

2002 C L C 582

[Peshawar]

Before Ijaz-ul-Hassan, J

Qazi MUHAMMAD IFTIKHAR---Petitioner

Versus

Sufi NOOR ELAHI---Respondent

Civil Revision No.91 of 1995, decided on 5th October, 2001.

(a) Easements Act (V of 1882)---

---S. 4---Right of easement---Right of passage of water for irrigation--Plaintiff claimed right of easement on the ground that the defendants had no right to block the water channel which was passing through the land owned by the defendants, as the orchard of the plaintiff was being irrigated by the water channel---Both the Courts below had concurrently decided the matter against the plaintiff---Validity---Where the plaintiff had alternate access to his orchard and he could use the same at his leisure, the right of easement had rightly been declined to the plaintiff for valid reasons due to lack of evidence on file---No misreading or non reading of evidence warranting interference by High Court was found--Both the Courts below had dealt at length with the matter and discussed all the issues in a proper manner in the light of the material on file---High Court declined to interfere with the judgments and decrees passed by the two Courts below in circumstances.

Anata Kumar Majumdar and others v. Gopal Chandra Majumdar and others PLD 1961 Dacca 65; Messrs Eastern Carpets (Pak.) Ltd. v Province of the Punjab and another 1994 MLD 558; Saffatullah and others v. Munshi Ainuddin and others PLD 1.964 Dacca 52; Haji Khan Baz Khan and 8 others v. Abdur Rahim and 5 others PLD 1993 Pesh. 36 Haji Muhammad Din v. Malik Muhammad Abdullah PLD 1994 SC 291 Messrs Pakistan Warranted Warehouse Ltd. v. Messrs Sindh Industrial Trading Estate Ltd. and another 1991 SCMR 119; Qazi Muhammad Ishaq v. Abdul Waheed PLD 1975 Pesh. 82; Tai Muhammad v. Mst. Zaitoonay and another PLD 1995 Pesh. 135 and Zardad Khan v. Mst. Safia Begum 1989 CLC 2006 ref.

(b) Civil Procedure Code (V of 1908)---

---S. 115---Revision---Concurrent findings of fact by the Courts below--Appraisal of evidence by High Court in exercise of revisional jurisdiction---Scope---In absence of any jurisdictional error or material irregularity, High Court in its revisional jurisdiction under S.115, C.P.C. is not competent in undertaking its own appraisal of evidence in the face of the concurrent finding of the two Courts below---Such powers are intended for correcting errors made by the subordinate Courts in the exercise of their jurisdiction---Ordinarily erroneous decisions of fact are not revisable except in case where the decision is based on no evidence or inadmissible evidence has

been relied upon or the order sought to be revised is so perverse that grave injustice may result therefrom---If High Court is satisfied that the findings are based on misreading or nonreading of evidence, the Court, in exercise of its revisional jurisdiction can legally set at naught the concurrent finding of fact of two Courts below---Concurrent finding of fact does not always stand in the way of High Court to displace them in the appropriate cases.

Muhammad Younis Khan Tanoli for Petitioner.

Khalid Rehman Qureshi for Respondent.

Date of hearing: 24th September, 2001.

JUDGMENT

This revision petition is directed against the judgment and decree of Additional District Judge, Haripur, dated 19-3-1995 whereby Civil Appeal No.24/13 of 1994 filed by Qazi Muhammad Iftikhar petitioner was dismissed and the judgment and decree of Senior Civil Judge, Haripur, dated 28-3-1994 announced in Civil Suit No.241/1 of 1990, dismissing the suit of the petitioner was upheld and maintained. `

