IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Civil Revision No. S – 52 of 2006

(Rustam and others vs. Khan Muhammad & others)

Date of hearing: 24-01-2022
Date of judgment: 24-01-2022

Mr. Safdar Ali Bhatti, Advocate for the Applicants.
Nemo for Respondents.

JUDGMENT

Muhammad Junaid Ghaffar, J. – Through this Civil Revision, the Applicants have impugned judgment dated 09-01-2006 passed by 1st. Additional District Judge, Khairpur in Civil Appeal No.23 of 1993, whereby, while allowing the Appeal, judgment dated 29-06-1993 passed by the Senior Civil Judge, Khairpur in Civil Suit No.86 of 1991 through which the Suit of the Respondents was dismissed, has been set-aside and the said Suit has been decreed.

2. Heard learned Counsel for the Applicants and perused the record.

3. Insofar as the Respondents are concerned, despite issuance of various notices nobody has turned up, though Vakalatnama of their Counsel is on record and has never been discharged.

4. It appears that the Respondents filed a Suit for declaration and injunction seeking the following prayers; -

> (a) That this Hon'ble Court may graciously be pleased to declare that plaintiffs are owners of agricultural land bearing Survey Nos.700 (1-09), 1391 (1-24), 1392 (1-33) and 1533 (0-35) total area measuring (5-21), acres of deh Shah Ladhani, Taluka Khairpur, thereby correcting the entries in record of rights by entering the names of plaintiffs in mutation register, deleting the names of defendants.
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> (b) To grant permanent injunction, restraining the defendants, their representatives, assignees and any person on their behalf from interfering in the right, title and interest and possession of the plaintiffs, over the suit land, further restraining them from executing agreements, sale deeds, mortgage or any sort of transaction.

5. The trial Court after exchange of pleadings settled as many as 12 issues and was pleased to dismiss the Suit of Respondents on the ground that the same was not maintainable and even no case was made-out on merits. The said judgment and decree was challenged in Appeal by the private Respondents and through impugned judgment the Appeal was allowed by setting-aside the judgment of the trial Court and Suit has been decreed.

6. The precise case of the Respondents' was to the effect that the Suit land belonged to their father who had inherited the same long ago, whereas, the Respondents had manipulated the revenue record and had got mutation entries in their names fraudulently. In fact, the Suit was seeking cancellation of mutation entries in the name of the Applicants.

7. Insofar as the very maintainability of the Suit is concerned, it appears from the perusal of the record that the Respondents failed to specifically mention the cause of action[1] for filing of the Suit. Instead a very vague averment was made without giving any details of the dates on which the said cause of action had accrued. This is a very important aspect of the matter, as apparently the Suit was filed much belatedly in respect of some claim accrued in favour of the predecessors in interest of the Respondents by virtue of some decree of a Suit pertaining to year 1928. For that a proper cause of action was required to be disclosed so as to see that whether the Suit was within time or not. It is a matter of record that the entry of present Applicants is of the year 1942 and if that is so then how and in what manner the Suit of the Respondents was within time either for a declaration and or for cancellation of the entries. This has gone unexplained insofar as the Respondents are concerned. The learned trial Court was fully justified in holding that the Suit was not maintainable, whereas, the learned Appellate Court has failed to exercise due diligence and has erred in law by holding that the Suit was maintainable. Even otherwise the Suit was also barred for want of jurisdiction in as much as, it was only a mutation entry which was being agitated and of which the cancellation was being sought. In that case, if there is no objection regarding jurisdiction and authority of the Officer for passing of an order of

[1] 15. That cause of action arose to file this suit on or about few days back when the names of the defendants were entered in place of their father and plaintiffs came to know about this false and fabricated entry thereafter every day till today within the jurisdiction of this court.

