IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision No. S – 46 of 2000

Mst. Razia Begum & others v. Mir Ahmed & others

Date of hearing: **19-11-2021**

Date of decision: **19-11-2021**

Mr. Abdul Qadir Shaikh, Advocate for the Applicants.
Mr. Irfan Ali Soomro, Advocate for Respondent No.1.
Mr. Mehboob Ali Wassan, Assistant Advocate General Sindh.

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J U D G M E N T

Muhammad Junaid Ghaffar, J. **–** Through this Civil Revision, the Applicants have impugned judgment and decree dated 07-04-2000 and 12-04-2000, respectively, passed by the 3rd Additional District Judge, Sukkur in Civil Appeal No.49 of 1999, whereby the judgment and decree dated 29-09-1999 and 04-10-1999, respectively, passed by the 2nd nd Senior Civil Judge, Sukkur in F.C. Suit No.62 of 1992, through which the Suit of Respondent No.1 was dismissed, has been set aside and by allowing the Appeal, the Suit has been decreed.

2. Learned Counsel for the Applicants submits that the Appellate Court has erred in law and on facts while setting aside the judgment of the Trial Court, whereby the Suit filed by Respondent No.1 was dismissed; that no reliable evidence was ever produced before the Trial Court, hence, the Suit was rightly dismissed; whereas, the Appellate Court without referring to any material or evidence has allowed the Appeal by decreeing the Suit, which is not sustainable; that the Suit property has already been sold to various other buyers who were never joined as defendants; that PW-02 has come into evidence, whereas, he was only four years old when the transaction took place; that the property was initially owned by Respondent as a Benami owner, and thereafter it was transferred in the name of the Applicant by way of a sale statement duly recorded before the concerned authority on 09-01-1986 which was never challenged, whereas, belatedly Suit was filed in the year 1992; hence, no case was made out. He has prayed for setting aside the impugned judgment.

3. On the other hand, Counsel for Respondent No.1 has supported the impugned judgment and submits that the case of the Applicants was to the effect that ownership of Respondent No.1 was *benami*, which was never proved; hence, no case is made out; that the evidence of the Applicants failed to substantiate the claim of *benami*, therefore, the Appellate Court was justified in upsetting the judgment of the Trial Court; hence, the Revision Application does not merit any consideration and is liable to be dismissed.

4. I have heard both the learned Counsel and perused the record.

5. It appears that Respondent No.1 filed a Suit for declaration and possession and sought the following relief(s):

> *(a) To declare that the plaintiff is owner of S.NO:604/2 (4-13) to the extent of 0-10 paisa (3-00) acres S.NO:588 (5-28) to the extent of 0-64 paisa (3-24) acre and S.NO:326 (5-08) to the extent of (0-6) paisa (0-13) acres deh Trimonh Taluka Rohri District Sukkur.*
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> *(b) To declare that the mutation of suit land on the basis of fraudulent sale statement made by the defendant No:2 in favour of defendant No:4 and subsequent sale of S.NO:604/2 to the extent of 0-70 paisa and S.NO:588 to the extent of 0-64 paisa by the defendant No:4 and 6 in favour of defendant No:5 is illegal fraudulent and void abinitio and not binding upon plaintiff.*
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> *(c) To direct the defendant No:4 to 6 to handover the vacant possession of suit land to the plaintiff.*
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> *(d) To grant any other equitable relief which this Hon'ble Court deems fit and proper as per circumstances of the case.*
>
> *(e) To decree the suit with cost.*

6. After exchange of pleadings, the learned Trial Court settled the following issues and came to the conclusion that no case is made out, hence, the Suit was accordingly dismissed:

> *1. Whether the plaintiff is not the owner of suit property?*
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> *2. Whether defendant No.4 and 6 had committed fraud and got khata mutated in the name of defendant No.4?*
>
> *3. Whether the plaintiff has no cause of action to file the suit?*
>
> *4. Whether the plaintiff is entitled to the relief as prayed for?*
>
> *5. What should the decree be?*

