

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Civil Revision Application No.5-95 of 2007

[Sain Dino & others Vs. Province of Sindh & others]

Applicants: Mr. Fayaz Ali Metlo, Advocate.

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

Date of hearing: 07.11.2022.

Date of Judgment: 28.11.2022.

JUDGMENT

ADNAN-UL-KARIM MEMON, J. Through this revision application, applicants have impugned the legality of judgment and decree dated 24.04.2007 and 28.04.2007 passed by learned IInd Additional District Judge, Hyderabad in Civil Appeal No.251 of 2004 (Re-Province of Sindh v. Sain Dino & others) whereby the learned Judge while allowing the appeal set-aside the Judgment and Decree passed by learned IVth Senior Civil Judge Hyderabad in Suit No.143 of 2002 whereby the suit filed by applicants was decreed vide Judgment and Decree dated 30.07.2004 and 05.08.2004, inter alia on the ground that appeal was time barred by eight days; that the subject land remained in possession of the applicants since forefathers; that no forest land has been entered in Deh Konar; that the applicants are owners of the suit land; that the claim of forest department is based on notification dated 26.03.1895 as the same has not been brought on record through cogent evidence; that the purported notification in favour of forest department does not create title of the land; that in terms of Darya Khurdi the applicants are owners who lost their land to river and after its resurrection which was later on identified then its ownership remained with the applicants.

2. Applicants have averred that they filed Suit for declaration and permanent injunction against the defendants pleading therein that agricultural land originally belonged to late Uris son of Saindino Lakho the predecessor-in-interest of applicants and mutated in the record of rights as he in his life time was in cultivating possession of suit property hence on the premises of being survival legal heirs applicants inherited suit property and were enjoying cultivating possession thereof as devolved lawfully from their elders this is the reason they are claiming absolute, exclusive and joint ownership, suit land being Kachi lands in the end of 19th Century i.e the years of

1883-84 same was eroded by Indus River and remained as "*Darya Khurd*" which had re-appeared during the end of 20th Century i.e in the year 1974 since then the applicants are in physical cultivating possession of the joint owners being surviving predecessors-in-interest; however they acquired the knowledge through Tapedar of concerned beat that suit land were once confiscated illegally by the Government, hence the applicants had not remained owners; therefore the applicants without any delay moved application to the concerned Revenue Authorities seeking relief but to no avail, therefore, applicants being legal heirs of late Uris are lawful owners of the suit land but the action of respondents was/is void, abinitio, illegal, malafide having no legal effect in the eyes of law as the lands in question confiscated without hearing them hence cause of action accrued to them to file suit.

3. Upon service, respondents/defendants filed written statements mentioning therein that the land in question belongs to Forest Department and the applicants were/are unlawfully claiming the ownership over subject property as survey Nos.25, 31, 32, 184, 185, 188 to 195 had been declared as Government Forest Land in Deh Kunnar Taluka Hala under Section 19 of Forest Act, 1927 and its areas had already been entered in the revenue record per village Form VII-B; that Photostat copy of land register produced by applicants showing its front as Deh Kunnal but anterior pages displaying survey numbers of Deh Amin Lakho as well as denied applicants' joint ownership over subject land, being state land; that disputed land had already been entered in revenue record as Forest Land as applicants were dispossessed from Government Forest Land as per Rules; and, record has been manipulated by them for the land in question already reserved forest vide Notification dated 03.06.1895 and since then the same remained under physical possession of Forest department, hence the applicants failed to produce documentary proof regarding Darya Khurd rights thereby no Ijzatnama was produced as suit land was ever granted to them or their ancestors, hence suit of applicants was / is not maintainable in law and lastly stated that applicants had no cause of action to file the present suit being barred under Section 42 & 56 of Specific Relief Act, hence prayed for its dismissal.

4. On the divergent pleadings of the parties learned Trial Court framed the following as many as seven issues and recorded evidence of the parties and after hearing them through their counsel decreed the Suit vide Judgment and Decree dated 30.07.2004 and 05.08.2004 which was appealed by respondents before learned Additional District Judge-II, Hyderabad who reversed the findings of Trial Court allowing Civil Appeal No.251 of 2004 vide impugned Judgment and Decree dated 24.04.2007 and 28.04.2007, hence instant

revision application has been filed against such acceptance of appeal by learned Appellate Court.

