

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision No. S – 35 of 2009

Municipal Committee Khairpur v. Sindh Boys Scout Association & others

Date of hearing: **14-03-2022**

Date of decision: **14-03-2022**

Mr. Kalandar Bakhsh M. Phulpoto, Advocate for the Applicant.
Mr. Moin Azhar Siddiqui, Advocate for Respondent No.1.
Mr. Khan Muhammad Sangi, Advocate for Respondent No.2.
Mr. Ahmed Ali Shahani, Assistant Advocate General Sindh.
Mr. Muhammad Hamzo Buriro, Deputy Attorney General.

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J U D G M E N T

Muhammad Junaid Ghaffar, J. – This Civil Revision Application has impugned judgment and decree dated 23-12-2008 passed by 2nd Additional District Judge, Khairpur, in Civil Appeal No.64 of 2003, whereby judgment / decree dated 23-06-2003 and 26-06-2003, respectively, passed by Senior Civil Judge-II, Khairpur in F. C. Suit No.103 of 2001 (Old No.34 of 1996) through which the Suit of Respondent No.1 had been dismissed has been set-aside / reversed by decreeing the said Suit.

2. Heard learned Counsel for the Applicant as well as Respondent No.1 and perused the record.

3. Respondent No.1 had filed a Suit for declaration, injunction and mesne profit and the precise relief sought was to the effect that it may be declared that they are absolute owners of the Suit land; whereas, any action of the Applicant regarding disposal and raising of construction of shops etc. on the Suit land was illegal and unauthorized. It was further prayed that sale / lease of land by the Applicant in favour of Respondent No.2 is also *mala fide* and illegal. The learned Trial Court settled the following issues:

1. *Whether the suit is not maintainable? O.P.D.*
2. *Whether the suit is barred under law? O.P.D.*
3. *Whether the suit is bad for non-joinder of necessary parties? O.P.D.*
4. *Whether the plaintiff is owner of the land in suit? O.P.D.*

5. *Whether the defendant NO: 1 disposed of some portion of the plaintiff's land, and raised construction of shops, illegally? O.P.D.*
6. *Whether the sale of land by the defendant NO:1 in favour of the defendant NO:2 for construction of Income Tax Office and residences is illegal and without any lawful authority? OPD.*
7. *Whether the plaintiff is entitled for recovery of possession of the land disposed of by the defendant NO: 1? OPD.*
8. *Whether the plaintiff is entitled for identical profits including future lease money regarding the partitions of the suit land occupied by the defendants? O.P.P.*
9. *Whether the plaintiff is entitled for mesne profits, if yes then at what rate? O.P.P.*
10. *What should the decree be?*

4. Thereafter, the learned Trial Court was pleased to dismiss the Suit of Respondent No.1 in the following terms:

“ISSUE NO: 4.

The burden to prove this issue lies upon the plaintiff. PW Wali Muhammad has deposed that in the year 1939-40 the Ruler of Khairpur state has allotted the land (20-15) acres to boy scout association and such entry entered in the official record. He has produced deh form NO: 1 at Ex: 113 and certified true copy of form deh jo Register at Ex: 114, order of Deputy Commissioner Khairpur at Ex: 116. The plaintiff in order to prove his ownership over the suit property has relied upon the documents at Ex: 113 and Ex: 114. The perusal of Ex: 113 and Ex: 114 shows that there is entry in the name of plaintiff in respect of an area of (20-15) acres, this entry does not show that under whose order it has been maintained in the revenue record. It also does not show that who had granted the disputed land in favour of the plaintiff. This entry does not support the version of the plaintiff that the disputed land was granted to the plaintiff by the Rulers of the Khairpur state. This entry does not reveal that the disputed land was originally owned by the Rulers of Khairpur state. The plaintiffs own document at Ex: 116 which reveals that control and maintenance of disputed property was given to the plaintiff, this document does not reveal that the proprietary rights were transferred to the plaintiffs. Mere entry in the Ghat Wadh form in the name of plaintiff does not prove ownership of the plaintiff over the suit property. Since the burden to prove this issue lies upon the plaintiff, but the plaintiffs have not produced any authentic document to prove their ownership over the suit property. I therefore answer issue NO: 4 as not proved.

ISSUE NO: 5 & 6.

