

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

IInd Appeal No.5-57 of 2018

Muhammad Iqbal ----- Appellant

Versus

Mehmood Ali & others ----- Respondents

Date of hearing: **07.11.2022**

Date of judgment: **05.12.2022**

Mr. Irfan Ahmed Qureshi, Advocate for appellant.

Mr. Arbab Ali Hakro, Advocate for respondents No.1 to 3.

Mr. Allah Bachayo Soomro, Additional Advocate General, Sindh.

JUDGMENT

ADNAN-UL-KARIM MEMON, J. Through this IInd Appeal, the appellant is asking for setting aside the Judgment and Decree dated 24.09.2018 passed by learned Additional District Judge, Khipro in Civil Appeal No.84/20177 (Re-Tajuddin @ Taj Muhammad and others v. Mehmood Ali and & others), whereby judgment and decree dated 20.05.2017 passed by Senior Civil Judge Khirpo in FC Suit No.64/2015 was upheld.

2. At the outset, I asked the learned counsel for the appellant to satisfy this Court about the maintainability of this appeal against concurrent findings recorded by the learned Trial Court and learned first Appellate Court.

3. Mr. Irfan Ahmed Qureshi, learned counsel for the appellant, replied to the query and contended that ordinarily concurrent findings recorded by the Courts below could not be interfered with by the High Court while exercising jurisdiction in the second appeal, howsoever if erroneous findings arrived at by the Courts below could be assailed, as in the present case, the learned Courts below have completely ignored important pieces of evidence brought on record in favor of the appellant thus the findings are perverse appreciation of evidence and this Court is liable to interfere with concurrent findings as the same suffer from the acute miscarriage of evidence and exclusive of material available on the record, resulting in a gross miscarriage of justice. He further submitted that impugned Judgments and Decrees are contrary to law and facts and the same is premised on misreading and non-reading of evidence. Learned counsel emphasized that the learned courts below without adverting to the very moot question that without seeking a declaration to any title or

entitlement, mere Suit for possession was not maintainable and the claimed relief ought not to have been granted to the respondents in view of the provisions of the Specific Relief Act; that both the courts below have erred in decreeing the Suit in favour of the respondents, hence the findings of the learned Trial Court on the issue No.5 as 'affirmative' was/is not in accordance with law and not sustainable; that learned appellate court failed to consider the fact that plaintiff Mehmood Ali in his evidence has not denied that he had no declaration from Court in respect of Plot No.Y-33 and when he had no declaration hence the suit was barred under section 42 of Specific Relief Act; that it is clear that suit property and the property bearing No.Y-33-1 are two different properties and respondents/plaintiffs wrongly claiming their right over the property of appellant because there was/is no property as plot No. Y-33, the private respondents/defendants No.1 and 2 were not the tenants of the respondents/plaintiffs but they were the tenants of the appellant and they had been paying rent to the appellant being owner of the suit property; that learned both Courts below failed to consider that the shops in which the respondents/defendants No.1 and 2 were tenants was/is the property of late Rawat Khan who rented out one shop to one Mukhtiar Ahmed in the year 1986 for three years (upto 1989) and another shop was rented out to Ismail Khan in the year 1972 for eleven months, such rent agreement were also executed, thereafter Rawat Khan himself being the owner orally rented out the same to respondent/defendant No.2 and the respondent/defendant No.2 being a close relative, monthly rent of the said shops was regularly paid to Rawat Khan and after his death tenancy period continued with his legal heir Muhammad Iqbal (the appellant /defendant No.4) and monthly rent is being paid to him in the capacity as owner; that learned Courts below failed to consider that to prove the ownership over the property bearing No.Y-33/1, the appellant/defendant No.4 examined himself and he in his evidence specifically deposed that his late father Rawat Khan had property i.e. House and Shops in Khipro Town being Plot No.Y-33/1 and said shops were in tenancy with Tajuddin & Taj Muhammad, Tarique Aziz, and Riyasat Ali since the lifetime of his late father. He belied the claim of the respondents/plaintiffs that they were owners of the suit shops and were in his possession, same had been let out to tenants and they were paying him rent regularly by producing certified true copies of Record of Permanent Transfer Order (PTO) of Property No.Y-33/1, original possession certificate, original notice issued by Town Committee Khipro, certified true copy of Taluka Form II in respect of Plot No.Y-33/1, Map/suratehal, Deh Form II, Original Tenancy Agreements, certified true copy of Taluka Form II in respect of House No.Y-33 showing that no area of Plot No.Y-33 was/is mentioned, certified true copy of Taluka Form II and Record of

