Order Sheet

IN THE HIGH COURT OF SINDH,

CIRCUIT COURT, HYDERABAD

R.A. No. 190 of 2006

Misri Vs. Photo & others

R.A. No. 195 of 2006

Muhammad Ishaque Vs. Photo and others

Applicant(s) : Misri in R.A No. 190 of 2006and Muhammad Ishaque in R.A. No. 195 of 2006 through Mr. Qamar Mehmood Baig, Advocate.

Respondents: Photo and others in R.A. Nos. 190 & 195 of 2006 through Mr. Faheem Murtaza who is called absent today.

Mr. Allah Bachayo Soomro, Addl. A.G.

Date of hearing: 08.11.2021
Date of Decision: 06.12.2021

O R D E R

ADNAN-UL-KARIM MEMON, J:- The applicant(s) through the listed Revision Applications have called in question the judgment and decree dated 12.08.2006, passed by learned District Judge, Badin in two consolidated Appeal Nos. 29 & 37 of 2000, whereby the learned Judge, allowed C.A. No. 29 of 2000 and dismissed C.A No. 37 of 2000 emanated from F.C. Suit No. 35 of 1996 (renumbered as F.C. Suit No. 35 of 1996 & renumbered as F.C Suit No. 101 of 1999) whereby the learned Senior Civil Judge, Badin partly decreed the suit of plaintiffs.

2. Brief facts of the case are that respondents 1 & 2 filed F.C. Suit No. 35 of 1996 which was renumbered as F.C. Suit No. 19 of 1998 subsequently again renumbered as F.C. Suit No. 101 of 1999 against applicants and others for declaration and permanent injunction stating that S.Nos. 172(2-25 acres), 173(3-20 acres) and 174(4-35 acres) total area 11-00 acres in Deh Tayab Sahito Taluka Tando Bago is their ancestral property; and, allotted to their grandfather namely Allah Dino son of Dodo and Ahmed son of Dodo vide allotment order

dated 16.12.1930; that in the year 1993 applicants informed them that suit lands have been granted to them; therefore, they approached the office of Mukhtiarkar Tando Bago who issued Robkari dated 8.5.1993 that the suit land is the ancestral property of respondents 1 and 2 but he does not know as to how it has been allotted to applicants; it is further stated that the land has been bifurcated in an individual unit according to which B.No. 172 has been shown in the name of Ahmed who is the father of respondent No.4 from 1935, B.No. 173 has been shown as Evacuee property in 1959, B.No. 174 has been fraudulently shown in the name of applicant Misri whose father's name is Yaqoob but in the record of right, it is shown as Ahmed. It is further alleged that these entries have been shown without any base and all entries are illegal and fraudulent, therefore, they filed suit.

3. Upon service of process, Revenue Officer and Barrage Mukhtiarkar filed their written statements stating therein that for S.Nos. 172 & 173 it is for plaintiffs/respondents 1 & 2 to prove their case but concerning S.No. 174 they stated that it was government Na-Qabooli land, the same in the year 1963-64 along with S.Nos. 180 & 188 were granted permanently to Misri son of Ahmed Sahto. On his death as per the order of Revenue Officer Kotri Barrage dated 5.2.1983 khata of said survey numbers were mutated in the name of his son Muhammad Yaqoob. Since the grant of said Survey was fully paid and T.O Form was issued, therefore, presently the status of suit survey number is Qabooli land. D.C. Badin and Mukhtiarkar Tando Bago adopted the same written statement.

4. Defendants / Applicants Misri son of Yaqoob and Akbar son of Ahmed in their written statement has admitted that they were informed by plaintiffs about their ownership in Survey Numbers 172 & 174; they stated that entry Nos. 112 &136 in the names of paternal grandfathers of plaintiffs and Robkari dated 8.5.1993 are bogus; they vehemently denied that plaintiffs or their ancestors had never remained in possession of suit land nor did they have any right and title over the same; they further stated that Entry Nos. 141 & 6 in the name of Ahmed and Entry No. 261 and 170 in the name of the father of Defendant No.6 and Entry No. 176 in the name of Defendant No.6 namely Yaqoob (legal heir of Defendant No.6) are correct and legally mutated in their names and they are in cultivating possession of suit land. They pointed out that the case of plaintiffs is

pending disposal before Revenue Authorities. According to them the plaintiff to avoid any adverse orders from Revenue Forum they willfully failed to appear before the revenue authorities the defendant No.2 as their claim which according to the answering Defendants is time-barred. They prayed that plaintiffs have no cause of action and the present suit is not maintainable being barred by law and further under the Specific Relief Act. Besides the suit is undervalued, therefore, the same may be dismissed with costs. Defendant Muhammad Ishaque was served but he neither appeared nor filed any written statement, hence he was declared ex-parte.

