

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision No.S- 132 of 2010

(Muhammad Haneef & others v. Abdul Aleem & others)

Civil Revision No.S-149 of 2010

(Muhammad Iqbal & others v. Muhammad Ayoub & others)

Date of Hearing: **25-04-2022**

Date of Decision: **25-04-2022**

M/s Abdul Qadir Shaikh and Abdul Aziz Shaikh, Advocates for legal heirs of Applicant No.1 in Civil Revision No.S-132 of 2010 and for legal heirs of Respondent No.1(a) in Civil Revision No.S-149 of 2010.

Mr. Sarfraz A. Akhund, Advocate for the Applicants in Civil Revision No.S-149 of 2010 and for Respondents No.1 to 4 in Civil Revision No.S-132 of 2010.

Mr. Mehboob Ali Wassan, Assistant Advocate General Sindh.

J U D G M E N T

Muhammad Junaid Ghaffar, J. – Both these Civil Revisions are being regularly fixed by the office together, perhaps for the reason that it is between the same parties and is in respect of the same Suit property, notwithstanding the fact that impugned Judgments/Orders in both these Civil Revisions are separate and different. Since both learned Counsel have been heard together on the merits of the case, hence, they are being decided together through this common Judgment.

2. Civil Revision No.S-132 of 2010 has impugned Judgment dated 04.02.2010, passed by learned II-Additional District Judge, Khairpur in Civil Appeal No.13 of 2009 (**Abdul Aleem & others v. Muhammad Haneef & others**), whereby Civil Appeal has been allowed and the Judgment dated 06.04.2009, passed by 1st Senior Civil Judge, Khairpur in Civil Suit No.148 of 2006 (**Muhammad Haneef & others v. Abdul Aleem & others**) has been set aside through which the Suit of the Applicants was decreed.

3. Insofar as other connected Civil Revision bearing No.149 of 2010 is concerned, it has impugned Judgment dated 26.03.2010, passed by II-Additional District Judge, Khairpur in Civil Appeal No.41 of 2010 (**Muhammad Iqbal & others v. Muhammad Ayoub & others**), whereby Appeal has been dismissed and the Order dated 02.02.2010, passed by

II-Senior Civil Judge, Khairpur in F.C Suit No.151 of 2009 (**Muhammad Iqbal & others v. Muhammad Ayoub & others**) was maintained, through which the Application under Order VII Rule 11 CPC was allowed and the Plaint in F.C Suit No.151 of 2009 was rejected.

4. For ease of reference, the Applicants in Civil Revision No.S-132 of 2010 would be hereinafter referred to as "**the Applicants**"; whereas the Applicants in Civil Revision No.S-149 of 2010 would be hereinafter referred to as "**the Respondents**".

5. The Applicants had filed a Civil Suit for declaration and injunction and sought the following prayer(s):

"a). This Hon'ble Court would be pleased to declare that on the basis of registered sale-deed dated 5.8.1984 in the name of late Muhammad Ayoub, the plaintiffs, being surviving legal heirs of Muhammad Ayoub are bonafide exclusive and rightful owners of the suit land and claim of defendants No.1 to 4, upon suit land by changing khata in their names and selling land or taking possession is illegal, unlawful, malafide and nullity in the eyes of law, with help of defendant No.5.

b) .To grant permanent injunction thereby restraining the defendants No.1 to 4 from dispossessing the plaintiffs from the suit land forcibly and illegally without due course of law and also further simultaneously restraining the Mukhtiarkar(Revenue), Khairpur (Defendant No.5), from changing khata of suit land in the names of Respondents No.1 to 4 or issuing them sale certificate and also restraining the Sub-Registrar, Khairpur (Defendant No.6) from registering any document regarding suit land on the approach of defendants No.1 to 4.

c). To award costs of the suit and other relief deemed fit and proper".

6. Learned Trial Court after exchange of pleadings settled the following issues:

"1. Whether the father of plaintiffs had purchased the suit land from Muhammad Saleh through registered sale-deed dated 5.8.1984 which is genuine?

