

# **IN THE HIGH COURT OF SINDH,**

CIRCUIT COURT, HYDERABAD

## **IInd Appeal No. 32 of 2022**

Appellant : Muhammad Sachal through L.Rs through  
Mr. Sohail Anwar Arain, Advocate

Mr. Ayaz Ali Rajpar, Asstt: A.G. along with Imran nazir  
Shaikh, Assistant Commissioner, Tando Adam

Date of hearing : **09.09.2022**

Date of Announcement : **16.09.2022**

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

**ADNAN-UL-KARIM MEMON, J -.** Through instant IInd Appeal, the appellant has called in question the vires of Judgment dated 10.02.2022 and Decree dated 15.02.2022 passed by learned Additional District Judge, Tando Adam in Civil Appeal No. 40 of 2021 whereby the learned Judge while dismissing the appeal maintained the Judgment and Decree dated 24.2.2021 passed by learned Senior Civil Judge, Tando Adam in F.C. Suit No. 52 of 2015.

2. Mr. Sohail Anwar Arain learned counsel for the appellant has argued that learned appellate court dismissed the appeal without framing points of determination as required under CPC, hence the same is liable to be reversed; that while giving findings on legal issues 1 to 3 framed by the trial court the appellate court held that the alleged malafides were not proved though the same stand proved through documentary evidence as time barred appeal was considered by EDO without hearing the appellant; that both the courts below misread the evidence as attorney of respondents 9 and 10 in clear terms in cross-examination admitted that no any ancestor of defendants was/is buried in the said graveyard hence the Judgment passed by both the courts below is against the evidence on record and is liable to be reversed; that both the courts below while deciding the case miserably failed to consider admission of attorney of respondents 9 and 10 in cross-examination claimed that one acre of suit land is in their cultivating possession while in 2-20 acres there were/are houses and Masjid and the remaining land is barren while the order dated 9.6.2010 says that the whole area of 7-13 acres is graveyard which is sufficient proof of malafide on the part of respondents, hence the judgments of both the courts below are liable to be reversed; that both the courts below did not give weight to the admission of Mukhtiarakar in cross-examination wherein he said that he did not produce any notification regarding reservation of suit land for graveyard and that he did not produce any record prior to Register VII regarding reservation of suit land for graveyard, hence the decisions of both the courts below are liable to be reversed. He lastly prayed for allowing the instant IInd appeal.

3. Mr. Ayaz Ali Rajpar, Asstt: A.G. along with Imran Nazir Shaikh, Assistant Commissioner, Tando Adam has produced the original revenue record which shows the subject land is still reserved for the graveyard and prayed for dismissal of the appeal.

4. I have heard learned counsel for the parties and perused the record with their assistance.

5. It appears from the record that the subject land bearing S.No.12 admeasuring 7-13 acres was initially granted to the appellant on 28.06.1993. Thereafter Member Board of Revenue Land Utilization Department vide order dated 29.05.1994, canceled the said grant. Such order of cancellation was subsequently withdrawn, authorizing Commissioner, Shaheed Benazirabad to decide the case on the suo-moto side, who vide order dated 31.12.1997 restored the grant in favor appellant and allowed to pay Malkana installments as per policy/rules. After issuance of T.O forms dated 13.05.2009, the appellant approached Mukhtiarkar Revenue Tando Adam for keeping such mutation in the record of rights, but he refused; therefore the applicant filed CP. No. D-501 of 2010 before this Court. In the said petition Assistant Commissioner as well as Mukhtiarkar Tando Adam being respondents filed comments stating that as per record the disputed land is amenity land of graveyard. During pendency of the above petition, respondent No.9 filed Revenue Appeal against the grant of the applicant before EDO (R), Sanghar who vide order dated 23.6.2010 canceled the allotment of the appellant. Subsequently vide order dated 26.3.2015 the above petition was disposed of leaving the petitioner at liberty to avail of appropriate remedy as his title over the land was disputed hence the applicant filed F.C. Suit No. 52 of 2015 with the following relief(s):-

