

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Civil Revision No. S – 132 of 2009

(Shafqat Ali vs. Province of Sindh & others)

Date of hearing: 07-03-2022

Date of decision: 07-03-2022

Mr. Safdar Ali Bhatti, Advocate for the Applicant
Mr. Zulfiqar Ali Naich, Assistant Advocate General

JUDGMENT

Muhammad Junaid Ghaffar, J. – Through this Civil Revision, the Applicant has impugned judgment dated 27-10-2009 passed by 2nd Additional District Judge, Khairpur in Civil Appeal No.94 of 2009, whereby, while allowing the Appeal, judgment dated 17-08-2009 passed by Senior Civil Judge, Gambat in Civil Suit No.16 of 2008 has been set-aside, through which the Suit of the present Applicant was decreed.

2. Heard learned Counsel for the Applicant as well as learned AAG Sindh and perused the record.

3. The Applicant had filed a Suit for injunction and recovery of damages and had sought the following prayers;-

(1) This Honourable Court is pleased to grant mandatory injunction directing the defendant No.1 to 5 to remodel/reconstruct the Diraza Minor water course No.13-R in a such design which may become able to irrigate the lands of plaintiff situated in deh Mir Khan Shahani, Taluka Sobhodero.

(a) The defendants No.2 to 5 be directed to pay the damages caused by them to plaintiff with the rate of Rs.10,00,000/- per year with effect from stoppage of water to lands of plaintiff till the restoration of water.

(b) The defendants be permanently directed not to tamper with water course No.13-R of Diraza minor as it may not irrigate the lands of plaintiff in Deh Mirkhan Shahani.

(c) The costs of this suit be awarded.

(d) Any other relief also which is deemed fit and proper by this Honourable Court.

4. The learned trial Court after exchange of pleadings, settled the following issues and decreed the Suit of the Applicant.

1. Whether the suit of the plaintiff is maintainable in law?
2. Whether the land of plaintiff had/was previously settled on water course No.13-R Daraza Minor?
3. Whether the defendants Nos. 2 to 5 malafidely displaced the original portion of water course of Daraza Minor on the private basis and the same will good performance to irrigate the land of plaintiff?
4. Whether the displacement of water course No.13-R of Daraza Minor the land of plaintiff could not be irrigated properly and same became barren?
5. Whether due to such act of defendants No.2 to 5 plaintiff suffered loss of Rs.Ten Lacs per year with effect from stoppage of water to land of plaintiff till the restoration of water?
6. Whether the plaintiff is entitled for the relief?
7. What should the decree be?

5. The relevant findings of learned trial Court are as under;-

“Issues No.3&4

Since both the issues are inter connected with each other as such I would like to discuss and decide together.

The learned counsel for the plaintiff has argued that the defendants have constructed a new module on suit water course about 50 feet away from old module. He has argued that the defendants malafidely kept the level of module at very high, hence in view of high bed level the irrigation water is not reaching at the land of the plaintiff which has caused great loss to the plaintiff and the land of the plaintiff have become barren.

On the other hand the learned counsel for the defendants has argued that the defendant have not constructed any new water course and the old water course is flowing at the site since last more than about 50 years and the plaintiff is irrigating his land from said water course. He has argued that the land of the plaintiff is at high level and no any loss is caused to the plaintiff due to alleged water course.

I have considered the submissions of learned counsel for the parties and gone through the case file.

The case of the plaintiff is that the defendants have constructed a new module on suit water course and have kept its bed level at very high and due to which the irrigation water is not reaching at the land of the plaintiff.

Record shows that the defendants neither in their written statement nor in evidence have denied the construction of new module nor stated/deposed that they have not changed the construction of suit water course. It is admitted position that the case of the plaintiff is not regarding change in construction of suit water course but the case of the plaintiff is regarding change of construction of module of suit water course and on this point the defendants have remained totally silent hence under these circumstances the presumption would be that the defendants have admitted the allegations of plaintiff regarding change in construction of module of suit water course.

The plaintiff in his evidence has also substantiated his version of pleadings. The version of plaintiff is also fully supported by his two witnesses namely Bilawal and Chanessar and both of them have deposed that new module has been constructed at high level.

The version of the plaintiff is further supported with the report of Commissioner in which it is stated that there exists new module about 50 feet away from old module and is constructed at high level and due to which the land of the plaintiff is not being irrigated.

In view of the above discussion and evidence available on record, I hold that the defendants illegally changed the position of module and constructed new module at high level and due to which the land of the plaintiff is not being irrigated. The issues Nos. 3 and 4 are answered accordingly.

