

**IN THE HIGH COURT OF SINDH BENCH AT SUKKUR**

**Civil Revision No. S – 48 of 2010**

**(Abdul Razzaque & others v. Mukhtiar Hussain & others)**

Date of hearing: **21-03-2022**

Date of Decision: **21-03-2022**

Syed Jaffar Ali Shah, Advocate for the Applicants.

Mr. Kalander Bakhsh M. Phulpoto, Advocate for Respondents No.1 to 8.

Mr. Muhammad Yakoob Soomro, Advocate for Respondents No. 9(a) to 9(c).

Mr. Shahriyar Imdad Awan, Assistant Advocate General-Sindh

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**J U D G M E N T**

**Muhammad Junaid Ghaffar, J.** – Through this Civil Revision, the Applicants have impugned Judgment dated 16.10.2010, passed by II-Additional District Judge, Khairpur in Civil Appeal No.08 of 2010 (**Lal Bakhsh & others v. Abdul Razzaque and others**), whereby, while allowing the Appeal, Suit of private Respondents has been decreed and Judgment dated 02.12.2009, passed by 1<sup>st</sup> Senior Civil Judge, Khairpur in Civil Suit No.39 of 2003 (**Lal Bakhsh & others v. Abdul Razzaque and others**) through which the said Suit was dismissed has been set aside.

**2.** I have heard both the learned Counsel and perused the record.

**3.** It appears that Respondents had filed a Civil Suit for declaration, possession, mesne profit and injunction and sought the following prayer:

“i) That this Hon'ble our t may be pleased to declare that the plaintiffs are legal and lawful owners of the suit property described above and the defendant No: 1 to 6/or any one else has got no right or concern of whatsoever nature over the same and the possession of the defendant No:1 to 6 is illegal, unauthorized and unwarranted under the law.

ii) To pass decree in favour of the plaintiffs thereby directing the defendant No:1 to 6 to vacate the suit area and deliver its vacant possession to the plaintiffs, being its legal and lawful owners.

iii) To award mesne profits at the rate of Rs:3000 per month in respect of the suit area from the Last 3 years and till physical possession of the suit area is delivered to the plaintiffs.

iv) To grant permanent injunction in favour of the plaintiffs thereby restraining the defendants permanently from interfering with the legal right, title of the plaintiffs over the suit area and so also restraining the defendant No: 1 to 6 to

permanently from making any alienation, sale, changing the shape of raising construction over the suit property in any manner whatsoever nature, award costs of the suit.

v) To award costs of the suit.

vi) To award any other relief which this Hon'ble Court may deem fit and proper, in the circumstances".

**4.** Learned Trial Court after exchange of pleadings settled various issues and while dismissing the Suit came to the following conclusion:

**Issue No.1**

The plaintiffs in their plaint have stated that the suit plot was purchased by them from their father Haji Khuda Bakhsh through registered sale deed in the year 1966. The plaintiffs in their plaint are totally silent that from whom their father had purchased the suit plot and they are also silent about its area purchased by their father. The defendants Nos. 1 to 6 in their written statements have taken the plea that the actual area of the suit plot purchased by father of the plaintiffs from one Muhammad Bassar Khaskheli in the year 1947 through registered sale deed is 2958 square feet and not 4892 square feet. This in view of the denial of the defendants about actual area of the suit plot, it was for the plaintiffs to adduce valid documentary evidence in this regard particularly in respect of area of the suit plot purchased by their father, who subsequently sold out the same to the plaintiffs in the year 1966. The plaintiff No.3 has produced the registered sale deed executed by their father in favour of the plaintiffs at Exh.30/B. But the plaintiffs have not produced any document to show the actual area of the suit plot purchased by their father. The plaintiff No.3, who is attorney of the remaining plaintiffs in his examination in chief is also totally silent about the fact that how his father became owner of the suit plot and what was the actual area of the suit plot purchased by their father. However, the plaintiffs in their plaint and the plaintiff No.3 in his examination in chief have given the area of suit plot as 4892 square feet. In his cross examination the plaintiff No.3 for the first time has deposed that his father Khuda Bakhsh had purchased the suit plot from Uris, Muhammad Bassar and Mariam. Relevant paragraph of cross examination of plaintiff No.3 is reproduced as under:-

“.....Khuda Bux has purchased the suit property from Uris, Bassar and Mariam. It is fact that the registered sale executed in between Khuda Bakhsh and Uris and others has not produced by me before this Court....”.

