Judgment Sheet

IN THE HIGH COURT OF SINDH,

CIRCUIT COURT, HYDERABAD

R.A. No. 81 of 1998

DATE	ORDER WITH SIGNATURE OF JUDGE

02.06.2022

For hearing of CMA 218 /98
For hearing of main case

None present for applicant
Ms. Aneela Firdous, Advocate for respondents
Mr. Allah Bachayo Soomro, Addl.A.G.

J U D G M E N T

ZULFIQAR AHMAD KHAN, J.- Through captioned Civil Revision Application, the Applicant has called into question the Judgment and Decree dated 25.4.1998 and 30.04.1998 respectively passed by learned District Judge, Tharparkar at Mithi in Civil Appeal No.5 of 1995, whereby the Appeal was dismissed and judgment and decree dated 17.04.1995 passed by Senior Civil Judge, Mithi in F.C. Suit No. 40 of 1980 was maintained.

2. Brief facts of the case as per memo of plaint are that applicants filed F.C. Suit No. 40 of 1980 against respondents for declaration and injunction. The case of applicants before the trial court was that applicant / plaintiff No.1, predecessor-in-interest of applicants No. 2 and 3 and so also the co-applicants / plaintiffs brought under cultivation pieces of government waste land in their respective makans in the year 1966-67 which were subsequently entered in their names in the record of rights, thus they became entitled to have their cultivated land brought on “Hameshgi Yadasht” for conferment of permanent rights. The subordinates of respondents 1 to 4 prepared “Hameshgi” which included land cultivated by the applicants and submitted the same to respondent No.4 for approval who by his two orders dated 30.10.1976 sanctioned the “Hameshgi Yadasht” and forwarded the same to Assistant Commissioner under his No.R-4834 dated 4.11.1976. The same were passed by Mukhtiarkar Diplo who issued “Ijazatnama” in favour of applicants after recovering “Malkana” (consideration) from them. The applicants thus

acquired permanent rights in respect of land cultivated by them and their names were entered in Revenue record as owners thereof.

3. That respondents 5 to 8 filed time barred appeal before respondent No.3 where the applicants appeared and objected to the maintainability of the appeal as well as challenged his jurisdiction but who without adverting to the question of limitation allowed the appeal vide order dated 8.2.1979 and remanded the case to respondent No.4 for fresh decision. The said order was challenged by applicants before respondent No.2 but they failed, hence they filed the suit with following prayer:-

(a) Declaration that the order passed by defendant No.3 and subsequently upheld by defendant No.2 are illegal, void, malafide and without jurisdiction. The same are incapable of being acted upon by defendant No.4 and consequently the plaintiffs continue to be owners of the suit land by virtue of Ijazatnama issued in their favour.

(b) Injunction restraining defendant No.4 from acting on illegal and void orders of defendants No.2 and 3 in respect of suit land comprising K.Nos. 123, 124, 45, 47, 43, 46 and 44 situated in deh Sedio Taluka Diplo District Tharparkar.

4. Upon service respondents 5 to 8 appeared and filed written statement whereas respondents 1 to 4 remained absent. Respondents 5 to 8 in their written statement ***inter alia*** contended that the applicants had not cultivated the land and have arranged false entries in the record with the connivance of village staff. They further stated that the disputed pieces falling in their Makan visriabah, were cultivated by makani Abadgars Hussain, Miro, Latif, Mobin and Ahmed; besides above they also raised legal pleas.

5. On the pleadings of the parties learned trial court framed following issues:-

1. Whether the orders passed by defendants No.2 and 3 are illegal and malafide ?

2. Whether the plaintiffs are owners on the basis of Ijazatnama?

3. Whether the orders of defendant No.4 is illegal in respect of suit land?

4. Whether the plaintiffs have not cultivated the suit land?

5. Whether the plaintiffs have arranged to manipulate the revenue record of the suit land?

6. Whether the defendants have Hameshgi Yadasht?

7. Whether the suit is not maintainable?

8. Whether the suit is bad for non-joinder of necessary parties?

9. What should the Decree be?

6. In order to settle the above issues learned trial court recorded the evidence of both the sides and after hearing the arguments of their counsel dismissed the suit vide Judgment dated 17.4.1995. The applicants against the above Judgment preferred appeal which was also dismissed vide Judgment dated 25.4.1998 maintaining the Judgment of trial court; the applicants therefore, challenging the above judgments of the lower courts filed the instant Civil Revision Application.

7. None present for applicants.

8. Learned counsel for respondents submits that this Revision Application has been filed against the concurrent findings of the courts below and all efforts have been made to bring forward any one to represent the applicant, which remains failed since 2016 when their counsel stated that he has lost contact with his clients..

9. It appears that after obtaining a stay order on 17.08.1998 none has effectively appeared to pursue this matter and this case is accordingly heard on merits on the basis of available record as well as with the assistance of counsel for respondents as well as learned A.A.G.

