

Order Sheet
IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision No.S-211 of 2019

DATE OF HEARING	ORDER WITH SIGNATURE OF JUDGE.
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1. For orders on O/objections No.1,3 and 4 at flag-A.
2. For orders on CMA No.11584/2019
3. For hearing of main case.

Date of hearing.

08.04.2022

Mr. Abdul Mujeeb Shaikh Advocate for Applicants.

ORDER

ARSHAD HUSSAIN KHAN, J.- By means of present Civil Revision Application, the applicants have assailed the order/judgment of two courts below viz. **(i)** Judgment & Decree dated 12.01.2013, passed by Ist Civil Judge, Ghotki, in Civil Suit No.19 of 2012 (Old Civil Suit No.33 of 2010) whereby the suit of plaintiff/respondent was decreed and **(ii)** Order dated 30.09.2019, passed by Additional District Judge-II, Ghotki, in Civil Appeal No.12 of 2013 whereby the appeal preferred by the present applicants/defendants, against the judgment and decree passed in F.C Suit No.19 of 2012, was dismissed as withdrawn.

2. The facts germane to the present case as narrated in the pleadings are that the plaintiff/respondent is the owner of S.No.694 admeasuring an area 02-14 acres and S.No.572 admeasuring an area 03-12 acres to the extent of 00-50 paisa share situated in Deh and Tapa Khangarh (suit land), while the defendants' are used to reside adjacent to the suit land. It has been stated that the plaintiff made a private right of way from his suit land, however, when the same was being utilized for the irrigation purposes by the plaintiff, the applicants/defendants forcibly resisted the same on the pretext the same is public thoroughfare whereas the land on which the right of way was made is owned by the plaintiff and defendants have got nothing to do with the said land. It has been stated that the defendants have attempted to create an illegal private road without seeking any permission from the concerned department/authority as such the attempt of the applicants/defendants to create road from

the plaintiff's land is illegal, unlawful, unjustified and against the law. It is has been also stated that the plaintiff is in peaceful possession, cultivating and enjoying the produce of the land since his forefather till today. It has been also stated that the defendants ill-natured and influential persons are bent upon to make private road through the land of the plaintiff. The plaintiff having no option has approached the court of Ist Civil Judge, Ghotki, by filing Civil Suit No.19 of 2012 (Old Civil Suit No.33 of 2010) with the following prayers:-

- a) To declare the act of the defendants for forcible making private road through the land of plaintiff is illegal, unjustified and against the law without due process of law.
- b) To direct the defendants not to interfere for peaceful cultivating and possession, enjoyment of the suit land till the final disposal of the suit.
- c) To restrain the defendants from raising illegal private road through the land of the plaintiff is undue, illegal, unjustified against the law till the final disposal of the suit.
- d) Any other consequential relief deem fit be granted to the plaintiff.”

3. The said suit, after a full-dressed trial, was decreed in favour of the plaintiff/respondent, vide judgment dated 12.01.2013. Relevant portions of the judgment are reproduced as under:-

“ISSUE No. 1.

10. This issue is a legal issue and burden of this issue lies upon the defendants, as it has been stuck down from the pleadings of defendants, but they failed to prove it in what circumstances the suit of the plaintiff is not maintainable . No single word in the evidence has been deposed by the Attorney of the defendants, which the suit of the plaintiff is not maintainable and also the defendants failed to cross examine the plaintiffs' witnesses. Only in the written statement it was pleaded that the suit of the plaintiff is not maintainable. It settle law that when defendant after filing written statement fails to appear to support pleas raise in written statement and did not cross examine the plaintiffs, in such a situation the adverse inference could be drawn against defendants and pleas taken by plaintiffs should be accepted as true and written statement is not substantive piece of evidence unless averments made therein are proved through evidence. In this regard I rely upon case law, reported as 2007 SCMR1790, 2002 1988 Karachi 460, 2002 CLC 1770 Karachi, 2006 CLC 440 Karachi and 2003 MLD 205 Karachi. Therefore, this issue is decided in negative.

ISSUE No.2.

11. The burden to prove this issue lies upon the shoulder of plaintiff as to whether the defendants forcibly made passage/road from the land of plaintiff. In this regard, the plaintiff Abdul Wahid examined himself (Ex.-29) and has

produced true copy of entry (Ex.30) showing the title over the land and has deposed by saying that "It is land wherein the defendants have forcibly establish private way from their houses towards main link road. They have neither obtained permission from me nor got sanction from the department". The version of the plaintiff is supporting with the evidence of two witnesses, which to unchallenged and un-rebutted, as the defendants side failed to cross-examine any plaintiff's side witness. On the contrary the evidence of attorney of defendants is without supporting the evidence of other witnesses or by production and exhibiting the valid documents convincing that they have legally made passage from the land of plaintiff. The attorney of defendant in the cross examination has admitted by saying that "It is fact that I have not produce any kind of sketch /map which shows existence and passing of such way since very old or at present. Moreover, the defendants have failed to prove through oral or documents evidence that the said made passage from the land of the plaintiff is sanctioned and appearing in the record/sketch and/or acquired by the competent authority. However, the plaintiff by producing the oral and documentary evidence has established that he remained in possession continuously over the land since forefather. It is settled principle of law that " possession follows the title. In this regard I rely upon case law reported as PLD 2001 Lahore 390. In such situation, this issue is decided in favour of the plaintiff in affirmative.

