

HIGH COURT OF SINDH, CIRCUIT COURT AT HYDERABAD

IInd Appeal No.60 of 2022

[Rais Muhammad Mithal versus Muhammad Hassan & Ors.]

Appellant : Through Mr. Ayatullah Khuwaja advocate

L.Rs of respondent No.1: Through Mr. Babar Kamal Arain advocate

Respondents No.2to5: Through Mr. Wali Muhammad Khoso advocate

Respondents No.6to11: Through Mr. Allah Bachayo Soomro Addl: A.G

Respondents No.12&13: Through Syed Kamran Ali advocate

Date of hearing: 15.01.2024, 29.01.2024, 12.02.2024,
19.02.2024, 01.03.2024 and 08.03.2024

Date of decision: 15.03.2024

J U D G M E N T

KAUSAR SULTANA HUSSAIN J.- This appeal has been directed against the findings of two Courts below. Private respondents had instituted F.C Suit No.41 of 2017 [*Re: Muhammad Hassan & Ors. Versus Province of Sindh & Ors.*] for declaration, cancellation and injunction before the Court of Senior Civil Judge-II Shaheed Benazirabad (**Trial Court**), which was decreed vide Judgment and Decree both dated 11.08.2021; being aggrieved with the said judgment and decree the appellant/defendant No.7 had preferred Civil Appeal No.52 of 2021 [*Re: Rais Muhammad Mithal versus Muhammad Hassan and Ors.*] before IInd Additional District Judge Shaheed Benazirabad (**1st Appellate Court**), however, the same was dismissed vide Judgment dated 05.08.2022 followed by Decree dated 10.08.2022.

2. Precise facts of the matter, which have given rise to present second appeal, are that respondents No.1 to 5/plaintiffs had filed the aforesaid suit for declaration, cancellation and injunction in respect of land bearing Survey No.434/2 admeasuring 01-14 acres situated in Deh Doulatpur, Taluka Kazi Ahmed District Shaheed Benazirabad (**Suit Property**) by claiming that the suit land was purchased by late Muhammad Siddique (*who was father of respondents No.1 to 4 and husband of respondent No.5*) from one Muhammad through registered Sale Deed dated 28.07.1977 which was accordingly entered in revenue record in his favour. They further claimed that Muhammad Siddique died in the year 2001 and as such the suit property was devolved upon them being legal heirs

and they were/are in possession of the suit property. They also claimed that earlier in the year 1981 their late father/husband Muhammad Siddique had filed F.C Suit No.269 of 1981 in respect of suit property against one Manzoor Ahmed Khanzada, which was decided in his favour upto 1st Appellate Court vide judgment and decree dated 31.10.1993 and no one challenged the said judgment; that thereafter such entry bearing No.242 dated 03.05.1997 was kept in favour of late Muhammad Siddique in revenue record but surprisingly the defendant No.7/appellant by way of his influence succeeded to get inserted a note in his favour on said entry; that in the year 2014 they moved applications to revenue hierarchy for change of foti khata and concerned Mukhtiarkar vide letter dated 16.12.2014 reported that according to entry No.25 dated 02.11.1984 of VF-XV the suit property pertains to defendant No.7/appellant; that Mukhtiarkar further reported that there is another entry which shows that defendant No.7/appellant had purchased the suit property from one Manzoor Ahmed Khanzada; that on 16.07.2015 Mukhtiarkar concerned had issued Robkari to them, mentioning therein that suit property is in possession of the plaintiffs; that on 14.07.2015 defendant No.7/ appellant alongwith 15/20 persons came at the suit property and tried to dispossess them; that then they approached the police authorities, who provided protection for some time but thereafter failed to discharge their duties. They filed the captioned suit with the prayer that entry in favour of defendant No.7/appellant is result of fraud and was kept in collusion with revenue staff, as such is liable to be cancelled and defendant No.7/appellant may be permanently restrained from interfering in the suit property.

