ORDER SHEET

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

R.A No. 343 of 2010

DATE	**ORDER WITH SIGNATURE OF JUDGE(S)**

Date of Hearing : 28.02.2018.
Date of Order : 28.02.2018.

Mr. Roshan Ali Azeem Mallah, Advocate for applicants.
Ms. Rehana A. Arain, Advocate for respondent No.2.

O R D E R

AGHA FAISAL, J: This is a civil revision application instituted in the year 2010 against the Judgment dated 06.08.2010, (hereinafter referred as to the "Impugned Order") passed by the Court of the learned 3rd Additional District Judge, Dadu, in Civil Appeal No.09 of 2010.

2. It may be pertinent to reproduce the content of Impugned Order herein below:

> " This Civil Appeal is directed against the order dated 14.12.2009 passed by the learned Ist. Civil Judge, Dadu, in Ex. Application No.4 of 2007 Re-Khushi Muhammad (since dead) through his Legal representative Muhammad Ghiyas Arain and others Vs Wapda through its Chairman Wapda & Others, where he allowed the Execution Application filed by the Respondents/D.Hs.
>
> The relevant facts to decide this appeal are that F.C. Suit No.31/86 for Possession, Permanent Injunction and mesne profits was filed by the Decree holder/plaintiff Khushi Muhammad and others against Wapda through its chairman and others. The suit was tried and decreed by the trial court vide judgment and decree dated 5.9.1987 wherein it was ordered that J.Ds/Defendants should hand over the vacant possession of an area 0-13 ghuntas from S.No. 837 of deh Marakhpur Taluka Dadu to the D.Hs/plaintiff after removing/dismantling the construction of compound wall raised over it. It was also ordered that defendants/JDs should not encroach upon raising any

construction and interfering with the peaceful possession of D.Hs/plaintiffs over S.No.837 of deh Marakhpur Taluka Dadu in any manner permanently and the mesne profit of land area 0-13 ghuntas of S.No.837 of deh Marakhpur Taluka Dadu at Rs.6623-50 (in words Rupees Six thousands six hundred twenty three and fifty paisa) was awarded to the D.Hs/plaintiffs. Against the above said Judgment and decree, the J/Ds went in appeal which was dismissed by the Honourable District Judge Dadu, on 19.4.1993 and revision filed by them was dismissed by the Honourable High Court vide judgment dated 09.03.2006. Thereafter execution application was filed for execution of the Judgment and decree before the trial court which was allowed and it was ordered that vacant possession of 0-13 ghuntas property of D/Hs under possession of the J/Ds be handed over to the D.Hs and further directed the J/Ds to pay the mesne profits of Rs.6623-50 to the D/Hs, vide order dated 14.12.2009, hence the J/Ds filed the instant appeal.

I have heard learned counsel for the appellant and respondents.

It is contended by Mr. Shoukat Ali Birhmani, learned advocate for the appellant that the appeal lies on law, facts and equity, the trial court allowing the execution application made erroneous and irrelevant observations an impugned order is contrary to the facts and procedure and is not binding upon the appellants/J.Ds and trial court has not properly discussed the material brought on the record and the trial court ought to have dismissed the Execution application and the impugned order is illegal, fanciful, arbitrary, void against the principle of natural justice and is not sustained in the eyes of law and the trial court has travelled beyond its jurisdiction. It is next submitted the office and store of the appellants are located in City Survey No.943 area 70815 Sq:Ft: and such entries are available in city survey record in favour of the appellants/defendants and no any portion of Agriculture land bearing S.No.837 of deh Marakhpur is under occupation with appellants/defendants as alleged by the respondent. He further argued that the trial court had acted beyond its jurisdiction during pendency of Execution application trial court allowed amendments on the application of D.Hs to change the designation of parties/J.D and allowed to correct the amount in column No.9 of execution application and prayed for setting aside the impugned order. He has relied upon case law reported in 2004 C.L.C 979 (Karachi) and 2004 C.L.C 1266 (Lahore).

