

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision No. S – 62 of 2003

Abdul Sattar Soomro v.

Mst. Nabul (late) through her legal heirs and others

Date of hearing: **15-11-2021**

Date of announcement: **17-12-2021**

Mr. Muhammad Adil Khan, Advocate for the Applicant.
Syed Jaffar Ali Shah, Advocate for legal heirs of Respondents No.1.
Mr. Nisar Ahmed Bhanbhro, Advocate for Respondent No.6.

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J U D G M E N T

Muhammad Junaid Ghaffar, J. – Through this Revision Application the Applicant has impugned judgment dated 8.8.2003 passed by 2nd Additional District Judge, Khairpur in Civil Appeal Nos.33 and 34 of 2000, whereby, the Appeals filed by Respondent Nos. 6 & 7 have been allowed and the judgment passed by Civil Judge, Khairpur dated 2.2.2000 in Suit No.65 of 1998 (Old No.93 of 1990) has been set-aside, whereas, the Suit has still been decreed; but on different grounds and reasoning, which has affected the present Applicant.

2. Heard learned Counsel and perused the record.

3. It appears that in the first round, the Suit of Respondent No.1 / Plaintiff for declaration, possession and mesne profit was decreed vide judgment dated 31-08-1996, which attained finality and admittedly none of the parties including the present Applicant had filed any Appeal. Record further reflects that even Execution Application was allowed and the objections of the present Applicant were dismissed. Thereafter, the present Applicant filed C. P. No. D-771 of 1997, wherein a compromise application was filed between the present Applicant and Respondent No.1, and by consent vide order dated 17-11-1998, the application was granted as prayed. The application was to the effect that Respondent No.1 gave no objection for setting aside the judgment and decree and remand of the case for a fresh decision in respect of plot No.26 after allowing full opportunity of

hearing to the parties; whereas, it was further agreed that as and when the present Applicant hands over vacant possession of 30 sq. ft. out of plot No.26, the Respondent No.1 would withdraw the Suit.

3. It appears that thereafter on remand, the learned Trial Court once again decreed the Suit; however, this time the finding as to the claim of the Respondent No.1 as against the Applicant and other Respondents was altered and modified, and by such judgment, this time Respondent Nos. 6 & 7 were aggrieved, and their legal heirs filed Civil Appeal Nos.33 and 34 of 2000, which were allowed through impugned judgment, and the judgment of the Trial Court passed in the second round was set aside; whereas, in fact, the earlier judgment was reaffirmed through the impugned judgment.

4. The first and foremost question would be that after first judgment of the Trial Court dated 31.8.1996, when no Appeal was preferred, and in respect of which, the Execution Application was also allowed, can the same could have been disturbed through a Constitutional Petition, and that too, by a compromise application between two parties only? Apparently, at least the answer to the question would be that at the most, the compromise application / order would only apply inter parties and would be in the affirmative to that extent only. Insofar as the order of compromise obtained in the petition is concerned, this Court cannot comment as to the very maintainability of the Constitutional Petition and the order passed thereon, as apparently that has attained finality as no one had challenged the same any further. However, it is settled proposition of law that any compromise reached between the parties is only applicable amongst the parties who have done so and is not binding upon those who were never party to the said compromise judgment and decree. It is settled law that a decree passed on the basis of a compromise by and between the parties is essentially a contract between the parties which derives sanctity by the Court super-adding its seal to a contract and since the compromise even after it is super-added with the seal of the Court has almost all the ingredients of a contract, therefore, it can be set aside on any of the ground on which a contract could be attacked such as fraud, mistake or misrepresentation¹. A consent decree is a kind of agreement / contract between two parties with a superadded command of the court but it would not bind a third party who was not party to the said suit². Therefore, in all

¹ Abdul Hafeez v Pakistan Defence Housing Authority (PLD 2015 Sindh 336)

² Muhammad Iqbal v Khair Din (2014 SCMR 33)

fairness, the Appellants before the Appellate Court / Respondent No.6 & 7 herein, and even other Respondents, to the exclusion of the Applicant and Respondent No.1, are not bound by the compromise order obtained in the Constitutional Petition. Resultantly, the judgment to that effect, whereby their rights were safeguarded, cannot be disturbed by means of a subsequent judgment, which could only be made applicable between the Applicant and Respondent No.1 if at all.

