

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

R.A. No. 15 of 2003

[Islamic Republic of Pakistan v. Rahim Bux and others]

Applicant : The Islamic Republic of Pakistan and others through Mr. Muhammad Humayoon Khan, Deputy Attorney General.

Respondents : Rahim Bux and others
None present for respondents

Date of hearing & Decision : 22.11.2021

O R D E R

ADNAN-UL-KARIM MEMON, J.- The applicants through this Civil Revision Application have called into question the judgment and decree dated 24.02.2003 passed by learned VIIth Additional District Judge, Hyderabad in C.A. No. 10 of 2001 whereby the learned Judge while allowing the appeal subject to cost of Rs.1000/- directed the parties to appear before the trial court on 11.3.2003 without fail to produce their evidence and set-aside the Judgment and Decree of trial court dated 12.12.2000 & 20.12.2000 respectively passed by IVth Senior Civil Judge, Hyderabad dismissing the suit of respondents under Order XVII Rule 3 CPC.

2. Brief facts of the case are that respondents filed suit for injunction. In the plaint it is stated that the plaintiffs are related interse and descendants of their ancestors Tagio, Ali Bux and Muhammad Hassan all sons of Gul Muhammad Lashari and are residing in their ancestral village known as Tagio Lashari village which is situated in Survey No.160, Deh Fouji Gah Taluka and District Hyderabad. The said survey number along with survey Nos. 145, 146, 158, 159 and 161 of Deh Fouj Gah admeasuring 23-3 acres also their ancestral property and such entires were duly kept in revenue record; that about four months back the applicants through their subordinate staff put wire-hedge around the above mentioned village and agricultural land of respondents; and, on

protest of respondents demarcation was scheduled but the same was never conducted, hence they filed the above suit.

3. The applicants 1 to 3 filed written statement denying the claim of respondents and further stated that it was unsurveyed waste land and there was no survey number; therefore, the answering defendants were put in physical possession since 1844 to 45 when the British Ruler conquer of Sindh and the said suit area comprising 23-3 acres were physically taken for the purpose of Defence Department; and, was duly marked and handed over to the Defence Department; at the time when the said area was declared as part and parcel of Cantonment it was reserved for defence units thus the alleged contention of respondents is manipulated, maneoured and with malafide intention to grab the valuable piece of land; whereas an area 0-65 acres was graciously resrved to accommodate local villagers and it was known as Tagio Lashari village; that said villagers have their vested claim for the purpose of Tagio Lashari village and the applicants put wire-hedge in the greater interest of security and safeguard their interest excluding the area earmarked for Tagio Lashari.

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

1. Whether the suit is not maintainable at law?
2. Whether the suit barred by any law?
3. Whether the plaintiffs are residents of village TagioLashari?
4. Whether the village TagioLashari is in existence in map?
5. Whether the Defendants have encroached upon the area of property or around the village of plaintiff with hedge of wires?
6. Whether the plaintiffs are entitled to relief as prayed for by them?
7. What should the Decree be ?

5. After framing issues, depiste lapse of five years plaintiffs / respondents failed to examine even a single witness and several adjournments were sought and granted with last and final chance with specific directions that no further chance will be given but they

did not care and sought adjournment on each and every date of hearing on one pretext or the other, therefore, on the date when the Judgment was passed the matter was fixed for evidence of plaintiff side but plaintiff No.1 sent adjournment application which was rejected and their defence side was closed for want of evidence under Order XVII Rule 3 CPC. As excerpt of the Judgment is as under:-

“Issue No. 03 to 06

The burden to prove these issues lies upon the plaintiffs, but as already stated despite availing more than five years, the plaintiffs have to lead evidence, as such nothing has come on record in support of these issues, which in the circumstances are replied in the negative.

Issue No. 01 & 02.

Since the plaintiffs have failed to prove their case, I therefore do not find it necessary to discuss these legal issues.

Issue No.07

In view of my findings on issues No. 03 to 06 above, suit of the plaintiff is dismissed with costs. Decree to follow accordingly.”

The applicants being aggrieved by and dis-satisfied with the above order, preferred C.A. No. 10 of 2001 which was allowed by the appellate court, however, subject to cost of Rs.1000 with direction to the parties to approach trial Court for recording evidence. The applicants challenging the above direction have filed the instant Civil Revision Application. An excerpt of the judgment is as under:-

“ In view of the above facts and the guidance of the case law. I am of the humble view that the Judgment and Decree cannot hold the field in terms of Rule 3 of Order 17 CPC but at the most can be termed to have been passed in terms of Order 17 Rule 2 CPC or in terms of Order 9 CPC. The event, when learned trial court was of the view that the appellants / plaintiffs had no mind to adduce the evidence then it should have closed his side and called upon the defendants to adduce their evidence, by not doing so, it has fallen in a gross illegality and material irregularity therefore, its Judgment and Decree as it passed cannot be allowed to stand, which is hereby set aside. Accordingly the case is remanded to the trial court with the directions to proceed it by allowing a fair chance to appellants to produce their entire evidence in support of their case, subject to payment of costs of Rs. 1000/- on 11.3.2003. The cost of deposited shall be paid by the trial court to respondents to compensate them to the extent for the agonies; they had faced due to appellants / plaintiffs.