The learned advocate for the respondent has argued that first class suit No.31/19186 was decreed by the court and the appellant had filed the appeal which was also dismissed. Thereafter the appellant filed Civil Revision No.28/1993 which was dismissed. Thereafter the execution application No.04/2007 was filed by the

respondent which rightly allowed by the trial Court and the amendment made by the respondent/decree holder during pendency of execution application was not regarding the change of the claim of the decree holder/respondent only the designation were changed. There is no record of S.No.943 but the office of the appellants is situated in S.No.837 which has been decreed. Order passed by the learned trial court is based upon sound reasons hence the appeal may be dismissed.

I have given careful consideration to the arguments of learned advocate for the appellants and learned advocate for the respondents and perused the material available on record and also have gone through impugned order and R & Ps of this case. Admittedly execution application was filed by the decree holder for execution of the decree dated 5.9.1997 which was upheld by the Honourable High Court vide judgment dated 9.3.2006. The contention of learned counsel for appellant that the office of the appellants are located in city survey number No:943 area 708 Sq.Ft and no any portion of the agriculture land viz bearing No.837 of deh Marakhpur is in occupation of the appellant has no force because the said ground has already been agitated during proceedings of the Civil Suit, hence that ground has no force and as far as the ground that trial court has exercised the power beyond his jurisdiction by allowing the decree holder during pendency of the execution to correct/reduce the amount in column No.9 of the execution application from 1,33,580, to 6623/- and allowing the amendment in the designation of the parties in the execution has also not force because the said amendments were allowed by the trial court by passing the order on the application u/s 115 C.P.C of decree holder and after considering the counter affidavit/objections of the JDs and arguments of learned counsel for the parties vide order dated 6.8.2009 and that order has not been challenged by the appellants, therefore, the said plea of the appellants in this appeal against order dated 14.12.2009 is not considerable and has no force. I find that the order of the trial court is based upon sound reasons does not require any interference.

The facts of the case law cited by the learned advocate for the appellants are different from the facts of this case, therefore, cited case law is not helpful in the appeal, therefore, the appeal in hand is dismissed with no order as to costs."

3. It was observed from a perusal of the diary that interim orders were operating in this case, wherein proceedings in execution had been stayed, and that the matter was being continuously prolonged at the behest of the applicants.

4. This Court had granted two fixed dates, alongwith time, for the matter to be heard and determined, yet on both occasions the counsel for the applicants had failed to proceed with the matter while seeking extension of the interim orders granted earlier.

5. It may be pertinent to reproduce the order dated 21.02.2018, which stated as follows:

> " Learned counsel for applicants states that he does not have the complete case file and seeks an adjournment.
>
> Learned counsel for applicants further states that the order of this Court dated 14.2.2018 has not complied with till date.
>
> Learned counsel for the respondent No.2 states that interim orders are operating in this present revision application and that the matter has been adjourned on one pretext or another for last eight years.
>
> Let this matter came up for hearing on 28.2.2018, when it shall be taken up at 12-30 pm. As a final indulgence, the Interim order passed earlier to continue till next date of hearing. Further it is stated that the said order shall automatically lapse on 28.2.2018 unless there is observation to the contrary recorded on the said date".

6. The matter was finally heard and at the very outset the learned counsel for the applicants was asked to point out any legal infirmity in the Impugned Order.

7. Instead of adverting to the Impugned Order, the learned counsel for the applicant read out in detail the contents of documents filed alongwith his statement dated 08.03.2017 and submitted that the purported factual inaccuracies contained therein qualified as the reasons/ grounds for grant of the subject revision application.

8. The Court reviewed the said documents, being a photo copy of the diary in the Execution Application No.04/2017 dated 24.02.2017, a letter of the office of Ist Senior Civil Judge Dadu dated 13.4.2012 and a sketch with illegible handwriting and was of the tentative view that not

only was the content of such documents contrary to the pleadings and records herein but also that perhaps a factual enquiry was not included in the purview of this Court's jurisdiction pursuant to section 115 of Code of Civil Procedure, 1908.

9. It was noted that despite being asked on several occasions to cite the relevant portion of the Impugned Order which was alleged to have been either an exercise without jurisdiction or a failure to exercise jurisdiction or an act in exercise of jurisdiction illegally or with material irregularity,the counsel for the applicant failed to do the same.