5. Mr. Fayaz Ali Metlo learned counsel for applicants contends that the judgment and decree passed by learned Appellate Court is opposed to law; that alleged notification dated: 06.03.1895 does not bear signature of any authority and is void document and same was recorded in the record of rights after more than 104 years; that learned Appellate Court failed to consider that applicants inherited the land from their ancestors; that claim of respondents that suit land was forest land admittedly false as Government Forest land in all neighbour dehs namely Deh Amin Lakho, Deh Daloo Ketu, Deh Bhanote, Dah Jamalabad etc duly identified in Deh Maps however in the Deh Map of Deh Kunnar there is no mention of Government land; that learned Appellate Court did not appreciate that in 19th Century Indus River eroded thousands of acres hence different suits were filed by effectees, for example Suit No.474/84 in respect of land eroded by Indus River in Deh Amin Lakho Taluka Hala while Suit No.506/83 pertaining to land eroded in Deh Daloo Ketu decreed by learned Courts whereas Deh Kunnar is in between Deh Amin Lakho and Deh Daloo Ketu; that learned Appellate Court failed to appreciate the evidence properly thereby erroneously set-aside the judgment of learned Trial Court; that appeal filed against acceptance of applicants' appeal was time barred and it was illegally condoned the delay. Learned counsel for Applicant submitted that the appellate court erred in dismissing the suit for want of jurisdiction as the suit was not for any matter covered by Section 172 of Sindh Land Revenue Act, 1967; that forest notification relied upon by the Forest Department, though filed with written statement, was never exhibited in evidence, and thus the Forest Department failed to prove that the suit land was part of the reserve forest. Learned counsel in support of his contentions has relied upon the cases of 2017 MLD 1105 (Sindh DB), PLD 2001 SC 514-a @ 517, PLD 2014 SC 585, PLD 2016 SC 872, PLD 2009 SC 95, 2013 PTD 1023, 2011 SCMR 1341, 2000 SCMR 548-A @ 553, 1982 CLC 2564, 2002 YLR 3005, 2017 MLD 1105, PLD 2014 SC 85, 1987 CLC 1902, 1992 SCMR 2334-F @2341, 1996 SCMR 78, 2007 YLR 960 and 2011 CLC 490. Learned counsel very elaborately defined the term Darya Khurdi and called in question the validity of the notification dated 26.03.1895. He also emphasized that before entering into the merits of the case the appellate Court ought to have considered the point of limitation; however, the jurisdiction was assumed without lawful justification. Learned counsel explained that the subject land has never been forest land as per maps. He emphasized that mere issuance of notification under the Forest Act would not divest the real owner of the land being assigned to the Forest Department through such notification. He also

emphasized the point that the land lost to the river could be reclaimed after its identification and the ownership of the land shall remain with the original owner. Learned counsel referred to section 53 of the Land Revenue Act, 1967, and submitted that the remedy to file suit for declaration is provided, as such, the jurisdiction of the Civil Court is not barred under the law. It is further urged that in the present case the land has been claimed as qabooli land as such it was never Government land and the Government has not shown any record how Government acquired it or possessed it. He prayed for allowing instant civil revision application by setting aside the impugned judgment rendered by the Appellate Court and restoring the judgment of the Trial Court thereby suit of the applicants stood decreed.

6. Mr. Allah Bachayo Soomro learned Additional Advocate General, Sindh supported the judgment of the learned Appellate Court and argued that firstly the Revision is incompetent as it has not fulfilled the requirements of Section 115 C.P.C.; that the land belongs to the forest department and the claim of applicants is negated; that "Darya khurdi right" means the right to hold "Katcha State land" in lieu of qabooli land that has been eroded or lost in river action. Katcha State land" means land located in between the flood protective bunds of River Indus known as the riverine Katcha area. Under the erstwhile scheme for granting Katcha State land, an applicant satisfying Deputy Commissioner of his Darya khurdi right could be granted Katcha State land in the same Deh for agriculture purposes after proceedings held in common assembly (jalsa-e-aam). However, the applicants had not produced in evidence any letter of grant of land to his forefathers by the Government of Sindh against purported Darya khurdi right. He prayed for the dismissal of the instant Revision Application.

7. I have given due consideration to the arguments advanced by learned counsel for respective parties, and have also gone through the record with their assistance as well as case law cited at the bar.

8. The controversy involved in the matter is whether the subject land is Qabuli land or Forest land.

9. The case of applicants is that the suit land belonged to their ancestors who died and the suit land was inherited by the applicants being legal heirs. The applicants are in possession of suit land. At trial applicants examined P.W Ali Murad as their attorney at Ex.21, who produced special power of attorney at Ex.21/A, old deh Form from Revenue Record at Ex.21/B, Photostat copy of application addressed to EDO Revenue at Ex.21/C and Photostat copy of

application addressed to Mukhtiarkar Head Quarter Hala at Ex.21/D thereafter the applicants' evidence side was closed at Ex.22.

