

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Revision Application No. S-46 of 2016

Applicants: Mushtaque Ahmed & others through Mr. Nishad Ali Shaikh, Advocate holding brief for Mr. Parya Ram Advocate

Respondent No. 6 to 10: Through Mr. Yar Muhammad Jalbani, Advocate

Respondents No.1 to 5: Through Mr. Noor Hassan Malik, Assistant Advocate General

Date of hearing: 11.11.2021
Date of decision: 11.11.2021

ORDER

KHADIM HUSSAIN TUNIO, J.- Through captioned revision application, the applicant has impugned the judgment dated 31.05.2014 and decree dated 03.06.2014 passed by Senior Civil Judge Ubauro in FC Suit No.112/2011 (*Re- Mushtaque Ahmed and others Vs. P.O Sindh and others*) as well as judgment and decree dated 13.02.2016 passed by learned Additional District Judge Ubauro in Civil Appeal No.149/2014 (*Re- Mushtaque Ahmed & others Vs. P.O Sindh & others*), hence this revision application has been filed.

2. Brief facts of the present Revision Application are that the applicants filed suit for declaration and permanent injunction, pleading therein that they are owners and in possession of agricultural land bearing No. 397 (2-25), 400 (05-17) and 399 (05-01) acres situated in Deh Dabli, Taluka Ubauro, being a qabooli land in nature while challenging the order dated 12.05.2008 passed by DDO Revenue Ubauro who cancelled their entries for the land.

3. Out of pleadings of the parties, following issues were framed by the learned trial Court:-

1. Whether order dated 12.05.2008 passed by DDO Revenue Ubauro is illegal and without legal justification and the action of defendants No.6 to 10 is illegal malafide, so also the report of Mukhtiarkar is illegal?

2. Whether no cause of action to the plaintiff for filing of the present suit and plaintiff never remained in possession nor they have any concern with the suit land property and the suit is not maintainable under the law?
3. Whether the plaintiff is entitled for relief and declaration for suit property?
4. What should the decree be?

4. The applicants/plaintiffs examined PW-1 Abdul Ahad at Ex.55, PW-2 Noor Muhammad at Ex.56, PW-3 Assistant Mukhtiarkar Ghanwar Khan at Ex.59 and PW-4 Ayaz Ali at Ex.60, who produced various documents in their evidence and then learned counsel for the plaintiffs closed their side; vide statement at Ex.61. On the other hand, the respondents/defendants also examined their witnesses namely DW-1 Ghulam Shabbir at Ex.64, DW-2 Ashiq Hussain at Ex.65, DW-3 Mst. Sahjan at Ex.66, DW-4 Arbab at Ex.67 DW-5 Ghulam Qadir at Ex.68 who produced many documents in their evidence as well. Thereafter, the learned counsel for respondents/defendants No.6 to 10 closed their side; vide statement at Ex.69.

5. After hearing both the parties, the learned two Courts below dismissed the suit as well as appeal of the applicants/plaintiffs.

6. Learned counsel for the applicants contended that the findings of the courts below are entirely based on misreading and non-reading of evidence of the witnesses of the plaintiff; that the impugned judgments and decrees are liable to be dismissed; that the learned appellate court failed to give its decision while observing all the points for determination; that no such points were framed by the learned appellate Court; that the learned appellate court and trial Court has erroneously observed that the land was granted to the respondents in an open Katchehri; that the learned appellate court has not only misconstrued the relevant law and fact involved in that case but has also utterly failed to properly evaluate and appreciate the oral as well as documentary evidence available on the record which has resulted in prejudice and injustice to the applicant; that the impugned judgment and decree of the learned appellate court is unjust,

improper, capricious and against the law, justice, equity and good conscience, hence is liable to be set-aside.

7. Conversely, learned Asst.A.G and counsel for the respondents has raised no objection to the remand of the case to the learned appellate Court for decision afresh after framing of proper points of determination.

