

THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Revision Application No. S - 120 of 2014

[Shabbir Ahmed Memon and others versus Shahnawaz and others]

Applicants 1, 2[i]&[ii] 3-6 : Shabbir Ahmed Memon and others through Mr. A.M. Mobeen Khan Advocate.

Respondent 1 : Nemo.

Respondent 2 : Parvez Ahmed through Mr. Ahmed Ali Hussain, Advocate.

Respondents 3-15 : Nemo.

Revision Application No. S - 16 of 2010

[Shahnawaz and another versus Shabbir Ahmed Memon and others]

Applicant 1 : Nemo.

Applicant 2 : Parvez Ahmed through Mr. Ahmed Ali Hussain, Advocate.

Respondents 1,2[i]&[ii] 3-7: Shabbir Ahmed Memon and others through Mr. A.M. Mobeen Khan Advocate.

Respondents 8-13 : Nemo.

Dates of hearing : 17-09-2020 & 28-09-2020

Date of decision : 18-01-2021

ORDER

Adnan Iqbal Chaudhry J. - Revision Application No. S-120/2014 emanates from Suit No. 44/2007, while Revision Application No. S-16/2010 emanates from Suit No. 97/2009. Both suits were filed by Shabbir Ahmed, his siblings and mother (hereinafter 'the Plaintiffs'). The contesting Defendants (1 and 2) in both suits were Shahnawaz & Pervez Ahmed. The Plaintiffs and said Defendants were legal heirs of late Ghulam Hyder Memon. Since the underlying facts are common and overlapping, both Revision Applications are decided together.

2. Suit No. 44/2007 was filed before the Ist Senior Civil Judge, Sukkur for partition of immovable properties left behind by late Ghulam Hyder Memon. These properties comprised of 4

commercial properties at Sukkur, 1 flat at Karachi, and 39 urban and agricultural properties at Khairpur. Some of the properties at Khairpur, which appeared to be agricultural, were described in the plaint vaguely as being situated within municipal limits. Though some of the suit properties were beyond the local limits of the civil court at Sukkur, it was pleaded that the suit at Sukkur was maintainable in view of section 17 CPC.

3. Per the written statement of the Defendants 1 and 2, some of the suit properties were gifted by late Ghulam Hyder Memon to the Defendant No.1 and the father of the Defendant No.2; that for some of the suit properties, the Plaintiffs had earlier filed Suit No. 76/1991 and Suit No. 35/1996 before the Senior Civil Judge, Khairpur, both of which were dismissed in default; therefore, Suit No. 44/2007 was barred by *res judicata* and Order IX Rule 9 CPC; that some of the suit properties were agricultural land, for the partition of which the Defendants 1 and 2 had already initiated proceedings before the Revenue Officer, and to that extent the suit for partition was barred by section 172 of the Sindh Land Revenue Act, 1967 read with section 11 of the Sindh Revenue Court Jurisdiction Act, 1876.

4. On 19-05-2007, the Plaintiffs filed a statement in Suit No. 44/2007 conceding to the jurisdiction of the Revenue Officer to partition agricultural land and did not press the suit to the extent of certain agricultural land. The Plaintiffs filed an amended plaint but without excluding any agricultural land as described in the original plaint. An amended written statement was filed taking the objection that after the Statement dated 19-05-2007, the suit cannot be for partition of any agricultural land and it was denied that any part of the agricultural land was within municipal limits.

5. On 01-09-2007, the interim *status quo* order operating in Suit No. 44/2007 was recalled for all agricultural land. Against that order, the Plaintiffs filed Revision No. 31/2007 before the Additional District Judge Sukkur, contending that the interim *status quo* order

was wrongly recalled for that part of the land which was within municipal limits. Revision No. 31/2007 was disposed of by consent by requiring the trial Court to decide the injunction application finally, which was so dismissed on 09-05-2009. In the meanwhile, on the application of the Defendants 1 and 2 under section 135 of the Sindh Land Revenue Act, 1967, the Deputy District Officer (Revenue) Kingri initiated proceedings for partition of the agricultural land of the parties. In said proceedings the Plaintiffs were arrayed as Respondents. On 29-01-2008, the Deputy District Officer (Revenue) Kingri passed an order under section 145 of the Sindh Land Revenue Act to partition the agricultural land after noting that the Respondents (Plaintiffs) did not appear despite service. The land that was partitioned included the survey numbers that were alleged by the Plaintiffs to be within municipal limits.

