

ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA
Civil Revision Application No.S-06 of 2014
Constitutional Petition No.S-174 of 2012

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

Applicant /Petitioner : Muhammad Ayoub Khoso through Mr. Rafique Ahmed K. Abro, Advocate.

Respondents: Mohammad Ali Siyal through his L.Rs Mst. Sarya Shaheen and others, through Mr. Asif Hussain Chandio, Advocate.

Date of hearing : 11.09.2017.
Date of Order : 29.09.2017.

J U D G M E N T

Muhammad Junaid Ghaffar, J: Through this Civil Revision Application, the applicant has impugned judgment dated 13.11.2013 passed by the II-Additional District Judge, Mehar, District Dadu in Civil Appeal No.83 of 2010, whereby, while dismissing the appeal, the Court has maintained judgment dated 25.5.2010 and decree dated 31.05.2010 passed in consolidated Suit Nos.89/2008 and 93/2008, through which the Suit filed by the applicant was dismissed, whereas the Suit filed by respondent No.1 was decreed. In the Constitutional Petition, the petitioner / applicant has impugned order(s) dated 30.11.2012 and 02.03.2012 passed by Senior Civil Judge and IInd Additional District Judge, Mehar in Execution Application No.19 of 2011 and Civil Revision No.03 of 2012, whereby, the Execution application has been allowed. On 15.3.2012 the order of the Executing Court was stayed.

2. Precisely, the facts as stated appear to be that respondent No.1 initially filed F.C. Suit No.89/2008 against the applicant and others for declaration and permanent injunction. In the said Suit, written statement was filed by the applicant on 31.3.2009, whereas, the applicant, also filed F.C. Suit No.93/2008 for declaration, cancellation of illegal sale deed dated 01.9.2008 and such Suit was filed on 10.10.2009. Thereafter, the respondent No.1 filed an

application under Order VI, Rule 17, CPC and sought amendment in his plaint, which was allowed on 08.9.2009 and through such amendment the respondent No.1 also sought cancellation of registered sale deed dated 17.9.2007 issued in favour of the applicant along with recovery of stolen articles and permanent injunction. The case of respondent No.1 is that he is owner of City Survey No.82, admeasuring 1365.7 sq.ft. situated in Mehar Town, out of which an area of 1173 sq.ft: consists of a residential house, which was owned by Muhammad Abdul Munaim, who inherited the same from his father Muhammad Abdul Hakeem Shaikh and after Foti Khata Badal he intended to sell the same, which was purchased by respondent No.1 on the basis of an agreement. It is his case further that during the pendency of the Suit one Bakhshal Khan Khoso sold out Suit premises to his son i.e. the applicant through registered sale deed dated 17.9.2007, for which he had no title, right or interest. In this context he relied upon Rubkari, dated 25.10.2008 issued by the Sub Registrar, Dadu.

3. On the other hand, the case of the applicant in his Suit No.93/2008 is that the property was originally owned by Abdul Hakeem Shaikh through entry dated 29.05.1974, who sold it to Bakhshal Khan on 29.7.1975 and such entry was kept in the record of City Survey. According to the applicant, Bakhshal Khan sold the Suit property to the applicant through sale deed dated 17.9.2007 before Sub Registrar, Mehar and the entry is also recorded with the City Survey. It is also stated by the applicant that he is in possession of the property since 1975, as Bakhshal Khan was his father who had purchased the same from Abdul Hakeem Shaikh.

4. After exchange of pleadings, the learned trial Court settled the following issues for adjudication and Suit No 89/2008 being earlier in time was treated as a leading Suit:-

1. Whether Suit house was originally the property of Muhammad Abdul Munaim, who inherited the same from his father Mohammad Abdul Hakeem Shaikh, from whom the plaintiff purchased the Suit house through agreement and then the plaintiff executed registered sale deed in his favour vide receipt No.106 Serial No.1659 dated 1.9.2008?
2. Whether the registered sale deed dated 17.9.2007 in favour of defendant No.1 is illegal, void and is aliable to be cancelled?
3. Whether the defendant No.1 on the basis of false registered sale deed robbed/removed the valuable articles cash amount from the house of plaintiff (Mohammad Ali Siyal) forcibly with malafide intention, hence the defendant No.1 is liable to return the robbed articles?

