Judgment Sheet

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Civil Revision Application No. 190 of 2016

Applicant	:	Dilmurad S/O Rehmat Khan Brohi, through Mr. Kamaluddin Advocate.
Official respondents 1 to 4:		through Mr. Allah Bachayo Soomro, Additional Advocate General Sindh.
Respondent No.5	:	Called absent.
Dates of hearing	:	16.01.2023 and 13.02.2023.

J U D G M E N T

***NADEEM AKHTAR, J*.** F.C. Suit No.210/206 of 2011 filed by the applicant against the respondents for declaration, cancellation and injunction was dismissed by the trial court vide judgment and decree dated 30.05.2012. The said dismissal was challenged by the applicant vide Civil Appeal No.67 of 2015, but the same was dismissed by the appellate court vide impugned judgment and decree dated 21.05.2016 and 27.05.2016, respectively. Through this Civil Revision Application filed under Section 115 CPC, the applicant has impugned the concurrent findings of the learned courts below.

2. The case of the applicant before the trial court was that he was the owner of agricultural land bearing Revenue Survey Nos. 63/4 (1-23 acres), 22/1 (1-29 acres), 22/2 (3-29 acres), 22/3 (4-00 acres) and 22/4 (4-00 acres), total area 15-01 acres, situated in Deh 40 Nasrat, Taluka Daur, District Shaheed Benazirabad **('suit property')** ; the suit property was mutated in his name and he was in possession thereof and was also paying land revenue to the Government ; the suit property was mortgaged by him with Zarai Tarqiati Bank Limited **('the bank')** in consideration of a loan obtained by him from the bank ; in order to usurp the suit property, private respondent No.5 was trying to get the same transferred in his name through impersonation and fraudulent means ; the applicant made several representations in this behalf to official respondents 2 to 4 requesting them not to allow any such fraudulent transfer ; despite the above, respondent No.5 managed to get an area of 1-23 acres out of S.No.63/4 transferred in his favour by committing fraud, forgery and impersonation ; the said fraudulent transfer was made on the basis of a sale deed dated 19.11.1997 allegedly registered by the Sub-Registrar concerned / respondent No.4 in favour of respondent No.5 ; and, the applicant came to know about the impugned fraudulent transaction about

a week before instituting the Suit when respondent No.5 attempted to dispossess him from the suit property illegally and forcibly. It was pleaded by the applicant in his plaint that he never sold any part of the suit property to respondent No.5 nor did he receive any sale consideration in respect thereof from him and he also never handed over possession of any part of the suit property to respondent No.5. It was alleged by him in his plaint that respondent No.5 was trying to get the remaining area of the suit property mutated in his name in a similar fashion. In the above background, the applicant had prayed for a declaration that he is the owner of the suit property having possession thereof, and had further prayed that the impugned registered sale deed dated 19.11.1997 in favour of respondent No.5 be cancelled. Consequential relief of permanent injunction was also sought by him seeking to restrain the respondents from interfering in his title and/or possession in respect of the suit property.

3. The Suit proceeded ex-parte against the respondents as they did not appear nor did they file their written statement before the trial court despite service of summons through all modes including publication in newspaper. In support of his claim, the applicant examined four (04) witnesses including the Tappedar concerned and the Manager of the bank. Thereafter through the impugned judgment and decree, the Suit was dismissed by the trial court on the grounds that the applicant had failed to produce the scriber and attesting witnesses of the impugned sale deed, and also that it was barred by limitation. While concurring with the findings of the trial court, the appellate court dismissed the appeal filed by the applicant. The respondents remained absent before the appellate court also despite issuance of notice through all modes including publication in newspaper.

4. In the present proceedings, notices were repeatedly sent to respondent No.5 directly and also through the learned Senior Civil Judge concerned. As he could not be served despite all such attempts, the notice was finally published in newspaper on 16.11.2022. Despite publication of notice, respondent No.5 still did not appear and accordingly, vide order dated 16.01.2023, service upon him was held good.

5. It is contended by the learned counsel for the applicant that it is settled law that the burden to prove a document lies upon the beneficiary thereof which, in the instant case, was respondent No.5, and the applicant had challenged the subject sale deed allegedly executed in favour of respondent No.5 on the ground that it was manipulated, forged and collusive ; however, despite this settled legal position, it was erroneously held by both the learned

courts below that the applicant was required to prove the impugned sale deed by producing its scriber and attesting witnesses. It is further contended by him that the applicant had successfully discharged his burden in proving his case and the evidence produced by him had remained uncontroverted, un-rebutted and unchallenged as respondent No.5 did not appear before the learned courts below nor did he cross-examine any of the witnesses produced by the applicant. It is also contended by him that the suit property was lying mortgaged with the bank at the time of the alleged execution of the impugned sale deed which fact was confirmed by the Manager / authorized representative of the bank who was produced as his witness by the applicant and who had further stated in his evidence that not only was the suit property still lying mortgaged with the bank, but the loan obtained by the applicant from the bank in consideration thereof was also still outstanding. It is urged by the learned counsel that both the learned courts below failed to appreciate that the suit property could not be sold during the subsistence of mortgage. It is also urged by him that the findings of the learned courts below that the Suit instituted by the applicant was barred by limitation are not sustainable as the applicant had categorically stated in his plaint that the fact that respondent No.5 was claiming title in respect of the suit property on the basis of the impugned sale deed came to his knowledge only a week before the institution of the Suit when defendant No.5 attempted to dispossess him therefrom ; and, this statement made by the applicant had also remained unchallenged and un-rebutted.

