

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Revision Application No.S-87 of 2016

Applicant(s): Badlo deceased through his legal heirs and others through Mr. Abdul Rasheed Kalwar, advocate.

Respondent(s): Hassan Shah deceased through his legal heirs and others through Mr. Jam Jamshed Akhtar, advocate.

The State: Through Mr. Noor Hassan Malik, Assistant Advocate General, Sindh.

Date of hearing: 11.11.2021
Date of decision: 11.11.2021

ORDER

KHADIM HUSSAIN TUNIO, J.- Through instant civil revision application filed under Section 115 CPC, the applicants have impugned the judgment and decree dated 21.06.2016, passed by the learned IInd Additional District Judge Ghotki, whereby the learned Judge maintained the judgment and decree dated 30.06.2011, passed by the learned Senior Civil Judge Ghotki in F.C Suit No. 14/2002 whereby the suit of the applicants/plaintiffs was dismissed.

2. Facts, in brief, of the present matter are that the applicants/plaintiffs filed F.C Suit No. 14 of 2002 against the respondents/defendants No. 1 to 3, claiming that the applicants were leasing out land on solid (*pakka*) track in Deh Sundrani when the Colonization Officer published a schedule for state land in Deh

Sundrani, for its disposal to farmers and scheduled a katchery on 02.07.1973. On receiving this information, the applicants/plaintiffs disputed the schedule while seeking possession of the land as already having cultivating possession and proved their eligibility in the katchery before the Colonization Officer and deposited their initial deposits. The Colonization Officer granted the state land to the applicants/plaintiffs from the year 1977-78, 1980-81, 1983-84, 1987-88, 1981-82 and 1989-99 in an open assembly, without any dispute from the respondents/defendants 1 to 3. Allegedly, when Deh Sundrani was ordered to be transferred to Taluka and District Ghotki from Taluka Kashmore, District Jacobabad vide notification dated 08.07.1997, the charge was handed over to Mukhtiarkar Ghotki on 12.07.1997. Prior to handing over the charge, the defendant No. 1's son allegedly in collusion with the field staff and Mukhtiarkar of Kashmore got mutation entry No. 84 dated 03.07.1997 entered into the revenue record Form VII(B) of Deh Sundrani for an area of 521-30 acres in his grandfather Hassan Shah's name while claiming Darya Khurdi right. Upon the transfer of record, the defendant No. 1 got the whole area of 521-30 acres transferred in his father and uncle's name through mutation entry No. 150 dated 04.08.1997 and then on the same day got a 0-50 share of the land of his uncle transferred in his father's name through Foti Khata Badal vide mutation entry No. 151. Afterwards, the defendant No. 1 got the same land transferred in his name to the extent of 00-58 paisas share, in his mother's name (defendant No. 3) to the extent of 00-13 paisas share and in the name of his sister (defendant No. 2) to the extent of 00-29 shares through Foti Khata Badal of his father. After gaining information of such actions by the defendants, the applicants/plaintiffs moved an application before the Commissioner

Sukkur and he transferred the same to Additional Commissioner Sukkur No. II, who after an inquiry cancelled entry No. 84 of 1997 and all subsequent entries after the initial one. Dissatisfied with the same order, the defendants challenged it before the Member Board of Revenue Sindh at Hyderabad and got the order passed by the Additional Commissioner Sukkur No. II set aside. Hence, the applicants/plaintiffs filed FC Suit No. 14 of 2002 before the Senior Civil Judge Ghotki.

3. In support of their case, the applicant/plaintiff Badlo examined himself at Ex-63 and produced various documents in his evidence. He also examined witness Abdul Malik at Ex-96 and PW-2 Haji Muhammad at Ex-97. Thereafter, the side of the applicant/plaintiff Badlo was closed; vide statement at Ex-98.

4. On the other hand, respondents/defendants examined one Mahar Ali Shah, the attorney of the private respondents/defendants at Ex-108, DW Syed Shah Jahan Shah at Ex-138 and DW Haji Khan at Ex-139. Thereafter, side of the respondents/defendants was closed; vide statement at Ex-140

5. After hearing the parties, the learned trial Court vide judgment dated 30.06.2011 dismissed the suit filed by the applicants/plaintiffs, hence, the instant civil revision has been preferred.

6. Learned counsel for the applicants/plaintiffs and counsel for the respondents/defendants, after arguing the matter at length, jointly prayed that the judgment passed by the two Courts below may be set aside and the matter may be remanded to the court of Senior Civil Judge Ghotki for allowing the parties to amend their pleadings,

for re-calling the issues and for adducing of further evidence. Learned Assistant Advocate General did not controvert the same suggestion and recorded no objection.

7. I have given due consideration to the submissions advanced by the learned Counsel for the parties and perused the record minutely.

