IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

R.A. No. 199 of 1999
[Prof. Muhammad Rahim & Ors vs Municipal Committee Mirpurkhas & Ors]

Applicants	Prof. Muhammad Rahim and others through Mr.Arbab Ali Hakro,Advocate.
Respondents	Mr. Wali Muhammad Jamari, Asstt: A.G.

Date of hearing	28.10.2021
Date of decision	19.11.2021

O R D E R

ADNAN-UL-KARIM MEMON, J.- The applicants through this Civil Revision Application have called into question the judgment and decree dated 29.07.1999 & 10.08.1999 passed by learned 1st Additional District Judge, Mirpurkhas whereby the learned Judge while allowing the appeal filed by Municipal Committee Mirpurkhas, set-aside the judgment and decree dated 19.12.1998 & 24.12.1998 respectively passed by learned 1st Senior Civil Judge, Mirpurkhas in F.C. Suit No. 97 of 1992.

2. Brief facts of the case are that on 26.7.1992 applicants filed F.C Suit No. 97 of 1999 against the respondents for declaration and injunction praying therein that the order of respondent No.2 giving plot to respondent No.1 is illegal, void & without lawful authority. The applicants pleaded that they were/are brothers and residing in house No. 127 Mir Farm Colony, Mirpurkhas. Adjacent to the house on the southern side there are 3 plots each plot is 1025 sq. ft which are in their possession since 1997 surrounded by walls and hedges. The above plots were part of old abandoned Bhada land. They applied for their grant to respondent No.2 who after consultation with Revenue Officer granted jointly vide order dated 8.9.1988. Respondent No.2 bifurcated the plot to each of the applicants and they obtained NOC from the Irrigation Department and Mukhtiarkar under letters dated 2.9.1987 and 28.7.1989 referred to Commissioner for confirmation, for residential purpose at the rate of Rs. 3/- per sq. ft. The Commissioner under letter dated 22.4.1991 accepted the proposal of respondent No.2 and directed to issue formal allotment orders. Per averments, the contract was completed and the applicants have/had

vested rights on the subject plots; that respondent No.2 was bound to obey the orders of Commissioner, but he refused and acted with malice as the applicants were Sindhi speaking and he did not intend to allow the subject plot to be allotted to the applicants; that respondent No. 2 called respondent No.1 and gave subject plots under order dated 02.12.1991; thereafter the suit for declaration and injunction was filed before learned Ist Senior Civil Judge Mirpurkhas.

3. That respondent No.1 appeared & filed written statement denying the possession of applicants and pleaded that the letter of Commissioner dated 22.4.1991 was obtained by practicing fraud, misrepresentation and concealment of material facts. He admitted that the land had been allotted for construction of pacca road in the interest of public at large; that the subject plot was Bhada land granted after obtaining NOC dated 17.6.1987 from XEN Jamrao; that respondents 2 & 3 adopted the written statement of respondent No.1 and denied the allegations leveled against them with the assertion that the subject bhada land was used for pacca road and the same was never allotted to the applicants so their claim that they are/were granted the subject plots by the order of Commissioner dated 22.04.1991 is an afterthought and not worth consideration.

4. From the divergent pleas of the parties, learned Trial Court framed the following issues:

i. Whether the suit is not maintainable?

ii. Whether the plaintiffs have no cause of action?

iii. Whether the suit is insufficiently stamped?

iv. Whether the suit plot has been granted to the plaintiffs according to law?

v. Whether the plaintiffs are in possession of the suit plot? If yes, from which period?

vi. Whether the grant of the suit plot to the plaintiff is obtained by misrepresentation and fraud by concealing the true facts?

vii. Whether the plaintiffs are entitled for the relief claimed?

viii. What should the decree be?

