

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR
(Judicial Department)

W.P No.1176-P/2022

Gul Hussain Vs. Fazal Shah and others

Present: Mr. Arif Mehmood & Mehboob Ali, Advocates
for Petitioner.

Mr. Umar Farooq, Advocates alongwith
son/special attorney for Respondent No.1.

Date of hearing: **12.07.2023**

JUDGMENT

MUHAMMAD NAEEM ANWAR, J.- Through instant petition filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has called in question the judgment and decree of the learned Additional District Judge, Mardan at *Katlang* dated 06.01.2022, whereby his civil revision petition against the judgment and decree of the learned Civil Judge-II, Mardan at *Katlang* decreeing suit of the respondent/ plaintiff No.1, was dismissed.

2. Facts lying in the background of this petition are that Gul Hussain, the present petitioner was the defendant in Civil Suit No.28/1 (*neem*) instituted by respondent No.1 on 18.08.2015 u/s 9 of the Specific Relief Act, 1877 (**the Act of 1877**) alleging therein his dispossession by the petitioner/ defendant from the property as described in the headnote الف of the plaint situated in the revenue estate of *Katlang*, District

Mardan being his exclusive ownership on the strength of decree in Civil Suit No.235-A/1 of 2008 filed on 20.05.2008, decided on 24.07.2008 by the Court of learned Civil Judge-XIII, Mardan and decree in the said suit was executed through execution petition No.35/10 instituted on 31.07.2009 and decided on 07.04.2010, whereby the execution petition being satisfied was filed by the learned Executing Court (Civil Judge-IX, Mardan), wherefrom the present plaintiff/ respondent has allegedly been dispossessed by the petitioner/ defendant on 31.05.2015. Suit was contested by the petitioner/ defendant through his written statement on different legal and factual objections by alleging therein that besides other objections, the respondent/ plaintiff has never been dispossessed by him and that he is in possession of the property as co-sharer, over which, he has made construction by spending a huge amount. The learned trial Court, after completion of evidence of the parties and hearing them, has granted a decree for recovery of possession to the extent of 24-marla property and also directed the demolition, if any, in the aforesaid property of 24-marla. Civil Revision No.21/CR of 2021 was filed by the present petitioner against the judgment and decree of the learned trial Court (Civil Judge-II, Mardan at Katlang), however, same was dismissed by the learned Additional District Judge, Mardan at Katlang through impugned judgment and decree dated 06.01.2022, hence, this petition.

3. Mr. Arif Mehmood, Advocate representing the petitioner contended that suit titled “**Fazal Shah Vs. Gul Hassan and others**” bearing No.235-A/1 was not in respect of any specific property rather the plaintiff, now respondent, through said suit had sought declaration to the effect that he is owner of 01-kanal 16-marla and 06-sarsai in the property alienated through mutations No.2601 dated 15.02.2006, No.2763 dated 31.10.2006, No.1785 dated 19.07.2003, No.2655 dated 15.04.2006, No.2685 dated 20.05.2006 & No. 2626 dated 15.04.2006, which is his sole ownership and claim of the present petitioner (defendant No.1 of suit No.235-A/1) in respect of this property is inoperative upon his rights; that recovery of possession of the property, if proved to be in possession of the then defendant, was also sought, alongwith the prayer for perpetual injunction. He also added that to the extent of the property, which is the subject matter of mutations No.2763, 2626 & 2655, the petitioner has got no concern or interest, however, in rest of the properties of the aforesaid mutations, the petitioner/defendant was in possession as co-sharer but this aspect was overlooked by both the learned Courts below in the impugned judgments while determining the suit filed u/s 9 of the Act of 1877, as such, the impugned decree passed in favour of the respondent/plaintiff and dismissal of his revision there-against is the result of misreading and non-reading of record, against the

provisions of section 9 of the Act of 1877 being inconsistent with the decree passed in favour of the respondent/ plaintiff in the earlier suit No.235-A/1, thus, it caused grave miscarriage of justice.

