence available on record I hold that the suit land was originally belongs to the father of the plaintiffs, therefore, Issue No.2 is answered accordingly.

Issue No.3;-

In view of my findings on issue No.2, I hold that Foti Khata Badal by entry No.415 dated 17.7.81 in respect of suit land is legal and lawful. Issue No.3 is therefore answered accordingly.

Issue No.4;-

On this issue the plaintiffs in their plaint as well as in their evidence has stated that the suit land is in their possession. *The versions of the plaintiff is supported by the defendants witness Mohammad Ali who is Tapedar of beat and has deposed that the suit land is in possession of the plaintiffs and the land revenue is being paid by the plaintiffs and Otaq of the plaintiffs is also constructed there*. On the other hand the defendants in their W/S has clearly stated that the suit land is in their possession since their ancestors, but the defendant No.3 Mohammad Waryam has deposed that in the year 1997 the plaintiffs have forcibly occupied the suit land and plaintiffs are in illegal possession of the suit land. Under these circumstances I hold that the plaintiffs are in possession of the suit land. This issue is therefore answered in affirmative accordingly."

8. The Respondents being aggrieved impugned the said judgment before the Appellate Court and the Appellate Court determined the following points for adjudication; -

1. Whether the Appellants/Defendants are dispossessed by the Respondents/Plaintiffs after filing of the suit and if so what is its effect?

2. Whether the document that is Entry No.415 favouring the Respondents/Plaintiffs is really reliable?

3. Whether there is proper appreciation of available evidence by the trial Court?

9. The finding of the learned Appellate Court relevant for the present purposes is as under;

> **"**POINT NO: 1.
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> This is very important point and the trial Court to frame it as an issue. The appellant/Defendants have filed an amended written statement. The amended W.S. was filed just to bring on the record that they were dispossessed during pendency of the suit. The trial Court at the time of framing issues has to keep this aspect in mind. It will be assistance for the parties to bring the facts on record properly regarding this point. However, from the available evidence, the real facts may be reflected. In this respect a look at the paragraph 10 of the plaint provides some clues. According to paragraph 10 the cause of action was accrued when the defendant tried to possess the land forcibly but their attempt was failed. The plaint does not describe the fact completely regarding failure of the Appellants/Defendants. This fact was, totally denied in W.S. by the Appellants/Defendants. At the time deposition the plaintiff again said that the suit was filed because the defendants tried to dispossess the suit land. Again no detail of defendants "try" or "attempt" has been given. The plaint as well as plaintiff remains silent regarding any attempt of theirs to approach law enforcement agencies. In contrast to the averment, the defendants first filed W.S. in which they denied the possession of the plaintiffs on the suit land and then they filed an amended W.S in which they claimed that their possession has been snatched by the Respondents/Plaintiffs. But is doesn't mean that there are only words against words regarding possession or dispossession. Infact the Appellants/Defendants have produced an FIR regarding the incident of dispossession. It is worth nothing that at the time of cross, a suggestion was made that a similar FIR was lodged by the Respondents/Plaintiffs which was replied in affirmative. This suggestion of the learned counsel for the Respondents/Plaintiffs itself indicates that some event was taken place. It is also worth noting that the application of amendments in W.S. filed the Appellants/Defendants was allowed under no objection but without admitting the contents thereof. From the contents of the FIR # 73/97 it appears that the Appellants/Defendants were not only dispossessed from the suit land but they sustained fire arm injury. Although, it is claimed that counter FIR was lodged but the same was not brought on the record. The certified copy of FIR # 73/97 also reveals that the final report on the basis of FIR was submitted and a sessions case was pending against the respondent party. The FIR # 73/97 indicates that defendant No.3 Waryam received fire arm injury on chest while his nephew Din Mohammad received fire arm injury in the abdomen. It means that in the said incident the defendant party was made a prey of aggression. It is to be noted that the Appellants/Defendants have produced bulk of record like land revenue receipts, Form NO.1 etc. which also fortifies the contentions of the Appellants/Defendants plea regarding possession. From the above discussion, it is established that the possession of the suit land prior to the year 1997 was in

the hands of the Appellants/Defendants. The effect on this finding is that the Respondents/Plaintiffs claim of ownership is not coupled with possession as the possession was later on taken by them. Another effect of this fact will be that if the Respondents/Plaintiffs are trespassers then they are not entitled for any relief of injunction in their favour. In this respect reliance may be taken from the celebrated case of "Shahid Coal Agency, Quetta vs. Chairman (now General Manager) Pakistan Railways, Lahore and another" (PLJ 1983 Quetta 19).

Point NO: 2

This aspect of the case has been discussed by the trial Court while dealing with issue No.2. The trial Court has framed the issue in negative form, which is not desirable. It is better for the trial Court to frame the issue in assertive form so that it becomes obvious that with whom the onus lies to prove the same. The trial Court has taken reliance only on the entry No.415 which was not only denied but has been challenged with the help of the bulk of evidence. The trial Court has shifted the entire burden to the defendants side regarding issue No.2. I think, it was done because the issue was not properly framed. The trial Court framed the issue in the following language.

