

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Civil Revision Application No. S- 73 of 2010

1. For hearing of main case.
2. For hearing of CMA No.216/2010.

Applicants : Ram Dev & another through Mr. Ghulam Dastagir A. Shahani, Advocate.

Respondent : Zafar Ali Soomro, through Mr. Rafique Ahmed K. Abro, Advocate.

Date of hearing : 25.08.2017.

Date of Order : 06.10.2017.

J U D G M E N T

Muhammad Junaid Ghaffar, J: Through this Civil Revision, the applicants have impugned judgment dated 23.11.2010 passed by the 1st Additional District Judge, Shikarpur in Civil Appeal No.32/2010, whereby while dismissing the appeal the Appellate Court has maintained judgment dated 25.5.2010 passed by the II-Senior Civil Judge, Shikarpur in F.C. Suit No.07/2003, through which the Suit filed by the respondent was decreed.

2. Precisely, the facts as stated appear to be that the plaintiff/respondent filed a Suit for possession and recovery of Rs.34,000/- as mesne profits as well as for permanent injunction. According to the respondent, property bearing C.S. No.22/147/27/1, measuring 29.8 sq. yards and C.S. No.22/147/17-1, measuring 10.7 sq. yards, situated in Lakhi Gate, Shikarpur, originally belonging to one Abdul Sattar was purchased by him under a registered sale deed bearing No.99 on 28.01.2002 on the basis of City Survey Record and

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such property was thereafter mutated in his name. It is further stated that though plaintiff/respondent was in possession of his property, but as an abundant precaution an application was moved to the City Survey Officer, Shikarpur to carry out appropriate measurement of Suit property and then it transpired that insofar as C.S No.22/147/17-1 is concerned, the entire area was in possession of the respondent. However, insofar as C.S.No.22/147/27/1 is concerned; an area of 130 sq. feet was in possession of the applicants. It is the case of the respondent that the applicants were in unlawful possession of the part of respondent's property and, therefore, the Suit was filed seeking the following prayers:-

- a) To grant decree for possession in favour of the plaintiff and against the defendant directing him to deliver vacant possession of the Suit property to plaintiff.
- b) To direct the defendant to make payment of Rs.34,000/- as consideration for use and occupation of the Suit property from February, 2002 to June 2003 and also at Rs.2000/- per month from July 2003 till the delivery of possession of the Suit property to the plaintiff.
- c) To permanently restrain the defendant from handing over the possession of the Suit property to anybody else excepting the plaintiff.
- d) To award the costs of the Suit.
- e) To grant any other relief.

3. Written statement was filed by the applicants and legal as well as factual objections were raised, whereafter the following issues were settled by the Court:-

1. Whether the Suit is not maintainable according to law?
2. Whether the Suit is undervalued and insufficiently stamped?
3. Whether the Suit is barred under Limitation Act, and Specific Relief Act?
4. Whether the Suit is hit by provision of res judicata?

5. Whether the plaintiff is entitled to be relief claimed?
6. What should the decree be?

4. After recording of the evidence, the trial Court answered issue No.1 against the respondent/plaintiff, whereas issue Nos.2, 3 and 4 were answered in favour of the respondent/plaintiff. Insofar as issue No.5 is concerned, the same was answered against the respondent/ plaintiff by dismissal of the Suit through judgment dated 24.12.2005. The said judgment was impugned in appeal and the Appellate Court through judgment dated 18.8.2006 passed in Civil Appeal No.03/2006 set aside the same and remanded the matter to the learned trial Court with certain directions. After remand, judgment dated 25.5.2010 was passed by the trial Court and the Suit was decreed, against which the impugned judgment dated 23.11.2010 was passed and instant Civil Revision has been filed under Section 115, CPC.

