

ORDER SHEET  
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA  
Civil Revision Application No.S-07 of 2009

DATE OF HEARING	ORDER WITH SIGNATURE OF JUDGE
-----------------	-------------------------------

1. For orders on CMA No.125/2011.
2. For hearing of CMA No.55/2009.
3. For hearing of main case.

**Applicants** : Mst. Razia Begum through her attorney, namely, Zia Ahmed Jalbani.

**Respondents** : Farid Khan Jalbani through his L.Rs and others.

**Mr. Gulzb Rai C. Jessrani, advocate for applicant.**  
**Mr. Imdad Ali Mashori, advocate for L.Rs of respondent No.1.**  
**Mr. Munawar Ali Abbasi, Asst. Advocate General.**

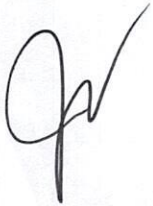
**Date of hearing** : 18.09.2017.

**Date of Order** : 18.09.2017.

O R D E R.

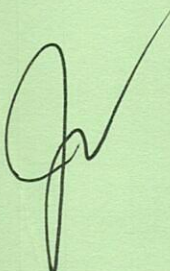
Through this Civil Revision application, the applicant has impugned judgment dated 22.01.2009 passed in Civil Appeal No.34/2006 by the 1<sup>st</sup> Additional District Judge, Larkana, whereby, the appeal has been dismissed by upholding the judgment dated 31.10.2006 and decree dated 06.11.2006 passed by the III-Senior Civil Judge, Larkana, who had dismissed the Suit of the applicant/plaintiff.

2. Briefly, the facts as stated appear to be that the applicant filed a Suit for declaration, possession and perpetual injunction and after filing of written statement the Court settled the issues and after recording of evidence decided Issue No.2 regarding ownership of the Suit land in favour of the applicant and the other issues against the applicant, including issue regarding maintainability of the Suit, which was filed on the basis of power of attorney. The applicant then filed appeal, wherein the appellate Court adjudicated the matter in respect of issue Nos.3 and 4 and dismissed the appeal, hence instant revision application.



3. Learned Counsel for the applicant submits that both the Courts below have erred in law and facts and it is a case of misreading and non-reading of the evidence inasmuch as once the trial Court gave its findings in affirmative in respect of issue No.2, the learned trial Court could not have dismissed the Suit merely on the ground that compliance of Order VI, Rule 2, CPC was not made by specifically mentioning the fact that plaint has been filed through attorney. He has referred to the memo of plaint and the verification clause and submits that substantial compliance was made; therefore, Suit could not have been dismissed on such basis. In respect of issues No.3 and 4, he submits that the trial Court as well as the appellate Court have failed to appreciate the evidence including the report of Assistant Mukhtiarkar, Larkana and Commissioner of Site inspection dated 28.6.2003, which was furnished pursuant to the directions of the trial Court and, therefore, both these issues ought to have been decided in favour of the applicant. Learned Counsel has also referred to the certified copy of the power of attorney and in support he has relied upon the case of *Nasir Abbas v. Manzoor Haider Shah* (**PLD 1989 SC 568**).

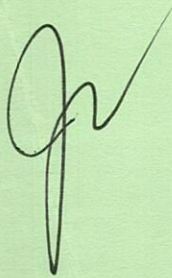
4. On the other hand, learned Counsel for respondents submits that the Suit was not maintainable, as the applicant claims ownership on the basis of an agreement and such Suit was barred under Section 42 of the Specific Relief Act and, therefore, the appellate Court has correctly taken notice of the same and dismissed the appeal. He further submits that the respondents are owners of the property on the basis of 'Sanads' issued under the Goth Abad Scheme and they had led evidence in support of their claim, which has been correctly appreciated and, therefore, instant Revision be dismissed.



5. I have heard both the learned Counsel and perused the record.

6. It appears that applicant filed a Suit for declaration, possession and perpetual injunction in respect of property bearing Nos. 110, 111, 112 & 113 measuring 2178 Sq.ft near Grid Station Ratodero purportedly purchased from Ghulam Abbas, Khush Muhammad, Muhammad Umer & Sobdar Khan on the basis of separate agreement(s) all dated 4.11.1997. The sellers were owners on the basis of Sanads duly mutated in revenue records through Deh Form-II. The dispute with respondent/defendant who purportedly owns Survey Nos.170 & 171 on the basis of Sanads issued under the Goth Abad Scheme, is to the effect that the defendants land is encroaching upon the applicants Survey Nos. and it is the case of the applicant that the defendant may be the owners of their Survey Nos. but at a different location and not on the land of the applicant. The learned Trial Court after exchange of pleadings settled the following issues and it would be advantageous to reproduce the issues adopted by the trial Court, which read as under:-

1. Whether the Suit is not maintainable according to law?
2. Whether Plaintiff is owner of 04 plots bearing Nos.110, 111, 112 & 113, situated in Deh Ratodero, Taluka Ratodero?
3. Whether correct number of disputed two plots is 110 and 111 OR 170 and 171?
4. Whether defendant No.1 had illegally encroached upon two plots of Plaintiff bearing No.110 & 111 OR the defendant NO.1 has constructed the house on his own plots bearing No.110 and 171?
5. Whether Plaintiff is entitled for Possession of two plots bearing Nos.110 and 111?
6. Whether the Plaintiff is entitled for the reliefs as prayed for?
7. What should the decree be?



