

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT
JUDGMENT

C.R.No.112/2014

Muhammad Naseem etc. **VS.** Province of Punjab through
Collector, District Bhakkar etc.

Date of hearing	: 30.01.2023
Petitioners by	: Mr. Mubeen-ud-Din Qazi and Tahir Mahmood Chaudhary, Advocates
Respondents by	: Mr. Muhammad Nawaz Chaudhary, Zubda-tul-Hussain and Muhammad Ahmad Qayyum, Advocates

Ch. Muhammad Iqbal, J:- Through this single judgment, I intend to decide the titled Civil Revision as well as Civil Revision No.113/2014 as both these cases have arisen out of the same judgments & decrees.

2. Through these civil revisions, the petitioners have challenged the validity of the judgment & decree dated 24.09.2010 passed by the learned Civil Judge, Bhakkar who dismissed the suit for declaration and permanent injunction filed by the petitioners and also assailed the consolidated judgment & decree dated 26.09.2013 whereby the learned Additional District Judge, Bhakkar dismissed the appeals of the petitioners.

3. Brief facts of the case are that the petitioners/plaintiffs filed a suit for declaration alongwith permanent injunction against the respondents/defendants and contended that land measuring 78000 Kanal bearing Khata Nos.96 to 634 situated in Moza Darboola Tehsil Mankera District Bhakkar is Shamlat Deh.

That previously the suit land was bearing Khata Nos.1 to 41 comprising of total land measuring 100200 Kanal out of which 26000 Kanal have become *Adna Malkiat*. The petitioners/plaintiffs and their predecessors are owners and residents of Moza Darboola. They have reclaimed the suit land on the basis of breaking up (نوٹوڑ) as well as sinking of wells. The petitioners/plaintiffs have contended that they are the inferior proprietors (*Adna Malkan*) and are in possession of the suit land since 1923-24; that after promulgation of MLR No.64 the inferior proprietors (*Adna Malkan*) who were in possession of any Shamlate land, were declared as full owners of the said land. That by operation of above regulation, the petitioners who were inferior owners became full owners of the land. However, in this regard, they filed claim before the Collector, Bhakkar who vide order 29.05.1982 declared that the petitioners/plaintiffs are in possession of the suit land and accordingly mutation Nos.26 to 56 were passed. The respondents/defendants being alleged superior owners [*Aala Malkan*] of the land challenged the said order through an appeal which was accepted by the Commissioner, Sargodha Division, Sargodha on 28.02.1983 and the order dated 29.05.1982 was set aside. The petitioners assailed the order dated 28.02.1983 before the Member, Board of Revenue through revision petitions which were accepted in the terms that the orders of the both the lower fora were set aside, the previous entries in the revenue record were maintained and the petitioners were advised to approach the Civil Court for redressal of their grievance. The petitioners/plaintiffs assailed the said orders through Writ Petitions [No.3034 & 3035 of 1986] which were dismissed by this Court on 27.07.1999.

Thereafter, the petitioners/plaintiffs No.1 to 5 on their own as well as being representatives of petitioners/plaintiffs No.6 to 1730 filed a suit. The respondents/defendants filed separate

contesting written statements. As per divergent pleadings of the respective parties following issues were framed:-

1. *Whether the plaintiffs are owner in possession of the suit land as Adna owners and the defendants have no concern whatsoever with the suit land? OPP*
2. *Whether the order of Commissioner, Sargodha dated 28.02.1983 is false illegal and liable to be cancelled? OPP.*
3. *Whether the plaintiffs have got no cause of action? OPD.*
4. *Whether the plaintiffs have not come to the court with clean hands? OPD.*
5. *Whether the suit is barred by law of limitation ? OPD*
6. *Whether this court has got no jurisdiction to entertain this suit? OPD*
7. *Whether the suit is fictitious and based on concocted story and the plaintiffs are in illegal possession of the suit land therefore, the defendants are entitled to the recovery of Rs.1 Karor as special cost u/s 35-A of CPC? OPD.*
8. *Whether the plaintiffs are estopped by their words and conduct to file this suit? OPD.*
9. *Whether the defendants No.12 to 17 are entitled to the land mentioned in para 4 of preliminary objections on the basis of the decree therefore, the suit is liable to be dismissed? OPD-12 to 17*
10. *Whether Mst. Waziran widow of Khuda Bukhsh is necessary party, who has not been joined as party therefore, the suit is liable to be dismissed? OPD-12 to 17*
11. *Whether the defendants Naheed Akhter & Muhammad Shakeel are minors who have been impleaded by next friend therefore the suit is liable to be dismissed? OPD-12 to 17*
12. *Whether the suit is barred by principle of resjudicata? OPD-18 to 27 & 31 to 49.*
13. *Whether the suit is hit u/s 56-D of Specific Relief Act? OPD.*
14. *Whether the description of the suit land is not correct, therefore, the suit is liable to be dismissed? OPD.*
15. *Relief.*