5. Learned Counsel for the applicants has contended that the respondent has admittedly purchased the property bearing C. S. No.22/147/27/1 from one Abdul Sattar, who was only owner to the extent of 1/3rd share and, therefore, the respondent is not the owner of the entire property; that the learned trial Court after remand of the matter has not followed the directions of the Appellate Court inasmuch as the survey of both the properties in question has not been carried out, whereas even otherwise there are inherent defects in the survey so carried out and, therefore, no reliance can be placed on the said survey report; that during pendency of this Civil Revision an application under Order XLI, Rule 27, CPC was filed and the same was allowed through order dated 07.3.2011 and various additional documents have been brought on record, which amply justify the stance of the applicants; that respondent is already in possession of

excess area, which is reflected from the record, whereas the applicants are only having possession of their property; that the Appellate Court has failed to determine the points for consideration as required under Order XLI, Rule 31, CPC, hence impugned judgment is liable to be set aside; that respondent was required to prove his case on the basis of his documents and must not be benefited out of any defect in the applicants' case, if any; that the respondent ought to have brought on record original transfer orders, wherein the first owner was mentioned and that would have clarified that only 1/3rd area was allotted in the name of the first owner in respect of the survey in dispute. In support of his contention, he has relied upon the cases reported as *Sudhangshu Bimal Biswas v. Mustafa Chowdhury* (1968 SCMR 213), *Nasir Abbas v. Manzoor Haider* (NLR 1989 Civil SCJ 811), *Abdul Kabeer v. Abdul Wahid* (1968 SCMR 464) and *Wajid Ali v. Muhammad Hussain* (1986 MLD 2915).

6. Conversely, Counsel for respondent No.1 has contended that instant Civil Revision application is misconceived and has rather become infructuous, as the applicants pursuant to the judgment and decree of the trial Court had also filed a Suit bearing No.122/2010 regarding the sale deed of the respondent in question and the said Suit was dismissed vide judgment dated 29.02.2012 and an appeal was filed bearing No.18/2012, which also stands dismissed through judgment dated 30.03.2017; that in the written statement the case set up by the applicants was of pre-emption in respect of the property and then the applicants have taken another stance while defending their case; that in his cross-examination the applicant was agreeable for a proper measurement and such measurement was carried out on the direction of the Appellate Court, therefore, the applicants have no case; that the respondent is claiming ownership on the basis of a

registered document which was never challenged until passing of the impugned judgment and decree by the trial Court, whereas even such challenge has been unsuccessful at two forums; that this Court under its Revisional jurisdiction cannot deeply appreciate the evidence as contended on behalf of the applicants, where no material irregularity or misreading or non-reading of the evidence has been pleaded, whereas the Courts below have exercised their jurisdiction properly. In support, he has relied upon the cases reported as *Salman Ashraf v. Begum Asmatun Nisa* (1997 CLC 176), *Islamic Republic of Pakistan v. Abdul Ghani Abdul Rehman Ltd.* (2002 CLC 1039), *Muhammad Ismail v. Muhammad Shafi* (1992 CLC 2060), *Rehmatullah Khan v. Mughal Shah* (2004 CLC 1409), *Muhammad Sharif v. Parveen Akhtar* (1993 CLC 95), *Muhammad Azeem v. Mehmood Khan Bangish* (2010 SCMR 817) and *Muhammad Idrees v. Muhammad Pervaiz* (2010 SCMR 05).

7. I have heard both the learned Counsel and perused the record placed before this Court.

8. The facts of the case have already been stated in detail and, therefore, need not be reiterated once again. The respondent filed his Suit for possession and recovery of mesne profits and so also for permanent injunction in respect of his claim on two properties bearing C.S. No.22/147/27/1 measuring 29.8 sq. yards and property bearing C.S. No.22/147/17-1 measuring 10.7 sq. yards. The dispute amongst the parties is only in respect of the first property. The respondent claims that an area of 130 sq. feet originally stated as 124 sq. feet in the said property is in unlawful possession of the applicants and for this purposes the aforesaid Suit was filed. In the first round, the learned trial Court gave finding on issue Nos.2, 3 and 4 in favour of the respondent/ plaintiff, whereas issue No.1 and 5 were decided against the respondent. The applicants never challenged the findings

so given in favour of the respondent and they attained finality. However, the respondent filed an appeal and through judgment dated 18.8.2006 the impugned judgment of the trial Court was set aside with certain directions. It would be advantageous to refer to the directions contained in the remand order, which reads as under:-

