Judgment Sheet

IN THE HIGH COURT OF SINDH CIRCUIT COURT LARKANA

Civil Revision No.S-07 of 2008

Applicant	:	Nawabzada Saeed Ahmed Khan through Mr.Ghulam Dastagir Shahani, Advocate
Respondents No.3 to 9:		Through Mr. Abdul Hamid Bhurgri Additional Advocate General Nemo for Respondent No.1, 2 & 10
Date of hearing	:	**25.5.2023**
Date of Decision	:	**19.7.2023**

J U D G M E N T

ARBAB ALI HAKRO, J.- Through this Civil Revision Application under Section 115, the Civil Procedure Code 1908 ("**the Code**"), the applicant has impugned Judgment and decree dated 27.02.2008 passed by V-Additional District Judge, Larkana ("**the appellate Court**")in Civil Appeal No.17 of 2006, whereby; the Judgment and decree dated 08.6.2006 and 09.6.2006 respectively, passed by Senior Civil Judge-I, Larkana ("**the trial Court**") in F.C Suit No.253 of 2000, through which the suit of the applicant was decreed has been set-aside by dismissing his Suit.

2. Facts, in brief, are that the applicant had filed suit for Declaration and Permanent Injunction against the respondents, claiming that land bearing S. No.37(4-11), 38(2-35) and 49(1-07) total admeasuring 8-13 acres, situated in Deh Nabi Bux, Tapo Baqapur, Taluka & District Larkana ("**the suit land**") was granted to Respondent No.1 in an open *Katcheri* by Respondent No.7, after payment of installments the suit land was transferred in the name of Respondent No.1 and such T.O Form was issued in her name. Subsequently, the applicant acquired ownership of the aforementioned suit land from Respondent No. 1, by means of a Registered Sale Deed dated 02.3.1998 and subsequently had the

Right transferred to his name through appropriate mutation procedures. Later on, vide Order dated 26.9.2000, Respondent No.3,revoked the grant of Respondent No.1 regarding the suit land subject to the litigation while considering an appeal from Respondent No.2, despite the appeal having exceeded the applicable time limit. Respondent No.3,justified this decision by concluding that the suit land is located within Larkana City's belt area, rendering the grant contravention of the Land Grant Policy. Thus, the applicant sued before the trial Court with the following prayers: -

a) The Hon'ble Court may be pleased to declare that the proceedings of Revenue Appeal filed by the defendant No.2 before the defendant No.3 against the applicant and defendant No.1 are illegal, malafide, without lawful authority and without locus-standi and therefore the defendant No.2 has no right to proceed with the said Appeal and so also threatened act of defendant No.3 to interfere in any way with the plaintiff's proprietary rights as well as his possession and enjoyment of the Suit land as its' owner, is equally, illegal, malafide and without lawful authority, and the plaintiff continues to be its owner by virtue of its valid purchase from the defendant No.1 under the registered sale deed dated 02.3.98 and the suit land does not fall within the alleged belt area of M.C Larkana.
b) Issue perpetual Injunction against the defendants, restraining them from interfering in any way, either personally or through their agents and subordinates, with the title, possession and enjoyment of the plaintiff in the Suit land except by due process of Law and directing the defendant No.2 not to proceed with Revenue Appeal filed before the defendant No.1.
c) Costs.
d) Relief.

3. Upon service of summons, only Respondents No. 2 & 8 contested the suit and filed their written statements, while the remaining respondents/defendants declared exparte by the trial Court.

4. Per written statement of Respondent No. 2, the suit land in question was not granted to Respondent No. 1, during an open *Katcheri*, as she is a *Parda Nasheen* lady who did not attend such a gathering. It was further alleged that the Order dated 30.07.1992, related to the land grant, was a document that had been manipulated, and such manipulation had been orchestrated by the husband and son of Respondent No. 1, namely Ali Bux and Zahoor Ahmed, who had been working in the capacity of Tapedars. It was further pleaded in the written statement that after Commissioner Larkana cancelled the grant, all subsequent transactions and entries were deemed illegal, the applicant ought to exhaust all available remedies to file a suit, rendering it unenforceable under Section 11 of the Sindh Land Revenue Jurisdiction Act. Furthermore, the applicant has never physically possessed the Suit land.