Permanent transfer deed (PTD) of Plot No.Y-33; that in the cross examination learned counsel for the respondents/plaintiffs failed to shatter the evidence of the appellant in respect of ownership of the property i.e. Y-33/1; that the respondents/plaintiffs have failed to prove that the possession certificate issued in favor of the appellant was/is managed one; that the respondents/plaintiffs have also admitted the above documents at Ex.55-D and 55-F being true and genuine documents; that learned Courts below failed to consider that appellant denied that PTD was managed; that learned Courts below failed to consider that concerned officials have not been examined to prove that the documents submitted by the appellant were/are fake and managed one hence the title of the appellant over the property has been established; that learned Courts below failed to consider that respondents/plaintiffs examined one Imamuddin, Mukhtiarkar Revenue Taluka Khipro, who in his evidence produced Revenue Entry No.4136 dated 21.02.1995 at Ex.44-A, which explicitly shows that the House No.Y-33 was allotted to Sikandar Ali Khan from 21.04.1959 through Assistant Settlement Commissioner, Mirpurkhas vide its order; that learned Courts below failed to consider that no area of the plot is mentioned, no allotment order of Assistant Settlement Commissioner, Mirpurkhas is mentioned, the date of its mutation in Taluka Form II is mentioned as 21.02.1995 after 36 years of its allotment and no column of area is marked, the column of Patan Jo Register, Taluka and name of the defendant are blank, no reason has been assigned that as to why the mutation entry has been maintained after 36 years of its allotment but, surprisingly, the document Ex.44-B produced by the same witness shows the full description of the property viz House No.Y-33, including the Suratehal/Map, area of the said property Y-33. He pointed out that in the same entry not only the Foti Khata of the late Sikandar Khan had been changed but two different note(s) of different dates were also appearing. In the note of the measurement, nothing was mentioned as to why and in whose order the measurement of plot Y-33 was done. The second note shows that the said note was kept after passing judgment and decree in FC Suit No. 44/2001; that both the lower Courts below while passing the Judgments and Decrees have failed to consider the fact that in F.C. Suit No.44/2001 no area of the Plot Y-33 is mentioned and the property Y-33 is mentioned as house and the defendants in that Suit had illegally occupied the suit house, however, said the suit was decreed in 2002; that learned Trial Court failed to consider the fact that Taluka Form II produced at Ex.44-B was not the Taluka Form II, because it is not under the actual Form II of the property and in this Form surprisingly the area of the Plot Y-33 is appearing 6777 sq. feet. Learned counsel referred to the Rent Application filed by the respondents and submitted that after the change of Foti Khata they

constructed the house and shops over Plot Y-33. Learned counsel submitted that the suit filed by the respondents/plaintiff was/is barred by limitation as the respondents/plaintiffs were never in possession of the suit property, as the suit property remained in possession of the appellant's father late Rawat Khan and after the demise of Rawat Khan, the suit property remained in his possession. He lastly submitted that the title of the property is in dispute, the simple suit for permanent injunction or possession, without seeking a declaration of title, would not be maintainable as such the instant Appeal may be allowed and Judgments of both the Courts below may be set-aside.