6. Against the above mentioned partition order, the Plaintiffs filed Revenue Appeal No. 26/2008 before the District Officer (Revenue) Khairpur under section 161 of the Sindh Land Revenue Act, 1967. That appeal was dismissed by order dated 09-08-2008. The Plaintiffs then preferred Revision Application No. 08/2008 before the Executive District Officer (Revenue) Khairpur under section 164 of the Sindh Land Revenue Act. The Defendant No.1 moved an application before the Senior Member Board of Revenue to transfer said Revision alleging bias. By order dated 06-12-2008, the Senior Member transferred the Revision to the Executive District Officer (Revenue) Naushero Feroze where it was renumbered as Revision Petition No. 34/2009. On 21-05-2009, that Revision Petition of the Plaintiffs was dismissed in default.

7. The above order dated 21-05-2009 passed by the Executive District Officer (Revenue) Naushero Feroze, dismissing Revision Petition No. 34/2009 in default, was challenged by the Plaintiffs by way of Suit No. 97/2009 before the 1st Senior Civil Judge, Khairpur. The plaint of Suit No. 97/2009 was rejected by the trial Court under Order VII Rule 11 CPC by order dated 06-10-2009. However, on

Civil Appeal No. 102/2009 the learned District Judge Khairpur restored the plaint by order dated 22-12-2009, which order is challenged by the Defendants 1 and 2 before this Court by way of Revision Application No. S-16/2010.

8. In the meanwhile, by a statement dated 12-02-2010 filed in Suit No. 44/2007, the Defendants 1 and 2 conceded to the prayer for partition of non-agricultural properties excepting the ones that had been gifted to them. On the other hand, by way of objections the Plaintiffs submitted that they had conceded to exclude from the suit only the agricultural properties specifically mentioned in their Statement dated 19-05-2007, whereas Survey No.s 362, 94, 73, 60, 63/1 and 63/2 of deh Kingri, had never been withdrawn from the suit which were Abadi land falling within municipal limits, and for the partition of which only the civil court had jurisdiction.

9. By a report dated 17-09-2010 submitted in Suit No. 44/2007, the Mukhtiarkar (Revenue) Taluka Kingri informed that:

"I have Honour to submit that the Revenue Record has been verified which reveals that S. No. 362, 73, 60 , 63/1 and 63/2 of deh Kingri stands on the khata of Shahnawaz s/o Ghulam Hyder and Pervaiz Ahmed s/o Shamsudin Memon and S. No. 94 stands on the khata of Shabir Ahmed, Basheer Ahmed, Khurshed Ahmed, Mst. Shamshad Begum, Mst. Saeeda Begum, Mst. Mumtaz Begum all sons and daughters of deceased Ghulam Hyder and Mst. Hakim Zadi widow of Ghulam Hyder, vide entry No. 204 dated 06-11-2009 of VF-VII-B, the land is agricultural. Photocopy of Record of Right duly attested are submitted herewith for kind perusal of Honourable Court."

In view of the above report, the contention of the Plaintiffs that Survey Nos. 362, 94, 73, 60, 63/1 and 63/2 in deh Kingri were falling within municipal limits, did not find favor with the trial Court who proceeded to pass a preliminary decree dated 01-02-2011 for partition in Suit No. 44/2007.

10. The preliminary decree for partition passed in Suit No. 44/2007 was assailed by the Plaintiffs by Civil Appeal No. 09/2011 before the IInd Additional District Judge, Sukkur. The appeal was

primarily against the exclusion of Survey Nos. 94 , 73 , 362 , 60 , 63/1 and 63/2 in deh Kingri from the preliminary decree. The appeal was dismissed by judgment and decree dated 19-06-2014; hence Revision Application No. S-120/2014 before this Court by the Plaintiffs.