5. Respondent No.8 (Barrage Mukhtiarkar) also filed written statement and pleaded that the applicant has no cause of action to file the suit as the suit land is the property of the Government of Sindh, and he is not entitled to any relief prayed for.

6. From the divergent pleadings of the parties, the trial Court formulated the following issues:-

i. Whether the Suit is maintainable at Law?

ii. Whether the suit land was granted to the defendant No.1 legally by C.O Sukkur at Hyderabad?

iii. Whether the plaintiff is the owner of the suit land by virtue of its' purchase under the register Sale Deed dated 02.3.1998 as alleged in the plaint?

iv. Whether the Order dated 26.9.2000, passed by defendant No.3, is, illegal, malafide, unjust,

arbitrary and without jurisdiction, as alleged in the plaint, and if so, to what effect?

v. Whether the defendant No.3 has jurisdiction to cancel the entries of the plaintiff, which were based upon the purchase of the Suit land by the plaintiff under the registered sale deed dated 02.3.1998?

vi. Whether the defendant No.3 to 9 are competent to dispossess the plaintiff from the Suit land forcibly or except due course of Law?

vii. Whether the plaintiff is entitled to relief claimed?

viii. Whether the cause of action arose for the plaintiff?

ix. What should the decree be?

7. Both parties examined themselves and produced relevant documents supporting their claims. Besides himself, the applicant also examined four other official witnesses. After examining the evidence produced by the parties and hearing their respective submissions, the respondent's suit was decreed as prayed with no order as to costs.

8. The above Judgment and decree of the trial Court were then impugned by Respondents No.3 to 9 through an Appeal, and through the impugned Judgment, the Judgment of the trial Court has been set aside, and the appeal has been allowed.

9. At the very outset, the learned counsel for the applicant contended that the suit land was initially granted to respondent No.1 on 30.7.1992 by way of Land Grant Policy, 1989, and after payment of installments, it was transferred in her name in the Record of Rights, and it becomes Qabuli land. He further contends that the applicant purchased the Suit land through a registered Sale Deed dated 03.03.1998; after that, Respondent No.3 entertained a time-barred appeal of Respondent No.2, in which the applicant was not a party; however, the applicant, after acknowledgement of said proceedings, filed objections and filed suit by challenging the proceedings initiated by the respondent No.3.

He further contends that despite receipt of notice dated 26.9.2000, he illegally and malafidely decided the appeal on the same date and passed the Order, cancelling the grant of Respondent No.1. Subsequently, the plaint was amended and sought cancellation of above Order. He also contends that the ownership of the Respondent. No.1, has not been disputed by the Government, even though Mukhtiarkar recorded evidence and admitted facts about the plaint. He also referred to Notifications dated 12.02.1996 and 04.9.2000, which reflect that the suit land is not within the limit of Municipal Corporation Larkana, and Respondent No.3, illegally cancelled the grant on that score. He further stated that order of Respondent No.3, was challenged, based on jurisdiction, malafide and the Civil Court having ultimate jurisdiction to examine legality, proprietary of any act, Order of Revenue functionaries and learned appellate Court illegally held that suit is barred under Section 11 of the Sindh Revenue Jurisdiction Act of 1876. In support of his contention, he relied upon **1986 SCMR 62, PLD 1998 Karachi 28, 1974 SCMR 356, PLD 1970 SCMR 180, NLR 2000 Rev. 94.**

10. Conversely, the learned Additional Advocate General for Respondents No.3 to 9 contended that the Notification dated 17.3.1981 and 12.02.1996 are in respect of suit land and it was legally issued under Section 8 of Sindh Local Government Ordinance, 1972. Consequently, the suit land cannot be granted as it came under the Municipal limit, the alleged grant was illegal and managed by Respondent No.1, based on fraud and misrepresentation. He finally concluded that the Order of Respondent No.3 and the appellate Court had not committed any misreading, non-reading or illegality in its Judgment, which requires no interference.