The parties at discord led their respective pro and contra evidence. The learned trial court finally dismissed the suit of the petitioners/plaintiffs vide judgment & decree dated 24.09.2010. Being dejected, the petitioners/plaintiffs assailed the said judgment & decree through two separate appeals which were dismissed by the learned appellate Court through consolidated judgment & decree dated 26.09.2013. Hence, these civil revisions.

4. I have heard the arguments of learned counsels for the parties and have gone through the record with their able assistance.

5. In order to prove the assertions made in the plaint as well as to prove issue No.1, plaintiffs produced Munir Hussain (P.W.1) who deposed that the plaintiffs are in possession of the suit land prior to 1923-1924; that the suit land is *Shamlat* and they are holding the land as inferior owner (*adna maalik*); that they installed tube-wells, planted trees and constructed houses on the suit land; that they used to pay Revenue fee (*maalialia*) and other taxes etc.; that in 1958 Martial Law Regulation was promulgated and the Collector passed order declaring them as inferior owner (*Adna Maalik*) in the year 1982 and accordingly mutations were sanctioned; that against the said order the defendants filed an appeal which was accepted; that the petitioners filed petition before the Board of Revenue who advised them to approach Civil Court for redressal of the grievance; that they challenged the said order before the High Court but the order of Board of Revenue remained upheld. During cross examination, he deposed that:

"میرا مورث اعلیٰ گاما تھا یعنی پردادا تھا۔۔۔ یہ درست ہے کہ گاما کے نام پر کوئی کنواں نہ ہے۔۔۔ میری عمر 33 سال ہے۔ یہ درست ہے کہ میری پیدائش 1958 کے بعد کی ہے۔ اعلیٰ مالکان کی موضع میں ملکیت نہ ہے۔ 1959 میں ہمارا نام رجسٹر حقداران میں بطور شرع مالکان درج ہے۔۔۔ مجھے علم نہ ہے کہ 1966 میں ہم نے کوئی دعویٰ سینئر سول جج صاحب میانوالی کیا تھا۔ مجھے اس بارے علم نہ ہے کہ اس دعویٰ میں یہ بیان بذریعہ کونسل دیا تھا کہ لینڈ کمیشن والے رقبہ سے ہمارا کوئی تعلق نہ ہے۔ مجھے علم نہ ہے کہ دعویٰ سالم خارج ہو گیا تھا۔ مجھے علم نہ ہے کہ ڈسٹرکٹ جج میانوالی نے ہماری اپیل خارج کر دی تھی۔ مجھے علم نہ ہے کہ مسٹر جسٹس زاہد حسین نے ہماری اپیل خارج کر دی تھی۔ یہ درست ہے کہ لینڈ کمیشن نے رقبہ متدعو یہ حصول کیا تھا۔ مجھے اس بات کا علم نہ ہے کہ لینڈ کمیشن نے حصول شدہ رقبہ مختلف لوگوں کو بشمول مدعا علیہم کو نیلام کر دیا تھا۔ مجھے علم نہ ہے کہ خریداروں سے لینڈ کمیشن نے 1/4 حصہ رقم بھی وصول کر لی تھی۔ مارشل لاء ریگولیشن 1958 میں جاری ہوا تھا۔ نوٹیفیکیشن کے مطابق یہ نہ لکھا ہوا تھا کہ ادنیٰ مالکان کو حقوق دے دیئے جائیں۔ کل رقبہ تعدادی تقریباً 161000 کنال ہے۔ میرا نام دعویٰ میں بطور مدعی شامل ہے۔ یہ درست ہے کہ روبرو کمشنر ہم نے اپنا موقف بیان کیا اور کمشنر نے ہمارے موقف کو

