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*Before Riaz Ahmad, J*

MUHAMMAD SAEED-Petitioner

*versus*

MUHAMMAD URFAN AND ANOTHER-Respondents

Civil Revision No. 2077-D of 1986, decided on 10th November, 1986.

**(a) Civil Procedure Code (V of 1908)-**

-- S. 115 & O. XIV, R. 1-Framing of issues-Duty of Court Refusal to frame issues amounted to case decided-Omission to frame issues amenable to revisional jurisdiction.-Court, *held*, was bound to apply its mind and to understand facts before framing issues Where a Court omitted to frame an issue it was up to the parties to move Court to get the omitted issue framed-Refusal to frame issues would amount to a "case decided" and would be amenable to exercise of revisional jurisdiction.

*Mehr Bakhsh and another v. Maula Dad and another* P L D 1951 Lah. 113 ; *Firm R. S. Hira Singh v. Muhammad Afzal Khan etc.* A I R 1941 Pesh. 59 ; *Sardaran and others v. The Municipality, Lyallpur* P L D 1961 (W. P.) Lah. 35 ; *Mt. Alam Bibi and another v. Jawaya and others* A I R 1934 Lah. 300 ; *Dulhin Rajkishore Kuer v. Sheikh Muhammad Qayyum* 198 1 C 890 and *Hiranmoy Bhaduri v. Probal Kumar Pramanik* 205 I C 138 *ref.*

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

O. XIV, R. 1-Framing of issues-Issues framed twice in *suit* Parties not vigilant to agitate framing of omitted issue-Effect Failure of parties not to agitate before Court to frame an issue, *held*, would amount to waiver abandonment of such issue.-[Waiver].

**(c) Punjab Pre-emption Act (I of 1913)-**

-- S. 15-Civil Procedure Code (V of 1908), S. 115 & O. XIV, R. 1-Omission to frame issue-Evidence on such omitted issue already on file-Benami nature of suit was not borne out by evidence on record--High Court in revisional jurisdiction while taking upon itself to go through such evidence took no exception to suit having been decreed in favour of minor as per superior right of pre-emption.

**(d) Punjab Pre-emption Act (I of 1913)-**

-- S. 15-Civil Procedure Code (V of 1908), Ss. 96 & 115-Two rival pre-emption suits-Decree of Trial Court in favour of minor modified by Appellate Court that in case minor failed to deposit pre-emption amount within specified time suit of rival pre-emptor would be decreed-Such modification of decree by Appellate Court being in consonance with law, *held*, could not be disturbed by High Court in revisional jurisdiction.

A. K. Dogar for the State.

## ORDER

This civil revision has been filed to assail the orders dated 19-4-1981 delivered by Civil Judge at Faisalabad, whereby a suit for possession through pre-emption, instituted by respondent Muhammad Irfan against the petitioner was decreed, and also against the order dated 30-7-1986 passed by an Additional District Judge, at Faisalabad, whereby in appeal the judgment and decree passed by the Civil Judge was upheld.

2. The brief facts giving rise to the litigation between the parties are, that respondent No. 1 Muhammad Irfan a minor through his paternal aunt instituted a suit against the petitioner vendee and respondent No. 2 Ghulam Mustafa the rival pre-emptor for possession through pre-emption of the suit land. It was averred in the plaint that the suit land was alienated by Ghulam Hussain vendor in favour of respondent No. 1 in consideration of Rs. 10,000 *vide* registered sale-deed dated 9-6-1980. It was further pleaded that a fictitious price of Rs. 18,500 has been entered in the sale-deed. The plaintiff Muhammad Irfan claimed that being son of the vendor Ghulam Hussain he had the superior right to pre-empt the aforesaid sale over all others.

3. Respondent No. 2 Ghulam Mustafa the rival pre-emptor also instituted a suit for possession of the suit land through pre-emption claiming that the suit property was his ancestral property and the vendor Ghulam Hussain was his real brother, and he being the co-sharer, had the right to pre-empt the sale. Ghulam Mustafa respondent 2 plaintiff further pleaded, that the suit instituted by respondent No. 1 Muhammad Irfan minor pre-emptor was collusive and the sale was affected secretly and no notice was given to him and a fictitious price of Rs. 18,500 had been entered in the sale-deed.

4. The vendee-respondent No. 1 Muhammad Saeed resisted the suit by maintaining, that he was tenant in possession of this suit land at the time of sale, therefore, the plaintiff had no cause of action and since the suit property had not been partitioned, therefore, the suit was not maintainable. It was further alleged by the vendee, that the suit was Bainami and was thus liable to be dismissed. The vendee-respondent No. 1 further pleaded, that the suit was collusive and the claim of the rival pre-emptor was not superior to his claim and respondent No. 1 minor Muhammad Irfan and his next friend Parveen Akhtar had full knowledge of the same.

