

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

**Present:  
Mr. Justice Muhammad Iqbal Kalhoro  
Mr. Justice Adnan-ul-Karim Memon**

**C.P. No.D-86 of 2007**

Mst. Hani through LRs ----- Petitioners

VERSUS

Government of Sindh  
& others ----- Respondents

**C.P. No.D- 114 of 2010**

Khan Muhammad  
& others ----- Petitioners

VERSUS

Province of Sindh  
& others ----- Respondents

**Date of hearing: 21.2.2019  
Date of decision: 20.3.2019**

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Mr. Zahoor Ahmed Baloch, Advocate for petitioners in CP No.D-86/2007.

Mr. Jhamat Jethanand, Advocate for Applicants/Intervenors in CP No.D-86/2007.

Mr. Allah Bachayo Soomro, Addl. A.G

**ORDER**

**ADNAN-UL-KARIM MEMON, J.-** The Constitution Petition No. D- 86 of 2007 was disposed of by this Court vide order dated 31.10.2007 with the following observations, an excerpt of which is reproduced as under:-

**“Mr. Baloch, learned counsel for the petitioner submits that since the order dated 01.06.2007 passed in the present proceedings has been complied with; the petition as well as the pending applications have become infructuous and may be dismissed, as such.**

**The petition along with the pending application is dismissed as infructuous.”**

2. On 07.11.2007 Applicants namely Khan Muhammad, Nawab, Arbab and Mst. Hanifan all sons and daughter of deceased namely Yar Muhammad, filed Application bearing (M.A No.2206/2007) under section 12(2) CPC with a prayer to set-aside the order dated 1.6.2007 passed by this Court, whereby Mukhtiarkar Digri was directed to handover possession of part of 127-06 acres of land with further direction to hand over the remaining land to the petitioner.

3. On 8.11.2007 Applicant Abdul Karim son of Yar Muhammad filed Application bearing (M.A No.2207/2007) under section 12(2) CPC with a prayer to set-aside the order dated 1.6.2007 passed by this Court.

4. Mr. Jhamat Jethanand, learned Counsel representing the Applicants/ interveners in CP No.D-86/2007 argued that Mst. Hani according to her share is entitled to 61-00 acres situated in Deh 204 and 205 which was given to her by Mukhtiarkar Digri on 22.7.1998 by virtue of order of Provincial Mohtasib Ala, whereby she admitted her claim to that extent as discussed supra and was satisfied, therefore, the order dated 1.6.2007 obtained by Mst. Hani from this Court regarding possession of remaining portion of land is illegal, void and was obtained without joining the other legal heirs; that all the legal heirs are in physical possession of the land according to their shares and Mukhtiarkar Judho wanted to dispossess them by force on the basis of order passed by this Court, which was obtained by playing fraud and concealing the factual position from the Court; that CP No. D- 86 of 2007 was not maintainable under the law as the matter was sub judice before the Civil Court and the Court of Wards was not made party in this petition; that as soon as the Applicants came to know about the impugned order, they moved Application under Section 152 CPC and under Section 47 Rule 11 CPC read with Section 151 CPC, which was disposed of on 30.10.2007 being infructuous; that the letter produced by the petitioner is fabricated and manipulated by the petitioner with the help of Revenue authorities; that under the shadow of order of this Court, Mukhtiarkar cancelled the khata of all the legal heirs and entered the entire land in the khata of Mst. Hani, who is entitled only for 61-00 acres land as per mutation and decision of Provincial Mohtasib Ala Karachi; that the petitioner deliberately and intentionally not made them party in the petition, thus, deprived all the legal of their rights, who were forcibly dispossessed from their land ; that the Applicants will be seriously prejudiced, if the impugned order dated 1.6.2007 is not set-aside and petition dismissed with special cost. In support of his contention, he relied upon the case law reported in Hussain Bakhsh v. Settlement Commissioner, Rawalpindi and others (PLD 1970 SC 1), Ghulam

Muhammad v. M. Ahmad Khan and 6 others (1993 SCMR 662), Secretary, Ministry of Religious Affairs and Minorities and 2 others v. Syed Abdul Majid (1993 SCMR 1171), Ikram-ul-Majeed Sehgal v. Pakistan through Secretary Ministry of Interior and another (2013 CLC 386), Sayed Bashir Hussain v. Abdul Waheed and 3 others (2013 MLD 1675), Member Board of Revenue / Chief Settlement Commissioner Punjab, Lahore v. Abdul Majeed and another (PLD 2015 SC 166) and Municipal Corporation of Delhi v. Gurnam Kaur (AIR 1989 SC 38) .