سننے کے بعد فیصلہ ہمارے خلاف کر دیا تھا۔ بورڈ آف ریونیو میں ہم نے اپیل فائل کی تھی۔ بورڈ کا فیصلہ 07.07.1996 ہوا تھا۔ بورڈ آف ریونیو کے فیصلہ کے خلاف عدالت عالیہ نے 27.07.1999 کو فیصلہ کیا تھا۔۔۔ درست ہے ہم نے ہائیکورٹ میں رٹ دائر کی تھی تو اس میں یہ نہ لکھا تھا کہ قبل ازیں ریگولر اپیل عدالت عالیہ میں زیر سماعت ہے۔۔۔ یہ درست ہے کہ کمشنر کے فیصلہ کے خلاف ہم نے (ادنی مالکان) نے بورڈ آف ریونیو میں اپیل کی تھی۔ انہوں نے اپیل منظور کر لی تھی۔ ہم نے سول کورٹ میں دعویٰ اس لئے دائر کیا کہ کلکٹر کا حکم بحال کیا جاوے۔۔۔ خسره نمبران 371، 376، 377، 367، 372، 373 تا 369 اراضی بقدر 635 کنال 3 مرلہ کے بارے میں یہ نہیں بتا سکتا کہ اس اراضی کے بارے میں تنازعہ کن کن کے مابین ہے۔۔۔ یہ درست ہے کہ بورڈ آف ریونیو نے SO اور کمشنر کے فیصلے اراضی متدعو یہ کی بابت منسوخ کر دیئے تھے۔۔۔ یہ درست ہے کہ بورڈ آف ریونیو کے فیصلے کے خلاف مدعیان فریق فیصلہ نے رٹ کی تھی۔ ہائی کورٹ نے (BOR) کے فیصلہ کو بحال رکھا۔"

Haji Mukhtar Hussain (P.W.2) deposed during his cross examination that:

"مجھے علم نہ ہے کہ کنواں کس کے نام ہے۔۔۔ مجھے 35 سال سے قبل کے بارے میں علم نہ ہے کہ گورنمنٹ نے کوئی رقبہ حصول کیا تھا یا نہیں۔۔۔ مجھے علم نہ ہے کہ مدعیان نے کس بارے میں دعویٰ کیا ہے البتہ مدعیان کو علم ہو گا۔۔۔ ادنی مالکان وہی ہیں جو موقع پر قابض ہیں۔۔۔ مجھے کسی بات کا علم نہ ہے مالکان جانتے ہیں کہ میں صرف قبضہ کی گواہی دیتا ہوں۔ ملکیت کا مجھے علم نہ ہے، مالکان کو پتا ہو گا۔"

Malik Falak Sher (P.W.3) deposed during cross examination that:

ارضی متدعو یہ شملات دیہہ ہے۔ اس لئے یہ مالک قابض ہیں۔ مجھے علم نہ ہے کہ ادنی مالکان کیا ہوتے ہیں۔ مجھے یہ علم نہ ہے کہ اعلیٰ مالکان کیا ہوتے ہیں۔ مجھے علم نہ ہے کہ اراضی متدعو یہ پر مدعیان نے کس کی اجازت سے قبضہ کیا تھا۔۔۔ مجھے شملات کے بارے میں علم نہ ہے، اللہ بہتر جانتا ہے۔۔۔ مجھے علم نہ ہے کہ اس موضع میں کون کتنے رقبہ پر قابض ہے۔ مجھے اس بارے میں بھی علم نہ ہے کہ مدعیان کتنے رقبہ پر قابض ہیں۔ مجھے علم نہ ہے کہ مدعیان کس حیثیت سے قابض ہیں۔"

