IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Civil Revision Application No.58 of 2022
[**Muhammad Bux since deceased, through his Legal heirs**
Vs. Wali Muhammad & others]

Civil Revision Application No. 59 of 2022
[**Muhammad Bux since deceased, through his Legal heirs**
Vs. Wali Muhammad & others]

Applicants	:	Through Mr. Muhammad Saleem Hashmi Qureshi, Advocate
Respondent No.1	:	Through Mr. Sikander Ali Soomro, Advocate
Respondent No.2	:	NEMO
Respondents No.3 to 7	:	Through Mr. Muhammad Yousuf Rahpoto, Assistant Advocate General, Sindh.
Dates of hearing:	:	**30.01.2025, 31.01.2025 & 14.02.2025**
Date of Decision:	:	**21.02.2025.**

JUDGMENT

MUHAMMAD HASAN (AKBER), J.- This single consolidated Judgment will decide Civil Revision Application No.58 of 2022 and Civil Revision Application No.59 of 2022, being on the common questions of law and facts. Both these Civil Revisions have been preferred by the same Applicant(s) being legal heirs of Muhammad Bux (since deceased), wherein the consolidated Judgment dated 19.01.2022 and decree dated 24.01.2022 passed by learned Additional District Judge-I, Dadu have been assailed, whereby the Applicants' Civil Appeals No.84 of 2021 and 85 of 2021 '*Muhammad Bux since deceased through his L.Rs Vs. Wali Muhammad & others'* were dismissed. These appeals were preferred against the consolidated Judgment and Decree passed by the learned Senior Civil Judge-II, Mehar @ Dadu whereby, F.C. Suit No.253 of 2019 ('**leading suit**') filed by Respondent No.1 (Wali Muhammad) was decreed as prayed, whereas the F.C Suit No.12 of 2020 (**'subsequent suit'**) filed by Muhammad Bux was dismissed.

2. Concisely, the facts are that the Respondent No.1 (Wali Muhammad) filed F.C. Suit No.253 of 2019 ('**leading suit**') for declaration and permanent injunction against the Applicant before the Court of learned Senior Civil Judge-II, Mehar @ Dadu, claiming therein that he owns commercial land being Survey No.267 admeasuring 02 acres in Deh Makhdoom Bilawal (**Suit land**) on which he had established petrol pump. The parties are relatives *inter se,* entangled in dispute over

ancestral properties. It was averred that on 28th May 2019 at about 05:00 pm when the Respondent No.1 along with his sons went to the petrol pump for collection of profit amount, he saw that present applicants/defendants were occupying the said petrol pump and by issuing threats they forcibly dispossessed from his lawful property, which gave cause of action to Respondent No.1 to initiate the said Suit, with the following prayers (wherein certain prayers for mesne profits and possession were also allowed later under Order VI Rule 17 CPC). The final prayers, after amendments, were as follows:

> *"a) It is most respectfully prayed that this Honourable Court may be pleased to pass judgment and decree in favor of the plaintiff and against the defendants declaring that the plaintiff is owner of the suit property on the basis of title documents.*
>
> *b) Declare that the private defendants are trespassers on the suit property and have acted illegally by dispossessing the plaintiff from the suit property.*
>
> *c) That this Honourable Court may be pleased to direct the private defendants to handover the physical possession of the suit property to the plaintiff.*
>
> *d) That this Honourable Court may be pleased to grant the mesne profits of the suit property to the plaintiff out of the sale of diesel and petrol at the rate of Rs.50,000 per month beginning from 27.05.2019.*
>
> *e) That this Honourable Court may be pleased to grant injunction in favor of the plaintiff and against the defendants restraining the defendants from alienating the suit property by creating third party interest themselves, through their agents, servants or whosoever.*
>
> *f) Cost of the suit property be borne by the defendants.*
>
> *g) Any other relief deemed fit and proper may be granted in favor of the plaintiff."*

3. After admission of the leading Suit, summons were issued against the present Applicants, who filed their written statement. During pendency of the leading Suit, the Applicant/ Muhammad Bux (since deceased) being represented in these revisions through his legal heirs, filed F.C Suit No.12 of 2020 (**'subsequent suit'**) for Specific Performance of contract, against Wali Muhammad and others, with the claim that the Suit land is in the name of Respondent No.1 vide entry No.246 dated 20.03.1997, however on 01.05.1997, Respondent No.1 entered into an Exchange Agreement ('**Exchange Agreement**') in respect to sale of the Suit land with Muhammad Bux, in exchange for his land and based whereon, Respondent No.1 acquired the land from Survey Nos.63, 66, 77, 79/1, 79/2 and 82 admeasuring 03-36 ½ acres as share of Muhammad Bux. The Exchange Agreement was reduced into writing and was attested by two witnesses and it was agreed that transfer documents/registered sale deed would be executed later, while time was not essence of contract, as the parties were brothers *inter se*, however peaceful possession was exchanged with each other in performance of such agreement. After getting possession of Suit land from Respondent No.1, the applicants established petrol pump with name 'Makhdoom