2. Whether the entries kept in revenue record in the name of the father of the plaintiffs namely Muhammad Ayoub on the basis of registered sale-deed are illegal?

3. Whether the defendants No.1 to 4 have any legal right in the suit property?

4. Whether the plaintiffs are entitled for the relief claimed?

5. Whether the stamp paper was purchased by the parties from Sukkur treasury or not?

6. What should the decree be?

7. After evidence, the Suit of the Applicants was decreed, as prayed for; whereas, the Respondents preferred Civil Appeal and through impugned Judgment, the Civil Appeal has been allowed by setting aside the Judgment and decree of the Trial Court.

8. The precise reason, which has prevailed upon the Appellate Court, is in respect of appreciation of evidence of two witnesses, produced by the Defendants / Respondents before the Trial Court. In fact, the Trial Court had also relied upon the evidence of both these DWs; however, it is only the appreciation of evidence on which both the Courts below have differed. In fact, both the Courts below have relied upon the evidence in piecemeal and have not read the same as a whole. To that, before proceeding further, it would be advantageous to refer to evidence of DW-3 Muhammad Dawood and DW-4 Muhammad Ramzan, which reads as under:

DW-3 Muhammad Dawood

To

Examination-in-Chief by Mr. Ghulam Mustafa Sahito Advocate for defendants

I know Abdul Aleem and Muhammad Haneef, both are my nephews. The suit property is joint properties. The suit property not disposed of and I never acted as witness in any sale agreement whatsoever produced before the Court.

Cross to Mr. Ahmed Ali Shahani, Advocate for plaintiffs

It is fact that suit land originally belonged to my father Muhammad Saleh. It is fact that Muhammad Saleh had three sons myself, Muhammad Ramzan and Muhammad Ayoub father of plaintiff. It is fact that in the life of Muhammad Saleh Muhammad Ayoub look after the land and paid the land revenue. It is fact that after the demise of Muhammad Ayoub the land looked after by Muhammad Hanif and he paid the land revenue. I have already received my share from the suit land. I see Ex.25-B which is bears my signature at the serial of witness. I see Ex.25-B the signature of Muhammad Saleh is not bears of him. It is not fact that Muhammad Saleh sold out the suit land to Muhammad Ayoub as same is joint property. I came before this Court today with my son. It is not fact that I have been come at the instance of Abdul Aleem what is why I am deposing falsely.”

DW4- Muhammad Ramzan.

To,

Examination-in-Chief to Mr. Ghulam Mustafa Sahito, Advocate for defendants

Abdul Aleem and Muhammad Hanif both are my nephews. The suit land was joint property. I myself and Abdul Aleem received the due share from the suit property. When my father came after getting treatment he informed that he has sold out some land to Muhammad Ayoub Shaikh. We only signed on the sale deed but not appeared

before any office as we were obedient sons of our father as his record and life was unblemished. I see Ex.25-B and say that the signature of my father appears on the sale deed, in the year 1986 we signed on the sale deed and my father had been expired in the year 1988.

Cross to Mr. Ahmed Ali Advocate for plaintiffs

The suit property is now in possession of Muhammad Hanif he is factual owner of the suit land. It is fact that the registered sale deed Ex.25-B is genuine and not forged”.

9. Both the above witnesses were in fact witnesses of the sale deed in question being relied upon by the Applicants. Surprisingly, they appeared as Respondents / Defendants witnesses before the trial Court. In fact, the Applicants and Respondents are *inter se* related and the Applicants’ case is that their grandfather had sold out the suit property to their father in 1984 and since then they are in possession of the property. To the extent of possession, there appears to be no dispute. On the other hand, Respondents’ case is that they are the cousins of the Applicants; whereas, their father also owned the property, as it was never sold by the grandfather, hence the dispute.