The rival pre-emptor-respondent No. 2 Ghulam Mustafa also resisted the suit alleging that it was collusive and was barred by time and his right of pre-emption was superior to that of the plaintiff.

5. On 15-12-1981 the learned Administrative Civil Judge, Faisalabad framed the following issues out of the pleadings of the parties :-

"(1) Whether the plaintiff has no cause of action and locus *standi* to file the suit ? O. P. D. (Vendee)

(2) Whether the suit is not maintainable in its present form ? O. P. D. (Vendee)

(3) Whether the suit is improperly valued for the purpose of court-fee and jurisdiction, if so, what is the proper valuation ? O. P. D. (Vendee)

(4) Whether a sum of Rs. 18,500 was *bona fide* fixed or actually paid on sale consideration of the suit land ? O. P. (Parties)

(5) If issue No. 4 is not proved, then what was the market price of the suit land at the time of sale ? O. P. (Parties)

(6) Whether the plaintiff is estopped to institute this suit by big conduct ? O. P. P. (Vendee)

(7) Whether the plaintiffs have superior right of pre-emption qua the defendants/vendee, and what is the order of priority *inter se* the pre-emptors ? O. P. P."

(8) Relief.

6. On 7-4-1983 the suits were consolidated and another Civil Judge, again framed the issues which were the same as cost before by his pre decessor the learned Administrative Civil Judge on 15-F 2-1981.

In the course of trial the parties were called upon to lead evidence for discharging the burden of issues. The counsel for the parties did not press Issues Nos. 2, 3, 4 and 5. On issues Nos. 1 and 6 the learned Civil Judge discussed the evidence led by the parties at length. In support of his case on behalf of minor plaintiff/respondent No. 1 *Mst.* Parveen Akhtar his paternal-aunt entered the witness-box. In cross-examination she admitted that she had no source of income, but stated that she will be raising the funds from the income of her husband. She also admitted in cross-examination that she had no ill-will towards Ghulam Hussain vendor. It was further stated by her that she was angry over the sale of the suit land. P. W. Subedar Insaf Ali also appeared on behalf of the plaintiff who in cross-examination admitted that Parveen Akhtar, the next friend of the minor plaintiff/respondent No. 1 was the wife of the brother of the vendor's wife. The witness further stated that the real mother of the plaintiff minor had quarrelled with her husband and was living separately in Leiah. In cross-examination the witness further admitted that all the expenses were being borne by *Msr.* Parveen Akhtar. A suggestion was made to him that the suit was brought as a device by minor through *Mst.* Parveen Akhtar so that she can acquire the property but the suggestion was denied.

7. In the light of this evidence it was argued before the trial Court that the suit was collusive and has been brought at the behest of vendor Ghulam Hussain and since Parveen Akhtar paternal-aunt of the minor- plaintiff had no source of income or had no money, therefore, the suit was mala fide. These contentions were repelled by the learned trial Judge who came to the conclusion that no collusiveness had been proved

on the record by the defendant side. The learned Civil Judge further observed that the plaintiff being minor aged 5 years had no wisdom to collude. Similarly, the record also indicates that defendants also failed to establish any collusiveness of *Mst. Parveen Akhtar*, the next friend of the minor plaintiff with Ghulam Hussain vendor. The witness produced by the defendant (D. W. 1) stated in his examination-in-chief that if the suit was decreed, the amount will be paid by *Mst. Parveen Akhtar*. The learned Civil Judge further observed that suit of the minor-plaintiff for possession through pre-emption could not be defeated on mere inferences that *Mst. Parveen Akhtar* might be in league with the vendor, particularly when he had a legal right vesting in him under section 15 of the Pre-emption Act.

8.. On the question of estoppel the petitioner/defendant-vendee Muhammad Saeed stated that before purchasing the land the plaintiff and the rival pre-emptor were asked to purchase it but they refused. The ,learned Civil Judge ignored the mere oral assertion and rightly so because there was no corroboration of such assertion. The witness for the defen dant (D. W. 3) stated that they had no knowledge or infr, rqtjqn **about the Sale,**

9. I have carefully gone through the evidence on the record and the pleadings of the parties and in my view the findings arrived at by the learned Civil Judge referred to above were justified on the record of the case.

10. Aggrieved by the judgment and decree delivered by the learned Civil Judge an appeal was taken and the same was dismissed *vide* impugned orders delivered by learned Additional District Judge Faisalabad. In course of the arguments before the learned Additional District Judge the issues with regard to the estoppel, waiver and the sale price of the suit land were not pressed. The petitioner is aggrieved of the fact, that the learned appellate Court did not consider the nature of the suit of the respondent being Benami. In this context, the learned Additional District Judge observed that since the issue, whether the suit is Benami or not, had not been framed, nor the rival pre-emptor or the petitioner had moved the learned trial Court at any stage to frame such issue, therefore, it will be presumed that the issue had been given up.

