

ORDER SHEET

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA.

Civil Revision No. S- 29 of 2019.

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Date	Order with signature of Hon'ble Judge
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For hearing of maintainability.

17.8.2020.

Mr. Abdul Qadir Abro, advocate for the applicant.

Mr. A.B Francis, advocate for the respondent No.5.

Mr. Liquat Ali Shar, Addl. A.G.

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**Muhammad Junaid Ghaffar-J.** :- This civil revision application has been filed against judgment dated 12.02.2019 passed in Civil Appeal No.15 of 2018 by Additional District Judge-I, Shikarpur through which the appeal has been dismissed and judgment dated 22.02.2018 passed by 2<sup>nd</sup> Senior Civil Judge, Shikarpur in consolidated F.C Suit No.136 of 2013 and FC Suit No.65 of 2014, has been maintained, whereby the suit of the present applicant was partly decreed along with the Suit of Respondent No.5.

Learned counsel or the applicant submits that the applicant had filed his suit for declaration, perpetual injunction, possession and cancellation of documents as well as recovery of articles and damages with specific prayer in the plaint; however, learned trial Court as well as the appellate Courts have failed to appreciate the evidence led by the applicant; that all the prayers ought to have been decreed including that of damages and declaration of illegal dispossession by respondent No.5; that the witness of the respondent in his cross examination had admitted that earlier the applicant was in possession of the suit land; that she was dispossessed by respondent No.5 illegally, and therefore, the Courts below have misread the evidence and this Court has the jurisdiction to take notice of such misreading of facts and law under section 115 CPC and to allow this revision by decreeing the suit of the applicant to that extent.

On the other hand, learned counsel for respondent No.5 has supported the impugned judgments of the Courts below and admits that to the extent of decree in favour of applicant, the respondent No.5 has not preferred any appeal or other proceedings.

I have heard both the learned counsel and perused the record. It appears that the applicant had filed F.C Suit No.66 of 2014 against the respondents and had sought the following prayer:

- i) To declare that the plaintiff is absolute and exclusive owner of 0-50 paisa share in C.S No.25/494 total area 157 Sq. yards situated at Alvi Muhalla Shikarpur even her dispossession was unjustified. Further declare that the plaintiff is eligible and rightful to occupy her share of the suit house, its location is described above. Further declare that the sale deed dated 14.01.2013 got prepared by the defendant No.3 of 0-50 paisa share in his favour to be invalid, void and liable to cancellation. The defendants No.3 and 4 may be directed after cancellation of mutation entry and registered sale deed in favour of defendant No.5 may be cancelled and such cancellation entry may be recorded in city survey record.
- ii) To direct the defendant No.5 to hand over vacant possession of the suit house to the plaintiff from which she was ousted forcibly and illegally. Further direct the defendant No.5 is liable to pay the damage of walls, its new construction Rs.2,50,000/= so also liable to pay Rs.3,55,000/= price of articles which have been forcibly taken away from the house which belong to plaintiff.
- iii) To grant perpetual injunction, restraining the defendant No.5 not to sell out alienate, rent out, demolish or remove the material from the suit house.
- iv) To award the costs of suit.
- v) To grant any other consequential relief which this Honourable Court deems fit and proper under the circumstances of the case.

At the same time, respondent No.5 had also filed F.C No.136 of 2013 (the relief(s) being irrelevant for the present purposes) and after consolidation, the respondent No.5's suit was made as a leading suit. Learned trial Court settled the following consolidated issues for adjudication:

1. Whether the suit is maintainable under the law?
2. Whether the suit is barred by limitation as well as barred by any disabling enactment?
3. Whether Mst.Khadija Bibi is illegally dispossessed from her house by plaintiff/defendant Shahzad Alam by force and without lawful authority and material also taken away of plaintiff and plaintiff Shahzad Alam got constructed the house and Mst.Khadija Bibi got the house/suit property constructed?
4. Whether the plaintiff Mst.Khadija Bibi is absolute owner of suit house and sale deed in favour of respondent 5 is liable for cancellation?
5. Whether the plaintiff Mst.Khadija Bibi has ever remained in possession of suit land?