10. In response to the arguments of learned counsel for the applicants, learned counsel for the respondent submitted that the Impugned Order was the second concurrent finding of the Courts upon the execution of a duly adjudicated claim of the respondent, which was otherwise sustained by three concurrent findings and had attained finality.

11. The learned counsel stated that a suit had been filed by the respondents against the applicants, which was decreed in favour of the respondents vide judgment dated 26.5.1987 in Suit No. 31 of 1986, by the Court of learned Civil Judge Dadu. The operative part of the said judgment is as follows:

> " In my humble opinion plaintiffs have very much cause of action to bring the present suit against the defendants specially when again they have started illegal construction upon the 13 ghuntas of land belongs to plaintiffs and there is nothing to show that decree dated 26.3.1984 in suit No.16/84 is not affective. It is also admitted position that plaintiffs filed Execution Application before the learned Senior Civil Judge, Dadu which was ultimately dismissed with the observation that if there is any violation of the terms of decree/Fresh cause of action occurred to plaintiffs to file a fresh suit. As such in my view there was no way for the plaintiff to come before present court on the basis of the compromise decree.

> Issue No.4. As I have discuss the whole case of both the sides and given my findings upon Issue No.1 in affirmative and on issue No.2 in Negative and on issue No.3 discuss above suit of the plaintiffs is hereby partly allowed to extent of prayer clause (a) (b) and (c) while for the prayer clause of (d) I hereby appoint to Mr. Ghulam Mohd advocate as a Commissioner to give the details of cultivation or mesne profit for 13 ghuntas of S.No.837 from the date of encroachment till the delivery of possession.
>
> Plaintiffs is hereby ordered to pay Rs.500/- Commissioner fee.
>
> Let the preliminary decree be framed till the final report of commissioner and further after the commissioners report Final decree to be prepared."

12. The aforesaid judgment was assailed by the applicants in appeal before the learned District Judge Dadu, in Civil Appeal No.73 of 1987, and the said appeal was dismissed vide judgment dated 19.04.1993.

13. The operative part of the aforesaid judgment is reproduced herein below:

> "11. In this background the evidence of Assistant commissioner Khemchand and Ex.14 as recorded by this court gains importance. He while referring to personal inspection of the site through the trained staff and after making reference to various documents and entries opined that "WAPDA" occupies 25 ghuntas of the land of Khushi Muhammad and others. It would be un-necessary to dwell upon the trifling matters with regard to impleading or non-impleading of some officials as defendants or as appellants on which the learned counsel for the other side laid stress.
> 12. Thus there is overwhelming evidence to show that the disputed portion of the land/plot belongs to the plaintiffs. It may be emphasized that in civil matters preponderance of evidence as against proof beyond reasonable doubt in criminal cases, in the guiding factor for deciding any issue. In the circumstances I do not find any justifiable reason to annul the impugned Judgment and decree. Hence the appeal is dismissed with costs."

14. Thereafter the applicants had preferred a civil revision against the judgment of the appellate Court, being Civil Revision No.88/1993, which was dismissed by this Court vide judgment dated 09.03.2006.

15. It may be pertinent to reproduce the relevant content of aforesaid judgment herein below:

> “9. As is obvious, from the perusal of the record that the learned District Judge during the pendency of thee appeal directed the trial court to examine Tapedar of the area to determine the exact location of the Survey Number in dispute and the parties were also allowed to bring on record any additional documentary evidence in support of their case. Subsequently, further directive was issued by the appellate court whereby Assistant Commissioner Dadu was required to inspect the site and submit his report. The site was inspected by the said official alongwith his subordinate staff in presence of the parties counsel and took necessary measurements. He was examined by the appellate court and had produced relevant record of S. No: 837 along with his own report wherein it was stated that the applicant had encroached upon area of 25 ghuntas of the land of the respondents. Afterwards learned District Judge vide judgment dated 5.8.1991 and the consequent decree set aside the judgment and decree of the trial court and remanded the case with directions to frame additional issue with regard of valuation of the suit property and payment of the court fees. Against such Judgment a Revision petition was filed by the respondent before this court which was allowed and the Impugned Order of the remand of the case was set aside with the observation that the appeal be deemed as pending for adjudication according to law on consideration of the evidence brought forth on record.
>
> 10. It is an undisputed fact that the Survey Number (837) is the property of the respondents. Applicant has admitted the ownership rights and the title of the respondents over the land in question. The case of the applicant is that they had not encroached upon the area of the land, which was the property of the respondents. The applicant had not produced any documentary evidence on the record so as to prove that the dispute area was their property. Learned appellate court had taken into consideration the entire evidence placed on the record and assigned cogent and detailed reasons for answering the issues in favour of the respondents. Finding of the trial court endorsed by the Appellate court that the applicant had encroached upon piece of land which was the property of the respondents was based on proper appraisal of the evidence led by the parties in support of their claim. The oral evidence adduced by the respondents was supported by the documentary evidence and the same was sufficient to prove that the area encroached upon by the applicant included their land also as claimed by them.