Bilawal Petroleum Services', and also a hotel thereon and a few years back, computerized Weighing Machine (*kanta*) was also established on the Suit property. On the other hand, the Respondent No.1 also remained in possession of the land exchanged under the Exchange Agreement, and he is enjoying agricultural produce thereon since 1997. The applicants' side many times approached Respondent No.1 for execution of registered sale deed for the suit land, but Respondent No.1 kept him on false hopes. It is also averred that previously the respondent No.1's son (Nisar Ahmed) wanted to get a guest house (*Musaffir Khana*) constructed in front of the house of Muhammad Bux, on which objection was raised by the applicants' side, which annoyed the Respondent No.1, and as a reaction to the same and as a pressure tactic, he filed the leading suit against them. In this way, it was averred that the cause of action accrued to Applicant side firstly on 01.05.1997, when the Exchange Agreement was executed, and lastly on 01.06.2019 when respondent No.1 filed the leading Suit against. Muhammad Bux therefore filed the subsequent Suit, with the following prayers:

> *"a) That this Honourable Court may kindly be pleased to pass decree for specific performance of contract directing the defendant No.1 to execute the registered sale deed in respect of sale of suit property in favor of plaintiff in continuation of exchange agreement to sell dated 01.05.1997 and in case of failure, the Nazir of this Honourable Court be appointed for registration of suit property in favor of the plaintiff from defendant No.2 to 4 and the plaintiff is ready to transfer his agricultural land bearing survey No.63, 66, 77, 79/1, 79/2, 82 admeasuring 03-36 ½ acres in favor of the defendant No.1 in the offices of defendants No.2 to 4.*
>
> *b) To award cost of the suit to the plaintiff.*
>
> *c) Any other relief which this Honourable Court may deem fit and proper under the circumstances of the case."*

4. After admission of the subsequent Suit, the Respondents filed their written statements. Thereafter by consent of the parties, both the suits were consolidated, and the following consolidated issues were framed by the learned trial Court:

> *"1. Whether the suit No.253/2019 is not maintainable under law?*
>
> *2. Whether the suit No.12/2020 is not maintainable under law?*
>
> *3. Whether the plaintiff Wali Muhammad Panhwar is owner of suit property viz: survey No.267 admeasuring 02-00 acres situated in Deh Makhdoom Bilawal and is entitled for possession along with mesne profits? If yes, its effects?*
>
> *4. Whether the plaintiff Wali Muhammad Panhwar established a petrol pump in the name of Makhdoom Bilawal Petroleum Service situated over the suit property and defendant No.5 is manager of the said petrol pump?*
>
> *5. Whether the plaintiff Muhammad Bux Panhwar and defendant No.1 on dated 01.05.1997 entered into exchange agreement of sale of suit property viz; agricultural land bearing S.No.267 measuring 02-00 acres situated at Deh Makhdoom Bilawal Taluka and District Dadu against exchange with plaintiff's agricultural land*

bearing S.No.63, 66, 77, 79/1 & 2 and 82 admeasuring 03-36 ½ as per share of plaintiff?

6. Whether after execution of agreement dated 01.05.1997 the parties are in possession of their respective lands as per agreement of exchange of properties?

7. Whether the sale/exchange agreement dated 01.05.1997 is forged and fabricated? If yes it's effects?

8. Whether the plaintiff Wali Muhammad had established petrol pump in the name of Makhdoom Bilawal Petroleum Service at Deh Jageer Taluka Johi at RD 200 at the left side of Larkana road but he has wrongly shown the existence of such petrol pump at the suit land?

9. Whether the plaintiff of F.C suit No.253/2019 namely Wali Muhammad Panhwar is entitled for relief claimed?

10. Whether the plaintiff of F.C suit No.12/2020 Muhammad Bux Panhwar is entitled for relief claimed?

11. What should the judgment and decree be in both suits?"

5. That the process of consolidation of suits, framing of Issues and recording of evidence were conducted by consent of the parties. Both parties led their respective evidences and after hearing the arguments of the respective counsels, the learned trial Court passed the impugned consolidated Judgment and separate decrees, whereby leading Suit of Respondent No.1 (Wali Muhammad) was decreed as prayed, whereas the subsequent suit of the Applicant (Muhammad Bux) was dismissed. The Applicants filed both the Civil Appeals against both the decrees, which were dismissed by the learned Appellate Court, vide the impugned judgment and decree.