4. Whether the plaintiff Mohammad Ali Siyal is in possession, occupation and enjoyment of the Suit house since its purchase?
5. Whether the Suit house was the property of one Abdul Hakeem son of Shaikh Imam, who sold it to one Buxial Khan son of Balach Khan Khoso, such record of rights was mutated in his favour?
6. Whether said Buxial Khan Khoso sold the Suit house to plaintiff (Mohammad Ayoub) for sale consideration of Rs.91,000/- through registered sale deed dated 17.9.2007, such record was mutated in favour of plaintiff dated 26.9.2007?
7. Whether the defendants created dispute with the plaintiff hence such FIR was also registered against the defendants (In F.C. Suit No.93/2008).
8. Whether the plaintiff Mohammad Ali Siyal is legal and rightful purchaser of the Suit house or defendant Mohammad Ayoub?
9. Who plaintiff is entitled for the relief claimed for?
10. What should the decree be?

5. The respondent No.1 examined himself and produced Rubkari as Exh.44-A, photocopy of registered sale deed dated 17.9.2007 as Exh.44-B, original registered sale deed dated 01.9.2008 as Exh.44-C. The respondent No.1 also examined Sub Registrar, Dadu as Exh.46 and also examined City Surveyor as Exh.49.

6. On the other hand, the applicant examined himself as Exh.52, and produced the Original True Copy of extract from the property register card regarding survey No.82/1 in favour of Abdul Hakeem as Exh.52/A, true copy of extract from property register card in respect of Survey No.82/1 in favour of the applicant as Exh.52/B, original copy of registered sale deed dated 17.9.2007 in his favour as Exh.52/C. He also examined witness of registered sale deed, namely, Asadullah as Exh.53. The learned trial Court after recording evidence came to the conclusion that respondent No.1 has proved his case, hence his Suit was decreed, whereas the Suit of the applicant was dismissed. In appeal through impugned judgment the learned Appellate Court has maintained the judgment and decree passed by the trial Court.

7. Learned Counsel for the applicant has contended that the Courts below have failed to appreciate the evidence properly inasmuch as the respondent No.1 never produced his alleged sale deed with the plaint, whereas he only produced a photocopy of the receipt regarding the execution of the sale deed; that the learned trial Court only relied

upon the deposition of the City Surveyor, which otherwise goes in favour of the applicant; that the applicant has always been in possession of the property in question, whereas, the bills were produced in evidence which are in the name of the applicant; that admittedly there is no entry in the city survey record regarding the alleged sale deed of the respondent No.1, which he has admitted in his cross-examination; that the applicant's claim is in fact in relation to City Survey No.82/1 and not 82, as claimed by respondent No.1; that proper entry exists in the revenue record regarding the applicant's ownership; that the applicant produced supporting evidence by examining Asadullah, who is the marginal witnesses of the sale deed and has also confirmed that the applicant resides in the Suit property and is in possession since 1975; that in case where the Courts below have misread the evidence, the revisional Court can reverse the findings and can interfere in its revisional jurisdiction. In support of his contentions, he has relied upon the case of *Islam-Ud-Din v Mst. Noor Jahan* (2016 SCMR 986), *Nazim-Ud-Din v Sheikh Zia-Ul-Qamar* (2016 SCMR 24), *Mst. Sarwar Bano v Province of Sindh* (PLD 2015 Sindh 445); *Ghulam Muhammad v Ghulam Ali* (2004 SCMR 1001), *Muhammad Akhtar v Mst. Manna* (2001 SCMR 1700) & *Noor Muhammad v Jamal Din* (2000 CLC 305).

8. On the other hand, learned Counsel for respondent No.1 has supported the impugned judgment(s) and has contended that both the Courts below have correctly appreciated the evidence available before them; that respondent No.1 examined the officials, who produced a Rubkari which does not support the case of the applicant; that the respondent No.1 is the lawful owner of City Survey No.82 and, therefore, this revision merits no consideration and is liable to be dismissed.

