

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision No. S – 76 of 1997

Mst. Tahira Mir v. Mumtaz Hussain Shah and others

Date of hearing: **29-11-2021**

Date of announcement: **21-01-2022**

M/s Bhajandas Tejwani and Manoj Kumar Tejwani, Advocates for the Applicant.

M/s Muhammad Bux Khalidi and Shafqat Rahim Rajput, Advocates for private Respondents.

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J U D G M E N T

Muhammad Junaid Ghaffar, J. – This Civil Revision Application has been filed by the Applicant impugning judgment and decree dated 01-09-1997 and 15-09-1997, respectively, passed by the District Judge, Sukkur in Civil Appeal No.16 of 1996, whereby the judgment and decree dated 31-10-1996 and 06-11-1996, respectively, passed by the 1st Senior Civil Judge, Sukkur in F.C. Suit No.113 of 1988, through which the Suit of Applicant was decreed, has been set aside and the Suit has been dismissed.

2. Learned Counsel for the parties have filed written arguments which have been perused along with available record.

3. As per record it is the case of the Applicant that the Suit land was purchased from one Syed Noor Shah, who was purportedly the original allottee and was granted the said land vide order dated 21-09-1967 in satisfaction of his Mukhadami right by the Deputy Land Commissioner. It was averred that on such purchase, the record was also mutated in favour of the Applicant; whereas, possession was also handed over. It further appears that subsequently the said land was also allotted to one Syed Shah Muhammad Shah, who then conveyed the said land to Respondents No.1, 2 and 3. It is a matter of record that in such proceedings, the original allottee and seller of the land to the Applicant Syed Noor Shah appeared before the Deputy Land Commissioner and surrendered the Suit land in favour of legal heirs of Syed Shah Muhammad Shah, and based on this, order dated 20.5.1982 was passed. Being aggrieved, the Applicant

preferred Appeal before the Land Commissioner, who vide order dated 24-01-1988, remanded the matter to the Deputy Land Commissioner for passing a fresh order after hearing all the parties. It is the case of the Applicant that since the land was sold to her, the same could not have been surrendered. It further appears that before the proceedings on post-remand could be finalized, the Applicant filed a Suit for declaration and injunction, and the purported cause of action was the alleged conduct of the concerned Mukhtiarkar and purported forceful attempts of dispossession as well as cancellation of the mutation. The learned trial Judge after exchange of pleadings settled the following issues;

1. Whether the Plaintiff is owner of the Suit land?
2. Whether the allotment of suit land to deceased Shah Muhammad Shah was illegal?
3. Whether Noor Shah, predecessor in title surrendered the suit land to the legal heirs of deceased Noor Shah. If so what is its effect?
4. Whether the matter in dispute is pending with land Commissioner, if so what is its effect?
5. Whether jurisdiction of the Civil Court is barred under 64 MLR 1959?
6. Whether the suit is bad for non-joinder of parties?
7. Whether the Suit is not maintainable at law?
8. Whether the Plaintiff has not paid proper Court Fee Stamps?
9. Whether the Suit is time barred?
10. What should the Decree be?

4. The said Suit was decreed by the 1st Senior Civil Judge, Sukkur vide his judgment dated 31-10-1996, against which the private Respondents preferred Appeal, which has been allowed through the impugned judgment. As to the judgment of the trial court since admittedly the Applicant had already availed the remedy before the department and have even been successful in Appeal, whereas, the matter was remanded, therefore, the first and foremost issue which the learned trial court was required to deal with was Issue No.7, which has been decided by the learned trial court along with Issue Nos. 5,6,8 & 9 in the following terms;

The burden to prove in respect of these issues on the defendants and these issues are legal and inter-connected therefore I would like to discuss and decide these issue together. The defendants according to record have not

appeared and produced any evidence either oral or documentary, however, from the perusal of record it shows that the subject matter of suit does not fall within the prohibition of 66 MLR 1959, and it is not evident from material on the record that the suit is bad for mis-joinder of the parties, hence, these issues are replied not proved.

