IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Civil Revision No. S – 62 of 2000

(Jeewano and others vs. Shaikh Ahmed & others)

Date of hearing: 08-11-2021
Date of judgment: 08-11-2021

Mr.Abdul Ghaffar Memon Advocate for the Applicants
Mr. Abdul Mujeeb Shaikh Advocate for the Respondents

JUDGMENT

Muhammad Junaid Ghaffar, J. – Through this Civil Revision, the Applicants have impugned judgment dated 23-02-2000 passed by 3rd. Additional District Judge, Mirpur Mathelo in Civil Appeal No.16/1998 whereby the judgment and decree dated 05.06.1997 passed by Senior Civil Judge, Ubauro in F.C Suit No.126/1997 (New), has been set-aside.

2. Learned Counsel for the Applicants has argued that the Appellate Court was not justified in setting-aside the judgment and decree passed by the trial Court in favour of the Applicants; that the Applicants had purchased the property from Respondent No.1 by way of an oral sale agreement which was duly recorded before the concerned Mukhtiarkar; that in the first round as well, the trial Court has decided the matter in favour of the Applicants, hence this Revision Application merits consideration and be allowed by restoring the judgment of trial Court.

3. On the other hand, the Respondents Counsel has supported the impugned judgment of the Appellate Court.

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

5. The Applicant No.1 had filed a Suit for declaration and injunction to the effect that the order dated 21-04-1980 passed by Mukhtiarkar Ubauro in favour of plaintiff in respect of the suit property was legal and proper, hence the Applicants be declared as owners of the suit property. The said Suit was decreed by the trial Court vide judgment dated 30-03-1995, however in appeal, the same was set-aside vide judgment dated 05-06-1997. The relevant observations of the Appellate Court in the first round reads as under;-

> "I have carefully heard Mr. Abdul Ghani Shaikh, learned advocate for appellants and Mr. Saindad Khan Kolachi, Learned advocate for respondents, and perused the relevant record.
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> From the perusal of R & Ps it appears that said Shaikh Ahmed has not been examined in the trial Court, but he appeared before learned District Judge, Ghotki, where neither his evidence was recorded on oath, nor he was subjected to cross-examination. In such circumstances, without touching the merits of the case judgment dated 30-03-1995 and decree dated 04-04-1995 passed by learned trial Court, are set-aside, and suit is remanded to the learned trial Court *with direction that learned Senior Civil Judge, Mirpur Mathelo, shall call summons Shaikh Muhammad, if any of the party, applies for his evidence as additional evidence*. I have decided to remand the suit as per observations of learned District Judge, as reproduced above infact it is development at appellate stage with no other as to costs. Resultantly, appeal is disposed of in the above terms. Learned lower Court shall decide the Suit within the period of 2 months a fresh in accordance with law. Parties are directed to appear before learned trial Court on 17-06-1997."

6. It appears that pursuant to remand order; once again the trial Court has passed judgment and decree in favour of the Applicants and it is pertinent to note that the directions given in the remand order were not complied-with. Neither the Applicants nor the Respondents made any efforts to examine Respondent No.1/Defendant No.1 as directed. Nonetheless, the said judgment was appealed and through impugned judgment, the judgment and decree has been set-aside by the Appellate Court, whereas, the relevant observations of the Appellate Court are as under;-

> "Admittedly in this case the mutation entry of the disputed 0.50 paisa share was affected in favour of contesting respondents by the Mukhtiarkar Ubauro on the basis of sale statement allegedly made by the vendor in favour of the contesting Respondents in presence of the two respectable persons, but either in the plaint or in the impugned order of the Mukhtiarkar Ubauro vide Ex.100 it does not show the names of the said two persons. The contesting respondents also did not examine any of the attesting witness of the mutation at the trial and the learned Senior Civil Judge, Ubauro did not consider this aspect of the case and relied upon the admission of the appellant No.1(defendant No.3) wherein he had admitted that Shaikh Ahmed sold his lands to the various person out of survey Nos. 173, 469, 775, 384, 744 and 457 before the Mukhtiarkar and based his findings on issue No.1 as this clear admission on the part of the appellant No.1, which are in violation of provisions of