9. I have heard both the learned Counsel and perused the record placed before me including the R&P.

10. The precise facts have already been stated and need not be reiterated. The case of respondent No.1 initially in his Suit was only to the extent of declaration and permanent injunction and after filing of written statement by the applicant, the respondent No.1 amended his plaint and also included the prayer for cancellation of the sale deed dated 17.9.2007 in favour of the applicant. In Para 2 of his un-amended plaint it is stated *that at the time of transaction the possession of the Suit house was handed over to the plaintiff and the sellor [sic] promised that he will*

execute registered sale deed so soon in favour of the plaintiff. Again in Para No.3 it is stated that recently sellor [sic] Muhammad Muniam Shaikh executed registered sale deed in favour of the plaintiff vide receipt No.106 Serial No.1659 dated 1.9.2008. It is pertinent to observe that notwithstanding the amended plaint, when initially the respondent No.1 filed his Suit, the only declaration which was sought was to the extent of the alleged dispossession from the Suit property. The respondent No.1 had never sought a declaration regarding ownership on the basis of his sale deed 1.9.2008 on which subsequently he had relied upon. It further appears from perusal of his un-amended plaint that it was never disclosed as to when the property was actually purchased by him and it is only stated that "recently the seller Muhammad Munaim Shaikh executed registered sale deed in his faviour vide receipt No.106, Sr. No.1659 dated 1.9.2008". It is an admitted position and which fact was not denied by the Counsel of respondent No.1 that no sale deed was ever produced either with the original plaint or even with the amended plaint and thereafter it was produced in the evidence. In his cross-examination he states that "it is a fact that I have not produced any documents which shows the ownership of Abdul Manan except registered sale deed which was executed between me and Abdul Manan". He has further stated that "it is a fact that I have not produced any Sui gas, water supply or electricity bill in Court, however, I am residing in disputed house since 1970". This piece of evidence led by him is not confidence-inspiring as on the one hand he says that he is residing in the house since 1970, whereas, according to his own version the sale deed in question was executed in 2008. He has not stated that on what basis he was in possession and residing in Suit property. Moreover, it has not come on record through any document / evidence that as to how and on what basis Abdul Munaim inherited the property. Neither any date has been so stated nor has any extract of Foti Khata Badal been produced. And neither Abdul Munaid has come in evidence to support the case of respondent No.1. Even otherwise ownership in the name of Abdul Hakeem Shaikh has not been denied, and as per record he became owner for the first time on 29.5.1974, then how come respondent No.1 was having possession of the property since 1970 as claimed, whereas it is not his case that he had entered into any transaction with Abdul Hakeem Shaikh but with Abdul Munaim who had inherited the property allegedly. Such inheritance could not predate even the ownership date of his father. This all has a significant importance for the reason that Applicant claims that Suit property in question was

sold by Abdul Hakeem Shaikh (original owner which has not been denied) during his lifetime. He was further confronted and he states that "it is a fact that I have produced simple Photostat copy of agreement and Photostat copy of registration slip issued by Sub Registrar Mehar with my plaint in the Court". Again he says that "it is a fact that I had not produced Photostat copy of registered sale deed with my application under Order VI, Rule 17, CPC". Again to a question he states that "it is a fact that I have got registered sale deed in the year 2008, while the registered sale deed in favour of the father of the applicant pertains to the year 1975". On the other hand, the applicant in his evidence produced various documents, which include the City Survey Extract from Property Register of Survey No.82/1, dated 29.5.1974 as Exh.52-A, copy of extract from property register dated 26.9.2007 as Exh.52-B, and registered sale deed dated 17.9.2007 as Exh.52-C. In support, the applicant also examined one Asadulah Jamali (Exh-53) who is also one of the marginal witnesses to the sale deed, and who in his examination-in-chief has stated that the applicant is living in the disputed house since his childhood and he is also witness of the registered sale deed in question and he affirmed his signatures on the said sale deed. In cross-examination on an overall ascertainment it appears to me that his evidence to the extent of the sale deed in question was not shaken and, therefore, both the Courts below have failed to appreciate the evidence produced by the applicant in support of his sale deed.