5. Learned Trial Court after examination of the parties and their witnesses, and after hearing them decreed F.C. Suit No. 97 of 1992 vide judgment and decree dated 19.12.1998 & 24.12.1998. The respondent- Municipal Committee Mirpurkhas being aggrieved by and dissatisfied with the above Judgment and Decree filed Civil

Appeal No. 8 of 1999 which was allowed by learned 1st Additional District Judge, Mirpurkhas vide judgment and Decree dated 29.07.1999 & 10.08.1999 with the observation that the suit filed by the respondents was not maintainable at law. Against such conflicting findings the applicants have approached this Court through this Civil Revision Application.

6. At the outset, I asked learned counsel representing the applicants as to how this revision application is maintainable against the findings of learned 1st Additional District Judge, Mirpurkhas on the premise that the subject land/plot had been allotted to Municipal Committee Mirpurkhas for construction of Pacca road, in the interest of public at large.

7. Mr. Arbab Ali Hakro learned counsel for the applicants replied to the query and argued that the learned lower appellate court erred in law in holding that the suit is not maintainable under Section 42 of Specific Relief Act. He asserted that the applicant owns the subject land which was duly allotted to them and confirmed by the Commissioner on the recommendation of respondent No.2. Thus, the applicants have a right, title & interest in the suit plots. Therefore, the suit under Section 42 of the Specific Relief Act was/is maintainable under the law; and the findings on issue Nos. 1 & 2 are liable to be reversed; that learned lower court committed material illegality by not appreciating that the Commissioner had already confirmed vide letter dated 22.4.1991 thus re-allotting the same to someone else did not have sanctity under the law; therefore, the learned lower appellate court had committed material illegality by observing that the grant as yet has not been confirmed; that learned appellate court has illegally held that Section 36 of Colonization of Government Land Act has put the legal bar to Civil Court to take cognizance and that the Civil Court has no jurisdiction while giving the findings on issue Nos. 1 and 2. It is submitted that the civil court while exercising supervisory jurisdiction could interfere if the orders were without jurisdiction, malafide, collusive, and based on fraud. Therefore, the civil Court has ultimate jurisdiction to decide the issue between the parties, therefore the findings on issues No. 1 and 2 are liable to be set aside. That learned lower appellate court failed to appreciate that the civil court possessed the jurisdiction to strike down the orders of Colonization Officer in violating the law; and, putting unwarranted interpretation; that learned lower appellate

court erred in law by not appreciating that respondent No.2 had not acted under the provision of the Act and failed to comply with the orders of Commissioner, therefore, civil Court had jurisdiction in the matter; and the findings are illegal hence liable to be set-aside; that learned appellate court erred in law by not appreciating that the civil court despite provision of Section 36 of Colonization of Government Land Act 1912 has jurisdiction to entertain the suit and if the order passed by the revenue authority was bad in law, without lawful authority and malafide. Therefore, learned appellate court has illegally allowed the appeal and set aside the decree of trial court hence is liable to be set-aside; that learned appellate court has committed material illegality by not appreciating that the civil Court has jurisdiction to examine the cases to be satisfied where Executive Functionary had exercised their powers under law and had followed the statutory obligation as also the principle of natural justice. Therefore, civil Court has jurisdiction, and exercise of such jurisdiction would not militate against the provision contained in Section 36 of Colonization of Government Land Act 1912 and judgment and decree of appellate court is liable to be set-aside; that learned appellate court has erred in law by observing that the applicants though condemned unheard are not sustainable under the circumstances of the case. It is submitted that any order passed in violation of the principle of natural justice was/is not sustainable under the law, therefore, findings on issues No. 1 and 2 are liable to be set aside; that learned lower appellate court has given its findings on issue Nos. 1 and 2 erroneously based on misreading of documentary as well as oral evidence which explicitly shows that the applicants have a cause of action to file the suit before the civil court and no Special Tribunal has jurisdiction; and the remedy has properly been availed by the applicants before the trial court, therefore, the judgment of appellate court is liable to be set-aside; that learned appellate court has committed material illegality by holding that the applicant has not been able to satisfy that the grant order was issued under letter dated 29.5.1988. It is submitted that the oral evidence, as well as documentary evidence, proves that the applicant was legally granted and the same has not yet been canceled, challenged, terminated by any authority, therefore, respondent No. 2 has no jurisdiction to allow the same to Municipality on 02.12.1991, which is void, malafide, above their lawful authority and has been no value in the eyes of law, thus the