7. The said order was impugned by way of Appeal by Respondent No.1, and through impugned judgment, the Appellate Court has allowed the Appeal by decreeing the Suit as prayed. The relevant finding of the Appellate Court is as under:

> **"***The perusal of judgment of the lower court reveals that appellant has adduced evidence of his son Shabir Ahmed and one witness Fazal Hussain but has not produced any document in support of proof of his ownership. Because of his failure to do so and the claim of respondents that property was purchased in Benami name of the appellant the trial court has decided the issue against the appellant.*
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> *Although no document is produced by the appellant/ plaintiff but there is no denial from the side of respondents that appellant was not the owner. They admit him as benami owner and these are all the more reasons that they by considering him as owner and capable of transferring the title in their favour got effected the transaction of sale through statement before respondent No:2. By denying the title the respondents in fact are taking away their own base of title which they derive through the appellant.*
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> *The decision of issue No:1 is dependent upon the decision of issue No:2. Once transaction of sale is not established the title automatically will revert back in favour of appellant therefore it is necessary to examine the decision of issue No:2 first.*
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> *Admittedly appellant has denied the transaction of sale and has sought the declaration on basis of such transaction about the mutation in favour of the respondents therefore in view of authority 2000 CLC-419 the burden of proof was upon the respondents/vendees/beneficiaries and not upon the appellant. By shifting the burden of proof upon the appellant the trial court has fallen in error therefore findings of lower court to issue No:2 cannot be maintained thus are reversed and decided in affirmative.*
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> *The ownership of the appellant is admitted by the contesting respondents with the variation that he is benami owner but to prove that he was actual benami owner no evidence has been adduced thus their admissions leave the appellant as simple owner and when issue No:2 is decided in affirmative the claim of plaintiff even without documentary evidence in view of admission of the respondents is established therefore findings of trial court to the issue No:1 are disturbed and decided in favour of the appellant and in negative.*
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> *The findings to issue No:2 in view of changed findings to issue No:1 & 2 above also should not sustain therefore same are modified in negative.*
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> *For the foregoing reasons and findings to issues No:1 and 2 above the judgment and decree of trial court is set aside, appeal is allowed and in consequences suit of appellant/plaintiff is decreed with no order as to the costs.***"**

8. From perusal of the aforesaid observations of the Appellate Court, it appears that the learned Appellate Court without examining the fact that it was the Respondent No.1 / Plaintiff, who had come before the Court seeking a declaration as to the ownership of the property in question as well as possession, with a further prayer that the sale transaction already recorded be cancelled (notwithstanding that the Suit was not titled as such), was required to prove it on the basis of his own evidence. It is well established principle of law that a party must succeed on the strength of his own case and cannot be allowed to take advantage of the weakness of the other side[1]. In civil proceedings an issue is to be decided by preponderance of evidence and in case where there is a word against a word it is the party on whom lay the onus must fail[2]. It was incumbent upon the Respondent No.1 / Plaintiff to adduce evidence and establish that no sale transaction was recorded by him by appearing before the concerned Mukhtiarkar. However, the learned Appellate Court, instead of looking into this aspect of the matter while passing the impugned judgment, despite holding that although no document has been produced by the Appellant, but since there is no denial from the Applicant as to the *benami* ownership of Respondent No.1, the Suit of Respondent No.1 ought to have been decreed. As to this it may be observed that benami ownership of Respondent No.1 was in fact a narration of fact contained in the memo of plaint; and was correctly done, as it is the case of the Applicant that Respondent No.1 being benami owner of the Applicant, had thereafter, transferred the property in favor of the Applicant by way of sale statement before the concerned authority. To establish the bona fides of such sale transaction it was compulsory to narrate this fact that originally Respondent No.1 was Applicant's benami owner. There was nothing wrong into it; nor Respondent No.1 could have benefitted from such fact. The Appellate Court has drawn a completely wrong and illegal inference from such narration of fact to upset the finding of the Trial Court. The learned Appellate Court has further gone on to hold that since the transaction of sale has not been established, then automatically pursuant to claim of *benami* ownership, the same is established in favour of Respondent No.1; however, the learned Appellate Court has miserably failed to refer to any evidence, whereby it could be inferred that transaction