8. From the perusal of record, it transpires that the applicants/ plaintiffs filed a suit for Declaration and Permanent Injunction against the respondents/ defendants. The applicants/ plaintiffs have produced documentary evidence *i.e.* copies of seventy-six (76) land grant orders at Ex-71-A-1 to 71-A-76 respectively and attested copy of Rubkari by Mukhtiarkar Ghotki at Ex-77 as well as schedule of property at Ex-65. Whereas, the respondents/defendants produced certified true copy of form VII-B entry No. 84 dated 03.07.1997 at Ex-128, form VII-B entries No. 150, 151 and 152 at Ex-129 to 131 respectively and Rubkaries at Ex-132 and Ex-133. The applicants/plaintiffs have challenged the authenticity and genuineness of the entries being illegal, forged and fabricated. The respondents/defendants have neither adduced any evidence nor examined any official from the revenue authorities to ascertain the documents they have relied upon. He has produced the extracts but has not examined author of the said document. Learned two Courts below have unnecessarily given the weight to the entries though the same are not proper documents. Said entries contemplate that the properties in dispute were owned by one Hassan Shah (Sr.) through Darya Khurdi right and although these documents have been executed in evidence but their authors have not been examined. Both the courts below seem

to have ignored the well settled principle of law that there is considerable difference between productions of documents on record and proving contents thereof. Thus, bringing papers on record cannot be considered as *synonymous* with that of *proving* them. Guidance is taken from the case of *Province of the Punjab through Collector v. Syed Ghazanfar Ali Shah & Others* (2017 SCMR 172) wherein it was observed that:-

“8. Where did NOC come from, who issued, and countersigned it and what is the latter fate of this document is again anybody’s guess. How did the Solicitor edge in and where did the letter purportedly written by him come from and how did it reach the hands of the person producing it in the Court? How did the Minister step in the matter when it was pending in the Court? Where did go the record of the letter and the register showing its dispatch, if at all it was written? Why did the respondents bypass the mode of proving the document prescribed by Articles 2 and 78 of the Qanun-e-Shahadat Order and what did constrain the Court to rely upon them? **How could, bringing of papers on the record, be considered synonymous with proving them?** All these questions are fundamental and foundational but the learned Additional; District Judge hearing the appeal and the learned Single Judge of the High Court hearing the revision petition relied on these documents without addressing anyone of them.

9. The argument that where a party did not raise objection as to the admission of a document and its exhibition, it cannot subsequently complain about its mode of proof has not impressed us **as the provisions governing the mode of proof cannot be compounded or dispensed with, nor can the Court, which has to pronounce a judgment, as to the proof or otherwise of the document be precluded to see whether the document has been proved in accordance with law, and can, as such, from basis of a judgment.** In the case of *Messrs Bengal Friends and Co. , DACCA v. Messrs Dour Benode Saha and Co., and The Deputy Registrar of Trade Marks, Chittagong* (PLD 1969 SC 477) this Court while dealing with the mode of proof of the document nor properly brought on the record held as under:-

“Besides the authenticity of the account books relied upon by the It was omitted from consideration that under section 34 of the Evidence Act entries in books of account regularly kept in the course of business are only declared to be relevant whenever they refer to a matter into which the Court has to enquire. But this does not dispense with the requirement of section 67, that if a document

*is alleged to have been written by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting. **Mere production of account books kept in regular course of business, therefore, does not constitute evidence of entries contained therein.** The Legislature....”*

9. The learned trial Court as well as Appellate Court have committed material irregularity and illegality while not summoning the original record as well as adducing the evidence in respect of the suit property though, per law, the Court(s) are competent to exercise such discretion even without an application from parties. Thus, the judgments and decrees passed by the learned two Courts below are not sustainable under the law and the same are liable to be set aside as both the Courts below have committed illegalities and irregularities while passing the impugned judgments and decrees.

10. In view of the above facts and circumstances, particularly the law laid down by the Honourable Supreme Court as referred hereinabove and the prayer put forward by the counsel for the parties, the judgments and decrees passed by the learned Courts below were set aside vide short order dated 11.11.2021. The matter was remanded back to the learned trial Court i.e. Senior Civil Judge Ghotki to allow the parties to amend their pleadings, frame proper issues, to summon original record from concerned authorities in the light of the documents produced by the applicants/plaintiffs or by the respondents/defendants, particularly entry No. 84 dated 03.07.1997, consider the legality of Darya Kurdi Right and its extent, examine official representatives as either court witnesses or allow the parties to adduce additional evidence and then pass fresh judgment in accordance with law, within a period of six(6) months from the date of receipt of copy of this order.

The parties are directed to appear before the Senior Civil Judge, Ghotki on 29.11.2021 without claiming further notice. The parties are also left to bear their own costs.

11. These are the reasons for the short order dated 11.11.2021.

JUDGE

Ghulam Muhammad / Stenographer