Issue No.5

I have already observed in the foregoing issues Nos. 3 and 4 that the defendants have changed the module of suit water course illegally and constructed new module on suit water course at high level and due to which the land of the plaintiff is not being irrigated, hence in view of my above findings I am of the humble view that the plaintiff has sustained loss. The plaintiff has claimed damages at the rate of Rs.10,00,000/- per year but no documentary evidence is placed on record. Hence the said losses will be determined by the Commissioner appointed by the Court. The issue No.5 is answered accordingly.

Issue No.2.

There is dispute between the parties regarding settlement of land of plaintiff on suit water course, hence in view of admitted position the issue No.2 is answered in affirmative.

Issue No.1

In view of my findings on issues Nos.2 to 5, I hold that the suit of the plaintiff is maintainable, I therefore, answered issue No.1 in affirmative.

Issues No.6&7

In view of my findings on the above issues, preliminary decree of the suit of the plaintiff and final decree will be prepared on the report of Commissioner. The Mukhtiarkar (Revenue) Sobhodero is appointed as Commissioner to determine the actual loss/damage per year from 3 years prior to filing of the suit till disposal of the suit after verification at site and submit his report. The plaintiff is directed to deposit Rs.2000/- as Commissioner fee.”

6. The same was then impugned by the Respondents herein by way of an Appeal and through the impugned judgment, the judgment of the learned trial Court has been set-aside and the Appeal has been allowed. The relevant findings of the learned Appellate Court are as under;-

“Point No.1

The PW-1 Shafqat Ali (respondent No.1/plaintiff) has supported his case as narrated in the plaint but during cross-examination he stated (line 10 to 15 of page 3 of Ex.45) as under;-

It is correct to suggest that I have constructed pacca water course at the distance of 50 feet from Module water course No.13-R. It is correct to suggest that such pacca water course was constructed by the Water Management Department. It is correct to suggest that I have not joined them as party.

It is clear from the above statement of the respondent No.1 / plaintiff that the constructed was made by respondent No.1 / plaintiff and the present appellants and water management department under the supervision of respondents No.3 and 4 / defendants No.2 to 5 have nothing to do with the said construction and respondent No.1/plaintiff had no cause of action against them.

The DW-1 Lal Bakhsh (respondent No.3/defendant No.4 has deposed in his examination in chief (line 12 to 14 of page-1 and line-1 of page-2 of Ex.57) as under;-

“The same water course constructed pacca by plaintiff himself with the assistance of water Management Department in the year 2006. The claim of the plaintiff to the extent of his claim is false.”

The above piece of evidence of DW-1 has gone unchallenged and this evidence also proves that the construction of water course was made by water Management and not by Irrigation Department.

DW-2 Zulfiqar Ali, Assistant Director, Field Team, Water Management Program, Ranipur stated during cross-examination (line 11 to 16 of page-2 of Ex.60) as under;-

“It is correct to suggest that water course No.13-R Daraza Minor was constructed on our approved design. It is correct to suggest that I have inspected the said water course till today.”

It is clear from the above statement that the construction of water course of the respondent No.1/plaintiff was made under his chairmanship on the funds provided by Water Management Department and the present appellants and respondents No.3 & 4/defendants No.2 to 5 have no concern with the construction.

For the reasons given in preceding paragraph No.9 to 11, I am clear in my mind that the respondent No.1/plaintiff has failed to prove the construction of the water course No.13-R Ex Daraza Minor to be malafide and he is not entitled to any relief claimed and point No.1 is replied in negative.

Point No.2.

In view of above discussions and reasons the civil appeal No.94/2009 is allowed with no order as to costs and judgment and decree dated 17-08-2009 and 21-08-2009 respectively is set-aside and F.C Suit No.16/2008 (Re- Shafqat Ali vs. P.O Sindh and others) previously decreed stands dismissed with no order as to costs.”

7. From perusal of the aforesaid reproduction of the prayer clause as well as judgment of the two Courts below, it transpires that primarily the Applicant had sought merely an injunction against the Respondents seeking directions to re-model and reconstruct the water course 13-R in a certain manner along with a prayer for payment of damages caused to the Applicant due to stoppage of water till its restoration. The case as set up by them was that the module of the water course was changed in a manner which has resultantly dried the lands of the Applicant which were earlier being cultivated with abundant supply of water. Apparently, there were two prayers in the Suit i.e. a mandatory injunction with directions to remodel / reconstruct the water course which at the time of filing of the suit was disadvantageously constructed; and second, for payment of damages caused during such period. If the finding of the learned trial Court in respect of issue Nos.3 and 4 are perused, it appears that based on some Commissioner’s report and without application of an independent mind as to the veracity of the said report, the learned trial Court has decided these issues in favour of the Applicant, whereas, at the same time the defence of the Respondents to the effect that the land of the Applicant is at a high level and if any water does not reach their land, no loss is being caused by them; or for that matter due to any changes in the water course, has been