11. Insofar as private Respondents No.1, 2 and 10 are concerned, they have been served through publication; but nobody has turned up.

12. The arguments have been heard at length and the available record has been carefully evaluated with the able assistance of the learned counsel for the parties. To evaluate whether justice has been dispensed, it is imperative to analyze the findings of both the Courts below.

13. Upon examining the impugned Judgment of the appellate Court, it was concluded that the applicant's claim is precluded under Section 11 of the Sindh Revenue Jurisdiction Act of 1876. For expediency, Section 11 ibid is being reproduced as follows: -

> ***"11. Suits not to be entertained unless plaintiff has exhausted right of Appeal.****----No. Civil Court shall entertain any suit (Subs. by the A. O., 1937, for "against Government" and finally the word" Government" was subs. for the word "crown" by P. O. No. 1 of 1961.)[against the Government) on account of any act or omission of any Revenue officer unless the plaintiff first proves that, previously to bringing his Suit, he has presented all such appeals allowed by the Law for the time being in force as, within the period of limitation allowed for bringing such Suit, it was possible to present."*

14. The Appellate Court, in contravention of established legal procedures, inaccurately declared that the applicant should have exercised the option of utilizing the appeal mechanism as prescribed by the Revenue hierarchy before instituting the Suit. Such findings of the appellate Court are based on a misconception of the Law and thereby the learned appellate excluded the jurisdiction of Civil Court. The exclusion of the jurisdiction of the Civil Court is not to be readily inferred but that such exclusion must either be explicitly expressed or clearly implied. According to opinion of Lord Thankerton, "*it is also well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal*

has not acted in conformity with in the fundamental principles of judicial procedure". When matter before Civil Court is of a civil nature and falls within the plenary jurisdiction vested in Civil Court under the Code, unless the same is provided to have been covered by the exception, mere existence of a provision of law regarding exclusion of jurisdiction of a Court is not enough.

15. It is a matter of record that initially, the applicant filed suit for Declaration and Permanent Injunction on 25.9.2000, subsequently; plaint was amended with the leave of Court, as Order dated 26.9.2000, passed by Commissioner Larkana (Respondent No.3) cancelling the grant of Respondent No.1 was challenged. The appellate Court failed to acknowledge that the plaintiff had filed a suit on 25.9.2000,to challenge the actions and proceedings initiated by Commissioner Larkana and that the Commissioner received notice of the Suit on 26-09-2000. Despite this, the Commissioner proceeded to hear the appeal of Respondent No.2, and revoked the grant of Respondent No.1 through an order issued on the same day. The provision outlined in Section 11 *ibid* is not pertinent to the applicant's case. When the suit was initiated, the Order of the Commissioner in question was not yet in effect and was subsequently passed at a later time. Therefore, the conclusions drawn by the appellate Court on jurisdiction and the suit being precluded under Section 11 *ibid* are unfeasible under the Law. Where the controversy between the parties hinges on the point of jurisdiction, if is the duty of the trial Court to decide the question of jurisdiction after giving an opportunity of hearing to the parties and then proceed on to other issues regarding merits of the case. Court formulating issues on pleadings, the issues relating to jurisdiction should be treated as preliminary issues and decided after examining the evidence led by the parties. The trial Court has rightly observed that the suit is maintainable. The relevant findings of the trial Court on issue No.1

