IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision No. S – 04 of 2013

Muhammad Bachal alias Muhammad Usman Bhambhro…..Applicant
Versus
Haroon Mari……..……..Respondent

Date of Hearing: **22-11-2021**
Date of judgment: **04-02-2022**

Mr. Mukesh Kumar G. Karara, Advocate for the Applicant.
Mr. Kalander Bakhsh M. Phulpoto, Advocate for the Respondent.

J U D G M E N T

Muhammad Junaid Ghaffar, J. **–** Through this Civil Revision, the Applicant has impugned Judgment dated 15.10.2012, passed by Additional District Judge-III, Khairpur in Civil Appeal No.165 of 2010 (*Muhammad Bachal v. Haroon),* whereby, while dismissing the Civil Appeal Judgment dated 19.10.2010 passed by Senior Civil Judge-I, Khairpur in F.C Suit No.95 of 2010 (*Muhammad Bachal v. Haroon)*, through which the Applicant/Plaintiff's Suit was dismissed, has been maintained.

2. Heard both leaned Counsel for the Applicant / Plaintiff and Respondent / Defendant and perused the record.

3. It appears that the Applicant filed a Suit for declaration, possession, mesne profit and permanent injunction seeking the following relief(s):-

> **(a) That this Hon'ble Court may be pleased to declare the plaintiff as owner of the suit land.**
>
> **(b) To direct the defendant for vacating the possession and hand over the same to plaintiff, if the defendant fails to do so, to direct the Nazir of this Hon'ble Court got vacated the possession and handover the same to plaintiff.**
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> **(c) To, award the mesne profit since year 2008 and on wards Rs. 200,000/- per year.**
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> **(d) To, grant the permanent injunction favour of the plaintiff restraining the defendant that he not to create further charge, encumbrance on the suit property, not to change the shape of suit land, not to interfere with the rights and title of the plaintiff.**
>
> **(e) To, award the costs of suit.**

(f) To, award any other relief which this Hon'ble court deem fit ad proper".

4. Learned Trial Court settled the following issues from the pleadings of the parties.

1. Whether the suit of the plaintiff is maintainable?

2. Whether suit of plaintiff is barred by law?

3. Whether plaintiff is owner of suit land on the basis of grant?

4. Whether plaintiff is entitled for vacant possession of the suit land?

5. Whether plaintiff is entitled for mesne profits since 2008 at the rate of Rs.200,000/- per year till delivery of its vacant possession?

6. Whether plaintiff is entitled for relief claimed?

7. What should the decree be?

5. After evidence was led by the parties, the Trial Court came to the conclusion that the Applicant has failed to prove his case; hence the suit was dismissed; against which Civil Appeal also stands dismissed.

6. Perusal of the record reflects that as per the plaint it is the case of the Applicant that the suit land was granted in 1993 by the Colonization Officer, Sukkur Barrage; that T.O form was issued by the District Officer, Revenue; that on such basis Khata was entered by the concerned Mukhtiarkar, and admittedly, insofar as the grant of land in question to the Applicant is concerned, there appears no dispute; except the verbal denial of the Respondent. Admittedly, the Revenue Authorities or the Barrage Department had never taken any action against grant of the land to the Applicant. Neither it has been cancelled; nor any notice for such cancellation has been issued. The entire plaint is premised on the fact that the Respondent being his Hari had denied payment of batai share. In fact, it was more a Suit for possession as against a declaration regarding ownership for the reason that there was nothing against the Applicant insofar as the grant of the land is concerned. Perhaps this was so done as Respondent, earlier in time, had filed Suit No.81 of 2008 (Haroon v Muhammad Bachal & Others) challenging the grant of the Applicant, which was later on withdrawn without any further action on the part of the

Respondent. In that case the prayer in the plaint regarding a declaratory decree was required to be amended and or deleted. Nonetheless, for all legal purposes, as would be clear later on in this opinion, the Suit merely remained a Suit for possession.

7. Record further reflects that both the Courts below, without dilating upon this aspect of the matter (may be for lack of assistance on the part of the Applicant) have gone into the question of very grant / allotment of the land to the Applicant and its validity under the law. To that, it needs to be appreciated that this was never a question before the Courts below, as the jurisdiction so vested in the Civil Court under Section 9 of the Civil Procedure Code, is bounded and restrictive as against the jurisdiction of a Court under the Constitution. This distinction has to be kept in mind in this case wherein the dispute is between two private parties in respect of possession of the land. The matter before the Civil Court has to be decided on the basis of pleadings and the evidence on record. If the case had been that the allotment of the Applicant was disputed or cancelled or even was disputed by the Government department before the Court, then perhaps the Court in the facts and circumstances of the case can make observations regarding the allotment and even issue directions to the official Department in this regard. It is an admitted position that none of the departments were defendants; nor the respondent made any effort for their impleadment, whereas, all the witnesses from the Department, as were summoned as court witnesses, only came with certain documents and were never put into the witness box under oath; nor they led any evidence nor even came before the Court to be joined as Defendants to contest the validity of the grant / allotment made to the Applicant. Rather they were summoned by the Respondent as defendant's witnesses and were not cross examined in any manner. This summoning of official witnesses and leading their evidence, in fact, goes against the Respondent.

