

Order Sheet
IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
LARKANA
Civil Revision No.S-82 of 2022

Applicant: Nek Muhammad Khan son of Zangi Khan
Sohriyani, through Mr. Muhammad Qasim
Khan, Advocate.

Respondents: Mukhtiar Ahmed and others

Date of Hearing: 30.10.2023.

Date of Order 30.10.2023

ORDER

KHADIM HUSSAIN SOOMRO, J :- Through this Civil Revision Application under Section 115, the Civil Procedure Code 1908 ("**the Code**"), the applicant has impugned the Judgment and Decree dated 07.04.2022 and 08.04.2022 respectively, passed in Civil Appeal No.01 of 2022, by the learned District Judge, Kashmore at Kandhkot, ("**the appellate Cour**") whereby the Judgment and Decree dated 08.12.2021, passed by learned Senior Civil Judge, Kashmore ("**the trial Court**") in new F.C.Suit No.126 of 2021 were maintained and the suit filed by the applicant was dismissed.

2. Succinctly facts as averred in the plaint are that approximately 14 years prior plaintiff and defendant No.1 conjointly purchased a piece of land admeasuring 8-20 acres from S.Nos.648 to 652 of Deh Kandhkot (**the suit land**). as a co-sharers to the extent of 37.5% and 62.5% respectively from previous owner namely Sardar Pervaiz Ahmed Khan Sohriyani on total consideration of Rs.28,00,000/- Out of the total consideration the applicant and respondent No.1 from their joint account as per their share paid Rs.10,50,000/- and Rs.17,50,000/- through one Muhammad Aslam s/o Muhammad Yousif Gujar, who was joint care taker of Al Ghazi Fish Farm owned by the applicant and respondent No.1 in partnership basis, after purchasing the said property was being used as a fish farm with mutual consent of applicant and respondent No.1. The relation between the parties deteriorated when applicant came to know that the respondent No.1 has secretly and fraudulently got changed Khata of suit property in his name as a sole owner through a registered sale deed.

The applicant/Plaintiff prayed the following prayers:

- A. To declare that the plaintiff is real and absolute owner of the suit property to the extent of his share mentioned in para-2 of the plaint.
- B. To direct the defendant no 2, 3 to 7 for proper measurement and impartial portion of the suit property through meets and bounds in supervision of NAAZIR of the court and further be pleased to put the plaintiff in separate possession of suit property to the extent of his actual share after physical and proper measurement of the suit property.
- C. To grant permanent injunction against the defendant No.1, thereby restraining him permanently from transferring the possession of suit property by means of further sale or otherwise to any other person and grant permanent injunction against the official defendants for mutation of khata or ownership of suit property in the name of any other person or bring the same under bar permanently.
- D. A mandatory injunction with all occurring benefits may also be granted including cancellation of Registered Sale Deed No.28 dated 12.01.2004 registered with the name of defendant No.1.
- E. To award any other relief under the circumstances.
- F. To award the cost of the suit.

3. In the wake of service upon the respondents, they submitted their written statement wherein denied the claim of the applicant made in the plaint and further stated that they have purchased the suit property from the previous owner by way of register sale deed dated 12-01-2004, from the previous owner after payment of consideration amount.

4. On the divergent pleadings of the parties, the learned trial court framed the following five issues:-

- (1) Whether the suit of the plaintiff is not maintainable according to law.
- (2) Whether the plaintiff is co-owner /co-sharer with the defendant no 1 in the suit land measuring (8-20) out of survey numbers 648, 649, 650, 651 and 652 of Deh Kandhkot?.
- (3) Whether the register sale deed No 28 dated 12-01-2004 and mutation No 69 dated 8-03-2004, of Deh Kandhkot are liable to be cancelled?
- (4) Whether the plaintiff is entitled to the relief claimed for ?.

(5) What should the decree be ?

5. The plaintiff in order to establish his case produced copy of private Faisala At Ex 38/A, & 38/B and also examined his witness namely Muhammad Aslam Gujar At Ex 46/ and close and side of evidence At Ex 47.

6. The attorney of the defendant no 1 namely Adam Ali submitted his affidavit in evidence At Ex 49, produced G.P.A as well as scan copy of entry no 69 of V-F VII, At Ex 49/A,& Ex 49/A,. The authorized person of Mukhtiarkar was also examined who produced entry no 69 of V-F VII, At Ex 53/A & Ex 53/B, The authorized person of sub registrar was also examined who produced register sale deed, At Ex 54/A & Ex 54/B, after that the defendant side was closed At Ex 55.

