

# IN THE HIGH COURT OF SINDH,

CIRCUIT COURT, HYDERABAD

## IIInd Appeal No. 67 of 2019

Appellant : Muhammad Usman through L.Rs through  
Mr. Parkash Kumar, Advocate

Respondent : Abdul Razzak Soomro through  
Mr. Arbab Ali Hakro, Advocate

Mr. Allah Bachayo Soomro, Addl.A.G.

Date of hearing : **22.08.2022**

Date of Announcement : **02.09.2022**

## J U D G M E N T

**ADNAN-UL-KARIM MEMON, J -.** Through instant IIInd Appeal, the appellant has called in question the vires of the Judgment dated 12.9.2019 passed by learned VIII<sup>th</sup> Additional District Judge, Hyderabad in Civil Appeal No. 162 of 2016 whereby the learned Judge while allowing the appeal set-aside the Judgment and Decree dated 25.7.2016 passed by learned 1<sup>st</sup> Senior Civil Judge, Hyderabad in F.C. Suit No. 252 of 2010, inter-alia on the ground that the ownership of Survey No.191, area 07-34 acres is being claimed by the respondent was/is purely based upon revenue entry No.175 of the year 1933, Deh Jamshoro, Tappa Giddu Bunder, Taluka Qasimabad, for which there was / is neither mother entry nor onward supporting record entered in the name of respondent and / or predecessors in interest of the respondents as portrayed by him and claimed ownership. The appellant heavily relied upon the report of Assistant Commissioner Taluka Qasimabad, which reads as under:-

*“that the entry No.175, dated: 20.09.1933 of VF-VII of Deh Jamshoro, is not the final record of ownership of any entry, as prior to partition, there was old Village Form VII, the year 1937-38 and after partition through the process of re-writing and re-construction of record of rights, the year 1955-56 came in force on the basis of which entire transaction of record of rights had taken place onward for a long time.*

*It is further stated that in the instant matter, the ownership of Survey No.191, area 07-34 acres is being claimed purely on the basis of entry No.175 of the year 1933, Deh Jamshoro, for which there is neither mother entry nor onward supporting record entered are being quoted in favor of ownership of the said land situated in Deh Jamshoro, Tappa Giddu Bunder, Taluka Qasimabad.”*

2. Mr. Parkash Kumar learned counsel for the appellant, has briefed this court on the subject dispute and submitted the respondent/plaintiff filed Suit No.252 of 2010 (New Suit No.403 of 2010) against the appellant for Declaration, Possession, Mesne Profits, and Permanent Injunctions alleging therein that Mst. Maryam Daughter of Yameen was co-sharer along with respondent / plaintiff in Survey No.191 Deh Jamshoro, Taluka Qasimabad, District Hyderabad. The respondent/

plaintiff with Mst. Maryam filed F.C Suit No.165 of 1993 for Declaration, Partition, Separate Possession in respect of Survey No.191 admeasuring 7-34 acres Deh Jamshoro, Taluka Qasimabad, and the said suit was disposed of as compromised by and between the parties; and, Mst. Maryam the mother of respondent/plaintiff had received 0.7 paisa share equal to 21 Ghunta and she was handed over possession of the said area. Based on the said compromise decree, Mst. Maryam and Mst. Hajra were handed over possession of 1-2 acres of survey No.191/4 Deh Jamshoro and the appellant was given 14 Ghunta from survey No.191 and such mutation entries were maintained in the revenue record. Per learned counsel for the appellant, at the time of partition in November 1998, the respondent owned a house admeasuring 2450 sq.ft from survey No.191 which was received by the respondent/plaintiff. The respondent/plaintiff was allowed on his request to remain in possession of the house till he arranged for another house; learned counsel added that the respondent/plaintiff filed the subject suit before the trial with the following prayer:-

### **PRAYER**

- A) It is declared that the plaintiff is the owner of Survey No.191 admeasuring 0.14 acres Deh Jamshoro and the defendant is in possession of a house admeasuring about 2450 sq ft of above survey number specifically shown in the sketch with plaint and bound to put the plaintiff in possession of the same.
- B) To pass the decree of possession of suit property consisting of house admeasuring 2450 sq ft constructed over the portion of survey No.191 Deh Jamshoro, Village Haji Ismail Soomro near Soomra Market Wadhu Wah Qasimabad, Hyderabad specifically shown in the sketch and direct the defendant to put the plaintiff in vacant physical possession of the same.
- C) To pass the decree of mesne profit of suit property of Rs.15000/- from 16.08.2010 to 30.09.2010 at the rate of Rs.10,000/- per month along with markup and for a future period till the plaintiff is put in possession by the defendant.
- D) To pass the decree of permanent injunction restraining the defendant through himself, his subordinates, servants, and agents from alienating, selling, transferring, handing over possession or raising construction, or creating a charge or lien over the suit property shown in para No.6 of the plaint.