"Since all other issues were decided against the respondent and no cross objections or appeal was filed by the respondent as such the judgment and decree dated 04.01.2006 passed by learned 1st Senior Civil Judge, Shikarpur in S.C. Suit No.07/2003 is hereby set aside and the case is remanded to the trial Court with the directions that the trial Court shall appoint City Survey Officer, Shikarpur as commissioner directing him to take the measurements of the property C.S. No.27/147/27/1 and 22.147/17-1 and so also the property in possession of the respondent after issuing notice to both the parties. The City Surveyor be directed to record measurements of the property some Pacca point in presence of both parties or their authorized agents. The appellant is directed to produce the original sale deed through which he had purchased the property before the trial Court as commissioner's fee. Both the parties are present in Court and they have been directed to appear before the trial Court on 03.08.2006 and the trial Court need not to issue any notice to the parties. With these observations this appeal is disposed of in the above terms and the parties are left to bear their own costs."

9. Perusal of the aforesaid directions reflects that the trial Court was directed to appoint the City Survey Officer to take measurement of the properties bearing C.S.No.22/147/27/1 and 22/147/17-1 and the property in possession of the applicants after issuing notice to both the parties. Record reflects that in compliance of the directions as above the trial Court carried out the exercise of survey and a report dated 19.9.2006 was furnished to the Court. The applicants filed their objections, whereas another report was also filed on 29.4.2008 and once again the applicants filed their objections and such objections were dismissed as being without merits. It appears to be an admitted position that no further remedy was sought and the findings of the trial Court on the objections remained unchallenged. Subsequently, certain applications were also filed by the applicants

but they were also dismissed and no further favourable order was passed, as even in one Revision application the case was decided against the applicants. Though, in my view, no findings were to be recorded in respect of issue Nos.2, 3 and 4, which were already decided in favour of respondent in the earlier round of litigation, however, the learned trial Court has once again decided the same in favour of the respondent. The only material issue which is in dispute is issue No.5 and the trial Court has given a very detailed and elaborate finding in favour of the respondent and the same reads as under:-

"I have considered the above contentions. It is admitted position that the Suit is filed by plaintiff for possession initially for the area 124 sq. feet and according to report of commissioner/City Survey Officer Shikarpur, such area was found 130 sq. feet, when measurement was carried out on the directions of this Court, in compliance of Appellate court judgment. Plaintiff seeks such relief on basis of his title document that is registered sale deed in his favour and its perusal shows the total area of two properties mentioned therein to have sold out in favour of plaintiff by Abdul Sattar. How Abdul Sattar became competent to sell out the entire area of both properties and if he was not competent to sell out total area of both properties, the person whose right if had been infringed could have filed Suit against the plaintiff to seek cancellation of his title document to the extent of area if any sold out by Abdul Sattar in excess of his share, but unfortunately such course is not adopted in this matter although litigation on basis of title document is in Court since year 2003. During the pendency of this Suit, application u/o 1, Rule 10 CPC was filed by one Muhammad Farooque claiming himself to be son of Muhammad Ashraf, to be made as party in this case on the ground, that plaintiff wanted to usurp the property C.S. No.22/147/16/27 (2/3) and this application after hearing the objections filed by plaintiff was dismissed by this Court on 28.5.2009, wherein it was observed that applicant had shown his share in some other property, whereas two properties in the registered sale deed in favour of plaintiff were different city survey numbers, therefore, he is not necessary party. Said applicant Muhammad Farooque thereafter appears silent and did not challenge such order, if the share of Muhammad Ashraf in the properties sold out to plaintiff was illegally sold out under the registered sale deed executed by Abdul Sattar. I am unable to understand why Muhammad Farooque or the defendant Pirbhu Mal had failed to challenge such registered sale deed through separate Suit. For the moment, it appears clearly on the record that title document is authenticated for its all legal purposes and area 130 sq. feet out of C.S. No.22/147/27/1 is found in possession of defendant as reported by City Survey Officer. The defendant Pirbhu Mal had been contesting the claim of plaintiff right from the day plaintiff