5. Now when the judgment of the Trial Court in the second round is perused, it appears that the learned Trial Court was much impressed by the directions of the Division Bench passed on the compromise application; whereas, that was neither an order of the Court on merits nor any reasons were assigned by the Court; but was merely an order allowing the application by consent of the parties. In that case, it is not *per se* a judgment of the Court on merits but is only allowing the consent order and the agreement so reached by the parties. Not only this, the learned Trial Court in the second round also considered various other evidence and the reports, which were not part of the judgment in the first round; however, in any case, as noted hereinabove, the first judgment of the Trial Court was though set aside, but it was only to the extent of the Applicant and Respondent No.1 and not against other Respondents. Based on this analogy, it does not seem to be appropriate that by way of a new judgment, rights which had accrued in favor of certain parties and had attained finality, could be disturbed in this manner surreptitiously, wherein only the Applicant had sought setting aside of the judgment of the Trial Court through a Petition, which course was even otherwise not a proper remedy as neither any Appeal was filed nor the matter came up in Civil Revision. Adding to it is the application amongst two parties seeking setting aside of the entire judgment and decree. This is why the learned Appellate Court has mostly reiterated the findings of the Trial Court arrived at in the first round though judgment dated 31.8.1996. The learned Appellate Court has gone through the entire record and has come to the following conclusion:

“ISSUE NO: 1.

The learned counsel for the Defendants NO: 6 and 7/ appellants contended that the suit of the plaintiff is not maintainable on the ground of non-mentioning the particulars of the property. I have gone through the pleadings of the parties and found that not only in plaint but so also in the written statement the number, area and situation of the disputed property are clearly shown, hence the

Defendants NO: 6 & 7/appellants failed to prove this issue, therefore, issue NO: 1 is answered in negative.

ISSUE NO: 2 & 4.

It is stated by the plaintiff/Respondent No: 1 in her plaint that prior to the above suit Defendant No: 1/Respondent NO: 2 Imdad Hussain filed a suit for specific performance of contract in an appeal filed against the dismissal order of the trial court and it was held by the appellate court that Imdad Hussain is entitled for an area of 1400 sq: ft: whereas the plaintiff/Respondent No: 1 is entitled to the extent of 2016 sq: ft: It is further asserted that the appellate court further observed that the site inspection carried out that the Respondent Mst: Nabal was having 582 sq ft: lesser than her actual area. Thus it appears that the Plaintiff/ Respondent NO: 1 was in possession of 1434 sq ft: prior to filing of the suit, the plaintiff was totally dispossessed, hence the plaintiff has amended her plaint and stated in para NO: 8-A "that the Defendants NO: 1, 4, 5(a) to (c), 6 and 7 in collusion with each other upon the remaining area of 1434 sq: ft and the whole of the plot NO: 26 is in possession of the above said Defendants, who are encroachers and liable to be dispossessed."

It is clearly held by the appellate court in Civil appeal NO: 11/81 (19/81), that the Plaintiff is entitled to 2016 sq ft: therefore, the ownership of the Plaintiff/Respondent No: 1 is to the extent of 2016 sq: ft is settled. Now it is to be considered that who is encroacher upon the property in dispute and to what extent?

I have gone through the R & Ps of the case called by this court from the learned lower court and perused the same. It depicts that the Defendant NO: 1 has purchased plot up to the extent of 1400 sq: ft: and he has established his right as discussed above. Since the plots in the aforementioned block has been resell and purchased twice or thrice therefore, the some discrepancies in the plot numbers have been caused. However the right of the parties up to the extent of area of their plots can easily be established according to available evidence. The Defendant NO: 6 and 7 have filed their joint written statement according to which Mustafa Hussain son of Defendant NO: 7 has purchased his plot from one Hajan and the said Hajan has purchased plot from Imdad and the right of Imdad over the plot has already been established in the earlier suit and same is admitted by the Plaintiff. The sale agreement executed between Mustafa Hussain and Hajan dated 31.1.88 has not been challenged by Imdad Hussain. Neither he appeared before the learned lower court nor given any evidence, therefore, the right of the Defendant NO: 7 on this plot is established. The Defendant NO: 3 Hadi Bakhsh sold out plot NO: 26 measuring 2000 sq: ft: to Defendant No: 6 Ghulam Mukhtiar on 3.5.87 through agreement to sell. The Defendant NO: 3 has also not denied the execution of the sale in favour of Defendant NO: 6, therefore, I am in considered view that the sell made in favour of Defendant NO: 6 and son of the Defendant NO: 7 went un-rebutted and unchallenged. The Defendant NO: 2 purchased two plots from its original owner Mir Ghulam Hussain Talpur bearing No: 23 and 24 through registered sale deed dated 26.10.1974 admeasuring 4000 sq: ft and at present the legal heirs of Defendant NO: 2 are in possession of the above plot. The photo copy of such sale deed is

available with the R & Ps of the case along with their written statement. Now the situation is that plot NO: 25 is legally purchased and possessed by Defendant NO: 6 Ghulam Mukhtiar. Plot No: 26 is lawfully owned by the L.Rs of Defendant NO: 7 Aijaz Ahmed.