findings on issue Nos. 4 and 6 are illegal and are liable to be set-aside; that learned appellate court failed to appreciate that there was no evidence brought on record by the respondents to prove that the applicant has obtained by order by misrepresentation, fraud and by concealing the facts; that respondents 2 and 3 have not filed written statements and there is no evidence to that effect, thus findings on issues No. 4 and 6 are liable to be set aside; that learned appellate court has erred in law while giving findings on issue No.5 that there is no corroborative evidence to prove the possession of applicant on the suit plot. It is submitted that the respondents have not denied the possession of applicants and even then it is not proved that respondent No. 1 owns the suit plots. He urged that admittedly the applicants are residing in house No. 127 and the disputed plot is in front of their house and is in their use since before grant to them and that Mukhtiarkar in his support has admitted the possession of applicants, but learned appellate court has based its findings on misreading of evidence on issue No.5, therefore, the same is liable to be set-aside; that learned appellate court has illegally, without assigning cogent reason has set aside the judgment and decree of trial court, therefore, the same is liable to be set aside. He lastly prayed for allowing the instant Revision Application.

8. Mr. Wali Muhammad Jamari learned AAG has supported the appellate judgment and decree and prayed for dismissal of the instant Revision Application; learned AAG took plea that the suit filed by applicants was also barred under Section 36 of the Colonization and Disposal of Government Lands (Sindh) Act, 1912 which provides that a civil court shall not have jurisdiction in any matter of which the Collector is empowered by this Act to dispose and shall not take cognizance of the manner in which Provincial Government, Board of Revenue or Collector or any other Revenue Officer exercises any power vested in it or in him by or under this Act; though learned AAG vehemently relied upon this Section, but he could not point out whether the controversy or the bone of contention raised by the applicants could have been decided or disposed of by the hierarchy under Revenue laws. He further pointed out that since subject plot/land was never allotted to the applicants under the Colonization Act, therefore, the applicant's suit was not maintainable; under sub-section (2) various conditions are provided for which civil court cannot exercise its jurisdiction as such the decision of appellate

Court is correct in upsetting the judgment and decree of learned trial Court.

9. Heard arguments of the parties present in court and perused the judgments and decrees passed by both the courts below.

10. Primarily suit property/plots admeasuring 0-03 Ghuntas in Mohag of S. No.120 in deh 109 Taluka Mirpurkhas is owned by the Irrigation Department Government of Sindh as admitted by the applicant-plaintiff himself when he appeared as PW-1 and shown by the documentary evidence produced by him in the shape of copy of letter dated 22.4.1991 Exh.40 and the document produced by the senior Assistant Revenue Branch D.C office Mirpurkhas, junior Clerk Irrigation department Jamro Division Mirpurkhas and draftsman Municipal Committee Mirpurkhas namely Muhammad Ibrahim also stated so in his evidence concerning the subject land to be used for pacca road in the best interest of public at large.

11. The case of applicants-plaintiff as pleaded seems to be that they were allotted the subject plots by the order of Commissioner Mirpurkhas in the year 1991 and subsequently allotted to Municipal Committee Mirpurkhas for construction of Pacca road, in the interest of public at large. In such a scenario I seek guidance from the latest decision of Honorable Supreme Court on the subject proposition and clear in my mind that for seeking declaration under section 42 of Specific Relief Act, 1877 through a declaratory decree, a pre-existing right can be declared by the Court and a new right cannot be created. Reference is made to the cases of *Muhammad Siddique (Deceased) through LRs and others v. Mst. Noor Bibi ('Deceased) through LRs and others* (**2020 SCMR 483**) and *Abdul Razak V. Abdul Ghaffar and others* (**2020 SCMR 202**).

