

**HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD**

R.A No.185 of 2019

Applicant / Plaintiff : *Through Mr. Arbab Ali Hakro,
Advocate*

Respondent No.14 : *Through Mr. Ghulamullah Chang,
Advocate*

State: : *Through Mr. Wali Muhammad
Jamari, Asst: Advocate General.*

Date of Hearing : *08.03.2021*

Date of Judgment : *08.03.2021*

J U D G M E N T

ARSHAD HUSSAIN KHAN, J: The applicant through instant Revision has called in question the Judgment & Decree dated 05.09.2019, passed by learned District Judge / Model Civil Appellate Court, Badin, in Civil Appeal No.51 of 2019, maintaining the order dated 21.05.2019, passed by Senior Civil Judge, Matli, whereby plaint of the suit filed by applicant being F.C. Suit No.Nil of 2019 [Re-Haji Umer v. Manthar and others] was rejected under Order VII rule 11 CPC.

2. Briefly stated facts of the present case are that the applicant / plaintiff alongwith four others were granted land on harp conditions from Kharif 1981-82 by Revenue Officer Kotri Barrage, Hyderabad, total land measuring 20-00 acres from U.A. No.160 and Survey No.256. The predecessor in interest of the respondents submitted application to the R.O. Kotri Barrage for seeking cancellation of grant of applicant upon which Revenue Officer Kotri Barrage called report through Assistant Revenue Officer Kotri Barrage whereby ARO conducted site inspection and reported that except 02-00 acres from grant of Shafi Muhammad rest of land granted to other is lying within 20 chains. The then Revenue officer Kotri Barrage on the basis of said report cancelled the grants of all grantees and allowed 02-00 acres to Shafi Muhammad. The grantee filed appeal before Additional Commissioner Hyderabad who dismissed the appeal. The

applicant and others then filed Revision application before Senior Member Board of Revenue who restored the grants in favour of grantees. Thereafter, the respondents being legal heirs of one Haji Kaloo, challenged the said order of Board of Revenue in F.C. Suit No.27 of 1985 before the Court of Senior Civil Judge, Badin, who decreed the said suit. The Applicant and others filed Appeal No.24 of 1993 in the Court of 2nd Additional District Judge, Badin, who allowed the appeal. The legal heirs of Haji Kaloo filed Revision Application No.108 of 1995 before Honourable High Court of Sindh and the Honourable High Court dismissed the revision. Respondents / Ali Muhammad and others filed application under section 12(2) CPC in R.A. No.108 of 1995, which was also dismissed. Thereafter, the applicant approached the D.O. Revenue with a request to accept the *Malkana* installments of his grant and to issue T.O. Form and to maintain the record in his name. The balance amount was accepted and T.O. Form was issued and land was mutated in the names of applicant. The said respondents / Ali Muhammad and others filed application under Section 161 of Land Revenue Act to recall the T.O. order, the said appeal was dismissed. Thereafter, respondents / Ali Muhammad and others filed second appeal before Executive District Officer Badin and the same was also dismissed. The said Muhammad Khan and others then filed C.P. No.D-503 of 2010 before Honourable High Court. The Honourable High Court observed that similar controversy decided in earlier round of litigation in C.P. No.67 of 1967 and, therefore, dismissed the petition. The applicant upon dismissal of the petition on the basis of T.O Form issued in his favour filed F.C Suit No.Nil of 2019 for declaration, recovery of possession, mesne profits/compensation and injunction against the respondents in respect of the land granted to him, however, the trial Court rejected the plaint of applicant under Order VII Rule 11 CPC, vide order dated 21.05.2019. Against the said such, applicant preferred Civil Appeal No.51 of 2019, which was also dismissed through the judgment and decree impugned in the instant revision application.

3. Upon notice of instant revision, only respondent No.14 has come forwarded and contested the present case.

4. Learned counsel for the applicant/plaintiff during his arguments while reiterating the contents of the revision application has contended that judgments and decrees impugned in the present proceedings are bad in law and facts both. Further contended that learned trial court illegally exercised Suo-moto jurisdiction and rejected the plaint under Order VII Rule 11 CPC without considering the averments of the plaint; further contended that learned courts below while passing the impugned judgments and decrees have utterly failed to apply their judicious mind to consider that the chequered history of the litigations between the parties where title of the applicant was decided in Revision Application No.108 of 1995 by this Court, vide judgment dated 11.04.2005 and thereafter applicant paid *Malkana* installments of his grants and T.O form dated 22.06.2006 was issued in favour of applicant and entry No.154 mutated in the record of rights. However, the respondents challenged the applicant's title and entry in revenue record before District Officer and Executive District Officer Revenue, Badin, which were dismissed, vide order 11.11.2006 and 18.02.2016 respectively. Further contended that during the pendency of appeals before Revenue Authority one Muhammad Khan son of Khair Muhammad and five others filed Constitutional Petition No. D-503 of 2010 challenging the T.O Forms in favour of the applicant. The said petition was dismissed on 23.11.2016. Further contended that after culmination of above legal proceedings the applicant filed suit for recovery of possession of land, which was under the illegal possession of the respondents. It is also contended that cause of action for filing the suit was initially accrued to the applicant on 11.04.2005 when the judgment in revision application No.108 of 1995 was passed and lastly on 23.11.2016 this Court dismissed the constitutional petition No. 503 of 2010. It is further argued that both the courts below have failed to assign any provision of law under which the suit of the applicant / plaintiff was barred by limitation; that the plaint itself discloses cause of action and question of limitation has illegally been decided by both the courts below without application of judicious mind and applicant has been deprived from fair trial of his claim and rejection of plaint without recording evidence of parties would prejudice the applicant / plaintiff. It is also

