IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Civil Revision Application No. S-53 of 2012

Applicant Gul Sher son of Haji Usman	:	through Mr. Daim Hussain Bhanbhro associate of Mr. Mukesh Kumar G. Karara, Advocate
Respondents No.1 to 4	:	through Mr. Agha Athar Hussain Pathan, Addl. Advocate General, Sindh
Respondent No.5	:	None present
Date of Hearing	:	25.11.2024
Date of Judgment	:	16.12.2024

JUDGMENT

Muhammad Saleem Jessar, J.- Through this Civil Revision Application filed under Section 115 of Civil Procedure Code, 1908, applicant Gul Sher has challenged the Judgment and Decree dated 20.02.2012 passed by District Judge, Gotki, in Civil Appeal No.71/2011 whereby he maintained the judgment and decree dated 26.09.2011 passed by Senior Civil Judge, Ubauro (trial Court) vide F.C Suit No.193/1982.

2. Brief facts giving rise to filing of instant Civil Revision Application are that plaintiff Muhammad Alim filed Suit No.193 of 1982 for declaration and permanent injunction before the Court of Senior Civil Judge, Ghotki wherein Summons were issued to the defendants and after trial the suit was decreed

vide Judgment and Decree dated 29.04.1992. The defendants preferred civil appeal before the District Judge, Sukkur against aforesaid judgment and decree. The appeal was disposed of by Additional District Judge, Ghotki vide Judgment dated 05.10.1993 whereby case was remanded to the trial Court with the direction to allow the parties to adduce the defence in the light of their claims according to law. The aforesaid Judgment passed by Additional District Judge, Ghotki was assailed by other side by preferring Civil Revision before this Court which was decided vide Judgment dated 20.12.2006 whereby case was remanded to the trial Court with observation that since respondent No.5 has not fi1ed Written Statement, therefore, although he is not entitled to adduce any evidence; however, he is entitled to cross-examine the plaintiff / applicant on the basis of affidavit in *ex parte* proof filed by him. With this modification, the order of the Appellate Court was maintained and the revision was dismissed.

3. Consequent upon receiving copy of aforesaid Judgment passed by this Court, court motion notices were issued to the parties and both the parties were served and they engaged advocates. As the case was remanded only for the purpose of cross-examination of the witnesses, who had sworn the affidavits, as such on 27.11.1990 they were cross-examined by learned counsel for defendant No.5. Learned counsel for other defendant filed statement wherein he adopted the same cross-examination.

4. It seems that the plaintiff in the aforesaid suit had stated that in the year 1966/67, he had purchased agricultural land in auction, bearing S.Nos. 680 (2-7), 681 (4-00) , 682 (3-37) , 683 (2- 26),684 (3-00), 685 (4-01), 694 (4-00), 695 (4-00), 696 (4-00), 697 (4- 00), 602 (1-00), 698 (3-20), 699 (3-21), 701 (2-18), 702 (2-34), 703 (4- 00),704 (4-00), 711 (4-02), and 712 (2-02) of lot No.12, admeasuring 63-33 acres, situated in Deh Garkano, from Colonization Officer, Guddu Barrage Sukkur at the rate of Rs.910-00 and he had paid the installments to the Government and is in possession of the same. In the year 1975, when the land was block surveyed, it was found that the plaintiff was in possession of excessive area of 5-26 acres, hence the plaintiff applied to defendant No.4 for grant of said excessive land too and after necessary formalities, defendant No.4 vide his order dated 04.07.1975 approved revised sanction in favour of the Plaintiff according to block Survey measurements of lot No.12 of Deh Garkino, Taluka Ubauro and this fact was noted in A-Form of the plaintiff and

accordingly the plaintiff paid an excessive amount of Rs.5141-50 on 07.07.1975. According to the plaintiff, first time in the month of March 1977, plaintiff was served with a notice issued by defendant No.4 that one Gul Sher, defendant No.5, has moved an application that an area of 4-00 acres was wrongly included in auction lot No.l2. However, the said application of defendant No.5 was rejected by defendant No.4 on 11.04.1978. Defendant No.5 preferred an appeal before defendant No.3, who by his order dated 17.09.1978 granted the said land to defendant No.5. Thereafter, the Plaintiff preferred Second Appeal before defendant No.2 against the order of defendant No.3 dated 17.09.1978, who by his Order dated 24.05.1982 kept the said disputed land for village asaish. The plaintiff challenged both, viz. order dated 17.09.1978 passed by defendant No.3 and order dated 24.05.1982 passed by defendant No.2 by filing a suit, claiming said orders to be illegal, malafide, ultra vires, null and void, in effective and in-operative having been passed without jurisdiction, thus liable to be set aside.