4. On the other hand, Mr. Umar Farooq, Advocate representing the respondent/ plaintiff submitted that not only the decree passed in favour of the respondent/ plaintiff in the earlier round of litigation in suit No.235-A/1 had attained finality as the appeal of the petitioner was dismissed and then his application filed u/s 12 (2) C.P.C was also turned down against the said judgment and decree dated 24.07.2008. He, while referring to the warrant of possession, added that on 13.03.2010, possession of the decreed property was handed over to the respondent/ decree-holder and as such the decree of the learned trial Court had been satisfied and execution petition was thus filed. Lastly, he submitted that this property was rightly described, which was in consonance with the warrant of possession on the strength of which, the actual/ physical possession was transferred to the respondent/decree-holder and this aspect has rightly been determined by the learned trial Court while decreeing suit of the respondent/ plaintiff. He prayed for dismissal of the instant petition.

5. Arguments heard and record perused.

6. C.M No.360-P/2023: This application is aimed for placing on file copies of the mutations No.2601, 2655, 10238, 2763, 2626 & 2685 alongwith an extract from the *Jamabandi* for the year 2021-22 pertaining to *khasra* No.2691 of the revenue estate of *Katlang*, District Mardan. Not only the contents of the application were duly supported by the affidavit of the deponent but the attested copies of *pert sarkar* of the mutations pertain to the property, which were relied upon by the respondent/plaintiff in his previous suit No.235-A/1 have not been annexed with instant petition besides learned counsel for the petitioner has not objected these documents. Needless to say, that the referred to above mutations (*pert sarkar*) were ought to have been placed on record before the learned trial Court or to be rendered in evidence through official concerned, in order to substantiate the contention of the respondent/ plaintiff but none of the parties have placed on record these documents. Be that as it may, learned counsel for the respondent was confronted with the contents of the mutations and the mutations in juxtaposition with the copy of the plaint of the earlier suit and warrant of possession in that suit, who admitted at the bar that these were mutations, which were the subject matter of the earlier suit No.235-A/1 decreed in favour of the respondent/ plaintiff, hence, this application stands allowed, consequently the documents

annexed therewith are read as part and parcel of the instant writ petition.

7. Under the provisions of section 9 of the Act of 1877, if any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him, may by suit recover possession thereof, notwithstanding any other title that may be set up in such suit.

The prerequisites of section 9 *ibid* are that:

- i. **The person suing must have been dispossessed;**
- ii. **Such dispossession must be of immovable property;**
- iii. **Such dispossession should be without consent and should be otherwise in due course of law; and**
- iv. **The suit is to be brought within a period of six months from the date of dispossession.**

It is by now settled that the question of title either of the plaintiff or defendant cannot be raised or gone into in order to seek relief u/s 9 *ibid*. Rel: “**Late Mst. Majeedan through Legal Heirs and another Vs. Late Muhammad Naseem through Legal Heirs and another**” (2001 SCMR 345).

8. Apart from the above, the proceedings under the provisions section 9 of the Act of 1877 do not constitute a bar against any of the parties suing to establish his title over the property as held by the apex Court in the case of “**Canal View Cooperative Housing Society Vs. Javed Iqbal and another**” (PLD 2004 SC 20). Since, the dispossession is alleged by the plaintiff/ respondent that he was dispossessed on 31.05.2015

whereas, the suit was filed by him on 18.08.2015, thus, it was filed within a period of six months and hence the issue regarding limitation for filing of the suit is decided in favour of the respondent/ plaintiff.

9. The crucial point which requires determination through instant petition is the description of the property of the suit in hand in juxtaposition with the decree passed in favour of the respondent in the earlier round of litigation in suit No.235-A/1. It is undisputed that the respondent/ plaintiff, while filing the suit u/s 9 of the Act of 877, has not given the description of the property in terms of *khata* number or *khasra* numbers, wherefrom he was allegedly dispossessed by the petitioner/ defendant, rather the property was described as under:

محدوده بحدودات، شمالاً دارالعلوم فاروقیہ جنوباً، آراضی زیر قبضہ مد
عاعلیہ، شرقاً مکان مدعی و مکان حسین خان، غرباً راستہ واقع موضع کا
ٹٹنگ جو کہ مدعی کی واحد ملکیت ہے

If this is the same description given in the earlier round of litigation in Suit No.235-A/1 decreed on 24.07.2008 and possession whereof was handed over to the respondent/ plaintiff and from said property he was later on dispossessed by the petitioner then ultimately the decree passed in favour of the plaintiff/ respondent is in consonance with the requirements of law and the suit falls within the parameters of section 9 of the Act of 1877 but the intriguing aspect is description of the

property in earlier suit No.235-A/1, wherein declaration was sought by the respondent/plaintiff in respect of the following property:

دعویٰ استقرار حق بدیں مرد کہ مدعی اراضی تعدادی کم و بیش 6 سیرسایہ، 6 مرلہ، 01 کنال کا مالک و قابض بلا شرکت غیر ہے بروئے انتقالات نمبری 2601 مصدقہ 15.2.2006، 2763 مصدقہ 31.10.2006، 1785 مصدقہ 19.07.2003، 2655 مصدقہ 15.04.2006، 2685 مصدقہ 20.05.2006، 2626 مصدقہ 15.04.2006 اور مدعا علیم کو یہ حقوق نہیں پہنچتا ہے کہ وہ اس قدر آراضی پر اپنا حق ملکیت جتائے۔ اس سلسلہ میں جملہ کا روائی منجانب مدعا علیہم غیر قانونی خلاف قانون، خلاف ضابطہ اور خلاف واقعات، انصاف ہے۔ اور حقوق مدعی پر غیر مؤثر اور کالعدم ہے۔

Therefore, admittedly neither *khasra* numbers nor other description of the property was specifically mentioned in the plaint of the earlier suit No.235-A/1 and in such an eventuality, the mutations attested and were the part of earlier *lis* will resolve the controversy, which reflects that:

- i. Mutation No.2601 was in respect of the property measuring 01-kanal 02-marla (ghair mumkin abadi), wherefrom 01-marla and 05-sarsa was transferred from the petitioner to the respondent/plaintiff to the extent of 14/198 shares, thus, in *khasra* No.2691, the decree holder/respondent of earlier suit No.235-A /1 was not exclusive owner rather the present petitioner was the owner of 184 shares as depicts from attested copy of *pert sarkar* of mutation No.2601;
- ii. Mutation No.2763 was in respect of four *khasra* numbers, out of *khata* No. 462/1276 to 1279, whereby out of 21-kanal 08-marla only 11-marla was transferred in favour of the respondent/ plaintiff;
- iii. Mutation No.2655 pertains to *khasra* No.2669 measuring 01-kanal and 05-marla, wherefrom 7/25 shares to the extent

of 07-marla property were transferred in favour of the respondent/ plaintiff;

- iv. Mutation No.2685 is in respect of four *khasra* numbers from *khata* No.462/1276 to 1279 measuring 21-kanal and 08-marla, wherefrom 11/428 shares measuring 11-marla were transferred to the respondent/ plaintiff;
- v. Mutation No.2626 is in respect of the property bearing *khasra* No.2673 measuring 01-kanal and 17-marla and *Khasra* No.2687/1 measuring 13-marla, wherefrom only one *kanal* and 04-sarsai property was transferred in favour of the respondent/ plaintiff.
- vi. Another mutation No.1785 dated 09.07.2003 is reflected in the plaint of the earlier suit No.235-A/1, however, neither any attested copy is available on record nor description thereof is mentioned, however, learned counsel for the petitioner submitted at the bar that to the extent of the property transferred in favour of the respondent/plaintiff from property mentioned in mutations No.2655, 2763 2626 & 1785, he has got no concern whatsoever, rather confined himself to the extent of the property bearing *khasra* No.2691, which is the subject matter of mutation No.2601, wherefrom property measuring 01-kanal and 05-marla, was purchased by the respondent/ plaintiff from the petitioner.

The referred to above mutations clearly elaborate that none of the mutations is in respect of the sole proprietorship of the respondent/ plaintiff rather certain shares were transferred in his favour through different mutations as reflected in the headnote (l) of the plaint of the earlier suit No.235-A/1.

10. More-so, warrant of possession, whereby actual /physical possession of the property was transferred to the respondent/ decree-holder of suit No.235-A/1, does not bear any

specific *khasra* number, rather certain shares were purchased by him and warrant of possession reflects that the property was handed over to the decree holder description of whereof is as under:

مشرق حسین خان ، مغرب ثابت اللہ . جنوب گل حسن ، شمالا کی طرف مدرسہ حافظ اختر علی۔

Warrant of possession for actual possession shall be read in juxtaposition with the decree sheet, which for ready reference is reproduced as under:

پرچہ ٹگری
بعدالت جناب حسین علی سول جج صاحب XIII ، مردان
فضل شاہ ولد عبدالمناف سکنہ کاتلنگ تحصیل کاتلنگ، مردان.....مدعی

بنام

گل حسن ولد زرنوش، خان افضل، نور افضل، اختر امین پسران مسما تان صفیہ، فریدہ ، دلفرو شہ دختران شیرخان پسر، مسماة سلمی دختر الطاف حسین ، نظر گل، رحمان گل، شیر گل پسران ہمیش گل ، شاہ افضل ولد شیر افضل ساکنان کاتلنگ تحصیل و ضلع مردان
.....مدعا علیہم

ا. دعوی استقرار حق بدیں مراک کہ مدعی اراضی تعدادی کم و بیش 6سرسایہ، 6 مرلہ، 01 کنال کا مالک و قابض بلا شرکت غیر ہے بروئے انتقالات نمبری 2601مصدقہ، 15.2.2006، 2763مصدقہ 31.10.2006، 1785مصدقہ 19.07.2003، 2655مصدقہ 15.04.2006، 2685 مصدقہ 20.05.2006، 2626 مصدقہ 15.04.2006 اور مدعا علیہم کو یہ حقوق نہیں پہنچتا ہے کہ وہ اس قدر اراضی پر اپنا حق ملکیت جتائے۔ اس سلسلہ اس ایک جملہ کا روانی منجانب مدعا علیہم غیر قانونی خلاف قانون، خلاف ضابطہ اور خلاف واقعات ، انصاف ہے۔ اور حقوق مدعی پر غیر مؤثر اور کالعدم ہے۔

ب. دعوی دخلیابی: اگر کسی کل یا جز رقبہ متدعویہ پر قبضہ مدعی درست ثابت نہ ہوا یا دوران مقدمہ ہاتھ سے نکل جائے تو اسی صورت میں ٹگری دخلیابی بطور دادرسی مستلزمہ۔

ج. دعوی صدور حکم امتناعی دوامی بدیں مراد کہ مدعا علیہم حقوق مدعی میں کسی قسم کی دخل مداخلت نہ کرے۔ مدعی کو بے دخل نہ کرے۔ قبضہ اراضی کسی دیگر کے نام منتقل نہ کرے، آبادی، منتقلی سے منع و باز رہے۔

<u>بنائے</u>	<u>اختیارات سماعت</u>	<u>مالیت بغرض کورٹ فیس</u>
	کل رقم مبلغ 600	<u>دعوی</u> ا.استقرار حق مبلغ 200 روپے عرصہ چند یوم سے ب.دخلیابی 200 روپے عاعلیہم ج.حکم امتناعی 200 روپے حدود عدالت
از انکار مد		
اندر		
مردان پیدا شد		

Or 25
24.07.2008

Sabz Ali/* (S.B)

HON'BLE MR. JUSTICE MUHAMMAD NAEEM ANWAR

مختیار مدعی حاضر۔ بروئے آرڈر شیٹ محررہ امروزہ یکطرفہ ڈگری بحق مدعی بر خلاف مدعا علیہم صادر کی جاتی ہے۔

CJ-XIII, Mardan
24.07.2008

مدعی

روپے	پے سے	خرچہ نالاش	روپے	پے سے
---	---	اسٹامپ عرضی دعوی	---	-- -
---	---	اسٹامپ وکالت نامہ	---	-- -
---	---	اسٹامپ معہ ثبوت	---	-- -
---	---	فیس ابل کمیشن	---	-- -
---	---	فیس اشتہار	---	-- -
---	---	فیس وکیل	---	-- -
---	---	-----	150	-- -
---	---	متفرق	---	-- -
روپے	پے سے	میزان	روپے	پے سے

آج بہ ثبت میرے دستخط و مہر عدالت بذا جاری کیا گیا۔

سول جج، مردان

As per contents of the decree sheet, respondent Fazal Shah has never been declared to be exclusive owner of any specific *khasra* number in explicit terms rather certain mutations were mentioned in the decree sheet with specification of the date its attestation, therefore, for determination of the *lis* in hand, it shall be seen **as to whether the possession of the property, which is the subject matter of the instant suit, was**

Sabz Ali/* (S.B)

