IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Civil Revision Application No. S-169 OF 2010

Applicants: Ghulam Ali and another
Through Mr. Mian Abdus Salam Arain, Advocate

Respondent No.1 & 2: Altaf Hussain and Muhammad Rahib
Through Mr. Soomar Das R. Parmani, Advocate

Date of hearing: 24.05.2021
Date of decision: 24.05.2021

O R D E R

KHADIM HUSSAIN TUNIO, J.- Through instant civil revision application, the applicant has challenged the judgment and decree dated 30.06.2005, passed by the Additional District Judge-II, Ghotki in Civil Appeal No.43/2005, whereby the appeal was allowed and consequently F.C Suit No.01/2004 filed by applicants was dismissed.

2. Precisely, facts of the instant revision application are that the applicants/plaintiffs filed F.C Suit No.01/2004 for Pre-emption against the respondents pleading therein that respondent/defendant No.3 is uncle of plaintiffs who was shareholder in the agricultural land with the plaintiffs to the extent of 00-25 paisa in S.No.44(5-33), 41 (5-34), 75 (4-18), 60(4-36), 98 (5-05), 51(5-35), 54 (4-35) and 99 (3-12) and 16 paisa share in S.N.94(4-02) total area of share of the defendant No.3 is 10-09 acres, situated in Deh Kachi Tiobi Taluka Ghotki. It is further stated that the land originally belonged to grandfather of the plaintiffs who was also father of defendant No.3 and after his death the same developed on his four sons, the father of the plaintiff and his three brothers to the extent of

25 paisa share of each, except in one survey number in which the shares are different. One uncle of the plaintiffs namely Sain Ahmed had given his share to the plaintiffs on 20.07.1993 and such entry No.137 was got effected in the revenue record and after death of father of the plaintiffs Foti Khata was also got changed in favour of the plaintiffs. Their brothers and one sister as per entry No.198. The plaintiffs being co-sharers are shafi-sharik in the suit and the suit survey numbers are joint property and are not partitioned between the co-sharers and the same is under possession of the plaintiffs who have been cultivating the same and presently plaintiffs have cultivated the cotton and sugar can crops in the suit land except S.No.41 and 44. The plaintiff were ready to purchase the share of the defendant No.3 but their uncle sold the same secretly on 17.07.2003 to the defendants No.1 and 2 for consideration of Rs.80,000/- through a registered sale deed and on the same day at about 6.00 p.m the plaintiffs along with witnesses Mushtaque Rafique, Asshraf and Muhammad Boota were present in the land for irrigation of the same when the defendants came at the suit land and disclosed that the defendant No.3 had sold his share of the land to the defendants No.1 & 2 for the consideration of Rs.80,000/-, the plaintiffs without loss of time made the first demand of pre-emption claiming that they are shafi-i-sharik hence have a right of purchase the land for the same consideration and against in presence of the witnesses they made second demand, referring the first Talb-e-Muwasibat that the land be re-soled to them for the same consideration and the defendants kept them on false hopes. Defendant No.1 & 2 have been trying to dispossess the plaintiffs forcibly and want to encroach on the valuable side of the suit survey numbers, hence the plaintiffs filed suit with prayers that defendant No.1 & 2 be directed to

transfer the suit land receiving consideration of Rs.80,000/- and if the defendants failed to comply the directions of the court then the Nazir of the court be directed to execute a sale deed on behalf of the defendants No.1 & 2 and in favour of the plaintiffs, the defendants No.1 & 2 be restrained permanently from dispossessing the plaintiffs from the suit land and selling the same to any other person.

3. After notice, the defendant No.1 & 2 filed their written statements stating therein that the plaintiff were not shafi-i-sharik in the suit land though the plaintiffs were co-sharers, as the land of the defendant No.3 alrady stood partitioned hence his share was separate and the same was being cultivated by the defendant No.3 himself and after sale of the land the defendant Nos.1 & 2 are in cultivating possession of the suit land. The assertion of the plaintiffs are false as on 17.07.2003, the defendants had not gone to the land in the dispute, in presence of the plaintiffs, neither the plaintiffs had made any demand of pre-emption nor any cause of action has accrued to the plaintiffs to file the suit hence the same be dismissed. The defendant No.3 did not appear nor filed his written statement hence he was made ex-parte.

4. On the pleadings of the parties, following issues were framed on 27.03.2004.

1. Whether the plaintiffs being co-sharers are shafi-i-sharik in the suit land?
2. Whether the plaintiffs made Talb-e-Muwasibat and Talb-e-Ishhad according to injunction of Islam?
3. Whether the plaintiffs are entitled for the relief claimed?
4. What should the decree be?

5. In support of their case, parties led their evidence. The applicant /plaintiff Ghulam Ali examined himself and produced power of attorney

executed in his favour by the plaintiff No.2. H also produced mutation entries in Deh form VII-B, true copy of sale deed dated 17.07.2003 and true copy of an application dated 12.04.2003allegedly moved by a son of the defendant No.3 to Mukhtiarkr Ghotki. He also produced 10 land revenue receipt and an attested copy of number Shumari. PW Mushtaque Ahmed and PW Muhammad Rafique were also examined and then the plaintiffs side was closed vide statement dated 26.03.2005.

6. The respondent No.2 Muhammad Rahim examined himself and produced power of attorney executed in his favour by the defendant No.1. DW Muhammad Jial was also examined and then learned counsel for defendants closed the side vide statement dated 14.05.2005

7. After hearing both the parties, the trial court of Senior Civil Judge Ghotki decided the suit in favour of plaintiffs vide judgment and decree dated 31.05.2005 and 04.06.2005.

