Order Sheet

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Revision Application No. 53 of 2012

Date of hearing : 21.02.2013.

Applicant : Muhammad Siddique through
Mr. Sartar Iqbal Panhwar Advocate.

Respondent : Abdul Rehman through
Mr. Muhammad Sachal R. Awan advocate.

O R D E R

NADEEM AKHTAR, J.- This Civil Revision Application has been filed by the applicant against the judgment delivered on 10.12.2011 in Civil Appeal No.61/2011 by the learned District Judge, Badin, whereby the applicant's said appeal has been dismissed and the judgment and decree dated 28.03.2011 passed in the applicant's F.C. Suit No. 111/2011 by the Senior Civil Judge, Badin, dismissing the applicant's suit for specific performance and permanent injunction, have been upheld.

2. The brief facts of this case are that the applicant and the respondent are closely related as the respondent's father was the maternal uncle of the applicant. The father of the applicant and the respondent's father purchased lands measuring 9-01 acres in Survey No.1 (8-20 acres) and Survey No.2 (0-39 acres), situated in deh Moro Jagir, Tapo Hingorjani, Taluka Tando Bago, District Badin. Both the co-owners had equal shares of 50 Paisa each in the entire said land. After the death of the applicant's father and brother, he became the sole and absolute owner of the 50 Paisa share in the land belonging to his deceased father. The 50 Paisa share of the respondent's father was inherited upon his death by the respondent to the extent of 44 Paisa, and by his mother Mst. Rani to the extent of 06 Paisa. The names of the respondent and his mother were mutated in the Revenue record through *Deh* Form-VII on 06.03.2008. It is pertinent to mention here that the applicant's father Ahmed had passed away on 02.03.1980.

3. It is the case of the applicant that in the year 1980, a private partition and settlement took place whereby the land was partitioned and the respective shares of 50 Paisa each of the co-owners were earmarked, distributed and handed over to them. By virtue of the said private partition and settlement, the applicant came into possession of the 50 Paisa share originally owned by his

deceased father, and also an area of 2-10 acres out of the share inherited by the respondent. It has been averred by the applicant that he is in possession of the entire said land, including the said area of 2-10 acres, since 1980. It is also the case of the applicant that the respondent, for the first time in the year 2005, raised objection to the private partition and settlement and the applicant's possession in respect of the respondent's land of 2-10 acres. The applicant has averred that because of the dispute raised by the respondent, the parties arrived at a *faisla* whereby the respondent agreed to withdraw his objection and claim, subject to the payment of Rs.150,000.00 to him by the applicant. The applicant has claimed that, in order to record the *faisla*, an agreement was executed on 28.12.2005 (the Agreement) by the applicant and the respondent, wherein it was mentioned that the respondent had received a sum of Rs.130,000.00 from the applicant as earnest money, and the balance amount of Rs.20,000.00 was to be paid by the applicant at the time of execution and registration of the sale deed in favour by the respondent. The applicant has alleged that the respondent committed breach of the Agreement by not performing his agreed part of the contract.

4. It was an admitted position that the applicant was in possession of the disputed area of 02-10 acres inherited by the respondent, but the respondent was claiming that the possession of the same was taken over from him by the applicant forcibly and illegally in the year 2008. The respondent filed an application for restoration of the possession of the said land before the Director Human Rights / Sessions Judge, Badin, who disposed of his application vide order dated 19.12.2008 by observing that he did not have the jurisdiction to pass such an order, and that the respondent may approach the competent court of law for redressal of his grievance. It was specifically observed in the aforementioned order that the present applicant had stated in his reply before the Director Human Rights / Sessions Judge, Badin, that the said land was given to him in the year 1980 in pursuance of a *faisla*, but he did not produce any proof in support of this assertion.

5. Thereafter, the respondent filed several criminal proceedings against the present applicant before the Sessions Judge, Badin, the Ex-Officio Justice of Peace / District Judge, Badin, and this Court. The present applicant also filed a Constitutional Petition before this Court against the respondent for quashment of the F.I.R. lodged against him by the respondent. The said criminal proceedings between the parties are not relevant for the purpose of deciding this revision application.