3. After institution of suit the summons were issued to defendants. The defendant No.7/appellant filed his written statement, wherein he denied the allegations leveled by plaintiffs. He claimed in his written statement that suit property was purchased by him from late father/husband of plaintiffs through sale statement before Mukhtiarkar concerned on 02.11.1982 in presence of witnesses against sale consideration of Rs.30,000/- and such entry bearing No.25 was kept in revenue record in his favour and possession was delivered to him; that then after obtaining necessary permissions from the authorities concerned he installed the patrol pump on suit property; that plaintiffs were never in possession of the suit property, as it was lawfully purchased by him from their predecessor-in-interest; that on account of construction of national highway the patrol pump was closed by him, however tanks thereof are still existing at suit property; that F.C Suit No.269 of 1981 was between predecessor-in-interest of plaintiffs and one Manzoor Ahmed and he was not party to the said proceedings; that since he lawfully purchased the suit property as such after judgment and decree in above suit the note in his favour was inserted alongwith entry No.241 dated 03.05.1997 and predecessor-in-interest plaintiffs never challenged the said note during his lifetime.

4. The official respondents were formal party to the proceedings and the National Highway Authority despite notice did not turn up to claim the suit property. Nonetheless from divergent pleadings of the parties following Issues were framed:

- i. *Whether the plaintiffs are the owners and in possession of the land in suit mentioned in Para No.3 & 4 of the plaint being predecessor of late Muhammad Siddique s/o Jewan Mallah who purchase the land in suit from one Muhammad vide registered sale deed dated 28.07.1977 as such the plaintiff No.1 is son and plaintiffs No.2 to 4 are the daughters and the plaintiff No.5 is widow of deceased Muhammad Siddique Mallah?*
- ii. *Whether the defendant No.7 is owner and in possession of the land in suit as such the defendant purchase the same land from Muhammad Siddique during his life time through the oral statement dated 2.11.1982 before the Mukhtiarkar Moro and such mutation has been taken place in the Revenue Record of Rights vide entry No.25 as such the defendant No.7 installed the petrol pump after obtaining the necessary permission?*
- iii. *Whether the parties have encroached upon the land belonging to the National High Way authority.*
- iv. *Whether the suit is time barred?*
- v. *Whether the plaintiff is entitled to the relief claimed?*
- vi. *Result.*

5. In support of their case, plaintiffs led evidence through their attorney Ali Bux at Ex.15, who produced certain documents. Plaintiffs also examined one Ali Nawaz at Ex.16 and then closed their site at Ex.17. Whereas defendant No.7/appellant examined himself at Ex.18 and produced certain documents. He also examined three witnesses in support of his case at Ex.19 to 21 and then closed his side at Ex.22. Finally the learned trial Court after hearing the parties decreed the suit of plaintiffs as prayed vide Judgment and Decree both dated 11.08.2021 and appeal filed there against by the appellant was dismissed by the learned Ist Appellate Court vide Judgment dated 05.08.2022 and Decree dated 10.08.2022, hence this second appeal. For the sake of ease of reference the judgments and decrees passed by learned trial Court as well as learned Ist Appellate Court are hereinafter referred to as impugned judgments and decrees.

6. Learned counsel for the appellant contended that learned trial Court erred seriously in law while exercising the jurisdiction, as plaintiffs had challenged the revenue entry in favour of appellant, as such the jurisdiction of learned Civil Court was specifically barred by Section 172 of Sindh Land Revenue Act 1967 as well as Section 11 of Sindh Revenue Jurisdiction Act 1876; that even the suit of the plaintiffs was time barred as the appellant purchased the suit property from predecessor-in-interest of plaintiffs in the year 1982 whereas the plaintiffs