> 11. Obviously, the applicant had no title in the disputed land and both the courts below have rendered concurrent view that the property of the respondents had been encroached upon by the applicant by raising the construction of the compound wall. Learned trial court and the appellate court had rightly drawn inference against the applicant on account of non-production of the documentary evidence. In absence of such evidence brought to record by the applicant there was absolutely no justification to reject the un-rebutted documentary evidence placed on record by the respondents. Learned courts below have reached the conclusion that the disputed property belongs to the respondents and the applicant had encroached upon by constructing the compound wall thereon.
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> 12. In light of the reasons enumerated above, the Impugned Order and decree call for no interference by this Court in exercise of its Revisional Jurisdiction. I find absolutely and nothing wrong in the finding arrived at by learned Courts while dealing with the suit/appeal filed by the parties. The conclusion so drawn by the appellate court did not suffer from any infirmity so as to justify any reason to annul the Impugned Order and decree passed by learned District Judge in exercise of the jurisdiction vested in it. Consequently, the Revision Application merits no consideration and the same is hereby accordingly dismissed. The parties are left to bear to their own costs."

16. The learned counsel for the respondents submitted that the judgment passed in the aforesaid civil revision application was never challenged or assailed by the applicants before august Supreme Court or any other forum and therefore, had attained the finality.

17. It was contended that thereafter respondents preferred an execution application, which was duly allowed vide an order dated 14.12.2009.

18. It may be pertinent to reproduce relevant portion of the said order as follows:

> "I have heard the learned counsel for the parties and perused the material available on record.
>
> From the perusal of record it transpires that plea of construction of the J/Ds in C.S. No.943 Ward "A" was never taken by the J/Ds before the trial court, nor Appellate or Revisional Court as such same cannot be

considered now. Moreover during the trial, trial court had examined the Tapedar of the area, Mukhtiarkar and Assistant Commissioner to determine the exact location of property in dispute and it was proved that J/Ds had encroached upon the property of D/Hs. Even otherwise, it is well settled law that an executing Court cannot go beyond the decree and if it is claimed that the decree is wrong or even that it is fraudulent or for any other reason a nullity, the executing court cannot entertain such objections. According to section 47 & Order XXI Rule 10 and 24 CPC, where decree had become final, the executing court would have no option but to execute the same as it was passed and the executing court had no jurisdiction to re-determine the liability of any party or reconsider the law for that purpose. I am fortified in my above view from the authorities reported as *SAIFEE DEVELOPMENT CORPORATION LTD: Karachi vs. M.A. Karim (PLD 1974 Karachi 424) and Mst. Yasmeen Vs. The National Insurance Corporation and othes (2004 CLC 979)*. The argument of learned counsel for the J/Ds that in the execution application D/Hs have claimed the mesne profits to the tune of Rs.1,33,580/- as such jurisdiction of this court is ousted. In this regard the record reveals that no doubt the above said amount was initially claimed in the execution application but later-on it was corrected by moving application which was allowed by this court vide order dated 06-08-2009 and the said order was also not challenged which had attained finality, as such again taking up the same plea is not tenable in accordance with law. Moreover this technical ground is agitated for taking the benefit of mistake which was neither fundamental nor basic but was a typographical mistake and on the basis of such technical mistake the D/Hs according to my humble view cannot be deprived from their due right. Similarly proposition of law is also provided in the authority reported as *Khawaja Ghulam Qadir and another Vs. Custodian Evacuee Property and 13 others (2004 CLC 895)* relied upon by the learned counsel for the J/Ds and I am of the humble view that the above authority instead of supporting the case of J/Ds, supports the case of D/Hs and provides the guide line that technicalities which are neither fundamental nor basic should not come in the way of justice. The consideration of record further reveals that no legal infirmity is pointed out by the learned counsel for the J/Ds in execution of the decree on the contrary the objection of D/Hs caries weight that without depositing the decreetal amount by the J/Ds their objections cannot be considered. In support of the above version learned counsel for the D/Hs has relied upon the authority reported as *Allied Bank of Pakistan Ltd: Vs. Fateh Textile Mills Limited and 7 others (PLD 2007 Karachi 397)*. In this authority Honourable Sindh High Court has held that in money decree objection or question relating to execution of decree would be barred from considering such objections/questions, unless judgment debtor deposit

