

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision No. S – 40 of 2005

Ayaz Ahmed Soomro.....Applicant

Versus

Rasheed Rehman (deceased) through his LRs & others.....Respondents

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

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

Mr. Manoj Kumar Tejwani, Advocate for the Applicant.

Mr. Sajjad Hussain Kolachi, Advocate for the Respondent No.1(a).

J U D G M E N T

Muhammad Junaid Ghaffar, J. – Through this Civil Revision, the Applicant has impugned Judgment dated 30.11.2004, passed by Additional District Judge-II, Khairpur in Civil Appeal No.35 of 1998 (**Ayaz Ahmed v. Rasheed Rehman alias Abdul Rehman through his LRs and others**), whereby Judgment dated 28.03.1998, passed by Senior Civil Judge-1, Khairpur in F.C Suit No.224 of 1985 (**Rasheed-ur-Rehman alias Abdul Rasheed v. Fazal Muhammad and others**) through which the Suit of the Respondents was decreed, has been maintained and the Civil Appeal has been dismissed.

2. Heard learned Counsel for the Applicant as well as Respondent No.1(a) and perused the record.

3. The Respondents had filed a Suit for declaration along with cancellation of sale deed and permanent injunction and the prayer thereof in the Suit reads as under:

“(a) That this Hon’ble Court may be pleased to declare that the plaintiffs are rightful owners of the suit land bearing Survey No.501 (6/25) acres in deh Noorpur taluka and District Khairpur, by virtue of sale deed (Regd) dated 4.6.1941 and by way of adverse possession also.

(b). To declare that the alleged said deed arranged in favour of the defendant No.3 Biland-Mal fraudulently and by impersonation in the year 1945 is forged one and does not vest any right or title in respect of the suit land and all the subsequent transaction/alienation of the basis of the said forged sale deed and null and void and it does not affect therefore the rights of the plaintiffs.

(c). To grant permanent injunction restraining the plaintiff from interfering with the possession over the suit land themselves, their agents, servants, friends and any other agency in any manner whatsoever and the defendants be restrained from further alienations of suit land in any manner”.

4. The said Suit was decreed by the Trial Court through its Judgment dated 28.03.1998, which has been maintained by the Appellate Court through impugned Judgment dated 30.11.2004. It is a matter of record and so also pleaded by the private Respondents that allegedly some sale deed of the year 1945 was an outcome of fraud to deprive the said Respondents of their legal ownership; hence, liable to be cancelled. It would be advantageous to refer to paragraph Nos. 2,3 & 4 of the Plaint, which reads as under:

“2. That after the death of original owners, the plaintiff are rightful owners of the suit land and are in exclusively constructive continuous, open hostile, any interrupted adverse possession and enjoyment of the suit land since 1941. And this recorded fact is widely known to the defendants. The plaintiffs have also been paying the land revenue since 1941 up-till now. The batai share of the land in suit has not been paid to any.

3. That it appears that the defendant No.3 arranged a forged sale deed in respects of suit land in year 1945 in collusion with the defendants Nos: 1,7 and in order to defraud the plaintiffs and to deprive them from their legal ownership over the suit land.

4. That the defendants, on the basis of the above said forged sale deed arranged by the defendant No.3 in collusion with others got inserted the suit property in purchi Taqsim Khatoon in the name of the father of the defendant No.1 dishonestly and with malafide intention. The defendant No.1 again hurriedly sold out the land in suit to the defendant No.2 on papers behind the back and without notice to the plaintiffs, although the plaintiffs being legal owners have all along remained in possession and enjoyment of the suit land. Again the defendant No.2 hurriedly and malafide sold out the land simply on papers to the defendant No.4 behind the back and without notice to the plaintiffs. The aforesaid mutation as the result of aforementioned sale of the suit land by the defendants No.1 and 2 were sanctioned by the defendant No.7 without knowledge and notice of the plaintiffs”.

5. In response thereof, in the written statement, said contentions were denied in the following terms:

“4. Denied emphatically. In fact, the property in suit originally belonged to Laduk Mal who sold the same to Molvi Abdul Ghani and Allah Warrayo who late sold the same to one Biland-Mal in the year 1945 through a registered sale deed. After migration of Biland-Mal to India on the eve of partition of sub-continent the said property was treated as an evacuee property and formed part of compensation pool. Subsequently, it was allotted to Ghulam Ghous, who was a displaced person from India and after completing all formalities prescribed under the

Rehabilitation Laws, the above property was mutated in his name in the Revenue record, and after the death of Ghulam Ghous, it was mutated in the name of his son namely, Fazal Muhammad, who for all intents and purposes became the absolute owner thereof. On 27.03.1980, Fazal Muhammad sold the above land to Mehraruddin defendant No.2 and accordingly, Khatta was mutated in his favour. Subsequently Meharuddin entered into an agreement for sale respecting the said property with one Abdul Qadir son of Saifullah but this transaction was not put through and by mutual consent. It was cancelled and the land thereafter was sold to the answering defendant on 27.5.1980 through a registered sale deed. Thus the above property has been changing hands from time to time and each transaction has invariably followed the delivery of possession in favour of fresh vendee. It would be worthwhile to mention that while purchasing the said property, the answering defendant was put in physical possession thereof. In view of the submission made herein, all averments made by the plaintiffs contrary to factual possession are denied in toto”.

6. When Respondent No.1 while recording his evidence came into the witness box, he admitted certain facts which are crucial for determination of the fact that whether the Suit by itself was competent and within limitation or not. It would be advantageous to refer to the cross-examination of Respondent No.1, which reads as under:

“XXX to advocate for defendant No.4 .

