

[Balochistan]

Before Gul Hassan Tareen, J

ABDUL KHALIQ and another---Petitioners

Versus

MUHAMMAD ISMAIL and others---Respondents

Civil Revision No. 470 of 2021, decided on 16th September, 2024.

Specific Relief Act (I of 1877)---

---Ss. 8, 42 & 54---Qanun-e-Shahadat (10 of 1984), Art.126---Suit for Declaration and possession---Counter claim of ownership of the disputed land---Failure of petitioners to prove possessory title---Admission of petitioners as to respondents' possession on the disputed land---Lack of explanation for purchase without possession---'In pari delicto, potior est conditio possidentis" principle of---Concealment of material facts before the Court---Equitable nature of reliefs of declaration and injunction---Suit of the petitioners was dismissed concurrently by both the Courts below---Validity---Possession was prima facie evidence of ownership---Petitioners could not prove their possessory title on the disputed land through purchase and failed to establish that respondents had no possessory title---Petitioners and their witnesses admitted the possession of respondents on the disputed land, therefore, they even failed to prove their possessory title---Petitioners did not offer any explanation, why they purchased the disputed land without receiving its physical or constructive possession---It is an established principle that 'potior est condition possidentis' (the condition of actual possessor is stronger)---Where both the parties are equally at fault, then law will favour the party who is in possession, thus, petitioners had no cause of action for seeking declaration and perpetual injunction against the respondents---Petitioners had intentionally concealed the possession of respondents on the disputed land and the existence of the decision of a religious scholar in their plaint---Remedy of declaration and injunction are equitable in origin and discretionary in nature and remain so despite statutory confirmation in Ss.42 & 54 of the Specific Relief Act, 1877 (Act)---One who seeks declaration and/or injunction in his favour must come to the court with clean hands---Petitioners had not come to the Trial Court with clean hands and concealed the material facts from the Trial Court, thus, they were not entitled to the equitable remedy and discretionary reliefs under Ss.42 & 54 of the Act---Petitioners were not in possession of the disputed land, thus, they could not have sought perpetual injunction against the respondents---Petitioners had not even pleaded their dispossession from the disputed land by the respondents and they had not sought the relief of possession and cancellation of contract in their plaint---Furthermore subordinate Courts had also decided issue of court fee against the petitioners and they had not met the deficiency of court fee either before the Trial Court or before the Appellate Court---Civil Revision was dismissed, in circumstances.

Ameena v. Kulsoom Begum PLD 1983 Karachi 200 and Atta Muhammad v. Maula Bakhsh 2007 SCMR 1446 rel.

Habib-ur-Rehman Baloch for the Petitioner.

Ali Ahmed Kurd for Respondents Nos. 1 to 3.

Date of hearing: 13th September, 2024.

JUDGMENT

GUL HASSAN TAREEN, J.---This civil revision petition is directed from the concurrent judgments and decrees of the Subordinate Courts, whereby civil suit instituted by the petitioner was dismissed.

2. Mr. Habib-ur-Rehman Baloch, learned counsel for the petitioners states that petitioners had purchased the subject land from its actual owner, Wali Muhammad (predecessor of respondents 4 to 8) vide contract dated 02 April 2011 in sale consideration of Rs.1,55,000/- and the said Wali Muhammad in his written statement admitted the pleaded purchase of the petitioners. He states that petitioners had proved execution of the contract, sued upon, by examining its attesting witnesses, therefore, the Courts below should have decreed the suit. He states that respondents 1 to 3 ('respondents') had also pleaded purchase of the subject land through contract dated 08 September 2003 but they failed to establish the said contract by examining its both attesting witnesses. He states that the concurrent findings of facts recorded by the Subordinate Courts suffer from material illegality.

3. Mr. Ali Ahmed Kurd, learned counsel for the respondents at the outset raised objection to the maintainability of this petition by stating that the concurrent findings of facts recorded by the Subordinate Courts do not suffer from any error of law and of jurisdiction, as such, the same cannot be interfered with in limited revisional jurisdiction. He states that no cause of action accrued to the petitioners and they had come to the Court with unclean hands and did not plead factum of possession of respondents on the subject land. He states that issue of possession was concurrently decided in favour of the respondents, he represents. Learned counsel finally states that petitioners had also concealed the existence of the decision of a religious scholar, therefore, their suit was barred by section 32, the Arbitration Act, 1940.

Respondent 4 present in person adopted petitioners' learned counsel arguments.

4. Heard. Record gone through.

5. Undeniably, the subject land is unsettled and both parties have no legal document of ownership in their possession, such as, revenue entry or registered deed. Before the Trial Court, both parties had claimed possession of the subject land. In their amended plaint, petitioners had pleaded that, 'they have purchased the subject land vide contract dated 02 April 2011, whereas, the respondents started claiming that they had purchased the subject land vide contract dated 08 September 2003 which shows their mala fide intention.' In prayer clause B, petitioners prayed that, 'respondents have no right to interfere with their possession on the subject land.'