5. Learned Senior Civil Judge, Ubauro decreed the suit vide judgment decree dated 26.9.2011. The said judgment and decree was assailed by defendant No.5 in Appeal; however, the said appeal was also dismissed by the District Judge, Ghotki dated 20.02.2012, hence Defendant No.5 / applicant namely, Gul Sher, has preferred instant Civil Revision Application.

6. I have heard learned counsel for the parties and have perused the material available on the record.

7. It appears that initially an area of 63-33 acres of deh Garkano, Taluka Ubauro, District Ghotki was allotted to respondent No. 5 / plaintiff Muhammad Alim Kosh which he developed and made it cultivable. On block survey the same was found to be in excess by area of 05-26 acres. The plaintiff applied for revised Grant which was sanctioned in his favour; however, the said grant was challenged by applicant / defendant No.5 by way of appeal filed before Additional Commissioner, Sukkur, which was accepted, thereby granting him 04-00 acres of land which now would be called as 'suit land'. The order passed by Additional Commissioner, Sukkur was challenged by respondent No.5 / plaintiff by way of a second appeal before Member Board of Revenue, Sindh, who, after due notice and hearing the parties, cancelled the Grant of the suit land made in faovur of applicant / defendant No.5; however,

while doing so he kept suit land for Asaish of village Alam Khan Kosh. It was in the circumstances that respondent No.5 / plaintiff filed F.C Suit No. 193 of 1982 before the Court of Senior Civil Judge, Ubauro (Re. Muhammad Alim and others vs. Government of Sindh through Secretary (Land Utilization) Sindh and others) (trial Court) (annexure 'C' at page 23 of the Court file). On admission of suit, process was issued and defendants were served; however, later defendants Nos. 1 to 4 were made *ex parte* in terms of order dated 13.12.1983, besides *ex parte* order was also passed against defendant No.5 / applicant on 06.03.1983. Thereafter, defendant No.5 filed an application under Order IX Rule 9 CPC on 19.02.1984 whereby he sought setting aside of *ex parte* order. Such application was objected by plaintiff and on 03.06.1984 the application under Order IX rule 9 CPC was dismissed. The plaintiff filed *ex parte* proof duly supported by his affidavit. Defendant No.5 as well as A.G.P. were given chance to conduct cross-examination and thereafter, plaintiff's side was closed vide statement dated 23.09.2011. The applicant / defendant No.5 had also filed an application under Section 151 CPC for adducing his evidence. After due notice and hearing parties, said application was also dismissed being meritless by means of order dated 07.04.1991.

8. Mr. Daim Hussain Bhambhro, Advocate, associate of Mr. Mukesh Kumar G. Karara, learned counsel for applicant / defendant No.5, submitted Written Synopsis, which were taken on record. He also submitted that Appellate Court has not appreciated the material placed before it and has wrongly dismissed their appeal being Civil Appeal No. 71/2011 (Re. Gulsher vs. Government of Sindh through Secretary (Land Utilization) Sindh and others). He further submitted that neither the trial Court had framed issues before passing the judgment, nor even the Appellate Court settled points for determination while deciding the appeal, therefore, the Judgments passed by the Courts below are unlawful and liable to be set aside. He prayed that by allowing instant civil revision application, the case may be remanded to trial Court for deciding it afresh.

9. Mr. Agha Athar Hussain Pathan, Assistant Advocate General Sindh, opposed Revision Application and submitted that though the trial Court had not passed proper Judgment; however, the applicant being defendant No. 5, had filed an application under Order IX Rule 9 CPC which was dismissed; however, said dismissal order was not assailed, therefore, it attained finality.