5. On the divergent pleadings of the parties, learned trial court framed the following issues:-

1. Whether the plaintiffs are the absolute owners of the suit land?
2. Whether the entries in the record of rights and allotment of the suit land in the name of Defendant No.5 to 7 are illegal, malafide, void, collusive and the same is liable to be canceled?
3. Whether the suit is not maintainable?
4. Whether the suit is badly time-barred and the suit barred under the Specific Relief Act?
5. Whether the suit is undervalued?
6. What should the decree be?

6. Learned trial court after recording evidence of the parties on the above issues and hearing the parties partly decreed the suit to the extent that plaintiffs are owners of Survey Nos. 172 admeasuring 2-25 acres and 173 admeasuring 3-20 acres situated in Deh Ayab Sahto Taluka Tando Bago District Badin and as regards Survey No. 174 measuring 4-35 acres the parties were directed to approach revenue authorities for determination of their rights. An excerpt of the judgment dated 28.2.2000 is reproduced as under:-

> "**ISSUE No.4**
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> The burden to prove this issue lies on defendants learned advocate for defendants Nos 6 and 7 has referred to article 14 of the Limitation Act. According to this article, the suit is to be filed within one year of the act or order of an officer of Government in his official capacity, not herein otherwise expressly provided. In this case no specific order of any government, servant has been challenged but a declaration

has been sought that the plaintiffs are the lawful owners of the suit land. According to plaintiffs, they were informed in the year 1993 by the defendant's Nos 5 to 7 that the suit land has been allotted to them and the present suit has been filed in the year 1996 i.e within 6 years of the occupying to the cause of action as a suit for declaration of any right or title can be filed within six years, I, therefore, hold that the suit is not time-barred nor the same is barred under specific Relief Act. This issue is, therefore, answered accordingly.

ISSUE N0.05

The burden to prove this issue lies on the defendants. However the learned advocate for defendants No. 6 and 7 and learned DDA for defendants Nos 1 to 4 did not seriously press this issue. Accordingly, I hold this issue as not pressed.

ISSUENO.06.

In view of my findings on the above issues the the suit is partly decreed to the extent that the plaintiffs are of owners of survey numbers 172 measuring 2-25 acres and 173 measuring 3-20 acres situated in Deh Tayab Sahto Taluka Tando Bago district Badin and as regards survey No.174 measuring4-35 acres is concerned the parties are directed to approach revenue/Barrage authorities for determination of their rights. There will be no order as to costs."

7. The said judgment and decree of the trial court was challenged before the learned Appellate Court by the parties, which after hearing the counsel of the parties held that the findings of the trial court in respect of Survey No. 174 are not correct and per evidence and documents available on record, therefore, the appeal of appellants Photo and Mst. Amnat was allowed with no order as to costs but the appeal of Muhammad Ishaque was dismissed with no order as to costs, hence these revision applications. An excerpt of the judgment is reproduced as under:-

"13. The barrage authorities granted S.No. 174 to Muhammad Yakoob wrongly as it was not available for grant having been already granted to predecessor-in-interest of appellants photo. Mst Amnat in early 1930. Thus, the Barrage authorities committed two frauds, one by including S.no.174 in another part of grant Ex-116, the other they granted S.No.174 when it was not available-le for the grant. The respondents No.2, 3, 4 have not adduced evidence to make the ambiguity clear. It is very shocking that the government officers do not take interest in the suit property and they slept over the rights after filing a written statement which is not a substitute for evidence. It is apparent in this particular case is a case of a duplicate grant and in such a situation. It was incumbent upon respondent No.

> 2,3, and 4 to step up in the witness box to adduce evidence and produce the original record to assist the court properly in order to determine the rights of the parties properly in accordance with the facts and record. The officers, I am sorry to say that have not discharged their official duties but they are guilty of gross negligence which should not go unpunished. A copy of this Judgment be sent to the secretary Revenue) Board of Revenue Sindh Hyderabad for necessary disciplinary action against the delinquent officers respondent No 2, 3, and 4 with the copy to the District C-ordination officer Badin for information and necessary action against the respondents 3 and 4. Point No.4 is answered in the affirmative.
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> 14. For the reasons discussed above, I am of the opinion that the finding of learned senior civil Judge, Badin in respect of S no. 174 is not correct and in accordance with the evidence and the documents available on record, therefore, the appeal of appellants photo and Mst Amnat bearing No.29 of 2000 is allowed with no order as to costs. While appeal No.37 of 2000 filed by the appellant Muhammad Ishaque is dismissed with no order as to costs."