5. Mr. Zahoor Ahmed Baloch, Advocate for the petitioners supported the orders dated 01.06.2007 and 18.6.2007 passed by this Court. He next argued that no fraud has been committed; therefore, the listed Applications are not maintainable and lastly prayed for dismissal of the listed Applications.

6. We have heard learned Counsels for the parties on the listed Applications and perused material available on the record.

7. In the instant matter, we are called upon to decide an Application of the Applicants filed under Section 12(2) of the Code of Civil Procedure, 1908 (CPC). Basically the Applicants are aggrieved by the order dated 01.06.2007 passed by this court (in C.P No.86/2007), claiming to have been procured by the petitioners through fraud and misrepresentation, on the grounds that Mst. Hani is entitled only to the extent of 61 acres of subject land according to her share in Deh 204 and 205 which was given to her by Mukhtiarkar Digree, on 22.7.1998, she admitted and was satisfied as per decision of learned Provincial Ombudsman; that the order obtained by Mst. Hani from this Court regarding the entire land is illegal and falls within the ambit of Section 12(2) CPC; that all the legal heirs are in physical possession of the land according to their shares but due to order passed by this Court on 01.6.2007, the Mukhtiarkar concerned is bent upon to dispossess the legal heirs which is obtained by misrepresentation of facts and fraud; that the Petition bearing No.86/2007 is not maintainable under the law as the Courts of Wards is not a party in the proceedings; that the Applicants when came into knowledge moved an application under section 152 CPC and under section 41 Rule 1 CPC which was disposed of on 30.10.2007 being infructuous; that under the shadow of order of this Court, Mukhtiarkar cancelled khata of all legal heirs and entered entire land in the khata of Mst. Hani who is entitled only 61 acres land as per mutation and decision of Provincial Ombudsman; that the Petitioner intentionally did not make the legal heirs as party in the proceedings and obtained

the order from this Court and deprived them from their legal right in the Suit property.

8. Conversely, the Petitioners have objected the contention of Applicants/interveners on the premise that the Petitioner namely Mst. Hani joined all the necessary party and obtained order dated 01.6.2007 from this court in accordance with law; that the interveners are only in possession of the land as per their share and by manipulating, fraudulently taken over the possession of the land of petitioner and her sister Mst. Fatima for which the Petitioner filed this present petition in the year 2007 and this Court vide order dated 01.6.2007, rightly directed the Mukhtiarkar concerned to handover the physical possession of the land according to share of the Petitioner; that this Court passed order in favour of the petitioner and in compliance of that order the Mukhtiarkar cancelled the illegal entry and made entry in favour of the Petitioner which act is within the parameters of law; that this court vide order dated 01.6.2007 called Mukhtiarkar who confirmed the factual position of the case and this court being satisfied with rightly ordered him to handover the remaining portion of the land to the petitioner; that the captioned petition was simply disposed of as not pressed, thus no fundamental right of the Applicants have been violated; that if the Applicants are aggrieved by and dissatisfied with the orders passed by this court they have the remedy under the law to avail first, which they have failed; that the listed Applications of the Applicants/interveners are liable to be dismissed on the ground that nothing has been concealed from this court.

9. To resolve the issue in hand it is imperative to determine as to whether any fraud has been committed with this court as agitated by the Applicants?