7. After examining the evidence produced by both the parties and hearing both the parties counsel, the trial Court vide Judgment dated the Judgment and Decree dated 08.12.2021, passed by learned Senior Civil Judge, Kashmore dismissed the suit. The applicant against the judgment and decree of the trial court preferred Civil Appeal No.01 of 2022, which was also dismissed impugned the Judgment and Decree dated 07.04.2022.

8. Learned counsel for the applicant has contended that the learned Trial Court, as well as the Appellate Court, did not appreciate the material facts available on the record while passing the impugned Judgment and the Decree, and the learned Trial Court has erred while deciding the case on technicality grounds and not on the merits of the case. Hence, the Judgments and Decrees passed by both the Courts below may be set aside.

9. I have made extensive deliberations on the arguments advanced by the learned counsel for the applicant and meticulously assessed the material available on the record with his assistance.

10 It is an admitted fact that there is no title document of the land in question in favour of the applicant/plaintiff that can create a right or legal character in his favour, for convenience and brevity in the relevant Section 42 of the Specific Relief Act reads as under:-

“42. Discretion of Court as to declaration of status or right. Any person entitled to any legal character, or to any right as to

any property, may institute a suit against any person denying or interested to deny his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief." (Underlining is for emphasis)".

11. Suppose any of the rights arising from a title is infringed or threatened. In that case, an aggrieved person has the right to institute a suit in terms of Section 42 of the Specific Relief Act for a declaration against any person denying or interested in denying the title to such character or right to such property. The Court may, in its discretion, make a declaration that he/she (plaintiff) is entitled. A suit for declaration of status or rights is maintainable if it is in accordance with any statute or in accordance with the law for the time being enforced. The applicant sought the declaration of ownership to the extent of his share without any title document in his favour. He alleged to have purchased the suit land from the previous owner on the basis of the partnership with respondent no 1, but there is no partnership deed in terms of the Partnership Act. The Partnership Act, 1932 (IX of 1932) provides that there are restrictions on bringing a suit for the enforcement a right derived from a contract or granted by this Act cannot be initiated in any court by, or on behalf of, an individual acting as a partner in a firm against the firm or any individual claimed to be or to have been a partner in the firm, unless the firm is registered, in the instant case neither there is name of firm nor its registration was brought on the record during trial. The relevant provision of the partnership act is reproduced as under:-

" 69. Effect of non-registration.– (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm."

12. The applicant/plaintiff sought the relief for the restoration of possession under section 8 of the Specific Relief Act 1877. First of all, it is essential to discuss the scope of section 8 and its applicability for that, it is necessary to reproduce the relevant section as under;-

8. *Recovery of specific immovable property: A person entitled to the possession of specific immovable property may*

recover it in the manner prescribed by the Code of Civil Procedure.

13. The Phrase “entitled to the possession”; in the context of legal discussion, if it is undertaken that the plaintiff is entitled to possession, it suggests that the plaintiff has a legitimate claim or right about the subject property. This right is expected to align with the substantive law, demonstrating that the plaintiff’s right to possession is in accordance with the relevant legal principles and statutes governing property rights. In other words, the plaintiff’s claim is founded on a valid and legally acknowledged right to possess the property, as defined by the applicable substantive law. The first portion of section 8 above, which is related to the right of a person who is legally entitled to possession. The term entitled serves as the foundation for this right to pursue ownership, but in the case in hand the applicant/ plaintiff does not have any legal document that can create right over the subject property. *In this context I took guidance from the case of Hazratullah and others v. Rahim Gul and others (PLD 2014SC 380), the Hon’ble Apex Court held as under:*

“...it may be held that in a suit under section 8 of the Specific Relief Act, 1877, the declaration of the entitlement is an inbuilt relief claimed by the plaintiff of such a case. Once the plaintiff is found to be entitled to the possession, it means that he/she has been declared to be entitled, which includes the declaration of the plaintiff qua the property....”.

14. In cases where the title is disputed, a suit under section 42 of the Specific Relief Act is to be instituted for a declaration of rights. If there is a dispute over possession arising from a contested title, casting doubt on the claimant's right and creating uncertainty, the legal course of action is to first pursue a declaration of rights, and possession is a subsequent relief. In this regard, the reliance can be placed In the case of *Taj Wali Shah v. Bakhti Zaman* (2019 SCMR 84), the relevant paragraph of the judgment is reproduced under:-

" 6. Any suit under section 8 of the Specific Relief Act, 1877, could be filed by any person entitled to the possession of specific immovable property on the basis of his title and where the title is disputed one a suit under section 42, for declaration, under Specific Relief Act, 1877, is to be filed. Where a suit for possession, on the basis of a title which is

disputed one, creating a cloud over his title, he must seek a declaration to his right, first.”

