

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

IIInd Appeal No. S – 02 of 2009

Lal Bux and others v. Government of Sindh and others

Dates of hearing: **24.01.2022, 14.02.2022 & 28-02-2022**

Date of judgment: **28-02-2022**

Mr. Deedar Ali M. Chohan, Advocate, holding brief for Mr. Malik Naeem Iqbal, Advocate for the Appellants.
Mr. Ahmed Ali Shahani, Assistant Advocate General Sindh.

J U D G M E N T

Muhammad Junaid Ghaffar, J. – Through this 2nd Appeal, the Appellants have impugned judgment and decree dated 10-10-2009 and 12-10-2009, respectively, passed by the 2nd Additional District Judge, Khairpur in Civil Appeal No.83 of 2009, whereby while dismissing the Appeal, judgment and decree dated 18-08-2009 and 22-08-2009, respectively, passed by the Senior Civil Judge-II, Khairpur in F.C. Suit No.77 of 2008 (Old No.56 of 2001) has been maintained, through which the Appellants' Suit was dismissed.

2. Mr. Malik Naeem Iqbal learned Counsel for the Appellants while assisting the Court on the earlier dates of hearings had contended that the two Courts below have seriously erred in law and facts while passing the impugned orders; that the respondents had all along failed to lead any evidence, and therefore, the Suit of the Appellants could not have been dismissed; that the suit land was owned by the Appellants on the basis of an inquiry dated 9.12.1921 of the then Khairpur State in favor of the their predecessor in interests, which has gone unchallenged; that the claim of the Appellants was supported by the attested copy of order of Minister, Khairpur State, whereby, the inquiry as above was affirmed; that suit property was duly mutated in favor of the Appellants as legal heirs; that the same was also allowed sub-division by the concerned authorities; that all such documents are public documents within the meaning of Article 85 of the Qanoon-e-Shahadat Order, 1984; hence, were not required to be proved strictly; that the Courts below have failed to appreciate these documents, hence, the impugned judgments are liable to be set-aside by

allowing instant Appeal. In support he has relied upon the cases reported as *The Evacuee Trust Property Board v Haji Ghulam Rasul Khokhar (1990 SCMR 7250; Muhammad Sidik v Ghulam Hyder (PLD 1961 (WP) Kar 511); Sheikh Akhtar Aziz v Mst. Shabnam Begum (2019 SCMR 524); Muhammad Akram Qureshi v Pakistan Defence Housing Authority (2017 CLC 495); Imam Bux v Daim (PLD 2007 Karachi 358); Fateh Muhammad v Pervaiz Ali (2021 CLC 1644).*

3. On the other hand, learned Assistant Advocate General has opposed this Appeal by arguing that two courts below have recorded concurrent findings of facts against the Appellants, whereas, no case has been made out to overturn these concurrent findings; that no supporting documents were placed on record to support the stance of the Appellants; that a mere inquiry report does not create title or ownership; that instead of a second appeal, they ought to have filed a Revision, and therefore, the Appeal is liable to be dismissed.

4. Heard learned Counsel for the Appellant as well as learned AAG. Today, written arguments have also been filed by Counsel holding brief. I have also gone through the same including the R & Ps of the case file. Since the Appeal has been heard at length on merits on several dates; therefore, the same is being decided on its own merits, without touching upon the issue that whether a Revision was competent instead of an Appeal as apparently there is no issue of limitation either way; nor office has raised any objection; and lastly, even if that be the case, the Court can always convert the same into a Revision.

5. It appears that the Appellants had filed a Suit for declaration and injunction before the Court of Senior Civil Judge, and sought the following relief(s);

- i. *That by decree of this Hon'ble Court, it be declared that the plaintiffs are owners in possession of the Agricultural land measuring 17-15 acres out of S.No.1 of deh Bhambho Khoram taluka Kingri Distt. Khairpur having valid title and khata on the basis of enquiry order passed by the Enquiry Officer Khairpur State & inherited from their father.*
- ii. *That permanent injunction be granted whereby restraining the defendants or any other claiming through them from making any kind of interference in the rights, title and possession of the plaintiffs in respect of suit land as per sketch prepared by the Revenue and Survey Deptt., in any manner what-so-ever in nature.*

- iii. *To grant costs of the suit and any other relief deem fit and proper in the circumstances of the case.*

6. The learned trial Court after exchange of pleadings settled various issues and by way of its judgment dated 18.8.2009 was pleased to dismiss the Suit in the following terms;

“ISSUE NO.1.