- a. Grant a decree declaring that the Plaintiff is the lawful grant of suit land i.e. under Block No.12, admeasuring 7-13 acres situated in Deh Dhamoi Taluka Tando Adam District Sanghar under a valid and legal grant after full payment of plaintiff became owner and further the order dated 09-06-2010 be declared as void, abinitio, without jurisdiction, malafide, illegal, ultra virse, against the principles of natural justice and has no binding effect upon the plaintiff's right as grantee of the above suit land and is entitled for mutation of his name in the record of rights being maintained and controlled by the Taluka Mukhtiarkar, Tando Adam,
- b. Grant a decree, cancelling the order dated 09-06-2010 passed by the defendant No.2, as illegal, time barred, void, abinitio, without jurisdiction, malafide, ultra virse, against the principles of natural justice so also against the Land Grant policy and has no binding effect upon the plaintiff's right as grantee of the above suit land and the defendant No.2 has no authority and jurisdiction to site over his own order as Revisional/Revenue Authority.
- c. Grant Mandatory Injunctions restraining the official defendants Assistant Commissioner Tando Adam and Mukhtiarkar Taluka Tando Adam viz. defendants No.4 and 5 from mutating the record of rights in respect of agricultural land block No.12, measuring 7-13 acres

situated in Deh Dhamoi, Taluka Tando Adam, on the basis of order dated 09-06-2010, passed by the defendant No.2 personally through themselves, their agents, successors, servants, subordinates, assignees directly or indirectly in any manner whatsoever in favour of any person and further the said defendants be directed to mutate the entry in the record of rights in the name of plaintiff on the basis of T.O. Form dated 13-05-2009 in respect of the above suit land.

- d. Grant Permanent Injunction restraining and prohibiting the defendants from mutating, alienating, gifting, mortgaging, granting of leasing or creating any kind of lien or encumbered document in respect of agricultural land block No.12, measuring 7-13 acres situated in Deh Dhamoi Taluka Tando Adam, in favour of any person personally through themselves, their agents, successors, servants, subordinates, assignees directly or indirectly in any manner whatsoever till final decision of the suit.
- e. Award costs of the suit in favour of the plaintiff against the defendants.
- f. Any other relief deemed fit and proper in light of the facts and circumstances of the case.

6. Respondents / Defendants 9 & 10 filed joint written statement; Mukhtiarkar (Revenue) also filed written statement. The respondent/defendants denied the claim of appellant and stated that the disputed land was/ is amenity land as is entered in the name of graveyard vide VF-VII-A (1985) and under the law, the amenity land cannot be allotted/granted, thus grant of amenity land/graveyard land in favor of the appellant / plaintiff violates the law laid down by the Honorable Supreme Court. The learned trial court on the pleading of the parties framed the following issues.

1. Whether the suit is maintainable?
2. Whether the suit is barred by law?
3. Whether this Court has jurisdiction to try the suit?
4. Whether the Suit land was available for grant in favour of the plaintiff?
5. Whether the plaintiff obtained the grant order and T.O. Form in his favour by fraud and misrepresentation?
6. Whether the Suit land is amenity land reserved for the graveyard?
7. Whether the plaintiff is in possession of whole disputed land admeasuring 7-13 acres or its portion admeasuring 1-20 acres?
8. Whether the impugned order dated: 09-06-2010 passed by defendant No: 2 has attained finality?
9. Whether the re-exist houses and mosque & graveyard over the disputed land?
10. Whether at the time of issuance of grant order of the disputed land in favour of the plaintiff, the Barrage Department observed all the legal requirements?

## 11. Relief.

7. During pendency of the Suit plaintiff passed away; therefore, his L.Rs prosecuted the subject Suit. The learned trial court to settle the issues examined the parties and after perusing the record dismissed the suit vide Judgment dated 24.2.2021. The applicant being aggrieved by the said Judgment preferred Civil Appeal No. 40 of 2021, which was also dismissed vide Judgment and decree dated 10.2.2022.

8. Primarily under Section 42 of the Specific Relief Act, a person, entitled to any legal character or any property right can institute a suit for declaratory relief in respect of his title to such legal character or right to property. Here in the present case, the applicant claims the land, that was reserved for graveyard, which is an amenity and that could not be granted to anyone under any circumstances, except reserved for the purposes, thus the courts below rightly nonsuited the appellant and in such circumstances, no further indulgence could be given to the appellant. In a somewhat similar law point in respect of a plot that was carved out within a park area, the Hon'ble Supreme Court has been pleased to hold that an amenity plot cannot be used for commercial purposes.