8. Record further reflects that in fact the Applicant has been treated to be in an adversarial position in his own Suit inasmuch as he was required by the two Courts below to justify his grant / allotment first as against the Respondent, notwithstanding that there is neither any cancellation of the said grant; nor any such proceedings are pending in that respect. On the contrary, the Respondent who admittedly does not own land in question;

nor has sought any declaration from the Court to that effect; rather he by himself first filed a Suit for cancellation of the grant of land in question and then withdrew it, is enjoying possession of the Suit land without any lawful authority. The Courts below have completely overlooked this issue. While confronted, Counsel for the Respondent conceded to this effect; however, stated that in case this Civil Revision is dismissed; then the land would go to the Government, notwithstanding the fact that his client is in possession. This stance of the Respondent has come from nowhere; rather is an attempt to justify his illegal possession, as in that case he ought to have handed over the possession to Government voluntarily instead of defending these proceedings. In the entire pleadings including written statement and the evidence, the Respondent has not been able to show as to how and in what manner the possession was given to him and this would only lead to an inference that the Respondent/Defendant, as contended by the Applicant/Plaintiff, was his Hari and upon refusal of Batai share, cause of action accrued. What has happened in this matter is that the two Courts below have assumed the jurisdiction of the Revenue Officers and have touched upon the merits of the allotment in question by holding that the Applicant was not entitled for such allotment under the Act, as he failed to fulfill the requisite conditions of being a Hari or landless Hari etc. As noted hereinabove, same could have only been agitated by the Respondent in his Suit, which he never did so; or by the Revenue Department or any other concerned Department alleging any fraud or illegality in the grant / allotment of the land to the Applicant. This is not the case, and therefore two Courts below, by themselves ought not to have touched upon this aspect of the matter as a Civil Suit has to be dealt with and decided on the preponderance of the evidence of both the parties and then see what relief is to be granted or not.

9. It would also be of relevance to examine the deposition as well as cross examination of the Respondents attorney Ghulam Nabi (DW-08, Exh-35) which reads as under;

> **"Examination chief to Mr. Kalander Bakhsh Phulpoto, Advocate for the defendant.**
>
> I am attorney of defendant. I produce photo state copy of power of attorney as Exh. 35/A. The original power of attorney submitted by me in suit No.81/2008 which was dismissed as withdrawn. *An agricultural land admeasuring 16-00 acres was granted to the plaintiff from U.A No.361 Deh Salko, Taluka Naro. I am in possession of the said land since beginning*. The plaintiff is resident of Taluka Khairpur and is not hari. The defendant is hari and is residing in Taluka Naro. Prior to grant of suit land to the plaintiff other four agricultural land admeasuring 74-00 acres were granted to the plaintiff. *The grant of suit land in favour of plaintiff is unlawful*. The suit land was allotted to the plaintiff from U.A No. 361 in the year 2006 whereas T.0. Form in respect of suit land was issued in the year 2004. The plaintiff is land grabber. The plaintiff has filed this false suit.

Cross examination to Mr. Rabait Ali Bhambhro Advocate for plaintiff.

