

(51)

ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA
Civil Revision Application No. S-43 of 2020

DATE OF HEARING	ORDER WITH SIGNATURE OF JUDGE
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1. For orders on office objections.
2. For orders on CMA No.261/2020.
3. For orders on CMA No.262/2020.
4. For hearing of main case.

Applicant : Arbab *alias* Arbab Ali through his attorney Abdul Wahid Rind Baloch.

Respondents : Abdul Jabbar Attar & others.

Mr. Zamir Ali Shah, advocate for applicant.

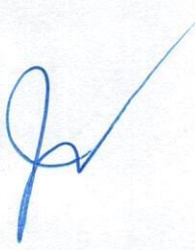
Date of hearing : 07.08.2020.

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ORDER.

This civil revision application has been filed against order dated 18.12.2019, passed by the District Judge, Jacobabad, whereby the judgment dated 17.4.2019 in F.C. Suit No.208/2017 passed by 1st Senior Civil Judge, Jacobabad, through which the suit of the respondents/ plaintiffs was dismissed, has been set aside with certain directions.

2. Learned Counsel for the applicant submits that the learned trial Court had passed a very reasoned order by dismissing the suit of the plaintiffs; that the plaintiffs had failed to prove in evidence their pleadings; that the onus was on the plaintiffs to establish that the defendant/ applicant was in unlawful possession of the suit property; that the appellate Court has set aside the judgment of the trial Court without proper reasoning; hence, this civil revision application merits consideration.



3. I have heard the learned Counsel for the applicant and perused the record.

4. It appears that the suit of the plaintiffs/respondents was for declaration that they are the exclusive owners of agricultural land to the extent of an area of 2-16½ acres having 50% share out of survey No.100, area 4-33 acres, situated in Deh Aqilpur, Tapo Janidero, Taluka & District Jacobabad and the defendant is in unlawful possession of an area of 3200 sq. feet out of the suit land. The plaintiffs led evidence and also summoned the concerned Mukhtiarkar, who in his cross-examination and by record submitted that the plaintiffs were in fact still the owners of the suit property to the extent of 100% in his record, (which unfortunately has been discarded as an old entry by the learned trial Court) and the sale deed, whereby 50% share was sold out, has still not been mutated in their record. The learned trial Court settled the following issues, wherein the relevant issue is issue No.3 and reads as under:-

1. *Whether the suit of plaintiffs is not maintainable under the law? OPD.*
2. *Whether the plaintiffs are exclusive owners of the property viz: agricultural land to the extent of an area 02-16½ acres being 50% share in Survey No.100 of DehAqilpur, Tapo and Taluka Jacobabad? OPP*
3. ***Whether the defendant is in unlawful possession of an area of 3200 square feet out of suit land viz. agricultural land to the extent of an area 02-16½ acres being 50% share of plaintiffs in Survey No.100 of DehAqilpur, Tapo and Taluka Jacobabad? OPP***
4. *Whether the plaintiffs are entitled to any relief claimed? OPP.*
5. *What should the decree be?*

4. The findings of the trial Court in respect of issue No.3 read as under:-

"14. The onus lies upon the plaintiffs to prove that the defendant is in unlawful possession of an area of 3200 sq. feet out of suit land viz. agricultural land to the extent of an area 02-16½ acres being 50% share of plaintiffs in Survey No.100 of Deh Aqilpur, Tapo and Taluka Jacobabad. In support thereof, the plaintiff requested for examination of Mukhtiarkar concerned with production of relevant record. Such request was allowed after hearing the parties. Thereafter, the Mukhtiarkar concerned appeared and deposed at Ex.27 with production of relevant document viz. Deh Form VII-B entry No.401 dated 20.06.1994, copy of Faisla dated 08.03.2017 held by him, his report addressed to Deputy Commissioner, Jacobabad and statements of two witnesses.

