

*ORDER SHEET***IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD**

C.P. No.D-497 of 2015.

DATE

ORDER WITH SIGNATURE OF JUDGE

Present.

Mr. Justice Salahuddin Panhwar.

Mr. Justice Muhammad Iqbal Mahar.

1. For katcha peshi.

2. For hearing of M.A-1236 of 2016.09.11.2016.

Mr. Fayaz Ahmed Laghari, Advocate for petitioner.

Mr. Anwar H. Ansari, State Counsel.

Mr. Muhammad Hashim Bajeer, Advocate for respondents No.6 to 9.

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SALAHUDDIN PANHWAR, J:- Through instant petition, the petitioner, *an old aged lady*, has challenged the order passed by Member (Gothabad) Board of Revenue Sindh, whereby her appeal was dismissed as time barred.

2. It is the case of the petitioner that in the Foti Khata Badal of two deceased Ibrahim and Tahir, which was effected earlier, petitioner was shown as one of their legal heirs and such mutation was effected as well. Thereafter, private respondents challenged that entry before Assistant Commissioner and Assistant Commissioner passed a detailed order and directed the Mukhtiarkar to hold an Open Kachery and effect Foti Khata Badal under section 42 of Sindh Land Revenue Act; such order was assailed by respondents in revision application; that revision application without hearing the petitioner was allowed, thereby fresh mutation was effected vide entry No.153 dated 24.05.2000; while referring the order of Additional Commissioner, Mirpurkhas, the petitioner preferred appeal before Member (Gothabad) Board of Revenue Sindh, but her appeal was dismissed on the ground of limitation.

3. At the outset, learned counsel for the petitioner, *inter alia*, contends that petitioner is legal heir of aforementioned deceased persons and mutation was effected in accordance with law, whereas respondents filed suit as well application before Assistant Commissioner and by its order Assistant Commissioner directed that fresh Foti Khata Badal shall be effected; however, respondents challenged that order by filing revision application No.06/1995 before Additional Commissioner,

same was allowed, however, the order is *ex parte* without hearing the petitioner and legal right of the petitioner has been snatched.

4. In contra, learned counsel for private respondents while referring *P L D 1990 Supreme Court 1195, 2013 C L C 1155 and 2004 M L D 597*, contends that factual controversy cannot be resolved in writ jurisdiction; petitioner failed to pursue her case within time, hence her appeal was dismissed being time barred and subsequently subject matter land was transferred through gift.

5. Learned State Counsel appearing on behalf of respondents No.1 to 5, contends that there is factual controversy, hence instant petition is not maintainable.

6. Heard and perused record.

7. At the very outset, we have no hesitation in acknowledging that *normally* the disputed questions of *facts* cannot be decided in the Constitutional Jurisdiction of this Court but it does not mean that decisions which are manifestly arbitrary, based on no evidence, or contrary to the record and not justified by law will be upheld. Reference in this regard can well be made to the case of *Al-Hamza Ship Breaking Co. v. Government of Pakistan* 2015 SCMR 595. Even otherwise, instant petition is falling within meaning of ‘*writ of prohibio*’ hence order(s) or manner of exercise of jurisdiction by subordinate court(s) or *Tribunal* can well be examined by this Court.

8. In the instant matter, it is not disputed that in first Foti Khata Badal petitioner was shown as legal heir of deceased persons whereas in order passed by Assistant Commissioner though opinion was given with regard to legal heirs while referring two *Pedigrees* but in the last, direction was given for effecting fresh Foti Khata Badal. At this juncture, it would be relevant to refer operative part of the the concluding para of the order of the Assistant Commissioner which reads as:

“...I am of the view that the foti khata made is correctly effected and further order that the foti Khata of the land in other deh Kachoki be effected by the Mukhtiarkar, in open Katchery as required under section 42 Land Revenue Act, and the appeal / petition of Muhammad Waris and others is rejected.”

The perusal of the above would speak for *itself* that :

- i) *foti-khata was already effected;*
- ii) *was held to be correctly effected;*
- iii) *petitioner had her share in such foti-khata mutation*

Thus, it can *safely* be said that petitioner did hold title (name in Khata) hence no action *legally* was to be taken against the petitioner without first providing a fair opportunity to her even by Appellate authority as this was not only against the spirit of **natural justice** later insisted by introducing Article 10-A in Constitution of Islamic Republic of Pakistan under title of '*fair trial*'. Even if, one *despite* service of notices remains absent yet it does not absolve one in authority to *blindly* go on a dotted line. The appellate or Revisional authority can *competently* set-aside an order of its subordinate authority but such setting aside must always be based on some reasoning and not for simple reason that respondent did not appear. A referral to concluding para of the order of the Additional Commissioner shall make it clear that as to on what ground/reason the Revision was allowed which is:

“5. *I have given full consideration to the arguments, advanced by the learned Counsel for petitioners and have come to the conclusion that the respondents have lost their interest to pursue the case / matter and they are deliberately avoiding to attend the court. As such I do not find any cogent reason to prolong the revision proceedings. Consequently, the revision-petition is allowed.*”

Non-appearance of respondent or to have a file removed from the list cannot be a reason to set-aside an *order* particularly where impugned order *otherwise* has given some rights and title to respondents. The Courts or Tribunal *even* are custodian of rights hence must act strictly in accordance with requirement of law and law only.

With regard to limitation, it is not disputed that mutation was effected in favour of the petitioner in earlier mutation (Foti Khata Badal) and her claim was under law of *inheritance* which, in law, recognizes no limitation and even otherwise the order of the Additional Commissioner was in *no way* qualify to the term '**Order**', as recognized by General Clauses Act therefore, such was also having no protection of limitation *even*. From another angle, it was not domain of the Additional

Commissioner to deprive petitioner from her *status* which she had earned in result of proceedings, initiated within meaning of Section 42 of Sindh Land Revenue Act, 1967 and was given space in the list of legal heirs. Thus, the moment the respondents disputed such *status* of the petitioner it (*matter*) became out of jurisdiction of Revenue authorities as they are not competent to pass a *Declaratory Decree* which *otherwise* is absolute domain of competent Civil Court.

With regard to order of Member (Gothabad) Board of Revenue Sindh, which shows that the petitioner filed appeal with a delay of fifteen (15) years, in addition to above with regard to limitation point, we would that a void order will not prevail over the rights of the parties and in such cases limitation would not apply. Accordingly, order passed by Member (Gothabad) Board of Revenue Sindh and Additional Commissioner are hereby set aside. All mutations made in consequence thereof would be having no legal value under the eyes of law and shall be cancelled forthwith. However, if respondents are aggrieved with earlier *foti khata badal* and they are disputing inheritance right of petitioner are at liberty to approach civil Court for decision with regard to legal heirship of deceased Ibrahim and Tahir.

Petition is allowed.

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