



of deh Walhar Taluka Talhar, District Badin was parted in two equal shares with link road leading from Hyderabad-Badin main road to Garho and Rip Sharif; respondent purchased 50 paisa shares viz. 3-03 ½ acres of survey number 252 which was situated at northern side of link road from its original owner through registered sale deed; that respondent in the year 2005 got it converted into Sikni land from competent authority i.e. District Officer Revenue Badin and got it measured with the help of Tapedar of beat in presence of original owner and it became 134491.5 square feet, and the same was mutated in record of rights; that during measurement, it was found that shops of Defendants / Applicants were constructed over purchased property of respondent but since shops were already constructed over there and during measurement occupants assured respondent that they would vacate the same and surrender its vacant possession as and when required to the respondent; that in the year 2008 respondent approached the applicants and other occupants who became ready to surrender the subject shops but finally the applicants refused to vacate the shops, consequently respondent filed Civil Suits No.144 to 149 of 2015 against the applicants, for possession of suit shops before learned Senior Civil Judge, Matli District Badin with a prayer to direct the applicants to vacate the suit shops and handover vacant possession thereof or in the alternate the applicants be ejected from the suit shops by issuing writ of possession. The applicants contested the suit by filing written statement and raised factual as well as legal pleas, it was stated that respondent filed suits for recovery of possession of shops, but he failed to prove existence and exact location of shops on his land; that there was no document to support plea of the respondent to prove existence of these shops on his land viz. site map or revenue record. Learned trial Court in order to adjudicate the matter between the parties framed following issues:

1. *Whether either suit is not maintainable under the law?*
2. *Whether plaintiff is the lawful owner of survey No.252/06-07 acres of the Walhar Taluka Talhar, if yes, whether disputed shops constructed over an area of above survey numbers of plaintiff?*
3. *Whether disputed shops are constructed over government property?*
4. *What should the decree be?*

3. Learned trial court after examination of the parties and evidence decided the aforesaid issues vide common Judgment dated 31.10.2016 and Decree dated 05.11.2016. Applicants being aggrieved by and dissatisfied with the aforesaid judgments and decrees filed Civil Appeal Nos.106 to 111 of 2016 before learned District Judge, Badin. Learned Appellate Court framed two points of determination i.e. whether the disputed shops are constructed on survey No.252 of Deh Walhar Taluka Talhar, in the land of respondent or whether the disputed shops are constructed over Government land and after hearing the parties maintained the Judgment dated 31.10.2016 and Decree dated 05.11.2016 passed by learning Senior Civil Judge, Matli, vide common Judgment and Decree dated 25.05.2017.

4. Mr. Ashfaq Nabi Qazi, learned counsel for the applicants attempted to convince this court that no boundaries are mentioned in the Registered Sale Deed of respondent. The respondent purchased the suit property from joint khata as is evident from the mutation entered in favour of respondent; that the respondent miserably failed to prove that he was dispossessed from the subject shops, the stance taken by him in his suits completely contradicted the evidence he led; that none of the party in civil suit could be allowed to adduce evidence which was never pleaded and decision of the case could not rest on such evidence; that when any evidence beyond the pleadings is adduced, no party on the basis of such evidence could be allowed to set up altogether new case at his whim and press the same for getting a decree; that anything stated outside the scope of pleadings could not be looked into and no decision could be based on such evidence. Learned counsel has emphasized that the two Courts below have based their findings on the title documents of respondent in order to get possession of the subject shops which had never been his property even after his purchase of subject survey No.252 (06-07 acres), and the subject shops were not part and parcel of such survey number as discussed supra. Learned counsel pointed out that in a suit under "the Specific Relief Act" the Court is only required to see if the plaintiff was in possession of the property and was dispossessed by the defendant; that the fundamentals to be proved by the plaintiff in order to succeed in getting relief in such suit would be his possession of the immovable property and that he was dispossessed from the property without his consent and such dispossession was otherwise than due course of law; that the object of Section 9 of "the Act" was to discourage people from forcibly occupying immovable property by taking law in their own hands and further to safeguard the possession of a person to the immovable property, irrespective of his title. Such remedy could not be used as a tool to dispossess the applicants already in possession of the subject shops