6. In the above background, the applicant filed F.C. Suit No. 111 of 2011 before the Senior Civil Judge, Badin, against the respondent for specific

performance of the Agreement and permanent injunction. The suit was strongly contested by the respondent. It was asserted by the respondent in his written statement that he never executed any sale agreement in favour of the applicant ; he did not receive any sale consideration from the applicant ; the possession of the disputed land was never handed over by him to the applicant ; the possession was forcibly taken over by the applicant on 03.10.2008 ; the agreement was a false and forged document ; and the alleged claim of the applicant was false and contradictory as the applicant had stated before the Director Human Rights / Sessions Judge, Badin, that the disputed land was acquired by him in pursuance of the private partition and settlement held in the year 1980, but in his suit, the applicant claimed to have purchased the disputed land from the respondent through the Agreement dated 28.12.2005.

7. On the basis of the pleadings of the parties, the trial Court framed four issues ; namely, (1) Whether at the time of execution of sale agreement dated 28.12.2005, the defendant was the owner and was in a position to sell the suit land to the plaintiff ? (2) Whether the defendant executed sale agreement dated 28.12.2005 in favour of the plaintiff and received Rs.130,000.00 as earnest money from the plaintiff, if so, its effect ? (3) Whether the plaintiff is entitled to the relief claimed ? and (4) What should the decree be ? In support of his claim, the applicant / plaintiff examined himself and two other witnesses, who were allegedly present at the time of the Agreement. The respondent / defendant examined himself and one other person in order to show that the respondent was in possession of the disputed land till 2008. By the judgment delivered and the decree prepared on 28.03.2011, the suit filed by the applicant was dismissed. Being aggrieved with the said judgment and decree, the applicant filed Civil Appeal No. 61/2001 before the District Judge, Badin, which too was dismissed vide judgment delivered on 10.12.2011 upholding the judgment and decree passed by the trial Court.

8. While dismissing the applicant's suit, it was held *inter alia* by the trial Court that the respondent was not competent to sell his share to the applicant on the date of the alleged Agreement dated 28.12.2005, as the disputed land was mutated in favour of the respondent in the *foti khata* on 06.03.2008 ; the Agreement was doubtful as the evidence of the applicant's witnesses was contradictory regarding the place of drafting of the Agreement, the place of its execution and the place of its attestation ; the applicant did not produce any receipt of the alleged sale consideration ; the Agreement was unregistered ; and that the applicant could not prove his claim successfully. While dismissing the applicant's appeal, it was held *inter alia* by the lower appellate court that the applicant had admitted that an affidavit was filed by him before the Director Human Rights / Sessions Judge, Badin, wherein he did not mention anything

about the Agreement dated 28.12.2005 ; if the Agreement had been actually executed by the parties, the applicant would have mentioned about the same in his said affidavit ; the applicant had failed to prove the Agreement ; and that the applicant's suit had been rightly dismissed as there was no illegality or irregularity in the findings of the trial Court.

9. I have noticed that the Suit and the cause of action pleaded therein by the applicant were based only on the Agreement, and the relief sought therein by the applicant was only in respect of the area of the disputed 2-10 acres. It would not be out of place to mention here that, in his Suit, the applicant did not plead at all the facts regarding the purported private partition and settlement allegedly held in the year 1980, his alleged possession in respect of the disputed land of 2-10 acres since 1990, and/or about the purported *faisla* held in the year 2005. On the contrary, it was pleaded by the applicant in paragraph 4 of his plaint that the vacant possession of the disputed land of 2-10 acres was handed over to him by the respondent in the presence of witnesses at the time of the Agreement, that is, on 28.12.2005. Due to this reason, the trial court very rightly did not frame the issue in respect of the purported private partition and settlement allegedly held in the year 1980, and/or the *faisla* allegedly held in the year 2005. Thus, the claim for adjudication before the trial court was not in respect of the said private partition and settlement allegedly held in the year 1980 and/or the *faisla* allegedly held in the year 2005, but was only with regard to the alleged Agreement dated 28.12.2005.

10. By not pleading the aforementioned important and material facts in the plaint, the applicant became disentitled from leading evidence in respect thereof. As such, the evidence led by the applicant in relation to
the private partition and settlement allegedly held in the year 1980, the *faisla* allegedly held in the year 2005, and his alleged possession since 1980, was inadmissible and of no value. The applicant also became disentitled from agitating any of the said facts before the trial court, in appeal before the lower appellate court, and especially in revision before this Court. It is a well established principle of law that new facts cannot be pleaded before the appellate forum. It is also a settled law that in civil proceedings, parties are bound by their pleadings, and they cannot be allowed to deviate from their pleadings. This view expressed by me is fortified by the following authorities of the Hon'ble Supreme Court :

PLD 1974 SC 322 :
Mst. Murad Begum etc. V/S Muhammad Rafiq etc.