11. With regards to Revision Application No. S-120/2014 emanating from Suit No. 44/2007, Mr. Mobeen Khan, learned counsel for the Applicants/Plaintiffs submitted that both the Courts below failed to appreciate that though Survey No.s 97, 73, 362, 60, 63/1 and 63/22 in deh Kingri were entered in the revenue record as agricultural land, these were used as Abadi; that with the passage of time such land had come within the municipal limits of Pir Jo Goth Town, and thus excluded from the purview of the Sindh Land Revenue Act, 1967 by virtue of section 3 thereof; and therefore only the civil court had jurisdiction to partition the same. In support of that, Mr. Mobeen Khan Advocate relied on the cases of *Dr. Jalal Khan v. Qazi Naseer Ahmed, Deputy District Officer (Revenue), Kharian* (2005 MLD 814) and *Muhammad Hassan v. Khawaja Khalil-ur-Rehman* (2007 SCMR 576). He further submitted that the Mukhtiarkar's report dated 17-09-2010 did not give any finding whether the survey numbers in question were within municipal limits or not, and thus the trial Court ought to have recorded evidence to determine the same. With regards to the urban properties he submitted that the preliminary decree for partition passed in Suit No. 44/2007 was contrary to Order XX Rule 18(2) CPC.

On the other hand, Mr. Ahmed Hussain, learned counsel for the Respondents/Defendants 1 and 2 submitted that no part of the agricultural land was within municipal limits; that after the Plaintiffs withdrew the agricultural land from Suit No. 44/2007, the Revenue Officer proceeded to partition the same, against which the Plaintiffs availed remedies before the Revenue hierarchy; that in view of sub-section (2) of section 3 of the Sindh Land Revenue Act, the question whether any agricultural land was within municipal limits was also within the domain of the Revenue Officer who has decided that question in the negative.

12. With regard to Revision Application No. S- 16/2010 emanating from Suit No. 97/2009, Mr. Ahmed Hussain, learned counsel for the Applicants/Defendants 1 and 2 submitted that Suit No. 97/2009 was barred by section 172 of the Sindh Land Revenue Act, 1967, and therefore the appellate Court erred in setting aside the order of rejection of plaint. He submitted that against the dismissal of Revision Petition No. 34/2009 in non-prosecution, the remedy of the Plaintiffs was either by way of a review under section 163 of the Sindh Land Revenue Act, or by way of a second revision before the Board of Revenue under sub-section (1) of section 164. He submitted that a second revision before the Board of Revenue was held maintainable in the cases of *Khair Din v. I.U Khan CSP, Member (Revenue) Board of Revenue, West Pakistan* (PLD 1968 Lah 11); and *Noor Muhammad v. Member (Judicial) Board of Revenue, Punjab* (PLD 1986 Lah 237). Learned counsel argued vehemently that Suit No. 97/2009 had been filed only to stall the partition order passed by the Revenue Officer.

On the other hand, Mr. Mobeen Khan, learned counsel for the Respondents/Plaintiffs supported the order of the appellate Court whereby the rejection of the plaint of Suit No. 97/2009 was set-aside. He submitted that the Plaintiffs were never issued notice of the date of hearing of Revision Petition No. 34/2009 by the Executive District Officer (Revenue) Naushero Feroze; that in any case, said Revision should have been decided on the merits and its dismissal for non-prosecution was without jurisdiction; that the Plaintiffs have no remedy against such order and thus a civil suit to challenge the same was maintainable.