3. The appellant/respondent appeared and filed written statement denying the case of the respondent/plaintiff, with the assertion that the said village namely 'village Ismail' is in existence for about 100 years; that all the legal heirs of Usman Son of Umar are co-owners and in joint possession of survey Nos.191 including village Ismail; that the respondent was/is not the owner of 14 Ghuntas from survey Nos.191; that the suit was/is not maintainable and was/is barred by Sections 42 & 56 of the Specific Relief Act. From the pleadings of the parties learned trial court framed the following issues.

### **ISSUES**

1. Whether the plaintiff is owner of survey No.191 admeasuring 0.14 acres Deh Jamshoro and the defendant is in illegal possession of the house admeasuring about 2450 square feet as shown in the sketch?
2. Whether the defendant is in possession of suit house as a lioness (correct word should have been licensee) and same is terminated on 16.08.2010?
3. Whether the defendant is in possession of the suit house through his ancestor?
4. Whether the plaintiff has entitled to possession and suit house with mesne profit @ 10,000/- per month with mark-up?
5. Whether the suit is not maintainable?
6. Whether the suit is barred by any law?
7. Whether the plaintiffs are entitled to relief as prayed for?
8. What should the decree be?

4. On the above issues both the parties adduced their respective evidence and learned trial court after hearing the parties dismissed the suit on the analogy that the respondent was/is not entitled to any relief as claimed in terms of the aforesaid issues. The respondent/plaintiff feeling aggrieved with the above Judgment of trial court filed Civil Appeal No. 162 of 2016 which was allowed, vide judgment and decree dated 12.9.2019 with the reasoning that the trial court failed to consider the material available on record properly and committed illegality in passing the impugned Judgment and Decree dated 25.7.2016, hence the instant IInd Appeal. An excerpt of the judgment and decree dated 12.9.2019 of the appellate court is reproduced as under:-

#### **POINT NO.1.**

10. According to the appellant previously suit No.165/1993 was filed in respect of the same subject matter and the said suit was compromised and on the basis of said compromise decree the suit survey number was partitioned and each and every co-sharer was given possession of their respective shares by assigning new survey numbers e.g. 191, 191/1, 191/2, 191/3 and 191/4. According to the appellant, the respondent is residing in the house constructed over survey No.191 owned by the appellant. It is a further case of the appellant that he asked the respondent to vacate the suit house but he declined. Therefore the respondent being in illegal possession is liable to pay the mesne profits.

11. On the other hand the respondent admitted the compromise decree passed in suit No.165/1993 but has stated that the said compromise decree is collusive and fraudulent. It is a further case of the respondent that suit land was not ever partitioned and the entries made on the basis of partitioned are fraudulent. It is the further case of the respondent that there is an old village by the name Ismail situated on survey No.191 and the respondent and other co-sharers of the said survey Nos. are residing in the said village having an area of 1.02 acres. The record shows that the respondent during cross-examination admitted that he has not challenged the compromise decree of

the court and also the entry in revenue record Ex.50. Thus it appears that the compromise decree passed in suit No.165/1993 is admitted by the respondents since the compromise decree has not been challenged, hence the presumption can be drawn that the compromise decree has been accepted by the respondent.

12. As regards the possession of the respondent in the house constructed over survey No.191, the claim of the respondent is that there is a village by the name Ismail situated over survey No.191. The record shows that the respondent has not produced any documentary evidence to prove that there is a village by the name of village Ismail. The witness Muhammad Yameen examined by the respondent during cross-examination has admitted that there is no entry in respect of village Haji Usman/Ismail in the record of rights. He further admitted that the portion of land which is in possession of the respondent is entered in the revenue record in the name of the appellant as owner. He admitted that the respondent did not pay any rent to the appellant.