> Section 42 of the Land Revenue Act for want of compliance of pre-requisition for effecting mutation and thus the findings of the learned trial Court are not sustainable in law. The learned trial Court conversely much weighed the agreement of sale dated 10-04-1980 in favour of the appellant No.1 allegedly executed by the appellant No.2 and held that it was not proved in the case. The alleged sale agreement dated 10-04-1980 was not sought to be enforced specifically as the counter or set off, as no issue to this effect was framed. The findings of the learned trial Court on issue No.1 are therefore set-aside and for that reasons the findings on the other issues are also not sustainable in law.
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> It is also pertinent to mention that the appellants No.2 had disowned the sale of the disputed land in favour of the contesting respondents in his statement / application dated 04-06-1996 before the learned District Judge, Ghotki, when he was called in person on application of the contesting respondents in the decided Civil Appeal No.30/95 with precondition and the legal implication of the statement of Shaikh Ahmed would have been that the alleged sale of the disputed 0.50 paisa share out of S.No.457 in favour of the contesting respondents would have lost its sanctity and that statement was not considered by this Court on the ground that the said statement of Shaikh Ahmed was not recorded on oath. Since the Shaikh Ahmed was called with that pre-condition and he disowned the alleged sale in favour of the contesting respondents thus they are estopped by law to deny legal implications of the statement of Shaikh Ahmed which is also reflected in the order dated 04-06-1996 passed by the learned District Judge, Ghotki in Civil Appeal No.30/1995. The contention of the learned counsel for the appellants in this respect is well-founded.
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> In view of the above facts and circumstances of this appeal the impugned judgment and decree passed by the learned Senior Civil Judge, Ubauro is not sustainable in law as the provisions of Section 42 of the Land Revenue Act were either not complied with by the learned Mukhtiarkar Ubauro and the contesting respondents also failed to examine either of the witness of alleged mutation at the trial in order to muster support in respect of their claim. I, therefore, allow this appeal and set-aside the impugned judgment and decree and dismiss the suit being not maintainable in law. Let the decree be drawn accordingly. The R & Ps be sent back to the learned trial Court with the compared copy of this judgment and decree in appeal. Parties to bear their own costs."

7. Perusal of the aforesaid findings clearly reflects that the Appellate Court was fully justified in setting-aside the judgment and decree of the trial Court, inasmuch as Respondent No.1 was never summoned as a witness and apparently this was not done especially by the Applicants for the simple reason that earlier before the District Judge, Ghotki, the said Respondent No.1 had appeared and clearly stated that the property in

question was though owned by him; but was never sold to the Applicants nor any such oral statement was ever recorded by him before the concerned Mukhtiarkar, as alleged. The said statement was discarded in the earlier round by the Appellate Court for the reason that it was not on oath; however, to do justice, a chance was given to the parties to summon this Respondent No.1 as their; or in the alternative a Court witness; but this process was not adopted. Since a very specific order for remand was passed by the Appellate Court in the first round and the very basis for such a remand order was the statement of Respondent No.1, therefore, it was mandatory and incumbent upon the Applicants to seek examination of Respondent No.1 as a witness. Admittedly no such effort was ever made by the Applicants and while confronted, learned Counsel for the Applicants could not refer to any application ever made by the Applicants for the summoning Respondent No.1 as a Court witness. In that case, the learned trial Court was misdirected in deciding all other issues as primarily the case of the Applicants could only be sustained, if the evidence of Respondent No.1 was recorded, as directed by the Appellate Court in the first round of litigation.

8. In view of the hereinabove facts and circumstances of this case, I do not see any reason to interfere with the judgment of the Appellate Court, which has been passed after careful examination of the record, and appears to be correct and justified in law, therefore this Revision Application was dismissed by means of a short order in the earlier part of the day and these are the reasons thereof.

Judge

ARBROHI