10. To go ahead with the aforesaid proposition, it is expedient to have a look at section 12(2) CPC, which speaks of the principle that if a Decree, Order or Judgment is obtained by Fraud, misrepresentation, or where Question of jurisdiction has arisen, such Order Decree or Judgment can be challenged through an Application in the same court and no other separate Suit is required to lie. An excerpt of the section 12(2) CPC is reproducing as under:-

**“12 (1) Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.**

**(2) 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.”**

11. Term Fraud, is not defined in Civil Procedure code. But in most simple sense means “Deception intended to result in financial or personal Wrongful gain”. Fraud is defined in Contract Act, 1872. That is much elaborative and enough for understanding the term. Definition is as follows:-

**“Fraud” means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract: - (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;**

**(2) the active concealment of a fact by one having knowledge or belief of the fact; (3) a promise made without any intention of performing it;**

**(4) any other act fitted to deceive;**

**(5) any such act or omission as the law specially declares to be fraudulent.**

12. We have noted that serious allegations have been leveled by the Applicants against the Petitioner, for committing fraud upon this court through misrepresentation of facts for which evidence needs to be recorded, in the light of decision rendered by the Honorable Supreme Court in the case reported in (2008 SCMR 236). Even for attraction of Section 12 (2) CPC following are the pre-requisites. Plea for challenging the Order, decree or judgment shall be that the order, decree or Judgment was obtained through fraud and misrepresentation. In our view in Constitutional Petition no evidence can be recorded, which factual controversy can only be resolved by adducing evidence in proper forum under the law and not in this court, therefore the parties have to take resort of the competent forum to resolve their entitlement in the subject land.

13. Looking at the at the allegations of the Applicants, Prima-facie, record reflects that the captioned petition was filed on 3.3.2007 with the prayer that the respondent No.2 and 4 may be directed to hand over physical possession of the entire land/estate No.1079 of petitioner and compensation. This Court vide order dated 01.6.2007 directed the Mukhtiarkar Digree to hand over the possession of that part of 127-06 acres of land to the petitioner and thereafter the matter was not pressed by the petitioner vide order dated 31.10.2007. Further as per aforesaid direction of this Court, the entries have been effected / reversed in favour of petitioner Mst. Hani to the extent of 99.00 acres + 48 acres of agricultural land situated in Deh 205 Taluka Jhudo, which is supported by the extract of Village Form-VII –B along with sketch as per Mashirnama. Record further reflects that petitioner Mst. Hani Ward of Estate No.1079 was paid maintenance allowance from the years 1966 to July 1990. The above Estate was discharged from the assumption of Court of Wards on 22.8.1990 and possession of 48 acres of Deh 205

was already handed over to Mst. Hani on the directives of Assistant Commissioner Digree. For the remaining area of 127 acres in both Dehs the matter remained under litigation. However, no maintenance allowance and other subsidy appears to have been paid to the petitioner Mst. Hani after discharge of her Estate as possession of 147 acres up to 22.7.1998 remained with Arbab Ali and Khan Muhammad Siyal and thereafter possession of 99 acres Deh 205 remained with them up to 12.6.2007 when land was handed over to the petitioner.

14. It appears from the record that several litigations between the parties were pending in the Court of law which have been decided, copies of orders whereof have been placed on record. The important question is whether the petitioners were entitled to the land as per Schedule of Ward No.1079 of Deh 205 Taluka Digri admeasuring 48.17 acres of Estate No.9 & 8 of Mst. Fatima of Deh 205 measuring 48.178 acres; and both the estates were given under the superannuation of Court of Wards and there was no one to look after the share of petitioner Mst. Hani and Mst. Fatima; that in the year 1952 the land was inherited by Yar Muhammad and Ghulam Rasool according to their share and khata was mutated in the record of rights, the land was distributed in two estate i.e. Estate No.1084 admeasuring 38-10 acres in the name of Abdul Kareem and other Estate No.1241 admeasuring 11.05 acres in the name of Ghulam Rasool and went in the superannuation of the Courts of Wards; that in the year 1959 the land of deceased Yar Muhammad 6-15 acres which was distributed amongst the legal heirs i.e. deceased Khan Muhammad and Yar Muhammad an Land Commission according to Marhat Land Regulation No.64, the land was reduced to 206-17 acres and 188-17 acres in Deh 204 and after resumption of the land by the Government the remaining land granted to deceased Yar Muhammad and Khan Muhammad is only 206 acres in Deh 205 and 188 acres in Deh 204 and this entry was made in the revenue record during the year 1960, thereafter resumption of land Yar Muhammad, Mst. Hani and Mst. Fatima were given the shares of the property as under:

- |    |              |                  |
|----|--------------|------------------|
| 1. | Yar Muhammad | 13 anas 8 paisas |
| 2. | Mst. Hani    | 1 ana 2 paisa    |
| 3. | Mst. Fatima  | 1 ana 2 paisa    |

This share of land was inherited from the property left by deceased Khan Muhammad because Mst. Fatima, Mst. Hani and Mst. Rasti also gifted her share to her brother Yar Muhammad and Khan Muhammad in the year 1941 and after the death of Khan Muhammad, Mst. Fatima and Mst. Hani were given the share from the property left by deceased Khan Muhammad. After mutation of khata in

the name of Mst. Fatima and Mst. Hani the record of rights was corrected accordingly and due share was given to them. In the year 1998 legal heirs of Yar Muhammad moved an application before Provincial Ombudsman for distribution of land amongst the legal heirs and Mst. Hani by her husband Ghulam Hyder who purportedly fabricated the power of attorney in the name of his wife Mst. Hani and Provincial Ombudsman with the consent of both the parties appointed architects namely Faqeer Bashir Ahmed Leghari, Faqeer Khan Muhammad Leghari and Faqeer Babar Khan Leghari and all decided this matter amicably between the parties and this *faisla* was accepted by both the parties and khata was mutated according to the decision and such entry was made in the record of rights and Mst. Hani was given Estate No.1079 admeasuring 48-17 acres in Deh 205 and 13/2 in Deh 204 and the total land given to Mst. Hani was 61/1-2 acres and such *mashirnama* was prepared and both the parties agreed and *khata* was mutated accordingly, thereafter every *khatedar* was put in physical possession of the land and Form-VII was prepared and issued and thereafter Mst. Hani again filed a Suit after the release of Estate No.1079 from the Court of Wards. All these facts have not been disputed but it has been forcefully alleged that the attorney of petitioner Mst. Hani in order to usurp property of Mst. Hani filed the present petition before this Court and without joining the legal heirs as a necessary party and obtained the order dated 1.6.2007 from this court. For convenience sake, as excerpt of the order dated 1.6.2007 is reproduced:-

**“ Learned A.A.G. has filed parawise comments on behalf of respondents No. 2 and 3, which are taken on record. Copy has been supplied to the learned counsel for the petitioner.**

**Petitioner’s counsel and states that out of 188-36 acres, only 61-30 acres has been handed over to the petitioner. It has come on the record that the levy of 127-06 acres of land is still remains to be made and the petitioner is running from pillar to post but the same was not being handed over to her.**

**In the circumstances, Mukhtiarkar Digri who is present in Court is directed to handover possession of that part of 127-06 acres of land, which falls within his Taluka and the Mukhtiarkar, Taluka Jhudo is also directed to handover the remaining land which fall within the area to the petitioner. This should be done before the next date of hearing. Any defiance of the orders of this Court would entail contempt proceedings. The above directions with regard to the Mukhtiarkar, Judho shall be communicated to him by learned that assistant AG whatever income with the petitioner is entitled to as per Courts orders shall also be paid to the petitioner in accordance with law.**

**To come up on 16.6.2007.”**

15. The perusal of orders shows that this Court only directed the Mukhtiarkar concerned to hand over possession of remaining portion of land as per her entitlement. In view of the forgoing, we have reached the conclusion that this

court in a disposed of matter cannot determine the claims and counter claims of the parties on the subject land and record evidence. It is for the competent authority to determine the property rights of the parties.

16. In the light of above facts and circumstances of the case, the instant Applications are hereby disposed of in the terms, whereby the competent authority/Senior Member Board of Revenue, Sindh is directed to probe the matter of the parties and determine their entitlement on the subject land in accordance with law, within a period of two months from the date of receipt of this order and submit compliance report for our perusal in Court through Additional Registrar of this Court. The parties are directed to produce their documents / title before the revenue officials as discussed in the preceding paragraph, who shall dispose of the same not later than three months. Consequently the C.P. No. D- 114 of 2010 is disposed of accordingly.

JUDGE

JUDGE

**Irfan**