6. I have heard the learned counsel for the applicant and have also examined the material available on record. It was held by the trial court that the applicant had failed to examine the scriber and attesting witnesses of the impugned sale deed and a copy of the sale certificate and affidavit of the applicant with his thumb impression were attached to the impugned sale deed. It was observed by the trial court that the plaintiff had challenged the sale deed after thirteen years without explaining such inordinate delay. In view of the above findings, the trial court came to the conclusion that not only the applicant had failed to prove his case, but his Suit was also barred by limitation. It is a matter of record that the applicant had challenged the sale deed, allegedly executed by him, by asserting that he never executed the same and by claiming that the same was a fabricated document. By producing evidence on oath, which evidence was in line with his pleadings, the applicant had discharged his burden whereafter the burden had shifted upon respondent No.5 to prove the contrary. However, respondent No.5 admittedly never appeared before the trial court to dispute the allegations made by the applicant or to controvert the statements made on oath by his

witnesses, nor did he produce any evidence of his own. Thus, the entire evidence produced by the applicant remained absolutely unchallenged and un-rebutted. The learned courts below did not appreciate that the applicant had challenged the sale deed in favour of respondent No.5 and was not relying thereon nor was he claiming any benefit therefrom. In such circumstances, he was not required to prove the execution of the impugned sale deed by producing its scriber and/or attesting witness as he was not the beneficiary thereof. It was also held by the trial court that payment was made to the applicant whereafter the impugned sale deed was executed by him in favour of respondent No.5 after completion of all legal formalities. Such finding by the trial court was clearly contrary to the un-rebutted evidence on record as the applicant had categorically denied receiving any sale consideration from respondent No.5, executing the impugned sale deed in his favour and/or handing over possession of the suit property to him.

7. Record shows that four (04) witnesses were produced by the applicant. PW-1, who was the Tappedar concerned and had produced the original record of the suit property, had deposed that as per the relevant entry available in the Revenue Record the suit property was lying mortgaged with the bank at the time of his deposition. He had further deposed that the suit property was purchased by the applicant on 01.08.1987 from its previous owner. PW-2, who was the authorized representative of the bank and had produced the relevant record, had deposed that the applicant had obtained a loan from the bank against mortgage of the suit property which was still lying mortgaged with the bank at the time of his deposition, and an amount of Rs.473,114.00 was still outstanding against him. PW-3, who was the attorney of the applicant, had deposed that the applicant was the lawful owner of the suit property which was duly mutated in his name in the record of rights and he was cultivating the same till the time of his deposition. He had also deposed that respondent No.5 had no right to or concern with the suit property and the impugned sale deed in his favour was a forged document, and he never paid any sale consideration to the applicant nor was the possession of the suit property handed over to him by the applicant. He had further deposed that the suit property was still lying mortgaged with the bank and had produced the certificate issued by the bank confirming the mortgage. PW-4 had deposed that he knew the applicant and his attorney ; the applicant had not sold the suit property to anyone ; the suit property was still lying mortgaged with the bank ; and, the impugned sale deed in favour of respondent No.5 was forged. None of the above witnesses of the applicant were cross-examined by respondent No.5 or even by the official respondents

/ defendants. Accordingly, the entire evidence produced by the applicant indeed remained unchallenged and un-rebutted.

8. It is the matter of record that the Suit instituted by the applicant was dismissed by the trial court in the first round vide judgment and decree dated 30.05.2012, however, the appeal filed by the applicant was allowed by the appellate court by observing that the trial court had not considered the documents and evidence of the applicant to the effect that the suit property was lying mortgaged with the bank and the applicant had examined the authorized representative of the bank. While allowing the appeal filed by the applicant, the trial court was directed by the appellate court to decide the Suit afresh in accordance with law. Perusal of the impugned judgment of the trial court shows that the un-rebutted evidence produced by the applicant, particularly that the suit property was lying mortgaged with the bank at the relevant time which fact was confirmed not only by the two private witnesses, but also by the Tappedar concerned and the authorized representative of the bank, was again not considered by the trial court in the second round despite specific direction by the appellate court. The effect of mortgage of the suit property at the relevant time confirmed by the above mentioned material witnesses and the un-rebutted evidence on record in relation thereto was not discussed at all in the impugned judgment. Thus, despite specific direction of the appellate court, the impugned judgment was delivered by the trial court without appreciation of material un-rebutted evidence and without weighing or applying the same.