6. Conversely, Tufail Ahmad, Patwari Moza Darbola has appeared as D.W.1, who deposed that the Moza Darbola is consisted of land measuring 16119 Kanal; that after promulgation of MLR 1966, 1972, 1977 the superior owners (*aala malkan*) of the Moza Darbola surrendered the land and land measuring 1474 acre (117920 Kanal) was resumed in favour of the State by the Land Commission; that the cases of the Moza Darbola were

pending in different Courts; that the District Collector, Bhakkar vide order dated 29.05.1982 passed order for the disbursement of land measuring 11952 Acre of Aala Malkan in favour of inferior owners (Adna Malkan) and in the year 2005-06 the rest of the area measuring 37098 Kanal was transferred in favour of Provincial Government through Land Commission; that the plaintiffs are illegal occupants due to which penalty (*tawan*) is required to be recovered from them. During cross examination, he stated that mutation No.24 dated 03.06.1982 was sanctioned in favour of defendants but the said mutation was cancelled by the order of Commissioner; that the said order was upheld by the Board of Revenue as well as High Court. Muhammad Afzal (D.W.2), one of the respondents/defendants has deposed that they purchased land measuring 635 Kanal 03 Marla from Madah Hussain s/o Bahadur and the plaintiffs have no concern with the said land.

7. Admittedly, the suit land is Shamlat and the petitioners/plaintiffs & proforma respondents have claimed to be the inferior owner (*adna maalikan*) on the basis of breaking up (نوٹوڑ) as well as sinking of wells but the rights of inferior ownership (*adna malikan*) were abolished, after the promulgation of MLR 1964. In Para 3 of Martial Law Regulation 1964, it is provided that any rule or order made therein, shall have effect notwithstanding anything contrary in any other law. For ready reference, Para 3 *ibid* is reproduced as under:

“3. Regulation to override other laws, etc. The provisions of the Regulation, any rule or order made thereunder, shall have affect notwithstanding anything to the contrary in any other law, or in any order or decree of Court or other authority, or in any rule or custom or usage, or in any contract, instrument, deed or other document.”

Under Para 22 *ibid*, superior ownership (*Aala Malkiat*) and other similar interests stood abolished. For reference, Para 22 *ibid* is reproduced as under:

“**22. Intermediary interests.** *Ala-Milkiat* and similar other interests subsisting immediately before the commencement of this Regulation, shall on such commencement, stand abolished and no compensation shall be claimed by, or paid, person affected by the abolition.”

The petitioners/plaintiffs merely have claimed that they have broken up the land and have dug wells but in this regard they have not produced any evidence. Further, they also did not produce any evidence that the superior owners (*aala maalikan*) gave permission to the petitioners/plaintiffs for taking possession of the land. It is an essential pre-requisite for the inferior ownership (*adna maalikan*) that they shall approach the superior owners (*aala maalikan*) and offer them share of produce (*nazrana / jhaar*) and take permission but there is no favourable evidence in this regard. The Hon'ble Supreme Court of Pakistan in a judgment titled as *Khanan and 2 others Vs. Fateh Sher through Ahmad and 15 others* (1993 SCMR 1578) has held that inferior owners (*adna maalikan*) should approach superior owners (*aala maalikan*) and offer them share of produce (*nazrana / jhaar*) and take permission and if such permission is granted, they (*adna maalikan*) could remain in possession. The petitioners/plaintiffs failed to prove the pre-requisite of inferior ownership (*adna maalikeat*) through any credible evidence. The petitioners/ plaintiffs have not fulfilled the criteria prior to the promulgation of MLR 1964.