10. In rebuttal respondents examined DW Muhammad Talib Forest Officer at Ex.25, who produced Form VII-B at Ex.25/I and notification dated 26.03.1895 at Ex.25/II and claimed that the Gazette Notification under which the subject land had been declared Reserved Forest, had carried forward to the Forest Act, 1927 and is still intact, and for that learned AAG has placed reliance on order dated 27.10.2008 passed by Hon'ble Supreme Court of Pakistan in **Civil Petition No. 172-K of 2006** titled Muhammad Waris v. Chief Conservator of Forest, Sindh; that Notification 26.03.1895 published in Bombay Government Gazette dated 2.6.1887 under Section 19 of Indian Forest Act, 1878, the subject land along with other lands, had been declared 'Reserved Forest', Also, it has been observed by Hon'ble Supreme Court of Pakistan in the order dated 27.10.2008 that on the enactment of Forest Act, 1927, the notifications issued under Indian Forest Act, 1878 did not cease to hold the field under Section 6 of General Clauses Act, 1897; therefore, the observations of trial court that the said Forest Notification did not carry any evidentiary value being Photostat copy issued before the Establishment of Pakistan and the respondents in collusion with Mukhtiarkar concerned made entries in the record in the year 1999 though despite of knowledge that for last more than 100 years the applicants/plaintiffs were cultivating the suit land, was misreading of record and it was incumbent upon the competent authority to determine whether the applicants or their forefathers were granted land based on Darya khurdi right, and if so, whether the applicants had encroached on any part of Forest land which burden was shifted when the entries were made in the revenue record in the year 1999 and prima facie the applicants have not called in question the revenue record in favour of the respondents Forest Department even the subject notification was not impugned in the proceedings.

11. Perusal of the record reveals that the respondents produced Deh Form-VII B at Ex.27/A vide which the suit land was mutated in favor of Forest Department vide entry No.8 dated 08.02.1999 which shows that before 1999 it was Government land and the applicants claimed that they are owners of the suit land based on Darya Khurdi right; however, they failed to prove before the Trial Court that based on Darya Khurdi right their predecessor-in-interest were holding the possession of suit land. Primarily no documentary evidence has been placed on record to claim ownership based on Darya Khurdi right which right has already been explained in the preceding paragraphs merely saying that it was Darya Khurdi right is not

sufficient to claim ownership on the contrary the respondents have proved that this was Forest Land vide entry No.8 dated 08.02.1999 even otherwise the subject survey numbers had already been mentioned in the notification dated 24.08.1893.

12. Reverting to the claim of the applicants that the appeal was time-barred it suffices to say that when the land belongs to the Forest Department and the applicants had no right/title to claim the land in question thus the question of limitation is diluted for the reason that law favors adjudication on merits rather than based on technicalities as the applicants are taking resort of limitation to circumvent the ownership rights of the Forest Department Government of Sindh, therefore, the point of limitation will not be helpful to the applicants. So far as the Darya Khurdi right is concerned I am quite safe to say that for establishing a claim of right of ownership over the property (land etc) under the right of Darya Khurdi one will have to establish three facts 1) his ownership before eroding of the land 2) revival of the land and 3) reformation of the land and its identification as the same land. In the present case the applicants claiming the ownership based on Darya Khurdi right the burden was upon them to prove their assertion and claim as they have failed to produce to prove their claim of ownership in respect of the land in question. Since ownership before eroding is the first and basic fact hence it would be proper to examine what the applicants have produced to prove the same. The perusal of copies produced by the applicants before the Trial Court is not sufficient to claim ownership. The Darya Khurdi right cannot be insisted on without establishing eroding of the owner's land/property and its reformation. In the present case, the applicants could not be brought evidence to prove such a fact. In the absence, thereof the right of Darya Khurdi of the applicants if any, cannot be entertained nor the suit land can be given to the applicants against such claim. Although per Article 118 of the Qanoon-e-Shahadat Order the failure of the applicants to prove the above ingredients for Darya Khurdi rights was sufficient to answer the claim as discussed supra.

13. So far as the maintainability of the suit it is manifest that though the applicants claim ownership in respect of the suit land while claiming confiscation of the land by the forest department as illegal it is also a matter of record that through written statement the forest department had claimed the land to be forest land with reference to the copy of Government Gazette dated 24.08.1893 and other documents which prima facie show title in favor of the forest department and these documents have not been challenged by the applicants, as such, suit of the applicants in such

eventuality was barred under providing clause of section 42 of the Specific Relief Act, 1877.

14. Prima facie forest land is under illegal occupation by various encroachers, and the Honorable Supreme Court of Pakistan has taken cognizance of the matter and directed the Provincial Government to immediately take steps to retrieve possession of forest land from the illegal occupants, in terms of the ratio of orders passed by Honorable Supreme Court in the case of *Qazi Ali Athar and others v. Province of Sindh and others.*

15. The competent authority is under obligation to take disciplinary action against all delinquent officials who are indulged in disposing of the Forest land under the revenue hierarchy. The disciplinary action and its logical conclusion must be reported to this court through the Additional Registrar of this court within one month.

16. In view of hereinabove facts and circumstances of this case, I do not see any illegality, misreading, or non-reading of evidence in the impugned judgment of the Appellate Court, which appears to be correct in law and is based upon material evidence on record.

17. The judgment and decree dated 24.04.2007 and 28.04.2007 passed by learned IInd Additional District Judge, Hyderabad in Civil Appeal No.251 of 2004 are upheld. This revision application is dismissed with cost.

JUDGE

Muhammad Danish