6. Learned counsel for the applicants mainly contended that the respondent No.1 has failed to prove his claim through credible evidence, however, the learned trial Court decreed the leading suit, which decision was also erroneously concurred by the learned Appellate Court, without considering the evidence in its true perspective; that the respondent No.1 concealed the fact of the exchange agreement reduced in writing between the parties, hence no cause of action accrued to him for filing the leading Suit, which aspect was also not considered by both learned Trial & Appellate Court; that both the Courts below failed to consider that the respondent No.1 claimed that he had established the petrol pump over the suit land, however he had not produced any documentary proof to support his such assertion, while the applicants produced entire documents of sale and purchase of petrol and other related documents; that the Respondent No.1 failed to furnish license of the petrol pump purportedly to have established the same; that though the respondent No.1 failed to prove his claim but his case was only decreed on the premises that disputed survey numbers were into record of rights in his name, however the rest of documents produced by applicants were discarded by the learned trial Court; that the judgments and decrees passed by learned Courts below are result of misreading and non-reading of evidence and in illegal exercise of jurisdiction, as such, the case may be remanded because the documents relied by applicants have not been considered; that both parties are brothers and they had privately distributed exchanged their landed

properties after demise of their predecessor but this fact has not been considered by the learned trial Court; that the Mukhtiarkar Revenue Dadu has supported the claim of applicants on the point of possession; that the applicants are in possession of suit land and they have built petrol pump thereon while the respondents have falsely claimed their ownership over the said petrol pump; that sufficient evidence has been brought on record by the applicants in support of their claim but same has been ignored by the learned trial and appellate Courts; that respondent No.1 had prayed for declaration of ownership of petrol pump but the learned trial Court has declared him as owner of entire suit survey number 267; that the learned trial as well as appellate Court did not appreciate the evidence in its true perspective and passed the impugned consolidated judgment and separate decrees in hasty manner which are not sustainable under the Law. He further argued that the reliefs of mesne profits and possession were not prayed originally in the memo of plaint, but it was later on, through an application under Order VI Rule 17 CPC, that the same was allowed by the trail Court. Even after the amendment, the amended issues were not added but it was only mentioned in the impugned Judgment. Learned counsel prayed for allowing these revisions applications by setting-aside the impugned judgments and decrees and relied upon 2022 SCMR 360, PLD 1994 Peshawar 228, 2005 SCMR 135, 2009 SCMR 623, 2002 CLC 819, PLD 2006 Karachi 497, 1968 SCMR 573, 2019 SCMR 1930 and 2019 SCMR 567.

7. Controverting the above arguments, learned counsel for the respondent No.1 argued that the respondent No.1 is real owner of suit property; that the possession of subject petrol pump was with the respondent No.1 and same was being managed by his manager, subsequently, applicants side illegally occupied the same; that no such exchange agreement was executed between the parties and the alleged agreement is false and fabricated one which is liable to be cancelled; that the applicants have failed to prove the execution of alleged exchange agreement in accordance with law as the attesting witnesses were not examined by them; that sufficient oral and documentary evidence was produced by the respondent No.1 in support of his claim as well as in rebuttal of claim of applicants, therefore, the learned trial Court has rightly extended relief in his favor which was extended by learned Appellate Court; that there is no misreading and non-reading of evidence as trial was conclude and Suits were decided after leading evidence by both sides; that the impugned judgments and decrees are well reasoned and in accordance with Law and same do not require any interference of this Court, therefore same may be upheld and the revisions may be dismissed.

8. During course of hearing, both the learned counsels informed that Execution Application No.3 of 2020 was filed by the Respondent side for implementation of Decree, wherein till date, decree to the extent of handing over of possession has already been satisfied when the possession was handed over by the Applicant side on 04-10-2022. However with respect to the issue of mesne profits, both learned

counsels submitted that because the trial Court did not calculate the quantum of mesne profits therefore such matter is still pending before the Executing Court, whereas the exact amount of mesne profits has not been calculated till date.

9. Learned Assistant Advocate General, Sindh stated that official respondents are proforma party, since the matter is a private dispute *inter se* relatives brothers and no Government interests were involved.

10. I have heard learned counsel for respective parties and with their able assistance, scanned through the evidence produced by the parties, summary whereof is that, on Issues No.1 and 2, *qua* maintainability of both the suits, the burden was upon both the parties respectively, who failed to produce any evidence or to point out to any provisions of law which could have hindered filing of the two suits and therefore such Issues were rightly decided in Negative by the learned trial Court. With respect to Issues No.3 and 4 which are interconnected, the primary burden was on Respondent No.1 to establish his ownership rights, possession and establishment of petrol pump on the suit property, who examined himself at Ex.24 and asserted his averments in the plaint and produced registered sale deed and computerized copy of village form VII-B. The respondent No.1 was cross examined at length by the Applicant side but the registered sale deed and other documents could not be shattered. On the other hand, Muhammad Bux examined his attorney Ghulam Omar at Ex.44 who stated that on 01.05.1997 his father and his uncle (Wali Muhammad) made an agreement on agricultural land and exchanged survey No.63, 66, 67, 79/1 and 79/2 and 82 of his father with survey No.267 in name of Wali Muhammad and he admitted the title of Wali Muhammad on survey No.267. Further the Mukhtiarkar Taluka Dadu stated in written statement that in entry No.244 of VF-VII-A from survey No.267, an area of 02-00 acres being a share, is entered in the name of Wali Muhammad son of Allah Bux Panhwar. The Applicant side failed to prove execution of the exchange agreement, therefore, the Respondent No.1 was held to be also entitled for possession. As for the arguments of the learned counsel for the Respondent that the suit property is only patrol pump, the trial Court framed a specific issue to which the Applicants did not raise any objection. In his examination-in-chief, Respondent No.1 also stated that his land bearing survey No.267 is situated in Deh Makhdoom Bilawal and on such land he got permission and installed a Patrol Pump with name Makhdoom Bilawal Patrol Service. He further stated that Defendant No.5 is his Manager at patrol pump. The Respondent No.1 also produced registered sale deed where the patrol pump is installed and he also exhibited letter of National Tax Certificate at Ex.24/C and also exhibited an Order under section 170(3) of Income Tax Ordinance with his name at Ex.24/E. The Respondent No.1 was cross examined by the counsel for Applicants at length, but his version could not be shattered and he successfully proved that patrol pump was established by him. On the contrary, the Applicant's attorney Ghulam Omar was examined at Ex.44, who stated that they constructed patrol pump on the exchanged

