IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

R.A. No. 249 of 2011

Applicants	:	*through Mr. Muhammad Amir Qureshi, advocate*
Respondent No.2(a)	:	*through Mr. Sikandar Ali Kolachi, advocate*
Respondent No.3	:	*through Mr. Jaidev Sharma, advocate*
Official respondents	:	*through Allah Bachayo Soomro, Additional A.G Sindh*
Date of hearing	:	*25.10.2021*
Date of Order	:	*19.11.2021*

O R D E R

ADNAN-UL-KARIM MEMON, J.- *The a*pplicants have impugned the judgment and decree dated 16.07.2011 & 19.07.2011 respectively passed by learned Additional District Judge Umerkot in Civil Appeal No.46 of 2010 (*Re: Yousuf & Others versus Muhammad Hassan & Others*), whereby, the the learned Judge while allowing the appeal setaside the judgment and decree dated 08.10.2010 & 13.10.2010 respectively, passed by learned IInd Senior Civil Judge Umkerkot in F.C Suit No.55 of 2010 (*Re: Muhammad Hassan & Others versus Mouchar & Others*) on the premise that the suit of the applicants was not maintainable, as they failed to prove their case.

2. There are two rounds of litigation. The present applicants had filed F.C Suit No.174 of 1994, which later on was renumbered as F.C. Suit No. 55 of 2010 for declaration and permanent injunction, claiming therein that Survey No.41 in Deh Dudhar Tappo Denar Taluka Umerkot, admeasuring 05.00 acres originally belonged to one Dhano S/o Walho but by lapse of time, same was devolved upon them. It is also averred in the plaint that at a distance of about 07-00 acres of the above survey there is a Begoti bearing No.11, which was purchased by private respondents from one Meghoram; that in between the above survey number and Begoti the above said 07-00 acres of land (***Suit Land***) is a mohaga for which they are entitled to

be granted according to Land Grant Policy; however, as alleged, the respondent No.4/Deputy District Officer (Revenue) in connivance with the private respondents re-surveyed and re-fixed the boundaries of above land and prepared sketch, showing the boundaries of Begoti and suit land to be meeting and overlapping with each other, though there is no connection in between them. The respondents herein also filed F.C Suit No.32 of 2003 seeking declaration in their favor in respect of the suit land.

3. Both the above suits, were consolidated and vide judgment & decree dated 28.02.2004 & 06.03.2004 the suit of present applicants viz. F.C Suit No.174 of 1994 (old) 55 of 2010 (New) was dismissed on merits, while the suit of present respondents viz. F.C Suit No.32 of 2003 was dismissed being time-barred. The present respondents did not prefer any appeal against the said judgment and decree, whereas the present applicants impugned the said judgment & decree through Civil Appeal No.45 of 2004, which was finally disposed of by learned appellate Court vide judgment and decree both dated 27.05.2009, whereby the aforesaid judgment & decree were set-aside and the matter was remanded to learned trial Court with directions to conduct site inspection in presence of all parties, including officials concerned and then decide the matter afresh. Accordingly, the learned trial Court carried out the site inspection and finally decreed the Suit of present applicants, vide judgment & decree dated 08.10.2010 & 13.10.2010 respectively, against which the private respondents preferred Civil Appeal No.46 of 2010, which was allowed and consequently the learned appellate Court set aside the judgment & decree dated 28.10.2010 & 13.10.2010 and maintained the earlier judgment & decree dated 28.02.2004 & 06.03.2004 respectively passed by learned trial Court, hence the present revision.

4. It is, *inter-alia*, contended by learned counsel for the applicants that the impugned judgment and decree suffer from material illegalities and irregularities. He next contended that learned trial Court in earlier judgment dated 28.02.2004, while mainly relying upon the sketch of Assistant Commissioner, had wrongly held that sweet water well is the property of respondents and saltish water well is the property of applicants; in support thereof, he submits that said sketch does not carry any legal value, as the same was not prepared in presence of the parties. He further contended that the Suit of the

private respondents was dismissed being time-barred, against which they did not file any appeal; hence the same had attained finality, which gives presumption to the fact that they have no case at all. He also contended that learned appellate Court while remanding the case to learned trial Court vide judgment dated 27.05.2009 has discarded the demarcation report of Assistant Commissioner and has also given adverse findings concerning the authenticity of the same, hence same carries no value in the eyes of law. Learned counsel argued that the site inspection report dated 05.08.2010 was carried out with prior consent of all parties and respondents did not challenge it before any Court of law. He lastly argued that it is beyond comprehension that when the earlier judgment & decree of learned trial Court were set aside and the case was remanded by judgment dated 27.05.2009, which remained unchallenged by either party, then how the earlier judgment & decree dated 28.02.2004 & 06.03.2004 can be maintained, as the same had already been set aside. He prayed for allowing this revision and setting aside impugned judgment & decree.