[1] Kazi Noor Muhammad v Pir Abdul Sattar Jan [PLD 1959 (W.P) Karachi 348]

[2] ALLAH DIN *v* HABIB (PLD 1982 SC 465)

of sale was never established. In fact, the Applicant was never required to establish the sale transaction; rather the onus was on Respondent No.1 to come forward and adduce evidence that he never executed any sale transaction; and therefore, the entry recorded in the record of rights pursuant to such transaction of sale be cancelled. Nothing has been adduced by Respondent No.1 in this regard. The Respondent No.1 himself led the following evidence:

> **"***Examination in Chief to Shakeel Ahmed Memon adv. for plf.*
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> *I have filed this suit for declaration and possession. I use to reside alongwith my brother in law. My brother in law was tapedar. I had purchased 10 acres of Agricultural land from one claimant Muhammad Yasin. After some time I give 4-00 acres land out of 10-00 acres to my brother-in-law. Because he promised me to get possession from claimant Yasin. I had purchased the suit land in the consideration of Rs.20,000/- but in the year 1986 the defendant No.4 fraudulently had got changed Khata in collusion with defendant No.6. Then I went to defendant No.2 Mukhtiarkar Rohri and inquired about the position of the suit land. Then I moved application before SDM Rohri but he did not decide the said application and now I came to this court to file this case that I have never sale the above suit land to defendant No.4 and all the signatures are forged and manipulated. Now the dispute is over S.No.604/2 (4-13) in which my share is 70 paisa, S.No.588 (5-28) in which my share is 64 paisa, S.No.326 (5-08) my share is to the extent of 06 paisa this suit land is situated in Deh Trimooh Rohri. The above S. number which were cultivated by my hari who had paid me batai. Now I came to this court for declaration and possession about the above suit land which is not sale by me to the defendants.*
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> *Cross to Mr. Syed Bahadur Ali Shah advocate for defendant No.4.*
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> *It is correct that I have not produce the original Khata of the disputed land in the court. It is correct that I have not mentioned in this plaint that I had purchased the suit land from one Yasin. It is correct that I have not mentioned in the plaint that I executed agreement with Qazi Maqbool Ahmed regarding the suit property. At the time of purchasing the suit land I was aged about 18/19 years. It is correct that at the time of purchased of the suit land Qazi Maqbool Ahmed was Tapedar. It is incorrect to suggest that the suit land was purchased by Qazi Maqbool Ahmed. The co-sharer in the disputed land are Jagirani, Odhana, Palh and they are in possession of the suit land to the extent of their shares. It is correct that Mst. Razia had got executed power of attorney in the name of Faqir Muhammad. It is incorrect to suggest that I have identified the said power of attorney. It is correct that S.No. 511 was sold out by Mst. Razia to Mst. Sobia. It is correct that the said land was sold out through general power of attorney. I knew about the selling of the suit land in the year 1990. It is correct that the suit land is sold out on the consideration of Rs.50,000/-. It is correct that I have not filed suit for cancellation of the sale agreement.***"**

9. Perusal of the aforesaid evidence clearly reflects that not only this evidence is distorted and hearsay but so also even not supported by his own pleadings, and therefore, the Appellate Court was not justified in setting aside the judgment of the Trial Court, whereby the Suit was dismissed.

10. In view of herein above facts and circumstances of the case, since a case for exercising jurisdiction in terms of Section 115 CPC was made out as the order of the Appellate Court is an outcome of misreading and non-reading of the evidence and material on record; this Civil Revision Application was **allowed** vide a short order dated 19-11-2021 and these are the reasons thereof.

J U D G E

Abdul Basit