He further submitted that even the original order passed by Revenue Authorities whereby Member (Land Utilization) Board of Revenue Sindh cancelled the Grant, was also not challenged. Besides the land in suit has already been kept by the Revenue Authorities for Asaish of village Alam Khan Kosh, therefore, such order passed by the then Additional Commissioner, Sukkur is still in field and was not challenged by any of the parties (page 35). He further submitted that the land in dispute is Government property and the applicant as well as respondents have got no title to claim the same.

10. Although this case has a chequered history; however, the moot points which require decision in instant Civil Revision Application are; as to whether the judgment and decree passed by the trial Court viz. Senior Civil Judge, Ubauro, without framing the issues and as to whether the judgment of the Appellant Court i.e. District Judge, Ghotki, without settling the points of determination, are in accordance with the law or not?

11. Before dealing with the aforesaid legal points, I deem it proper to scrutinize the background of this litigation in order to expose the conduct of present applicant Gul Sher. As stated above, respondent No.5 Mohammad Alim / plaintiff had stated in the suit filed by him that in the year 1966/67, he had purchased agricultural land in auction from lot No.12, total admeasuring 63-33 acres, and had paid the installments to the Government and was in possession of the same. In the year 1975, when the land was block surveyed, it was found that he was in possession of excessive area of 5-26 acres, hence he moved an application for grant of said excessive land too, which was allowed vide order dated 04.07.1975 and accordingly the plaintiff / respondent No.5 paid an excessive amount of Rs.5141-50 on 07.07.1975. Thereafter, in the month of March, 1977, plaintiff was served with a notice issued by defendant No.4 that one Gul Sher, defendant No.5, has moved an application that an area of 4-00 acres was wrongly included in auction lot No.l2; however, the said application was dismissed on 11.04.1978. It is not understandable that as to why the applicant / defendant No.5 Gul Sher remained mum for a long period of about ten (10) years and did not resort to any remedy. It is not the fact that only in papers the plaintiff Mohammad Alim was granted said land but, in fact, he also got physical possession of the same, therefore, it cannot be said that the applicant was not aware of such fact.

12. Not only this but even the original order passed by Revenue Authorities whereby Member (Land Utilization) Board of Revenue, Sindh cancelled the Grant earlier made in favour of the applicant / defendant No.5, was also not challenged by him.

13. Again in the proceedings of Suit No.193 of 1982 filed by respondent No.5 Mohammad Alim, despite service of summons / process none of the defendants including present applicant Gul Sher made their appearance, thus they were debarred from filing written statement and then *ex parte* order was passed against them. Thereafter, the applicant / defendant No.5 filed an application under Order IX Rule 9 CPC on 19.02.1984 whereby he sought setting aside of *ex parte* order which was dismissed vide Order dated 03.06.1984; however, again the applicant showed slackness and did not challenge said order, thus the same attained finality. Thereafter, again he moved another application under Section 151 CPC for adducing his evidence and after due notice and hearing the parties the application was dismissed by means of order dated 07.04.1991. The said order too was not challenged by him, which also attained finality.

14. It is worthwhile to point out at this juncture that in the earlier Civil Revision filed by present applicant, which was decided by this Court vide Judgment dated 20.12.2006, case was remanded to the trial Court with direction to allow the applicant / defendant No.5 to cross-examine the plaintiff / respondent No.5 on the basis of affidavit in *ex parte* proof filed by him. With this modification, the order of the Appellate Court was maintained and the revision was dismissed. However, in said order it was clearly held that since present applicant / defendant No.5 had not fi1ed Written Statement in the suit, **therefore, he was not entitled to adduce any evidence**. The said findings recorded by this Court were also not assailed before the higher forum, thus the same also attained finality.

15. Despite above, it was pleaded on behalf of the applicant / defendant No.5 that the *ex parte* order passed by the trial Court and then its affirmation by the Appellate Court was not in consonance with the law and that the defendant should have been afforded opportunity to adduce evidence in his defence.