land of survey No.267 in year 1997 and also reconstructed the same patrol pump in year 2017, and Respondent No.1 has fraudulently claimed ownership of patrol pump. He further stated that Respondent No.1 has no ownership on the patrol pump. However, Applicant side could not show any document regarding license of patrol pump or approval thereof and other enquiries necessary for grant of license certificate and they only produced receipts of purchasing of tanks. Hence in case of non-submission of sufficient documents of grant of license, such documents cannot be relied upon, therefore, the Applicant failed to rebut the claim of Respondent No.1. In this way, Respondent No.1 has proved that he himself established the patrol pump in his own property with name of Makhdoom Bilawal Patrol Service. The Respondent No.1 proved both these issues which were decided by the learned trial Court in his favour.

11. It is however noted that in the same Issue No.3, to the extent of grant of mesne profits, the submissions put forth by Mr. Hashmi learned counsel for the Applicants draws attention to multiple legal and factual aspects, which are separately discussed and decided in the later part of this Judgment.

12. Regarding Issues 5 and 6, the same were also interconnected and the burden of both these issues was upon the Applicant side to prove the exchange agreement and their possession in terms of such agreement. The Applicants examined Ghulam Omar as attorney at Ex.44, who stated in his examination-in-chief that on 01.05.1997 his father (Muhammad Bux) and his uncle (Wali Muhammad) made agreement on agricultural land by which, survey No.63, 66, 67, 79/1, 79/2 and 87 [which were in the name of his father (Muhammad Bux)] were exchanged with Survey No. 267 Deh Makhdoom Bilawal [which was in the name of his uncle (Wali Muhammad)]. In order to discharge burden, the defendant produced the Exchange Agreement, wherein two attesting witnesses are shown, one of them as Sono son of Waryam Panhwar and the other one was Muhammad Uris son of Adam Khan. But during the evidence, Applicant's attorney examined Lutufullah, who was the Assistant Engineer Irrigation and another witness Sarfraz who was Secretary Union Council Allahabad. Neither the witness Muhammad Uris was produced in the witness box, nor any solid evidence was produced to establish the death of the witness Sono Khan. Even no one from the family of Sono Khan was examined by the Applicant side to establish that he has expired and to establish the exact date of his death. Moreover, the other attesting witness Muhammad Uris was also not produced, nor his whereabouts were given by the Applicant's attorney, and therefore, the Applicant side failed to prove the execution of the exchange agreement, whereon their entire claim was based.

13. It would be relevant to note here that mode of proof is the procedure by which the "relevant" and "admissible" facts have to be proved, the manner whereof has been prescribed in Articles 70 to 89 of the Qanun-e-Shahadat Order 1984. In other words, a "relevant" and "admissible" fact, is admitted as a piece of evidence, only when the same has been proved by the party asserting the same. In this regard,

the foundational principle governing proof of contents of documents is that the same are to be proved by producing "primary evidence" or "secondary evidence". Guidance in this regard can be taken from '*Mst. Akhtar Sultana V. Major (R) Muzaffar Khan Malik'* PLD 2021 SC 715.

14. Article 79 of the Qanun-e-Shahadat Order 1984 mandatorily provides that where a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and capable of giving evidence. Exclusion to this rule has been provided only with respect to those registered documents which are admitted.

15. The term "attested", as provided under Section 3 of the Transfer of Property Act, 1882 means attested by two or more witnesses, each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant.