To prove above issue burden lies upon the plaintiff as it is settled principle of law that plaintiff have to prove its case by producing oral evidence and documentary proof and not on the weakness pints/evidence of defendants. It is admitted position that plaintiffs named above already filed civil suit bearing No.25/2001 (Lal Bakhsh and others v/s Government of Sindh and others) for declaration and permanent injunction on the same suit property, area and survey number, claiming for ownership of suit property, the said suit was rejected by this court vide order dated. 02.5.2001. The copy of said order lying on record, the said order reveals that the earlier suit was in respect of same subject matter and in between the same parties, in the said suit, the plaintiff claimed to be the owners in possession of suit land by inheritance. From perusal of said order further reveals that in the said suit the plaintiffs had not sought declaration in respect of their title and resulting thereby the plaint was rejected holding that suit was barred under section 42 of Specific Relief Act. The plaintiffs failed to prefer appeal against the above order dated. 02.5.2001 and brought the fresh suit by adducing the prayer of declaration to the fact that they be declared as owner of suit land. Since the earlier was between the same parties in respect of same subject matter, therefore, the present suit on the basis of same cause of action is not maintainable and barred by law U/O 2 Rule 2 CPC.

Even otherwise the defendants have denied about title of the plaintiffs and stated in their written statement that the documents in favour of plaintiffs are forged, fictitious manipulated with collusion of Revenue Staff, than the plaintiffs was duty bound to prove the above documents in favour by examining official witnesses/authors of documents that above documents are issued by the officer concerned and are genuine, the plaintiffs failed to do so, inspite of opportunities. Admittedly, the defendants failed to adduce their evidence in the first round as well as in the second round after remand of suit, but it is well settled principle of law that plaintiff have to prove their case by examining oral evidence and documentary proof i.e. author of documents, and not on the weakness points of defendants. It is also admitted position and well settled principle of law that pleadings cannot be treated as evidence, but as per settled principle of law that the plaintiffs are duty bound to prove their case accordingly. In the present suit the plaintiffs have failed to examine the author of the documents, plaintiffs have failed to produce original documents too. In the absence of above evidence, I am of the humble opinion that plaintiffs failed to prove their case i.e. to prove issue No.1, that their suit is maintainable according to law, hence, I decide issue No.1 as affirmative.

ISSUE NO.2.

To prove above issue burden lies upon the plaintiffs as they are claiming to be the owner of the suit land through their ancestors, inheritance from their father according to the ownership of the suit land under the inquiry held on 04.12.1921, the plaintiffs have failed to produce original record regarding the suit land in favour of their father and subsequently in their favour and not examined competent official of Revenue Department as well as author of the documents. All the documents produced by the attorney of plaintiffs in evidence are attested photo copy, the said can not be relied upon to prove the ownership of plaintiffs over the suit land. In the light of above discussion and discussion on issue No.1, I decide issue No. 2 as affirmative.

ISSUE NO.3.

In the light of discussion on issue No. 1 and 2, the plaintiffs are not entitled for relief claimed, therefore, I decide issue No.3 as negative.

ISSUE NO.4.

In the light of discussion on issue No.1 to 3 that suit of plaintiff is not maintainable, the plaintiffs are not owners of the suit land, therefore, they are not entitled for relief claimed, hence, suit of plaintiffs is hereby dismissed with no order as to costs.”

7. The Appellants being aggrieved with the above judgment filed an Appeal and the learned Appellate Court through impugned judgment has been pleased to dismiss the same in the following manner;

“POINT NO: 1.

8/- *The learned trial Court has observed that the suit is barred under order 2 Rule 2 C.P.C mainly on the ground that the appellants/plaintiffs previously filed suit No: 56/2001 praying for declaration, permanent injunction and in that suit relief of declaration regarding title over the suit land was not prayed. The perusal of order dated 2.5.2001 shows that the plaint was rejected on the ground that the suit is barred under section 42 of Specific Relief Act for failure to seek relief of declaration regarding the right and title over the suit property and in pursuance of that order the appellants/plaintiffs filed fresh suit. Learned advocate for the appellants/plaintiffs contended that the suit No: 25/2001 was filed with the prayer that the respondents/defendants have no authority to dispossess him and according to him at that time the title of appellants/plaintiffs was not under challenge hence that relief was not sought.*

9/- *Order 2 Rule 2 C.P.C provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. Provision of order 2 Rule 2 C.P.C relates the relief to be sought to the cause of action and the learned advocate for appellants/plaintiffs contends that at the time of filing the suit his right and title was not under challenge and due to that*

reason he had not prayed for the relief of declaration for their title over the suit property. I agree with such contention of the learned advocate for the appellants/plaintiffs that the suit does not come within purview of order 2 Rule 2 C.P.C. and hold that suit is maintained. Accordingly the point No.1 is replied in negative.

POINT NO: 2.

10/- P.W Ghulam Jaffar has deposed that the land is situated in Katcha area and it was brought in the Khata of ancestors of the appellants/plaintiffs on the basis of enquiry conducted in the year 1921 and during cross examination to learned DDA the P.W 1 stated that he heard from the ancestors that the plaintiffs (appellants/plaintiffs) are in possession of the suit land. PW 2 Sharafuddin Ghumro has also taken the same plea in his evidence recorded at Ex: 32 that 17-15 acres out of S.No.1 belongs to appellants/plaintiffs while 25-05 acres belongs to Government Revenue department. Admittedly the appellants/plaintiffs claim the title on the basis of enquiry report and neither enquiry officer has been examined and nor original report is brought on record. Mere fact that the appellants/plaintiffs is in possession since long does not entitle him as exclusive owner of the suit property.