On the other hand the defendant No.1 in his examination in chief has deposed that the suit plot was purchased by father of the plaintiffs from Bassar in the year 1947 through registered sale deed and in the said registered sale deed, area of the suit plot was given as 2958 sq.ft. He has further deposed that the plaintiffs had purchased the suit plot from their father in which the plaintiffs have shown excess area of the suit plot as 5000

square feet, hence the subsequent registered sale deed executed by father of the plaintiffs in favour of the plaintiffs showing excess area of the suit plot is false. The defendant No.1 has produced the certified true copy of registered sale deed dated 30.8.1947, executed by the original owners in favour of Khuda Bakhsh (father of the plaintiffs) at Exh.102/G. Perusal of Exh.10/G clearly shows that the father of the plaintiffs had purchased the suit plot admeasuring 2958 square feet. The authenticity of registered sale deed Exh.102/G has not been questioned during cross examination of the defendant No.3. According to the plaintiffs the said plot was sold out by their father to the plaintiffs in the year 1966 through registered sale deed Exh.30/B. Perusal of Exh.30/B shows that area of the plot under sale has not been mentioned therein. Therefore, in view of measurement of the suit plot as given in the registered sale deed Exh.102/G as 2958 square feet, it appears that the father of plaintiffs sold out the suit plot admeasuring 2958 square feet and not 4892 square feet to the plaintiffs. Therefore, in view of the above evidence and documents available on record, I am of the humble opinion that the father of the plaintiffs had purchased the suit plot admeasuring 2958 square feet, through registered sale deed Exh.102/G and he sold out the same to the plaintiffs through registered sale deed Exh.30/B.

Therefore, the plaintiffs have wrongly claimed they purchased the suit plot as 4892 square feet, without any documentary evidence. The case of the plaintiffs is that they purchased suit plot admeasuring 4892 sq.ft and out of that area the defendants Nos. 1 to 6 have acquired 1963 square feet. Thus it appears that except 1963 square feet, the plaintiffs are in possession of remaining area from 4892 square feet. After deducting an area of 1963 square feet from alleged 4892 square feet, it appears that the plaintiffs are in possession of an excess area of 2929 square feet then that actually purchased by their father in the year 1947 and sold out by their father to the plaintiffs in the year 1966. Therefore, in my humble opinion the plaintiffs are not owners of the suit property i.e. 1963 square feet, in occupation of defendants Nos 1 to 6, which is said to have Government property, for which the defendants Nos 1 to 6 are already required to vacate the same according to the letters produced by the plaintiffs from Exh.38/G to Exh.38/J. Therefore, the suit of the plaintiffs is barred by the section 47 of the Specific Relief Act. I, therefore, answer the issue No.1 in the affirmative”.

**Issue No.3.**

I have already observed in issue No.1 that the plaintiffs are not owners of the suit property, therefore, in view of my findings given on issue No.1, the issue No.3 becomes redundant and is answered accordingly”

**5.** The Respondents then preferred Civil Appeal and the learned Appellate Court through impugned Judgment has allowed the Civil Appeal and finding in respect of Point No.1 for determination is as under:

**Point No.1. "whether the appellants / plaintiffs are the exclusive owners of the area of 4895 sq. feet, city S.No: 31 by virtue of registered sale deed and are of 1963 sq. feet is in possession of the respondents No:1 to 6/ defendant No:1 t 6"**

9. Through the plaint and evidence the appellants/plaintiffs have claimed their right and title over suit City S.No. 31 and their such claim has been admitted in paragraph No.12 of the written statement filed by the respondent No: 1 to 6 / defendant No: 1 to 6 which reads as under:

"That the contents of para No: 12 of the plaint is denied being false, incorrect and concocted. Further submitted an area of city survey No:31 is in possession of the plaintiffs and no any single feet is in possession of the answering defendants, are in possession of the own property belonging to ancestors."

10. In his deposition the PW-1 Mukhtiar Hussain (applicant No: 1/plaintiff No: 3) has deposed that the area of 1963 ft from City S. NO: 31 has been possessed and amalgamated by the respondent No: 1 to 6/defendant No: 1 to 6 with City S. No: 27, 28 and 30. This evidence of the PW-1 gets full support from the order passed by the Assistant Commissioner on 28.6.1992 and its relevant part is reproduced here in below for sake of convenience:

"Under the above facts and report of Mukhtiarkar Khairpur and documents produced by applicant it is proved that an area of 1963 Sq.ft is in authorized possession of opponents. I therefore order that the unauthorized possession be got removal under the process of law and applicant be put in possession of the same".

11. Though the order of Assistant Commissioner Khairpur dated: 28.6.92 is not binding upon this court but shows that this matter was already inquired and investigated in detail and it was found that the area of 1963 sq. ft out of C.S.No:31 is in possession of respondent No: 1 to 6/defendant No: 1 to 6 and this material can be taken into consideration.