5. With utmost respect it may be observed that the learned trial court has fallen in serious error while deciding these issues. Firstly, for deciding legal issues, including an issue that whether the suit is maintainable, ordinarily no evidence is to be led by the parties and barring exceptions (which are not attracted in this case), the same has to be dealt with and decided by the Court itself, even if no evidence has been led. This also applies even if no such plea has been taken. Per settled law maintainability of a Suit is always a moot question and cannot be ignored or brushed aside on the ground that no evidence was led by a defendant. Once issues were framed to that effect, then it was incumbent upon the Court to decide the same in accordance with law on its own. Nonetheless, in this case, the aforesaid finding of the learned trial Court is not only sketchy and evasive, but even otherwise is devoid of any sound reasoning of its own. Therefore, the learned trial Court had miserably failed to appreciate the law and had fallen in grave error in deciding these legal issues in a slipshod manner. As to the other issues, since the very maintainability of the suit was not decided in accordance with law, any discussion on them would be an exercise in futility.

6. In Appeal the learned Appellate Court has also disagreed with the finding of the trial court on the issue of maintainability. It would be advantageous to refer to the findings of the learned Appellate Court, through which the Appeal has been allowed, and the judgment and decree has been set aside. The same reads as under:

“Appellant’s learned Advocate has contended that the order passed by Deputy Land Commissioner in the matter of double allotment was set-aside by the learned Land Commissioner, Sukkur and the matter remanded back for fresh decision after hearing Tahira Mir also. The revision against the remand order was dismissed by the learned Member Board of Revenue Sindh therefore the matter is pending before Deputy Land Commissioner, Sukkur. According to Learned Advocate the suit filed by Tahira Mir was with ulterior motive to create hurdles and not permit the Deputy Land Commissioner to proceed with the matter. He further argued that when the position is that proper forum i.e Deputy Land Commissioner (DLC) Sukkur is to exercise his jurisdiction over the matter and decided if the suit was not maintainable particularly when no order passed by any authority of Land Commission has been challenged. He also referred to MLR 64 paragraph 26. The second

objection of the learned Advocate was that the suit is barred u/s 11 of Sindh Revenue Jurisdiction Act 1876 and third attack by him was that the suit was barred by Limitation Act.

Learned Advocate representing the contesting respondents argued that though the matter was remanded to Deputy Land Commissioner and has not been decided by him but it was the act of Mukhtiarkar the respondent No.5 which gave the respondent/plaintiff cause of action for bringing the suit. According to learned Advocate Mukhtiarkar had threatened to interference with them mutation and possession over the land therefore the respondent No.1/plaintiff filed the suit.

The dispute is over the allotment of land resumed under Land Reforms MLR 64. The question involves is the duplication of allotment in respect of Survey numbers and the matter is pending before authorities of Land Commission since long. The Latest position is that the order passed by Deputy Land Commissioner was set-aside and the matter remanded to him for fresh decision after providing Tahira Mir with an opportunity of being heard and as such it is before the original forum which has yet to take decision in accordance with law. It is settled position of Law that Civil Court being court of ultimate jurisdiction can examine the orders of Special Forum and legality thereof but it can never exercise the original jurisdiction of those Forms. Here when the controversy is within the jurisdiction of Land Commission and is pending before the original forum the suit for declaring one allotment as legal and the other illegal is definitely not maintainable particularly when none of the order passed by the Land Commission authorities has been challenged through this suit.

As regards the allegation against Mukhtiarkar for tampering with the record and interference with the possession it is in the evidence of Mazharuddin the Attorney of the lady respondent/plaintiff that after allotment of the land to Shah Muhammad Shah mutation was made in his favour. Her learned advocate also admits that position saying that mutation was made in favour of Shah Muhammad Shah after decision by Deputy Land Commissioner, Sukkur. From this it is clear that the time when the respondent No.1/plaintiff alleged the threats to have been issued for cancellation of her entry the disputed land was not in her Khatta. On the contrary the mutation was in favour of Shah Muhammad Shah therefore the allegation appears to be false and concocted. In view of that position it will be erroneous to believe the other allegation about interference with the possession which is also linked with the allegation of threat of cancellation of the entries. In presence of the order of Land Commissioner Mukhtiarkar could never dare to interfere with possession of any party at his own. Thus the suit of lady in respect of injunction against Mukhtiarkar was also liable to be dismissed.