completely overlooked. It is by now settled law, that the report of a Commissioner appointed by the Court is always persuasive in nature, and is only a tool for the Court to arrive at a just and fair decision but under no circumstances it is binding on the Court. It is not necessarily to be acted upon by the Court mandatorily. The Court has to and must examine the report as a Commissioner's report is not a substitute of evidence, and can only be an aid in evidence, whereas, this is not a case where the matter is being decided on the basis of any evidence which could corroborate with the pleadings and documents on record. We may, however, observe that inspection of location by a Court may be necessary and helpful in deciding a case, but surely it should not be substituted as an evidence, which otherwise is required to be produced by a party¹. Thus, Order XXVI, Rule 12(2), C.P.C. makes it discretionary for the Court to accept or reject a Commissioners report if it is to the dissatisfaction of the Court.²

8. Respondents had further pleaded that in any case the water course in question was not constructed by the present Respondents; but by Water Management Board which incidentally at the relevant time was being presided as Chairman by the present Applicant. This fact has been admitted in evidence by PW-1 Shafqat Ali (Ex.45) in the following manner;-

"It is correct to suggest that I have constructed pacca water course at the distance of 50 ft distance from construction of module of water course No.13-R. It is correct to suggest that such water constructed as pacca by the Water Management Department. It is correct to suggest that I have not joined them as party. It is correct to suggest that previously I was served in Sasso department. It is incorrect to suggest that I was terminated from Sasso department. Vol. says I have received golden hand shake."

9. Such conduct of the present Applicant does not support his case in any manner, whereas, non-joinder of the Water Management Board also appears to be intentional with an attempt to avoid true facts coming on record. The learned Appellate Court was fully justified in observing that if that be the case, which is an admitted fact; then the Water Management Board ought to have been joined as a defendant in the Suit. Nonetheless, the observations of the learned trial Court in respect of issues No.3 and 4 even if accepted is only to the extent that loss was caused to the

¹ Abdul Rashid v Mahmood Ali Khan (1994 SCMR 2163)

² Gulzar Hussain Awan v Akbar (1999 YLR 2250)

Applicants and while deciding issue No.5, it has been held by the learned trial Court that though the plaintiff/applicant has claimed damages at the rate of Rs.10,00,000/- per year but no documentary evidence is placed on record. After recording such finding, surprisingly the learned trial Court observed that the said losses will be determined by the Commissioner appointed by the Court and thereafter while deciding issues No.6 and 7 a preliminary decree was passed and some Commissioner was also appointed and purportedly some final decree has been passed. I have not been assisted by any orders on the Commissioner's report filed and presented pursuant to the preliminary decree; nor that the said report was ever objected or any decision was made by the learned trial Court on such report. Even if this aspect is ignored, once the trial Court came to the conclusion that the claim of damages has not been proved as pleaded; then it was not required to appoint a Commissioner for calculation of losses as apparently these were special damages and were required to be specifically pleaded and then proved. If any assistance is required one may go through the case reported as ***Abdul Majeed Khan v. Tawseen Abdul Haleem and others*** [2012 PLC (C.S.) 574]; which has dealt with the manner whereby special and general damages are to be claimed and proved.

10. It is not that on the one hand the Court comes to the conclusion that damages have not been proved; and at the same time, appoints some Commissioner for ascertaining damages as it is not the duty of the Courts to ascertain such damages. It may be relevant to mention that this is not the case of calculation of mesne profits or interest on an admitted amount for which perhaps in exceptional circumstances, a Commissioner can be appointed for arriving at a correct determination of the same. This is a case of damages, which if not proved then the Suit is liable to be dismissed. Here the court after coming to the conclusion that the Applicant has failed to prove the damages as claimed; went on to appoint a Commissioner for such purposes. This conclusion has no basis and cannot be acted upon in this manner. The only conclusion ought to have been is dismissal of claim of damages.

11. Lastly, it may be observed that though there is a prayer of mandatory injunction as above, however, even the learned trial Court has not decreed the same to this extent; and therefore, the Suit was only decreed to the extent of grant of damages by way of a preliminary decree

and thereafter a final decree. There is no order or judgment of the trial Court regarding grant of prayer No. (1) as above and while confronted, learned Counsel for the Applicant has not been able to show as to how the said relief is being asked for.

12. In view of hereinabove facts and circumstances of this case, it appears that the learned Appellant Court was fully justified in setting-aside the judgment and decree of the trial Court, hence by means of a short order in the earlier part of the day this Civil Revision Application was dismissed and these are the reasons thereof.

Judge

ARBROHI