8. The defendants/respondents preferred an appeal before the District Judge Ghotki being Civil Appeal No.43/2005. The appellate court viz. learned II-Additional District Judge, Ghotki, after hearing both the parties, allowed the said Civil Appeal. Hence the applicants being aggrieved from the said appeal, preferred instant civil revision application.

9. Learned counsel for the applicant submits that the learned appellate court failed to consider oral as well as documentary evidence of the applicants side; that the findings of appellate court on the only issue No.2 are entirely based on mis-reading and without going through the evidence of the witnesses of the plaintiffs when all the three witnesses have deposed that they made the first demand Talab of Pre-emption and second

Talab with reference to the first Talab of pre-emption; that findings of the trial court which are well reasoned are liable to be restored: that the learned appellate court while determining issue No.2 has erroneously observed that the plaintiffs has no full filled the requirements of section 236 of Muhammadan Lw ehen the evidence of plaintiff Ghulam Ali PW Mushtaque Ahmed and PW Muhammad Rafique is very much clear on this point; that the learned appellate court has no only misconstrued the relevant law and fact involved in that case but also has utterly failed to properly evaluate and appreciate the oral as well as documentary evidence available on the record which has resulted in prejudice and injustice to the plaintiffs; that the impugned judgment and decree of the learned appellate court is unjust, improper, capricious and against the law, justice, equity and good conscience, hence merits to be set-aside.

10. On the other hand, learned counsel for respondents has contended that the learned trial court while deciding issue regarding making of requisite demand did not properly appreciated the evidence available on record and decided the said issued illegally by holding that the respondent had made requisite demands in accordance with law.

11. I have heard the learned counsel for the parties and perused the record.

12. From the perusal of judgment and decree passed by the learned trial court, it appears that from the pleadings of the parties, issues were framed by the trial Court on 27.03.2004. The trail court in its judgment dated 31.05.2005 has dealt all the issues but the learned appellate court does not appear to have recorded issue wise findings, whereby it has committed gross illegality in not complying with the mandatory provisions of Order

XLI, Rule 31, CPC. In this context, it would be proper rather advantageous to refer the Provisions of Order XLI, Rule 31 of the Code of Civil Procedure, 1908, which reads as follows:-

> "**R.31. Contents, date and signature of Judgment.**
>
> The judgment of the Appellate Court shall be in writing and shall state—
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> (a) the points for determination;
>
> (b) the decision thereon;
>
> (c) the reasons for the decision; and
>
> (d) where the decree appealed form is reversed or varied, the relief to which the appellant is entitled;
>
> And shall at the time it is pronounced be signed and dated by the judge or by the judges concurring therein."

13. From the bare reading of Rule 31 of Order XLI, CPC, it appears that the word "shall" used in it manifestly makes such provision mandatory in nature, hence the appellate Court while writing the judgment has to necessarily follow the prescribed procedure in it's letter and spirit. The purpose of insisting upon points for determination is to judicially determine all the legal and factual controversies, which are agitated or come out from the judgment of the lower/trial court. The reading of sub-rules (b) and (c) of the said Rule further explains that judgment of the appellate Court has been confined to such framed points for determination hence proper framing of points of determination cannot be denied because in absence whereof there can be no purpose of sub-rules (b) and (c) of the said Rule, resulting in making a Judgment of Appellate Court as not-sustainable under the law. I can further add here that though the provision is silent as to how the ***points for determination*** would be framed, as has been defined in Order XIV, Rule 1(3) of the Code, however, the object of ***point for determination*** seems to be same as that of **issues**, hence while framing/forming the point for determination

the appellate Court should keep in view all the agitated grounds or which appear from the record. It has never been requirement of the law and procedure that here must be number of points for determination; but attempt should be made to achieve the objective and spirit by framing/forming proper point(s) for determination which cover all the legal and factual issues, either agitated or appearing from the record, so that one cannot come with a plea of prejudice in result of departure from mandatory requirement of law.

14. The impugned judgment of the learned appellate Court clearly shows that the learned appellate Court has not determined the points for determination properly, which could be said to have covered all the factual and legal points, agitated or borne out from reading of the judgment of the trial Court, though it was mandatory requirement of the law under Order XLI, Rule 31, CPC. The learned appellate Court for deciding the appeal formulated following single point for determination:-

> "*Whether the impugned Judgment and decree requires intereference of the court?"*

15. Bare perusal of the impugned judgment passed by the learned appellate Court shows that the main issues relating to the making of demandas according to injunction of Islam and documentary evidence produced by the applicant during trial have not been properly dealt by the learned appellate Court and no such point for determination was framed by the learned appellate Court, thus there is a departure from mandatory requirement of law within spirit of Rule 31 of the Order XLI of CPC, which departure cannot be approved.

16. In view of hereinabove facts and circumstances of this case, the appellate Court has failed to frame relevant and proper points for

determination, hence it has caused prejudice to the applicant. I, therefore, deem it to be a fit case for remand to the appellate Court with directions to frame relevant points in compliance of Order XLI, Rule 31, C.P.C.

17. For the foregoing detailed reasons, this civil revision application was allowed by me and the matter was remanded to the learned appellate Court vide short order dated 31.05.2021 in the following terms:-

18. Above are the reasons for such short order.

19.

J U D G E

SulemanKhan/PA