mutation, then even if such order is illegal; then the jurisdiction of the Civil Court is barred and cannot be invoked in absence of such lack of jurisdiction. The proper course was to avail the remedy in the Revenue hierarchy. The learned trial Court was fully justified in holding that the Court lacked jurisdiction; but the Appellate Court has set-aside the same without any cogent reasoning or finding. It is also a matter of record that after dismissal of their Suit, the Respondents did approach the Revenue authorities by way of an appeal who vide his order dated 25.5.2000, though held that the entry in favor of the Applicant is an old entry pertaining to the year 1943; whereas, the Respondents have failed to show any illegality in the recording of these entries; however, since the matter is sub-judice in Appeal, the parties may seek their remedy before the said Court. Hence, by conduct of the Respondents they were estopped in pursuing the remedy before the Appellate Court, as it is they who themselves abandoned their remedy before the Court and approached the Commissioner by way of an appeal. And this was an act after dismissal of their Suit, whereas, they could not have pursued both the remedies simultaneously. The law in this regard is already settled that once a party has selected a legal forum for seeking any relief, then the said party cannot abate such proceedings in between and seek any other remedy for the same relief. Once that remedy was elected, then, by implication of the doctrine of election, the other remedy by way of a civil suit was barred[2].

8. Another aspect of the matter which has prevailed upon the Appellate Court in setting-aside the judgment and decree of the Trial Court is apparently some Application filed under Order 41 Rule 27 read with Section 151 CPC before the Appellate Court on behalf of the Respondents, wherein certain documents were relied upon which are dated much later in time as to the judgment of the trial Court. The learned Appellate Court has taken into consideration all these documents in deciding the appeal in favor of the Respondents. In that case such documents could not have been relied upon by the Appellate Court and the proper course was either remand of the matter and to permit the parties to lead their evidence before the concerned trial court on such documents which were issued subsequently or were later in time as against the judgment of the trial court; or in the alternative record evidence

[2] Reliance can be placed on the cases of Trading Corporation of Pakistan v. Devan Sugar Mills Ltd. (PLD 2018 SC 828); and Daan Khan v. Assistant Collector (2019 CLC 483)

by itself. However, mere filing of an application along with such documents does not suffice and the Appellate Court is not empowered to take the same on record. Not only this, even they have been relied upon while setting aside the judgment and decree of the trial Court before whom no such documents were ever produced or relied upon. This is a gross illegality committed by the Appellate Court and has become the prime reason to set aside the judgment of the trial Court. This perhaps in law, cannot be sustained.

9. It is also a matter of record that the learned Appellate Court has seriously fallen in error to observe that voluminous documents were placed on record by the Respondents. It would suffice to observe that voluminous documents are not of any consideration; but it is the quality and the reliability of the documents which matters in evidence. Though the judgment of the learned trial Court may not have been properly worded or reasoned; but in essence the conclusion drawn was very clear inasmuch as the suit was not maintainable, whereas, on merits they had failed to prove their case; therefore, only on this reason the said judgment could not have been set-aside. The findings of the learned Appellate Court appear to be based on presumptions and on the fact that various documents have been relied upon; hence, the Suit must be decreed. This approach was in incorrect approach and is not supported by law.

10. Lastly as to decree in favour of predecessor-in-interest of Respondents in Suit No.327 of 1928 is concerned, it may be relevant to observe that firstly, that Suit was in respect of some private partition between the parties and cannot be relied upon for a declaration; secondly, if that being so, then it was for the executing Court to execute such decree; but in no manner by way of a second civil suit, the same can be executed or for that matter be relied upon to get a decree of declaration. It is also a matter of record that insofar as the present Applicants are concerned, they were not a party to that Suit.

11. In view of hereinabove facts and circumstances of this case, it appears that the learned Appellate Court has fallen in error and has failed to appreciate the law as well as the evidence while setting aside the judgment of the trial Court; hence this Civil Revision Application merits consideration, and therefore, by means of a short order in the earlier part

of the day the same was allowed by setting aside the impugned judgment dated 9.1.2006 and these are the reasons thereof.

Judge