got properties measured and at that time, 124 sq. feet was found in possession of defendant Pirbhu Mal as mentioned in Rubkari dated 22.02.2003 of City Survey Officer, Shikarpur, thus plaintiff has cause of action to seek the relief of mesne profits from defendant from 22.02.2003, whereas Suit had been filed by plaintiff on 14.07.2003, thus such relief is prayed within time. The defendant has not disputed the quantum of mesne profits prayed by plaintiff, therefore, plaintiff is entitled to Rs.2000/- per month from 22.02.2003 as mesne profits till possession is delivered to the plaintiff with 6% Bank interest on such amount. At the same time, it would be open to competent person if any having share according to law in the property C.S. No.22/147/27/1 to challenge the registered sale deed through separate Suit, if law permits. However, till the registered sale deed is intact, plaintiff is entitled to recover 130 sq. feet area in possession of defendant and prayer clause No.3 of the plaint is also granted in favour of plaintiff. Issue No.5 is answered accordingly."

10. On perusal of the aforesaid finding, I do not see any reason not to concur with such findings, as firstly the directions of the Appellate Court have been complied with in letter and spirit. Though the Counsel for the applicants has raised objection to the effect that no proper survey was carried out, however, the record reflects that after the survey objections were raised by the applicants and they were dismissed. If the applicants were aggrieved, then they ought to have challenged the same further through appropriate remedy, whereas, even otherwise, it is admitted by the applicants that the dispute is in respect of only one property of the respondent, as, according to the learned Counsel, the respondent only owns 1/3rd share and the remaining 2/3rd share is owned by someone else. Record further reflects that one Mohammad Farooque, who claimed himself to be son of Mohammad Ashraf, also filed an application under Order I, Rule 10, CPC in the said Suit and he claimed his ownership in respect of C.S. No.22/147/16/27 (2/3) and such application was dismissed by the trial Court on 28.5.2009 and such order was never challenged any further. If the case of the applicants is to the effect that respondent is not the owner of the entire property as claimed by him on the basis of

a registered sale deed, then in law the right course for the applicants was to challenge the sale deed of respondent. The learned trial Court while decreeing the Suit had left such option to an aggrieved party and it appears that the applicants exercised such option by filing a fresh Suit bearing No.122/2010 which stands dismissed vide judgment dated 29.2.2012, against which an appeal bearing No.18/2012 also stands dismissed vide judgment dated 30.03.2017. It need not be reiterated that this Court under Section 115, CPC exercising Revisional jurisdiction has a limited scope and power while interfering with the concurrent findings of the two Courts below. There is no apparent misreading or non-reading of the evidence by the two Courts below so as to compel this Court to exercise its discretion in favour of the applicants. The entire case is based on the survey reports carried out on the directions of the Court, whereas the objections already stands dismissed and there is no further challenge to it. Moreover, the applicants have already exercised the option given by the trial Court in respect of challenging the sale deed of respondent, in which the applicants have also failed. Insofar as the objection regarding illegality and impropriety in the order of the Appellate Court is concerned, I am of the view that such objection is also misconceived. The only point for consideration before the Appellate Court was to the extent that whether the directions of the remand order was carried out or not. It is an admitted position that survey was carried out as directed and the report which came before the Court is against the applicants. In such circumstances, the Appellate Court was not required to give its entire findings in respect of all the issues, whereas the issue Nos.2, 3 and 4 could not have been re-agitated or reopened once again, as in the first round no appeal was filed and the finding in respect of these issues had already attained finality.

11. In view of hereinabove facts and circumstances of this case, I am of the view that no case is made out on behalf of the applicants, as there appears to be no misreading or non-reading of the evidence, whereas proper jurisdiction has been exercised by both the Courts below and, therefore, instant Civil Revision Application being misconceived in fact and law is hereby dismissed.

Dated: 06.10.2017

[Handwritten Signature]
JUDGE
6.10.17

Qazi Tahir P.P.*