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**IN THE HIGH COURT OF SINDH, CIRCUIT COURT,  
LARKANA**

Civil Revision Appln. No. S- 45 of 2013.

**Present:**

Mr. Justice Salahuddin Panhwar.

Muhammad Azeem Kalhoro. ....Applicant.

**Versus**

Agha Imdad Nabi & others. ....Respondents.

Mr. Rasool Bakhsh Soomro Advocate for the applicant.  
Mr. Habib-u-Rehman Jamali Advocate for respondent No.1.  
Mr. Abdul Hamid Bhurgri, Addl. A.G.


Date of hearing: 28.04.2014.  
Date of Judgment: 19.05.2014

**J U D G M E N T**

**Salahuddin Panhwar, J.-** Through instant civil revision, the applicant has assailed Judgment dated 11<sup>th</sup> October 2013 passed by Additional District Judge-III, Dadu; whereby suit filed by the respondent No.1 with regard to declaration, possession and permanent injunction was decreed through judgment and decree dated 28.3.2012 and 29.3.2012.

2. Precisely, relevant facts are that the plaintiff/respondent No.1, filed suit for declaration, possession and permanent injunction against the applicant/ defendant No.1, alleging therein that he owns survey No.161, in deh Kinro Kokol, Taluka Mehar, purchased through registered sale deed; survey No.155 belongs to applicant/defendant No.1, and applicant has encroched upon the area of 07 ghuntas, from the survey No.161 of plaintiff/respondent No.1, and has merged it in order to usurp the valuable portion of survey number 161, owned by him. Plaintiff further contended that the defendant No.1, attempting to sell out survey No.155, including the 7 ghunta of survey number of 161. Thus, he filed suit for possession.

3. On the contra, applicant/defendant while contesting the suit filed written statement, wherein claimed that he is in exclusive possession and occupation of 3-10 acres of survey No.155; no area of plaintiff's survey



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number is mixed up with survey No.155, and if the plaintiff has any objection to this, he may get the same measured through Settlement Commissioner, Record Office, Hyderabad, so to reach on correct conclusion about the area in possession of defendant No.1. He further claimed that the plaintiff has an evil eye over survey No.155.

4. Out of the divergent pleas of the respective parties, following issues were framed:

- (1) Whether, the defendant No.1 has encroached 07 ghuntas from survey No. 161 which belong to plaintiff and same 07 ghuntas has been merged with survey No.155, which belong to defendant No.1.
- (2) Whether, the defendant No.1 has made his survey number sikni in order to sell the same with malafide intention.
- (3) Whether, the defendant No.1, is liable to return back possession of 07 ghuntas to plaintiff being part and parcel of survey No.161.
- (4) Whether, the defendant No.1, is in possession and occupation of his own area and he never missed up any area from survey No.161 towards survey No.155.
- (5) What, should the decree be.

4. Learned counsel for the applicant has inter-alia, contended that judgment and decree passed by learned appellate court as well as trial court are bad in law; both inferior courts have not considered the material facts available on record; the factual position is that no area of the plaintiffs' survey number was mixed up with survey No.155 and even applicant/defendant had given option that if the plaintiff claims that his some area is mixed up with the survey No.155, he may get it measured through Settlement Commissioner Record Office, Hyderabad, but this aspect also had not been considered by the trial Court as well as appellate court.

5. On the other hand learned counsel for respondent contended that the impugned judgment is in accordance with law; the appellant/defendant failed to produce evidence that he has legal character of 03-10 acres and deh Form VII also indicates the total area of appellant/ defendant No.1 is 02-07 acres. Per learned counsel these facts are well discussed by both lower courts on each issue hence the judgment and decree, passed by the trial court as well maintained by the appellate court in favour of respondent/ plaintiff are

completely in accordance with law, and cannot be disturbed in revisional jurisdiction.

6. Before addressing the merits of the case it would be pertinent to mention that scope of revision, especially in the cases where concurrent findings are recorded by the inferior Courts is very limited. It is settled principle of law that re-appreciation of evidence at this stage is not permissible. Revisional Court cannot sit as appellate or original Court and it is settled view that only it has to be seen whether judgments of the lower Courts, suffers from patent illegality or irregularity or same are result of mis-reading or non-reading of evidence.

07. Keeping in view above touchstone, I have perused the available record. Learned counsel for the applicant has emphasized that trial Court as well as appellate Court have not examined the evidence brought on record in accordance with law, claim of the plaintiff was not substantiated with cogent evidence, and controversy regarding measurement of land involved between the parties was not properly adjudicated by both Courts. Suffice to say that it is matter of record that applicant has not disputed the ownership of defendant/ plaintiff, candidly agricultural land owned by both parties is adjacent to each other, and applicant has attempted to rely upon the report, which reflects that applicant is in illegal occupation of 02 ghunta land of survey number 161, which is owned by respondent/plaintiff. Further, applicant has pleaded that he is in occupation of 03 acres 10 ghuntas, whereas registered sale deeds as annexed in his evidence reveal that he has legal character of only 02-07 acres. However, with regard to this controversy it would be conducive to refer judgment of the trial Court as to verify whether such aspect was discussed and properly appreciated or not, hence last portion of discussion on point No.1 is reproduced hereunder:

*"An important part of the cross-examination of defendant No.1's attorney depicts that the previously filed suit was withdrawn on mutual understanding for the resolution of dispute out of the Court and the same carries the presumption of truth in favour of the plaintiff who finally approached the Court again when his grievance was not redressed. Equally, evaluation of the whole case from variety of angles suggests that it was defendant No.1 who encroached upon the part of plaintiff's land as such not only the dispute came out in shape of civil suit earlier filed and even remained in field till the institution of the*



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instant suit. Both the reports of the Tapedar refer encroachment of plaintiff's land by the defendant No.1 otherwise defendant No.1 would not have agreed upon the settlement of dispute out of Court but he did so just to camouflage the actual encroached area of plaintiff's land which is discovered in measurement carried out afresh. Defendant No.1 could not furnish plausible explanation as to why he stressed upon the authenticity of first report of Tapedar, Settlement and Survey Department and why he is not accepting the second report of the same Tapedar. However, it is of great importance that the reports of Tapedar, Settlement and Survey Department corresponds with the claim of plaintiff and on the other hand documentary evidence as well as admission of defendant No.1's attorney also supports the version of the plaintiff. Merely because that the official seal of the department or some other technical aspects are missing in the reports of Tapedar concern the same cannot be relied upon seems an afterthought idea generated in the mind of defendant No.1 just to camouflage the possession over extra area and merger of same in his own land otherwise the contents of the reports were not denied by the defendant No.1. It would be in the fitness of things to mention that in changed circumstances, Court always lean in favour of adjudication of lis on merits and for that purpose all the attending circumstances are to be kept under consideration, therefore, Court cannot follow the path chosen by the parties rather as custodian of law always find and discover the truth on the basis of evaluation of record. There is no question of waiver of right or estoppels but in fact the continuation of the cause of action. While closely examining the documentary evidence, I found that the two sale deeds produced by the defendant No.1 only depicts that he had purchased 1-03 and 1-4 acres, respectively but he is claiming in possession and occupation of 3-10 acre which is not only contrary to the factual position but also shows the contradictory defence version of defendant No.1 containing no sound proof of his actual occupation of land as owner, therefore, from whatever angle the case is examined the end result would be that the defendant No.1 is in occupation of 0-07 ghuntas extra land of plaintiff."

At this juncture issue No.4 is relevant; same is also reproduced as under:

"It is the case of plaintiff that survey No.155 belongs to defendant No.1 having an area of 07 ghuntas encroached by the defendant No.1 from survey No.161 of plaintiff and merged it. On the other hand, defendant No.1 claims that no any part or the area of plaintiff is mixed up with survey No.155 and if the plaintiff has any objection to this he may get the same measured through Settlement Commissioner, Record Office, Hyderabad, so reach correct conclusion about the area in possession of defendant No.1 as he is in exclusive possession and occupation of 3-10 acres of survey No.155.

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*It appears from the record i.e. two sale deeds produced by the defendant No.1 that the total area of 01-03 and 01-04 acres of survey No.155 was sold out to the defendant No.1 through two separate sale deeds whereas he himself is claiming in actual possession of 03-10 acres though Deh Form VII also indicates the total area of defendant No.1 as 02-07 acres, therefore, claim that the defendant No.1 is in possession and occupation of his own area and he never mixed up any area from survey No.161 towards survey No.155 seems not sound and contrary to the documentary record produced by his attorney and the actual picture emerged from the assessment of the entire record of the case and evaluation of the evidence is that the defendant No.1 enjoying possession of extra land which cannot be possible without merging the land or adjoining land owners who have boundaries of their land linked with the boundary of defendant No.1's land."*

While appellate Court has also discussed above aspect by framing the points of determination. Perusal of above, it is patent that applicant / defendant No.1 is owner of 02-07 acres, as properly discussed in above said portions of judgment which rights shall not be prejudiced or legally harmed even if the plaintiff / respondent No.1 is put into possession of his own (undisputed area) property, hence both courts below have not committed any illegality or irregularity. Moreover executing Court is bound to execute the judgment and decree in its letter and spirit, whereby only legal entitlement of the respondent/plaintiff No.1 will be restored to him. Executing Court may adopt any mode while delivering the possession to the respondent. Worth to add here that specific provisions are available in chapter twenty one of *Execution*, which enshrines comprehensive procedure, and thus any person, who is in possession with his legal entitlement cannot be dispossessed, therefore, under these circumstances the issue as resolved by both Courts, not requires further adjudication. With regard to the plea of applicant that application for calling additional evidence was declined by the appellate court illegally, it is pertinent to mention that such report was appended with written statement by the applicant/defendant, but he did not make attempt to produce the same in his evidence, whereas revenue surveyor of settlement department has categorically deposed in his evidence that applicant has occupied the *seven ghunta* of land owned by respondent/plaintiff thus instant plea is devoid of merits.

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8. Keeping in view the given circumstances, it appears that manifestly there is no illegality committed by the inferior Courts while adjudication the controversy between the parties. Besides, learned counsel for the applicant has failed to point out any material illegality or irregularity, which requires interference by this Court, hence instant revision being devoid of merits is dismissed.

  
Judge

Ansari.