IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Civil Revision No. S – 90 of 2009

(Haji Muhammad Ismail through LRs & others vs. Ali Gohar & others)

Date of hearing: **07-03-2022**
Date of Judgment: **08-04-2022**

Mr. Safdar Ali Bhatti, Advocate for the Applicant
Mr. Illahi Bux Jamali, Advocate for Respondent No.2(a)
Mr. Ahmed Ali Shahani, Assistant Advocate General

JUDGMENT

Muhammad Junaid Ghaffar, J. – Through this Civil Revision, the Applicants have impugned judgment dated 27-05-2009 passed by 2nd Additional District Judge, Khairpur, in Civil Appeal No.68 of 2007, whereby, while allowing the Appeal, the judgment dated 30-05-2007 passed by Senior Civil Judge, Mirwah in F.C Suit No.07 of 2003 has been set-aside, through which the Suit of the Respondents was dismissed and as a consequence thereof the Suit has been decreed as prayed by the Appellate Court.

2. Heard learned Counsel for the parties and perused the record including written submissions of the learned Advocates.

3. It appears that the Respondents had filed a Suit for declaration, possession, mesne profits and permanent injunction seeking the following prayer; -

(a) That this Honourable Court may be pleased to declare that plaintiffs are lawful owners of the disputed plot of 20x40 feets and shops, boundaries of which are mentioned in Annexure "A" being ancestral property of plaintiffs and situated in the Bozdar Wada town, Taluka Mirwah.

(b) To direct the defendants to vacate the disputed plot including shops and hand over the same to the plaintiffs

(c) To award the mesne profits of shops at the rate of Rs.10,000/= per year from January 2003 till delivery of possession to plaintiffs.

(d) To issue permanent injunction thereby restraining the defendants not to interfere in the rights, title of plaintiffs in respect of dispute land/shops and plot. Further be pleased to restrain the defendants not to create

further charge and encumbrance by way of lease, mortgage or creating third party interest, or in any manner till disposal of the suit.

(e) Costs of the Suit.

(f) Any other relief, which this Honourable Court may, deems fit and proper.

4. After exchange of the pleadings, the learned trial Court settled the following issues; -

1. Whether the suit is not maintainable according to law?
2. Whether plaintiffs are lawful owners of disputed plot measuring 20x40 feet and shops?
3. Whether defendant No.3 purchased two shops from plaintiffs?
4. Whether plaintiffs are entitled for the relief sought for by them?
5. What shall the decree be?

5. The learned trial Court after evidence of the parties has been pleased to dismiss the Suit of the Respondents, who being aggrieved filed an Appeal and learned Appellate Court through impugned judgment has set-aside the findings of the trial Court and has decreed the Suit as prayed. The learned Appellate Court after framing only one point for determination came to the following conclusion;

Points for determination

1. **Whether appellant No.1/plaintiff No.1 sold out the two shops to respondent No.3/defendant No.3.**
2. What should the decree be.?

"Point No.1;-

9. The appellant No.1/plaintiff No.1 namely Ali Gohar has deposed that the property in question belonged to his father and the claim of respondents/defendants is false and that he was in jail in one false case in the year 1999 and during that period his uncle Muhammad Ismail along with his son occupied his shop and when he came out from the Jail he requested his uncle to return the property but his uncle refused. He has deposed that there was private faisla held before Naib Nazim and he (appellant No.1/plaintiff No.1) was asked to receive amount, on account of shops and to that proposal he refused. During cross-examination the P.W-1 denied suggestion that he has sold out the plot to Ghulam Shabir (respondent No.3/defendant No.3) in the year 1989-1991 vide sale agreement. However, no suggestion has been

given to P.W-1 so as suggest the date of agreement and sale consideration.

10. The vendor Ghulam Shabir has not examined himself but D.W-1 namely Muhammad Saleh who recorded evidence as one of the respondent/defendant and so also attorney of other respondents/defendants deposed that both shops were purchased in the year 1989-1991. This witness has not deposed as to what was the sale consideration fixed between the vendor and vendee. During cross-examination the D.W-1 stated as under;-