urged that the learned courts below while passing the impugned judgments have failed to consider the point of limitation is a mixed question of facts and law, which could not be decided without providing opportunities to the parties for recording the evidence. Learned counsel in support of his stance in the case has relied upon the case of Sultan Muhammad and another v. Muhammad Qasim and others [2010 SCMR 1630], Mst. Sughran and others v. Allah Ditta and others [2003 MLD 1238], Muhammad Din v. Mst. Zenab Bibi and 3 others [2001 YLR 3103] and Iftikhar Ahmed v. Messrs Continental Beverages Pvt. Ltd. and others [1997 CLC 628].

5. Conversely, learned counsel for the respondents/defendants while supporting the impugned judgments and decrees has vehemently controverted the stance of the applicant in the present revision application. Learned counsel while rebutting the above said arguments has argued that the judgments and decrees impugned in the present proceedings are well reasoned, within the four corners of law and equity, hence do not warrant any interference by this Court in the present revision.

6. Learned Asst. Advocate General, Sindh, has supported the contention of learned counsel for the petitioner.

7. I have heard learned counsel for parties, perused the record as well as the case law cited at the Bar.

8. From the record, it appears that initially in the year 1983 one Haji Kaloo, the predecessor-in-interest of respondents, filed application before the revenue authorities, *inter alia*, against the present applicant for cancellation of grants in favour of the plaintiff and other grantee, which application was allowed on 18.07.1983. The said order was subsequently challenged by the applicant and others by filing appeal before Additional Commissioner, Hyderabad. However, the said appeal was also dismissed on 23.08.1983. The applicant and others against the order of dismissal of appeal preferred revision application before Senior Member Board of Revenue, Hyderabad, which was allowed on 26.12.1984 and the grant was restored in favour of the applicant and others. Against the said order of Senior Member of Board of Revenue, the legal heirs of

above said Haji Kaloo filed F.C Suit No.27 of 1985 in the court of Senior Civil Judge, Badin, for declaration and injunction, which was decreed on 20.05.1993. The applicant and others challenged the said judgment and decree in Appeal No.24 of 1993 before the court of 2nd Additional District Judge, Badin, which was allowed and the suit was dismissed on 27.04.1995. The legal heirs of Haji Kaloo having been dissatisfied with the judgment and decree dated 27.04.1995 passed in Civil Appeal No.24 of 1993 preferred revision application No.108 of 1995 before this Court, however, said revision application was dismissed on 11.04.2005 and judgment and decree of lower appellate court was maintained. It further transpires that Ali Muhammad and 36 others filed Misc. Application No.378 of 2005 under Section 12(2) CPC in R.A No.108 of 1995, which too was dismissed on 11.04.2005 with cost with following observation.

“It seems that the present applicants are sharing common intention with legal heirs of Haji Kaloo to drag the private respondents into litigation on one pretext or the other. This fact is evident from the history of litigation in respect of the disputed land which was granted to respondents Nos.1 to 4 as back as in the year 1982”.

9. Record also transpires that respondent including others filed constitutional petition No.D-67 of 2006, inter alia, against applicant being respondent No.15. The petition was disposed of with the following observation in the judgment of High Court:

“9. We accordingly dispose of this petition with the observation that without touching to the entitlement of respondent Nos.14 to 17 in any manner, the official respondents shall dispose of the application of petitioners pending before them, strictly in accordance with law”.