8. The Sindh Sagar Doab Colonization Act 1902 was repealed in 1929 and in the intervening period whereof, no proprietary rights of Shamlat were land granting in favour of any person. Munir Hussain (P.W.1) stated that they installed wells at the suit land but in this regard no solid, credible & corroboratory

oral or documentary evidence was produced. As per the revenue record from 1943-1944 to 2005-2006, the nature of the suit land has been mentioned as *barani*, *banjar qadeem* and *banjar jaded* which proves that the suit land was never cultivated by the petitioners/plaintiffs nor they did any labour for the purpose of breaking up of the land to make it cultivable. This fact is mentioned in *wajib-ul-arz* of Moza Darbola (Exh.P.12). In a judgment cited as *Ghulam Haider Vs. Ghulam Raza Shah and 12 others* (PLD 1979 Lahore 481) it has been held that no person can claim right of inferior ownership (*adna malkiyat*) by breaking barren (*barani*) land. Further, mere the cultivation is not a sole criterion / reason to confer proprietary rights on the basis of entry in the column No.6 of Jamabandi as “قبضہ باشرع مالکان بوجہ نو توڑ” as it neither creates any right of ownership in favour of the petitioners/plaintiffs nor declares them as inferior owner (*adna maalikan*).

9. As regard the claim of the petitioners/plaintiffs that they are in possession of the suit land since their forefathers for a long long time ago, as such they become owners of the land on the basis of adverse possession as well; suffice it to say in this regard that the Hon’ble Supreme Court of Pakistan in a landmark judgment reported as *Maqbool Ahmed Vs. Government of Pakistan* (1991 SCMR 2063), has already declared Section 28 of the Limitation Act, 1908 against the injunctions of Islam by holding that claim of adverse possession is repugnant to the injunctions of Islam. Thus, the above assertion of the petitioner/plaintiff is devoid of any force.

10. As regard the issue No.12 is concerned it is worth mentioning that as per available record, a lis having the same cause regarding the suit land among the same parties was earlier dismissed by the learned Civil Judge vide judgment & decree dated 13.11.1967 and appeal whereof was also dismissed by the

learned District Judge, Mianwali on 13.05.1968. For reference, the operative portion of the judgment dated 13.05.1968 and the claim made by the petitioners/plaintiffs in the instant suit are reproduced as under:

“Ali Muhammad and three others instituted the suit in the representative capacity under Order 1 rule 8 C.P.C., against Shamsher and 45 others, including the Land Commission and others entered in list ‘B’ attached with the plaint for perpetual injunction seeking to restrain the defendants from making alterations or change by way of mutation or by any other means of ownership rights in respect of land measuring 156572 kanals 1 marla, situated in the area of village Darbula, Tehsil Bhakkar, as entered in the Jamabandi of the year 1963-64 and described in the heading of the plaint in detail. The plaintiffs also prayed for restraining the defendants from removing the entry of Shamilat-deh as incorporated in column No.5 of the said Jamabandi. The plaintiffs claimed that they and their forefathers alongwith those entered in list ‘Alif’ were in cultivating possession of the suit land since time immemorial. The first regular Settlement had taken place in the year 1878 and according to the terms of Wajib-ul-arz prepared in that Settlement the person who had brought the barren land under cultivation were considered as malikan Adna while the owners of the land were termed as Malikan Ala. In order to get the rights of Adna Malkiyat the plaintiffs and their fore-fathers had complied with the conditions necessary for it as laid down in the said Wajib-ul-arz.”

After having lost the cause up to this Court, the petitioners/plaintiffs again instituted the instant suit, wherein they have sought a similar declaration which is as under:

"دعویٰ استقراریہ بدیں مضمون کہ قرار دیا جاوے کہ مدعیان مالکان و قابضان بطور ادنیٰ مالکان اراضی مندرجہ کھاتہ نمبر 96 تا 634 نمبر ان خسرہ سالم کھاتہ جات رقبہ تعدادی 100200 کنال میں سے رقبہ متدعویہ 78000 کنال واقعہ موضع در بولا تحصیل منکیہ ضلع بھکر کے ہیں اور مدعا علیہم کا اس سے کوئی تعلق واسطہ نہ ہے اور حکم کمشنر صاحب سرگودھا سراسر غلط خلاف قانون اور قابل منسوخی ہے۔ و نیز اصدار حکم انتاعی دوامی بنام مدعا علیہم کہ وہ قبضہ و کاشت مدعیان میں مخل و مزاح اور نہ ہی دیگر جگہ اراضی متدعویہ منتقل کریں۔"