The legal heirs of Defendant NO: 5 Ghulam Nabi asserted in their written statement that Ghulam Nabi purchased half portion of each plot viz. 27 and 28, admeasuring total area 1800 sq ft: through registered sale deed dated: 23.6.1979 and legal heirs are also in possession of the same.

The Defendant NO: 4 and Respondent NO: 5 Abdul Sattar has asserted in his written statement that they have purchased half of the plot NO: 27 and 28 and produced two photo copies of sale agreements relating to plot NO: 27 and 28 along with written statement, written in Sindhi language with title of agreement. "I have meticulously gone through both the agreements dated 18.10.79 and 9.1.82, which are simply written on stamp paper do not contain any signature of original owner Ghulam Hussain Talpur. It is worth consideration that neither it is attested by any marginal witness nor attested by any authorized officer. No consideration of amount is shown, therefore, such agreement are not legally valid and are void and illegal in the eyes of law. Therefore, it is held that the Defendant NO: 4/Respondent NO: 5 is in illegal possession of the portion of plot NO: 27 & 28 since 18.10.1979. I have also gone through the R & Ps of the case and so also a photo copy of registered sale deed annexed with the same, which was executed by Mir Ghulam Hussain in favour Defendant No: 4/Respondent NO: 5 dated 4.9.77 in respect of the plot NO: 70 and 71 situated in the same area viz: Altaf Colony Khairpur and the same have no concern whatsoever with the disputed property. The sale deed (photo copy of which is on the record) are product of fraud, managed one and fabricated in order to usurp the property of the plaintiff/Respondent NO: 1.

It is held that the Plaintiff/Respondent NO: 1 is entitled to get possession of 1906 sq: ft from plots NO: 27 and 28 which are in illegal possession of the Defendant NO: 4/Respondent NO: 5 Abdul Sattar. However, all the Defendant are in possession of their respective areas as rightly and elaborately discussed by the then Civil Judge Mr. Amjad Bohio vide judgment dated 31.8.1996. Therefore, the issues NO: 2 and 4 are answered in affirmative.

ISSUE NO: 3.

As it is stated by the Plaintiff/Respondent NO: 1 in her plaint asserted that she is not at present in possession even a single square feet and such statement remained un-rebutted and unchallenged, therefore, the issue is answered in affirmative.

ISSUE NO: 4.

As it is discussed above while discussing the issue NO: 2 and 4 that the Plaintiff/Respondent No: 1 was deprived from her legal possession of her property, she is entitled for the mesne profits. The attorney of the plaintiff/Respondent NO: 1 in his examination in-chief before the learned lower court, stated that the

prevailing rent for the plot in locality is about 600/per month and such part of his statement remained un-rebutted and un-challenged. Such statement was recorded on 19.6.1994 before the learned lower court, which means nine years have been passed and the value of the properties is increased day by day, therefore, keeping in view such situation, the mesne profits is hereby enhanced up to Rs: 1200/per month since 18.10.1979 up to the recovery of possession. The issue NO: 5 is answered in affirmative.

ISSUE NO: 5.

In view of the above discussion the appeal in hand is hereby allowed. The officer of this court is directed to return the R & Ps of the case to the concerned trial court.”

6. Perusal of the aforesaid finding of the learned Appellate Court clearly reflects that insofar as the present Applicant is concerned, he had miserably failed to justify his possession on the property in question, and was in fact, holding excess area without any lawful ownership or title, and therefore, was required to handover the possession as claimed by Respondent No.1. The judgment appears to be correct in law and is based on proper appreciation of the evidence and does not warrant any indulgence; whereas, it is neither a case of misreading nor of non-reading of the evidence; hence, no discretion can be exercised in favour of the Applicant. Therefore, this Civil Revision Application is liable to be **dismissed. Order accordingly.**

Dated: 17.12.2021

Abdul Basit

J U D G E