The plaintiffs witness Wali Muhammad in his examination in chief has stated that the disputed property was owned by Khairpur State. I have already observed that the plaintiffs have failed to prove their ownership over the suit property. It is also an admitted position that the suit property is within Municipal area of Khairpur. Since the suit property was owned by Khairpur state, as such it can not be treated as Government property. DW Sobdar Ali has produced the order of Deputy Commissioner Khairpur dated: 8.7.65 at Ex: 143. It appears that all the Government plots rest land etc lying within the Municipal limits were transferred by Municipal Committee Khairpur, therefore I am of the humble opinion that since the suit property being Government property is

lying within the Municipal area of Municipal Committee Khairpur, therefore, it was transferred to Municipal Committee Khairpur vide order dated: 8.7.65 Ex: 143, and therefore the disposal of the suit property by the defendant NO: 1 to defendant NO: 2 and raising construction of the shops by the defendant No: 1 on the suit property are legal. Issues Nos: 5 & 6 are answered accordingly.

ISSUE NO: 7.

In view of my findings on issue NO: 4 I am of the humble opinion that the plaintiff is not entitled of the suit property. Issue is therefore answered accordingly.

ISSUE NO: 1 & 2.

In view of my findings on issue NO: 4 I am of the humble opinion that suit of the plaintiff is barred U/S 42 of Specific Relief Act and is not maintainable. Issues NOs: 1 & 2 are answered accordingly.

ISSUE NO: 3.

The learned counsel for the defendants at the time of arguments has not been able to point out that who were the necessary and proper party which has not been joined by the plaintiff in the present suit. No evidence has adduced by the defendants in this regard, I therefore answer issue NO: 3 as not prove.

ISSUE NO: 8 & 9.

In view of my findings on issue NO: 4 I hold that the plaintiffs are not entitled for any profits, lease money and mesne profit in respect of suit property. Issues NOs: 8 & 9 are answered accordingly.

ISSUE NO: 10.

In view of my findings on the above issues I dismiss the suit of the plaintiff with no order as to cost.”

5. Respondent No.1, being aggrieved, filed an Appeal and the said Appeal has been allowed by the learned Appellate Court in the following terms:

“POINT NO: 1:-

10 P.W-1 has deposed that in the year 1939/1940 Rural of Khairpur State allotted area of 20-15 acres to Boy Scouts Association in the name as “Scout ground” and such entry is found in the record of the Government Departments including Survey & Revenue. This version has not been denied during cross examination and on the contrary the following suggestion/question was given to P.W-1:-

“I do not know whether notified area of Khairpur was part of Khairpur state in the year 1939/1940. I do not know whether in the year 1939 or 1940 that ground was an open space. It is fact that the dispute area was being used for holding the industrial and agriculture exhibitions”.

The above suggestion that plot was lying vacant and used for welfare purposes itself admits the claim of appellant/plaintiff that it was reserved as “Scout Ground.”

11 P.W-1 has produced Extract of deh Form-1 at Ex: 113 & 114, Sketch at Ex: 116. The P.W-1 denied the suggestion during cross examination that the documents produced by him are forged. These three documents have been maintained and prepared by survey department and head draftsman of the survey department namely Niaz Muhammad Soomro has been examined as P.W-2 who was given suggestion that documents were not authenticated but no specific suggestion has been given to him that documents at Ex: 113, 114 & 115 are forged having prepared fraudulently. P.W-2 is important witness for the purpose of these documents because he being official of survey department is the custodian of the said record and after such failure the mere suggestion given to P.W-1 that documents are forged does not falsify the documents.

12 The P.W-1 was cross examined and he denied the suggestion as under:-

“It is incorrect to suggest that in the year 1980 the Anaj and Khajoor Market was constructed over some of the area over disputed area of Scout Association, but on the contrary the encroachment started in the year 1983. I do not know whether the Governor of Sindh performed the opening ceremony of Khajoor and Anaj Mandi in the year 1980. It is incorrect to suggest that M. C Khairpur constructed ware house in the year 1960 by marking encroachment. It is incorrect to suggest that the documents produced by me are forged and fabricated documents.”

The above suggestion admits the version of appellant/plaintiff's association that the said property was brought in illegal possession.

13 The order of Deputy Commissioner Khairpur passed in the year 1993 available at Ex: 116 reads as under:-

ORDER OF THE DEPUTY COMMISSIONER
KHAIRPUR.

The Deputy Commissioner Khairpur is pleased to transfer the control and maintenance of old scout ground having an area of 20-15 excluding the area of Khajoor Mandi and including all other structures to the Sindh Boys Scout Association for the following purposes:-

1. Repair and maintenance.
2. Organizing annual Scout Jumbhories, Scout festivals, Scout camping for the promotion of Scouting/sports.
3. Any other sports activity.

