

IN THE HIGH COURT OF SINDH CIRCUIT COURT, HYDERABAD

Civil Revision Application No.S-126 of 2018

Applicants : Through Mr. Irfan Ahmed Qureshi,
Advocate

Respondents No.1 to 3 : Through Mr. Abdul Aziz Shaikh,
Advocate

Date of hearing & judgment : 16-01-2019

J U D G M E N T

Zulfiqar Ahmad Khan J: This revision impugns the judgment dated 08.05.2018, passed by the 8th Additional District Judge, Hyderabad in Civil Appeal No.250 of 2017 and the judgment and decree passed in F.C Suit No.384 of 2012 dated 25.08.2017 by IVth Senior Civil Judge, Hyderabad .

2. Brief facts of the case are that the private respondents No.1 to 3 (who are brothers) filed F.C Suit No.384 of 2012, claiming that from 21st May, 2000 the subject property being Shop No.5 Habibullah Road, Gur Mandi situated near office of the Union Council No.4, City Hyderabad (“the Shop”) had been transferred in their names and they have been paying rent to the respondent No.4 / HMC in respect thereof. They further stated that the defendant No.1 (their Aunt) had illegally constructed a Cabin/*Thalla* admeasuring 4x6 Feet in front of their shop, and despite various attempts for having the said cabin removed, the said illegal structure remained intact, which resulted in filing the said suit making following prayers:-

- a) *To pass Judgment and decree in favour of the plaintiffs.*
- b) *Declare that the act of the defendant No.1 to occupy the part of the shop of the plaintiffs illegally, unlawfully and malafidely and raised the Pucca construction of an area 4 x 6 feet. Adjacent the front door / shutter of the shop.*
- c) *To declare that the defendant No.1 has no any lawful right to use, sale out and let out the above said Pucca Cabin.*

- d) *To declare that the act of the defendant No.2 not taking action to the applications of the plaintiffs in respect of the removal of the illegal and unlawful Pucca constructed cabin of the defendant No.1 is illegally and malafidely.*
- e) *To direct the defendant No.2 to remove the illegal unauthorized constructed cabin of the defendant No.1 constructed by the defendant No.1 in the shop of the plaintiffs.*
- f) *To declare that the defendant Nos.1 and 2 have no legal status to allow the person to encroach the front area of the shop of the plaintiffs to put the moving cabin shove (Tehla) etc. and get the money from them.*
- g) *Declare that the defendant No.2 had got no right, power, lawful authority or legal right to let out on rent the road area / amenity land to the defendant No.1 and to declare the said rent agreement dated 05.03.2012, as illegal, unlawful, without lawful authority, against Sindh Local Government Ordinance, void abinitio, having got no sanctity in the eyes of law, malafide against principles of natural justice etc and order for cancellation of the said agreement dated 05.03.2012.*
- h) *To permanently restrained to the defendant No.1 directly or indirectly through his attorney, agent of authorized person from using, selling, transferring, alienating, and letting out the illegal pucca cabin (suit property) to anyone.*
- i) *Cost of the suit may also be awarded to the plaintiffs.*
- j) *Any other relief which this Honourable Court deem fit and proper may be awarded to the plaintiffs.*

3. In response to that plaint, a written statement was filed by defendant No.1 attached between page No.127 to 133, stating therein that in fact the Shop is an ancestral property belonging to their grandfather Safdar Ali S/o Karim Bux, who left 3 sons, namely Mehraj Ali, Sartaj Ali and Sher Ali as well as one daughter Mst. Nagina and one widow Mst. Barat as his legal heirs. While the plaintiffs are the legal heirs of Mairaj Ali, the defendants are legal heirs of the other brother of Sartaj Ali, who was survived by his wife Mst. Tahira (who even expired during these proceedings leaving behind the present defendants/applicants). It was also stated that the said Cabin in front of shop has been operated since 1979 and by a rental agreement entered in the year 2012, the Mst. Tahira (mother of defendants) was given tenancy rights in that structure.

4. Statement has also been filed by the defendant No.2/HMC, which particularly deny that the said Cabin was causing any impediment or hurdle to public or any portion of the Shop. It was further stated that the remedy was in

fact available to the plaintiffs to file an appropriate application with the Local Council Appellate Tribunal, rather than approaching Civil Court.

5. Trial Court closed the defendant's side by its order dated 03.12.2014, as vide order dated 27.07.2017 Mst. Tahira (the applicant) was not even permitted to produce her defence. The impugned judgment of the trial Court was passed on 25.08.2017, wherein following issues were framed.

1. *Whether suit of the plaintiffs is maintainable in law?*
2. *Whether plaintiffs are legal and lawful joint tenants of defendant No.2 in respect of shop No.5, Habibullah Road, Gul Mandi near office of union Council No.4, City Hyderabad and running the business therein in the name and style of New Bilal Confectionary?*
3. *Whether the act of defendant No.1 to occupy the part of the shop of plaintiffs by raising construction of pucca cabin over an area of 4 x 6 feet situated adjacent the front door / shutter of the shop is illegal, unlawful and mala fide?*
4. *Whether defendant No.1 has no lawful right to use, sell or let out the pucca cabin?*
5. *Whether rent agreement dated 05.03.2012, is illegal and void document, thereby the defendant No.2 has let out on rent the road area / amenity land to the defendant No.1?*
6. *Whether defendant No.2 is liable to remove the pucca cabin constructed by the defendant No.1?*
7. *Whether plaintiffs are entitled for any relief?*
8. *What should the decree be?*

6. Ignoring the defence brought forward by the private defendants, as well as by the HMC, all the issues were answered in affirmative and suit was decreed in favour of plaintiff against which an appeal was preferred. Before the appellant Court, favorable comments from HMC were filed.