10. Now in the given facts and circumstances of the case, when evidence of the two DWs, as above, is examined, it appears that though they are witnesses of the Defendants / Respondents, but in fact they have supported the case of the Applicants to a large extent. D.W-3 Muhammad Dawood (real brother of Applicants father) has admitted that he has already received share from the suit land. He further admits that Exh.25/B (sale deed) bears his signature at the serial of witnesses. He further admits that the Applicants’ father was looking after the land since long and was also paying the land revenue. It has been further admitted that after expiry of Muhammad Ayoub (father of Applicants), presently Muhammad Haneef, the Applicant was looking after the land and was also paying land revenue. The witness in question in fact is the son of Muhammad Saleh, the grandfather from whom the Applicants claim their ownership of the basis of the sale deed. It further appears that though this witness has also stated that Exh.25/B does not bear signature of Muhammad Saleh; whereas, Muhammad Saleh did not sell his suit land to Muhammad Ayoub, as it was a joint property. However, when this part of the evidence is read in juxtaposition along with evidence, as noted hereinabove, it appears that after admitting that he had received his share and so also the fact that the sale deed bears his signature, he has tried to overcome this shortcoming in the subsequent answers by saying that sale deed does not

bear signature of Muhammad Saleh. Once he admits that sale deed bears his signature then at least the very existence of the sale deed cannot be denied nor it can be said that the same was not executed. It needs to be appreciated that this witness is the real son of the executant of the sale deed.

11. The next witness D.W-4 Muhammad Ramzan, who is also the son of Muhammad Saleh, grandfather of the Applicants and again his entire evidence in cross-examination goes against the case of the Respondents and in favour of the Applicants. The witness admits that the suit property was in possession of the Applicants who is actual owner of the suit land and he further admits that the registered sale deed (Exh.25/B) is a genuine and not forged. How and in what manner, the Appellate Court could discard this piece of evidence and dismiss the Appeal of the Applicants is unclear. The Appellate Court has relied upon the evidence in piecemeal and without appreciating the same as a whole. The evidence per settled law has to be read as a whole and especially keeping in view the test of cross-examination through which a witness has gone through after entering into the witness box on oath. A mere pick and choose which is not here nor there, is not an appropriate procedure to appreciate the evidence. The conduct of the Appellate Court in appreciating the evidence of the witnesses as above is really surprising and mind boggling and that too from their examination-in-chief; whereas, per settled law, the evidence has to be read as a whole and especially when it has passed through the test of cross-examination. Cross-examination of a witness affirms what he has stated in his examination-in-chief and when in his cross-examination he cannot defend his examination-in-chief, then the Court cannot rely upon his examination-in-chief, but has to see and decide the matter on the basis of his cross-examination. In fact, here in this matter, the entire evidence of both these witnesses is in favor of the Applicants and against the Respondents. It is settled law that evidence of a witness has to be looked into as a whole; specially the cross examination so as to ascertain the veracity and truth of his assertion in his examination in chief. This is the only way the Court can appreciate the evidence of a witness, and if not, then every witness will take benefit of his examination-in-chief, which at times would not depict the true facts which can only come through his cross examination. The Court has to adopt the proper way while appreciating the evidence of a witness. Picking and choosing of such

minor portion of statement does not amount to pragmatic and positive inference and approach. The court is supposed to draw a conclusion keeping in view the substance of entire deposition of witness and one sentence cannot be torn out of context¹. While considering the evidence as a whole and arriving at a certain conclusion on the basis thereof, there are three things which are kept in view; the volume of evidence, the weight of the evidence and the probability of evidence. It is the cumulative effect of all the three aspects of the evidence that finally determines a certain question of fact². It is also a settled proposition of law that unless the witness enters into the witness box and is tested with the rigors of cross examination, his evidence cannot be relied upon or looked into. Purpose of cross-examination of a witness is to test the veracity of the statement of the witness made out in examination in chief. Therefore, equal importance should be attached by the court to the cross examination of a witness during evaluation of the evidence of such witness. In the peculiar facts and circumstances of this case, the Appellate court should not have relied upon merely the examination in chief and that too while upsetting the judgment of the trial court which had appreciated the evidence as whole and in a proper manner. It is also a cardinal principle of appreciation of evidence that the court in considering as to whether the deposition of a witness and/or a party is truthful or not may consider his conduct as the court has to assess to what extent the deposition of a witness can be relied upon.