> "It is admitted that there is no any witness amongst stamp vendors. It is correct to suggest that Qabooliat documents are not attested by Oath Commissioner. Voluntarily says that it is attested by Chairman Town Committee. I do not remember the date of sale agreement. The agreement was written at 11:00 am in T.C Bozdar Wada. At the time of writing of sale agreement there were present name Haji Hussain Bux Chairman. T.C Bozdar Wada. Fakir Ramz Ali Ansari, Ali Gulab Bozdar, Rehmatullah Lohar. It is correct to suggest that Haji Hussain Bux Bozdar and Rehmatullah Sial are not our witnesses. Voluntarily says both have expired. I do not know as to the cost of stamp paper on which such Qabooliat was reduced into writing. It is correct to suggest that NICs number of witnesses and executants are not written in sale agreements. The stamp paper was of cost of Rs.20/- on which sale agreement was written subsequently on later stage of sale and purchase. The stamp paper was purchased in the same year in which sale has been done. I do not remember date, but it was July 1991. One Jan Muhammad Memon and Mir Muhammad Ansari cited as witnesses of sale agreement made in year 1991. It is fact that Mir Muhammad Ansari is alive, who is not our witness. It is correct to suggest that the name of stamp vendor and stamp does not appear on sale agreement voluntarily says that it only contains sig: of stamp vendor. It is admitted that agreement executed in the year 1991 and the NICs in bar of either executants or witnesses. It is correct to suggest that signature of sisters of plaintiff have not been made on stamp paper executed in the year 1991.

It is clear from above statement that NIC numbers of the witnesses and executants are not mentioned in the sale agreement. The witness has not given the amount of sale and date of its payment and sale consideration is the important ingredient for the purpose of valid sale but it is missing in this case.

11. After death of Haji Andal the property has been inherited by legal heirs of Haji Andal but from statement of D.W-1 it is clear that all the legal heirs have not executed the sale agreement and such agreement cannot be said as legal and valid and bind upon all the co-sharers/legal heirs.

12. D.W-2 Ramz Ali Ansari, D.W-3 Ghulam Rasool, D.W-4 Jan Muhammad has supported the agreement. According to section 17 of Registration Act the property being of more than Rs.100/- is necessarily to be registered as such mere agreement is not sufficient to create right of ownership in favour of claimant.

13. In view of above discussion and reasons given in paragraph No.9 to 13, I am of the considered view that no sale in respect of shop

is proved in favour of respondents No.3/defendants No.3 namely Ghulam Shabir and accordingly the point No.1 is replied in negative.

6. It appears that private Respondents ("Respondents") had filed a Suit for Declaration, Possession, Mesne Profits and Injunction praying therein that they are owners of the disputed plot / area of (an open space of 20 into 40 ft.^{2}), as well as shops constructed on the property, being ancestral property which had devolved upon them upon death of their father. In support they had brought in evidence certain documents issued by the Town Committee concerned to prove transfer of property in their name as legal heirs of their deceased father. To that extent perhaps there does not appear to be any dispute. They had further pleaded that all along their father was the owner of the Suit property and had even rented out the same to various persons from time to time. On the other hand, the case of the Applicants was that insofar as the open space of 20 into 40 ft.^{2}, is concerned, that does not exist on the said property. As to the claim of ownership of the shops the stance of the Applicants was that these two shops were sold by the Respondents through two different Sale Agreement(s) duly executed in presence of witnesses; hence, they were the owners of the Suit property. The learned trial Court after settlement of issues as above, and on the basis of evidence came to the conclusion that insofar as the open space of 20 into 40 ft.^{2} is concerned, the same never existed; nor any convincing evidence has been led before the court on the basis of which the plaintiffs case could be established. As to the shops and claim of its ownership the trial Court came to the conclusion that the two agreements relied upon by the Applicants were proved and the said property had been sold to them by the Respondents. In view of such position Suit of the Respondents was dismissed on both counts. However, while adjudicating the matter, an issue was settled by the trial court for determining that whether the property had been sold by the Respondents / Plaintiffs pursuant to the agreement(s) in question, and if so, then as a consequence there of, the Applicants were owners of these two shops. Accordingly, while dismissing the Suit this issue was answered in the affirmative in favour of the Applicants by holding that the Agreement(s) were proved by them. The Respondents being aggrieved then approached the Appellate Court by way of an Appeal, and the Appellate court has been pleased to allow the Appeal by setting aside the judgment of the trial Court and has decreed the Suit of the Respondents as prayed. However,

it is noteworthy that the learned Appellate Court had settled only one point for determination i.e. ***"Whether appellant No.1/plaintiff No.1 sold out the two shops to respondent No.3/defendant No.3"***. This determination by the Appellate Court is only in respect of one of the issues settled by the trial Court, whereas neither any other point for determination was settled; nor there is any discussion in the impugned judgment in respect of the other issue regarding the open area of 20 into 40 ft.² and the claim of mesne profit. In fact, the Respondents have not challenged the Appellate Courts judgment to this extent and seem to be satisfied. The Appellate Court apparently could not have decreed the Suit as prayed without settling a point for determination in respect of the other issues. Therefore, this Court can appreciate the finding of the Appellate Court only in respect of one point / issue as above, whereas the other issues are deemed to be have been decided against the Respondents.