(whether the Suit is maintainable at Law?) are reproduced hereunder: -

> *"From the perusal of case file, it appears that the plaintiff has filed this Suit on 25.9.2000, in which the plaintiff has challenged the proceedings before the defendant No.3, as he was entertaining the Appeal after eight years of the grant of the suit land to defendant No.1 the notice was also served upon the defendant No.3 on 26.9.2000, but inspite of that he has passed the Order, which was later on challenged by the plaintiff by amending the plaint. It is surprising to see that in written statement, filed by the defendant No.8, it is mentioned that the grant of the defendant No.1 has been cancelled by the Commissioner vide Order dated 02.9.2000, but the Order was passed on 26.09.2000, which is produced by the plaintiff and also by the defendants, it means that either the defendant No.8 has mentioned the wrong date of the Order or the date of the Order has been changed by the revenue authorities from 02.09.2000 to 26.09.2000.The perusal of Order, it appears that the defendant No.3 has filed the Appeal before the Commissioner and the Commissioner after eight years of the grant of suit land to the defendant No.1, which was fully paid up, has entertained the Appeal as such legal question was involved in this matter and the Civil Court being Court of ultimate jurisdiction is competent to examine the legality and validity of the Order and bar of jurisdiction of Civil Court would not apply, when orders passed by the Collector are corum-non-judice and without jurisdiction and Civil Courts being Court of ultimate jurisdiction are possessed of jurisdiction to declare order-s of revenue authorities as corum-non-judice and without jurisdiction. Reliance is place upon N.L.R 2000 (Revenue) Larkana 94, 1974 SCMR 356. Therefore the Civil Court has jurisdiction to entertain the matter, hence the plaintiff has successfully proved this issue this issue and is answered IN AFFIRMATIVE."*

16. The case of the applicant is that the suit land was granted to Respondent No.1 after payment of installments, the T.O Form was issued and the record of rights was mutated in her favour. After that, she sold the suit land to the applicant through a Registered Sale Deed dated 02.3.1998. The disagreement between the parties regarding the determination of rights on the title is related to the registered Sale Deed. It is apparent that Commissioner Larkana assumed authority in a manner deemed unlawful and resolved the conflict between the parties, encompassing the issues of title and determination of rights. A commonly acknowledged principle in the field of Law is the abstention of Revenue Authorities from exercising jurisdiction in cases where a dispute of title arises between parties. Even otherwise, it is an established legal exposition that the Civil Court holds the ultimate jurisdiction and can consider such a suit according to Section 9 of the Code, which provides as under: -

> ***"9. Courts to try all civil suits uncles barred.--****The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."*

17. For determining the jurisdiction Civil Court, which otherwise have a plenary jurisdiction under Section 9 of the Code, the basis test is whether the action taken or order passed by the authorities in which the provision of bar of jurisdiction is available. If the order has been passed with the jurisdiction under the statute, then certainly the Civil Court has no jurisdiction to entertain a suit against the order which has been with jurisdiction, and if the order is beyond jurisdiction or scope of the authority vested by the statute, then certainly the Civil Court has jurisdiction to entertain a suit against such-like order.

18. The prayer clause (i) of the suit reflects that applicant

challenged the validity of Order dated 26.9.2000, passed by the Commissioner (Respondent No.3) on the ground of ultra vires and malafide, so such type of dispute required to be decided by the Civil Court and Revenue Authorities have no jurisdiction to pass any order, where the land has already been transferred or granted to a private person, and it becomes Qabooli land. In this context, I am fortified by a Division Bench decision in ***Mitho Khan vs Member Board of Revenue Sindh, Hyderabad and another*** **(*PLD 1997 Karachi 299*)**, wherein it was held as under: -

> *"There is no denial of the fact that the petitioner's father had fully paid up the grant, which is also borne out by the entries in the Revenue Record and the orders passed by the Colonization Officer as well as the Additional Commissioner, Hyderabad. It is settled position to Law that after the land was acquired, the status of Qabooli land, land grant authorities became functus officio and could not deal with the transfer or grant of such land.At any rate, without the cancellation of grant in favour of the petitioner, disputed land could not be lawfully granted in favour of the respondent, which, on the face of it, is illegal and void."*