13. Heard the learned counsel and perused the record.

Revision Application No. S-120/2014:

14. As discussed above, while Suit No. 44/2007 was originally filed by the Plaintiffs for partition of both urban properties and agricultural land, it was later conceded by the Plaintiffs by way of a Statement dated 19-05-2007 that the jurisdiction to partition

agricultural land lay exclusively with the Revenue Officer in view of section 172(2)(xviii) of the Sindh Land Revenue Act, 1967. Thus, Suit No. 44/2007 remained for partition of non-agricultural properties only. In Revision Application No. S-120/2014 it is the case of the Applicants/Plaintiffs that both the Courts below failed to appreciate that with the passage of time some agricultural land had come to be within municipal limits for which the Revenue Officer had no jurisdiction to partition in view of section 3 of the Sindh Land Revenue Act; that no evidence was recorded by the trial Court to determine whether any part of the land recorded as agricultural was within municipal limits; and thus the preliminary decree passed in Suit No. 44/2007 had wrongly excluded the land falling within municipal limits. It appears that the preliminary decree was passed after considering a report dated 17-09-2010 submitted by the Mukhtiarkar that the survey numbers claimed by the Plaintiffs to be within municipal limits were in fact agricultural land which had by then been partitioned by the Revenue Officer between the Plaintiffs and the Defendants 1 and 2. That report of the Mukhtiarkar is of course disputed by the Plaintiffs. Nonetheless, the contention of the Plaintiffs that some of the survey numbers were within municipal limits, was considered by the trial Court and the appellate Court but did not find favor with them.

15. Section 3 of the Sindh Land Revenue Act, 1967 stipulates that:

“3. Exclusion of certain land from operation of this Act.- (1) Except so far as may be necessary for the record, recovery and administration of village cess, or for purposes of survey, nothing in this Act applies to land which is occupied as the site of a town or village, and is not assessed to land revenue.

(2) It shall be lawful for the Collector acting under the general or special orders of the Board of Revenue, to determine for the purposes of this Act, what lands are included within the site of a town or village, and to fix and from time to time to vary the limits of the same, regard being had to all the subsisting rights of the land-owners.”

In Human Rights Case No. 69229-P of 2018 (PLD 2019 SC 297) *regarding functioning of Patwaris, Kanungos, Tehsildars in the urban area*

of Lahore, the Supreme Court discussed the elements of “land which is occupied as the site of a town or village” within the meaning of section 3(1) of the Punjab Land Revenue Act, 1967, which provision excludes such land from substantial provisions of the said Act. The Supreme Court held that :

“..... every case must be decided on its merits and the mere inclusion of a certain area within a town/village for jurisdictional purposes does not trigger the exemption from land revenue under the law. For instance, the construction of a house on one single field does not convert land otherwise subject to land revenue, into the site of a town or village. Similarly, where the area is under fluctuating assessment and if during the currency of a settlement a particular part of the land is used for purposes other than agriculture, it is not excluded under Section 3(1) of the Act of 1967.”

16. It was not the case of the Plaintiffs that survey numbers alleged to be within municipal limits had ever been notified as such. Those survey numbers continued in the revenue record as agricultural land. The Plaintiffs did not file any material with the plaint or before the appellate Court to demonstrate that a part of the agricultural land was within municipal limits. It was also not the case of the Plaintiffs that such land was ‘not’ assessed to land revenue so as to attract the second condition of section 3(1) of the Sindh Land Revenue Act for excluding the said land from said Act. On a query made by this Court during hearing, learned counsel for the Plaintiffs had also conceded that the land alleged to be within municipal limits was unconstructed property. In these circumstances, the cases cited by learned counsel for the Plaintiffs were of no help to him. In *Dr. Jalal Khan v. Qazi Naseer Ahmed, Deputy District Officer (Revenue), Kharian* (2005 MLD 814) it was an undisputed fact that the property in question was urban property with a building constructed thereon; and thus it was held that section 3 of the West Pakistan Land Revenue Act, 1967 was applicable. Reliance on *Muhammad Hassan v. Khawaja Khalil-ur-Rehman* (2007 SCMR 576) is also misplaced as that was not a case in respect of section 3 of the West Pakistan Land Revenue Act, 1967.