13. In view of hereinabove facts and circumstances of this case, it appears that the Appellate Court had seriously erred in law and facts by mis-appreciating the evidence of the two witnesses, who were material witnesses and were in fact produced by the Respondents themselves, whereas, the learned Trial Court had come to a fair and just conclusion by decreeing the Suit of the Applicants. In view of such position, Civil Revision No.S-132 of 2010 merits consideration warranting interference by this Court; hence, the same is allowed by setting aside the impugned Judgment dated 04.02.2010, passed by the Appellate Court, whereas, that of the Trial Court dated 06.04.2009 stands restored.

¹ 2016 C L C Note 73 RIAZ AHMAD V. FAZAL HUSSAIN

² Fatima Bai v Shaikh Muhammad Zaki (1990 CLC 1064)

13. As to the connected Civil Revision No.149 of 2010 is concerned, it appears that two years of filing of the suit by the Applicants, the Respondents had filed their Suit, for declaration, cancellation, partition, possession, mesne profits and injunction, wherein Application under Order VII Rule 11 CPC was filed, which was allowed by the Trial Court which order has been maintained by the Appellate Court. The precise reason for granting such Application was that since already a Judgment has been pronounced in favour of the Applicants in respect of the same dispute and between the same parties, therefore, *res judicata* under Section 11 CPC applies and the Suit is barred. However, it needs to be appreciated that insofar as the applicability of Section 11 CPC is concerned and as rightly pointed out by the Respondents' Counsel, that no final adjudication had taken place; whereas, the matter was pending in Appeal or Revision and therefore strictly Section 11 CPC could not have been invoked. To that extent, though the argument appear to be attractive; however, in the present facts and circumstances of this case, when the matter has now reached this Court in Civil Revision and Judgment of the Trial Court in favour of the Applicants has been maintained, as above, it would be a futile exercise if the two impugned judgments/Orders in the Suit of the Respondents are set aside and matter is remanded to the Trial Court for de novo consideration inasmuch as it has been already held and maintained that there was a valid sale deed in favour of the Applicants and therefore no Court would be in a position to decree a suit for cancellation of same. In that case the Respondents Revision Application must be dismissed and it is so ordered.

14. Having said that it may be of relevance to observe that if the Plaint ought not to have been rejected under Order VII Rule 11 CPC as contended, but at the same time, the Suit of the Respondents appears to be hopelessly time barred as the sale deed was executed in 1984 and was all along impliedly within the knowledge of the Respondents and therefore, attempt of the Respondents seeking cancellation of the sale deed after filing of the Suit by the Applicants does not seem to be justifiable nor it can condoned as the limitation period already stood expired. On this count as well the Respondents had no case and the Suit was ultimately liable to be dismissed. Lastly, it is a matter of record that Respondents father had never challenged the sale deed in question in his life time, and so also his other brothers as well. Two of his brothers

(brothers of respondents father) were even witnesses of the sale deed; hence, it cannot be presumed that it was not in the knowledge of the Respondents father that any sale deed has been executed by his father in favor of Applicants father. Therefore, the Respondents had no lawful right to challenge the sale deed in question; and even if they had, the claim was hopelessly time barred. Accordingly, Civil Revision No.S-149 of 2010 does not merit any consideration; hence the same is liable to be dismissed and it is so ordered.

14. Both the above Revision Applications were decided by means of a short order in the following terms in the earlier part of the day and these are the reasons thereof. ***Office to place a signed copy of this order in captioned connected matter.***

“For reasons to be recorded later on, Civil Revision Application No. S-132 of 2010 is **allowed**, the impugned judgment dated 04-02-2010 passed by the Appellate Court in Civil Appeal No.13 of 2009 is hereby set-aside and that of the trial Court dated 06-04-2009 passed in Civil Suit No.148 of 2006 stands restored, whereas, Civil Revision Application No.149 of 2010 is hereby **dismissed.**”

J U D G E

Ahmad