8. I have heard the learned counsel for the parties and perused the record.

9. From the perusal of judgment and decree passed by the learned trial court, it appears that from the pleadings of the parties, issues were framed by the trial Court and through its judgment dated 31.05.2014, learned trial Court dealt with various issues. However, the learned appellate court does not appear to have recorded an issue-wise finding and therefore it has committed gross illegality in not complying with the mandatory provisions of Order XLI, Rule 31 of the Civil Procedures Code. It is by now a well-settled principle of law that the provisions of Order XLI, Rule 31 of C.P.C. are mandatory in nature and are to be followed to enable the appellate Court to decide the matter in accordance with law. Where the appellate Court fails to consider the evidence on record or the order of appellate Court lacks application of judicious mind, it would amount to a failure to comply with mandatory provisions of Order XLI, Rule 31 C.P.C. It has been held by this Court in the case of *Juma Khan v. Mst. Shamim and others* (1992 CLC 1022) that the provisions of Order XLI, Rule 31 C.P.C. are mandatory in nature and the judgment of appellate Court has to set out points for determination, record the decision thereon and give its own reasons for the said decision. The Hon'ble Apex Court, in the case of *Gul Rehman v. Gul Nawaz Khan* (2009 SCMR 589) has further been pleased to observe that:-

"The judgment of the appellate Court in hand is not a judgment in its true sense and it is even admitted by the High Court that the first appellate Court has followed the path least resistant. The appellate Court should have applied Order XLI, rule 31, C.P.C. in

stricto sensu as it has got ample powers under Order XLI, rules 32 and 33, C.P.C.

We are convinced that the first appellate Court, which is ultimate Court of facts, has not done its legal duty.

9. Learned counsel for the respondent mainly opposed remand relying on Order XLI, rule 23, C.P.C. and stated that neither the case has been decided on preliminary points nor other facts are available on record to justify the remand of the case. In this regard, he placed reliance on the cases of Arshad Ameen v. Messrs Swiss Bakery and others, 1993 SCMR 216 and Muhammad Dervaish Al-Gilani and 14 others v. Muhammad Sharif and others, 1997 SCMR 524, but the precedent case-law is not applicable to the present case as in these two cases appeal was filed before the High Court and in the instant case revision had been filed before the High Court. The High Court, if it was of the opinion that the first Appellate Court has not adhered to Order XLI, rule 31, C.P.C. should have sent the case back to the appellate Court with some directions and should not have decided the case in revisional jurisdiction as the scope of revision, to some extent, is limited. *In the case in hand the appellate Court has given cursory judgment mainly depending on the decision of the trial Court although sufficient material in the shape of evidence was available before it. The judgment of the first appellate Court is itself a big reason for remand of the case.*

(emphasis supplied)

10. The impugned judgment of the learned appellate Court clearly shows that the learned appellate Court has neither framed nor established the proper points for determination and has also failed to record its finding on the issues already framed by the learned Senior Civil Judge, which could be said to have covered all the factual and legal points so agitated or borne out from reading of the judgment of the trial Court, though it was a mandatory requirement of the law under Order XLI, Rule 31, CPC. Bare reading of the impugned judgment passed by the learned appellate Court shows that the main issues relating to the orders passed by the Revenue Authorities and documentary evidence produced by the applicant during trial have not been properly dealt with by the learned appellate Court and no such point for determination was framed by the learned appellate Court, thus there is a departure from mandatory requirement of law within spirit of Rule 31 of the Order XLI of CPC, which departure cannot be approved.

11. For the foregoing reasons, the appellate Court has failed to frame relevant and proper points for determination, has merely agreed with the judgment passed by the trial Court without taking necessary effort to adjudicate properly and by doing so has caused prejudice to the applicant. This is a fit case for remand to the appellate Court with directions to frame relevant points in compliance of Order XLI, Rule 31, C.P.C. Resultantly, this revision application was allowed and the matter was remanded back to the learned appellate Court vide short order dated 11.11.2021. Above are the reasons for such short order.

JUDGE

Ghulam Muhammad / Stenographer