IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision No. S – 20 of 1999

Shamsuddin alias Shaman & others v.

Rabnawaz (deceased) through his legal heirs & others

Date of hearing: **25.10.2021**

Date of announcement: **06.12.2021**

Syed Sardar Ali Shah Jillani, Advocate for the Applicants.
Mr. Abdul Ghaffar A. Memon, Advocate for legal heirs of Respondent No.1.

.-.-.-.-.-.-.-.-.-.

J U D G M E N T

Muhammad Junaid Ghaffar, J. **–** Through this Civil Revision, the Applicants have impugned judgment dated 17-11-1998 passed by the Vth Additional District Judge, Sukkur in Civil Appeal No.13 of 1998, whereby, the judgment dated 21-11-1997 passed by the 2nd Senior Civil Judge, Sukkur in F.C. Suit No.44 of 1998, through which the Suit of Respondent No.1 was dismissed, has been set aside by decreeing the said Suit.

2. Learned Counsel for the Applicants has contended that the Appellate Court has erred in law by setting aside the judgment of the Trial Court as no case for decreeing the Suit was made out; that the property was lawfully mutated in the name of the Applicants and their legal heirs pursuant to a clearance certificate; that the finding of the Appellate Court that no title or ownership could be created on the basis of clearance certificate is erroneous; that the land in any case was not available for transfer to the Respondents; that the Respondents had admitted in the plaint that they are *haris;* hence, no ownership title could be created in their favour, and therefore, the impugned judgment of the Appellate Court is liable to be set aside. In support, he has relied upon *Azizuddin v. Muhammad Ismail and others* (**1985 SCMR 666**), *Mst. Roshi and others v. Mst. Fateh and others* (**1982 SCMR 542**), *Jan Muhammad v. Mulla Abdul Rehman and 4 others* (**PLD 1998 Quetta 34**), *Juma Khan v. Mst. Shamim and 3 others* (**1992 CLC 1022**), *Muhammad Siddique v. Mst. Hawabai and 5 others* (**1986 CLC 54**), *Qamar-un-Nisa v. Noor Elahi and another* (**1987 CLC 1210**), *Civil Aviation*

Authority v. Noor Muhammad (**PLD 1988 Karachi 401**) and *Ghulam Haider and another v. Sadiq Ali through Legal Heirs and others* (**2006 YLR 2440**).

3. On the other hand, Respondents' Counsel has supported the impugned judgment and has contended that the Applicant had claimed that the Suit property was granted to his father in a claim and a *khatooni* was issued, whereas, the Tapedar of the Rehabilitation Branch, in his evidence, has affirmed that no *khatooni* was ever issued either in the name of Moji or Juma; that no such document as to *khatooni* was ever produced; that the clearance certificate was even otherwise not a title document and was only issued at the request of the Applicants; that for creation of title in favour of the Applicants and their ancestors, various requirements were to be fulfilled, as apparently, the property is an Evacuee property, whereas, no provisional transfer order (PTO) or permanent transfer deed (PTD) has been issued; that Respondents have always been in continuous possession and have enjoyed the Suit land, whereas, presently, pursuant to decree of the Appellate Court the *khata* of the Suit land now stands mutated in their name; that even otherwise, the Applicants' father or for that matter the grand-father did not qualify as a displaced person as defined under Section 2(2) of the Displaced Persons (Land Settlement) Act, 1958, but were local persons, by caste Soomro; hence, no case is made out and the Revision Application be dismissed. In support, he has relied upon *Federation of Pakistan through Secretary Ministry of Defence and another v. Jaffar Khan and others* (**PLD 2010 Supreme Court 604**), *Allah Bakhsh and another v. Muhammad Ayoub and another* (**2010 CLC 1568**), *Feroz Din and another v. Settlement Commissioner (Lands) and others* (**1997 CLJ 7**), *Muhammad Ismail and others v. Muhammad Ibrahim* (**1996 CLC 1044**), *Muhammad Ali, etc. v. The Chairman, Evacuee Trust Property Board, Lahore, etc.* (**NLR 2002 Civil 469**), *Muhammad Irshad and others v. Chairman, Evacuee Trust Board and others* (**2001 SCMR 704**), *Ghulam Akber and others v. Muqarab Khan and others* (**2003 CLC 1118**) and *Sardar Khan and others v. Ghulam Muhammad and others* (**2011 CLC 592**).