4. Mr. Arbab Ali Hakro, learned counsel for respondents No.1 to 3 has supported both the impugned judgments and decrees passed by the learned courts below and submitted that no irregularity or illegality has been committed; that the findings recorded by the learned trial Court on the issues are based on sound reasons after taking into consideration the entire evidence and documents produced by both parties. To rebut the contentions of the appellant learned counsel submitted that a simple suit of possession was maintainable against the tenants of the suit property who had defaulted in payment of rents and refused to vacate the premises. Learned Advocate further argued that the learned trial Court vide judgment dated 30-07-2002 in First Class Suit No. 44/2001 filed by respondents/Plaintiffs against one Amjad Ali son of Ajeet Khan, has already declared them as owners of the suit properties and said judgment has already attained finality. Learned counsel further submitted that the appellant has allegedly claimed to be the owner of the suit property, being allotted to his father namely Rawat Khan, but the title of Rawat Khan was also the subject matter in F.C. Suit No. 44/2001, wherein, one Amjad Ali who is nephew of the appellant, therefore, the appellant cannot claim to be the owner based on documents which have already been repudiated /rejected in F.C. Suit No.44/2001. Learned counsel submitted that since the question of title has already been determined conclusively by the competent Court in favor of respondents/Plaintiffs, therefore, no further declaration was required in the aforesaid suit hence suit is maintainable. On the point of limitation learned counsel submitted that the suit property was rented out to tenants and they defaulted in payment of rent from October 2011 and thereafter in February 2012 and finally refused to vacate the suit property and thereafter respondents/Plaintiffs filed rent application No.1 of 2012 which was dismissed on 13-11-2013. Learned counsel submitted that respondents/Plaintiffs filed the instant suit on 23-11-2015 therefore, the suit was within the time from the accrual of the cause of action in October 2011. He lastly prayed for dismissal of the instant appeal with cost.

5. I have heard learned counsel for the respective parties and have also gone through the record available before me.

6. The questions involved in the matter for determination are whether suit plot No. Y-33 area 6777 sq. ft situated in Khipro Town, Taluka Khipro District Mirpurkhas belongs to the legal heirs of the late Sikandar Khan; and whether F.C Suit No. 64 of 2015 filed by the respondents/plaintiff for possession, mesne profit, and permanent injunction was/is maintainable under the law.

7. To settle the aforesaid propositions, it appears from the record that respondents/plaintiffs Mehmood Ali, Muhammad Younus, and Khurram Khan all sons of Sikandar Khan claim that the suit property belonged to their father and after his death it was inherited by them being his legal heirs and constructed two shops falls at Khipro-Hathungo road, three residential houses at the back portion of the said plot and its front portion which falls on Khipro-Mirpurkhas main road Khipro Town and they constructed two shops and one stair. It is further averred that due to a dispute between the landlord and tenants on certain issues, they litigated through rent application No.01/2012 before the learned rent controller Khipro, which was dismissed on 20/12/2013, therefore, they filed First Rent Appeal No.01/2014 before learned District Court Sanghar which was remanded back with directions to the rent controller to conduct a site inspection and decide the application afresh, however, rent application was again dismissed on 13/11/2015 with observations that parties may recourse to the civil proceedings for resolving the civil dispute.

8. Finally, respondents/plaintiffs filed F.C Suit No. 64 of 2015 before the learned Senior Civil Judge Khipro for possession, mesne profit, and permanent injunction. The learned Trial Court after recording the evidence of the parties concluded vide judgment and decree dated 20.05.2017 that respondents/Plaintiffs are owners of the suit shops whereas the claim of appellant/Defendant No.4 over the suit shop is based on manipulated & managed documents. Besides, Defendant No.4's admissions that he was one of the witnesses of the Foti Khata Badal/Transfer of Property No.Y-33 to legal heirs of deceased Sikandar Khan, itself is sufficient to believe that Defendant No.4 has no right or title to Suit properties, which as per inspection report of Civil Judge & Judicial Magistrate Khipro dated 10-10-2015, Exhibit No. 42/A, are constructed over Plot No.Y-33 Khipro-Sanghar Road, owned by Plaintiffs, therefore, possession of Defendant No.4 over suit shops & staircase is illegal & unlawful. The appellant being aggrieved by and dissatisfied with the aforesaid judgment and decree preferred Civil Appeal No.84/20177, which was dismissed vide Judgment and Decree dated 24.09.2018 passed by learned Additional District Judge, Khipro. The appellant being aggrieved by and dissatisfied with

the aforesaid judgment and decree has filed the revision application before this court, which was converted into IInd Appeal vide order dated 2.11.2018.

