

Present: 31/3/2016  
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**IN THE HIGH COURT OF SINDH CIRCUIT COURT LARKANA**

Civil Revision No: S-11 of 2016

1. Hussain Ahmed s/o Late Hafiz Abdul Salam Brohi,
2. Rasheed Ahmed s/o Late Hafiz Abdul Salam Brohi,
3. Ahmed Hassan s/o Late Hafiz Abdul Salam Brohi,
4. Muhammad s/o Ali Hyder Brohi

All muslim, adult, r/o village Dost Shakh,  
Taluka and District Shikarpur.

Through their General attorney namely Abdul Shakoor  
s/o Moulana Abdullah by caste Shaikh, muslim, adult,  
aged about 51 years, r/o village Touheedabad Taluka  
and District Shikarpur.

..... Applicant.



**VERSUS**

1. P.O Sindh through secretary/ Senior Member Board  
of Revenue Sindh, Shahbaz Building Hyderabad.
2. Deputy Commissioner Shikarpur.
3. Mukhtiarkar (Revenue) Shikarpur.

..... Respondents.

**CIVIL REVISION U/S 115 OF  
CIVIL PROCEDURE CODE.**

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**IN THE HIGH COURT OF SINDH CIRCUIT COURT LARKANA**

**Civil Revision No.8-11 of 2016**

Applicants : Hussain Ahmed and 03 others  
through Mr.Abdul Rehman Bhutto  
Advocate

Respondents : Province of Sindh and 02 others  
Through Mr. Abdul Hamid  
Bhurgri Additional Advocate General

Date of hearing : **02.6.2023**

Date of Decision : \_\_\_\_\_

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

**ARBAB ALI HAKRO, J.-** Through this Civil Revision Application under Section 115, the Civil Procedure Code 1908 ("**the Code**"), the applicants have impugned Judgment 25.02.2016 and decree dated 26.02.2016, passed by IV-Additional District Judge, Shikarpur ("**the appellate Court**") in Civil Appeal No.10 of 2014, whereby, the Judgment dated 25.01.2014 and decree dated 30.01.2014, passed by I-Senior Civil Judge, Shikarpur ("**the trial Court**") in F.C. Suit No.38 of 2011, through which the suit of the applicants was dismissed has been maintained by dismissing the Appeal.

2. The suit was filed by the applicants/plaintiffs against the respondents/defendants, seeking a Declaration and Mandatory Injunction. They claim that Sobedar Muhammad Siddique, who resides in District Rawalpindi (Punjab), was the owner of land bearing S. No.21/1-14 and others located in Deh Dost Wah Taluka& District Shikarpur, executed power of attorney in favour of Muhammad Idrees Khan. It empowered him to carry out any necessary actions and transactions related to the aforementioned land, including the authority to sell and transfer it on his behalf. Furthermore, it is claimed that the attorney, Muhammad Idrees Khan, utilized his power of attorney to sell the above land in pieces to his son Riaz Ahmed, as well as three other individuals named Jamal, Lutufullah, and Allah Dewayo, by



executing separate Sale Deeds around the year 1988. In addition, the attorney also sold a portion of land measuring 08-00 Acres from S. No.21/1-4 located in Village Dost Wah Taluka and District Shikarpur ("**the suit land**"), on behalf of Sobedar Muhammad Siddique, the owner of the land to the applicants through registered Sale Deeds and has also given them possession of the suit land. The applicants bought 2-00 acres from the suit land to build a Masjid and Madarsa for prayers and religious education. The remaining 6-00 Acres were kept for cultivation, as stated in the registered Sale Deed dated April 12, 1988. The applicants' names were included in the record of rights based on the above Sale Deed. The applicants built a Masjid and Madarsa on 2-00 Acres of the suit land. It is also claimed that Sobedar Muhammad Siddique, the owner, filed a lawsuit (F. C Suit No.191 of 1989) against the Province of Sindh and others. The defendants included Muhammad Idrees Khan, his son Riaz Ahmed, Jamal, Lutufullah, and Allah Dewayo. In the lawsuit, Siddique requested to be recognized as the rightful owner of the land and for the sale deeds in favour of Riaz Ahmed, Jamal, Lutufullah, and Allah Dewayo to be declared invalid. The suit mentioned above was decreed in favour of Sobedar Muhammad Siddique, and the defendants in question then preferred an appeal, which ultimately was dismissed. The applicants were not party in the lawsuit mentioned above, and no relief was prayed against them. As a result, the applicants, aggrieved with the Judgment and decree, moved an application under Section 12 (2) of the Code, but it was dismissed. Following this, the applicants filed a lawsuit in June 2010 before the Court of I-Senior Civil Judge, Shikarpur, seeking a declaration and injunction. However, the trial Court rejected the plaint of the suit in limine. The applicants appealed against the rejection of their lawsuit, but their Appeal was also dismissed by the appellate forum on 23.02.2011. They then brought a Civil Revision before this Court. Afterwards, the applicants discovered that the



