

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

CIRCUIT COURT, HYDERABAD

## **R.A No. 63 of 2019**

Applicant : Muhammad Ismail through  
Mr. G.M. Leghari, Advocate

Respondent : Muhammad Ahsan through Mashooq Ali Bhurgri who  
is called absent today

Date of hearing  
and Order : 19.08.2022

## **ORDER**

**ADNAN-UL-KARIM MEMON, J.** Through instant revision application, the applicant has called in question the judgment and decree dated 26.03.2019 passed by learned 2<sup>nd</sup> Addl. District Judge, Badin in Civil Appeal No. 67 of 2019, whereby the learned Judge while dismissing the appeal maintained the Judgment dated 27.10.2018 and decree dated 31.10.2018 passed by the trial Court in Suit No. 11 of 2017. The applicant has now attempted to re-open the case through this revision application under Section 115 CPC inter-alia on the ground that the trial court has not considered the plaintiff/appellant as absolute owner of the suit land as the same has been purchased by him through registered sale deed and the Judgment of lower courts is against the evidence on record. He prayed for allowing the instant revision application.

2. Brief facts of the case as per memo of Revision Application is that agricultural land bearing Survey No. 361 admeasuring 0-11 acres situated in deh Kamaro, Taluka and District Badin is the sole property of plaintiff/appellant to the extent of 100 paisa share and entered in the Revenue record. The property was purchased by the plaintiff/appellant from one Haji Allah Dino and Wali Muhammad Bhurgri through a sale deed. The defendant occupied the suit land forcibly and constructed katcha wooden hut and further he refused to vacate the land though the plaintiff complained to the Nek Mards; hence he filed the suit with the following prayers:-

A. That this Honorable Court may be pleased to decree the suit of the plaintiff and the defendant may be directed to vacate the suit land and hand over the possession of the same to the plaintiff without fail. And in case of failure, the Nazir of this Honorable Court may be directed to get the suit land vacated and hand over the possession of the suit land to the plaintiff in accordance with law.

B. That this Honorable Court may be pleased to direct the defendant to pay Rs.20,000/- as mesne profit for the last one the year of 2016 and in the future at the same rate viz Rs.20,000/- till disposal of the suit.

3. After admission of the suit, summons were issued and the defendant through his advocate filed written statement and also filed counter affidavit on application under order 39 rule 1 & 2 CPC. On 25.10.2017 application under order 39 rule 1 & 2, CPC was disposed of. On 04.11.2017 compliance under order 10(2), CPC was made and the following issues were framed on 18.11.2017 at Ex.09.

1. Whether the defendant has occupied the agricultural land of the plaintiff bearing S.No. 361 admeasuring 11 ghuntas situated in deh and Tapo Kamaro?
2. Whether the Katcha/wooden hut of the defendant is upon the land of the plaintiff bearing S.No. 361 admeasuring 11 ghuntas?
3. Whether the hut of the defendant is upon Government Bhadda land since, 1992, and not on the land of the plaintiff?
4. Whether the suit land is fertile land, able to produce about Rs.20,000/- per annum as cultivated and the plaintiff is entitled to recover the same as mesne profits?
5. Whether the plaintiff is entitled to recover the possession of suit land from the defendant being the owner?
6. Whether the plaintiff is entitled to the relief claim?
7. What should be decree be?

4. To prove his case, the plaintiff recorded his evidence and produced the original register sale deed at Exhibit-15, and attested copy of entry No.5 in Form VII at Exhibit-16. The defendant also recorded his evidence on Ex.22 and produced DW-2 Zafar Ali whose evidence was recorded on Ex.23.

5. Learned trial court after recording evidence and hearing the counsel for the parties dismissed the suit vide Judgment dated 27.10.2018 with the following findings on each issue:-

#### ISSUE NO.1

This was issued of the plaintiff and he was under the burden to prove this issue. It is matter of record that the plaintiff in his plaint para No.1 only mentioned an agricultural bearing S.No. 361 admeasuring 11-00 acres situated in deh Kamaro Taluka and District Badin but he failed to disclose any boundaries however he was bound by order 7 rule 3 CPC. Moreover, in his plaint Para No.4, the plaintiff alleged that the defendant occupied the suit land forcibly and constructed the Katcha wood made hut but he failed to mention the date and time of such dispossession. During his evidence the plaintiff produced only himself as a witness. He deposed in his examination chief that he purchased the land vide registered sale deed which was also produced by him. He further deposed about one year before filing of this suit the defendant occupied his land forcibly and constructed one wooden hut over it. He demanded the defendant to vacate the land but the defendant refused. The plaintiff produced original registered sale deed as well as attested copy of entry No.5 in form-VII. During cross examination he admitted that in para No.3 of the plaint he has only mentioned the purchase of the land and not that the possession was also handed over to him. He admitted that he has not mentioned the

day on which the defendant occupied his land. He also admitted that he had not produced any application which he would have moved before any authority about the occupation of his land before this suit.

Neither the plaintiff produced any other witness to support him in his claim nor any specific dates or time were disclosed by him to show that the defendant had occupied the land. The documents produced by the plaintiff are only relevant to the extent of ownership of the plaintiff, while he failed to produce any evidence showing factual position as to how the defendant was in possession of his land and as to how much of the portion is in possession of the defendant. In the circumstances the issue No.1 is answered as not prove.