2. The litigation between the parties started in the year 1990 when Qazi Muhammad Iftikhar plaintiff-petitioner filed suit against Sufi Noor Elahi defendant-respondent seeking a declaration to the effect that plaintiff is the owner of Khasra No. 1023 measuring 5 Kanals, 18 Marlas situated in village Haripur with a garden thereon and which is irrigated by Kathi (water channel) passing through Khasra No. 1045; that the plaintiff has been using the said Kathi from Manakrai Road up to his garden as a path also peacefully, without any interruption and as of right since the times of his forefathers; that there is no other path for reaching the garden of the plaintiff except the path through the said Khasra No.1045; that during the absence of the plaintiff from his village the defendant constructed a bungalow in his land and also illegally encroached upon a portion of Khasra No.1045 and included the same within the area of his bungalow by erecting boundary walls on both ends of the said portion; that the defendant, thus, has not only made the said portion of Khasra No.1045 inaccessible to the plaintiff but has also completely blocked the passage of the plaintiff for reaching to his land and garden in Khasra No.1023; that the defendant had no right to change the nature of said Khasra No. 1045 on the spot in any manner whatsoever or to interfere and create any hindrance in the said rights of the plaintiff and that the construction raised by the defendant on the said Khasra No.1045 were liable to be demolished and the status of the same as before was liable to be restored. By way of consequential relief the plaintiff also claimed mandatory injunction against the defendant directing him to demolish the constructions raised by him on Khasra No. 1045 and to restore the status of the said Khasra as it was before. By way of alternative relief, the plaintiff claimed joint possession of Khasra No. 1045 by demolishing the construction raised by the defendant and by restoring the same status of the said Khasra as it was before.

3. The defendant resisted the suit of the plaintiff and denied his claim regarding use of path. In view of the pleadings of the parties following issues were framed for trial:--

- (1) Does the plaintiff has a cause of action?
- (2) Is the plaintiff estopped?
- (3) Does the plaintiff has prescriptive rights upon the impugned Khasra to use it as a path way?
- (4) Do the constructions of the defendant hamper the plaintiff from enjoying his prescriptive rights?
- (5) Is the defendant entitled to special costs?
- (6) Relief.

4 Upon consideration of the evidence produced by the parties, the learned trial Judge took Issues Nos.3 and 4 together and found the same against the plaintiff holding that "there is no mention of any path in the Revenue Record in Khasra No. 1045 and plaintiff has failed to prove his uninterrupted use over the disputed property as his path, by producing any independent witness". The remaining issues were also decided against the plaintiff and consequently his suit was dismissed on 28-3-1994. An appeal was also preferred which was also dismissed on 19-3-1995, as mentioned above.

5. Mr. Muhammad Younas Khan Tanoli, Advocate appearing on behalf of the petitioner strenuously contended that the findings of the Courts below suffer from misreading and non-reading of material evidence on record and also from misappropriation of facts and law involved in the case. He also contended that the findings and the conclusion given on Issues Nos. 1, 2, 3 and 4 in dismissing the suit and the appeal are erroneous and cannot be allowed to remain intact for the reasons that the Courts below have wrongly held that the defendant being the owner (Mahazi Malik) of the land adjacent to Khasra No. 1045 had the right to make construction on that portion of Khasra No. 1045 which was contiguous to him. He added that the ownership of the land adjacent to any portion of Khasra No.1045 could not confer any right on the defendant to make construction on any portion of Khasra No. 1045 or to raise any other blockade or obstacle thereon which may have the effect of making any portion of Khasra No. 1045 inaccessible to others for whose common use and benefits the said Khasra No. 1045 was set apart as Kathi and path for irrigating and approaching their lands since time immemorial. Additionally it was urged that mere fact that there was no entry of path in Khasra No. 1045 in the Revenue Record could not deprive the plaintiff of his right of passage which was actually enjoyed by him peacefully, without interruption and as of right since time immemorial. In the last leg of arguments the learned counsel contended that the Courts below had no justifiable reasons to discard the evidence of P. W.4 and P.W.5 which clearly proves that the plaintiff has been using Khasra No. 1045 as path also for reaching his land for more than 50 years. In support of the submission reliance was placed on Anata Kumar Majumdar and others v. Gopal Chandra Majumdal and others PLD 1961 Dacca 65, Messrs Eastern Carpets (Pak.) Ltd. v. Province of the Punjab and another 1994 MLD 558 and Saffatullah and others v. Munshi Ainuddin and others PLD 1964 Dacca 52.