17. Be that as it may, the more important aspect of the matter was that the preliminary decree dated 01-02-2011 in Suit No. 44/2007 was passed **after** the Revenue Officer had already passed order dated 29-01-2008 under section 145 of the Sindh Land Revenue Act to partition the agricultural land of the parties, including the land allegedly falling within municipal limits. Against that order, the Plaintiff's appeal under section 161 of the Sindh Land Revenue Act had already been dismissed on 09-08-2008; and their Revision under section 164 of the Sindh Land Revenue Act had also been dismissed for non-prosecution on 21-05-2009. Both the said *fora* had rejected the ground that part of the land was within municipal limits. Thus, the jurisdiction exercised by the Revenue Officer to partition that land which was alleged to be within municipal limits, was never challenged by the Plaintiffs before the civil court. Rather, they elected remedies under the Sindh Land Revenue Act, 1967. The doctrine of election denotes that once the suitor elects a course from remedies available before competent *fora*, he is then precluded from re-agitating the same matter before the other forum¹. The doctrine of election was deliberated by the Supreme Court of Pakistan in *Trading Corporation of Pakistan v. Dewan Sugar Mills Ltd.* (PLD 2018 SC 828) to observe that:

“The moment suitor intends to commence any legal action to enforce any right and or invoke a remedy to set right a wrong or to vindicate an injury, he has to elect and or choose from amongst host of actions or remedies available under the law. The choice to initiate and pursue one out of host of available concurrent or co-existent proceeding/ actions or remedy from a forum of competent jurisdiction vest with the suitor. Once choice is exercised and election is made then a suitor is prohibited from launching another proceeding to seek a relief or remedy contrary to what could be claimed and or achieved by adopting other proceeding/ action and or remedy, which in legal parlance is recognized as doctrine of election, which doctrine is culled by the courts of law from the well-recognized principles of waiver and or abandonment of a known right, claim, privilege or relief as contained in Order II, rule (2) C.P.C., principles of estoppel as embodied in Article 114 of the Qanun-e-Shahadat Order 1984 and principles of res-judicata as articulated in section 11, C.P.C. and its explanations. “

¹ See judgment dated 16-11-2020 passed by a learned Division Bench of this Court in C.P. No.D-2933/2014, *Lucky Cement Ltd. v. Federation of Pakistan*.

It follows that once the Plaintiffs elected to challenge before the revenue forum the partition made of land alleged to be within municipal limits, they were precluded from agitating that partition in Suit No. 44/2007. Therefore, the trial Court was right to exclude that land from the preliminary decree in Suit No. 44/2007.

18. It was then submitted by learned counsel for the Plaintiffs that the preliminary decree for partition of urban properties passed in Suit No. 44/2007 did not comply with Order XX Rule 18(2) CPC as it failed to require an enquiry whether partition and separate possession of the properties could be conveniently made. The share in which the parties inherited the decreed properties was already prescribed by *sharia* and there was no dispute between the parties on that. After listing the properties for which it was passed, the preliminary decree directed that: "The City Survey Officers concerned are appointed as Commissioners with directions to submit the exact report after inspection in presence of the parties as per Revenue record." The very purpose of appointing Commissioners was to see whether the properties can be conveniently partitioned between the parties with separate possession. Therefore, the preliminary decree did comply with Order XX Rule 18(2) CPC. However, there is one aspect of the preliminary decree that requires a clarification. The words "commercial properties" appearing in the preliminary decree appears to be an error, in that, in addition to the 4 commercial properties at Sukkur, the list of decreed properties includes a flat at Karachi and 27 urban properties at Khairpur. Since no objection was or is raised to the territorial jurisdiction of the Senior Civil Judge at Sukkur to partition those immovable properties that were beyond Sukkur, presumably in view of sections 17 and 21 CPC, it is hereby observed that the preliminary decree passed in Suit No. 44/2007 is in respect of all urban properties listed therein and not only the commercial properties.