(Khusro Pervaiz Khan)
DEPUTY COMMISSIONER.
KHAIRPUR.

Though above order is specifies that plot measuring 20-15 acres was handed over to appellant/plaintiff's association for organizing Annual Scout Rallies but this order is also not in accordance to the actual facts because on one side the Deputy Commissioner Khairpur recognizes the control of Scouts association over the plot measuring 20-15 acres and on other side he has given shelter to the Khajoor Mandi which is situated in the same area.

14 D.W-1 who is encroachment Inspector of respondent/defendant No: 1 has deposed that disputed plot was owned by Municipal Committee Khairpur and that the Municipal Committee Khairpur is in possession of the said plot since 1947. On one side Municipal Committee Khairpur claims ownership since 1947 and on other side D.W-2 who is Taluka Officer planning of the respondent/defendant No: 1 has deposed in his examination-in-chief as under:-

“As that plot as the plot of Government therefore the D.C in the year 1965 with the approval of Deputy Commissioner Khairpur issued to hand over all the Government plots which come within the limits of Municipal Committee Khairpur, handed over to Municipal Committee free of costs for development purpose”.

15 The letter of 1965 relied upon by the D.W-2 available at Ex: 143 reads as under:-

ORDER OF THE DEPUTY COMMISSIONER
KHAIRPUR

All the Govt: plots, Waste Lands and Surfaces, etc lying within Municipal Limits are hereby transferred to Municipal Committee, Khairpur, free of cost with immediate effect, so as Municipal Committee may bring some financial improvements and other development schemes out of the sale proceed of the lands.

For (Pervez Ahmed Bhut) CSP,
Deputy Commissioner Khairpur.

Above referred letter does not specifically the plot claimed by appellant/plaintiff's association and moreover the disputed plot is appearing in the Government record as "Scout Ground" as discussed in preceding paragraph NO: 11; as such the above letter of Deputy Commissioner Khairpur will not be applicable to the disputed plot because if it had been otherwise then the Deputy Commissioner would not have passed order for handing over possession of the area of 11-21 acres to the appellant/plaintiff's association in the year 1993.

16 The D.W-2 Sobdar Ali has deposed that the area claimed by appellant/plaintiff was part of notified area and after merger of the Khairpur State in Pakistan it was handed over to Municipal Committee Khairpur but in this regard no any document has been brought on record in support of such claim, as such the mere saying so is not sufficient to create exclusive rights and title.

17 There is clear conflict between the D.W-1 and D.W-2. DW-1 claims ownership since 1947 without producing any record while D.W-2 claims ownership since 1954 and 1965 on the basis of letter of Deputy Commissioner which as already discussed in preceding paragraph NO: 15, does not appear to be applicable to the disputed plot.

18 In view of above discussion and reasons I am of clear in my mind that the property claimed by appellant/plaintiff is reserved for "Scout Ground" and it is not property of respondent/defendant No: 1 and point No: 1 is replied affirmative.

Point No: 3

19 *The learned trial court has observed that suit is barred under section 42 of Specific Relief Act. It has been already discussed in preceding paragraph No: 18 that the plot stands in the name as "Scout Ground" Section 42 of Specific Relief Act provides that any person having any right and title can knock the door of court for seeking relief of declaration and in this case the right and title in favour of appellant/plaintiff is created, hence in my opinion the suit is barred under section 42 Specific Relief Act.*

20 *Learned advocate for respondent No: / defendant No: 1 has contended in preceding paragraph NO: 7 of his written arguments that appellant/plaintiff can not file the suit or appeal being public functionary against an other public functionary but this contention does not appeal my mind because if any public functionary exceeds its limits then civil court is the ultimate form to decide such dispute. However the suit is maintainable.*

21 *As a result of my findings on Point No: 1 & 2 the civil appeal NO: 64/2003 is allowed with no order as to costs with the result of impugned judgment and decree 23.6.2003 and 26.6.2003 respectively is set-aside and suit No: 103/2001 (old No: 34/1996) which was previously dismissed by learned trial court now stands decreed as prayed with no order as to costs."*

6. Though very extensive arguments have been made on behalf of the Applicant regarding the ownership of Respondent No.1 and grant of a declaration by the Appellate Court, including reliance on certain documents which were never produced in evidence; however, insofar as the judgment(s) of the two Courts below are concerned, neither these arguments were ever raised before the said Courts; nor have they dealt with the same; hence, cannot be looked into at this stage of the proceeding by this Court.