11. Contrary to this the respondent No.1's case is solely dependent upon the report of the City Surveyor and the 'Rubkari' produced in evidence and on perusal of the same it appears that the said 'Rubkari' only challenges the entry in the name of Bakhshal Khan regarding survey No.82, whereas the case of applicant is to the effect that he is owner of survey No.82/1 and for which he had produced the extract of property register which reflects that there was an entry in favour of Abdul Hakeem Shaikh and was thereafter transferred in the name of Bakhshal Khan. This piece of evidence has not been considered by both the Courts below. On perusal of the judgment of the trial Court, it appears that the learned trial Court has been influenced with the examination of Sub Registrar, Dadu who supported the case of respondent No.1 regarding his 'Rubkari' to the effect that *there is no entry and the record in the name of Bakhshal Khan*. However, it has not been appreciated that this does not

substantiate and prove the case of respondent No.1 regarding his sale deed and ownership claim. The respondent No.1 has not been able to establish through cogent evidence that he was in possession since 1970, as claimed by him and even if he was in possession since 1970, then on what basis his possession was justified, as according to his own version, he purchased the property through sale deed in the year 2008, whereas his plaint is silent to the effect that whether he was in possession since 1970 or was there any other arrangement between him and the seller. It further appears that the learned trial Court has drawn an inference wrongly by stating that the applicant has created survey No.82/1 on his own to usurp the property of respondent No.1 bearing survey No.82. This is not justified or substantiated from any piece of evidence and is only a presumption on the part of the learned trial Court. It is settled law that cases are not to be adjudicated on the basis of conjectures and surmises and even on presumptions. The case must be proved on the basis of documents and the evidence so led by the parties. In the entire evidence led by respondent No.1, there is nothing to suggest the existence of sale deed and his possession. No witness in support of both has been produced. Moreover, if the case of applicant could not be proved according to the learned Trial Court (which in my opinion is not the case even otherwise), even then, there was no occasion to decree the Suit of respondent No.1 without any confidence inspiring and supporting evidence.

12. It is very surprising and strange to note that while dismissing the Suit of the plaintiff both the Courts below have failed to appreciate that the plaintiff in support of existence of his ownership of the Suit property had produce in evidence sufficient material including the Sale Deed, Entry in record of rights / property extract, marginal witness of the sale deed etc and despite this, only on the basis of a Rubkari (which incidentally is also in respect of S.No.82 and not 82/1), the Suit of applicant has been dismissed. In fact this is the only evidence (Rubkari Exh-44/A) which has prevailed upon the courts below in dismissal of applicants Suit. I am afraid this is not a correct approach. It is settled law that Entry in Revenue Records does not confer any title. Similarly, if there is no Revenue record of a transaction, which is based on some registered document (like sale deed in this matter), then the same cannot be discarded or cancelled ipso facto merely on such basis; rather proper evidence has to be led in this regard and the same has to be appreciated. Not only this, that the Suit of the applicant has

been dismissed, but even the Suit of respondent No.1 has been decreed, which included the prayer of cancellation of the sale deed dated 1.9.2007, duly registered in the name of the applicant. The matter does not end here, as conversely, the respondent No.1 has not even produced his Sale deed with the plaint (original or amended) and had only relied upon the receipt of such transaction. This is very surprising as well as alarming for this Court that on the basis of such defective evidence, not only the Suit of respondent No.1 has been decreed, but at the same time his Sale Deed has been accepted for declaration of his ownership. He had in fact not even prayed or pleaded for such a declaration. In absence of concrete and cogent as well as confidence inspiring evidence, and without examining any supporting witnesses, regarding purported purchase of Suit property by the Respondent No.1, it was required to be looked into with extreme care and caution.

13. In the case of ***Khalid Aziz v. Manzoor Hussain (2016 YLR Note 136)*** a learned Single Judge of this Court had the occasion to dilate upon the authenticity and validity of evidence of *Revenue Officials* brought on record by a contesting party in support of his / her case. The learned Judge has deprecated the practice of producing the *Revenue officials* in evidence without proper records and giving hearsay evidence in favor of one, and against the other. The relevant finding is as under;