As per record, in the earlier round of litigation, the Regular Second Appeal [No.586/1968] filed by the petitioners/plaintiffs was dismissed on 10.03.2000. The petitioners/plaintiffs did not challenge the aforesaid judgments & decrees any further, as such same have attained the status of finality and have become past and closed transaction. Reliance is placed on Pakistan

International Airlines Corporation Vs. Aziz ur Rehman Chaudhary and another (2016 SCMR 14). The earlier *lis* of the same suit land among the same parties had already been decided upto this Court, as such the subsequent suit on the same issue or cause of action is not maintainable under Section 11 of CPC, which provision envisages that no Court shall try a suit or issue in which the matter directly or substantially in issue has already been decided in former suit between the same parties or between the parties under whom they or anyone of them remained litigating against same title which issue has earlier been raised and has finally been heard and decided by Court of competent jurisdiction. For ready reference, Section 11 C.P.C is reproduced as under:

“Res Judicata. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I.__The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.__For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to right of appeal from the decision of such Court.

Explanation III.__The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.__ Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.__ Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.__ Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

The object of the principle of res-judicata is to make end of the *lis* and also to prevent multiplicity of litigation. That once a matter is decided finally between the parties to suit or proceedings then none from the said litigating parties could be allowed to re-agitate the matter in a subsequent suit or proceedings. The Hon'ble Supreme Court of Pakistan in a case titled as Muhammad Chiragh-ud-Din Bhatti Vs The Province of West Pakistan (Now Province of Punjab) Through Collector, Bahawalpur & 2 Others (1971 SCMR 447) held as under:-

“Even if section 11 of the Civil Procedure Code may not in terms apply in support of the plea of res judicata, it can hardly be disputed that the general principles of res judicata were clearly attracted to debar the petitioner from re-agitating the matter afresh by a civil suit, which had been put at rest by a judgment of the High Court passed in writ jurisdiction. The civil Court could not have by-passed or overridden the orders of the High Court competently made in another jurisdiction on the same subject between the same parties.”

In a case cited as Muhammad Akhtar etc. Vs. Abdul Hadi etc. (1981 SCMR 878), the Hon'ble Supreme Court of Pakistan held as under:

“It is obvious that after the aforesaid adjudication by this Court, a fresh suit to reagitate the same matter could not have been filed by the respondent which was nothing but an abuse of the process of law. Moreover in sub-section (2) of section 12 of the C.P.C (1908) it is laid down that “where a person challenges the validity, of a judgment, decree or order on the plea of fraud, misrepresentation or want of jurisdiction, he shall seek his remedy by making an application to the Court which passed the final judgment, decree or order and not by a separate suit.” The aforesaid provision was apparently not brought to the notice of the High Court. The result is that we convert this petition into an appeal and accepting the same, set aside the order of the High Court and maintain the orders of the Courts below thereto whereby the plaint had been rejected and suit was dismissed in that form. Parties to bear their own costs.”

Same view has been reiterated in cases reported as Muhammad Saleem and others Vs. Rashid Ahmed and others (2004 SCMR 1144), Messrs Gadoon Textile Mills Ltd. and others Vs. Chairman Area Electricity Board, WAPDA (PESCO), Peshawar and others (PLD 2005 SC 430), SME Bank Limited through President Islamabad and others Vs. Izhar ul Haq (2019 SCMR 939), Chief Commissioner Inland Tax through RTO Zone-I, Federal Board of Revenue, Hyderabad and others Vs. Ghulam Mustafa Mari, Ex-Inspector, Income Tax, Revenue Division, FBR, Hyderabad (2019 SCMR 1657) and Muhammad Afzal Khan Vs. Muhammad Aslam (deceased) through LRs. (2022 SCMR 1275).

In view of above, the learned Courts below erred in law as well as committed misreading and non-reading of evidence while rendering the findings on issue No.12, as such the same are hereby reversed and this issue is decided in favour of the respondents/defendants.

11. Resultantly, both these civil revisions are hereby dismissed with no order as to costs.

(Ch. Muhammad Iqbal)
Judge

Announced in open Court on 02.03.2023.
Approved for reporting.

Judge