It is incorrect to suggest that plaintiff is owner of suit land. It is incorrect to suggest that suit land was granted to the plaintiff by C.0.Sukkur Barrage in an open Katohehry. ***It is correct to suggest that T.0 Form in respect of suit 1and was issued in favour of the plaintiff and such entry has been made in the revenue record in the name of plaintiff.*** It is incorrect to suggest that plaintiff was in possession of the suit land prior to grant of the suit land. Vol. says that plaintiff was previously resident of Ranipur and thereafter he shifted to Khairpur. It is correct to suggest that I have not produced any proof that the plaintiff was previously resident of Ranipur and thereafter he shifted to Khairpur. It is incorrect to suggest that plaintiff had developed the suit land. It is incorrect to suggest that in the year 2005 the plaintiff gave the suit land to defendant on harap. It is incorrect to suggest that in the year 2008 the defendant stopped to pay batai share to the plaintiff. Vol. says the plaintiff was not owner of the suit land, therefore, question of giving batai share to the plaintiff does not arise. ***It is correct to suggest that defendant Haroon filed civil suit against the plaintiff in the civil court. It is correct to suggest that Haroon has withdrawn that suit and after withdrawal of the said suit he had not filed other suit.*** It is incorrect to suggest that plaintiff requested to the defendant through nekmards for batai share of the suit land but the defendant refused to do so. It is correct to suggest that I was attorney of the defendant in that suit. ***It is correct to suggest that after about 16/17 years of grant of suit land to the plaintiff, Haroon filed said suit.*** Vol. says after coming to know about the grant of suit land, he filed the suit. ***It is correct to suggest that Muhammad Haroon did not challenge the grant of plaintiff before revenue forum***. Muhammad Haroon filed civil suit after about 5/6 months of knowledge of grant of suit land in favor of plaintiff. My evidence was not recorded in the suit filed by defendant Haroon. It is correct to suggest that in the year 1993 another land was granted to me and not to Haroon. It is correct to suggest that Qadi Bux who was witness in the suit filed by Haroon was also granted agricultural land in the year 1993. It is correct to suggest that in the year 1993 open Katchehry was held. It is incorrect to suggest that in open Katchehry suit land was granted to the plaintiff. It is incorrect to suggest that no proof for grant of other land has been produced in this suit. ***It is correct to suggest that I have not produced any document to show that defendant Haroon is in possession of 16-00 acres of land***. *The yearly income of the suit land is about Rs.50,000/-*. It is incorrect to suggest that in the suit filed by defendant Haroon, it was stated by him that the yearly income of the suit land is Rs.100,000/-. It is incorrect to suggest that defendant had not participated in open Katchehry nor he had submitted any application for grant of suit land to the C.0. It is correct to suggest that I have not produced any proof in this respect. It is incorrect to suggest that plaintiff is owner of the suit land. It is incorrect to suggest that plaintiff is entitled for possession and mesne profits. It is incorrect to suggest that I am deposing falsely"

10. Perusal of the aforesaid evidence of the Respondent depicts that Respondent had failed to put up any defence as to holding on the possession of the suit land; nor it is the case of the Respondent that it was ever given by the Government; nor the Respondent had pursued his challenge to the grant of the Applicant. In that case any decision which favors the Respondent in fact amounts to sanctifying his illegal possession of the land. A mere statement to the effect that the grant of Applicant was unlawful does not suffice. It has to be proved with cogent and reliable evidence. Here in this case, the Applicant had sought declaration of ownership as well as possession and both the Courts below never looked into this aspect as to how Respondent is in possession. Moreover, as noted earlier, they also had to see that after Respondents withdrawal of his Suit for cancellation of the grant of the Applicant, and in absence of any objection by the official departments, the suit in effect had remained a suit of possession and no declaration was to be given regarding such ownership which was never in dispute before the Court. If the judgments

of two Courts below are sustained then the effect of these judgments would be, that the Applicant is not the owner of the land, but at the same time how the respondent can remain in possession would go unexplained; nor any justifiable cause has been shown by the Respondent to retain such possession. Under what law and authority such possession was being retained; there is complete silence to this effect. In fact, it was conceded before this Court that it has to go to the Government.

11. In view of hereinabove facts and circumstances of this case, it appears that the both the Courts below have erred in law in dismissing the Suit of the Applicant and have gone into the legality of his grant / allotment, which has neither been disputed by the Officials / Department; nor was under challenge on behalf of the Respondent; hence this is a case of exercising jurisdiction which was not vested in both the Courts below, and therefore, per settled law[1] in this Civil Revisional jurisdiction, even the concurrent findings of the Courts can be looked into by exercising powers under Section 115 CPC. Hence, this Civil Revision is ***allowed***. The Judgment dated 15.10.2012, passed by Appellate Court and Judgment dated 19.10.2010, passed by the Trial Court are hereby set aside and the Suit of the Applicant is decreed as prayed to the extent of prayer clauses (a, b & d). As to prayer clause (c) it is decreed in respect of mense profit as per admission / deposition of Respondents attorney Ghulam Nabi (DW-08, Exh-35) @ Rs. 50,000/- per year from 2008 till handing over of the possession. The Suit stands decreed accordingly.

12. This Civil Revision stands allowed in the above terms.

Dated: 04.02.2022

J U D G E

Ahmad

[1] Nazim-Ud-Din v Sheikh Zia-Ul-Qamar (2016 SCMR 24), Islam-Ud-Din v Mst. Noor Jahan (2016 SCMR 986), Nabi Baksh v. Fazal Hussain (2008 SCMR 1454), Ghulam Muhammad v Ghulam Ali (2004 SCMR 1001), & Muhammad Akhtar v Mst. Manna (2001 SCMR 1700).