7. Without considering these comments and applying judicial mind to the facts of the case, the appellate Court passed the impugned judgment which even fails to refer to HMC's version.

8. Learned counsel for the applicants stated that subject property was an ancestral property belonging to their grandfather Safdar Ali but mischievously through fraudulent means, was transferred in the name of the plaintiffs while ignoring the rights of other legal heirs including Sartaj Ali, as well as, Mst.

Nagina. He stated that before the trial Court no evidence nor any documents were produced to show that the said Shop was transferred in accordance with law in the name of the plaintiffs. He further stated that without any just reason, written statement filed by the defendants was not considered and they were declared ex-parte. Per counsel both the courts below had exercised jurisdiction vesting in them illegally and with material irregularity, as they disregarded Art. 79 of the Qanun-e-Shahadat, 1984 and misread or did not read the evidence.

9. Learned counsel for the respondents on the other hand stated that while the property was rightly transferred in the name of plaintiffs in the year 2000, but no action was taken against such allegedly fraudulent transaction, bringing finality to the transaction. Learned counsel stated that respondent Allah Rakha had made an application under Order 1 Rule 10 (2) to have his name deleted from the proceedings. He stated that in support of the written statement filed by the official respondents, no corroborative evidence came forward. Learned counsel stated that no illegality or irregularity has been committed by the trial or the appellate court thus no intervention is mandated in these judgments at this revision stage. Per counsel, the appellants have acquired rental agreement with the Municipal Corporation in the year 2012 merely to circumvent the process of law, and in fact said Cabin is an encroachment of public land, for which appropriate applications were moved and orders for its demolition verbally issued.

10. Heard the arguments of both the respective parties and perused the entire record available before me. Admittedly, through F.C Suit No.384 of 2012 the plaintiffs have sought negative declaration against the defendants as to their title in the Cabin. Plaintiffs have sought declaration that the Defendants have no any lawful right to use, sale out and let out the Cabin. Declaratory

suits are filed taking benefit of the provisions made available in the Specific Relief Act, 1877 through its Section 42 which provides as under:-

Discretion of Court as to declaration of status or right Bar to such declaration.

42. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

11. Section 42 only applies to cases where a person files a suit claiming entitlement to any legal character or to any right to property which is denied by the defendants. When a person's right and title is clouded by an instrument he may seek a declaration under section 42 to nullify the effect of such an instrument. There is a plethora of judgments holding that suit for mere declaratory relief under section 42 of the Act without stating anywhere in the plaint as to the legal 'character' or 'status' of the plaintiff disentitle him to such a prayer. Such a plaint in fact is held to be no plaint in the eye of law, and the same is liable to be rejected in exercise of the inherent power of the Court.

12. In the case at hand, the plaintiffs have not filed evidence to show their legal character in the Shop in question. Merely rent receipts have been produced admittedly the suit for declaration is not filed to clear their title in the suit property, rather negative declaration as to the defendants' right in the opposing Cabin are sought. In such circumstances where the plaintiffs instead of seeking a positive declaration in their favour, rather turned to seek a negative declaration against some defendants, courts have held as under:-

(i) *Mobeen Raza vs. Alloo & Minocher Dinshaw* (2016 CLC Notes 10)

In this case the Plaintiff sought declaration to the effect that the defendants had no interest in the suit property and were not entitled to sell or dispose of, the same. Question before the High Court was whether plaintiffs could seek such negative declaration in relation to

the disentitlement of the defendants without claiming in ownership, interest or legal character for themselves in relation to the suit property. It was held that plaintiffs had not sought relief in respect of property in question for themselves, nor any legal character had been attributed to suit property, hence no entitlement in terms of S.42 of the Specific Relief Act, 1877 was available to the plaintiffs and Plaintiffs having sought declaration to the effect that defendants had no locus standi or right in relation to the suit property; however such prayer would not entitle the plaintiffs to file suit for declaration when they were not claiming any interest, title or legal character in the property, and especially when defendants had established their interest in the property by placing a registered sale deed. Court held that suit for negative declaration was only maintainable in certain exceptional cases where a plaintiff demonstrated some interest in the property to which some legal sanctity could be attached only, then plaintiffs could seek some legal character in terms of S.42 of the Specific Relief Act, 1877. The suit was accordingly dismissed.

(ii) Karachi Municipal Corporation vs. Islamuddin (2017 YLR 804).

In this case the Plaintiff claimed that plots in question did not belong to defendants and also claimed damages of general nature. Trial Court and Lower Appellate Court decided the suit and appeal in favour of plaintiff respectively, but the High Court held that the Courts below did not read evidence and perused record in its true perspective on the account that the Plaint was ambiguous and was not maintainable as S.42 of Specific Relief Act, 1877, which does not envisage negative declaration. High Court set aside the findings of two Courts below as the same were suffering not only from misreading/non-reading of evidence and record but were also contrary to the relevant law and revision was allowed in circumstances.

13. The crux of the above discussion is that the findings of two courts below are suffering not only on account of mis-reading / non-reading of evidence and record, rather the plaint is even ambiguous. In fact the suit was not maintainable to the extent of most of the prayers, as Section 42 does not envisage negative declaration, thus the findings given by both the forums are

contrary to relevant law. Consequently this Revision is allowed, the impugned judgments and decree are set aside. The suit filed by the respondents 1 to 3 is dismissed.

JUDGE

Fahad Memon