ISSUE No.3.

12. The burden to prove this issue lies upon the shoulder of the defendants to prove it as to whether they have Katchi Sarak since long without interference and having no other passage to reach their houses and vice versa.

13. The made passage / Katchi sarak through the land has not been disputed by defendants, but the attorney of defendants in his deposition has deposed that in the examination in chief that;" There is only one way linking our village metal road with passed from the land which land only belongs to Yar Muhammad Faqeer Mahar', but in the cross examination he admitted by saying that "It is correct that our way also passes from Qabooli land of plaintiff S. No.694". However, nothing comes on record to say that the defendants have alternate way/passage to reach their houses. But the question raised and arisen here that; whether the way/passage from the land of plaintiff is legal! Reply would be illegal, and then the remedy is available with the defendants to sanction it from the competent authority with the consent of plaintiff of compensate him by acquiring the piece/area from the Qabooli land of plaintiff through revenue department or union council etc.

14. With the above observation, this issue is replied accordingly.

ISSUE No.4.

15. For what has been discussed hereinabove at issues No.1 to 3, it convince that the plaintiff has produced the certified true copy of entry/title document of the land, and also produced two witnesses other than him and established his case that the action of the defendants forcibly making private road through his land is illegal, therefore, the plaintiff is entitled for the relief restraining the defendants from undue act.

ISSUE No.5.

16. Under the above discussion at issues No.1 to 4, it is crystal clear that the suit of the plaintiff is very much maintaining and the act of the defendants without due course of law is illegal, as such the suit of the plaintiff is decreed as prayed with no order as to costs.

4. The above said decree was subsequently, challenged by applicants/defendants in Civil Appeal No.12 of 2013, which was dismissed as withdrawn vide orders dated 30.09.2019. Relevant portion whereof is reproduced as under:-

“At the very outset appellant Khan Zaman son of Ghulam Qadir Pitafi filed statement that Civil Appeal may be dismissed as withdrawn. The statement has been taken on record.

In view of statement the Civil Appeal under Section 96 CPC stands dismissed as withdrawn with no order as to costs”.

5. Learned counsel for the applicants while reiterating the facts has contended that the orders impugned herein are not sustainable in law and facts both. Further contended that the learned courts below while passing the impugned orders have failed to consider the evidence available on the record, which support the stance of the applicants. He further submits that attorney of applicants at his own accord without consent of the applicants has withdrawn the appeal, whereas no such instruction, in this regard, was given by the applicants. Lastly prayed that the instant Revision application may be allowed as prayed.

6. From the record, it appears the civil appeal No. 12 of 2013 was filed against the judgment and decree in favour of the respondent after a full dressed trail in the year, 2013 and it had remained pending for about six years without any useful purposes and eventually it was withdrawn in 2019 by the attorney of the appellant namely Khan Zaman who was also one of the parties in the proceedings. There is nothing available on record which could show that any proceedings and or action has been taken by the applicants against the said attorney for unauthorized withdrawal of the civil appeal. Moreover, the judgment passed by learned trial court appears to be based on the evidence produced before it.

7. The provisions of Section 115 C.P.C. envisage interference by the High Court only on account of jurisdiction alone, i.e. if a court subordinate to the High Court has exercised a jurisdiction not vested

in it, or has irregularly exercised a jurisdiction vested in it or has not exercised such jurisdiction so vested in it. It is settled law that when a court has jurisdiction to decide a question, it has jurisdiction to decide it rightly or wrongly both in fact and law. The mere fact that its decision is erroneous in law does not amount to illegal or irregular exercise of jurisdiction. For an applicant to succeed under Section 115 C.P.C. he has to show that there is some material defect in the procedure or disregard of some rule of law in the manner of reaching that wrong decision. In other words, there must be some distinction between jurisdiction to try and determine a matter and erroneous action of a court in exercise of such jurisdiction. It is a settled principle of law that erroneous conclusion of law or fact can be corrected in appeal and not by way of a revision, which primarily deals with the question of jurisdiction of a court i.e. whether a court has exercised a jurisdiction not vested in it or has not exercised a jurisdiction vested in it or has exercised a jurisdiction vested in it illegally or with material irregularity.

8. The upshot of the above discussion is that no illegality, irregularity or jurisdictional error in the order/judgment of the lower courts have been pointed out by learned counsel for the applicants. Resultantly, civil revision, in hand, being devoid of any force and merit, is dismissed in limine.

JUDGE

Ihsan.