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mutation entry for the suit land mentioned in the registered Sale Deed, which was in their name, had been invalidated. Therefore, the applicants visited the office of Mukhtiarkar (Rev. ) Shikarpur to verify the authentic status of revenue records. There, they discovered that the registered Sale Deeds belonging to Riaz Ahmed, Jamal, Lutufullah, and Allah Dewayo had been revoked based on a Judgment from the trial court on June 29, 1998. The entries in their names, including the entry for the land in question, were instructed to be nullified by the former Deputy Commissioner of Shikarpur. In compliance with this directive, Mukhtiarkar (Rev. ) Shikarpur cancelled the entry for the suit land. Thus, the applicants sued before the trial Court with the following prayers: -



- a) To declare that the order dated 07.04.2000, passed by the defendant No.2 for cancellation of mutation entry standing on the basis of registered sale-deed dated 30.11.1992 in respect of suit land in favour of purchasers (ancestors of plaintiffs No. and 2 and plaintiffs No.3 and 4) as illegal, void, abinitio, without jurisdiction and ineffective qua the rights of ownership in possession of the plaintiffs on the suit land.
- b) To direct the defendants No.2 and 3 to restore the mutation entry of the suit land in favour of the father of plaintiffs No.1 and 2 and plaintiffs No.3 and 4 which was before the passing of illegal Order of defendant No.2. and then the record of suit land be maintained in favour of plaintiffs.
- c) Costs.
- d) Relief.

3. The respondents were served with the summons but did not contest the suit; hence, they were proceeded exparte by the trial Court vide Order dated 08.9.2011, and the applicants were directed to adduce their evidence in exparte proof.

4. Applicant No.1 examined himself before the trial Court by filing his Affidavit-in evidence and produced relevant

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documents in support of his claim. In addition to himself, the applicants also filed an affidavit-in-evidence of his witness, Abdul Shakoor.

5. The trial Court formulated the following points for determination:-

- i. Whether the suit of plaintiff is barred and not maintainable under the law?
- ii. Whether the plaintiffs are entitled to the relief claimed?
- iii. What should the decree be?

6. After examining the evidence produced by the applicants and hearing both the parties counsel, the trial Court dismissed the applicants' suit with no order as to costs vide Judgment and decree dated 25.01.2014 and 30.01.2014.

7. At the very outset, the learned counsel representing the applicants contended that the impugned Judgment of the appellate Court violates Order XLI Rule 31 of the Code, which is a mandatory provision; therefore, the impugned Judgment of the appellate Court on this score alone is not sustainable under the law. He contends that the mutation entry in favour of applicants was cancelled. However, Sale Deed in their favour is still intact, according to which Masjid and Madarsah are constructed on two acres of land while six acres of land are in possession of applicants for cultivation. He contends that the entries in the revenue record in favour of purchasers, namely Riaz Ahmed, Jamal, Lutufullah, and Allah Dewayo, being defendants in F.C. Suit No.191 of 1989, were to be cancelled on the basis of a decree passed against them. However, the revenue authorities have illegally cancelled the entry of applicants. He contends that the applicants were not a party in the above suit; therefore, a decree passed in that suit was not binding upon the applicants as provided under Section 43 of the Specific Relief Act, 1877 ("**the S.R.A., 1877**"). He contends that the respondents were served but did not contest the suit; hence, they were proceeded exparte



by the trial Court, meaning the defendants had nothing in their defence. Lastly, he contended that both the Courts below committed illegality while dismissing the suit of applicants.