Previous suit was allowed to be withdrawn subject to cost of Rs:100 but I am not in possession of receipt of the payment of Rs:100 which was imposed, but the same was paid by me to the Judge. It is incorrect to suggest that cost by to was not deposited by me in the court. It is incorrect to suggest that Saeed Rehman is not in existence. I paid to file a case in custodian department in respect of sale deed of (Torn) in the name of Bilandmal the defendant No: 3. I did not file any case before Settlement authority claiming to be owner of the suit property. No suit for cancellation of sale deed in favour of defendant No:3 was filed by me or by my elder prior to 1979. After the death of my father Abdul Ghani and uncle Aliah Warrayo we did not file an application before Revenue authorities for change of Fotti Khata Badal. It is correct that in the beginning suit land was allotted to Ghulam Ghous. I do not know if after the death of Ghulam Ghous land was mutated in the name of his son Fazul Muhammad the defendant No:1. It is correct that on 27.3.1980 defendant. No:1 sold out the suit land to Mehardin through registered sale deed, No application or case was filed before Custodian and settlement department against the allotment of Ghulam Ghous and Fazul Muhammad and against the sale to defendant No:2. ***In the year 1980-81 we came to know about the sale deed in favour of defendant No:4.*** It is incorrect to suggest that even after the knowledge of sale deed in favour of defendant No:4 I filed a suit after delay of about 4 or 5 years. It is correct that in the year 1979 suit was filed against defendant No:1 to 3. It is incorrect to suggest that since 1945 we are not in possession of the suit land. It is incorrect to suggest that the possession of the land was transferred from Biland to Custodian and from custodian to Ghulam Ghous through settlement and thereafter, to his son defendant No.1 who transferred the possession to defendant No:2 and defendant No: 2 transferred the possession of land to defendant No:4 . In the year 1985 the value of suit land was 2500/ per acre. It is incorrect to suggest that the value of suit property in the year 1985 was about Rs:25000/- per acre. It is incorrect to suggest that

the revenue receipt produced by me is not in respect of suit land. It is incorrect to suggest that neither we have right or possession over the property but we have filed a false suit in the court.”

7. Perusal of the aforesaid cross-examination of Respondent No.1 clearly reflects that as to the facts so pleaded in the written statement are concerned, they have been admitted and not denied. The case of the present Applicant is that the property was though owned by Biland Mal prior to partition, but thereafter he migrated to India and the property was then transferred to the pool under the Evacuee Properties Laws. It is further case of the Applicant that the said property was then allotted to various persons and was owned by the present Applicant by way of various transfers and the fact that it was an Evacuee property, the same was never challenged; rather it has been admitted in the evidence of the Respondent No.1, as above. In his evidence, said Respondent No.1 has further admitted that **“In the year 1981 we came to know about the sale deed in favour of the Respondent No.4”**. This admission on the part of the said Respondent reflects that insofar as the subsequent sale deeds including sale deed of Respondent No.4 is concerned, it was in their knowledge in the year 1980 or for that matter at least in the year 1981. The limitation for filing a Suit for cancellation is three years, as provided under Article 91 of the Limitation Act, 1908. In that case, the Suit was hopelessly time barred and could not have been decided or adjudicated on merits. To this, it is the case of the Respondents that the Suit was filed for declaration along with cancellation. However, this appears to be an attempt to enlarge the limitation as against the limitation provided for a cancellation Suit inasmuch as once it came into their knowledge that some sale deed in favour of the Respondent No.4 is in existence; whereas, the property was an Evacuee property, then filing of a Suit for declaration to seek any enlargement of limitation does not suffice. Even if any declaratory Suit was competent; but once cancellation was sought, whereas, the Sale deed’s existence is already in knowledge, then the limitation applicable in respect of cancellation would apply and not of a declaratory suit. At the same time, if a Suit for cancellation had been filed within time, then at the same time the relief for declaration could have been maintained by itself; but not vice versa. If that is permitted, then in every Suit for cancellation, a prayer for declaration would be made which would automatically enhance the period of limitation. This can’t be the

intention of the law as different periods of limitation have been provided for cancellation and declaration.

8. From the above facts, it is clear that the Suit was hopelessly time barred and nothing has been stated in the Plea so as to overcome this crucial element going against the Respondents, whereas, the averments of the Applicant in this regard through their written statement stands admitted in the evidence, and therefore the two Courts below have seriously erred in law and facts by ignoring this pertinent aspect of the case regarding limitation. Once the Suit was barred in time, then any adjudication on merits was uncalled for. Accordingly, it is held that that the Suit was not competent being time barred; and therefore it is not only a case of mis-reading and non-reading of evidence; but so also of lack of jurisdiction. Hence, per settled law¹ in this Civil Revisional jurisdiction, even the concurrent findings of the Courts below can be looked into by exercising powers under Section 115 CPC and therefore by means of a short order passed in the earlier part of the day, this Civil Revision was **allowed** by setting aside the impugned Judgment of the Trial Court dated 28.03.1998 and that of the Appellate Court dated 30.11.2004 and these are the reasons thereof.

JUDGE

Ahmad

¹ Nazim-Ud-Din v Sheikh Zia-Ul-Qamar (2016 SCMR 24), Islam-Ud-Din v Mst. Noor Jahan (2016 SCMR 986), Nabi Baksh v. Fazal Hussain (2008 SCMR 1454), Ghulam Muhammad v Ghulam Ali (2004 SCMR 1001), & Muhammad Akhtar v Mst. Manna (2001 SCMR 1700).