5. Learned counsel for private respondents while opposing present revision supports the impugned judgment & decree.

6. I have gone through the judgment and decree of learned trial Court as well as appellate Court. Primarily, there is controversy between the parties over two wells, the applicants/plaintiff claim that both the wells located in Survey No.41 belong to them but the respondent/defendants claim that out of the above two wells, one sweet well is situated on the eastern side of the above-referred survey number, which comes within Begoti No.11 belonging to them, whereas the saltish water well situated at survey No.41 belonging to the applicants/plaintiffs.

7. In the consolidated judgment dated 28.2.20004 and decree dated 06.3.2004, the leaned 1st Senior Civil Judge Umerkot mainly relied upon the sketches prepared by Assistant Commissioner Umerkot on 6.7.1994 and held that sweet water well is the property of respondents/defendants while the saltish water is the property of applicants/plaintiffs. At this stage, learned counsel for the applicants has attempted to clarify that the subject sketches do not carry any legal value as the same was not prepared in presence of the parties. On the contrary, such sketches appear to be the outcome of influence

of the respondents/defendants. Be that as it may, I am only concerned whether the learned trial court has dealt with the issue under law or otherwise.

8. I have noticed that learned trial Court dismissed Suit No.32 of 2003 vide judgment and decree dated 28.2.2004 & 6.3.2004 respectively, which was not challenged by the respondents as such the same attained finality. Per learned counsel, this claim of the respondents has now been past and closed transaction thus their claim is barred by the doctrine of Estoppel.

9. It is also noted that learned Additional District Judge Umerkot in his judgment dated 27.5.2009 has discarded the above-referred demarcation report of Assistant Commissioner Umerkot and has given adverse findings regarding the authenticity of the same, for the aforesaid reasons, learned trial Court was directed to carry on inspection of Site in presence of the parties along with a team of land survey department in the light of Revenue Record preserved with them. The concerned Mukhtiarkar (Revenue) Umerkot was also directed to assist the team regarding the record of survey No.41 and Begoti No.11 of Deh Daudhar, Tapo Deenar. Per learned counsel, this important stance of the case has not been considered by the learned appellate Court.

10. Prima facie, the report dated 05.08.2010 submitted by the Commissioner, appointed by the trial Court, explicitly show the following factual position of the case:-

> "*After hearing both parties I am of the opinion that there were no any specific point retarding start and end of S. NO.41 and Begoti No.11, and old Rohira Trees was mark of identification which cut by someone may years back.*
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> *Therefore no any authentic proof regarding boundaries of S.No.41 and Begoti No.11, but unauthentic assessment of Mukhtiarkar Revenue Umekot and Tapedar and Supervisor of beat and Tapedar of Survey Department and one retired Tapedar Vishomal that straight land and leveled land is S.No.41, wherein both wells are zam of the opinion that assessment of Revenue staff might be correct because I am not technical person in this regard. Points on rough paper of the time of inspection is produced herewith."*

11. The learned appellate Court after perusing the record and hearing the parties set aside the judgment and decree of learned trial Court dated 08.10.2010 and 13.10.2010 and maintained the earlier judgment and decree of learned trial Court dated 28.02.2004 &

06.03.2004 on the point that the suit filed by the applicants was not maintainable, with the following reasoning: -