15. It is noteworthy that the entry of Form VII-B in respect of suit property produced by Mukhtiarkar has been admitted by the plaintiff in his cross as an old one with his further admission/failure to produce the fresh entry after selling an area 50,000/55,000 sq. feet from suit property. Thus, after sale of certain area of suit land vide registered sale deeds, a fresh entry in respect of remaining area of the suit property was required to be produced. Hence, the old entry produced by Mukhtiarkar in respect of suit property cannot be considered as a substitute for the fresh entry. Besides, the Mukhtiarkar has produced the attested copy of Faisla held by him between the parties showing measurement of suit property in presence of both parties (plaintiffs and defendant) wherein the house of defendant is shown falling within the ambits of the suit property. In respect of such faisla, the learned Counsel for the defendant has raised objection regarding its legality being in violation of Rule 67-A of Land Revenue Rules. The rule provides that it is mandatory to issue notice to both the parties regarding demarcation of land with full description and time, date and place thereof. However, the plaintiff has admitted in his cross-examination that neither the plaintiff was present during impugned demarcation nor was served with such notice. The relevant portion of his such cross-examination is reproduced as under:-

"It is correct to suggest that I have not produced the map of encroached property and the latest entry of suit property with that application to the Mukhtiarkar. It is correct to suggest that I had not mentioned the location of alleged encroached property, in the application. It is correct to suggest that the Mukhtiarkar had not determined the location and boundaries of allegedly encroached property/a house of 3200 sq. ft. out of survey No.100. It is correct to suggest that Mukhtiarkar had not issued the notice to any of the owner of survey No.100, before measurement. The Mukhtiarkar had prepared the sketch of survey number 100. It is correct that such sketch has not been produced either by the Mukhtiarkar or by me."

15. Thus, the legality of faisla of Mukhtiarkar in respect of demarcation has become questionable in the light of conditions envisaged under Rule 67-A of Land Revenue Act and the admission of plaintiff thereon. Therefore, such faisla of Mukhtiarkar along with its corresponding letters cannot be made worthy of reliance.

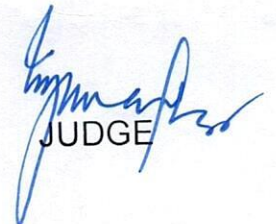
16. In this regard, the learned Counsel for plaintiffs has contended that the defendant is an encroacher and he does not have any title document of his house. Instead, the plaintiffs have a better title. The learned Counsel for plaintiffs has patiently been heard at length. However, it is settled law that the plaintiff has to prove his case on his own legs and not on the infirmity of the defendant. In this regard, I place my humble reliance on 2010 SCMR 1630 (Supreme Court of Pakistan) Re: Sultan Muhammad and another Vs. Muhammad Qasim and another:

"Art. 117---Burden of proof, failure to discharge---Effect---Party approaching court for grant of relief would have to discharge his own burden and stand on his own legs to succeed and could not avail benefit of any weakness in case of opposite party."

17. Thus, in the light of above admissions by the plaintiff No.01 in his cross-examination, they have been failed to establish the location of defendant's house within the ambit of suit property. Therefore, the issue under discussion is answered in negative."

5. Perusal of the aforesaid findings of the learned trial Court reflects that despite evidence of the concerned Mukhtiarkar as to the ownership and the relevant entries in the record of rights, the learned trial Court has failed to appreciate the same and has instead put the burden of proof upon the plaintiffs. It is the case of the plaintiffs that the defendant has encroached upon the land of the plaintiffs, whereas the defendant did not come up with any evidence as to any lawful possession of the land in question. The learned trial Court after reproducing the cross-examination of the concerned Mukhtiarkar went on to hold that any settlement / faisla arrived at by the concerned Mukhtiarkar was also against the provisions of the Land Revenue Act and cannot be entertained as worthy of any reliance. However, notwithstanding the glaring incorrect approach of the trial Court, the appropriate course of action at the least, and by giving benefit of doubt to the defendant, was to get proper demarcation by a local commissioner after notice to both the parties to resolve the controversy as to the alleged illegal possession of the

land by the defendant. Instead the learned trial Court has dismissed the entire suit. The learned appellate Court while setting aside the order of the trial Court has correctly appreciated the evidence led by the parties in juxtaposition to the facts of the case and has been pleased to note that the *real controversy between the parties is that whether the defendant has occupied the land of the plaintiffs from the survey number in question or not.* The learned appellate Court has further observed that if the report of the Mukhtiarkar was ambiguous as held by the learned trial Court, then the dispute could have only been resolved through fresh demarcation of the suit property. In these circumstances, the learned appellate Court has set aside the order with direction to appoint a fresh local commissioner to resolve the controversy. I am of the view that the order of the learned appellate Court warrants no interference as no case for any indulgence has been made out to so as to upset the impugned order while exercising jurisdiction under Section 115, CPC, as no prejudice would be caused to the defendant by remand of the matter to the learned trial Court for a fresh demarcation. It in fact protects both the parties fairly and justly. Accordingly, this civil revision application being misconceived is hereby dismissed in *limine* along with pending applications.


JUDGE