6. Whether the plaintiff/defendant No.5 Shahzad Alam is liable to pay mesne profits and damages?
7. What should the decree be?

After leading of the evidence by both the parties i.e. applicant and respondent No.5, learned trial Court decided issue Nos.3, 4 and 6 (relevant for the present purposes) to the extent that she has proved through registered sale deed that she is holder of 50% share in the suit property. It was further held that she remained in possession of the suit property to the extent of her share after execution of registered sale deed in her favour by her husband since deceased. Insofar as issue No.6 is concerned, learned trial Court has held that the applicant has not been able to prove such facts through any reliable evidence as she has failed to give description of damage caused to the portion of the house, whereas mesne profits were not prayed in the entire plaint; nor in the evidence, and the issue to the extent of claim regarding mesne profits was wrongly settled. The findings of the trial Court on the relevant issues as discussed above is as under:

**Issue No.4.**

The burden of proof lies upon defendant No.6 which she proved through Registered Sale Deed that she is shareholder of 50% in suit house admeasuring total area 315-3 Sq.: Yards along with 50% share of plaintiff Shahzad Alam in the suit house which could not be rebutted by plaintiff Shahzad Alam through any solid evidence. The registered Sale Deed dated 20.02.2013 in favour of plaintiff Shahzad Alam is also valid and legal in regard of the sale of 138 Sq.: Yards of suit house. It is important to mention that the total area of the suit house is 315-3 Sq.: Yards out of which 50% of share is held by plaintiff Shahzad Alam and Mst.Khadija each and also record is mutated in city survey in their names. The defendant No.6 could not prove though any solid evidence that Registered Sale Deed in favour of plaintiff Shahzad Alam is outcome of fraud, hence I answer this issue accordingly.

**Issue No.5.**

Admittedly defendant No.6 remained in the possession of share of her suit house after execution of Registered Sale Deed executed by her husband. As per report of Mukhtiarkar & City Survey Officer, the defendant No.6 was shown as legal owner of 50 percent share of suit house and she was shown in the report out of possession presently, hence I answer this issue in positive.

**Issue No.6.**

The burden of proof of this issue lies upon the defendant No.6 which she could not prove through any reliable evidence. The attorney of defendant No.6 could not give the description of any damage caused to the portion of house of defendant No.6 in his evidence. While the mesne profit is not prayed either in the whole plaint or in the evidence which issue to the extent of mesne profit was improperly framed, therefore, I answer this issue in negative.

After going through above findings and the material evidence available on record, which has been read out by the learned counsel for the applicant, I am unable to convince myself to exercise any discretion in favour of the applicant so as to upset the impugned findings and substitute the same with my own on the basis of the evidence as suggested on behalf of the Applicant. This in the present facts and circumstances is impermissible. If the conclusion drawn is not suffering from any infirmity, then it ought not to be interfered with and a mere fact that on examining the evidence, another view can be taken or is possible, it is not sufficient to upset the decision of the Courts below, until and unless the facts so warrant. Unfortunately, the case of the Applicant is not an exception of that nature. Reliance may be placed on the cases reported as *Abdul Qayum v Mushk-e-Alam* (2001 SCMR 798) and *Abdul Ghaffar Khan v Umar Khan* (2006 SCMR 1619).

The Courts below have appreciated the facts in juxtaposition with the evidence led by the Applicant correctly, and have arrived at a just and fair conclusion. The applicant has not been able to prove the claim as to she being illegally dispossessed by respondent No.5, and so also her claim regarding damages. Merely for the fact that she initially being in possession was thereafter found to out of possession would not necessarily mean that respondent No.5 had dispossessed her, as no evidence has come on record to this extent. The Applicant has miserably failed to establish such assertion made in the plaint. As to damages there is no iota of evidence to support her claim, whereas, mesne profits was not even claimed in the plaint.

In view of the facts and circumstances of the case and the observations as above, I am of the view that no case for interference by this Court is made out as neither there is infirmity in the impugned orders, nor, it is a case of exercising jurisdiction not vested in the Courts below; hence, this civil revision application is hereby dismissed with pending applications.

JUDGE