9. It had come on record through un-rebutted evidence that the suit property was lying mortgaged with the bank at the relevant time. Under Section 58(a) of the Transfer of Property Act, 1882, **('the Act')** a mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transferor is called a **"**mortgagor**"** and the transferee a **"**mortgagee**"**, and the principal money and interest / profit thereon, the payment whereof is secured, is called **"**mortgage money**"**. The above terms are defined in Section 58(a) of the Act, but the term **"**mortgaged property**"** has not been defined therein although it has been used in almost every section of Chapter IV (Of Mortgages of Immovable Property and Charges) of the Act. A plain reading of Section 58(a) ibid implies that mortgaged property is that specific immovable property the interest wherein is transferred by the mortgagor in favour of the mortgagee in consideration of the purpose mentioned in the said section. Section 58(f) of the Act provides

that where a person delivers to a creditor or to his agent documents of title of an immovable property with intent to create a security thereon, the transaction is called a mortgage by deposit of title deeds. This type of mortgage is also called an equitable mortgage.

10. In *National Bank of Pakistan through Attorney and another V/S Paradise Trading Company and others* ***(2015 SCMR 319)***, as the mortgaged property was sold during the subsistence of mortgage, the Hon'ble Supreme Court was pleased to declare the registered sale deed in respect thereof as illegal and void which was accordingly cancelled. In *Citibank N.A. through Manager V/S Muhammad Akbar and 3 others* ***(2005 MLD 384)***, it was held by a learned Division Bench of Lahore High Court, that once a property is mortgaged, even though it can be transferred, such alienation shall be subject to the charge of mortgage ; and, the person purchasing the property cannot take the advantage of the equitable rule by avoiding the charge and claiming the transfer to be free from encumbrance.

11. In view of the above, the legal position that has emerged is that the transfer of an interest in the mortgaged property under Section 58(a) of the Act in favour of the mortgagee creates a right in *rem* in favour of the mortgagee in respect of the mortgaged property that remains intact till the entire mortgage money is paid by the mortgagor to the mortgagee ; during the subsistence of mortgage although the mortgagor remains the lawful owner of the mortgaged property, however, his proprietary rights in relation thereto are subject to the mortgagee's rights and interest therein, and they remain suspended till the entire mortgage money is paid by him to the mortgagee and the mortgaged property is redeemed by him in accordance with law ; and, during such period, the mortgagor cannot transfer, alienate, sell or encumber the mortgaged property without the consent of the mortgagee, and any such action taken by him without the mortgagee's consent to defeat the mortgagee's rights and interest in the mortgaged property, would be illegal and would be subject to the rights and interest of the mortgagee in the mortgaged property. Both the learned courts below failed to appreciate that the Suit of the applicant ought to have been decreed in view of the well-settled legal position discussed above, especially in view of the un-rebutted evidence on record.

12. It was held by the trial court that the impugned sale deed executed and registered in the year 1997 was challenged by the applicant thirteen years later and as such the Suit was barred under Section 91 of the Limitation Act, 1908. The learned courts below failed to appreciate that the

pleadings and evidence of the applicant regarding the date of knowledge of the fact that respondent No.5 was claiming title in respect of the suit property on the basis of the impugned sale deed came to his knowledge only a week before institution of the Suit when defendant No.5 attempted to dispossess him therefrom, had remained unchallenged and un-rebutted. In such circumstances, there was no justification for the learned lower courts to disbelieve the applicant, especially without discussing and recording the reasons for disbelieving him.

13. In *Abdul Rashid V/S Muhammad Yasin and another* ***(2010 SCMR 1871)***, the Hon'ble Supreme Court was pleased to hold that where two courts below, while giving their findings on a question of law, had committed material irregularity or acted to read evidence on point which resulted in miscarriage of justice, High Court had the occasion to re-examine the question and to give its findings on that question in exercise of revisional jurisdiction, and High Court was obliged to interfere in the findings recorded by the courts below while exercising power under Section 115 C.P.C. After carefully examining the material available on record and the impugned judgments, I am of the considered view that the un-rebutted evidence on record was not appreciated by the learned courts below in its true perspective, and thus this is a case of misreading and non-reading of evidence. I am also of the view that the law applicable to the case at hand was not applied to it by the learned courts below, and as such they failed in exercising the jurisdiction vested in them by law. Therefore, the impugned judgments and decrees are not sustainable in law and as such cannot be allowed to remain in the field.

14. Foregoing are the reasons of the short order announced by me on 13.02.2023 whereby the impugned judgments and decrees were set aside, the Suit filed by the applicant was decreed as prayed for, and this Revision Application was allowed in these terms with no order as to costs.

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