8. Mr. Qamar Mehmood Baig, learned counsel for the applicants more particularly in Revision Application No. 195 of 2006 argued that the impugned order dated 3.4.2000 passed by learned trial court dismissing the application under order 9 rule 13, on the notion that it is time barred, is opposed to facts, law and justice, thus liable to be reversed; that the order of learned trial court is bad in law as while deciding the said application, he only referred the case diary dated 15-5-1996 which showed that the service was held good on the applicant by the learned predecessor of the trial judge, but he did not examine the endorsement of the bailiff or the thumb impression of the applicant to satisfy himself as to whether the applicant was properly served or not; that the trial court also failed to take note of the fact that under order 5 rule 10(1) CPC, it is mandatory that along with the summons under Rule 9 the registered post acknowledgment due notice with another copy of the summons signed and sealed in the manner provided in Rule 10 was also required to be sent and admittedly this mandatory provisions of law was not complied with as no registered notice was sent to the applicant for the hearing dated 15-5-1996; that learned trial court held the service good in mechanical manner without applying its judicial mind and only on the false report of bailiff which was denied by the applicant and as such the learned trial court acted illegally which resulted into miscarriage of justice; that the applicant had denied his thumb impression on the summons and at least the learned trial court could compare the thumb impression available before him on the vakalatnama as well as on the affidavit filed in support of the application under order 9 rule 13 CPC and under the circumstances

it was also necessary to record evidence for the purpose of deciding the question of service; that learned trial court failed to consider and appreciate that non-compliance of mandatory provision of Order 5 Rule l0(a) CPC was by itself sufficient to set-aside ex-parte order/decree against the applicant; that learned trial court has acted illegally to hold that Survey No. 175 is owned by respondent Nos.l & 2 merely for the reason; that applicant was ex-parte and did not participate in the proceedings which finding is illegal as the party has to stand on his own legs and cannot rely on the weakness or absence of other party; that learned trial court failed to consider and take note of the fact that entry No.183 dated 24-12-1959 showing survey No.175 in the name of Tehal-mal was an evacuee property and given in claim one Mohi-u-din and further entry No. 12 dated 25-4-1986 shows that M/s. Abdul Khalique, Khan Muhammad, Qasim Ali and Shoukat All sold the survey No. 173 to defendant No.5/applicant and the said entries are not disputed and nothing is brought to rebut the same and the entry No.183 dated 24-12-1959 being more than 30 years old it was no required to be proved under law against the respondent Nos.l & 2; that in presence of entry No.183 dated 24-12-1959 and entry No.12 dated 25-4-1986 pertaining to survey No.173 the respondents No.l & 2 could not be declared as owners of the said survey number; that the finding of learned trial court on issue No.2 is based on the illegal finding of issue No.l and accordingly the same is also illegal and nullity in the eye of law; that learned trial court seriously erred in law to holdthat the suit was maintainable and it was not time barred; that learned trial court failed to consider and appreciatethat the entry No.183 dated 24-12-1959 in Deh Form VII-B showing theSurvey No.I73 as an evacuee property of Tehal-Mal and allotted toMohi-u-ddin could not be challenged by filing suit in the year 1996after a period about 36 years and without joining the necessary partiesfor that purpose; that learned trial court also failed to consider andappreciate that there is not even an iota of evidence that the respondents No.l & 2 or their ancestors Allahdino and Ahmed were havingpossession over survey No.1 75 and further the suit was neither filed forpossession nor the said relief could be claimed after a period of 36 yearsby respondents No.l &2 but the learned trial court did not advertthis important aspect of the case; that impugned judgment of learned appellate court on Point No.1 is illegal in as much as the finding is not based on the factsand evidence available on record but is against the weight ofevidence and