12. The D.W-1 Abdul Razzak (respondent NO: 1/defendant No.1) has deposed in his examination in chief as under:-

The plaintiffs have purchased the suit property from their father. The area of the suit property about 5000 sq.ft. shown in the registered sale deed is false. The plaintiffs have shown excess area then that of actual area of the suit property. The plaintiffs have purchased the suit property from their father in the year 1966. In the subsequent registered sale deed, the area of the suit property about 5000 Sq. ft shown in the registered sale deed Ex:30/B is false.

13. On one side the DW-1 Abdul Razzak admits that city survey No.31 belongs to the appellants/plaintiffs and that they have no concern over that property but on the other side he has questioned the area City survey number, when it has been determined by the Revenue forum and so also admitted by respondents NO.1 to 6/defendants No.1 to 6 that city survey No.31 belongs to the appellants/plaintiffs then respondents NO.1 to 6/ defendants No.1 to 6 cannot question the area of city Survey No.31.

14. The copy of judgment dated: 31.10.1974 passed in the civil suit No.50/1972 (Haji Siddique V/S Haji Khuda Bakhsh & others) available in the R&Ps at Ex. 102/B also shows that the city survey

No.31 belongs to the predecessor in interest of appellants/ plaintiffs and this material also support the case of appellants/plaintiffs.

15. For the reasons referred in preceding paragraph No. 9 to 14, I am of the considered view that the appellants/plaintiffs are the exclusive owners of city S.No.31 and area of 1963 Sq: feet is in possession of the respondents No:1 to 6/defendants NO: 1 to 6 and accordingly the point No: 1 is replied in affirmative”.

**6.** Insofar as the Respondents are concerned, their claim is that the suit property was sold to them by their late father on the basis of a sale deed and as per record, the total area in their possession was 1996 sq.ft, whereas, it was alleged that an area of 1963 sq.ft was encroached allegedly by the present Applicants. Accordingly, they had claimed total area of their property as 4895 sq.ft. However, it is an admitted fact that insofar as the sale deed in favour of private Respondents is concerned; the same does not disclose the total area sold by their father to them. In that case, they had no justification to approach the Court and seek a declaration as to the alleged encroachment and the total area being claimed by them. It is also a matter of fact that the father of the private Respondents had purchased property somewhere in the year 1947 and the total area in his sale deed was 1996 sq. ft. While confronted, learned Counsel for the Respondents has made an attempt to argue that the boundaries have been described in the sale deed; hence the Appellate Court was justified in decreeing the Suit. To that, it may be observed with utmost respect that a registered instrument i.e. a sale deed cannot be construed at the whims and desire of a party holding it. The boundaries in such an instruments determine the metes and bounds of the property; but not the actual total area of the same. If some lesser area was shown in their sale deed as purchased, then the private Respondents ought to have approached their father; or in the alternative, sue him to make correction in the sale deed and handover the entire area. This is not the case of the private Respondents. Instead they approached the Court belatedly and then sought a declaration as to the alleged encroachment by the Applicants as well as claiming the remaining area of the property. It is settled law that a vendor cannot transfer a better title to a vendee than what he possesses at the time of transfer<sup>1</sup>. It is not a disputed fact anymore that the total area in the sale deed held by Respondents father

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<sup>1</sup> Faquir Muhammad v Fida Muhammad (2004 CLC 162); Muhammad Azam Masood v Muhammad Rauf (2020 MLD 1655); The Karachi Parsi Co-operative Housing Society Limited v Maneck M Dastur (2019 CLC 866)

was 1996 Sq. Feet. Therefore, he could only transfer and execute the sale deed for a total area 1996 Sq. Feet, and no more. At most, then apparently the only remedy the Respondents had was to approach their seller i.e. their father, and if not, then seek correction in the sale deed, if permissible in law. In any case, they could not have come with a plea that the Applicants had encroached upon their land, who by themselves were holding registered instrument in their favour. The Learned Appellate Court has fallen in error by decreeing the Suit of the private Respondents inasmuch as once it has come on record that the registered sale deed does not disclose the total area, whereas, father of the Respondents who had the sold property to them had only purchased 996 sq.ft as per his own sale deed, he could not have transferred any excess area as contended. No case for indulgence was made and the Judgment of the trial Court ought to have sustained.

Z. In view of hereinabove facts and circumstances of this case, the Applicants have made out a case and therefore by means of a short order dated 21.03.2022, this Civil Revision was allowed by setting aside the impugned Judgment of the Appellate Court dated 16.02.2010 by restoring the Judgment of the Trial Court dated 02.12.2009 and these are the reasons thereof.

**J U D G E**

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