8. Conversely, the learned A.A.G., while refuting the contention, argued that the Revision is not sustainable under the law and it is a case of concurrent findings, and in Revisional Court, the facts recorded by the inferior Courts cannot be disturbed; therefore, this Revision is not maintainable under the law.

9. The arguments have been heard at length, and the available record has been carefully evaluated with the able assistance of the learned counsel for the parties. I have also scrutinized the exactness and meticulousness of the judgments and decrees of both the lower Courts with a fair opportunity of the audience to the learned counsel for the applicants to satisfy me as to what has acted by the Courts below in the exercise of their jurisdiction either illegally or with material irregularity.

10. The pivotal questions which need to be addressed in order to reach a just decision are whether the suit of applicants is barred under Sections 11 and 12(2) of the Code and whether the decree passed in F.C. Suit No.191 of 1989 is binding on the applicants under Section 43 of the S.R.A., 1877.

11. Addressing the first question, the provision of Section 11 of the Code is reproduced as follows: -

**"11. Res Judicata:— No Court shall try suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court".**

**Explanation I.- The expression "former suit" shall denote a Suit which has been decided prior to the suit in question whether or not**

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*It was instituted prior thereto.*

*Explanation II.- For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of Appeal from the decision of such Court.*

*Explanation III.-The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly, or impliedly by the other.*

*Explanation IV.-Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue -in such suit.*

*Explanation V.-Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.*

*Explanation VI.-Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the person so litigating.*

12. A perusal of the above-quoted portion of Section 11 of the Code indicates that it prohibits a Court from trying any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such competent Court. As per the claim of the applicants, as stated in the plaint that Sobedar Muhammad Siddique was the owner of land bearing S. No.21/1-14 and others located in Deh Dost Wah Taluka & District Shikarpur, executed power of attorney in favour of Muhammad Idrees Khan, empowering him to carry out any necessary actions and transactions related to the aforementioned land, including the authority to sell and transfer it on his behalf. It is further stated in the plaint that the attorney, Muhammad Idrees Khan, utilized his power of attorney to sell the above land in pieces to his son Riaz Ahmed and three other individuals by executing separate Sale Deeds around the year 1988. In addition, the attorney also

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attorney Muhammad Idrees' and alleged power of attorney dated 28.9.1987 was cancelled/nullified in the trial of F.C. Suit No.191 of 1989. Therefore, a claim of the applicants under the words used in Section 11 of the Code "or any of them claim", and the principle of *Resjudicata* is applied to the case of applicants, and their claim is barred under Section 11 of the Code. In Case of Muhammad Saleem and others v. Muhammad Rashid and others (2004 SCMR 1144), it has been observed by the Honourable Apex Court of Pakistan that:-

*"There are concurrent findings of the fact that the issue raised by the petitioners in relation to the suit-land had been finally heard and decided by the competent court of law and, thus, issue raised in the subsequent suit was hit by the principle of Res-judicata within the contemplation of Section 11, C.P.C."*

Similar view has been taken by the Honourable Apex Court of Pakistan in Case of Ch. Riaz Ahmed Khan v. Muhammad Anwar Khan and others (PLD 2003 Supreme Court 484).

13. Reverting to the provision of Section 12(1) and (2) of the Code, which is reproduced as under: -

**"12. Bar to further suit.---** (1) *Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.*

(2). **Judgment obtained on fraud, misrepresentation or want of jurisdiction.** *Where a person challenges the validity of a judgment, decree or Order on the pica of fraud, misrepresentation or want of jurisdiction, he shall seek his remedy by making an application to the Court which passed the final Judgment, decree or Order and not by a separate suit."*

14. The examination of the aforementioned excerpt from Section 12(1) of the Code reveals a provision prohibiting the plaintiff from initiating subsequent legal proceedings regarding a specific cause of action. Moreover, the plaintiff is