challenged the said entry in the year 2017 i.e after about 35 years; that F.C Suit No.269 of 1981 was not against the appellant rather the same was filed by the predecessor-in-interest of the plaintiffs against one Manzoor Ahmed and on decree of said suit a note was inserted alongwith entry No.241 dated 03.05.1997 in favour of appellant in respect of suit property, as it was bonafidely purchased by the appellant and predecessor-in-interest of the plaintiffs did not challenge the said note during his life time despite having knowledge; that even after death of predecessor-in-interest of plaintiffs, the plaintiffs got mutated other properties left behind by their predecessor-in-interest, but they did not approach any authority for mutation of suit property, which is sufficient to prove that they were in knowledge that same had already been sold out by their father/husband in favour of appellant; that both Courts below have decreed the suit on the ground that appellant had failed to prove the possession, however the inspection conducted by the trial Court specifically proves the possession of appellant but the same was not even discussion in the impugned judgments and decrees; that even the report of Mukhtiarkar duly supported by documents and photographs prove the possession of appellant; that this Court had appointed Commissioner to visit the suit property and report of Commissioner supported by photographs also support the possession of appellant; that plaintiffs have miserably failed to show that why appellant was allowed to install patrol pump over suit property if it was not sold out to him; that plaintiffs did not enter into witness box and their attorney even admitted the possession of appellant during cross-examination; that the Robkari produced by the plaintiffs is managed and fake one as the same do not contain outward number. He lastly prayed that both impugned judgments and decrees may be set aside and suit of the plaintiffs may be dismissed being not maintainable and barred by time.

7. On the other hand learned counsel for the private respondents/plaintiffs supported the impugned judgments and decrees and argued that no ground under Section 100 CPC has been made out as such instant appeal is liable to be dismissed; that trial Court has rightly exercised the jurisdiction and there is no illegality in the impugned judgments and decrees; that no cogent ground has been brought on record by the appellant which may call for interference by this Court in concurrent findings of Courts below; that appellant had failed to prove oral statement as well as payment sale consideration; that alleged transaction is barred by Section 54 of Transfer of Property Act 1882 as well as Section 17 of Registration Act 1908; that both Courts below have rightly held that entry No.241 dated 03.05.1997 in favour of father of plaintiffs remained during the course of un-shattered and un-challenged proceedings at trial as the same was kept in pursuance of judgment and decree dated 31.10.1993 and note inserted alongwith said entry is managed one at the hands of appellant; that the only witness had deposed that possession of suit property was delivered to appellant on account of

sale consideration but the same witness admittedly is relative of appellant, therefore, his evidence cannot be relied upon being interested witness; that both Courts below have rightly held that appellant has failed to establish installation of patrol pump at suit property. Learned counsel further raised objections on report of Commissioner appointed by this Court and contended that nothing was stated by attorney of plaintiffs as has been mentioned in said report and even the report of Commissioner cannot be given preference over concurrent findings. They also contended appellant cannot be allowed to produce and/or rely upon the additional documents, which were not produced before learned trial Court. They lastly prayed for dismissed of present appeal. In support of their arguments they have relied upon the cases reported in (i) 2021 SCMR 391, (ii) PLD 2020 Lahore 478, (iii) 2022 SCMR 1842, 2018 YLR 2574, (iv) 2023 SCMR 1652, (v) 2009 SCMR 254, (vi) 2022 MLD 286, (vii) 2007 MLD 1357, (viii) 2017 YLR 2262 Sindh, (ix) 2018 YLR 2574 Lahore, (x) 1987 SCMR 61, (xi) 1992 SCMR 2334, (xii) 1996 SCMR 78, (xiii) 2004 SCMR 1043 and (xiv) 2005 SCMR 1859.

8. Learned Additional A.G Sindh stated that jurisdiction of Civil Court is specifically barred by law in the matters wherein any party is aggrieved by an entry in record of rights. He further stated that for exercising the jurisdiction both Courts below have relied upon Section 53 of the Sindh Land Revenue Act, however, said Section confers the jurisdiction on Civil Court only when the aggrieved party is in possession of the suit land, but in present case the possession of plaintiffs was doubtful as such the trial Court, being Civil Court, was not supposed to entertain the suit.