13. The record further shows that the respondent has failed to bring on record in what capacity he is occupying the land/house owned by the appellant. No, any documentary evidence is placed on record. Therefore I am of the view that the respondent is in illegal and unauthorized possession of the house situated on survey No.191.

14. entry No.68 dated 26.02.2000 maintained in Deh Form-VII-B reveal that an area of 14 Ghunta from survey No.191 which came in the share of the appellant by way of partition is exclusively owned by the appellant and this entry is intact till date and has not been challenged before any competent forum.

15. As regards the question limitation, the learned trial court has observed that suit is time-barred and the appellant has no cause of action to file the suit on the ground that after partitioned of the suit land the mutation entry was maintained on 26.02.2000 therefore the suit was hit by provisions of Article 120 Limitation Act which provides a period of 6 years for filing the suit. I do not agree with observations made by the learned trial court in this regard for the simple reason that the respondent was in possession even prior to the partition of the suit land. The suit survey number i.e 191 was partitioned in view of the decree passed in suit No.165 of 1993 and in consequence of compromise decree the survey No.191 was partitioned among the co-sharers and new survey Nos. were assigned to the land came in the share of legal heirs. Survey No.191/4 came in the share of the appellant. And at that time the respondent was already in possession of the area of survey No.191/4 and he was allowed to remain in possession over the area of survey No.191/4 by the appellant at the request of the respondent till he arranges alternate accommodation but in the year 2010, the respondent refused to handover vacant possession of the area in his possession owned by the appellant when the appellant demanded vacant possession from the respondent. In the circumstances, I am of the humble view that the period of limitation will start from the year 2010 when the respondent failed to vacate and hand over the vacant possession of the suit property to the appellant. It has also come on record that the respondent at his request was allowed by the appellant to remain in possession till he arranges some other accommodation.

16. From the material available on record it appears that survey No.191 admeasuring 14 Ghunta is exclusively owned by the appellant and the respondent is occupying an area of 2450 ft illegally and unlawfully. Therefore in my humble view, the respondent is liable to pay mesne profits of the suit property at the rate of Rs.5000/- per month from the date of filing of the suit till delivery of possession.

17. The perusal of the impugned Judgment and Decree reveal that the learned trial court while passing the impugned Judgment and decree did not

consider the material available on record properly and committed illegality in passing the impugned Judgment and Decree. Therefore in my humble view the same are requiring interference of this court. Point No.1 is answered in the affirmative.

**POINT NO.2:-**

18. In view of my findings on point No.1, the impugned Judgment and Decree are hereby set aside and the appeal in hand stands allowed as prayed. In a result, the suit of the appellant is decreed as prayed. There will be no order as to costs.

5. Learned counsel for the appellant has argued that the respondent obtained compromise decree through fraud; that the suit land was never partitioned and the entries made in the revenue record are illegal and fraudulent; that the respondents are residing in village Ismail for last 100 years and they are not liable to pay mesne profits; that the land of the village is a joint property of all the legal heirs of original owner Usman son of Umar; that the trial court has passed the impugned Judgment and Decree legally and did not commit any illegality; therefore the same requires no interference. He relied upon the case laws reported as *Khalil Ahmed v. Abdul Jabbar Khan and others*, **2005 SCMR 911**, *Nemat Ali and another v. Malik Habibullah and others*, **2004 SCMR 604**, and the report of the Assistant Commissioner.

6. On the other hand, Mr. Arbab Ali Hakro, learned counsel for the respondent, has argued that because of the compromise decree passed by the learned trial Court in Suit No.165/1993, the partition of suit land e.g. Survey No.191 was affected and the said survey number was assigned new survey Nos. 191, 191/1, 191/2, 191/3, and 191/4, and such entry was maintained in Revenue record being entry No.68 dated 26.02.2000; that the respondents are in occupation of the house situated in Survey No.191 owned by respondent. He argued that learned trial court has not applied its judicial mind while passing the impugned Judgment and Decree; that the appellant failed to prove the existence of any village over survey No.191; that the appellants are occupying the suit house situated on survey No.191 owned by respondent illegally and without any lawful authorities; that the defendant is liable to pay mesne profits of the suit house; that the trial court has not considered while passing the Judgment in F.C Suit No.165 of 1993 whereby the appellant was observed possessing legal sale deed in respect of suit land; that learned trial court has illegally held that decree dated 11.11.1998 passed in F.C Suit No.165 of 1993 is silent regarding any partition or distribution of survey No.191 among the co-sharers and co-owners; that Suit No.165 of 1993 was actually filed for partition and possession and the said suit ended into compromise whereby the parties agreed to partition the suit land and to put each and every co-sharer in possession of his respective share; that learned trial court held that the sketch produced at Ex.51 has no evidentiary value; that the appellant failed to produce title document in respect of suit house; that utility bills produced by appellant did not show property number; that the appellant has no legal right and title over the suit house; that learned trial court has wrongly held the suit being