> *"Adverting to the title of the plaint, plaintiff Muhammad Hassan and others have not cited Government of Sindh through its Secretary, he cited through Deputy Commissioner which is against the settled principles laid down by the Superior Courts. Reliance is placed on PLD 1971 Karachi 625, (2) PLD 2004 Karachi 472. Adverting to page No.02 of the plaint, the plaintiff claimed that suit land originally belonged to one Dhano son of Waloo, Hindu Bheel, whose local name was Rohiraro. The said original owner neither brought as a witness nor as a defendant in the suit. Who will certify or to prove the authenticity that the plaintiff is actual owner of the suit property/Well which he claimed. Therefore, I am strongly of the considered view that suit of the plaintiff is bad for non-joinder/misjoinder of necessary party. Without joining the necessary party how the controversy will solve? It implies that something wrong in the bottom which the plaintiff has concealed for the reasons best known by him. Reverting to the contents of the plaint, the plaintiff at page-03 paragraph-10 has stated that suit land was earlier surveyed 1886, the defendant No.04&05 are not competent to re-survey and re-fix its boundaries, they become functus officio. How they becomes functus officio, if fraud is committed, it vitiate all solemn proceeding. The authorities are competent to invoke article 21 of the General Clauses Act if, the situation is arrived like a fraud. The said Article empowers the authority to modify or cancel their own order. Therefore, the contention of the plaintiff as raised in paragraph No.10 of the plaint is without any foundation. Now coming to the written statement for which learned advocate for the respondents vehemently argued that who filed the written statement did not examine in the trial court. The contention of the learned advocate is totally incorrect. The fact is that one party has filed his written statement, remaining party adopted the same. Therefore, nothing wrong with the defendants. On other hand, the law says that the plaintiff should have to stand on his own legs in order to prove his case, he cannot shift this responsibility on the shoulder of defendants. Now coming to the report of Assistant Commissioner/Assistant Collector Grade-1 dated 06.07.1994 if plaintiff is aggrieved with the said report why he did not challenge the same before the Deputy Commissioner? There is no reply.*
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> *Adverting to the evidence of Tapedar Mahendro as Ex.122, he is the man of the field gave its expert opinion, he gave his evidence in favor of the defendant as he admitted in cross-examination that after demarcation it was found that suit water well is situated in Begoti No.11, which belongs to the defendants. Plaintiff Muhammad Hassan as Ex.26 gave contradictory evidence; therefore, no findings on his evidence can be given.*
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> *Pursuant to the above discussion I am strongly of the considered view that suit of the respondent was not maintainable, they failed to prove their case, and therefore the appeal is allowed. Impugned judgment dated 08.10.2010 followed by decree dated 13.10.2010 is set-aside with no order as to costs. The case-law cited by the learned Advocate for the respondents are based on a different set of circumstances. The earlier consolidated judgment dated 28.02.2004 followed by decree dated 06.03.2004 is hereby maintained after having been restored."*

12. I have gone through the memo of plaint of suit filed by the plaintiffs for declaration and permanent injunction, which shows the description of Survey No.41 i.e on its "northern" and "southern side" there is government wasteland and some dune, on its "western side" there is also a government land and yaksala of plaintiffs/applicants Karo and pado while on its "eastern side" there is also a government land. The reports of the official respondents, as well as

Commissioner, appointed by learned trial Court on the exact location of two wells, is still uncertain, therefore, based on uncertainty whether a suit for declaration and permanent injunction could be granted under the Specific Relief Act.

13. The answer in this regard is negative, for the simple reason that both the controversial wells, as discussed supra, are of the Government property. In principle Section 42 of Specific Relief Act deals with legal right as well as the threat or 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 own 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 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 of the Act. 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.

14. Primarily no declaration can be issued outside the provisions of Section 42 and the Courts' power to make declaratory decrees is, therefore, limited to the case contained in Section 42. A person entitled to any legal character or any property right can institute for declaratory relief in respect of his title to such legal character or right to property, thus no declaration can be allowed unless it can be brought within the four corners of the aforesaid section. It is well settled that where the suit is not based on legal right or character, discretionary relief of declaration cannot be granted. Even under the law, the Court must reject the plaint if, on a perusal thereof, it appears that the suit is incompetent, the parties to the suit are at liberty to draw the court's attention to the same by way of an application. The principles involved are two-folds in the first place, it contemplates that a stillborn suit should be properly buried at its inception, and secondly, it gives the plaintiff a chance to retrace his steps, at the earliest possible moment, so that, if permissible under law, he may find a properly constituted suit. It appears from the

language of Rule 11 of Order VII that it requires that an incompetent suit should be laid to rest at the earliest movement so that no further time is wasted over what has been bound to collapse as not being permitted law.

15. Besides above, on the point of the jurisdiction of this Court under Section 115 C.P.C, which primarily empowers this Court, at the first instance 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 have exercised 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 this 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 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.

16. The judgment and decree dated 16.07.2011 & 19.07.2011 passed by learned appellate Court in Civil Appeal No.46 of 2010 are sustainable and the same are maintained and resultantly, instant revision application stands dismissed with no order as to cost.

JUDGE

Hafiz Fahad