12. Coming to the issue of legal right of the applicants over the subject plots. In principle Section 42 of Specific Relief Act deals with the legal right as well as threat of invasion to it by a person having corresponding duty not to invade it, but to respect it. It would, therefore, apply only to a case where a plaintiff sues for declaration of his legal right whether to property or legal character provided it is invaded or threatened within invasion by the defendant. It does not deal with the negation of the defendant's rights. Consequently, a declaration that the defendant has no right to do something which

does not infringe upon any legal right to property or legal character of a plaintiff cannot be given under Section 42. The cause of action under this section should, therefore, be a threat of injury to the plaintiff's right or removal of cloud cast on his title. It does not allow the plaintiff to come to the Court to show his hostility only to what the defendant considers his right and which action does not cast any cloud upon the plaintiff's title. In such a situation I do not see any pre-existing right in favor of the applicants to claim declaration under Section 42 of the Specific Relief Act, merely obtaining order in favor from the Commissioner office as it appears from the record, without completing the codal formalities for disposal of Government land under the Colonization Act is of no help to the applicants.

13. Further, the possession of the suit Mohag was prayed for by the applicants- plaintiff. Admittedly, the suit Mohag is owned by the Provincial Irrigation Department Government of Sindh, and rights in the Mohag after allotment, if any, to the allottee were not conferred by the competent authority of Provincial Government. At this juncture, I am concerned with the question whether a declaration could be granted in such a situation by the Court of law. It is by now a well-settled principle of law that no declaration of title can be passed without impleading the real owner i.e. Provincial Irrigation Department Government of Sindh under section 79 of CPC and Article 174 of the Constitution 1973; and, that none could confer a better title in property than he possessed.

14. The Honorable Supreme Court has recently held that when the plaintiff claimed a declaration of title, without pre-existing right, the suit for declaration was not competent and the courts below should not have granted a declaratory decree when no pre-existing rights were available with the plaintiff.

15. In the present suit if the applicants were allotted Mohag there would have been a proper grant under the Colonization Act and not otherwise, which is not their case, rather the Commissioner issued only a letter in the year 1991, and their purported allotment was never acted upon; and, subsequently used for Pacca road.

16. Since the applicant-plaintiff has failed to prove any pre-existing right under the Colonization Act and other enabling laws to be declared owner of the subject plot by the Court, hence he has no

case at all to defend the findings of learned trial Court on the aforesaid points of law.

17. Besides above, the Honorable Supreme Court in recent judgment has held that Section 115 C.P.C empowers and mete out the High Court to satisfy and reassure itself that the order of the subordinate court is within its jurisdiction; the case is one in which the court ought to exercise jurisdiction and in exercising jurisdiction, the court has not acted illegally or in breach of some provision of law or with material irregularity or by committing some error of procedure in the course of the trial which affected the ultimate decision. If the High Court is satisfied that aforesaid principles have not been unheeded or disregarded by the courts below, it has no power to interfere in the conclusion of the subordinate court upon questions of fact or law. In the case of *Atiq-ur-Rehman Vs. Muhammad Amin* (**PLD 2006 SC 309**). The Honorable Supreme Court has further held that the scope of revisional jurisdiction is confined to the extent of misreading or non-reading of evidence, jurisdictional error, or illegality of the nature in the judgment which may have a material effect on the result of the case or the conclusion drawn therein is perverse or contrary to the law but the interference for the mere fact that the appraisal of evidence may suggest another view of the matter is not possible in revisional jurisdiction.

18. In my considerate view, the judgment and decree dated 29.07.1999 & 10.08.1999 passed by learned 1st Additional District Judge, Mirpurkhas does not suffer from any misreading or non-reading of evidence nor any other illegality and or irregularity calling the attention of this court for justifying any interference. Accordingly, instant revision application being meritless stands dismissed with no order as to cost.

JUDGE

Karar_hussain/PS*