

ORDER SHEET  
IN THE HIGH COURT OF SINDH,  
CIRCUIT COURT, HYDERABAD

R.A. No. 50 of 1998

Date of Hearing : 17.09.2015

Date of decision : 07.10.2015

Applicant : Gul son of Hussain  
Through Mr. Bahadur Ali Baloch Advocate who  
is called absent.

Respondent-1 : Jumo and others  
Through Mr. Hakim Ali Siddiqi, Advocate

Respondents No.3 to 5 : Province of Sindh and others  
Through Mr. Allah Bachayo Soomro Addl.A.G.

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

**NAZAR AKBAR, J.-** The applicant through this Civil Revision Application has called in question the judgment and decree dated 14.3.1998 and 18.3.1998 respectively passed by District Judge, Tharparkar at Mithi whereby Civil Appeal No. 28 of 1996 filed by respondents was allowed and the judgment and decree of dismissal of F.C. Suit No.144 of 1993 by Senior Civil Judge, Mithi was set aside and decreed the same. The applicant has assailed findings of the appellate court through the instant revision application.

2. Brief facts of the case are that respondents Nos.1 and 2 filed F.C. Suit No. 144 of 1993 against the applicant and official respondent Nos. 3 to 5 for declaration and permanent injunction claiming that they are legal heirs of late Luqman son Haroon. The Plaintiff case was that agricultural land admeasuring 4-31 situated in Survey Nos. 20 & 61 Deh Sandok Taluka Diplo (the suit land) was originally owned by their grandfather namely Haroon who died leaving behind (i) Gahu (son)

(ii) Luqman (Son) (iii) Mst. Ami (widow) & (iv) Mst. Zulekhan (daughter) as legal heirs. Subsequently, Mst. Ami also died leaving behind following legal heirs:-

<u>S.No.</u>	<u>Legal heirs</u>	<u>Relation</u>
Gaho (son)	Siddique	Son
Luqman (Son)	1. Jumo 2. Khameso	Sons
Mst. Zulekhan (daughter)	Misri	Son

3. After the death of Mst. Ami her share came to the legal heirs of her son Gaho namely Siddique and daughter's legal heirs namely Misri and the plaintiffs/respondent Nos. 1 and 2 as sons of Luqman. It was further claimed in the plaint that after the death of their father they being illiterate did not get their share mutated in the revenue record. However, they have been cultivating the suit land through co-sharer namely Siddique son of Gaho and Ezzo son of Allan. The plaintiffs also owned barrage land in Taluka Digri on lease as well as harp for the last 32 years and they always remained in possession of the same. The plaintiffs/ respondents Nos. 1 and 2 in the month of December, 1991 came to know from the Tapedar of the beat and from notice of an appeal filed by defendant No.1 before Revenue Authority that the same land was mutated in favour of defendant on false plea of adverse possession. Therefore, after obtaining true copy of relevant record they filed the above suit with the following prayer:-

- a. Declare that the plaintiffs / respondents being legal heirs of Luqman son of Haroon are lawful owners of the suit land to the extent of their share in it and their names are liable to be entered in the revenue record.
- b. Declare that the mutation affected by defendant No.2/ respondent No.3 in favour of defendant No.1/ applicant in respect of suit land is illegal, void ab-initio, malafide without jurisdiction and against the principles of natural justice and that the defendant No.1/ applicant is not owner of the suit land and his name is liable to be scored off from the record and the order of defendant No.2/ respondent No.3 is liable to be set-aside.

- c. Grant permanent injunction against the defendants restraining and prohibiting them from interfering in the peaceful possession of the plaintiffs over the suit land in any manner, by themselves or through their agents, subordinates, friends etc directly or indirectly.

4. The applicant/ defendant No.1 filed written statement whereby he stated that the suit land along with other lands namely Bhangrio, Wahar Bani and Duboo was originally belonged to Gahu, the great grandfather of the parties. It was claimed that Gahu had two sons namely Bachal and Yaroo. After the death of Gahu by private mutual agreement the suit land was given to Bachal while the land namely Bhangrio and 50 paisa share from Duboo was given to Yaroo. Since then, the suit land had been in cultivating possession of the legal heirs of Bachal namely defendant No.1 / applicant and Bhangrio Wahar Bani and 50 paisa share of Duboo had been in cultivating possession of legal heirs of Yaroo. He had also filed pedigree as Annexure 'A' that in the year 1967 the land was mutated in his name on the basis of statement of Siddique son of Gahu who is the real legal heir of Yaroo and Luqman son of Haroon. It was also claimed that the appeal of the plaintiff / respondent No.1 before the respondent No.4 was time barred by more than 26 years.

5. Learned trial court from the pleadings of the parties, framed the following issues:

1. Whether suit land is ancestral property of the plaintiffs and not the defendant No.1? If yes, then what is its effect?
2. Whether excepting the suit land, is there any other ancestral property, which was given to the plaintiffs? If yes, what is the effect?
3. Whether suit is time barred?
4. Whether the suit is not maintainable in law?
5. Who is in possession of suit property?
6. Whether this court has no jurisdiction to try this suit?
7. What should the decree be?

6. In order to prove their case, plaintiff / respondent No.1 namely Jumo examined himself as Ex.64 and produced documents as Ex.65, 66, 67 and 69. One

Muhammad Khan was also examined as Ex.70, as plaintiff's witness. The defendant / applicant Gul son of Hussain examined himself as Ex.79 and his witness, Ahmed as Ex.80 and closed the side.