7. Insofar as the Trial Court is concerned, the Suit was primarily dismissed on the ground that though there were some entries in favour of Respondent No.1, as claimed; however, the basis of such entries was not a matter of record nor Respondent No.1 had established as such, and after coming to this conclusion, the learned Trial Court went on to hold that the onus for proving the same was on the Respondent No.1, hence, the Suit was liable to be dismissed.

8. On the other hand, the Appellate Court has reversed such findings on the ground that all evidence brought before the Court in the shape of these entries was fully supported in the evidence and the cross-examination of the witnesses, and therefore, the Suit of Respondent No.1 must be decreed and it was so ordered.

9. Apparently, the Applicant's entire case is premised on the plea that the entries in the *Ghat / Wadh* Form do not create any title, and therefore,

the Suit could not have been decreed nor a declaration could have been given. To that extent, in certain cases, this proposition though applies; but not in each and every situation. In the peculiar facts and circumstances of this case, at least, it does not apply. Here the dispute is between a Local Government Department as against a Non-Governmental Organization incorporated by way of an Ordinance¹; and apparently has some control and management of the Provincial Government itself. The claim of Respondent No.1 is that the Suit land was originally owned by the Rulers of Khairpur State and was allotted to Respondent No.1 in the year 1939-40, and for such purposes, Deh Form No.1 (Ex.113), certified true copy of Form Deh Jo Register (Ex.114) and Order of Deputy Commissioner, Khairpur (EX.116) were produced. These documents have been discarded by the learned Trial Court on the ground that it has not been proved that the disputed land was originally owned by the Rulers of Khairpur State; nor any record is available to establish the entries in the record of the Government; hence, could not have been allotted or transferred in the name of Respondent No.1. Ordinarily, in a dispute between a private person with the Rulers of erstwhile Khairpur State; or even for that matter with the Government itself (but not through Municipal Corporation); this argument may have had some weight. But in the facts and circumstances of this case; definitely not. How the trial Court came to this conclusion that the property was never owned by the former Rulers of Khairpur State as this was nobody's case. As to the ownership of Rulers of Khairpur State and thereafter allotment of land in favour of Respondent No.1 is concerned, the same is clearly established from the above documents and there is no denial to the very existence of such documents except that Respondent No.1 presently is not in possession of the basic allotment order issued by the former Rulers of the State. At the same time, it is a matter of record and so also conceded that these exhibits and the entries in the forms are still existing and have never been cancelled; nor the Applicant has ever made any attempt to have them cancelled. While confronted, the Applicant's Counsel has argued that the land has been allotted to them by means of various orders of the Deputy Commissioner; however, admittedly, there is no formal allotment or grant of the land even in favour of the Applicant. Moreover, without cancellation of the allotment and the existing record in the name of Respondent No.1, no further allotment could be made to

¹ Pakistan Boy Scouts Association Ordinance 1959 (XLIII of 1959)

anyone else. There appears to be no dispute to this effect, and therefore, Respondent No.1 could not have been non-suited on this ground alone.

10. Applicant's Counsel has also made an attempt to argue that pending these proceedings there are certain changed circumstances, and as to the area of six acres out of the Suit land is concerned, the same has been given by the Deputy Commissioner to them and to that extent there remains no dispute. However, this matter has come before this Court by way of a Civil Revision under Section 115 CPC from conflicting findings of the two Courts below and without their being any formal grant of application to either lead additional evidence; or to bring additional documents on record; this Court is not obligated to decide the matter on the basis of subsequent development as contended. Nonetheless, and without touching upon the very merits of the subsequent developments as agitated; in fact, even the same goes against the Applicant's case inasmuch as if Respondent No.1 had no title or claim in the Suit land, then why an area of six acres is now being given to them by the Applicant or for that matter by the Deputy Commissioner in question. This is rather an admission that though the land was originally owned by Respondent No.1; however, to overcome the execution of a decree in their favor; now some part of the Suit property be formally allotted to them. This by no means support the Applicants in any manner insofar as the present Revision is concerned.

11. In view of hereinabove facts and circumstances of this case and the material placed before me, it appears that the Appellate Court was fully justified in accepting the claim of Respondent No.1 and has correctly set aside the judgment of the Trial Court by decreeing the Suit of Respondent No.1; therefore, by means of a short order announced in the earlier part of the day, this Civil Revision Application was **dismissed** with pending application and these are the reasons thereof.

Abdul Basit

J U D G E