15 The applicant/plaintiff has also sought the relief of cancellation of the registered sale deed under Section 39 of the Specific Relief Act 1877. For brevity and convenience, the pertinent section is reproduced herewith:-

"Section 39. Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause harm serious injury, a may sue to have it adjudged void or voidable, and the court may in its discretion, so adjudge it and order it to be delivered or cancelled."

"If the instrument has been registered under the Registration Act, the court shall also send a copy of its decree to the officers in whose office the instrument has been so registered; and such officer shall not on the copy of the instrument contained in his book the fact of its cancellation".

16. The applicant's failure to bring their case within the parameters of Section 39 is ascribed to the absence of rational apprehension that the written instrument in question, purportedly void or voidable, may cause grave harm or injury if left outstanding. Section 39 provides the avenue for a person facing prospective harm from such an instrument to seek legal remedy by suing to have it adjudged void or voidable. However, the applicant must establish a genuine and reasonable fear of significant harm. Furthermore, Section 39 grants the court discretionary power to adjudge the instrument void or voidable and order its delivery or cancellation. Notably, if the instrument has been registered under the Registration Act, the court is mandated to send a copy of its decree to the relevant registration officers. These officers are then required to annotate the fact of the instrument's cancellation on the copy contained in their records. The applicant's failure to meet the criteria outlined in Section 39 lies in the inadequacy of demonstrating a reasonable apprehension of serious harm arising from the outstanding instrument; hence, the applicant is also not entitled to the relief of cancellation of instruments.

17. Now, finally, turning towards the scope of the Revisional jurisdiction of the High Court, which is, in fact, very limited, particularly when there are concurrent findings of facts recorded by the trial as well as the appellate Court. There are abundant case laws on this point; however, I seek the guidance from the case of Mst. FAHEEMAN BEGUM (DECEASED)

THROUGH L.RS AND OTHERS VS. ISLAM-UD-DIN (DECEASED)
THROUGH L.RS AND OTHERS, reported in 2023 SCMR 1402, in which
Apex Court has held as under: -

"If the concurrent findings recorded by the lower fora are found to be in violation of law, or based on misreading or non-reading of evidence, then they cannot be treated as being so sacrosanct or sanctified that cannot be reversed by the High Court in revisional jurisdiction which is preeminently corrective and supervisory in nature. In fact, the Court in its revisional jurisdiction under 5 of 14 section 115 of the Code of Civil Procedure, 1908 ("C.P.C."), can even exercise its suo motu jurisdiction to correct any jurisdictional errors committed by a subordinate Court to ensure strict adherence to the safe administration of justice. The jurisdiction vested in the High Court under section 115, C.P.C. is to satisfy and reassure that the order is within its jurisdiction; the case is not one in which the Court ought to exercise jurisdiction and, in abstaining from exercising jurisdiction, the Court has not acted illegally or in breach of some provision of law, or with material irregularity, or by committing some error of procedure in the course of the trial which affected the ultimate decision. The scope of revisional jurisdiction is restricted to the extent of misreading or non-reading of evidence, jurisdictional error or an illegality in the Judgment of the nature which may have a material effect on the result of the case, or if the conclusion drawn therein is perverse or conflicting to the law."

18. Similarly, in the case of HAJI WAJDAD V. PROVINCIAL GOVERNMENT THROUGH SECRETARY BOARD OF REVENUE GOVERNMENT OF BALOCHISTAN, QUETTA AND OTHERS reported in 2020 SCMR 2046, it was held by the Apex Court that:

"There is no cavil to the principle that the Revisional Court, while exercising its jurisdiction under section 115 of the Civil Procedure Code, 1908 ("C.P.C."), as a rule is not to upset the concurrent findings of fact recorded by the two courts below. This principle is essentially premised on the touchstone that the appellate Court is the last Court of deciding disputed questions of facts. However, the above

principle is not absolute, and there may be circumstances warranting exception to the above rule, as provided under section 115, C.P.C. gross misreading or non-reading of evidence on the record; or when the courts below had acted in exercise of its jurisdiction illegally or with material irregularity".

19. In the light of the above discussion, I am quite clear in my mind that both the courts below, in their unanimous impugned judgments, are not found to have been tainted by misreading or failing to read the relevant material, nor are they found to have some jurisdictional flaw that justifies interference. Instead, they fall under one of the exceptions listed in Section 115 of the Code, 1908, whose scope is more limited and restricted to correcting errors of law as well as facts if found to have existed. As a result, for the aforementioned grounds, the instant civil revision application was dismissed in limine vide short order dated 30.10.2023, and these are the reasons for the same.

Judge