10. It is further noted that after the above judgment the plaintiff and other three grantees approached to the District Officer (Revenue) Badin for depositing of *Malkana* installments in respect of their grants and issuance of T.O. besides to get mutation of their names in Revenue Record. District Officer (Revenue) Badin, accepted the balance payment of installment and after completing formalities of the record issued T.O dated 22.06.2006 in the names of all grantees including the applicant. That in revised sanction the

grant of applicant granted to him from un-assessed number 160 of Deh Dhoro Neero (now) Taluka Talhar has been measured in shape of Black Survey. Plaintiff from Block No.21/3-C got an area 1-00 acres and from Block No.35/3-00 an area 3-00 acres total area 4-00 acres against his original grant, the same is mutated in revenue record as entry No.154 of Village Form VII-B, which hereinafter shall be referred to as suit land. The respondent Ali Muhammad and others filled appeal under section 161 of the Land Revenue Act with the prayer to recall the T.O order issued in the name of Applicant and others before the District Officer (Revenue) Badin, their appeal was dismissed, vide order 11.11.2006. The said respondents challenged the aforesaid order in the 2nd Appeal before the Executive Officer (Revenue) which too was dismissed on 18.02.2010. Record further transpires that during pendency of the appeal before the revenue authority a constitutional petition bearing No. D-503 of 2010, was filed before this Court, inter alia, against the applicant. The said petition, however, was also dismissed on 23.11.2016 with the following observation.

“Similar controversy was decided in the earlier round of litigation, by way of Civil Revision Application No. 108/1995 as well 12 (2) application and C.P. No.D-67/2006. Since the issue has attained finality after completing adjudication by the competent fora hence the instant petition being devoid of merit is hereby dismissed along with listed application.”

11. Prima facie, it appears that the applicant, after culmination of the above referred long drawn litigation, filed suit Nil of 2019 [Re- Haji Umer v. Manthar and others] before the court of learned Senior Civil Judge Matli. However, upon presentation of the above suit learned Senior Civil Judge Matli, without issuing notice to the other side rejected the plaint of the suit under Order 7 Rule 11, CPC on the ground of limitation. The said order was subsequently upheld by Learned District Judge Badin / Model Civil Appellate Court, Badin, in Civil Appeal No.51 of 2019. The judgments of both the learned courts bellow have been challenged in the present Revision application.

12. The provisions of Order VII, Rule 11, C.P.C. have been interpreted in number of cases and the consistent rule is that for the purpose of rejection of plaint the court need to confine to the contents thereof for the purpose of determining if it discloses a cause of action, not barred by law and that it was improperly valued or insufficiently stamped and on being called upon to make up the deficiency of definite amount of court-fee the deficiency is not made up. In the present case, the petitioner had categorically mentioned the details of long drawn litigations between the parties which ended on 23.11.2016 in the shape of order passed in C.P No. D-503 of 2010. It is the claim of the applicant that since ownership of the subject property has already been decided by the competent authority, therefore, through the above suit he sought recovery of possession, mesne profits/compensation and injunction only. A perusal of the plaint also transpires that the applicant in para-14 of the plaint has categorically mentioned the cause of action accrued to him for filing the case. It is a rule that while considering the rejection of the plaint under Order VII, Rule 11, C.P.C, the facts as asserted in the plaint need to be accepted as correct and if there is some dispute with regard to their correctness, the same could be resolved after framing the issues and evidence. It is also settled law that while rejecting the plaint the court has to confine to the contents thereof and any extraneous material or facts which was alleged by the other party or introduced in his written statement, could not be based for rejecting the plaint. It is strange that the facts as were assumed by the learned court below for rejection of plaint under Order VII, Rule 11, C.P.C., as the trial court had no occasion to express its view in respect thereof. Even otherwise the question of limitation being a mixed question of law and facts, could be determined after proper issue and evidence. Reference in this regard can be made to the case of Irshad Ali v. Sajjad Ali and 4 others [PLD 1995 SC 629] and Haji Abdul Sattar and others v. Farooq Inayat and others [2013 SCMR 1493] wherein it was, inter alia, observed by the Honorable Supreme Court that the issue of limitation being a mixed question of law and facts could not be determined without recording of evidence.

13. Moreover, it is the duty of the court to make a holistic and meaningful reading of the plaint and only when it is manifestly and uncontrovertibly evident that the requirements of Order VII, Rule 11, are met, and that it is plain that the plaint does not deserve to go to Trial, should it order a rejection of the Plaint. It is also well settled that a plaintiff should not be non-suited, unless, either there is incriminating evidence against a plaintiff that his claim is a time barred one, or, this issue could be decided on the basis of undisputed record. I consider that in the present case the proper course will be to give a chance to the parties to produce evidence before the trial court, which will be the proper forum to reach a fair conclusion after deducing the evidence produced before it. It is also imperative to mention that after incorporation of Article 10-A, in the Constitution of Islamic Republic of Pakistan 1973, the fair trial in due process of law is the fundamental right of the litigants.

14. In view of the foregoing discussion, and relying upon the ratio of the legal precedents, stated supra, it is observed that the impugned judgments suffer from serious error of law, as such unsustainable and are liable to be set-aside.

15. These are the reasons for my short order dated 08.03.2021 whereby instant Revision Application was allowed and the case was remanded back to the trial Court with the directions to decide the same after framing the issues and recording the evidence.

JUDGE

**Hafiz Fahad*