7. The learned trial court on the basis of evidence led by the parties and considering the arguments advanced by the counsel for the parties dismissed the suit. Respondent Nos. 1 and 2 being aggrieved filed Civil Appeal No. 28 of 1996 before the District Judge, Tharparkar at Mithi. The said appeal was allowed and the suit of appellants was decreed by setting aside the judgment and decree of the trial court. This Revision Application is directed against appellate decree.

8. The counsel for the applicant has hardly appeared in this case during the 17 years, and at least since 2007 he has never attended the Court. I have heard Mr. Hakim Ali Siddiqui, learned counsel for the private respondents and perused the record.

9. The perusal of impugned order of District and Sessions Judge, Tharparkar shows that it is devoid of any reasoning and support of the evidence led by the parties. The learned appellate Court has not even framed the points for determination for deciding the Civil Appeal No.28 of 1996 and hardly on one and half typed page the appellate Court has reversed the findings of the Senior Civil Judge, Mithi in F.C.Suit No.144/1993, whereby the said suit had been dismissed on pure legal propositions i.e. issue Nos.3, 4 and 5. Issue No.3 was about the limitation; issue No.4 was on the question of maintainability, which was decided by the trial Court with reference to first proviso to **section 42** of the Specific Relief Act, 1877 and issue No.5 was on the point of possession of the suit property, which again was reflecting on the importance of the proviso to **section 42** of the Specific Relief Act, 1877 that a simple suit for declaration of ownership of immoveable property is not maintainable if by the plaintiff is not in possession and he does not seek possession through the Court. These three legal propositions have been examined by the trial Court in dismissing the suit and each proposition was supported by the case law. The learned appellate Court failed to examine the order of Deputy Commissioner and the appellate authority under the Land Revenue Act, 1894 available as Ex.69 (page-103 of the appeal) and report of the Commissioner available as annexure-"E" (page-91 of the appeal). The Ex.69 clearly indicates that

the applicants Khamiso and Jummo were aggrieved by order of Mukhtarker Diplo dated **01.09.1967** and they have filed an appeal against the said order before the Revenue Authorities on **28.12.1991**. Thereafter, on dismissal of their appeal on **18.04.1993** they have filed civil suit with the prayer that the mutation entry dated 01.09.1967 in favour of respondent No.1/applicant herein, may be declared void, ab-initio and illegal. It is pertinent to mention here that the learned appellate Court while declaring that the suit was maintainable and not barred under Article 14 of the Limitation Act, has referred to the order of respondent No.3 (Revenue Authority) dated **18.04.1993** as cut off date for limitation to file the suit. However, the learned trial Court has examined limitation from the cut off date determined by appellate Court and found the suit was still hit by Article 14 of Quanoon-e-Shahdat Order, 1984 while deciding issue No.3 in the following term:-

“It has been pleaded by the plaintiffs, in their plaint, that they came to know about the mutation, in favour of the defendant Gul in the month of December 1991. Even if we assume, that the plaintiff acquired the knowledge of the mutation in favour of defendant Gul, in the year 1991 December, even then the plaintiff was supported to file the suit, challenging the orders passed by the Mukhtiarkar, within one year, from the date of his knowledge, as provided in Art. 14 of the Limitation Act. But the present suit seems to have been filed on 13.05.1993. The plaintiff Jumoo has admitted in his cross examination, that the khata was mutated in the name of defendant Gul, in the year 1967. That no appeal was filed by him before 1991. That Luqman also did not file any appeal from 1967 to 1971. Nor Siddique filed any appeal, during his life time.”

The learned appellate Court has not given any reasons on the point of limitation while setting aside a well-reasoned finding of the learned trial Court. It is the duty of the appellate Court that whenever the appellate Court reverses the findings of the Court below, it has to give reasons for disagreeing with the findings of the lower Court and also to advance reasons for his opinion in support of reversing the findings.

10. The appellate Court failed to appreciate the provision of **section 42** of the Specific Relief Act, 1877 and its proviso, which was reproduced by the learned trial Court while discussing the issue No.4 regarding maintainability of the suit. Respondent No.1/plaintiff has not prayed for possession from the applicant/defendant and he has only sought declaration of ownership as legal heir of

Luqman and declaration of cancellation of mutation. The appellate Court failed to appreciate that it has come on the record that Luqman who happened to be father of respondent No.1/plaintiff was one of the two Nek Mards, who appeared before the Revenue Authorities in 1967 for effecting mutation of the suit property in favour of the applicant. The applicant/defendant No.1 has made the following statement in his examination-in-chief:-

“After the death of my father Hussain, Foti Khata was changed in my name Tapedar changed the foti khata in my name, on the statements of Siddique s/o Gaho and Luqman s/o Haroon, the father of plaintiff’s. Khata was changed in the year 1967.”

And in the cross-examination his statement was not shattered when he categorically stated again that;

“Luqman, the father of the plaintiffs Jummo and Khamiso, was also present in the office of Mukhtiarkar at the time of mutation in my name. Plaintiffs Jummo and Khamiso are my nephews.”

Regarding possession, the respondents/plaintiffs themselves have admitted in their cross-examination that **“the fact is that he is in possession of the suit land since 1971”**. The learned trial Court on the basis of the evidence of possession and by following the mandatory proviso to **section 42** of the Specific Relief Act, 1877 rightly held that the suit was not maintainable; the appellate Court’s judgment is silent on the issue of maintainability of the suit with reference to **section 42** of the Specific Relief Act, 1877.

11. In view of the above legal and factual position on the record the judgment of appellate Court is set aside and the order of dismissal of the suit by the trial Court is restored. The revision application is allowed with no order as to costs.

JUDGE

Hyderabad  
Dated:07.10.2015