19. Mr. Ahmed Husain, learned counsel for the Defendants 1 and 2 had submitted that Suit No. 44/2007 was barred by *res-judicata* and Order IX Rule 9 CPC owing to the previous Suit No. 76/1991 and Suit No. 35/1996, which suits were dismissed for non-prosecution. But then the Defendants 1 and 2 have not challenged the preliminary decree passed in Suit No. 44/2007, rather they support it. Therefore, there will be no gain in examining that argument of Mr. Ahmed Hussain Advocate.

Revision Application No. S-16/2010

20. As narrated above, Revision Petition No. 34/2009 preferred by the Plaintiffs under section 164 of the Sindh Land Revenue Act was dismissed for non-prosecution by order dated 21-05-2009 passed by the Executive District Officer (Revenue) Naushero Feroze, and that order was challenged by the Plaintiffs by way of Suit No. 97/2009 with the following prayer:

“(i)- to declare that the plaintiffs are entitled to enjoy protection of law and to be treated in accordance with law as guaranteed under Article 4 of the Constitution; and that the order dated 21-05-2009 passed by the defendant No.7 in revenue revision application No.34 of 2009 (Shabbir Ahmed and others v/s Shahnawaz and others) is not in accordance with law and against principle of natural justice of hearing; and dismissing the revision application without considering merits of the case is ab-initio void, illegal and of no legal effect and, therefore, not binding on the plaintiffs.

(ii)- that permanent injunction be issued against the defendants 3 to 7 from implementing the order of the defendant No.4 dated 29-01-2008 illegally partitioning the agricultural lands belonging to the plaintiffs and the defendants 1 & 2; and the defendants 1 & 2 from interfering with the possession of the plaintiffs over the agricultural lands involved.

.....”.

In rejecting the plaint of Suit No. 97/2009, the trial Court held *inter alia* that the Plaintiffs were aware of the transfer of their revision to the Executive District Officer (Revenue) Naushero Feroze but were negligent in pursuing the same; that the relief sought in the suit was not covered by sections 42 and 56 of the Specific Relief Act; and since the dismissal of the Plaintiffs' Revision was for non-

prosecution, the better course for them was to file a restoration application before the same forum. However, the plaint was restored by the District Judge Khairpur by order dated 22-12-2009 passed in Civil Appeal No. 102/2009 by observing that before rejecting the plaint the trial Court ought to have considered the Plaintiffs' interlocutory applications under Order VI Rule 17 CPC and under Order I Rule 10 CPC that were pending in the suit; and that the question of maintainability of the suit was a mixed question of law and fact which should be decided by the trial Court after evidence.

21. I have examined the interlocutory applications of the Plaintiffs that were pending when the plaint of Suit No. 97/2009 was rejected. The application for amendment of plaint under Order VI Rule 17 CPC had only sought to add description of the agricultural land; and the application under Order I Rule 10 CPC had sought to implead the Province of Sindh as a party. In restoring the plaint of Suit No. 97/2009 the appellate Court did not notice that none of those interlocutory applications had any bearing on the primary objection to the suit raised in the Defendants' application under Order VII Rule 11 CPC, viz., that the civil court had no jurisdiction in view of the bar in section 172 of the Sindh Land Revenue Act, 1967. In fact, even the plaint-rejection order of the trial Court does not directly deal with that objection.

22. Sub-section (1) of section 172 of the Sindh Land Revenue Act, 1967 ousts the jurisdiction of a civil court in any matter in which a Revenue Officer is empowered by the Act to dispose of or take cognizance of a matter. Sub-section (2)(xviii) of section 172 expressly excludes the jurisdiction of a civil court with regards to any question connected with or arising out of proceedings for partition. The cause of action and the prayer clause of Suit No. 97/2009 manifests that the said suit was brought to challenge the order dated 21-05-2009 passed in proceedings duly taken under section 164 of the Sindh Land Revenue Act. In the circumstances, the bar to the jurisdiction

of the civil court under section 172 of the Act could only be circumvented if the Plaintiffs demonstrated that the case attracted one of the established exceptions to the ouster of the plenary jurisdiction of a civil court. Those exceptions have been discussed by the Supreme Court in *Abbasia Cooperative Bank v. Hakeem Hafiz Muhammad Ghaus* (PLD 1997 SC 3). In a nutshell, the civil court can intervene to exercise jurisdiction only if the order impugned therein suffers from a jurisdictional defect. Therefore, the only question to be considered in Revision Application No. S-16/2010 is whether the order dated 21-05-2009 passed by the Executive District Officer (Revenue) Naushero Feroze to dismiss the Plaintiff's Revision for non-prosecution was without jurisdiction so as to maintain a civil suit.