As regard the other contention of appellant's learned Advocate about limitation and Section 11 of Sindh Revenue Jurisdiction Act 1876 needless to give any clear finding in that respect particularly when the conclusion has been already drawn that the suit in respect of main prayer for declaration was not maintainable and in respect of the consequential relief of injunction is liable to dismissal.

The result of above discussion is that suit of respondent No.1 was liable to dismissal and has erroneously been decreed. The Judgment & decree are therefore set-aside. Consequently, the suit is dismissed. The respondent No.1 to suffer the costs throughout.”

7. From perusal of the aforesaid findings of the learned Appellate Court, it reflects that the Appellate Court has come to a conclusion that the very Suit of the Applicant was premature and not maintainable, as firstly, the Applicant had by herself chosen to avail the departmental remedy by approaching the Deputy Land Commissioner, and even in Appeal, was successful to the extent that the original order was set aside and matter was remanded to him for passing of an appropriate order. Admittedly, before any order could be passed, the Applicant filed instant Suit primarily seeking a relief against the Revenue authorities including the Mukhtiarkar concerned, and got the Suit decreed. This finding of the Appellate Court when examined in juxtaposition with the facts available on record, it appears that the learned Appellate Court was fully justified in setting aside the judgment and decree inasmuch as once an alternative remedy has been availed and the forum for such purposes has been selected by an aggrieved person, it is impermissible to abate the said proceedings in between and invoke jurisdiction of a Civil Court for the same purposes. Though the Suit and the prayer clause may have been differently worded, but in effect, the Suit was for a declaration that the Applicant is the lawful owner of the property in question having purchased lawfully from its owner / allottee. This relief could not have been sought through a Civil Court, once not only the remedy before the department has been availed; but so also for the reason that the matter was still pending adjudication before the first forum. In that case, any reliance on the evidence led by the parties is of no consequence, and in fact, an attempt has been made to prejudice the right of the Respondents before the original authority before whom the matter in hand was pending and was to be decided as directed by the Appellate forum.

8. Even otherwise, there is also another aspect, which need not be decided, but as a passing remark, it may be observed that the original allottee / seller of the land to the Applicant had appeared before the Deputy Land Commissioner in person and had surrendered the land in favour of Syed Shah Muhammad Shah, and therefore, the Applicant's grievance, if any, was confined against the said seller as to damages and compensation; but not against the present Respondents, and this is for the reason that Syed Noor Shah and Syed Shah Muhammad Shah, both were allotted land in claim of their certain rights, and the Suit land had a double allotment; hence, the same was surrendered. If the seller / original allottee had committed any fraud or misrepresentation with the present Applicant,

then at least to the extent of original allotment, the Applicant has no *locus standi*, but has to sue the seller in question. And precisely, this was required to be agitated before the forum chosen by the Applicant herself. The law in this regard is already settled that once a party has selected a legal forum for seeking any relief, then the said party cannot abate such proceedings in between and seek any other remedy for the same relief. Once that remedy was elected, then, by implication of the doctrine of election, the other remedy by way of a civil suit was barred¹.

9. In view of hereinabove facts and circumstances of this case, it appears that the impugned judgment of the Appellate Court dated 01.09.1997 does not warrant any interference by this Court, being based on proper appreciation of facts and law, and the judgment of the trial Court dated 31.10.1996 has been rightly set aside; hence, no case is made out. Accordingly, this Civil Revision Application, being misconceived, is hereby **dismissed** with pending application(s).

Dated: 21-01-2022

Abdul Basit

J U D G E

¹ Reliance can be placed on the cases of Trading Corporation of Pakistan v. Devan Sugar Mills Ltd. (PLD 2018 SC 828); and Daan Khan v. Assistant Collector (2019 CLC 483)