16. Sub-Article 2(a) of Article 17 of the Qanun-e- Shahadat Order 1984 provides that for competence of a person to testify, it generally requires that, the number of witnesses required in any case, shall be determined in accordance with the injunctions of Islam as laid down in the Holy Qur'an and Sunnah. However specially in matters pertaining to financial or future obligations, an instrument if reduced to writing, shall be attested by two men or one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly, subject to Hudood or special laws. On this subject, in the case of *'Sheikh Muhammad Muneer V. Mst. Feezan'* (PLD 2021 SC 538) the Supreme Court also sought Guidance from the Holy Qur'an and recorded the same, which is reproduced below, as provided in Verse 282 of the second chapter, *Surah Al-Baqarah*, which comprehensively deals with agreements:

In the name of Allah The Beneficent The Merciful

> *"O ye who believe! when you deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing. Let a scribe write down faithfully as between the parties: let not the scribe refuse to write: as Allah has taught him, so let him write. Let him who incurs the liability dictate, but let him fear his Lord Allah. And not diminish aught of what he owes. If the party liable is mentally deficient, or weak, or unable himself to dictate, let his guardian dictate faithfully. And get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind. The witnesses should not refuse when they are called on. Disdain not to reduce to writing for a future period, whether it be small or big: it is more just in the sight of Allah, more suitable as evidence and more convenient to prevent doubts among yourselves. But if it be a transaction which you carry out on the spot among yourselves, there is no blame on you if you reduce it not to writing. But take witnesses whenever you make a commercial contract; and let neither scribe nor witness suffer harm. If you do (such harm), it would be wickedness in you. So fear Allah; for it is Allah that teaches you. And Allah is well acquainted with all things."*

17. The Holy Qur'an therefore requires that the number of witnesses should be not less than two men or a man and two women (so that the one may remind the other if she forgets).

18. Applying the above guidance, principles and mandatory requirements to the facts of the present case, it can be safely concluded that the Exchange agreement was neither a registered document, nor was it admitted by the Respondent side, and therefore the mandatory requirements of Article 17 of the Qanun-e-Shahadat were fully applicable to it. Once, no attesting witness was produced to prove the exchange agreement, the restrictions as provided under Article 79 of the Qanun-e-Shahadat Order would be fully applicable.

19. With regards to the next argument by applicant side that one of the witness was not alive, Article 80 of the Qanune Shahadat Order would come into picture, which mandatorily puts the burden on applicant side to prove the death of such witness either through his death certificate or by producing some male member of the family of that witnesses in evidence to confirm the fact and the date of death. Such exercise was also not done in the instant case.

20. The principle has now been settled that mere assertion of death of marginal witness would not discharge the burden of a party. On record, there is nothing to establish the death of said witness. Simply alleging that a witness has died or cannot be found, would not assuage the burden to locate and produce him. Such principle has already been decided in the cases of *'Ghulam Sarwar V. Ghulam Sakina'* (2019 SCMR 567) and '*Sheikh Muhammad Muneer V. Mst. Feezan*' (PLD 2021 SC 538). Moreover, if no effort was made to prove death of their witness, strong presumption of withholding best evidence would be drawn against such party as entailed under Article 29(g) of the Qanune Shahadat Order 1984. Reliance is placed on '*Muhammad Sarwar v. Mumtaz Bibi and others*' (2020 SCMR 276) and '*Mst. Kamalan Bibi V. Province of Punjab*' (2022 CLC 890). Needless to say that the second witness was also not produced for evidence by the Applicant side, nor any claim of his death was even pleaded.

21. It is essential for a party to prove the execution of the document they are relying on through production of the document and also through the marginal witnesses, and the scribe of the instrument if such witnesses were not alive or could not be found to depose as the case be. It is clarified that such exercise is to be mandatorily complied with, even in cases of registered documents, for once a registered document is challenged, no statutory presumption could be attached to it without fulfilling the above mandatory requirements. I am supported on this by *'Jang Bahadur & others V Toti Khan and others'* (2007 SCMR 497). Conclusion of the above detailed discussion on the subject of proof of documentary evidence is that, the principles discussed above would be fully applicable to the case in hand, but the

Applicant side completely failed to comply with the same and could not prove the execution of the exchange agreement, which was therefore rightly held against them by both the courts below, hence their findings on such Issues are upheld.

22. As for issue No.7 and 8, on one hand Respondent No.1 deposed in his examination-in-chief that defendant No.5 (manager) use to look after his patrol pump and on 28.05.2019 they went to receive the cash from him at 05:00 pm, defendants No.1 to 4 went there with pistols and illegally occupied the patrol pump, whereas on the other hand, in his cross examination, he categorically denied the existence of exchange agreement. Since the Applicant side were not able to prove the exchange agreement by producing two attesting witnesses, based whereon, the said issue was decided in favour of Respondent. In order to prove issue No.8, Applicant did not produce any solid evidence and did not show that Respondent No.1 has wrongly shown in the existence of such patrol pump at suit land, while the Respondent has himself stated that they constructed such patrol pump in Deh Jageer, Taluka Johi but due to some conditions, it was cancelled and such area is lying vacant and the Applicant side failed to prove that such plea as they failed to prove their version that they constructed their own patrol pump at the suit land and they have no license in their favor, hence the Applicant side failed to prove this issue as well.