23. The Executive District Officer (Revenue) Naushero Feroze had dismissed the Plaintiffs' Revision for non-prosecution on the ground that despite repeated notices of hearing sent to the Applicants/Plaintiffs during February 2009 to May 2009, they did not once appear to pursue their Revision. There is nothing on the record to rebut that observation of the Revenue Officer. It cannot be the case of the Plaintiffs that they were unaware of the transfer of the Revision to Naushero Feroze because the transfer order was passed in the presence of their counsel. The argument that the Revision under section 164 of the Sindh Land Revenue Act could not have been dismissed for non-prosecution is misconceived. A similar argument taken against the dismissal of a revision under section 115 of the CPC was rejected by the Supreme Court in the case of *Ghulam Qadir v. Abdul Wadood* (PLD 2016 SC 712) where it was held that a revision application filed under section 115 CPC, which is not a revision *suo moto*, can be dismissed for non-prosecution. In holding so it was observed by the Supreme Court that :

“The revisional court should not be compelled to decide a civil revision on merits in the absence of either party(ies) just because it has been admitted to regular hearing. The court should not be rendered a slave to a person who files a revision petition and subsequently chooses not to appear before the revisional court due to disinterest or ignorance/indolence, and neither should such

person be awarded a premium/privilege in this regard, as this would result in (possible) injustice to the contesting party. Adopting such a course would inevitably result in an undesirable increase in the caseload of the (overburdened) courts as numerous revision petitions would remain pending. The courts must consider the competing interests of both parties in the light of the principles of proportionality and balancing. Dismissing a revision petition due to non-appearance of the petitioner(s) is a clear manifestation of the act of balancing by the revisional court in performance of its judicial and discretionary functions. The dismissal can always be challenged by the petitioner subject to him establishing 'sufficient cause' for his (or his counsel's) non-appearance on the date his case was dismissed for non-prosecution. The revisional court in exercise of its inherent jurisdiction may restore the petition."

Based on the same logic, I do not see why the Revenue Officer was obliged to decide the Plaintiffs' Revision application under section 164 of the Sindh Land Revenue Act on the merits when the Plaintiffs were not pursuing the same. Therefore, in my view the Executive District Officer (Revenue) had the power to dismiss the Revision for non-prosecution and it cannot be said that such order was without jurisdiction so as to make available to the Plaintiffs the general jurisdiction of the civil court.

24. As regards the remedy that was then available to the Plaintiffs against the dismissal of their Revision for non-prosecution, Mr. Ahmed Hussain, learned counsel for the Applicants/Defendants 1 and 2 had submitted that such remedy was either by way of a review under section 163, or by way of a second revision before the Board of Revenue under sub-section (1) of section 164 of the Sindh Land Revenue Act, 1967. But, in making such submission learned counsel did not notice that section 163 of the West Pakistan Land Revenue Act had been omitted for the Province of Sindh by Sindh Ordinance No. X of 1980. Also, while a second revision before the Board of Revenue under sub-section (1) of section 164 of the West Pakistan Land Revenue Act may be available in the Province of Punjab, but in Sindh such remedy is not free from legal debate by reason of the second proviso to sub-section (4) of section 164, inserted by Sindh Ordinance No. XI of 1980, which suggests that a second revision application before the Board of Revenue, as opposed

to a revision *suo moto*, may not be maintainable. The cases of *Khair Din v. I.U Khan CSP, Member (Revenue) Board of Revenue, West Pakistan*; and *Noor Muhammad v. Member (Judicial) Board of Revenue, Punjab* cited by Mr. Ahmed Hussain Advocate are in respect of section 164 as applicable to the Province of Punjab, and thus not of any help.