not entitled to bring a lawsuit concerning such cause of action in any court governed by this Code. The notable component of Section 12 is subsection (2), as it additionally stipulates that in cases where an individual questions the validity of a judgment, decree, or Order based on allegations of fraud, misrepresentation, or lack of jurisdiction, they must pursue their legal recourse through an application to the Court that rendered the final Judgment, decree, or Order, instead of initiating a distinct lawsuit. The legislation, with its amendment, pursuant to Section 12(2) of the Code, offers a legal recourse for contesting a decree on the grounds of fraud and misrepresentation, which cannot be addressed through a separate legal proceeding. Similarly, an individual's rights obtained through a legal decree cannot be disputed without contesting the decree. Moreover, an individual cannot assert his right against another individual who is currently enjoying rights conferred by a decree unless the decree itself is challenged under the applicable legislation, specifically Section 12(2) of the Code. The proceedings under Section 12(2) of the Code are in the nature of a declaratory suit claiming a Declaration to the effect that a decree passed by a civil court resulted from fraud and misrepresentation. The effect of this amendment, i.e. 12(2) of the Code, is that a civil suit is not competent to seek relief on the ground covered by sub-section (2) of Section 12 of the Code. This provision, thus, has a lawful effect of encroaching upon and curtailing remedy before the Courts of general jurisdiction in the relevant field.

15. The approach of the applicants in the instant case is also tainted with malafide, as they filed the suit after exhausting the remedy under Section 12(2) of the Code, which was dismissed by the trial Court and rather, the applicants did not challenge that dismissal Order, and it attained finality. Hence, knowingly that said Sobedar Muhammad Siddique in F.C. Suit No.191 of 1989 got a




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Declaratory decree in respect of a subject matter, which they claimed to be an outcome of collusion, fraud and misrepresentation, they have challenged the rights of said Sobedar Muhammad Siddique arising thereunder, through separate suit which is not permissible.


16. The applicants thus have already exhausted a remedy under Section 12(2) of the Code in terms of the doctrine of election for challenging ex parte and collusive decree, which they have challenged on the grounds of fraud and misrepresentation.

17. Adverting to the above second question, whether the decree passed in F.C. Suit No.191 of 1989 is binding on the applicants under Section 43 of the Specific Relief Act, 1877. It is imperative to reproduce the provision of Section 43 of the Specific Relief Act, 1877 as under: -



*"43. Effect of Declaration. A declaration made under this Chapter is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the Declaration, such parties would be trustees."*

18. It is an admitted position that the applicants were not a party in F.C. Suit No.191 of 1989, which was decreed in favour of owner Sobedar Muhammad Siddique. The point raised by the learned counsel for the applicants was that the said decree would not be binding on the applicants as they were not a party to the above suit. Of course, by virtue of the provisions of Section 43 of the Specific Relief Act, 1877, no judgment or decree in a suit would be binding on a person unless he is a party to the suit or is claiming through any party to the suit. However, I am of the view that the claim of the applicants is based on having acquired the right in the suit land by way of a registered Sale Deed through Power of Attorney given to Muhammad Idrees Khan by owner Sobedar Muhammad Siddique but said Power of Attorney was declared as illegal, forged and fabricated in a Judgment and Decree passed in F.C. Suit No.191 of 1989, therefore, said decree would be binding on the applicants.



19. For the foregoing reasons, the concurrent findings of the facts recorded by the Courts below do not appear to be suffering from jurisdictional defect. In the case of Haji Wajdad v. Provincial Government Through Secretary Board of Revenue Government of Balochistan, Quetta and others (2020 SCMR 2046), it was held by the Honourable Apex Court that:

**"There is no cavil to the principle that the Revisional Court, while exercising its jurisdiction under section 115 of the Civil Procedure Code, 1908 ("C.P.C."), as a rule is not to upset the concurrent findings of fact recorded by the two courts below. This principle is essentially premised on the touchstone that the appellate Court is the last Court of deciding disputed questions of facts. However, the above principle is not absolute, and there may be circumstances warranting exception to the above rule, as provided under section 115, C.P.C. gross misreading or non-reading of evidence on the record; or when the courts below had acted in exercise of its jurisdiction illegally or with material irregularity".**

20. The applicants have not been able to show that the concurrent findings of facts recorded by the courts below are unsustainable. I do not find any infirmity or illegality in the impugned judgments and decrees, which do not require any interference by this Court; therefore, the instant Revision application is devoid of merits, which is accordingly dismissed.

Soln 24.8.2023  
(Arbab Ali Hakro)  
Judge

Announced in open court.

Soln 28-8-2023.  
(Khadim Hussain Tunio)  
Judge



Amris  
28/8  
I/C Assistant Registrar