11/- The entire land of the country is the Government property and different persons derive their title through any lawful manner but here the appellants/plaintiffs have sought relief of declaration that he is owner of the suit property on the basis of enquiry report which itself does not create the right and title in favour of appellants/plaintiffs as exclusive owner and accordingly the point No: 2 is replied in negative.

POINT NO: 3.

12/- In view of my findings on point No.2, I am of the considered view that opinion recorded by learned trial court is based on well appreciation of the evidence on the record and it does not require interference and the Civil Appeal No: 83/2009 stands dismissed with no order as to costs.”

8. As per the findings of the trial Court, the case of the present Appellants was hit by the provisions of Order 2 Rule 2 CPC, as earlier, a Suit was also filed by the same parties wherein the plaint was rejected under Order 7 Rule 11 CPC, as being barred in terms of section 42 of the Specific Relief Act; hence, the second Suit was not maintainable; however, the said finding has been set-aside through impugned judgment by deciding the same in favor of the Appellants, whereas, no Appeal has been preferred by the respondents; hence, the said issue need not be addressed by this Court any further.

9. As to the argument of the Appellants Counsel that since no evidence was led on behalf of the Respondents; whereas, reliance was placed on public documents by the Appellants; hence, the Suit could not have been dismissed, it would suffice to observe that this argument is misconceived and is not tenable in the given facts and circumstances of the case. Though public documents, as rightly contended, are admissible in terms of Article 85 of the Order, and need not be proved strictly; however, it is not always true in each and every case. Here, the onus is on the Appellants to prove their case first. For that there is nothing on record to substantiate, except an inquiry report purportedly held way back in 1921; that is even prior to creation of Pakistan. The subsequent entries and entire record being claimed as public documents is based on that inquiry, which by itself is not a title document; nor has been proved in any manner. Moreover, the claim is being denied on the ground that it is Government Land belonging to the Forest Department and has been encroached upon by influential persons on the basis of forged and managed documents. In such a situation protection under Article 85 of the Order appears to be a far-fetched proposition and apparently cannot come to the rescue of the Appellants. It is settled law that a Mutation Entry in Revenue Record could neither create nor extinguish title to property as they are only maintained for fiscal purposes¹. Further a right to title or ownership of any property depends entirely on the title i.e. source of acquisition of the right while an Entry in the Record of Rights is not the conclusive evidence of the right to ownership². It is further settled that mere mutation does not confer any right in any property on any one and the mutation entry raised a rebuttable presumption in favor of person in whose favor the same is made³. Unfortunately, the Appellants have miserably failed to discharge the burden which in the given facts lay on them heavily as their only piece of evidence and documents is some inquiry of the year 1921 which they could not prove satisfactorily.

10. As to the argument that Respondents had failed to lead any evidence to rebut the contention of the Appellants; hence, Suit ought to have been decreed is concerned, the same again is misconceived and not tenable. Though the Respondents had failed to lead any evidence before the trial Court; however, they had filed their written statement which is a matter of

¹ Muhammad Ali v Hassan Muhammad (PLD 1994 SC 245)

² Bahadur Khan v Qabool Ahmed (2005 CLC 1937).

³ Ghulam Ahmed v Muzafara Begum (2011 YLR 2991)

record and the entire contention of the Appellants has been controverted and denied. Notwithstanding, that the Respondents failed to lead any evidence nor cross examined the witnesses of the Appellants; nor have led any arguments in the instant matter so as to defend their case, however, the Court in matters wherein Ex-parte proceedings are being carried on, has an additional burden and duty cast upon it, to ensure that the ends of justice are met and the interest of the party who has not been able to defend its case for any reason whatsoever, shall be protected and must be dealt with in accordance with law. The Court is required to examine the evidence as well as material brought on record and to see that the contention so raised is supported by evidence and supporting material or not. It is the duty of the Court to see whether the Plaintiff / Appellant is entitled to the relief being claimed and if yes, then to what extent. The Suit cannot be decreed as prayed in such matters, until and unless the Court is satisfied in this regard. Reliance in this regard may be placed on the cases of ***Nisar Ahmed & another Vs. Habib Bank Limited (1980 CLC 981) and Messers Al-Pak Ghee Mills through Managing Partner Vs. Zeeshan Traders through Proprietor (2008 CLC 120)***. Therefore, the contention in this regard is hereby repelled.

11. In view of hereinabove facts and circumstances of the case, it appears that the two Courts below were fully justified in dismissing the Suit of the Appellants as no case is made out either on facts nor in law, whereas, additionally, concurrent findings have been recorded by two Courts below, which are seldom interfered in exceptional circumstances which in the instant matter are completely lacking; hence, by means of a short order on 28.02.2022, this Appeal was dismissed and these are the reasons thereof.

Abdul Basit

J U D G E