25. Nevertheless, against the dismissal of their revision for non-prosecution by the Revenue Officer, the Plaintiffs had a remedy by way of a restoration application before the same forum. While it is correct that there is no specific provision in the Sindh Land Revenue Act empowering the Revenue Officer to restore a proceeding dismissed in non-prosecution, such power is exercised on the principle of natural justice which is read as part of every statute. In *Baghpotee Services (Pvt.) Ltd. v. Allied Bank of Pakistan* (2001 CLC 1363) the question was whether the Banking Court had jurisdiction to restore an application dismissed for non-prosecution in execution proceedings given that section 27 of the erstwhile Banking Companies (Recovery of Loans, Advances, Credits & Finances) Act, 1997 barred the Banking Court from reviewing its order. Justice Sabihuddin Ahmed speaking for a Division Bench of this Court held that an order recalling an earlier order which had not been passed on the merits but only on account of non-appearance of a party, would not amount to a 'review', but would be a 'recall' of the earlier order; that a 'review' is where the merits of the earlier order are considered, but in 'recalling' an order only the cause of non-appearance is taken into consideration; that while the power to review must be conferred by statute, the power to recall stems from the principles of natural justice required to be read into every law. *Baghpotee Services* had in turn relied upon *Haji Khudai Nazar v. Haji Abdul Bari* (1997 SCMR 1986) where, seized of the question whether the provisions of the CPC could be invoked in rent proceedings to set-aside an order passed ex-parte, the Supreme Court of Pakistan had held that :

“It is now well-settled that in proceedings before Court or Tribunal of quasi-judicial nature, even if there is no provision for setting aside an ex parte order, the Court/Tribunal would be empowered to exercise such power by applying principles of natural justice. Such provisions which enshrine principles of natural justice have to be read in the statute which do not specifically debar such a remedy. Therefore, even without applying the provisions of C.P.C. in terms, the procedure provided under Order IX, Rules 9 and 13 and Order XLI, Rule 17, C.P.C. can be applied by the Controller or the High Court in rent proceedings. In such cases the Court is not required to consider and decide it on merits, but it is to see whether the defaulting party was prevented from appearing in Court due to sufficient reasons. It would, therefore not amount to reviewing its own judgment which surely a Controller is not empowered to do.”

I may add that it would be pernicious to the administration of justice if every dismissal for non-prosecution by the Revenue Officer is permitted to be remedied only by way of a civil suit. Also, if that argument of learned counsel for the Plaintiffs were to be accepted then there is nothing to prevent a party looking to drag a matter to allow his case to be dismissed in default and then make a challenge before the civil court.

26. To recap the findings above, it is held that :

(i) Once the Plaintiffs elected to challenge before the revenue forum the partition made of land alleged to be within municipal limits, they were precluded from agitating that partition in Suit No. 44/2007. Therefore, the trial Court was right to exclude that land from the preliminary decree in Suit No. 44/2007.

(ii) The preliminary decree passed in Suit No. 44/2007 is not contrary to Order XX Rule 18(2) CPC. Said decree is in respect of all urban properties listed therein and not only the commercial properties.

(iii) The order dated 21-05-2009 passed by the Executive District Officer (Revenue) Naushero Feroze to dismiss the Plaintiff's Revision for non-prosecution was within his jurisdiction, and thus Suit No. 97/2009 brought to challenge such order was barred by section 172 of the Sindh Land Revenue Act, 1967. The remedy of the

Plaintiffs was by way of a restoration application before the Revenue Officer.

27. In view of the findings above, these revision applications are disposed of as follows:

- (a) Revision Application No. S-120/2014 is dismissed.
- (b) Revision Application No. S-16/2010 is allowed. Order dated 22-12-2009 passed in Civil Appeal No. 102/2009 is set-aside; the said appeal is dismissed; consequently, the plaint of Suit No. 97/2009 stands rejected.

JUDGE