6. I have gone through the amended suit of the petitioners, however, petitioners had not pleaded that the previous owner, Wali Muhammad (predecessor of respondents 4 to 8) had handed over possession of the subject land to them. In prayer clause B, petitioners sought relief that, 'respondents may be prevented from interference in the subject land', as such, they impliedly pleaded their possession on the subject land. However, perusal of record suggests otherwise. In their common written statement, respondents had pleaded that, 'the subject land was in their possession as hereditary tenants' and later, predecessor of respondents 4 to 8 had sold out the same to them. Petitioners examined Ghulam Qadir as PW-1. The said in his examination in chief stated that Wali Muhammad told him that, 'he has sold out the subject land to the petitioners, however, he has handed over the subject land to the respondents 1 to 3 for cultivation through tube-well.' The PW-2 Abdul Wahab in his cross-examination admitted that, 'respondent 1 has a tube-well on the subject land (Q. No.2)'. Petitioner 1 in his cross-examination admitted it correct that, 'respondents have two tube-wells on the subject land; voluntarily stated he has three tube-wells. (Q. No.15).' He also admitted it correct that, 'his sale document is not registered (Q.No.24).' He also admitted that, 'he had not paid the price in presence of witnesses (Q. No.25).' Though, the claim of petitioners was supported by said Wali Muhammad through filing a conceding written statement, however, neither he nor any of his legal heir appeared on oath in favour of the petitioners.

7. In their plaint, petitioners had not expressly pleaded their possession on the subject land, whereas, in their common written statement, respondents had pleaded their physical possession on the subject land, earlier as hereditary tenants and later, as owners through contract of sale dated 08 September 2003 (Ex.D/1). As hereinabove discussed, petitioner 1 and his witnesses admitted possession of the respondents on the subject land. Petitioners and respondents have no title document of the subject land, however, since respondents are in possession thereof, therefore, they should be given preference being in possession. Under Article 126, the Qanune-e-Shahadat Order (10 of 1984), 'when the question is whether any

person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.¹ Possession is *prima facie* evidence of ownership. Petitioners couldn't prove their possessory title on the subject land through purchase and failed to establish that respondents have no possessory title. Petitioners and their witnesses admitted the possession of respondents on the subject land, therefore, they even failed to prove their possessory title. Petitioners did not offer any explanation, why they purchased the subject land without receiving its physical or constructive possession. It has long been established that '*potior est conditio possidentis*' (the condition of actual possessor is stronger). Where both the parties are equally at fault, then law will favour the party who is in possession. Reliance is placed on the case reported as *Ameena v. Kulsoom Begum* (PLD 1983 Karachi 200). Relevant therein is reproduced hereunder:-

"... It is not the case of the respondents that they had acquired any right of easement over this piece of land by using the same since a very long time. In any case since both the parties were unauthorisedly using this piece of Municipal land, the principle underlying the doctrine of *pari delictum* will apply. The doctrine is that when both the parties are equally at fault, then law will favour the party who is in possession. Reference in this connection may be made to *Broom's Legal Maxims*, 10th Edn., page 4891 wherein learned author states as under in respect of the parties who are *ini pari delicto* :

"Not only in *aeguali jure*, but likewise in *Pari delicto*, is it true that *potior est conditio possidentis*, where each party is equally in fault, the law favours him who is actually in possession; a well-known rule, which is, in fact, included in that more comprehensive maxim to which the present remarks are appended."

Hence, petitioners had no cause of action for seeking declaration and perpetual injunction against the respondents.

8. Perusal of petitioners' plaint reveals that they had not expressly pleaded their possession on the subject land. Respondents are in physical possession of the subject land, however, petitioners in their plaint had intentionally concealed that respondents are in the cultivating possession of the subject land. In their common written statement, respondents had also pleaded that, 'prior to the institution of suit, parties had referred their differences to the sole arbitrator, Mufti Gul Hassan. The said arbitrator had decided the differences in their favour.'² The PW-1, Ghulam Qadir in his cross-examination admitted it correct that, 'Mufti Gul Hassan made a decision in favour of respondents.' Petitioner 1 in his cross-examination admitted it correct that, 'petitioners along with Wali Muhammad and respondents had appointed Mufti Gul Hassan as sharai arbitrator in writing dated 12 October 2011 (Q. No.1).' He admitted it correct that, 'his claim was dismissed by the arbitrator (Q. No.5).' He expressed his ignorance that, 'he has not mentioned the factum of the decision of Mufti Gul Hassan in the plaint (Q. No.7).'

The afore discussed facts show that petitioners had intentionally concealed the possession of respondents on the subject land and the existence of the decision of religious scholar in their plaint. Remedy of declaration and injunction are equitable in origin, and discretionary in nature and remains so despite statutory confirmation in sections 42 and 54, the Specific Relief Act (1 of 1877). One who seeks declaration and/or injunction in his favour must come to the court with clean hands. Petitioners had not come to the Trial Court with clean hands and concealed the afore referred facts from the Trial Court, therefore, they were not entitled to the equitable remedy and discretionary reliefs under sections 42 and 54, the Act (1 of 1877). The Apex Court in the case reported as *Atta Muhammad v. Maula Bakhsh* (2007 SCMR 1446) has held as under:

"The Courts should also keep in mind that relief of declaration is discretionary and a plaintiff who seeks discretionary relief must come to the Court with clean hands."

9. Petitioners were not in possession of the subject land, therefore, they could not have sought perpetual injunction against the respondents. They had not even pleaded their dispossession from the subject land by the respondents. They had not sought the relief of possession and cancellation of contract dated 08 September, 2003 in their plaint (as relied by the respondents). The Subordinate Courts had decided issue of court fee against the

petitioners but petitioners had not met the deficiency of court fee neither before the Trial Court nor before the Appellate Court.

10. For the foregoing reasons, the impugned judgments do not suffer from any error of law and of jurisdiction. I uphold the concurrent findings of facts recorded by the Subordinate Courts and dismiss this civil revision petition. No order as to costs.

SA/89/Bal.

Revision dismissed.