law applicable to the facts of the case; that learned appellate court in the Judgment has observed that "the appellant Ishaque defendant No.5 in the suit remained absent till he filed an application under 9 rule 13 CPC on 29-3-2000 for setting aside ex-parte decree dated 28-2-2000. In this application under Order 9 rule, 13 was not maintainable as it was time-barred." This observation of learned appellate court reflects that hedid not apply its judicial mind while deciding the point No.l as evenaccording to the said observation, the application under order 9 rule 13 CPCwas filed within a period of 30 days and it could not be held as timebarred; that learned appellate court did not examine the correctness or about the factum of service which was challenged bythe applicant but decided the same without recording evidence and for the reasons which are neither relevant nor tenable under the law; that learned appellate court failed to consider andappreciate the settled principle of law that service of summons in accordance with law has to be proved but this aspect of the case was notadverted to by the learned lower courts; that learned appellate court decided point No.1merely by saying that learned Senior Civil Judge Badin has properlyappreciated proceedings as dealt with by his predecessor but hehas omitted his finding on the limitation "which has been discussed byme that application under order 9 Rule 13 by itself time barred and noexplanation for such delay was forthcoming in the supportingaffidavit consequently I hold that application under order 9 rule 13 wasrightly decided by learned Senior Civil Judge Badin; that the finding of learned Appellate Court; is based upon misreading and non-application of judicial mind; that learned appellate court has decided point No.3against the applicant merely for the reason that the applicant had notfiled written statement nor adduced any evidence about hisentitlement over survey No.173; that learned appellate court did not examine the alleged title documents of respondents 1 & 2 to see whether the title ofrespondents No. 1 &2 over survey No. 175 was established under thelaw as the party is to stand on his own legs and cannot rely on the weakness of other party; that learned appellate court even did not examine entry No. 183 dated 24-12-1959 and entry No.12 dated 25-4-1986 in Deh Form VI1-B showing the Survey No. 173 in the name of claimant andlastly in the name of applicant which clearly disprove the title of respondents 1 &2 if any; that learned appellate court also did not examine themaintainability of the suit and about the limitation and as such it hasresulted into failure of justice as it was

the duty of Appellate Court U/s. 3 of the Limitation Act to see that the suit was not barred under the Limitation Act; that on the whole both the judgments and decrees of the learned lower courts are bad in law, cannot sustain, and are liable to be set aside by this Court. In support of his contentions, he relied upon the case of *Messrs Fatima Export Corporation and another Vs. Habib Bank Ltd* (**1983 SCMR 424**) and Syed *Mazhar Ali Shah Vs. Shah Muhammad (**1990 MLD 1070**).*

9. The private respondents have been served but they have chosen to remain absent, thus in presence of learned AAG and other parties, I have heard them and gone through the pleadings of the respondents and another record available before me.

10. Undoubtedly, Revision is a matter between the higher and subordinate Courts, and the right to move an application in this respect by the Applicant is merely a privilege. The provisions of Section 115, C.P.C., have been divided into two parts; the first part enumerates the conditions, under which, the Court can interfere and the second part specifies the type of orders which are susceptible to Revision. In numerous judgments, the Honorable Apex Court was pleased to hold that the jurisdiction under Section 115 C.P.C. is discretionary.

11. I have scanned the evidence available on record and found that findings arrived at by the learned appellate Court which has dealt with the issue of applicants very elaborately thus cannot be lightly interfered with unless some question of law or erroneous appreciation of evidence is made out. However, it appears from the record that the revenue department granted S.No. 174 to Muhammad Yakoob wrongly as it was not available for grant having been already granted to the predecessor-in-interest of the appellant photo, Mst Amnat in early 1930. The observation of the learned appellate court cannot be said to be erroneous to the extent that the Barrage authorities committed two frauds, one by including S.no.174 in another part of grant Ex-116, on the other they granted S.No.174 when it was not available-le for the grant. Official respondents failed to adduce evidence to clarify the position. The learned appellate court went ahead in saying that this is a case of a duplicate grant since the official respondents left the matter in the lurch and failed to produce the original record in court to determine the rights of the

parties properly. In my view, the decision of the learned appellate court does not require interference at my end at the revision stage.

12. In principle the applicants have lost their case at the appellate stage; and, at the revision stage, they have agitated the grounds already exhausted by them and properly adjudicated by the competent forum including the application under Order 9 rule 13 CPC in point of determination, thus in my view, no perversity and gross illegalities have been pointed out to upset the decision of the learned appellate Court, therefore, it does not appeal to remand the case to the learned subordinate Courts for re-determination of the question discussed supra as the matter has been decided on merits. The case law cited at the bar will not be helpful to the applicants in the facts and circumstances of the present case.

13. I am of the view that learned Appellate Court has considered every aspect of the case and thereafter passed an explanatory Judgment and decree on merits, therefore, no ground existed for re-evaluation of evidence, and thus, I maintain the Judgment and Decree passed by learned Appellate Court.

14. In the light of the above facts and circumstances of the case, I do not see any illegality, infirmity, or material irregularity in Judgment of the learned Appellate Court warranting interference of this Court. Hence, the above Revision Applications are found to be meritless and are accordingly dismissed along with the listed application(s).

J U D G E