7. Insofar as issue No.2 is concerned, the trial Court after examining the evidence came to the conclusion that the applicant/plaintiff has produced sufficient oral as well as documentary evidence to prove that the applicant/plaintiff is the owner of the Suit plots and accordingly issue No.2 was answered in affirmative. Insofar as issue No.1 regarding maintainability of the Suit is concerned, the trial Court decided the same against the applicant on the ground that compliance of Order VI, Rule 2 CPC has not been made, whereas, Issue Nos. 3 & 4 were also decided against the applicant by holding that the same were not proved satisfactorily. Insofar as Issue No.2 regarding maintainability is concerned, on perusal of the plaint and so also the above provision of Civil Procedure Code, I am of the view that substantial compliance was made by the applicant inasmuch as in the title of the plaint as well as in the verification clause it was clearly stated that the Suit is being filed on the basis of a power of attorney and such copy was also on the record of the trial Court brought through evidence of plaintiffs' attorney. It further appears to be a fact that Suit was filed by the husband of the plaintiff on the basis of such power of attorney, therefore, in my view the trial Court seriously erred in coming to the conclusion that Suit was not maintainable for non-compliance of Order VI, Rule 2, CPC. The issue in such circumstances ought to have been answered in favour of the applicant/plaintiff, and is so ordered accordingly.

8. Insofar as Issues No.3 and 4 are concerned, both these issues were decided by the trial Court against the applicant and the learned appellate Court while deciding the appeal considered both these issues as points for determination and was required to give its finding on both these issues; however, perusal of the appellate order reflects that the appellate Court instead of appreciating the evidence on both these issues, has in fact discussed the ownership of the

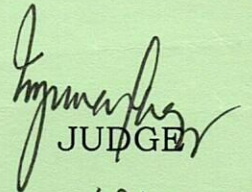


applicant, in respect of which the trial Court had given finding in favour of the applicant. The said finding was neither challenged by the respondents through any independent appeal or for that matter through any cross-objections in the appeal of the applicant. In such circumstances, issue No.2 and its findings in favour of the applicant attained finality and could not have been disturbed by the appellate Court. The appellate Court has seriously erred in giving its finding by holding that the Suit was hit by Section 42 of the Specific Relief Act, as the question of ownership already stood decided in favour of the applicant, whereas, neither any such issue was under challenge nor the appellate Court in terms of Order 41 Rule 31 CPC had framed any such point for determination. Moreover, the entire finding in respect of issues No.3 and 4 of the appellate Court does not reflect that the evidence has been properly appreciated inasmuch as the report of the Assistant Mukhtiarkar has not been considered, whereas he was appointed by the trial Court for inspecting the site and to determine as to whether the Suit property of the applicant is located on the same site as that of the defendants/respondents. The appellate order appears to be an order wherein misreading and non-reading of the evidence is apparent from bare perusal of the same.

9. In view of hereinabove facts and circumstances of this case, I am of the view that a case for indulgence is made out by the applicant and, therefore, this Civil Revision application is allowed in the terms that insofar as issue No.1 is concerned, the Suit of the applicant/ plaintiff is maintainable in law and the same being a legal issue is answered in favour of the applicant. Insofar as issue No.2 is concerned, the same already stands decided in favour of the applicant by the trial Court, against which neither any appeal was preferred nor any cross-objections were filed, the same, therefore, stands finally decided in the affirmative and in favour of the applicant. Insofar as the

findings of the appellate Court in respect of issues No.3 and 4, which were also framed as points for determination is concerned, both these findings are hereby set aside and the matter is remanded to the appellate Court for deciding both these issues afresh on the basis of the evidence recorded by the parties and so also after considering the report dated 28.6.2003 furnished by the Assistant Mukhtiarkar on the directions of the trial Court. If the appellate Court after remand decided these issues in favor of the applicant, then as a corollary, findings on Issue Nos. 5, 6, & 7 shall also be recorded by the said Court.

10. Instant Civil Revision application is allowed in the aforesaid terms.

  
JUDGE  
18/9/17

Qazi Tahir PA/\*