> decreetal amount in court or furnished security for its payment. In the present execution application the J/Ds have also failed to deposit the decreetal amount or furnish the security for its payment. All the discussion made above have lead me to the conclusion to hold that there is no legal compulsion or in-competency in execution of the decree.
>
> In view of the above circumstances, I allow the execution application and order that the vacant possession of 0-13 ghuntas property of D/Hs under possession of the J/Ds be handed over to the D/Hs. The J/Ds are also directed to pay the mesne profit of Rs.6623-50 to the D/Hs. The parties are left to bear their own costs."

19. The applicants then preferred an appeal against the aforesaid order, which was dismissed vide order dated 06.10.2010, which is in fact the Impugned Order.

20. The learned counsel for the respondents demonstrated from the record that the contentions raised by the learned counsel for the applicants in respect of the statement, belatedly filed after seven years of the institution of the present revision application, cannot be sustained as the said issue was never agitated before the trial Court or any successive appellate forum and that even otherwise the said factual controversy was irrelevant and inapplicable to the case at hand.

21. The learned counsel stated that there are three concurrent judgments wherein the claim of the respondents against the applicants has been sustained and subsequent thereto there are two concurrent judgments which have upheld the legality of the execution proceedings initiated by the respondents against the applicants.

22. The learned counsel stated that subsequent to the execution having been allowed to the respondents, a writ of possession was also issued thereto, which was demonstrated to this Court from the record.

23. It was contended that the possession of the land, subject matter of the writ of possession, was not transferred to the respondents in view of the interim orders that were passed in the present revision application.

24. The learned counsel for respondents submitted that present revision application merits immediate dismissal as the perpetuation of the same for even a day militates against the interests of justice.

25. This Court has carefully considered the contentions of the parties and has noted the inability of the learned counsel for the applicants to cite a single ground based upon which the jurisdiction of this Court could be exercised under section 115 of Code of Civil Procedure.

26. The three concurrent judgments, upholding the claim of the respondents, were reviewed in detail by this Court and this Court also had the benefit of the perusal of the two successive judgments in respect of the execution proceedings initiated by the respondents.

27. It is an admitted fact that the applicants have never assailed the judgment passed in Civil Revision Application No.88/1993 dated 09.03.2006 and hence the same has attained finality.

28. It is well settled law that any Executing Court while undertaking its duty to execute a decree does not go beyond the contents of judgment and decree and therefore, the attempt of the applicants to controvert the factual merits/aspects of the original judgment, while assailing the Impugned Order, which arises from execution proceedings, cannot be appreciated.

29. It is the considered view of this Court that no grounds have been invoked by the applicants to attract provisions of section 115 of Code of Civil Procedure 1908 and that there is no suggestion that the Impugned Order is either an exercise without jurisdiction or a failure to exercise jurisdiction or an act in exercise of jurisdiction illegally or with any material irregularity.

30. In view of the foregoing this Court was pleased to dismiss the subject Revision Application, alongwith listed application, vide short order dated 28.02.2018, contents whereof are reproduced herein below:

> "Heard learned counsel at length. For the reasons to be recorded later on, the present revision application, alongwith listed application, is hereby dismissed."

31. These are the reasons for the short order dated 28.02.2018, wherein subject revision application, alongwith listed application, was dismissed.

JUDGE

Shahid