9. Whereas Syed Kamran Ali advocate, who is representing the respondents No.12 and 13/NHA stated that they have no claim/right over the suit property and are proforma party, as such no arguments are being advanced.

10. I have heard the learned counsel for the parties and have perused the material available on record.

11. The first and foremost question before this Court is that whether the suit before the Civil Court /trial Court was maintainable, as the said suit had challenged the entry in record-of-rights?

12. To answer the aforesaid question, I have gone through the provisions of Sindh Land Revenue Act 1967 (**Act 1967**). Section 172 of the Act 1967 provides that Civil Court shall not exercise jurisdiction, wherein a Revenue Officer is empowered by the Act to dispose of or take cognizance of the matter. For better understanding the aforesaid Section is reproduced below:

“Section 172. Exclusion of jurisdiction of Civil Courts in matters within the jurisdiction of Revenue Officer.- (1) Except as otherwise provided by this Act, no Civil Court

shall have jurisdiction in any matter which Government, the Board of Revenue, or any Revenue Officer, is empowered by this Act to dispose of, or take cognizance of the manner in which Government, the Board of Revenue, or any Revenue Officer exercise any powers vested in it or him by or under this Act.

(2) Without prejudice to the generality of the provisions of sub-section (1), a Civil Court shall not exercise jurisdiction over any of the following matters namely:-

(i).....

(ii).....

(iii)....

(iv)....

(v) the framing of a record-of-rights or periodical record, or the preparation, signing or attestation of any of the documents included in such a record;

(vi) the correction of any entry in a record-of-rights, periodical record or register of Mutations;

(vii) to (xxi).....”

13. In addition to above I have also gone through the provisions of Sindh Revenue Jurisdiction Act 1876 (**Act 1876**); Section 11 whereof also restricts the Civil Court from entertaining any Suit, concerning any act or omission on part of Revenue Officer(s) unless the plaintiff first proves that prior to filing of said Suit he/she had exhausted the remedies available to him/her before the revenue hierarchy under the law. Section 11 *ibid* is reproduced below:

“11. Suits not to be entertained unless plaintiff has exhausted right of appeal:- *No. Civil Court shall entertain any suit I [against the Government] on account of any act or omission 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. In the present matter the respondent/plaintiffs had challenged the entry of record-of-rights in favour of present appellant/defendant before the Civil Court/trial Court and learned Civil/trial Court decreed the said suit while assuming the jurisdiction and appeal against said decree met with the same fate, though Section 172(2),(v) and (vi) of the Act 1967 place an embargo upon the Civil/trial Court from exercising jurisdiction in such matters. Besides Section 11 of the Act 1876 also restricts the Civil Court from entertaining any suit, even if the said Suit is concerning any act or omission on part of Revenue Officer(s), as in such a situation the aggrieved party has the remedy before the revenue

hierarchy and such aggrieved party has to first prove that prior to filing Suit he/she has exhausted the remedy available to him/her under the law.

15. Perusal of impugned judgments and decrees shows that in order to assume/exercise the jurisdiction both Courts below have placed entire reliance upon Section 53 of the Act 1967, however, the said Section confers the jurisdiction on Civil Court to pass a '*declaratory decree*' in respect of a right, only in case the aggrieved party [filing the such suit] is in possession of right for which he is seeking declaration under Chapter-VI of the Specific Relief Act 1877. For the sake of easiness Section 53 of the Act 1967 is reproduced herein below:

“Section 53: Suit for declaratory decrees by persons aggrieved by an entry in a record.- If any person considers himself aggrieved by an entry in a record-of-rights or in a periodical record as to any right of which he is in possession, he may institute a suit for declaration of his right under Chapter VI of the Specific Relief Act, 1877 (Act I of 1877).” (Bold and underlined added for emphasis).