The parties advocates are present, they are directed to appear before the learned trial court on 11.3.2003 without claiming any further notice from it. The appellants on payment of cost of Rs.1000/- shall lead their evidence. In default of any of the party as held above, the trial court shall be at liberty to proceed further in the matter in accordance with law keeping in view the observations made

hereinabove. It is further directed that the trial court shall conclude the trial of this case within four months time.

With the above observations this appeal is disposed off. The office is directed to remit the R&Ps of the trial court forthwith. Parties to bear their own costs.”

6. Mr. Muhammad Humayoon Khan, learned Deputy Attorney General representing the applicants has argued that the impugned Judgment and Decree of appellate court is against the facts and law; that learned appellate court wrongly and illegally exercised the jurisdiction vested in it by allowing the appeal and passing the impugned Judgment; that learned appellate court has not even referred the citations relied upon on behalf of the applicants; much less discussing and distinguishing the same; that the authority relied upon by the learned appellate court is not at all on the point of order XVII Rule 3 CPC; that the other authorities relied upon by the learned appellate court do not support the conclusion arrived at by it and on the contrary that were against the Judgment and Decree passed by it; that learned appellate court committed gross illegality in exercising its jurisdiction by ignoring seven rulings and authorities cited on behalf of applicants and passed the impugned Judgment and Decree in total disregard of the law laid down by the Honourable Superior Courts. He lastly prayed for allowing the instant Civil Revision.

7. I have gone through the judgment & decree dated 24.02.2003, passed by learned VIIth Additional District Judge, Hyderabad, whereby he directed the trial Court to conclude the trial within four months and premised his findings on the ground that judgment and decree passed by the trial Court closing side of party to produce evidence under Order XVII Rule 3 CPC was not sustainable in terms of Order XI CPC; that event when learned trial Court was of the view that the appellants/plaintiffs had no mind to adduce the evidence, then it should have closed its side and called upon the defendants to adduce their evidence, by not doing so it has fallen in gross illegality and material irregularity. At this stage learned DAG, has emphasized that the findings of learned appellate Court are erroneous and contrary to ratio of judgment of Hon'ble Supreme Court in the case of *Moon Enterprises CNC Station, Rawalpindi versus Suit Northern Gas Pipeline Limited through General Manager, Rawalpindi & another* (2020 SCMR 300). He further argued that bare reading of Order XVII Rule 3 CPC and the case law cited above would make it clear that for

Order XVII Rule 3 CPC to apply and the right of a party to produce evidence to be closed the following conditions must be made:

- (i) *at the request of a party to the suit for the purpose of adducing evidence, time must have been granted with a specific warning that said opportunity will be the last and failure to adduce evidence would lead to closure of the right to produce evidence; and*
- (ii) *the same party on the date which was fixed as last opportunity fails to produce its evidence.*

8. Per learned DAG, the respondents were given several opportunities to produce evidence but failed to substantiate their claim on the subject land. In this regard he took me to the Record and Proceedings of the case file and referred the diary sheets, order sheets and other relevant documents to show that the respondents were given sufficient opportunities to produce evidence in support of their purported pleas as made in the memo of plaint; however, they failed and neglected to do so compelling the Court to close their side to adduce evidence.

9. I have observed that though number of opportunities were given to the private respondents to put forward their defence but they chosen to remain absent either before the trial court and even this court inspite of service held good upon them by way of publication, which prima facie show their conduct that they have no defence to support their case; and this could be the reason to shy away from the proceedings and many other reasons best known to them.

10. The important question involved in the present proceedings is whether the time granted to the private respondents/plaintiffs to produce evidence from the date when the matter was remanded by learned Appellate Court vide Judgment dated 24.2.2003. Record does reflect that soon after remand of the matter by the learned appellate court, the applicants approached this court on 11.3.2003 and obtained interim order dated 24.3.2004 suspending the judgment and decree passed by the learned appellate court and this was the cause that they might not have gone to produce evidence before the trial court, thus I am of the considered view that the ratio of judgment passed by Hon'ble Supreme Court in the case cited above would be fully applicable in the case in hand, if they were / are allowed to produce evidence; therefore, the judgment and decree passed by learned appellate Court on the aforesaid plea is

sustainable in law. On the aforesaid proposition I am fortified with the decision of Honourable Court rendered in the cases of Muhammad Aslam v. Nazir Ahmed (2008 SCMR 942); Ali Muhammad v. Mst. Murad Bibi (1995 SCMR 773) & Ghulam Rasool v. Rai Ghulam Mustafa and others (1993 SCMR 2026).

11. For the reasons recorded above, I do find justification in the observation of learned appellate Court to remit the case to the trial Court for providing an opportunity to respondents to produce their evidence, therefore, at this stage I would like to observe that if the respondents / plaintiff fail to produce evidence within one month from the date of receipt of this order, the trial court would be justified to close their side for evidence and record evidence of applicants and pronounce judgment after hearing the parties and in the meanwhile no further indulgence could be given to the parties. The aforesaid exercise shall be undertaken within two months.

12. in view of the above facts and circumstances of the case, this revision application is disposed of in the above terms with no order as to costs.

JUDGE