10.....In law, he being beneficiary of alleged sale is required to prove actual transaction of the property and its possession. Record however speaks otherwise as there is factually no evidence in this regard. The evidence of some revenue officers i.e. Mukhtiarkar and Tapedar is of no help to conclude determinatively in favour of such transactions, for they have simply produced the relevant record and have spoken out what is recorded therein. When the very record (which creates rights over the property in favour of some persons in disregard to the rights of ostensible owners of the property) is alleged to have been tampered with, its production to support a claim is of no consequences. The claim endorsed in such record has to be first proved to lend degree of reliability to it. The respondents have not examined either the revenue officers who allegedly attested such mutation in their favour. And notably there is nothing on record to explain such failure on their part. Even no plea has been taken by them that these witnesses are either not available or their whereabouts are not known. In these circumstances the presumption in terms of Article 129 of Qanun-e-Shahadat Order, 1984 would be against them.....(Emphasis supplied)

14. Similarly in the case of ***Abdul Majeed v. Muhammad Subhan (1999 SCMR 1245)*** has been pleased to hold as follows;

10. It is very amazing to note that the Sale Mutation No. 133 attested on 21-3-1964 in respect of the disputed property, which was allegedly purchased by the registered sale-deed dated 10-1-1962, is neither based on this deed nor there is any mention of the deed. It is also very unique feature of this case that neither the original sale-deed was produced in Court nor permission was obtained for production of secondary evidence nor the vendee/defendant No.2 appeared in Court nor any of the marginal witnesses was examined, still it was boldly asserted that the execution of the deed has been proved. The same is the position of Sale Mutation No. 133 as its genuineness could not be proved as rightly concluded by the High Court. The finding of the High Court is that Abdul Majid respondent No.1 was Patwari of the area where the Suit land is situated and he collusively manoeuvred the attestation of the impugned mutations fraudulently and fabricated the fake registered sale-deed as he and his wife were the ultimate beneficiaries of all these transactions. This finding relates to factual appreciation of the controversy which need not be gone into as no substantial defect in reading oral or documentary evidence could be pointed out.

11. The learned counsel further argued that the registered sale-deed, mutation and Revenue Record are admissible in evidence and as the plea of the appellant finds support from all these documents, therefore, the High Court was not correct in discarding them. He referred to several cases to support his viewpoint. This is a sweeping and very wide argument and it is not so that everything which finds mention in the registered deed or Revenue Record must invariably be accepted without proof of their execution, genuineness and authenticity. It is axiomatic principle of law that a registered deed by itself, without proof of the execution and the genuineness of the transaction covered by it, would not confer any right. Similarly, a mutation although acted upon in Revenue Record, would not by its own force be sufficient to prove the genuineness of the transaction to which it purports unless the genuineness of the transaction is proved. There is no cavil with the proposition that these documents being part of public record are admissible in evidence but they by their own force would not prove the genuineness and execution of that to which they relate unless the transaction covered by them is substantiated from independent and reliable source. Admissibility is to be distinguished from proof required by law for determining the execution and genuineness of document. The plea of res judicata and estoppel were also raised against the plaintiff on account of, the earlier litigation. But we find that they have been satisfactorily resolved by the High Court as it has been said that the documents relied upon by the defendants were fake and fraudulent and, thus, could not form basis for declaring the present Suit as barred by res judicata or for applying the principle of estoppel against the plaintiff, This, appeal is found without merit and is, accordingly, dismissed with costs.

15. It is now a fact that at times the records are not properly maintained or produced and even then contrary evidence is given which badly affects the proper adjudication of cases before the Court. In this case (PW-2, Sub-Registrar, Dadu) has come in evidence to say that he had issued the Rubakari and voluntary stated "that there is no record of City Survey No.82 dated 29.7.1975 on the name of Buxial Khan s/o Baloch Khan Khoso as per record of our office", but at the same breath while being cross-examined he has also said "that I have

seen as Exh/44/B which is registered sale deed regarding C.S.No.82/1 in favour of Mohammad Ayoub Khoso while I have issued Roobkari in respect of C.S.No82". He did not bring any record of S.No.182/1, which is being claimed by the applicant. Nor even of S.No.82 except his Roobkari. This Court fails to understand as to how such piece of evidence has been appreciated in favor of respondent No.1, when the same is not supported by cogent documentary support. The said witness has only said that the name of predecessor of interest of applicant i.e. Buxial Khan is not recorded in the City Survey record in respect of S.No.82. That is correct because the applicant claims ownership of S.No.82/1 and not 82. The witness has not said in clear words that there is no record of Buxial Khan in S.No.82/1 as well. On the other hand the applicant has produced enough evidence to show from the Extract of Property Register Card that first owner was Abdul Hakeem by virtue of entry dated 29.5.1974 and then he sold it to Buxial Khan on 29.7.1975 for which also there is a proper entry in the Property Register Card. Moreover, in presence of a registered document reliance has been placed on the evidence of a Revenue Official without any supporting document.