7. Insofar as the stance of the Applicants is concerned, it is primarily based on two different agreements and that's all. Admittedly, they have never sought specific performance of these Agreements and have only taken this plea when Respondents had filed Suit for declaration and possession. By merely, relying on an Agreement of sale, a party cannot hold possession until and unless the said party has approached the Court within limitation for specific performance of the Agreement on the basis of which the possession was being held. Now if the property was purchased by them from the Respondents as claimed, then why they never sought transfer of the same in their name from the seller; or by way of a suit for specific performance is a question which remains unanswered. At the same time by pleading this, they have admitted the ownership of the Respondents. It is settled law that no title or ownership could be claimed merely on the basis of an agreement, even if the possession has been handed over. Mere prolonged possession even with title documents in hand does not establish the claim of ownership until and unless the sale is proved[1]. Taking such defence in a Suit for declaration and possession by the opposing party does not *ipso facto* justify holding of the possession.

8. It is very surprising that first the trial Court settled an issue in respect of the fact that whether the property was sold by the Respondents to the Applicants, and thereafter, came to an affirmative finding. However,

[1] Sadruddin v Sultan Khan (2021 SCMR 642)

a very crucial aspect of the matter which has escaped the attention of the trial court is that no ownership could be claimed or declared merely on the basis of a Sale Agreement, which is neither a title document, nor is otherwise a registered instrument. The same cannot convey a title or ownership in the property, whereas if a party is in possession pursuant to an Agreement, then it has to seek specific performance of the said Agreement and establish its own case by coming before the Court and leading evidence to that effect. If that is not done, then notwithstanding holding of possession, no title could be claimed by that person. Here the case of the Respondents/plaintiff was, that they are the owners of the property and from time to time their father had been renting the same to different persons, and for a certain period of time they could not look after the property due to the fact that one of the plaintiffs who is the only male member from amongst the owners was in jail, where as admittedly, the parties are *inter-se* related to each other. It is their case that in that period the possession was taken over and some documents were also managed by the Applicants to deprive them from their ancestral property. Be that as it may, since the entire case of the Applicants is based on some Sale Agreement(s), per settled law no judgement or decree could be given for declaring ownership on such basis. Moreover, impliedly or otherwise, no title could be created in favor of a defendant in a Suit merely by framing an issue of this nature, and that too on the basis of Sale Agreement(s). Here, in this matter, it was the Respondents / Plaintiffs who were before the court, seeking a declaration as to the ownership, and in that case, admittedly no specific performance of the Agreement could've been asked for, which apparently has been granted by the trial Court by first settling an issue, and then giving a finding to this effect. The same has been though corrected by the Appellate Court by setting aside the judgment of the trial Court, hence, the finding of the Appellate Court seems to be justified and correct in law and the Suit has been rightly decreed; but it could only have been decreed to the extent of ownership of the shops in question and not in respect of the open space and other relief(s) as the Appellate Court has not discussed any other issue in its judgment.

9. In view of hereinabove facts and circumstances of the case, it appears that no case for indulgence is made out by the Applicants, as apparently, the impugned judgment of the Appellate Court as to its final conclusion on the main issue is correct in law and facts, whereas, the trial

Court had seriously fallen in error in not only dismissing the Suit of the Respondents; but had in fact impliedly decreed the Suit in favor of the Defendants / Applicants, without any counter claim in the Suit before it. The same cannot be sustained in any manner. Accordingly, this Revision Application though does not merit any consideration and is liable to be ***dismissed***; however, while doing so, it may be clarified that the Suit of the Respondents could only be decreed to the extent of declaration and possession in respect of the shops in question, whereas, to the extent of the remaining prayers in the Suit ought to have been dismissed. It is so ordered accordingly.

Dated: 08.04.2022

Judge

ARBROHI