16. In this context, suffice it to reiterate the indolent and delinquent attitude, irresponsible conduct, carelessness and slackness on the part of the defendant as detailed above. Even the Superior Courts have not appreciated such conduct of a defendant and have, time and again, affirmed the passing of *ex parte* order against such defendant. In this connection, reference may be made to the case of ***TOWN MUNICIPAL ADMINISTRATION and others*** Vs. ***FRONTIER SUBMERSIBLE ENGINEERING AND ELECTRIC WORKS***, reported in 2011 YLR 208 [Peshawar], wherein Peshawar High Court held as under:

> ***"6. As discussed above, this court is supposed to resolve the issue as to whether in the aforesaid background the trial Court in spite of the absence of the written statement, delinquent attitude of the petitioners, their disinterestedness into the proceedings of the case was still debarred from the grant of ex parte decree in favour of the respondent decree holder. This plea of the learned counsel for the petitioners if viewed from all relevant angles, it becomes crystal clear that the courts below while keeping into consideration the throughout conduct of the petitioners have rightly refused to exercise their jurisdiction in favour of the petitioners. It is vividly clear from the record and referred to above that from the day one the petitioners were not interested into offering any reasonable opposition to the claim of the respondent decree holder because they did not submit their written statement within the prescribed period and when their defence was struck off, the said order was assailed before the appellate court but after the dismissal of their appeal, they did not seek their remedy any further and in this way the matter rested there. It is also clear from the record that throughout the proceedings they considered the same worthless and did not take any serious interest into the contest of the suit of the respondent. On many dates they and their counsel were found absent without any lawful excuse and so much-so when the trial Court, after recording the evidence of the respondent, made available to them the opportunity to cross-examine the respondent-plaintiff and his witnesses, they did not take any advantage from the said opportunity. In this way they themselves allowed the depositions of the respondent and his witnesses to go unchallenged without facing the test of cross-examination. This attitude of the petitioners is further indicative of their collusive delinquency on their part."***

17. Now adverting to the legal point regarding non-framing of issues, it may be observed that the issues are framed by the Court when a material proposition of fact or law is alleged by the plaintiff in order to support his right to sue or by the defendant in order to constitute his defence, meaning thereby that the requirement of framing of issues arise when the parties are at variance on certain material proposition of fact or law.

18. However, sub-rule (6) to Rule 1 of Order XIV, Civil Procedure Code provides, ***"Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence."*** From

this, it may be concluded that in case, in the suit the defendant after having been served with the summons / process does not appear before the Court and does not file written statement in denial and / or rebuttal to the averments made in the plaint by the plaintiff, then the Court is not under obligation to frame and record the issues.

19. Now examining instant case in the light of above legal position, as stated above, it appears that on admission of suit, process was issued and defendants were served, despite that they did not make their appearance, therefore, they were debarred from filing written statement and subsequently, defendants were made *ex parte.* Thereafter, present applicant / defendant No.5 filed an application under Order IX Rule 9 CPC and then another application under Section 151 CPC which were dismissed and such dismissal orders were also not challenged. In this view of the matter, provision of sub-rule (6) to Rule 1 of Order XIV CPC would be fully attracted, thus the trial court was not required to frame and record the issues.

20. It may also be observed that when in a suit, defendant does not file written statement in denial and rebuttal to the averments made by the plaintiff in the plaint, then in such an eventuality, it could safely be held that he **makes no defence,** as stipulated in Rule 1(6) of Order XIV CPC and, thus, no issues are required to be framed by the Court.

21. In the case of ***MUHAMMAD IBRAHIM (DECEASED) through LRs and another*** Vs. ***TAZA GUL and others,*** reported in **2020 SCMR 2033**, a Full Bench of Honourable Supreme Court while dealing with similar point, held as under:

> ***"So far as framing of specific issues in accordance with the pleadings of the parties or non-framing of any issue is concerned, we have already declared that framing or non-framing of issue cannot be a ground for reversing the judgment and decree of any court and party cannot pray for remand of the matter at later stage on the basis that any issue which was required in accordance with the pleadings of the parties was not framed. We are of the view that the evidence of the parties is to be led in accordance with the pleadings. It is not a legal defect if any specific issue is not framed and party claiming that issue do not agitate the matter for decades and if the language of existing issues is not in accordance with the wishes of any of the parties."***

22. As regards the plea raised on behalf of the applicant that the Appellate Court also erred in not framing / settling the points for determination while delivering the judgment, it may be observed that if the Appellate Court concurs with the findings arrived at by the trial Court, and in such a case,

while delivering the judgment, has re-appraised the evidence, applied its own mind to the case and has given reasons for agreeing with the findings of the trial Court, then non-listing the points for determination in its judgment, shall not adversely affect the judgment. In this connection, reference may be made to the case of ***UNITED BANK LIMITED*** Vs. ***SHOAIB AHMED and 5 others,*** reported in **PLD 2021 Sindh 394**, wherein this Court, while relying upon the judgments of Honourable Supreme Court, held as under:

> ***"Adverting first to the argument of Mr.Imdad Mashori that the case calls for a remand on the failure of the Appellate Court to frame points for determination under Order XLI, Rule 31, C.P.C. While it is correct that the judgment of the Appellate Court does not formally list points for determination, the judgment shows that the Appellate Court had in fact reappraised the evidence, applied its own mind to the case and gave reasons before siding with the trial court. Therefore, the question is whether Order XLI, Rule 31, C.P.C. mandates that the judgment of the Appellate Court should formally list points for determination in all cases, and whether its failure to do so renders the judgment defective.***
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> ***In the case of Gul Rehman v. Gul Nawaz Khan (2009 SCMR 589) relied upon by Mr. Mashori, the Supreme Court found that the first Appellate Court had given only a cursory judgment relying primarily on the judgment of the trial court and thus it was held that such judgment was not in compliance with Order XLI, Rule 31, C.P.C.***
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> ***In the case of Muhammad Iftikhar v. Nazakat Ali (2010 SCMR 1868) cited by Mr. Shakeel Abro, it was held by the Supreme Court that where the Appellate Court does not reverse the findings of the trial court, a decision on each issue may not be distinctly recorded as long as the provision of Order XLI, Rule 31, C.P.C. is complied with in substance. The same point is more eloquently discussed by the Supreme Court in Roshi v. Fateh (1982 SCMR 542) as follows:***
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> > ***"We agree that the judgment of the learned Additional District Judge is not altogether satisfactory and it would have been more appropriate for him to have himself discussed the merits of the evidence respectively led by the parties. But as this Court has observed in Ch. Abdul Kabeer v. Mian Abdul Wahid and others (1968 SCMR 464) that "a non-compliance with the strict provision of Rule 31 of Order XLI of Civil Procedure Code, 1908 may not vitiate the judgment and make it a nullity and the irregularity may be ignored if there has been substantial compliance with it . . . . . .The question whether in a particular case there has been a substantial compliance with the provisions of Rule 31, would depend on the nature of the judgment which is under appeal. For example, if the finding on a question of fact has been arrived at on proper and legal evidence, there could thus be no ground for interference under section 100 of the Code of Civil Procedure and, therefore, there would be no necessity for strict compliance with Rule 31. But, when important points of law are involved in the case, the Appellate Court must indicate the points raised and the reasons, for its decision". The question involved in the instant case was purely a question of fact and we feel that although the learned Additional District Judge may have failed strictly to comply with the provisions of Order XLI, Rule 31, C.P.C. there has been***

> ***a substantial compliance therewith. Hence the judgment of the learned Additional District Judge was not a nullity and affirming the finding of the trial Court that Sada was not a Shia being concurrent finding could not be interfered with in second appeal."***

Again, in the case of Zaitoon Bibi v. Dilawar Muhammad (2004 SCMR 877), it was held that:

> ***"Where the Appellate Court decides to affirm the findings of the trial court, it would be sufficient compliance with the provisions of law if the evidence is essentially discussed and findings recorded. At any rate it would not amount to violation of law, if some issues are discussed and decided together. Real question for deciding an appeal should be whether a party has been prejudiced and there has been gross miscarriage of justice."***

After going through the case-law discussed above, the argument that the matter calls for a remand merely for the reason that the first Appellate Court did not formally list points for determination, carries no weight when the Appellate Court had in fact reappraised the evidence, applied itself to the case and had given reasons for its decision before concurring with the trial court."