> Whether the suit survey numbers do not belong to the father of the plaintiffs?

From the above issue, it seems that the fact of belonging the survey numbers to the father of plaintiffs is rather admitted situation. It is now the defendants who have to establish that the same is not the correct. It is the reason, that at the time of dealing with this issue the trial Court has discussed the evidence of the defendants at length. In fact, the trial Court has shifted the entire burden to prove the issue No.2 on the defendants. The scheme of law is that it is the plaintiff, who has to establish his case. The weakness of the defendants case does not preclude the plaintiff to discharge the onus which upon him. It is the demand of law that the plaintiff, should stand on his own legs and feebleness or imparment of defendant would be, impertinent for lending strength to his weak case. In this respect reliance may be taken from the case of Haji Muhammad Sarwar Khan vs. Hussain Nawab and others (1992 CLC 1915).

Now it is to be seen that whether the Respondents/Plaintiffs have proved that the property belongs to them. The case of the plaintiffs is that the property was originally owned by their father Qadir Bakhsh. They are begetters of the property from their father. In this respect, they only brought on record the certified copy of the Entry No.415. According to the provisions of Qanoon-e-Shahadat, the certified copy of a document is secondary documentary evidence. No doubt, under the provisions of Qanoon-e-Shahadat usually presumption goes in favour of the certified copy of official documents (Art 90 to Art 98 of Qanoon-e-Shahadat). But it does not happen in each and every case. In fact when there is a strong denial from the other side coupled with some documents, then the onus to prove remains un-shedder even after production of the certified copy of an official document. In this respect the distinction between ordinary official documents and record of rights and other documents prepared and maintained under the land revenue Act is important. Because under section 52 of Land Revenue Act, an entry made in the record of rights in accordance with law or in a periodical record is presumed to be true until the contrary is proved or a new entry is lawfully substituted.

The case of the Respondent/plaintiffs is hit by the law of presumption also. The defendant has produced a Robkari (روبکاری) which is not a secondary document but a primary document under the definition of the Qanoon-e-Shahadat. The rule is that a primary document is to be proved from its contents. The Tapedar (تپیدار) was also examined by the trial Court and he declared that the Entry No.415 is dubious entry. Nonetheless, the Tapedar (تپیدار) is not the custodian of the documents. But is a fact that he is entitled to approach and inspect the documents and he is the person whose reports are relied upon in so many matters regarding the record of rights. The Land Revenue Act by its

> section 39, required that there shall be a record of rights for each estate. The record of rights includes the documents mentioned in the said section. Amongst the said documents include Register Haqdaran or Jamabandi (رجسٹر حقداران یا جمع بندی) Section 42 provides for the mode in which changes may be effected in the record of rights, the mode is by attesting mutation by the revenue officers, section 42 requires a person acquiring by inheritance purchase, mortgage, gift etc. any right in an estate as a land owner or a tenant for a fixed terms exceeding one year to report the fact to the Tapedar (تپیدار) this is followed by the procedure culminating in the attestation of a mutation. From the above discussion, it is proved that the Tapedar (تپیدار) is fully competent to give evidence regarding the fact and factitiousness of an entry in the record of rights. The outcome of the above discussion is that only on the basis of the Robkari (روبکاری) which bears the signature of Mukhtiarkar (مختیارکار) as attester, the Entry No.415 has been engulfed under thick clouds and solely the same is not reliable. It is very important to note that a mutation is not the part of record of rights but when its entries are incorporated in the record of rights i.e. register Haqdaran or Jamabandi (رجسٹر حقداران یا جمع بندی) it becomes the part of record of rights. A Khasra gardwari (خسرہ گردواری) which is usually produced as evidence of possession is not part of the record of rights. Therefore neither the mutation entry nor "Khasra Gardwar" (خسرہ گردواری) creates any title in favour of the Respondents/plaintiffs. In this respect reliance may be taken from the celebrated cases of "Ali Asghar Hussain shah and others Vs: Pehalwan shah and others" (1981 CLC 1752). Ghulam Mustafa and others Vs: Abdul Wahid and others" (1988 CLC 1246) "Mrs: Kishwar Vs: Abdul Dehyan and others" (2004 CLC 203).
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> The learned counsel for the Respondents/plaintiffs has also taken reliance from a pass Book on which the Respondents/plaintiffs have allegedly acquired loan from ADBP. I must say that the pass book in respect of land is issued for the limited purpose of short terms loans. The purpose of Pass Book has been mentioned at the bottom of it. The pass Book can not be used to create collateral for fixation of any credit limit of a person from the ADBP or any other commercial bank for over draft. It means that the pass Book is itself not a title document, especially if the same was issued on the basis of entry no 415.
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> The outcome of the above discussion is that the Respondent/plaintiffs have failed to establish their case for declaration and permanent injunction and thus no relief(s) can be extended to them in this respect.

