

**IN THE HIGH COURT OF SINDH,
BENCH AT SUKKUR**

Civil Revision No. S – 118 of 2014

(Abdul Wahab vs. Ameer Din & others)

Date of hearing: 31-01-2022
Date of judgment: 31-01-2022

Mr. Sarfraz A. Akhund, Advocate for the Applicant

JUDGMENT

Muhammad Junaid Ghaffar, J. – None present for the Respondents, whereas, on 19-11-2021, the following order was passed;-

*“None present on behalf of Respondents No.2 to 4 nor any intimation is received. On 23-11-2020, Respondent No.2 was in attendance before this Court and had sought time to engage Counsel, but nobody has turned up to assist the Court. As an indulgence, twice notices were repeated and stood duly served as per Bailiff’s report. Today, nobody is in attendance. **No further notice is required.** Since service is held good against the Respondent, Counsel for the Applicant shall come prepared and assist the Court on the next date. Adjourned.”*

2. Through this Civil Revision Application, the Applicant has impugned judgment dated 18-06-2014 passed by 2nd. Additional District Judge, Ghotki in Civil Appeal No.14/2011, whereby the judgment dated 22-12-2010 passed by Senior Civil Judge, Ghotki in F.C Suit No.53/2007 through which the Applicant’s Suit was dismissed, has been maintained.

3. I have heard the Applicant’s Counsel and perused the record.

4. The Applicant’s Counsel has read-out the impugned judgment and submits that the Appellate Court formulated only one point for determination i.e. *whether respondents have encroached upon suit land, raised construction over it and they are liable to pay mesne profit to appellant?* According to him the findings of the Appellate Court is in favour of the Applicant but despite this, the impugned judgment of the trial Court has been maintained. It would be advantageous to refer to the findings of the Appellate Court on the above point for determination, which is as under;-

“To establish this point, burden was upon appellant to prove it. He examined himself so also his witness Khan Muhammad. They both deposed that; respondents have encroached upon suit land. Respondents

*in their evidence have denied it. Appellant could not produce documentary proof, suggesting if respondents have encroached upon his suit land. During trial one Ferozuddin, the Sub-Engineer in Public Health Department, so also one Nazir Ahmed Kalwar, Supervising Tapedar, were examined. They both also have not cleared in their evidence, if respondents have encroached upon Appellants suit land. Mr. Shakeel Ahmed Kamboh in para No.8 of his written arguments submitted that; since respondents are denying their encroachment over appellant's land, therefore, to clear this point, demarcation was very much necessary. In para 8 of his written arguments, he further submitted that; suit land is situated in S.Nos. of appellant or respondents and parties are disputing over it. In such situation local Commissioner should have been appointed to get demarcate the land. I am in agreement with his contention that demarcation was very much necessary to resolve point of controversy between parties, which is lacking in case in hand. Mr. Jamshed Ahmed Faiz learned counsel for respondents also frankly concedes that there should have been demarcation of adjacent lands of appellant and respondents. From the pleading of the parties, it is clear that; appellant and respondents have adjoining land. Appellant's claim is that respondents have encroached upon some area of his land measuring 02 ghuntas and have raised construction over it in the month of May, 2005, whereas, case of respondents is that; they are residing in their own lands since five decades. Controversy between parties may be resolved after demarcation of adjoining lands of Appellant and Respondents. At this stage it cannot be said if respondents have encroached upon the land of appellant and they are liable to pay mesne profit to him on account of alleged encroachment over suit land. In attending circumstances respondents cannot be penalized for mesne profit, because claim of appellant appears to be *epsi-dixit*. However, Appellant may apply for partition of his land before revenue forums and after having partitioned it, if he finds that; respondents have encroached upon his land, he may file fresh suit, in accordance with law.*

Having profound regard for case law relied upon by learned counsel for appellant but facts and circumstances of same are quite different with case in hand.

*In the light of above discussion at this stage Point No.1 is answered as **"ambiguous one and not proved"**.*

Sequel of my discussion over Point No.1 is that; learned Judge of trial court has rightly dismissed Appellant's suit in respect of prayer clauses (b) to (g). Findings of trial court calls for no interference. I find no substances in appeal in hand, the same stands dismissed. Judgment dated 22-12-2010 and Decree dated 24-12-2010 passed by learned Judge of trial Court are maintained.

Civil Appeal No.14 of 2011 Re- Abdul Wahab Vs. Ameer Din and others, merits no consideration, the same is dismissed, leaving parties to bear their own costs."

5. Perusal of the aforesaid findings reflect that insofar as the contention of the Applicant is concerned, to the extent of carrying out the demarcation of the property so as to ascertain whether it has been encroached upon by the Respondents while construction of a drain by the Public Health Engineering Department has been accepted. Not only this, the Respondent's Counsel has also conceded before the Appellate Court that there should have been

demarcation of the property in dispute. However, for reasons best known to the Appellate Court, after recording such findings, while concluding the judgment has not only dismissed the Appeal but has also given direction to the Applicant to approach the revenue forum to seek partition of the land and thereafter, if any encroachment is found, a fresh Suit be filed in accordance with the law. After going through the record as well as the evidence of Ferozuddin, Sub-Engineer, Public Health Engineering Department Ghotki, who was summoned as a Court witness, it appears that the Appellate Court has erred in drawing the final conclusion as above and by dismissing the Appeal of the Applicant. Once the contention of the Applicant in respect of issue No.5 (“Whether during the month of May 2005 the defendants encroached upon the suit land illegally and constructed 3 rooms with malafide intentions?”) settled by the trial Court and the point for determination formulated by the Appellate Court itself was decided in favor of the Applicant to the extent that demarcation was required to be carried out, then further directions were either required to be given by the Appellate Court itself; or for such purpose, the matter ought to have been remanded to the trial Court before whom the Suit was filed by the Applicant. It can’t be that once it is admitted that the matter has to be resolved through demarcation then at the same time the same issue is decided against the party. This would prejudice a party owing to the act of the Court. The finding is not here; nor there. If permitted, this would not advance the cause of justice; rather would defeat the said cause.

6. In view of hereinabove facts and circumstances of this case, the findings of the Appellate Court to the extent of dismissing the Appeal and giving directions to the Applicant to approach the revenue forums for seeking partition and other relief is set-aside along with the judgment of the trial court; and the matter is remanded to the trial Court to proceed further as to the above findings of the Appellate Court regarding demarcation and the concession given by the Respondent’s Counsel. If on carrying out such exercise of demarcation, a case is made out by the Applicant as to Issue No.5, then the remaining issues be dealt with in accordance with law. With these observations, this Civil Revision Application is partly allowed. Office to communicate the same to the trial Court.

Judge