constructed on the property of Highway Department Government of Pakistan and not of the respondent; that the discrepant and contradictory evidence of the respondent, it is safe to conclude that he was never in possession of the subject shops and made up a story in order to usurp the government property by obtaining decree of the court; that the Courts below have failed to exercise jurisdiction in proper manner; that the version of respondent was not supported by any evidence; that both the court below have failed to consider the documents available on record, especially the certificate issued by Executive Engineer Highway Division, which prima-facie suggest the correct measurement of the subject shops i.e. The main road of Badin to Hyderabad is 220 feet wide and its measurement was taken from its Centre, which is 110 feet from the Centre on both sides; thus erroneously held that the width of the road is 110 feet i.e. 55 feet from the Centre on both sides; that the judgment and decree of Appellate Court is in utter disregard of the mandatory provision of Order XLI Rule 31 and Order XX Rule 5 of Civil Procedure Code; that it was necessary for the Appellate Court to record its findings on each issue by discussing relevant evidence adduced by the parties; that while deciding a particular issue, the Court is required to take into consideration and discuss the relevant piece of evidence having direct nexus with that specific point and record reasons justifying its findings thereon; that the above criteria of the judgment required by Order XX Rule 4 and 5 CPC must be adhered to, so that the rights of the parties in relation to controversy are conclusively determined; therefore, the judgment and decree of Appellate Court besides nullity in the eyes of law is contrary to the law and facts and based upon misreading / non-reading of evidence. Hence, the instant Revision Application may be allowed and the Judgment and Decree of Appellate Court may be set-aside; Besides the findings of learned appellate Court are reproduction of evidence and findings of learned trial Court and there is no specific finding of learned appellate Court; that learned trial Court as well as learned appellate Court have failed to consider the fact that after construction of Road the area of respondent was not 0.50 in Toto but some of the area went in construction of the Road and the width of road from its mid was / is 110 from both side which factum clarifies that the subject shop is not over the property of the respondent but it is the property of Highway Department, Government Pakistan and the claim of respondent that the shop in possession of applicant is over his land is illegal, void, malafide, wrong, against the law and natural justice with sole objet to grab more land than his right. Both the lower Courts below have not taken any effort to ascertain the official width of Hyderabad-Badin Main Road and the documents so produced by the applicants; that both the lower Courts below have failed to consider the evidence of Muhammad Ashraf who specifically

denied that the shop in his possession is over the land of respondent and such denial was sufficient to shift the burden of proof over the respondents and the respondents to remove this burden by leading confidence inspiring and concrete evidence to prove their claim over the shops in dispute ; that both the Courts below have failed to consider the fact that the controversy between the parties cannot be resolved without demarcation of the land of respondent; that learned trial Court erroneously held that the disputed shops are in the land of respondent. He referred his statement dated 31.08.2020 and relied upon rules 6 & 9 of Order XX CPC, Section 7 and 117 of the Sindh Land Revenue Act, 1968 and rule 67-A of Sindh Land Revenue Rules, 1968, Part-I of Standing Order No.4 of the Standing Orders of Revenue Department, Section 2(c) and 8(1)(b) of West Pakistan Highways Ordinance, 1959 and relied upon the cases of *Sultan Ali v. Khushi Muhammad* (PLD 1983 SC 243), *Rehmat Wazir and others v. Sher Afzal and others* (2005 SCMR 668), *Punjab Industrial Development Board v. United Sugar Mills Limited* (2007 SCMR 1394), *Qazi Munir Ahmed v. Rawalpindi Medical College and Allied Hospitals and others* (2019 PLC CS 928) and *Government of Pakistan, Revenue Division, Federal Board of Revenue and another vs. Nawaz Ali Shaikh* (2020 PLC (C.S) 585).

5. Mr. Muhammad Arshad Pathan, learned counsel for respondent, raised the question of maintainability of instant revision applications. While supporting the impugned judgments and decrees passed by both the Courts below he referred to his written submissions and argued that the applicants miserably failed to prove or assigned any cogent reason to disturb the concurrent findings of the Courts below. It is contended that this Court is not a Court of appeal to consider the case of applicants on the pleas taken by them in the present proceedings. However, this Court can only exercise jurisdiction, inter alia, if any jurisdictional error of learning Appellate Court is found or any point of law is involved. Undoubtedly, Revision is a matter between the higher and subordinate Courts and the right to move an application in this respect by the Applicants is merely a privilege; that the provisions of Section 115 Civil Procedure Code have been divided into two parts: First part enumerates the conditions under which the Court can interfere and the second part specifies the type of orders which are susceptible to Revision; that in numerous judgments, the Honorable Supreme Court was pleased to hold that the jurisdiction under Section 115 C.P.C. is discretionary in nature; that the findings arrived at by the learned Appellate Court cannot be lightly interfered with unless some questions of law or erroneous appreciation of evidence is made out. He lastly prayed for dismissal of instant revision applications.