23. Mr. Hashmi, learned counsel for Applicants, also argued that no fresh evidence of the Plaintiff was taken after framing of consolidated issues. Such claim is negated by the fact that admittedly the parties in both the suits were same and the subject property was also the same, but objection was not raised by the Applicants neither at the time of consolidation of the suits nor at the time of continuation of the evidence. On the contrary, the Applicants actively participated and cross examined Respondent No.1, and even led their own evidence. No application in this regard was made by them and they actively participated in this entire process. Even the orders of consolidation of the suit or continuation of the evidence were not challenged by the Applicants at any forum. The learned counsel was also unable to point out towards any substantial loss caused to the Applicants as a result of such procedure, which was continued and concluded with the assent of the parties whereby ample opportunity was provided to both the sides to produce their respective evidences.

24. Regarding the next argument by the learned counsel for the Applicant that correct issues were not framed by the Court, suffice to say that admittedly, even until the stage of final disposal of the suits, no application was moved by the Applicant side for framing of any new, further or correct issues (other than those already settled by the Court after consolidation of the suits). The power vested in a Court under Rule 5 of Order XIV CPC for framing of Issues can be exercised at any stage prior to the final disposal of the case and the parties are also under duty to make application for amendment or correction of Issues settled by the Court. Reliance is placed on '*Mst. Sughran Bibi and others V. Mst. Jameela Begum, and others'* (2001 SCMR

722) and '*Mst. Rasheeda Bibi and others V. Mukhtar Ahmad and others*' (2008 SCMR 1384).

25. While analyzing the evidence discussed above, I am also mindful of the fact that these two Revision Applications have been filed under section 115 CPC. against concurrent findings of fact by two Courts below, for which the first basic rule is that the scope of revisional jurisdiction is limited to the extent of misreading or non-reading of evidence, jurisdictional error or an illegality of the nature in the judgment which may have material effect on the result of the case, or if the conclusion drawn therein is perverse or conflicting to the law. The High Court has limited jurisdiction to interfere in the concurrent conclusions arrived at by the courts below while exercising powers under section 115, C.P.C. The provisions of section 115, C.P.C under which a High Court exercises its revisional jurisdiction, confers an exceptional and necessary power intended to secure effective exercise of its superintendence and visitorial powers of correction, unhindered by technicalities. Such is the ratio laid down by the Supreme Court in the case of *'Ikhlaq Ahmed'* (2014 SCMR 161).

26. The second principle which would also be fully applicable to the case in hand is that the interference by High Court in concurrent findings for the mere fact that the appraisal of evidence may suggest another view of the matter, is not permissible in revisional jurisdiction. There is a marked distinction between misreading/non-reading and mis-appreciation of the evidence where the scope of the appellate and revisional jurisdiction must not be confused and care must be taken for interference in revisional jurisdiction, only in the cases in which the order passed or a judgment rendered by a subordinate Court is found perverse or suffering from a jurisdictional error or the defect of misreading or non-reading of evidence has occurred and the conclusion drawn is contrary to law. For this, the case of '*Atiq-ur-Rehman v. Muhammad Amin',* PLD 2006 SC 309 can be referred.

27. The third rule is that concurrent findings of the courts below, on a question of fact, if not based on misreading or non-reading of evidence and not suffering from any illegality or material irregularity affecting the merits of the case, are not open to question at the revisional stage, as held in the case of *'Sultan Muhammad'* (2010 SCMR 1630).

28. On the flip side, while exercising jurisdiction conferred by section 115, C.P.C. the Court could interfere when the concurrent findings of fact recorded, are based on insufficient or inadmissible evidence, misreading or non- consideration of material evidence, erroneous assumptions of fact or patent errors of law or reveal arbitrary exercise of power or abuse of jurisdiction or where the view taken is demonstrably unreasonable which is not in consonance with material evidence. The cases of "*Asmatullah v. Amanat Ullah through Legal Representatives*" (PLD 2008 SC 155) and "*Abdul Sattar v. Mst. Anar Bibi and others*" (PLD 2007 SC 609) and

"*Mst. Naziran Begum through Legal Heirs v. Mst. Khurshid Begum through Legal Heirs*" (1999 SCMR 1171) can be referred to support this.

29. Applying the basic principles to the Issues being discussed (except the claim of mesne profits, which is being discussed in the later part of this Judgment), no infirmity or misreading or non-reading of evidence could be found in the concurrent findings of the two courts below. With respect to these issues, neither the Courts below have ignored material evidence nor did they draw wrong inferences or conclusions from the proven facts by applying the law erroneously, nor do the findings recorded amount to a dearth of evidence or suffering from any jurisdictional error or perversity.