"*It is well settled that a party can not be permitted to raise an altogether new ground of attack for defence, by departing from its previous*

pleadings, especially when the opposite party had no opportunity to adduce evidence in this behalf or to otherwise have an opportunity of meeting the plea during the course of the trial……..." ('B' at page 328).

1988 SCMR 1696 :
Mst. Jannat Bibi V/S Sher Muhammad and others.

"*…….. In civil proceedings a party is not permitted to deviate from his or her pleadings, nor can the court set up a different plea for a party and decide the suit on that basis……..*" ('B' at page 1701).

PLD 2007 SC 460 :
Sh. Fateh Muhammad V/S Muhammad Adil and others.

" *It is a settled law that parties are bound by their pleadings*".
('C' at page 465).

PLD 2007 SC 582 :
Zulfiqar Ali V/S Shahadat Khan.

" 12. …… there is ample authority that unless a case is set up in pleadings, decision of the case can not possibly rest on such a plea. This has been the consistent law with the rationale that the other party is not taken by surprise. …….."
(Paragraph 12 ('K') at page 591)

1996 SCMR 336 :
Binyameen and 3 others V/S Chaudhry Hakim and another.

" *It is a well-settled principle of law that a party can prove a case which has been pleaded by it. ……..It is also well-settled principle that no evidence can be led or looked into in support of a plea which has not been taken in the pleading. A party is required to plead facts necessary to seek relief claimed and he would be entitled to produce evidence to prove those pleas. Variation in pleading and proof is not permissible in law* ". ('B' at page 340)

11. I have already held that the applicant became disentitled from leading evidence in relation to the private partition and settlement allegedly held in the year 1980, the *faisla* allegedly held in the year 2005, and his alleged possession since 1980. However, I would still like to mention here that during the cross examination of the respondent, he was not confronted at all by the applicant's counsel with the suggestion that any private partition and settlement

took place in the year 1980, or that there was any *faisla* in the year 2005. The entire emphasis was on the Agreement dated 28.12.2005, which was categorically denied by the respondent. This clearly establishes that the applicant had hopelessly failed to prove that there was any connection of the Agreement dated 28.12.2005 with the private partition and settlement allegedly held in the year 1980 and/or with the *faisla* allegedly held in the year 2005.

12. Both the learned courts below dismissed the suit and the appeal filed by the applicant keeping in view the material that was on record before them, and the findings of both the courts below are concurrent. In this context, the well settled law is that the court would not normally go beyond the concurrent findings of facts recorded by the courts below after appreciation of evidence, unless it is shown that the findings are perverse, patently against the evidence, or so improbable that the acceptance thereof would tantamount to perpetuating a grave miscarriage of justice ; the jurisdiction of the High Court under Section 115 C.P.C. is narrower, and concurrent findings of facts could not be disturbed in revisional jurisdiction unless courts below while recording findings of facts had either misread the evidence or had ignored any material piece of evidence or were perverse and reflected some jurisdictional error ; and the burden lies heavily on the applicant to show that concurrent findings of facts recorded by the courts below are not sustainable. This view expressed by me is based on (1) *Noor Muhammad and others V/S Mst. Azmat-e-Bibi*, ***2012 SCMR 1373***, (2) *Alamgir Khan through his L.Rs and others V/S Haji Abdul Sattar Khan and others*, ***2009 SCMR 54***, and (3) *Noor Akbar V/S Mst. Gullan Bibi*, ***2005 SCMR 733***.

13. In view of the above discussion, it can be safely concluded that the concurrent findings of both the courts below are neither perverse nor patently against the evidence, nor the evidence was misread, nor any material piece of evidence had been ignored by the courts below, and there was no jurisdictional error in the proceedings. The applicant has not been able to show that the concurrent findings of facts recorded by the courts below are unsustainable. The findings of both the lower courts are based on correct appreciation of evidence, and full and proper application of mind. I do not find any infirmity or illegality in the impugned judgments and decrees, which in my humble opinion, do not require any interference by this Court. This Civil Revision Application is, therefore, dismissed along with C.M.A. No. 328 of 2012.

J U D G E