9. So far as the maintainability of F.C Suit No. 64 of 2015 is concerned, the learned trial court has very elaborately touched on this issue with the findings that the question of title of Plot No.Y-33, has already been resolved through judgment & decree dated 30-07-2002 in First Class Suit No.44/2001 and respondents/Plaintiffs have been declared as owners of suit shops & Plot No.Y-33, Khipro-Mirpurkhas Road, Khipro, therefore, appellant/Defendant No.4 being the son and one of the legal heirs of late Rawat Khan cannot deny the title of respondents/Plaintiffs based on title documents which have been rejected by Court of law way back in 2002. And it was held that in view of the judgment & decree dated 30-07-2002 in F.C. Suit No.44/2001, the appellants/Plaintiffs have already been declared owners of Plot No.Y-33 therefore, their suit for mere possession against the tenant/respondents/Defendant No.1,2 & 3, was/is maintainable.

10. As regards the issue of limitation the learned trial court has held that suit property i.e. two shops & staircase was rented to the tenants, when they stopped paying rent or vacate premises, they filed rent application No.1 of 2012, which was dismissed first on 20-12-2013 and thereafter secondly on 13-11-2015, with direction to parties to approach Civil Courts as a title dispute was involved in the rent application. As regards title/ownership of the suit properties, the respondents/Plaintiffs produced title documents in respect of Plot No.Y-33 and also produced a judgment dated 30-07-2002 in F.C.Suit No.44/2001 wherein, the respondents/Plaintiffs have been declared as owners of the suit property i.e. Plot No.Y-33, however, regarding renting of suit properties to the tenants, the respondents/Plaintiff stated that said shops were rented about 12 years before filing rent application and in cross-examination, the respondent/Plaintiff Muhammad Younis reiterated that suit shops were rented about 12 years back and admitted that no date, month or year of renting was given by him. Since the respondents/Plaintiffs in their pleadings and evidence had reiterated that tenants refused to pay rent from December 2011 and the suit was filed on 23-11-2015, therefore, the suit was filed within six years of the limitation period. Besides, the benefit of Section 14 of the Limitation Act, 1908 was also available to the respondents/Plaintiffs.

11. From the perusal of the judgments and decrees passed by the learned courts below, and evidence brought on record, it is quite obvious that Suit shops were constructed over Plot No.Y-33. The respondents/plaintiff produced Site Inspection Report No. 958/2015 dated 10-10-2015, submitted by learned Civil Judge & Judicial Magistrate Khipro, in Rent Application No.1/2012, wherein, the disputed shops had been shown part and parcel of property

bearing No.V-33 Khipro Town. Respondents/plaintiff produced four Revenue Entries/jarians, which reveal that House No.V-33 was mutated in the name of Sikandar Khan, and thereafter the said property was mutated in the name of his legal heirs. The record further reveals that the Widow of the deceased Sikandar Khan and the daughters of the late Sikandar Khan sold out their respective shares in property No.V-33 to their brothers namely Mehmood Ali, Muhammad Sarfaraz, Muhammad Yousif, and Khurram Khan and Muhammad Sarfraz sold out his share in Plot No.Y-33 to his brothers Mehmood Ali, Muhammad Yousif and Khurram Khan.

12. It also appears from the record that the late Sikandar Khan was the original owner of Plot No.Y-33 and his legal heirs had filed F.C. Suit No.44/2001 against Amjad Ali and others before the learned trial court which was decreed in their favor vide judgment & Decree dated 30-07-2002 whereby they were declared the owners of Plot No.Y-33, situated at Khipro-Mirpurkhas Road. The record reveals that documents produced & relied upon by appellant/defendant No.4 in the subject suit were also relied upon by Amjad Ali who was/is the grandson of the late Rawat Khan (father of appellant/Defendant No.4).