30. Now turning towards the last argument put forth by Mr. Hashmi, learned counsel for the Applicants, with respect to the blanket decree granted by the trial Court "as prayed" to Respondent's claim of mesne profits. This draws attention to the following factual and legal aspects of the cases, starting from the prayer clause (d) of the Respondent in leading suit No.253 of 2019 as amended which was that, *"(d) grant of mesne profits of the suit property to the plaintiff out of the sale of diesel and petrol at the rate of Rs.50,000/- per month beginning from 27.05.2019."* Such claim was added through the amendment in the plaint under Order VI Rule 17 CPC. which was allowed by the Court, and which Order was not assailed by the Applicant side. Such claim was also included by the Court as part of the amended and consolidated Issue No.3. As per the learned counsel, neither any evidence was produced on this issue, nor any discussion or reasoning was given in the Judgment on the said point by the learned trial Court, whereas the learned Appellate Court acted in a mechanical manner while concurring on this point. Continuing with his arguments, learned counsel further pointed out that in addition to the above, neither any inquiry for ascertaining mesne profits was conducted by the Court nor any speaking order was passed by the learned trail Court expressing reasons for dispensing with such an exercise of inquiry. The record is also silent on this aspect.

31. The next question would be the procedure provided under the law to ascertain mesne profits. The term "Mesne Profits" has been defined under sub-section (12) of section 2 of the Code as those profits which the person in wrongful profession of such property actually received or might with ordinary diligence have received there from, together with interest on such profits but shall not include profits due to improvements made by the person in wrongful possession.

32. Order XX Rule 12 provides for a preliminary decree to be passed for mesne profits under certain conditions and for which an inquiry is also to be held, whereas sub-rule (2) of Order XX Rule 12 provides that where an inquiry is directed in respect of rent or mesne profits, a final decree shall be passed in accordance with the result of such inquiry. Use of the word 'shall' in the said provision, makes it mandatory upon the Court to pass a final decree in such circumstance. The term

"Mesne Profits" has been defined under sub-section (12) of section 2 of the Code as those profits which the person in wrongful profession of such property actually received or might with ordinary diligence have received there from, together with interest on such profits but shall not include profits due to improvements made by the person in wrongful possession.

33. To look into as to who had to prove this claim, attention is drawn to Article 117 of the Qanun-e-Shahadat Order, 1984 which requires the primary burden to prove a fact on such person, who asserts such fact and desires the court to give judgment thereon. The terminology and turn of phrase "burden of proof" entails the burden of substantiating a case. The meaning of '*onus probandi*' is that, if no evidence is produced by the party on whom the burden is cast, then such issue must be found against him. The burden of proving the amount of profits that might, with ordinary diligence, have been received, is therefore on the person claiming it. Reliance in this regard could be placed on the case of *'Boman Abadan Irani and Others Vs Jehangir J. Mobed and Others'* (PLD 1967 Karachi 449) where, in a dispute between landlord and tenant, a Division Bench of this Court declared that:

> "24. The Plaintiff had claimed mesne profits at the rate of Rs. 500 per day from 1-9-53 till 15-12-53 amounting to Rs. 53,000 and further mesne profits at the same rate till the date of possession. However, no evidence was led by the plaintiff in proof of this claim. The burden of proving the amount of profits that might with ordinary diligence have been received is on the person claiming it. In the absence of any evidence on that point the learned single Judge granted to the Plaintiff a sum of Rs. 6,104 from 1st of September 1953 to the 15th of December 1953 at the rate of Rs. 1,744 per month. Mr. Lari had suggested that we take additional evidence on this point and had offered to file the receipt of additional tax imposed upon the property but we did not think that any case for additional evidence had been made out and we, therefore, rejected that prayer."

34. It is a well settled exposition of law that the plaintiff must succeed on the strength of his own case rather than the weakness of the defendant. The lawsuits are determined on preponderance or weighing the scale of probabilities in which Court has to see which party has succeeded to prove his case and discharged the onus of proof which can be scrutinized as a whole together with the contradictions, discrepancies or dearth of proof. It is the burdensome duty of the Court to detach the truth from the falsehood and endeavor should be made in terms of the well-known metaphor, "separate the grain from the chaff" which connotes and obligates the Court to scrutinize and evaluate the evidence recorded in the lis judiciously and cautiously in order to stand apart the falsehood from the truth and judge the quality and not the quantity of evidence. These observations were made in the case of *'Nasir Ali V. Muhammad Asghar' (*2022 SCMR 1054).

35. It has been argued on behalf of the Applicants that while granting mesne profits in a blanket manner, no inquiry was conducted, as postulated under Order XX Rule 12 CPC. Perusal of record also confirms that no preliminary decree was passed in the subject Suits. Record is also silent with regards to any order passed for

conducting such inquiry, nor any order for dispensing with such inquiry was available. Besides, no evidence was produced by the Respondent side to establish such claim. Mere claim would not be enough until the same were establish through evidence. Even in the Judgment passed by the learned trial Court, no discussion could be found with respect to such claim but the only words by which the mesne profits were decreed were, 'decreed as prayed'. This does not fulfil the requirements of law and would be against the ratio settled in the case of '*Abdul Gani Matbar Vs. Apser Ali Matbar and another*', PLD 1964 Dacca 633. Additionally, with respect to the ascertainment of the starting date and the ending date, for which the final decree for mesne profits could be granted, both the Judgments are completely silent. In the instant Revisions, it appears that the learned trial Court, instead of finding such dates before passing the decree, has left this entire exercise to be determined by the executing court where the decree is presently pending for the same purpose (as reported by the learned counsels). Such an exercise is also not permissible, as per the *dictum* expounded in the case of *'Noorali Pirmohammad Parsala Vs. Mrs. Patricia Dinshaw', (*PLD 1974 Karachi 235) wherein it has been declared as a duty of the trial Court to ascertain mesne profits under Order XX Rule 12 CPC.:

> "12……The learned Single Judge on the original side has, however, directed that mesne profits after the decree be determined in execution proceedings. It is doubtful whether this direction could be given under Order XX, rule 12, C. P. C. In our view, either an enquiry should have been ordered to ascertain the mesne profits from the date of the decree, or the order should have been to dispense with such enquiry, and then pass a final and executable decree in respect of the mesne profits from the date of the decree."

36. In the case of '*Ali Nawaz and 4 others V. Mst. Zainab and another'* (2000 MLD 1431) it was held that,

> "21. ……. the findings of the first appellate Court on issue No.8, which relates to the claim of mesne profits, are not based on proper appreciation of the evidence and circumstances of the case and thus liable to be set aside. Once the appellants have admitted that on the basis of alleged gift, they have denied the respondents of their respective share in the suit land, which gift has now been declared by the first appellate Court as illegal and void, then the appellants are liable to account for……. For this purpose, the lower Court shall frame preliminary decree, thereby appointing Commissioner to assess the income of the suit land for the intervening period and to determine the share of mesne profits of respondents therefrom……"

37. Applying the ratio of the above decisions to the facts of the instant case, I have no hesitation in concluding that the primary burden to establish his claim for mesne profits was on Respondent No.1, however admittedly, no documentary evidence was produced to establish such a claim. Mere one word statement that he received certain amount as monthly rent would not fulfil the requirement of law in the absence of any corroborating evidence. Not a single document, nor a single witness was produced to establish such a claim. As on part of the learned trial Court, neither any preliminary decree was passed nor any Inquiry, as postulated under the

provisions of Order XX Rule 12 CPC was ordered to be conducted, while no speaking order was passed to explain reasons for dispensing with such an inquiry. Even with regards to the question of ascertaining the quantum of mesne profit, not a single word could be found in both the impugned Judgments. The Judgments are also silent on the question of ascertainment of the starting date and the ending date for which the final decree for mesne profits could have been granted. If each of the precedence discussed *ibid* are read, it would show that the Courts therein have taken pains to accurately ascertain such dates, which in the instant case, was the duty of the learned trial Court before passing the decree. On the contrary, the only word which could be attributed in the Judgment with respect to grant of decree for mesne profits are, 'decreed as prayed', which apparently could not satisfy the mandatory requirements of law. If it is assumed that such blanket relief was granted to the Plaintiff based upon exercise of discretionary powers, such discretion ought not to have been exercised in an arbitrary manner. The evidence led by the Respondent before the trial Court therefore makes it copiously and profusely translucent and cloudless that the Respondent side has failed to prove their case on this count. The claim of mesne profit was therefore, decreed by both the learned Courts below, in a mechanical manner, without application of judicial mind, in the absence of any evidence, without passing of a preliminary decree, and without any inquiry being conducted. The learned Appellate Court also did not pay attention to this aspect of the case while upholding the impugned decree of the learned trial Court. The findings of the courts below are based on fallacious factual assumptions and misapplication of law. The view adopted also suffered from inconsistency with law declared by the superior courts on pivotal aspects on anvil. In these conditions the concurrently recorded findings could neither be considered sacrosanct nor immune to interference. As already discussed above High Court would seldom interfere in concurrent judgments of courts below if the result of misreading or non-reading of evidence or decision of the case was in violation of parameters prescribed by the superior courts. In such case, the ratio settled in the cases of *'Asmatullah', Abdul Sattar'* and *'Mst. Naziran Begum'* discussed *ibid* would be fully applicable. Such finding on the claim of mesne profits is contrary to the settled principles of law and is based upon misreading and non-reading of evidence, the same is therefore, set-aside.

38. In view of the above discussion, the instant Revision Applications are partly allowed. The impugned Judgments and Decrees are set-aside, only to the extent of the claim of mesne profits, as granted to Respondent No.1 in the leading F.C. Suit No.253 of 2019, and the same be accordingly modified. Consequently, F.C. Suit No.253 of 2019 is remanded back to the learned Senior Civil Judge-II, Mehar at Dadu, only for the purpose of ascertaining the Respondent No.1's claim of mesne profits, for which the learned Court shall frame preliminary decree, thereby appointing Commissioner to assess the income of the suit land at the relevant time

during which the suit property was under unlawful possession of the Applicants, and to determine the claim of mesne profits of Respondents therefrom. Rest of the reliefs, as sought in both these Revisions Applications along with all pending applications are dismissed and the impugned Judgments and Decrees to that extent are upheld. The Revision Applications stand disposed-off in the above terms, with no order as to costs.

J U D G E