

THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

R.A. No.61 of 2016.

Inayat Ali and others. . Versus. .Afsar Hussain and others.

Mr. Suresh Kumar, Advocate for the applicants.

Mr. Arbab Ali Hakro, Advocate for the private respondents.

Mr. Wali Muhammad Jamari, Assistant A.G.

Date of hearing & judgment: 06.04.2018.

JUDGMENT

Zulfiqar Ahmad Khan, J.- This revision has been preferred against the judgment dated 30.01.2015, passed by the appellate Court in Civil Appeal No.192/2012, where the appellate Court after considering the material available on record at length, remanded the case back to the trial Court to decide the same on the issue already framed on the point of maintainability and gave two months' time to do the needful.

2. Brief facts of the appeal are that respondents filed F.C. Suit No.224 of 1999 for Cancellation of documents; Declaration and Permanent Injunction, against the applicants pleading therein that their mother namely Mst. Aijaz Fatima as a claimant received agriculture land against her claim in Deh Bux Laghari, Tapo Tando Fazal, Taluka & District Hyderabad. The respondents scheduled the suit property as under:

- "A- Survey Nos.133, 136/B, 137-A-B, 135-B and 133 measuring 24-26 Acres.
- B- Survey Nos. 122-7-18, 123-9-5, 126-6 measuring 22-23 acres (total 47 acres).

3. It was the case of the respondents that deceased Rahim Bux and Ghulam Hussain Brohi were Haris of lands which were mortgaged by Mst. Aijaz Fatima in the sum of Rs.2,00,000/- (Rupees Two Lac) with United Bank Limited Station Road Branch Hyderabad, and due to non-payment of the loan

Bank had filed a suit for recovery against Mst. Aijaz Fatima which was pending in the Banking Court.

4. Mst. Aijaz Fatima died on 1.7.1992 at Karachi, and it is alleged by the respondents that deceased Rahim Bux in collusion with Ghulam Hussain dishonestly forged out a General Power of Attorney in respect of suit land to have allegedly been executed by late Aijaz Fatima on 22.10.1991 in favour of Rahim Bux for the entire land of 47 acres. That Rahim Bux on the basis of general power of attorney sold out 24-26 acres land to his wife Mst. Sahib Khatoon by registered sale deed dated 17.7.1993 and on the same date he executed another registered sale deed for the remaining land admeasuring 22-3 Acres in favor of the minor sons of Ghulam Hussain. That after the death of Mst. Sahib Khatoon the names of applicants No.1 to 6 were mutated in record of rights by Taluka Mukhtiarkar Hyderabad. The respondent No.1 being eldest member of the family had been in USA for education purposes and when he returned back to Pakistan, he came to know about the fraud stated above. The respondents pleaded that their mother Mst. Aijaz Fatima, the owner of the suit land was a "Parda Nasheen" lady of 75 years, died on 1-7-1992 at Karachi, and the power of attorney alleged to have been given to Rahim Bux by Mst. Aijaz Fatima was forged and the sale deeds made by the said attorney of the suit and to the defendants were illegal, void, ab initio and was of no effect.

5. On service applicants No.1 to 11 filed their written statement jointly whereby challenged the maintainability of the suit on various points of law, and on factual side they stated that Mst. Aijaz Fatima was granted an area of 46-23 Acres as claimant while an area of 0-26 Acres in Mohag of S.N 133 was granted in her favour by Barrage authorities. They stated the suit land was mortgaged by respondent No.1 and by Mst. Aijaz Fatima and thereafter the respondent No.1 misappropriated the loan amount and ran away to England. That in the event of non-payment of loan amount, the United Bank Limited filed a suit No.1662 of 1991 which was decreed, and the and applicants No.1 to 11 were paying the decretal amount in Execution application No.138/1995 in order to save the suit land from being auctioned. They denied that Mst. Aijaz

Fatima died on 1.7.1992 and death certificate is false and manipulated, according to them she was died on 7.10.1994. They denied that power of attorney dated 22.10.1991 was forged and not executed by Mst. Aijaz Fatima, and stated that they are in possession of the suit land as owners since 17.7.1993 and paying land revenue and other charges. They further stated in their written statement that in the year 1995 respondent No.2 filed a revision petition before the revenue authorities against the mutation entries mutated in their favour which was dismissed by the Member Board of Revenue vide order dated 02.10.1996. Respondents stated that they were the owners of the suit land and that respondents were trying to oust them from the possession of suit land and prayed that the suit of the respondents may be dismissed with compensatory costs. The official respondents chosen to remain absent as such declared exparte.