9. The aforesaid view is fortified by the following authorities of Hon'ble Supreme Court and cases decided by learned Division Benches of this Court, laying down the principles regarding illegal conversion and use of amenity plots/public properties for other purposes, rights of the public at large in respect of amenity plots/public properties and duties of authorities concerned for maintaining the status of amenity plots/public properties:

1. In *Ardeshir Cowasjee and others V/S Karachi Building Control Authority (KMC), Karachi and others*, 1999 SCMR 2883, the Hon'ble Supreme Court was pleased to hold, inter alia, that citizens were entitled to use the park with all amenities as use of park involving enjoyment of life was covered by the word "life" employed in Article 9 of the Constitution, and citizens had the right to ensure that the officials do not approve a plan in respect of the plot which might impinge on their right of enjoyment of life or is in violation of law; and, the unauthorized structure from the amenity plot/park was liable to be removed as the same could not be used for any other purposes than for which it was carved out.

2. In *Moulvi Iqbal Haider V/S Capital Development Authority and others*, PLD 2006 SC 394, it was held, inter alia, by the Hon'ble Supreme Court that a public park earmarked in a housing scheme created a right amongst the public, and that right included their right of entry in the park without any obstacle being fundamental right as enshrined in Article 26 read with Article 9 of the Constitution; liberty of a person to have access or utilize a right available to him cannot be taken away by converting the such

facility into a commercial one to extend the benefit to a third person; and, functionaries and authorities exercising statutory power were bound to discharge their functions strictly under law otherwise the action contrary to the law would not be sustainable and such Authority shall expose itself to disciplinary action.

3. In an unreported order passed on 12.03.2012 by the Hon'ble Supreme Court in Civil Petition No.80-K of 2011 (Sikandar & Company V/S Muhammad Rauf Qadri Junaidi and others), it was held, inter alia, that greenbelt/amenity was meant to be used by the residents of the area as a breathing space and not for construction purposes, auction whereof was a farce and sham attempt to rob the greenbelt/amenity plot from citizens of Karachi, which by no means is permissible by law; and, the said plot being public property meant only for public amenity purposes cannot be converted into the building and commercial site.

4. In Muhammad Ashraf and another V/S Faisal Cantonment Board and another, 2017 YLR 2091 and Constitutional Petition No.D-6183/2015 (Mazhar Ali Magsi V/S Province of Sindh and others), this Court has held that a public property meant for the use and enjoyment of general public cannot be leased to any private or third party nor can any type of third party interest be created therein; and, the government, the relevant municipal authority and all their functionaries are duty-bound to keep the public property free from all types of encroachments and claims.

10. Today learned A.A.G. assisted by Assistant Commissioner Tando Adam has produced the original record of land in question and submitted that whatever the encroachment be, shall be removed as per law.

11. Before parting with this judgment, in principle, the property in question being a public amenity cannot be encroached upon and as per the dicta laid down by the Hon'ble Supreme Court in the aforesaid cases, an area earmarked and reserved for an amenity like Massan/Graveyard and Aasaish, cannot be used for any other purposes, therefore Senior Member Board of Revenue is directed to initiate an inquiry into the matter and take prompt disciplinary proceedings as well as criminal proceedings against all delinquent officials who were instrumental to the grant of such land reserved for graveyard and report compliance accordingly. Therefore, in such circumstances, the Senior Member Board of Revenue and all concerned Deputy/ Assistant Commissioners, Mukhtiarkars, and Tapedars of the concerned area are jointly and severally responsible to ensure that an area earmarked and reserved for an amenity like Massan/Graveyard and Aasaish, cannot be used for any other purposes except the purposes discussed supra; and if this court finds the involvement of the officials in granting such Government land reserved for amenities and allowed the beneficiaries to use it and subsequently put it for sale via sale

certificate issued by concerned Mukhtiarkars concerned, the contempt proceedings shall be initiated against them as provided under Article 204 of the Constitution without providing further opportunity of hearing to them, besides criminal proceedings shall also be initiated against all.

12. In principle the scope of interference by this Court in the second appeal with the concurrent finding of the courts below, as authoritatively expounded by a five-member larger bench of the Honorable Supreme Court in the case of {Federation v. Ali Ihsan, PLD 1967 SC 249} and Sultan Muhammad and another. Vs. Muhammad Qasim and others (2010 SCMR 1630) is well settled and this Court is slow to go behind a concurrent findings of fact if that finding is not vitiated by any error in point of law and I do not find any of the exceptions provided therein, thus both the judgments and decrees are maintained and this appeal is accordingly dismissed, with direction to the Assistant Commissioner to retrieve the Government land if not earlier retrieved, in terms of law within a reasonable time.

**JUDGE**

*\*Karar\_Hussain /PS\**