16. A bare reading of Section 53 ibid makes it clear that a declaratory suit can only be instituted in respect of a right to which the aggrieved party, filing suit is in possession, which too as provided under Chapter VI of the Specific Relief Act 1877. However, as discussed herein below the plaintiffs/respondents had failed to prove possession over the suit property, as such the Civil Court has wrongly exercised the jurisdiction.

17. Since the '*declaratory suit*', can only to be instituted as provided by Chapter-VI of the Specific Relief Act 1877, therefore, before discussing the point of possession over suit property, I have gone through the Chapter-VI of the Specific Relief Act, 1877, which provides that any party entitled to any legal character institute a suit against any person, denying or interested to deny his title, but in the said suit the aggrieved party/plaintiff except declaration cannot ask for any further relief. Chapter VI of the Specific Relief Act is reproduced below:

Chapter VI of Declaratory Decrees

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

Bar to such declaration. Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.” (Bold and underlined added for emphasis).

Explanation. A trustee of property is a “person interested to deny” a title adverse to the title of some one who is not

in existence, and for whom, if the existence, he would be a trustee.”

18. Perusal of memo of plaint shows that plaintiffs/respondents had not only sought declaration but they had also sought directions for effecting mutation entries in their favour in respect of suit property so also orders for permanent injunction against the defendants, as such the suit filed by plaintiffs/respondents was also barred in view of restrictions provided under Section 42 of Specific Relief Act, 1877.

19. Coming to the point of possession over the suit property, it appears that the learned trial Court in order to determine the possession vide order dated 21.09.2017 (**available at page-161**) directed the Supervising Tapedar to inspect the property and submit report in respect of entry in question and in compliance of said Order the Supervising Tapedar submitted his report, which proves the possession of appellant/defendant over the suit property, however there is no mention about said inspection report in the impugned judgments and decrees. Further the plaintiffs/respondents did not enter into witness box and led their evidence through attorney, who during cross-examination admitted that appellant/defendant is in possession of the suit property by stating that *“the plaintiffs and his legal heirs never remain in possession of the land in suit since year 1982 and the defendant No.07 was owner of the disputed property, therefore, the deceased Muhammad Siddique and his legal heirs never filed any case or civil suit since 1982 till filing of the present suit”*, but again this clear and specific admission on part of plaintiffs/respondents do not find any mention in the impugned judgments and decrees.

20. It is noted that two specific Issues i.e Issue No.1 and 2 were framed with regard to possession of parties and installation of patrol pump over the suit property and in my view the burden to prove the same was on respondents/plaintiffs since they had instituted the suit, yet it was held by the learned trial Court that burden is on appellant/defendant No.7 to prove the same. Irrespectively the appellant/defendant No.7 claimed that after purchase of suit property in the year 1982 he had installed patrol pump thereon and his said claim was substantiated by the above-referred inspection report submitted by Supervising Tapedar and clear admission on part of attorney of respondents/plaintiffs, yet the trial Court presumed that respondents/plaintiffs are in possession of the suit property and as such exercised the jurisdiction, though there was no explanation on part of the respondents/plaintiffs that under what capacity they had permitted the appellant/defendant No.7 to install patrol pump on suit property and as to why they and/or their predecessor-in-interest had not filed any proceedings against appellant/defendant No.7 till 2017 i.e for about 35 years.

21. Evidence of attorney of respondents/plaintiffs further shows that though during examination-in-chief he claimed that they had approached the revenue authorities, however during cross-examination he stated that “*we have not produced any document that we approached the Revenue Authorities for redressal of our grievance.*” Said attorney further deposed during cross-examination that they filed petition before this Court wherein directions were issued for filing the Civil Suit, however, during cross-examination he stated that “*I have incorrectly deposed that directions for filing of the suit were issued by the Honourable High Court but it was disposed of on merit without any direction.*” The said attorney also denied installation of patrol pump at the suit property by the appellant/defendant No.7, however, his said claim was negated by the report of Supervising Tapedar, referred to above, so also report of the Commissioner appointed by this Court vide Order dated 13.02.2023 in order to surface the true picture of the site. The report dated 14.03.2023 filed by the Commissioner, appointed by this Court, is supported by the photographs of the suit land, which show existence of patrol tanks and Mosque and as such substantiate the claim of appellant/defendant No.7.