23. In another case decided by Larkana Bench of this Court viz. ***SAFDAR HUSSAIN JATT through Attorney and 3 others*** Vs. ***ZAFAR ALI ARAIN and 4 others***, reported in **2021 MLD 624 [Sindh (Larkana Bench)]**, it was held as under:

> ***"10. Insofar as the objection regarding the judgment passed by the Appellate Court in terms of Order XLI, Rule 31 and non-framing of points for determination is concerned, I may observe that on perusal of the said judgment, it appears that though specific points for determination have not been so stated, however, the learned Appellate Court after perusal of the material available on record and going through the Record and Proceedings of the trial Court has given its cogent findings which reflect that the controversy and the objections so raised on behalf of the Applicants have been duly attended to. If the Appellate Court in each and every case, has not framed points for determination, it is not that such judgment would be liable to be set aside on that ground alone, whereas, it becomes immaterial, more-so, when all the questions raised have been answered by the Appellate Court. The case of the Applicants is not that any misreading or non-reading of the evidence is involved; nor it is the case of the Applicants that the Courts below had no jurisdiction or have acted in excess of jurisdiction. It is, but sufficient, that the Appellate Court answers the material questions in its judgment and even if no points are framed for determination it would not ipso facto render the judgment illegal or without lawful authority subject to that the point or controversy has been attended to and decided on the basis of evidence available before the Court. This could only sustain when the judgment is itself without reasoning and also fails to determine the points for determination and not when it is a reasoned judgment attending to all the relevant issues / pertinent controversy between the parties.***
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> ***11. The Hon'ble Supreme Court of Pakistan in the case of Muhammad Iftikhar v. Nazakat Ali (2010 SCMR 1868) has been pleased to deal with a similar situation and has observed as under:***

> ***"4. We asked the learned counsel as to what were the arguments specifically urged before the learned High Court during the hearing of the regular second appeal but he failed to specifically refer the law points urged during the course of arguments before the learned High Court. However, perusal of para No.6 of the impugned judgment indicates that the only ground urged before the learned High Court was that the learned Courts below did not strictly adhere to the provisions of the Order XLI, Rule 31, C.P.C., which contention has been properly and correctly addressed to by the learned High Court in the impugned judgment. It appears from the perusal of the impugned judgment and that by the first Appellate Court, in substance compliance of the provisions of Order XLI, Rule 31, C.P.C was made and it is not always required that in each case the Appellate Court would deal with each of the issue and to resolve the same separately in the light of the evidence available on the record unless the same had caused any serious violation of the law or resulted into a grave miscarriage of justice to any of the parties to the Suit."***

24. Besides above, it is also noteworthy to point out at this juncture that normally this Court, in exercise of its revisional jurisdiction, is not supposed to interfere with the concurrent findings recorded by the two Courts below, unless there are exceptional circumstances to do so. In this context, reference may be made to the case of ***Haji MUHAMMAD YUNIS (DECEASED) through legal heirs and another*** Vs. ***Mst. FARUKH SULTAN and others***, reported in **2022 SCMR 1282**, wherein it was held by Honourable Supreme Court as under:

> ***"The High Court did not have, in its revisional jurisdiction, the legal mandate to reverse the concurrent findings of the trial and appellate courts, without first addressing the said reasoning of the trial and appellate courts. Accordingly, the judgment of the High Court warrants correction."***

25. In another case reported as ***MUHAMMAD FEROZE and others*** Vs. ***MUHAMMAD JAMAAT ALI*** (2006 SCMR 1304), the Apex Court held as under:

> ***"12. It is well-settled that concurrent findings of fact by two Courts below cannot be disturbed by High Court in second civil appeal, muchless in exercise of the revisional jurisdiction under section 1l5, C.P.C. unless the two Courts below, while recording the findings of fact have exercised jurisdiction not vested in them or failed to exercise jurisdiction so conferred. Scope of interference with concurrent findings of fact by High Court in exercise of revisional jurisdiction is very limited. While examining legality of judgment and decree in exercise of its powers under section 115, C.P.C., High Court cannot upset finding of fact, however, erroneous such finding is, on reappraisal of evidence, and take a different view of evidence."***

26. The upshot of above discussion is that the applicant has not made a case for interference in the judgments passed by two courts below in exercise

of its revisional jurisdiction. Consequently, instant Civil Revision Application is hereby dismissed being meritless.

27. The order dated 31.03.2023 depicts that despite publication of the notice in daily Kawish dated 01.12.2022, none of the legal heirs of private respondent No.5/plaintiff made appearance, therefore, the service against them was held good. In this view of the matter, let a copy of this judgment be served upon the legal heirs of respondent No.5 Muhammad Alim (since deceased) through Senior Civil Judge, Ubauro.

JUDGE

S u k k u r
Dated. 16.12.2024

Approved for Reporting