4. I have heard both the learned Counsel and perused the record.

5. Briefly the facts as they appear are that Respondent No.1 filed a Suit for declaration and permanent injunction before the 2nd Senior Civil Judge, Sukkur, and sought the following prayers:

i) That it be declared that the allotment/mutation of S.No: 318, situated at Deh Kalhori, in favour defendant No:4, and others, their predecessor-in-interest is illegal, null and void and the present plaintiff is entitled to the transfer of the suit land under Section 3 of the Evacuee Property and Displaced Persons Laws (Repeal) Act, 1975.

ii) To issue mandatory injunction in favour of the plaintiffs thereby restraining the defendant No:4 to 11 from interfering with the peaceful possession of the land in question of the plaintiff and further restraining them from recovery any zamindari batai share of the produce of the suit land.

iii) The costs of the suit may be awarded to the plaintiff.

iv) Any other equitable relief, which is deemed just and proper under the circumstances of the case may be awarded to the plaintiff.

6. After exchange of pleadings, the learned Trial Court settled the following issues:

1) Whether the suit is not maintainable in law?

2) Whether the suit is undervalued and in sufficiently stamped?

3) Whether the allotment of land in question and its mutation in favour of defendant No:4 to 11 is an act of fraud and forgery as such the same is null and void?

4) Whether the plaintiff being hari of the suit land is eligible for transfer of the same in his favour under section 3 of Evacuee Property and displaced persons law (Repeal) Act 1975?

5) Whether the defendants No:4 to 11 have got any right title or interest in suit land?

6) Whether the defendant No:6 to 11 had expired before the institution of this suit? If so, what is its effect?

7) What should the decree be?

7. In the first round, vide judgment dated 23-12-1993, the learned Trial Court dismissed the Suit. The said judgment was then impugned in Appeal before District Judge, Sukkur in Civil Appeal No.04 of 1994 and the same was though allowed vide judgment dated 11-12-1995, but matter was remanded with certain observations once again to the learned Trial Court. Subsequently, the Trial Court, in the second round, passed judgment dated 21-11-1997, whereby once again the Suit was dismissed; however, through impugned judgment, the learned Appellate Court has been pleased to set aside the dismissal order and has decreed the Suit as prayed.

8. From the record and the memo of plaint, it transpires that the claim of Respondent No.1 was that his father was the original *hari* of the land in question and was cultivating the Suit land since before creation of Pakistan till 1970 when he expired, and thereafter, the Respondent No.1 was in possession and was cultivating the same. It was further pleaded that originally the land was in the name of a Hindu owner, and after his migration, was mutated in the name of Central Government, but it was neither allotted temporarily nor was disposed of in any manner to any claimant; however, at the behest of the Applicant, Respondent No.1 received a notice dated 18-06-1989 from the concerned Mukhtiarkar to give *zamindari batai* share of the land of the produce and also handover possession to the Applicant. This perhaps was the cause of action to file instant Suit, as apparently, on inquiry, it came to the knowledge of Respondent No.1 that the land now stands mutated in favour of the Applicants.

9. As to the ownership of land, the entire record does not reflect that in any manner, it was either allotted to the Applicants or for that matter to Respondent No.1. In fact, in the plaint[1] itself, Respondent No.1 has pleaded that it was never allotted to anyone and was still a Central Government property. In that case a question also arises as to whether the Suit as framed by itself was maintainable for seeking a decree. The evidence of both the private parties are at variance and dependent on the official record, therefore, their claims ought to have been weighed on the strength of the evidence placed before the Court by the witnesses of the concerned departments. The deposition / evidence of Tapedar Ratto (Exh-105) and Sikandar (Exh-111) is as under;

Ex.105 – Deposition of Ratto S/o Buxo

"*Examination in chief to Mr. Qadir Bux Adv. for plaintiff.*

I am Tapedar of tapo Kandhra since last six months. My service in Revenue depot: is 23 years. I have brought Revenue record in respect of S.No:318, deh Kalhori, tapo Kandhra at present S.No.318 (4-12) is in the names Shamsuddin and 7 others all S/o of D/o of Mouji. Khatta was mutated on the basis of clearance certificate received from Rehabilitation depot:. Khata was mutated in favour of Shamsuddin and others on 2.8.87. This entry was attested by Mukhtiarkar on 15.5.89. I produce the record as Ex.106. Note (original entry seen and returned, certified copy be kept on record). Since the creation of Pakistan the disputed Survey number stood in the name of Central Govt: being Evacuee property. However on 28.8.1960, entry was made in Dakhal Kharij Register in the name of Juma Son of Nana, but such entry was not attested by Taluka Mukhtiarkar and disputed S.No. remained in the name of Central Govt:. I