22. Perusal of both judgments and decrees reflect that claim of appellant/defendant, as to installation of patrol pump at the suit property, was brushed aside by the Courts below only on the ground that appellant/defendant No.7 had only produced NOC issued the by Assistant Commissioner concerned regarding installation of patrol pump and failed to produce any other document. However, the documents submitted by the respondent No.8/Mukhtiarkar concerned through his report dated 09.02.2023 before this Court under the statement of Additional A.G Sindh dated 13.02.2023 again substantiate the claim of appellant/defendant No.7, since the said documents include (i) approved Map bearing No.4498 dated 31.08.1983, (ii) NOC dated 12.10.1983 issued by SSP Nawabshah, (iii) NOC dated 13.10.1983 issued by Assistant Commissioner Moro, (iv) NOC dated 13.10.1983 issued by Executive Engineer Highways Moro, (v) NOC dated 19.10.1983 issued by District Magistrate Nawabshah, (vi) Form-K license, (vii) Letter issued by Shell Pakistan Limited Company and (viii) Letter issued by Inspector Explosives Karachi.

23. Now question arises that whether this Court can consider the additional evidence/documents in appeal, which were not exhibited before trial Court. Rule 27(b) of Order XLI of C.P.C is very much clear, which provides that appellate Court can require any document to be produced or any witness to be examined for pronouncement of judgment or any other substantial cause. In present case the aforesaid documents have not been produced by the appellate/defendant No.7, however, same, as mentioned above, have been submitted by the Mukhtiarkar concerned on Court notice for which there is no restriction under the law. This view is fortified by the case reported in PLD 2007 Karachi 358.

24. Another important aspect of the case is that appellant/defendant No.7 claimed to have purchased the suit property from original owner late Muhammad Siddique in the year 1982 and thereafter installed the patrol pump, which has been proved by the report of Commissioner appointed by this Court as well as documents submitted by the Mukhtiarkar concerned as discussed above, however, the said late Muhammad Siddique/predecessor-in-interest had neither challenged the possession of appellant/defendant No.7 over the suit property nor filed any proceedings in respect of entry in question during his lifetime. Even the respondents/plaintiffs after the death of their predecessor-in-interest got mutated other properties in their names in the year 2003, but they did not approach revenue authorities in respect of suit property, except filing of present suit in the year 2017, which too after about 16 years of death of their predecessor-in-interest, who admittedly passed away in the year 2001.

25. Perusal of record further shows that though the respondents/plaintiffs denied the possession of appellant/defendant No.7 over the suit property, however, an application (**available at page-233**) was filed by the attorney of the respondents/plaintiffs in the year 2015 with SSP concerned wherein he alleged that they have been dispossessed from the suit property, however, even then no proceedings were initiated by them.

26. The above discussion led me to hold that since the respondents/plaintiffs had failed to prove their possession over the suit property rather the appellant/defendant No.7 is/was in possession thereof, as such the trial Court, being Court of civil jurisdiction, was not competent to entertain the suit, as the jurisdiction of trial Court was specifically barred by Section 172 of the Act 1967. Accordingly this appeal is allowed and in result whereof the impugned judgments and decrees so also orders in execution proceedings passed by the Courts below in F.C Suit No.41 of 2017 as well as Civil Appeal No.52 of 2021 are set aside. I have also perused the cases laws relied upon by the learned counsel for the respondents, however, same are distinguishable from the facts and circumstances of present case, hence no reliance can be placed thereon.

JUDGE