13. It appears that appellant/defendant No.4 examined himself and claimed that suit shops were constructed over Plot No.V-33/1, owned by his late father Rawat Khan. In support of his oral claim of title of Plot No.Y-33/A, appellant/defendant No.4 produced a Certified True Copy of Record of Permanent Transfer in respect of Property No.Y-33/1, Original Possession Certificate No.Sett/530 of 1992 dated 01-03-1992, Original Notice No.402 dated 03-10-82 issued by Town Committee Khipro, Certified true copy of Taluka Form-II vide Jarian No.212 dated 10-03-1977, Surethal of Plot No.Y-33/A, and Jarian No. 300 dated 10-03-1977 Taluka Form-II. As per the Record, it reveals that Deputy Settlement Commissioner Nawabshah transferred House No. Y-033/1 to Rawat Khan son of Ajmer Khan on 11-03-1965, however, no original of Record of Permanent Transfer was produced in evidence, nor original had been summoned to be produced by the office of Evacuee Property Branch Sanghar, in such circumstance the learned trial court discoursed that PTO as unworthy of credit & reliance, on the contrary appellant previously in rent application No.1 of 2012, claimed that suit property/shops were constructed over Plot No.169. As regards the veracity of Possession Certificate No.Sett/530 of 1992 dated 01-03-1992, produced by appellant/defendant No.4, Mukhtiarkar (Revenue) Khipro, deposed that there was no record of possession certificate No.Sett:530 dated 01-03-1992 in his, thus, the learned trial court took cognizance of the matter and declared the

possession certificate as a forged & fabricated document, thus the trial court did not place reliance on the evidence of the appellant.

14. As regards Notice No.402 dated 3-10-1982 issued by Town Officer Khipro to Rawat Khan, produced by appellant/defendant No.4, explicitly showed that the description of the property or Plot number was not mentioned in said notice rather, the notice was addressed to Rawat Khan (Javid Photo Studio) Mirpurkhas Road Khipro, therefore, this document did not show that same was issued in respect of Plot No.V-33/1. As regards the true copy of Jarian Na. 212 dated 10-03-1977 produced by respondents/plaintiff, Plaintiff also got summoned Mukhtiarkar (Revenue) Khipro, who produced the original record of Entry No.212 Taluka Form-II and was examined, it transpired that the entire page No.215 of Entry No.212 was pasted/inserted in between pages No.211 and 213, which reflected that some foul play & collusion in keeping the entry in the record of right.

15. Record further reveals that respondents/plaintiff produced a true copy of entry No.300, which shows that both entries No.212 & 300 were made on 10-03-1977, in respect of the same property No.Y-33-1 and no plausible explanation was placed on record as to why and what made the Revenue Authorities to make two entries in the record of rights in respect of same property, vide which Plot No.V-33/1 was transferred from one Asandas son of Joyat Ram to Rawat Khan son of Ajmeri Khan, thus, the veracity of the documents produced by appellant/Defendant No.4 was found to be doubtful and managed one. As per record appellant admitted in evidence that Entry No.212 was prepared on 21-03-1992 and the same was verified on 21-03-1992, thus, the veracity of entries No.212 dated 10-03-1977 was found to be doubtful & unbelievable.

16. The perusal of cross examination of appellant/defendant No.4, reveals that he made numerous admissions with regard to non production of rent receipts, non attestation of rent agreements, none mentioning of description of shops, plots, ward numbers etc, nonproduction of utility bills in the name of Rawat Khan, admission that entry No.212 was recorded on 21-03-1992, admission that entry No.300 was not verified by competent authority, admission that in Record of Permanent Transfer produced by him there was correction in Plot number, admission that all the documents produced in evidence in the subject suit were not produced in evidence in rent application No.1 of 2012, admission that no seal & signature of officer was affixed on sketch produced by him, admission in rent application No.1/2012 he stated that shops were construction over Plot No.Y-169, admission that in rent application he did

not claim ownership of Plot No.V-33/1, admission that after the death of Sikandar Khan, his properties were distributed among legal heirs of Sikandar, admission that he was witness of the Foti Khata Badal of properties of late Sikandar Khan.

17. In view of the above facts and circumstances of the case, and evidence brought on record, I am of the view that the learned trial court rightly held that respondents/Plaintiffs are owners of the suit shops whereas the claim of appellant/defendant No.4 over the suit shop was based on manipulated & managed documents. Besides, appellant/defendant No.4's admissions that he was one of the witnesses of the Foti Khata Badal/Transfer of Property No.Y-33 to legal heirs of deceased Sikandar Khan, itself is sufficient to believe that appellant/defendant No.4 has no right or title to Suit properties, which as per inspection report of Civil Judge & Judicial Magistrate Khipro dated 10-10-2015, that subject shops were constructed over Plot No.V-33 Khipro-Sanghar Road, owned by respondents/Plaintiffs, therefore, possession of appellant/defendant No.4 over suit shops & staircase was rightly declared illegal & unlawful.