6. As against this Mr. Khalid Rehman Qureshi, Advocate for the defendant-respondent supported the impugned judgment and decree and maintained that the unanimous verdict given by the Courts below is based on correct assessment and evaluation of evidence and provides no good ground for interference of this Court in the exercise of its revisional jurisdiction. He relied on *Haji. Baz Khan and 8 others v. Abdur Rahim and 5 others* PLD 1993 Pesh.36, *Haji Muhammad Din v. Malik Muhammad Abdullah* PLD 1994 SC 291,, *Messrs Pakistan Warranted Warehouse Ltd. v. Messrs Sindh Industrial Trading Estate Ltd. and another* 1991 SCMR 119, *Qazi Muhammad Ishaq v. Abdul Waheed* PLD 1975 Pesh. 82, *Taj Muhammad v. Mst. Zaitoonay and another* PLD 1995 Pesh. 135 and *Zardad Khan v. Mst. -Safia Begum* 1989 CLC 2006.

7. I have heard at length the arguments and submissions of learned counsel for the parties. I have also gone through the material on record with their able assistance.

8. There appears to be; no controversy between the parties that plaintiff-petitioner is the owner of Khasra No. 1023 measuring 5 Kanals, 18 Marlas in village Haripur with an orchard thereon which is irrigated by a water channel passing through Khasra No. 1045 owned by defendant respondent. The only grievance of the plaintiff-petitioner is that passage through Khasra No. 1045 has remained under the use of plaintiff petitioner and his forefathers since time immemorial without any objection or interruption from the defendant-respondent's side but the same has been recently blocked by the latter which has deprived the former of his right of way. According to the learned counsel for the plaintiff-petitioner the passage passing through Khasra No. 1045 is the only source of access to the orchard of his client and that closure of the passage has materially prejudiced the rights of the plaintiff-petitioner. The submission of the learned counsel is not sustainable. A perusal of the Revenue Record would unmistakably indicate that no passage or path has been shown in Khasra No.1045 and thus, the plaintiff-petitioner's claim cannot be accepted. It is true that the report commission leans in favour of the plaintiff-petitioner but it is equally true that the same has been kept aside for valid reason by the Courts below and it has been rightly pointed out that the report cannot be given preference over the Revenue Record on file. It has been vigorously contended by learned counsel for the plaintiff-petitioner that findings of the Courts below on issues decided against the plaintiff-petitioner are the result of misreading and non reading of evidence and wrong conclusions have been drawn but the learned counsel has not been able to point out any misreading or non reading of evidence resulting in miscarriage of justice. The mere assertion of the learned counsel that the decision of the Courts below is not in accord with material on record without a positive attempt on his part to substantiate the same is of no consequence. So far as the right of easement is concerned I find that the same has been declined to the plaintiff-petitioner for valid reasons due to lack of evidence on file. There is material on file to demonstrate that the plaintiff-petitioner has an alternate access to his orchard and he can use the same at his leisure.

9. It is not denied that the High Court in its revisional jurisdiction under section 115 of Civil Procedure Code is not competent in B undertaking its own appraisal of evidence in the face of the concurrent finding of the two Courts below, in the absence of any jurisdiction error or material irregularity revisional powers under section 115, C.P.C. are primarily intended for correcting errors made by the subordinate Courts in the exercise of their jurisdiction. Also ordinarily erroneous decisions of fact are not revisable except in cases where the decision is based on no evidence or inadmissible was relied upon or the order sought to be revised is so

perverse that grave injustice would result therefrom. It is true that the High Court in exercise of its revisional jurisdiction could legally set at naught the concurrent finding of fact two Courts below if it was satisfied that the findings are based on misreading or non-reading of evidence. It, therefore, follows that concurrent finding of facts do not always stand in the way of the 'High Court to, displace them in the appropriate cases. In the instant case the position is altogether different and no case of misreading or non-reading of evidence has been made out warranting interference of this Court. Both the Courts below have dealt at length with the matter and discussed all the issues in a proper manner in the light of the material on file.

10. In the result and for the foregoing reasons finding no substance in this revision petition I dismiss the same with no order as to costs:

Q.M.H./M.A.K./409/P

Revision dismissed.