#### ISSUE NO.2

This was also the issue of plaintiff to prove. The plaintiff only asserted the fact of wooden hut of the defendant being constructed over the land of plaintiff but he failed to produce any other witness or documentary prove to show that the wooden hut is constructed upon his land. Neither boundaries nor measurement could be brought on record by the plaintiff. The actual position of the wooden hut in the 11 ghuntas of the plaintiff also remained mystery. Nothing was produced by the plaintiff to prove the issue under discussion therefore this issue is also answered as not prove.

#### ISSUE NO.3

This was issue of defendant hence he was under burden to prove so. The defendant in his examination in chief deposed that he has been residing in his house since 1992 which is situated in Government Bhadda land between the four water courses, two of them at the each side of his house. He produce Dw-2 Zafar Ali as his witness who deposed that the defendant is his Hari and has been residing in his house since, 1992. He deposed that the house of defendant is constructed on a Government Bhadda land. He further deposed that there are four water courses in between there is a Government Bhadda land. The defendant produced himself and one other witness to prove the issue, however no documentary proof or any measurement from the concerned department was got conducted by the defendant. No technical witness was produced who could show as to where the Government Bhadda land was situated and could disclose the actual position of the alleged hut. In absence of enough and reliable evidence, I am of humble opinion that the defendant failed to discharge his burden therefore the issue No.3 is answered as not prove.

#### ISSUE NO.4

This was issue of the plaintiff hence burden was upon him to prove so. In order to discharge his burden the plaintiff only asserted fact that the land is fertile and could produce about Rs.20,000/- per annum. However neither the plaintiff produced any witness in support of his claim nor he could bring on record any such document which could suggest that the land is fertile and could produce about Rs.20,000/- per annum. In the circumstances the issue No.4 in hand is also answered as not prove.

#### ISSUE NO.5.

In view of the observations given under issues NO.1, 2 and 4, I am of humble opinion that the plaintiff has failed to discharge his burden therefore the instant issue No.5 is answered in negative.

ISSUE NO.06

The plaintiff has failed to prove his case with regard to the possession as well as the mesne profits, therefore the issue No.6 is also answered as negative.

ISSUE NO.7.

The plaintiff has failed to make out his case therefore the suit is dismissed with no order as to costs. Let a such decree be prepared.

6. The plaintiff being aggrieved by the said Judgment preferred Civil Appeal which was also dismissed by learned 2<sup>nd</sup> Additional District Judge, Badin; hence the present Revision Application.

7. I have noticed that the respondent has chosen to remain absent though served as such this court is left with no option but to hear the counsel for the applicants on the subject issue involved in the matter; and, have also gone through the record as available before me and find that there is concurrent finding available against the applicant which does not require further interference by this Court. An excerpt of the appellate judgment is reproduced as under:-

“ There is no dispute with regard to ownership of appellant over the suit property. The only question is involved is that the respondent has occupied the property of appellant. In this regard the case of the appellant is that the respondent has illegally occupied the suit land. In rebuttal the case of defendant is that he is occupying the government bhada land and is not in possession of the suit land. Hence the burden was upon the appellant that the respondent has illegally occupied the suit property. In this regard the appellant has examined himself only and no any other witness is examined by the appellant in support of his case. The appellant has neither summoned nor examined any official from the revenue department in order to prove the possession of respondent over the suit land. Thus it appears that the appellant has failed to prove his case. I therefore find that the learned trial court has passed impugned judgment and decree legally and did not commit any illegality or irregularity. Therefore the impugned judgment and decree do not require any interference. The point no.1 is answered in the negative.

POINT NO.2

In view of my findings on point No.1 the impugned judgment and decree are maintained and in consequences whereof the appeal stands dismissed with no order as to cost.

8. Primarily, cases can be revised by this Court as it possesses revisional jurisdiction as defined under Section 115 of the Code of Civil Procedure. This Court has the right to revise cases decided by subordinate courts to ensure the delivery of justice and maintenance of fairness. In the present case, though the applicant throughout the proceedings has lost his case up to the level of the appellate stage; and, at the revisional stage, on the pleas taken by him, now he has agitated the grounds already exhausted by him, however, the learned appellate court failed to examine the Mukhtiarkar concerned to ascertain whether the applicant was/is the owner of the subject, 11 ghuntas of the land, situated in deh and Tapo Kamaro and

allegedly occupied by the respondent as the private respondent, prima-facie, claims that he was/is in occupation of Government Bhada Land and not the land of the plaintiff.

9. Primarily, the aforesaid factum was/is required to be looked into by the learned Appellate Court in its true perspective as the trial court has given findings on the issue No.3 that the defendant failed to prove the subject issue on the premise that he has been residing in his house since, 1992; that his house is constructed on Government Bhadda land, however, he failed to produce the documentary evidence or any measurement from the concerned department to the aforesaid extent as no technical witness was produced who could show where the Government Bhadda land was situated and could disclose the actual position of the alleged hut.

10. In the light of the preceding paragraph, in my view, no ground existed for re-evaluation of evidence by the appellate court, as such the learned appellate court is directed to examine Mukhtiarkar concerned just to ascertain the actual position of the subject land whether the same is Government Bhada Land or the property of the plaintiff/appellant and after providing meaning full hearing to the parties pass judgment and decree under law. The aforesaid exercise shall be undertaken within one month. Hence, this Revision Application is allowed to the above extent, along with the pending application(s) with no order as to costs.

*\*Karar Hussain /PS\**

**JUDGE**