10. For considering the case of applicants on merits this court scanned by judgments of both the courts below. Before the trial court the applicants raised three questions i.e. the appeal before defendant No.3 was time barred and that there being no proper application, the same could have been condoned; that there was no explanation of delay in filing the appeal before defendant No.3. In reply to the above questions learned trial court has observed that these points were not raised in the plaint or evidence but have been raised in arguments after coming on record the condonation application and affidavit by plaintiff's own witness Noor Muhammad Clerk of office of Additional Commissioner, and when the counsel for applicants realized that the

application for condonation of delay was on the record and duly supported by an affidavit, he then taken the other pleas which were not so taken neither in the plaint nor in evidence; therefore, the same were considered being out of pleadings; the assertion made by plaintiffs in their plaint that the objection raised by them on point of limitation was overruled does not find place in the order itself recorded by the learned Additional Commissioner. Even the perusal of order of defendant No.2 does not show that the plaintiffs had raised any such plea of limitation before him. The plaintiffs themselves having not raised the plea of limitation, though they were being represented by their counsels, they cannot assail the orders of defendants 2 and 3 on such grounds.

11. As far as question of proper explanation of delay is concerned, it was for the revenue tribunal deciding the matter to consider it proper or improper. The defendants had explained in the memo of appeal and in the affidavit accompanied with the application for condonation of delay that the impugned order of Deputy Commissioner brining the suit land on “Hameshgi Yadasht” had been passed in their absence and the moment they came to know about it, they filed the appeal. This fact stated by defendants 5 to 8 stood unrebutted as no counter affidavit was filed by the plaintiffs before the defendant No.3 who being competent Revenue Tribunal under the Land Revenue Act, could examine the legality, propriety and correctness of the impugned order of “Hameshgi Yadasht”. The defendant No.3 being convinced about the grounds raised by the defendants 5 to 8 in their memo of appeal and in the accompanying affidavit set-aside the “Hameshgi Yadasht” and remanded the matter to the defendant No.4 for fresh decision after hearing both the parties, which was the just thing to do in my opinion too. It is pertinent to mention that since the impugned Order passed by defendant No.4 sanctioning special “Hameshgi Yadasht” was passed without hearing the defendants and without considering the objections, it definitely was against the principles of natural justice and thus illegal and void and not sustainable in law. It is established law that in case an impugned order is illegal and void, no limitation runs against such order. However, this point of fact was only to be appreciated by Revenue Tribunal but the defendant No.3 had not discussed in its order. Since there was nothing on record in rebuttal of application under Section 5 of the Limitation Act moved by defendants 5 to 8, the defendant No.3 deemed it to have condoned, and it passed the order on merit. Our superior courts have time and again observed that law favour adjudication on merits and procedural

technicalities could not be allowed to stand in the way of administration of justice.

12. In para 6 of the plaint it was pleaded that Mukhtiarkar Diplo issued "Ijazatnama" to the plaintiffs / applicants after recovering malkana from them. The "Ijazatnama" had been issued under the order of Deputy Commissioner which is always subject to appeal and revision and could not be considered as final. Since the order of Deputy Commissioner stood set-aside by a legal and valid order of the competent revenue tribunals, the plaintiffs cannot be deemed to be owners of the suit land.

13. With regard to issues 3, 4 and 5 the trial court held that these three issues are interconnected and were framed on the pleadings of defendants 5 to 8, who in their written statement pleaded that the suit land was not cultivated by plaintiffs and that the entries in revenue record were arranged and manipulated by plaintiffs and therefore the order of defendant No.4 wa illegal being based on forced, manipulated record and without hearing the defendants. The defendants examined two witnesses in support of their pleas but defendants themselves did not enter in the witness box to depose what have been placed in their written statement. Had the defendants 5 to 8 or any of them been examined, then the evidence of aforesaid witnesses could be termed as supporting evidence. These witnesses were neither party in the suit nor their plea is on record. They cannot establish plea of defendants, when they themselves have failed to appear as witness at trial, their written statement cannot be treated as substantive piece of evidence as has been held by our own High Court. The pleas of defendants raised in the written statement therefore cannot be relied upon in view of the authorities reported in PLD 1988 Karachi page 460. Site inspection report is also not a substitute for evidence as its author was not examined. The evidence is vague one and no help to defendants 5 to 8. The defendants thus failed to discharge their burden and failed to prove the issue therefore it was answered as not proved. For the aforesaid reasons the trial court dismissed the suit. The appellate court also maintained the Judgment of trial court being a Judgment passed according to law.

14. This Revision Application has been filed against the concurrent findings of the courts below. The judgments of both the courts below do not show any illegality or irregularity rather both are based upon material available on record. In these circumstances, where courts below while

delivering their judgment / order have given cogent and sound reasons and there appears no error, illegality or irregularity on the surface to call for any interference and no misreading and non-reading of evidence is apparent, I see no merits in the instant revision application, accordingly, relying on the dictum laid down by the Apex Court in the case of Abdul Razzak v. Shabnam Noonari and others (2012 SCMR 976), this revision application is dismissed alongwith pending application.

JUDGE

karar_hussain/PS*