barred by law of limitation; that the period of limitation would run from the date when right to sue accrued to a party under Article 120 of the Limitation Act. He argued that actually, the period of limitation will run from the last date of denial of the appellant for vacating the suit land; therefore, the impugned Judgment and Decree of Appellate Court is legal and under the law; therefore the same requires no interference of this Court. He lastly prayed for dismissal of the instant appeal.

7. Mr. Allah Bachayo Soomro, Addl. A.G supported the report of Assistant Commissioner Taluka Qasimabad.

8. I have considered the submissions of both the counsel and have gone through the relevant record with their assistance as well as case the law cited at the bar.

9. The prime question involved in the matter is whether the subject land Survey No.191, area 07-34 acres was based on revenue entry No.175 of the year 1933, Deh Jamshoro; and whether there is any mother entry supporting the claim of respondents on the land.

10. Keeping in view the aforesaid situation, this court vide orders dated 14.1.2022 and 19.5.2022 directed the Assistant Commissioner Taluka Qasimabad to appear and submit the actual position of the suit land; and in compliance, the Assistant Commissioner Taluka Qasimabad has submitted a report concerning Revenue entry No.175 dated 20.09.1933 of Village Form-VII of Deh Jamshoro, the extract of the report is as under:

*“that the entry No.175, dated: 20.09.1933 of VF-VII of Deh Jamshoro, is not the final record of ownership of any entry, as prior to partition, there was old Village Form VII, the year 1937-38 and after partition through the process of re-writing and re-construction of record of rights, the year 1955-56 came in force on the basis of which entire transaction of record of rights had taken place onward for a long time.*

*It is further stated that in the instant matter, the ownership of Survey No.191, area 07-34 acres is being claimed purely on the basis of entry No.175 of the year 1933, Deh Jamshoro, for which there is neither mother entry nor onward supporting record entered are being quoted in favor of ownership of the said land situated in Deh Jamshoro, Tappa Giddu Bunder, Taluka Qasimabad.”*

11. The presumption of truth is attached with the Revenue Record, however, the Honorable Supreme Court has held in its various pronouncements that this presumption is always rebuttable. This is settled law that the mutation itself does not confer or extinguish any right or title and if the mutation based on which right in the property is claimed, is disputed, the onus of proving the correctness of mutation and genuineness of the transaction contained therein would be, on the party claiming right based on such mutation. On the aforesaid proposition, I am guided by the decision of Honorable Supreme Court in the case of Arshad Khan v. Mst. Resham Jan and others, **2005 SCMR 1859**.

12. In the light of above, I am of the considered view that mutation entries in the Record of Rights are maintained for fiscal purposes and do not decide the question of title finally. In any event, such entries do not confer the right of ownership to property. My view is supported by the decision rendered by the Honorable Supreme Court of Pakistan in the case reported as **(2008 SCMR 589)**.

13. In the present case, the entries in the Revenue Record in respect of the suit-land were made in the name of respondent based on compromise decree dated 11.11.1998, in suit No. 165 of 1993, which was disputed by the appellant; therefore, without establishing the genuineness of the Revenue Record as portrayed by the respondent, the entries in the Revenue Record based on the compromise decree would be of no help to the respondent.

14. In view of the above position of the case, I am of the view that learned appellate court has completely failed to take into consideration the actual position of the suit land and based its finding merely on the compromise decree dated 11.11.1998, in suit No. 165 of 1993, in which Government of Sindh, through Secretary (BOR) was not a party to the proceedings, which is the erroneous decision suffering from grave illegality, which could not be condoned; as a result, the judgment and decree dated 12.9.2019 passed by the appellate Court are set aside, and I hold that the decision of learned trial court is based on the correct application of law and as such, the judgment and decree of trial court are hereby restored.

15. The instant appeal stands allowed in the above terms with no order as to costs.

**JUDGE**

*\*Karar\_Hussain /PS\**