18. Besides, the learned trial court declared respondents/defendant No.1 to 3 illegal occupants of the suit shops & staircase as such they were held liable to pay mesne profit @ Rs.5000/-. The learned trial court also declared that the respondents/plaintiffs had the cause of action to file this suit as they were/are owners of suit shops & staircase, being part & parcel of Plot No.Y-33, Khipro-Mirpurkhas Road Khipro, and respondents/defendant No.1-3 had refused to vacate the suit shops & staircase. Besides, appellant/defendant No.4's claim that suit shops were constructed over Plot No.V-33-A, had not been proved, rather, the claim of appellant/defendant No.4 was based on managed documents. The learned trial court concluded that the respondents/plaintiffs were/are entitled to the relief claimed.

19. In view of the findings recorded by the learned trial court, duly concurred by the learned appellate court very adeptly, I fully endorsed the same views agreeing with the same.

20. As far as the question of declaration is concerned, according to Section 42 of Specific Relief Act, 1877, only that person can maintain a suit for declaration who is entitled to any legal character or to any right as to any property. This means that the character or the right which the plaintiff claims and which is denied or threatened by the other side must exist at the time of the suit and should not be the character or right that is to come into existence at some future time. In the present case, the tittle of the subject property has already been settled vide judgment and decree dated 30.07.2002 passed in F.C. Suit No.44 of 2001 filed by plaintiffs/respondents against one Amjad Ali

wherein plaintiffs/respondents were declared owners of the subject property and the aforesaid judgment had attained finality.

21. The claim of the appellant over suit property alleged to have been derived from his late father Ravat Khan had also been subjected in the aforesaid F.C Suit No.44 of 2021 wherein the claim of Amjad Ali nephew of the appellant was rejected in said suit, hence the question of title of the suit property had already been decided by the competent Court of law in favor of respondents/plaintiffs so there is/was no need to again acquire the title of the property by the respondents/plaintiffs and in this way suit was rightly held to be maintainable under the law.

22. Another aspect of the case is that the inspection report dated 10.10.2015 filed in Rent Application No.01 of 2012 reveals that disputed shops are part and parcel of property bearing No.Y-33 Khipro town.

23. It is the well-settled exposition of the law, that in exercising the appellate jurisdiction, this court has to be satisfied that no illegality has been committed by the courts below and in such circumstances, has no power to interfere in the conclusion of the subordinate courts. Besides questions of fact or law based on substantial error or defect in the procedure provided under the law which effect the decision of the case upon the merits could only be looked into. Additionally, the scope of appellate jurisdiction is also confined to the extent of misreading or non-reading of evidence, jurisdictional error, or illegality of the nature of the judgment which may have the material effect on the result of the case or the conclusion drawn therein is perverse or contrary to the law but the interference for the mere fact that the appraisal of evidence may suggest another view of the matter is not possible in appellate jurisdiction.

24. So far as the challenge to the concurrent findings of the courts below in the appellate jurisdiction is concerned, the Honourable Supreme Court in the case of Ahmad Nawaz Khan Vs. Muhammad Jaffar Khan and others (2010 SCMR 984), has held that High Court has very limited jurisdiction to interfere in the concurrent conclusions arrived at by the courts below while exercising power under section 100, C.P.C. A similar view was taken in the case of *Sultan Muhammad and another. Vs. Muhammad Qasim and others.* (2010 SCMR 1630) that the concurrent findings of the courts below are not open to question at the appellate stage until and unless the exception provided under section 100 C.P.C are met for the reason that section 100 C.P.C empowers this Court to examine the soundness of conclusion drawn from evidence adduced by the parties. In the present case, the appellant has failed to prove his case throughout the proceedings thus no contrary view could be taken at second

appellate stage as no material has been placed on record to reappraise the evidence brought on record.

25. I am of the view that the learned trial as well as learned Appellate Courts had carefully examined the evidence led by the parties and I find no illegality in the judgments and decrees passed by the learned Courts below, which are based on the correct appreciation of evidence, thus the same are upheld, consequently, the captioned Appeal is dismissed with cost.

JUDGE

Muhammad Danish