19. The findings of the trial Court that the Colonization Officer Sukkur Barrage @ Hyderabad rightly granted respondent No.1's ownership of the suit land. In contrast, the applicant's lawful claim to the same land was established through the documented transaction of a Registered Sale Deed dated 02-03-1998. The applicant produced documentary evidence, which is in nature, a Secondary manner. The original record from the concerned authority/ authorities or such effort is made by the applicant to produce original documents viz. T.O. Form, Schedule of Property at the time of open Katcheri, Allotment Order of Colonization Officer, receipts of payment of amount and mutation entry etc. The appellate Court reversed the findings of the trial Court on the ground that the applicant failed to

produce a publication, proceedings of open *Katcheri* and the Allotment Order of Colonization Officer. The trial Court committed an error while considering the admissibility of evidence [secondary evidence], according to Chapter-V of Qanun-e-Shahadat Order, 1984 ("**QSO, 1984**"). Article 74 deals with and defines the mode of secondary evidence, while Article 76 of the Act *ibid* provides the cases and circumstances in which secondary evidence may be given. Whereas; Article 77 explicates Rules as to notice to produce. For ready reference, relevant excerpts from Articles 74, 76 and 77 of the QSO, 1984 are reproduced as under:-

> *"**Secondary Evidence.** Secondary evidence means and includes;*
>
> *(1) Certified copies given under the provisions hereinafter contained;*
>
> *(2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy and copies compared with such copies;*
>
> *(3) Copies made from or compared with the original;*
>
> *(4) Counterparts of documents as against the parties who did not execute them;*
>
> *(5) Oral accounts of the contents of a document given by some person who has himself seen it.*
>
> ***"76. Cases in which secondary evidence relating to documents may be given.** Secondary evidence may be given of the existence, condition or contents of a document in the following cases:-*
>
> *(a) When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, he process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in Article 77 such person does not produce it;*
>
> *(b)…….*
>
> *(c)……*
>
> *……*
>
> *In cases (a), (c), (d) and (e), any secondary evidence of the contents of the documents is admissible.*
>
> *……*

> ***77. Rules as to notice to produce****. Secondary evidence of the contents of the documents referred to in Article 76 paragraph (a) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is or to his advocate such notice to produce it as is prescribed by Law; and if no notice is prescribed by Law, then such notice as the Court considers reasonable under the circumstances of the case.*
>
> *Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:-*
>
> *(1)…….*
> *(2) ……..*
> *……..*
>
> *(6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.*

20. Ordinarily, it is necessary that document if tendered in evidence should be in original rather than the shape of true or Photostat copies. Primary evidence being available, its proof as required by Articles 78 and 79 should be furnished.

21. Under legal requirements for the production of secondary evidence, the party in possession of the document to be presented must be notified of the production of the said document within the Court. Alternatively, it must be proven that the original document is within the possession or authority of the individual against whom it is being presented or of any person legally obligated to produce it. If, after the notice mentioned in Article 77, the individual fails to produce the document or the original has been lost or destroyed, or if the party providing evidence of its contents cannot produce it within a reasonable amount of time due to reasons not caused by their negligence or inaction, then the secondary evidence may be presented.

22. Upon examination of the case record, it is evident that the applicant/plaintiff's presented documents were admitted as evidence improperly, without the required production of their original forms and without meeting the requisite conditions for allowing secondary evidence. It should be noted that mere consent or omission to object to the reception of inadmissible evidence does not constitute valid or legal evidence, as such; a departure from governing rules could significantly impact the Judgment of the trial court. In light of the factual and circumstantial evidence surrounding the case, the departure from the rule in question has substantially affected the trial court's decision, which may have resulted in a different outcome if the inadmissible evidence had been excluded. As such, the trial court's Judgment cannot be upheld. In this context, I am fortified with the case of ***Amirzada Khan and others vs. Ahmad Noor and others (PLD 2003 Supreme Court 410)***, wherein Apex Court has held as under: -