10. Perusal of the aforesaid findings of the learned Appellate Court reflects that the first thing which has prevailed upon is that some amended written statement was filed, wherein it was disclosed by the Respondents that possession was taken over from them during pendency of the Suit and, therefore, an issue to this effect had to be settled by the trial Court. If that was the case, then the Appellate Court instead of setting-aside the judgment and decree of the trial Court, ought to have remanded the matter. It may be of relevance to observe that the learned Trial Court had settled the Issues as above on 11.2.1999, whereas, the amended written statement had been filed on 30.11.1998; i.e. after the amended written statement was a matter of record. Nonetheless, if the Respondents case was of dispossession after filing of the Suit, it was incumbent upon them to get such issue settled by filing some application and if not, then a further challenge to such non-framing of an issue on

the ground that the possession was taken over forcibly from them after filing of the Suit. In his cross examination, Respondent / Defendant No.3, has replied that **"*it is fact that I have not filed any suit for possession*"**. He has further responded that **"*it is fact that the suit land is in possession of the plaintiffs and their houses and Otaq are also situated there, voluntarily says that they have constructed the same recently*"**. This reply does not support the case of the Respondents in any manner. If they were dispossessed as alleged, then not only a suit for possession was a must; but so also specific dates of such dispossession along with supporting evidence ought to have been brought on record as well. If that was not done by the Respondent/Defendants, then the Appellate Court ought not to have involved into this issue and decide the same on presumption. It has not come on record through any cogent evidence that dispossession of defendants was through force and / or after filing of the Suit. Nothing has been adduced for such assertion of the defendants and merely on the basis of amended written statement and reliance of some purported FIRs, the Appellate Court came to this conclusion. It is an admitted position that in fact there were counter FIRs to this incident [DW-1 / (Exhi-69) in his cross examination has stated that **"*it is fact that plaintiffs also lodged the same type of FIR against us*"**] and without any conclusive finding on the issue of who being dispossessing whom, on a presumptive analysis, the judgement of the Trial Court was not required to be disturbed.

11. It further appears that the Appellate Court also rephrased issue No.2 and after putting the entire burden upon the applicants, gave a finding against them. Again if that was the case, then the matter required either recording of additional evidence; or if not, then a remand to the trial Court for deciding the same once again. This was also not done. In fact, the Appellate Court has gone into issues which were not relevant and germane to the proceedings in hand, inasmuch as it was the Applicant / plaintiff who came before the Court with the plea that a declaration be given as to the ownership of the land in favour of the plaintiffs being inherited from their father, with an injunctive relief from interfering with their peaceful possession. Most importantly it had come on record that the land belongs to the deceased father of the Applicants / Plaintiffs and was being claimed / owned by them on the basis of inheritance and an entry of *foti khata badal* was recorded in the record of rights. As to the same being dubious, it may be observed that a mere statement to this effect without any further action by the concerned officials and the department is not only based on conjectures but is also irrelevant, and cannot be taken as gospel truth. If such an entry was dubious then some action ought to have been initiated. Admittedly, it is not the case wherein some action was pending in this regard and a mere statement to this

effect that there is some observation on the record regarding this entry being dubious does not suffice. It is not disputed as per record that the property was owned by the late father of the applicants and on the basis of such ownership it was recorded in the name of the Applicants as Foti Khata Badal. As to Respondents / defendants nothing has come on record as to their ownership and the purported inheritance by them. While confronted, the respondents' counsel stated before this Court that the defendants were not required to assert or prove anything as applicants had filed the Suit and not the respondents. This may be true, but for the purposes of dislodging the claim of the applicants and the defence that the property was inherited by the defendants, whereas, their claim regarding possession was lawful, they ought to have come before the Court with at least some material in support of this version. This was not their case. DW-1, Muhammad Waryam S/o Bangal Khan (Respondent / Defendant No.3 and attorney of Respondent / Defendant No.5) came in the witness box and replied that ***"it is fact that I have produced mutation entry in the name of Shah Mohammad and Gul Hasan. It is fact that those persons were not my real grand fathers"***. He has further stated that ***"it is fact that I have not produced the mutation record in the name of my real grand father."*** He has further submitted that ***"it is fact that I have not produced any land revenue receipts prior to 1990"***. Again he states that ***"it is fact that I have not challenged the Khata in the name of plaintiffs before any forum."***

12. In view of the hereinabove facts and circumstances of this case it appears that the learned Appellate Court was misdirected in setting-aside the judgment and decree of the trial Court and was a case of misreading of the evidence; hence this Court while exercising jurisdiction under Section 115 CPC, must interfere and accordingly by means of a short order the impugned judgment dated 20.5.2004 passed by the Appellate Court was set-aside and the judgment of the trial Court dated 29.8.2002 was restored and these are the reasons thereof.

Judge

ARBROHI