HON'BLE MR. JUSTICE MUHAMMAD NAEEM ANWAR

physically/actually transferred to the respondent/decree-holder and **whether the actual possession from joint ownership could be transferred in favour of the decree holder?** **Firstly**, the decree sheet and the description of the property mentioned in the warrant of possession are not in consonance with each other. In the plaint, the respondent/ plaintiff claimed his ownership to the extent of 01-kanal 16-marla & 06-sarsai from the properties, which were subject matter of six mutations and it is nowhere explained either in the decree sheet or available on the record that all these *khasra* numbers were contiguous to each other for determining the possession from any specific place, thus, it has not been proved by the respondent/ plaintiff that on the strength of decree in the earlier round of litigation in suit No.235-A/1, he was put in physical possession of the decreed property, which was the subject matter of six mutations and that too was in respect of certain shares. **Secondly**, in case of joint ownership, physical possession of the property could not be handed over within the purview of order XXI rule 35 (1) & (2) C.P.C, which for ready reference is reproduced as under:

35. (1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

At this juncture, for proper assistance regarding the execution of the earlier decree and proof of handing over of the possession of the decreed property to respondent/ plaintiff, learned counsel for the respondent/ plaintiff was asked as to whether decree from joint property could be executed by handing over physical possession, who admitted it at the bar that neither any such decree could be granted nor it could be executed. This aspect shall be dealt with in juxtaposition with the objection of learned counsel for the respondent/ plaintiff that in earlier round of litigation, the decree was maintained in appeal and even application u/s 12 (2) C.P.C of the petitioner was also dismissed. This Court would not enter into validity, correctness or legality of the decree passed in favour of the respondent/ plaintiff in earlier suit No.235-A/1 rather will confine itself to the extent of execution thereof which is basis of the suit in hand as he claimed that physical possession of the property was transferred to him in execution of the earlier decree, thus, the objection of the learned for the respondent/ plaintiff is of no avail to him rather it can safely be concluded that physical possession as claimed by the respondent in the instant suit has

not been properly transferred to respondent/ plaintiff (decree holder of earlier suit).

11. Since, the instant *lis* is the outcome of the decision of the revisional Court as in the suit filed u/s 9 of the Act of 1877 there is no remedy of appeal and in such an eventuality, the jurisdiction of this Court is only to the extent of legality or correctness of the findings of the learned Courts below, however, this aspect cannot be overlooked that in the earlier round of litigation, a decree was granted in favour of the respondent/ plaintiff but for the purpose of relief in the instant suit, same cannot be made as a foundation as the fate of the instant suit goes to the roots of the execution of the earlier decree.

12. Turning to the factual aspect, wherein it was alleged by the respondent/ plaintiff that on a particular date, he was dispossessed by the petitioner/ defendant from the disputed property. Special attorney/ son of the respondent appeared before the Court in person, who came to the rostrum and was asked about the date, on which, the respondent/ plaintiff was allegedly dispossessed, who submitted at the bar that he was at Karachi at the relevant time and even otherwise, there is no evidence of respondent/plaintiff that he would have been dispossessed on 31.05.2015. In consonance with the judgment of the apex Court pertaining to the ingredients of section 9 of the Act of 877, which are *sine qua non* to be proved by the plaintiff, he has

failed to prove his alleged dispossession from the immovable property. When the respondent/ plaintiff could not prove his dispossession with specification of the date, then only institution of the suit within limitation could not be adjudged.

13. Without dilating upon the title of the property as claimed by the respondent/plaintiff in the earlier round of litigation, he has failed to prove his case within the parameters of section 9 of the Act of 1877 and thus both the learned Courts below have failed in the application of law in its true perspective, as such, committed an illegality. Therefore, the impugned concurrent findings of the learned Courts below could not sustain in view of the principle enunciated by the Hon'ble Supreme Court of Pakistan in cases of "*Nazim ud Din and others v. Sh. Zia ul Oamar and others*" (2016 SCMR 24) and "*Noor Muhammad and others v. Mst. Azmat-e-Bibi*" (2012 SCMR 1373).

14. For the reasons discussed above, this petition succeeds, which is therefore allowed, the impugned judgments and decrees of the learned Courts below are set aside and consequently, suit of the respondent/ plaintiff is hereby dismissed, however, with no order as to cost.

Announced
12.07.2023

JUDGE

Sabz Ali/* (S.B)

HON'BLE MR. JUSTICE MUHAMMAD NAEEM ANWAR