The learned counsel for the petitioner has taken serious exception to this observation and it is contended that the learned Additional District Judge was under obligation to give up finding on the Benami nature of the suit, because ample evidence existed on the record for the determination of the nature of the suit.

10. I have carefully considered the contention of the learned counsel and its determination depends upon the interpretation of Order XIV, rule 1, C. P. C., the relevant portion of the said provision reads as under :-..-

"(1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue."

11. The above-quoted provisions clearly show, that it is the bounden duty of a Judge to apply his mind and to understand the facts before framing the issues, but what about the situation, when a Judge omits to frame an issue. In my view, it is well-settled law that in such eventuality, it is up to the parties to move the Court to get the issues framed. It is further pertinent to mention that refusal to frame an issue is amenable to the exercise of revisional jurisdiction of this Court under section 115, C. P. C. because such refusal amounts to a 'case decided'. The next, crucial question is, that is it always fatal to the trial of the suit, if the Judge omits to frame an issue? The answer to this question depends upon the consideration whether such irregularity is material one or not. If such omission has affected the disposal of the case on the merits, it will be a ground for remanding the case for a new trial, but if on the other hand, parties have not been prejudiced by the omission and substantial justice has been done in the case, notwithstanding the omission to frame issues, the decision will not be set aside or remanded for a new trial. I am fortified in this view by the judgment delivered by this Court in the case reported as *Mehr Bakhsh and another v. Mauls Dad and another* (1) and *Firm R. S. Hira Singh Attar Singh v. Muhammad Afzal Khan etc.* (2). The

(1) P L D 1951 Lah. 113 (2) A I It 1941 Pesh.59

same view was expressed by this Court in the case reported as *Sardaran and others v. The Municipality, Lyallpur* (1). In another case reported as *Mt. Alam Bibi and another v. Jawaya and others* (2). Similar view was expressed, in another case reported as *Dulhin Rajkshore Kuer v. Sheikh Muhammad Qayyum* (3). The same view was taken by Calcutta High Court in the case reported as *Hiranmoy Bhaduri v. Probal Kumar Pramanik* (4), it was observed that an irregularity which does not affect the merits of the case the appellate Court will not remand the case.

The same rule of law has been laid down in section 99 of the C. P. C. which reads as under :-

"No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court."

12. Applying the facts of the case on the touchstone of law referred to above, I am of the view that in this case, the parties were aware of the points requiring determination and had led the evidence and the Court had decided the issues. It is further pertinent to mention that twice the issues were framed during the trial, once on 15-12-1981 and for the second time on 7-4-1983. It is thus, evident that in between these two stages of the framing of the issues, a period of three years has lapsed and if the parties had really been vigilant they could have agitated before the Court to frame an issue on the Benami nature of the suit. Not having done so, it is obvious that it will be deemed that the petitioner had waived and abandoned the agitation of the aforesaid issue.

13. It was vehemently contended by the learned counsel for the petitioner, that though specifically the issue was not framed on the Benami nature of the suit, yet the evidence existed on the record for its determination and the learned Additional District Judge not having discussed the said evidence had erred in exercise of jurisdiction. I have taken upon myself to go through the evidence. In examination-in-chief *Mst. Parveen Akhtar* the next friend of the minor defendant categorically asserted that she will pay the amount herself if the suit is decreed. The evidence also discloses, that *Mst. Parveen* the next friend of the minor-defendant is also the land owner and the rival pre-emptor and the vendor are her real brothers. It is also on the record that the mother of the minor after quarrel, has left the house of her husband and *Mst. Parveen* was bringing up the minor child her nephew. No suggestion was given to her that the suit was Benami. On the contrary *Jamal Din* (D. W. 1) in examination-in-chief stated, that the suit if decreed the sale price will be paid by *Mst. Parveen* and it was *Mst. Parveen* who was instrumental in the institution of the suit. He has not even spoken a word about the suit being Benami.

14. After careful consideration of the evidence on the record I am of the view, that *Mst. Parveen Akhtar* being the paternal aunt has in good faith attempted to secure the property of her minor nephew and the suit is not at all Benami. No exception can be taken to the suit being decreed in favour of the respondent minor-defendant, inasmuch as under section 15 of the Pre-emption Act on account of his right to inherit the property of his father he had the superior right of pre-emption.

(1) P L D 1961 (W. P.) Lah. 35 (2) A I R 1934 Lah. 300  
(3) 198 1 C 890 (4) 205 1 C 138

15. While dismissing the appeal the decree was modified by the learned Additional District Judge to the effect that in case the respondent minor defendant *Irfan* does not deposit the sale price, then the suit will be decreed in favour of respondent No. 2 the rival pre-emptor. In my view such modification is also in accordance with law.

For the foregoing reasons, this revision petition has no substance and is dismissed *in limine*.

*A. A. Revision dismissed.*