> *"It is astonishing to note that all the Courts below have not adverted to this vital aspect of the case and proceeded to accept the document as a valid deed of transfer being 30 years old. Question arises as to where is the original document? After lengthy arguments of the learned counsel, we were inclined to order the impounding of document and directing the respondents to pay the stamp duty thereon alongwith penalty within the contemplation of section 35 of the Stamp Act, 1899 but when we examined original record of the trial Court, we were amazed to find that instead of original document a photostat copy was exhibited in evidence without the leave of the trial Court to lead secondary evidence, after the proof of loss or destruction of the original one. Since the respondents did not plead loss or destruction of the original agreement, we would be legally justified in presuming that they are guilty of withholding best available primary evidence. We feel,*

had it been produced in Court, it would perhaps have been unfavourable to them. Since the original document has not been placed on record, we are not inclined to pass any order for impounding the same. Assumption of the trial Court as well as the High Court that the deed of sale being more than 30 years old was a valid piece of evidence within the contemplation of Article 100 of Qanun-e-Shahadat Order, appears to be misconceived. Suffice it to observe that the document itself being inadmissible in evidence, hardly any presumption of correctness or its validity can be attached to it in the circumstances. In the absence of original document, in our considered opinion, no presumption of correctness or its due execution can be drawn in this case."

23. There exists a disagreement between the parties regarding the suit land, which according to the Commissioner's (Respondent No. 3) Order dated 26.9.2000, is situated within the belt area of the Larkana City 1st Class Municipal Committee. The relevant finding of the Commissioner is reproduced as under: -

"The disputed land is situated within belt area at 1/2 K.M away from Larkana City centre and surprisingly the same has been granted on permanent tenure in defiance of instructions of Board of Revenue contained in letter No.1864/61/6792-G-S dated 15.9.1961 read with Colonization Officer, Sukkur Barrage Hyderabad's letter No.PA/10687/1976 dated 24.12.1976. It has clearly been laid down that lands within 05 kilometers of Ist. Class Municipal Committees should not be granted on permanent tenure. I also examined the schedule of the area to be disposed in the impugned katchery which indicates that disputed land was not included in the schedule. The land in question was disposed of in violation of Land Grant Policy of 1989. The grantee/lessee have neither cultivated the disputed land nor have been under possession of the same which is also breach of conditions of the grant. Besides T.O Form in favour of respondent Mst.Aisha has been issued in violation of Land Grant Policy."

24. In determining a dispute concerning the location of the suit land situated within the belt area of Larkana City, governed by the 1st Class Municipal Committee. It is noted that the trial Court needed to formulate a proper and essential issue in this regard. Despite specific observations in the trial Court's and the appellate Court's findings, the issue remains inadequately addressed. The above Order of Commissioner reflects that he cancelled the grant based on two letters, as mentioned, but either party in the trial Court has not produced these letters. Although there exists a dispute regarding the physical possession of the suit land, the Order of the Commissioner indicates that the suit land was not listed in the schedule of the area designated for disposal in the open *Katcheri*.

25. For the preceding reasons, I am of the view that sufficient evidence has not been brought on record and the question of jurisdiction of the Civil Court is inconsistent. I conclude that Civil Court has jurisdiction and is not barred under Section 42 of the Specific Relief Act and Section 11 of the Sindh Revenue Jurisdiction Act. So far as factual findings of both the Courts below are concerned, i.e. without considering admissible evidence which is primary in nature and essential/material issues have not been framed by the trial Court, therefore, I hereby set aside the judgments and decrees of both the Courts below and Suit is remanded back to the trial Court with the direction to frame following issues and record evidence of both the parties on above issues and then decide the Suit in accordance with Law: -

i. Whether the suit land is situated within the local limit of Municipal Corporation Larkana and has been granted in defiance of instructions of the Board of Revenue contained in letter No.1864/61792-G-S dated 15.9.1961 and letter No.PA/10687/1976 dated 24.12.1976 and against Land Grant Policy, 1989...?

ii. Whether the applicant/plaintiff is in physical possession of the Suit land…?

26. With the preceding observations, the instant Revision Application is disposed of. Parties are left to bear their costs.

J U D G E