6. I have heard learned counsel for the parties, perused the material available on record and the case law cited at the bar.

7. The following main points need to be determined by this court:-

- i) Whether suit shops are constructed over Government property
- ii) Whether Government of Pakistan/Sindh was party to the proceedings
- iii) Whether subject land, i.e. *survey No.252/06-07 acres of deh Walhar Taluka Talhar* was properly demarcated before its purchase by the respondent?

8. In reply to the first point framed above I have noticed that learned Trial Court has held that “disputed shops are constructed over an area of main Hyderabad-Badin road because it is passing from there and adjacent with it disputed land of plaintiff is situated. Contention of defendants is that width of Hyderabad-Badin main road is 220 feet and their shops are situated at road side area which is government property thus it is for defendants to prove their claim. In support of oral version defendant Muhammad Yousif produced photostat copy of certificate and rough sketch of alleged road purportedly issued by Assistant Engineer Highways. It is settled principle that photostat copies of documents have no value in the eyes of law yet its executants should appear in court and pass test as provided under Article 71 of Qanoon-e-Shahadat, which is oral evidence and it must be direct, therefore, I am of the view that annexure 42/A and B are not helpful for defendants. Now the question arises that when plaintiff purchased 50 paisa shares of disputed survey number 252, shops of defendants were already situated there or not, its answer is in affirmative because it admitted by plaintiff Maqsood Ahmed in his evidence that when he purchased property in 1998 even converted it into sikkni in 2005 disputed shops were already constructed over there thus contention of Mr. Jamali that if shops of defendants are at government property then these are in Mohag of plaintiff and defendants should surrender shops in favour of his client carries no weight. On one hand yet boundaries of survey numbers 252 towards road side are not demarcated and after demarcation of boundaries if shops of defendants or their portion found beyond the limits of survey number 252 then plaintiff has no right to ask for his Mohag. On the other hand if shops are situated in government property at road side area than it is for the government to ask defendants for removal of encroachment and it is not for plaintiff to remove encroachment which is property of government. With these observations this issue is replied accordingly.”(Emphasis added)

9. I have noticed that the evidence of respondent speaks volume on the subject issue. Respondent has deposed that these disputed shops were situated at main road Badin to Hyderabad, and before he purchased the subject area, these shops were already existed; that the proper description of the subject shops were not given in registered sale deed, and he had never been in possession of the subject shops; that no demarcation of subject survey No.252 was made by Mukhtiarkar. In this regard the rule position is that, Rule 67-B of the Land Revenue Rules, 1968 read with sections 117 and 122 of the Land Revenue Act, 1967, provide that a land owner can be evicted if found in wrongful possession of a land as a result of demarcation proceedings taken under section 117 of the Land Revenue Act, 1967. The Collector hearing the said application moved under section 122 of the Land Revenue Act, 1967 may direct fresh demarcation proceedings or order eviction of the landowner who is in wrongful possession of the land. This power is qualified by proviso to sub-rule 5 of Rule 67-B which provides that where proceedings involve substantial question of title or an intricate question of law, the collector shall refer the matter to the civil court, but in the present case Mukhtiarkar concerned was not examined in the suit proceedings, neither was he called for demarcation of the open area, which prima-facie suggests that the present controversy could have easily been resolved if he would have been examined by the trial court in order to ascertain the boundaries of survey No. 252 so that nobody could be prejudiced this lapse has triggered the issue between the parties, though the applicants have admitted in the pleadings and evidence that they are not owner of the subject shops, but the same are situated over the Government property, and now in their possession. In view of the above learned Trial Court is required to take possession by appointing receiver.

10. On the second and third point, it is pointed out by learned counsel for the applicants that the suit shops are situated within the limits of Highway Department sub Division Badin-II, and there is clear restrictions under the law to construct or layout any means of access to or from the highway and to erect any building upon land within two hundred and twenty feet from the middle of the highway, therefore under section 79 of CPC and Article 174 of the Constitution, the Federal / Provincial Government was necessary party in the suit proceedings, failing whereof suit was liable to fail. Learned counsel for respondent strongly objected to the said objection as the said objection was never raised by the applicants in their written statement nor have agitated thereafter, especially when issues were framed or during the proceedings.