16. The upshot of the above discussion is that both the Court(s) below have miserably failed to appreciate the evidence properly and it is a fit case of misreading and non-reading of evidence led by the parties, and therefore requires interference by this Court while exercising its revisional jurisdiction, in view of the dicta laid down by the Hon'ble Supreme Court in the case of, **Nazim-Ud-Din v Sheikh Zia-Ul-Qamar (2016 SCMR 24)**, wherein it has been held by the Hon'ble Supreme Court as follows;

....."It is settled law that ordinarily the revisional court would not interfere in the concurrent findings of fact recorded by the first two courts of fact but where there is misreading and non-reading of evidence on the record which is conspicuous, the revisional court shall interfere and can upset the concurrent findings, as well as where there is an error in the exercise of jurisdiction by the courts below and/or where the courts have acted in the exercise of its jurisdiction illegally or with material irregularity".

17. Similar view has been expressed by the Hon'ble Supreme Court in the case of **Islam-Ud-Din v Mst. Noor Jahan (2016 SCMR 986)** in the following manner:

9. Mr. Gulzarin Kiani, the learned counsel for the siblings, contended that the High Court in exercise of its revisional jurisdiction could not have set aside the findings of the two courts below and if at all it should have remanded the matter.

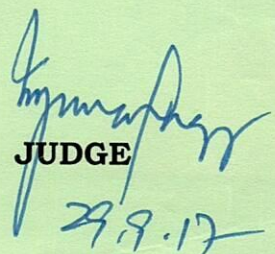
In this regard the learned counsel had cited a few cases (above). In the case of Saajananda Pandey, which was referred to in the case of Gul Rehman, the matter was remanded because "further investigation of some necessary facts" was required where after "many different principles" of law were to be dilated upon. However, there is no need of any further investigation in the present case nor the need to consider many different [legal] principles as a consequence thereof. In Iftikhar-ud-Din Haidar Gardezi's case it was held that judgments in revisional jurisdiction could only be assailed in terms of section 115 of the Code of Civil Procedure ("the Code"). We entirely agree. However, in the present case the trial and appellate courts had exercised jurisdiction vesting in them illegally or with material irregularity, as they disregarded Article 79 of the Qanun-e-Shahadat Order and misread or did not read the evidence as noted above. Since the parties had already lead evidence and the material facts had clearly emerged the High Court had correctly exercised its revisional jurisdiction under the Code. It was held in *Nabi Baksh v Fazal Hussain* (2008 SCMR 1454) that concurrent findings of the courts below can be set aside by the High Court in its revisional jurisdiction if the same, "were based on misreading or non-reading of the material available on record".

18. Further reliance can be placed on the cases of *Nabi Baksh v. Fazal Hussain* (2008 SCMR 1454), *Ghulam Muhammad v Ghulam Ali* (2004 SCMR 1001), & *Muhammad Akhtar v Mst. Manna* (2001 SCMR 1700).

19. In view of hereinabove facts and circumstances of the case, I am of the view that both the Court(s) below have failed to exercise the jurisdiction so vested in them and have completely misread the evidence on record while decreeing the Suit of respondent No.1. Accordingly the judgment dated 25.5.2010 and decree dated 31.05.2010 passed by the Senior Civil Judge, Mehar in F.C. Suit No.89 of 2008 as well as judgment dated 13.11.2013 passed by the Appellate Court in Civil Appeal No.83 of 2010 are set aside, whereas, F.C. Suit No. 93 of 2008 filed by the Applicant is decreed as prayed. Resultantly, the order dated 30.11.2011 passed in Execution Application No.19 of 2011 upheld vide order dated 2.3.2012 passed in Civil Revision No.03 of 2012 stands set aside by allowing C.P. No.S-174 of 2012.

20. Listed Revision as well as petition stands allowed as above.

Dated: 29.9.2017


JUDGE
29.9.17