6. During trial respondents in support of their case examined one Ghulam Hussain at Ex.110, who produced entry of burial of Hyderi Bagh Meve-Shah graveyard Karachi regarding death of Mst. Aijaz Fatima at Ex.111, Ghulam Hussain Khowaja at Ex.131, who produced death entry of deceased Mst. Aijaz Fatima at Ex.132, Raees Ahmed at Ex.141, Agha Riaz Hyder at Ex.158, who produced power of attorney at Ex.159, certified copy of power of attorney dated 22.10.1991 at Ex.162, CTC of sale deed dated 17.7.1993 at Ex.163, another sale deed dated 17.7.1993 at Ex.164 and death certificate of his mother Aijaz Fatima at Ex.165 and thereafter closed the side vide statement at Ex.169 on the other hand, applicants No.1 to 11 examined one Ghulam Hussain Brohi at Ex.172 Mst. Benazir at Ex.188, who produced death certificate of Mst. Aijaz Fatima at Ex.188/1 and then closed their side vide statement at Ex.173. The court witness namely Qamaruddin Shah, Government officer was examined at Ex.198, who was cross examined by both the counsel for the parties.

7. The trial Court vide judgment dated 12.02.2013 while having framed 9 issues, dismissed the suit on the point of limitation while deciding issue No.8 and refrained from giving any findings on the other issues.

8. Before the appellate Court it was argued that the respondents seeking cancellation of registered documents pertaining to the year 1991 and 1993 only filed suit in the year 1999, thus the suit was time barred as per Article 91 of the Limitation Act 1908 where three years limitation period was provided for filing suit to cancel or set-aside the documents. On the other hand it was contrarily argued that the learned trial Court framed 8 issues but gave finding on the legal issue only and left the other contentious issues undecided, and dismissed the above suit as such the learned trial Court violated the mandatory provisions of order 20 Rule 5 CPC. It was also contended that the trial Court illegally and erroneously applied Article 91 of the Limitation Act (IX of 1908) for computing the limitation period of the suit, as in the case at hand where the respondents filed suit for Declaration with consequential relief of cancellation as such Limitation period as provided under Article 120 of the Limitation Act (IX of 1908) was to be applied instead of Article 91, therefore the finding of the learned trial Court on the legal issue was not sustainable in law therefore, the judgment of the appellate Court is legal, proper and sustainable where the judgment delivered by the trial Court was rightly set aside.

9. The appellate Court framed the following points of determination:-

- 1) Whether the learned trial Court has given correct findings over issue No.8 i.e. legal issue and decided it in accordance with law?
- 2) Whether the impugned Judgment and decree has been passed in violation of the provisions of Order 20 Rule 5 CPC?
- 3) Whether the impugned judgment and decree passed by the trial Court require any interference?

10. Through a well reasoned judgment dated 30.01.2015, the appellate Court reached to the conclusion that in fact suit of the respondents was filed for declaration with consequential relief of cancellation therefore article 120 of the Limitation Act, 1908 was applicable to the above suit for computing limitation period instead of article 91 and declared that the findings of learned trial Court over issue No.1 were erroneous as such same were reversed and remanded the case back to the trial Court.

11. Learned counsel for the applicants referred to the statement of the plaintiff Agha Riaz Haider produced on page-219 and his cross-examination on page-223, where per learned counsel, he admitted of having knowledge of the sale deed before the date on which under paragraph-7 cause of action was alleged to have accrued, therefore, per counsel the trial Court was competent to have the suit dismissed by merely deciding on the issue of limitation.

12. Learned counsel for the private respondents to the contrary, challenged the very maintainability of the instant revision by referring to section 115 of the Code of Civil Procedure where a revision can lie against a final decision of the Courts below which, per learned, as evident from the perusal of the impugned judgment is not the case, as the appellate Court has not decided the matter rather remanded it back to the trial Court with direction to decide afresh. He referred to Order XLI Rule 23 C.P.C. contending that it was the duty of the appellate Court to remand the matter to the trial Court since the trial Court made a decision on the preliminary issue and failed to adjudicate other issues which needed a decision from the trial Court. To the point of limitation, he supported the judgment of the appellate Court, however, contended that appellate Court should have dealt with the instant suit under Article 120 rather than Article 91 of the Act.

13. It is matter of record that trial Court framed 8 contentious issues, but the trial Court had passed judgment on the basis of its findings on single issue i.e. of maintainability of suit and left 7 contentious issues undecided as redundant, though both parties in support of their respective claims led evidence and produced documents. It is settled law that as per Order 20 Rule 5 CPC Courts are bound to decide each and every issue separately, unless finding upon any more of the issues is sufficient for the decision of the suit.

14. After hearing the learned counsel as well as going through the judgments of the Court below, it is evident that the case at hand calls for a full-dressed trial so that valuable rights of the parties be determined after recording evidence from both the sides, as fraud has been alleged. It was thus

not appropriate to shut the doors on the litigants when alleged fraud was committed through the preparation of the power of attorney, for which a suit for cancellation was filed and but trial Court dismissed the suit leaving the respondents loose their valuable property rights. In my view, the appellate Court rightly considered the nature of the dispute in hand and was just to remand it back to the learned trial court with direction to decide all issues including the issue of maintainability afresh in accordance with law.

15. For the above reasons, the instant revision is dismissed and the judgment of the appellate Court is maintained. The trial Court is directed to do the needful in the light of the appellate Court's judgment within the time stipulated by the appellate Court.

JUDGE