11. To see the rule position of the case, it is expedient to have glance over Section 79 of the Civil Procedure Code, 1908, reads as in a suit by or against the (government the authority to be named as plaintiff or defendant, as the case may be, shall (a) in the case of a suit against Federal Government; (b) in the case of a suit by or against a Provincial Government. Whereas Article 174 of the Constitution of Pakistan, 1973 reads as "The Federation may sue or be sued by name of Pakistan and a Province may sue or be sued by the name of Province.

12. Perusal of record reflects that plaintiff filed Suit for possession in respect of suit shops on the premise that he is owner of Survey No.252/06-07 acres of Deh Walhar Taluka Talhar and the suit shops are constructed over an area of above survey numbers; however, learned trial Court held at issue No.3 that when the plaintiff purchased 50 paisa share of disputed survey No. 252, shops were already available there and the plaintiff has admitted in his evidence that he purchased the suit property in 1998 and converted it into sikni plot in the year 2005 the disputed shops were already constructed over there and the boundaries of survey No. 252 over road are not demarcated and it is for the government to ask the applicants for removal of encroachment, and decreed the suit of respondent on the premise that he is owner of aforesaid survey number to the extent of 50 paisa share of northern portion and entitled for vacant possession with demarcation of his property. The question arises when the disputed shops are on government property then why the government was not made party in the proceedings the learned trial court without dilating upon the competency of the suit in absence of legal requirement of arraying Federal / Provincial Government in view of Section 79 CPC and Article 174 of the Constitution of Islamic Republic of Pakistan, 1973. Even otherwise it is the bounded duty of court of law to see the legal frame of the suit, initially. The appellate Court while deciding the case, has not even touched the matter, which was the requirement. The bare reading of section 79 CPC would reflect that the word shall has been used for the purpose of suit by or against the Government and same is the position in Article 174 of the Constitution. Objections regarding non filing of suit in terms of such statutory provisions being a legal objection going to the merits of case could be raised at any stage. Courts below by ignoring such statutory provisions have committed an illegality going to the root of suit. No relief could be granted in such suit for being not maintainable. Courts below by granting relief in such non maintainable suit had acted in excess of jurisdiction. This court while exercising revisional jurisdiction is empowered to take notice of defect which were apparent on the face of record and if the demarcation was not made then how the suit was



proceeded without examining the Mukhtiarkar concerned who was required to first demarcate the land and submit report but he was not made party in the proceedings. All the aforesaid material points were not considered in both the forums below which requires interference by this Court.

13. In view of the above, the decisions of the two Courts are found to be illegal, and violative of law and the decisions if allowed to stay intact would cause serious prejudice to rights of Highway Department Government of Pakistan. The interference in the judgments passed by both the courts below is warranted in the circumstances. Reference in this context is made to the case of MUHAMMAD ANWAR v. Mst. ILLYAS BEGUM and others (PLD 2013 SC 255).

14. The suit under no circumstance could have been decreed in the light of discussion made above. This Court ordinarily in its revisional jurisdiction, does not undertake to re-appraise evidence in the matter to disturb the findings of fact but would certainly interfere where such findings are found to be based on non-reading or misreading of evidence, erroneous assumption of facts, mis-application of law, excess or abuse of jurisdiction and arbitrary exercise of powers. Such findings can be interfered with by issuing certain direction to correct the wrong decision of subordinate Courts. Reliance is placed on the case of MUHAMMAD LEHRASAB KHAN v. Mst. AQEEL-UN-NISA and 5 other (2001 SCMR 338).

15. In view of the above, the civil revision is hereby allowed and concurrent findings of two courts below are set-aside, the matter is remanded to leaned trial Court to decide the suit on available evidence as well as by examining the Mukhtiarkar concerned with direction to demarcate the property in question. The provincial government as well as Highway Department, through concerned secretary be arrayed as party in the proceedings and necessary amendment be made in the pleadings if any, and after due notice to all concerned and hearing them the decision be taken on merits in accordance with law, within a period of 02 months from the date of order of this Court.

16. This Revision Application stands disposed of in the above terms.

**JUDGE**