[1] Para-3: That after the migration of hindu owner the land in question was mutated in the name of central Government, but it was neither allotted temporarily nor disposed of in satisfaction to any claimant till today.

produce such entry No.52 of Dakhal Kharij Register as Ex.107. Note (original is seen and returned, certified copy be kept on record). Entry was not attested by Mukhtiarkar as no clearance certificate and record was produced before Mukhtiarkar as per note of Mukhtiarkar. According to record S.No.318 of deh Kalhori was not allotted to any body except Shamsuddin, which was allotted to them in 1987. Plaintiff Rabnawaz is hari of disputed number since 7/8 years.

Cross examination to Mr. M. Yousifi Adv. for defendant No.4 to 11.

*It is correct that Mukhtiarkar was competent to attest the entry in Dakhal Kharij Register at any time. Before partition of Indo Pak: the S.No:318 was in the name of Aasodo Mal Hindu. I am posted as Tapedar in Tapo Kandhra since last 6 months, voluntarily says he has already served in same tapa. It is correct that Juma had failed to produce the relevant Certificates as such khatta was not mutated in his favour.***"**

****

Ex.111 – Deposition of Sikandar Ali S/o Ali Muhammad

"*EXAMINATION IN CHIEF TO MR. MAHMOOD YOUSFI ADV: FOR DEFENDANT NO:4, 5, 7 TO 10.*

I am posted as Tapedar in the Rehabilitation branch D.C. Office Sukkur. I have brought the relevant record of Deh: Kalhori regarding S.No:317 & 318. I produce original RL-II Deh Kalhori entry No:155 which shows the names of Jumo S/O Nana by caste Dhobi R/O Kandhra as Exh:112. NOTE (Original is seen and returned after placing on the record certified true copy). RL-II register is maintained by Grade-17 Revenue Officer I have been directed to produce this record. Always RL-II is under lock and seal. Always Khatooni is issued on the basis of this register. No true copy is issued of RL-II Register.

XX TO QADIR BUX MEMON ADV: FOR PLAINTIFFS.

*I have brought this register which was in the custody of Office of D.C. Office Sukkur. Office Suptd: is the officer of 16/17 grade officer. Again says he might be in grade-17. It is correct that officer of the Office Suptd: is grade-16. I do not know the grade of Mukhtiarkar. RL-II registered is prepared on the basis of QPR documents, these QPR are received by our office from Lahore and India. I have not brought QPR. RL-II register brought by me as per certificate contains pages 296 signed by Naib Tehsildar & ASC Land Sukkur. It is correct that RL-II register contains different type of paper some are old and some are fresh. It is correct that RL-II register is not page wise correctly maintained. It is incorrect to suggest that there is tempering with RL-II register and some pages have been inserted later on. It is correct that pages of RL-II register from 68 to 80 are un-written and are blank. Likewise pages from 84 to 96 are blank. It is correct that entry in the name of Jumo is on full page No:3 there is no other entry on same page. God knows better about any later entry in the RL-II register but I have not made any entry subsequently. It is correct that on Page – No:3 in column No:11 there is no signature of Naib Tehsildar and Tapedar. There is no provision to enter the names of the legal heirs of such person who expires in the RL-II register. It is correct that in other entry there is signature of Naib Tehsildar and Tapedar.***"**

10. As to the claim of the Applicant is concerned, the above evidence of the official witnesses clearly does not support the said claim except that as late as in the year 1987 some mutation was made in their name. Besides that, nothing supports them. The claim of Respondent No.1 was only to the

effect that he was in possession; the property was owned by Central Government and by virtue of section 3(1)(b)[2] of the 1975 Act, he had a right in the property. As against this the claim of the Applicant is that property was an Evacuee property duly allotted in favor of his ancestors. As to the mutation entry in favour of the Applicants is concerned, though the same has been placed on record, but at the same time, it is not supported by any order of allotment or handing over of the property in accordance with law to the Applicants. Admittedly, the property was owned by the Central Government being an Evacuee property; hence, was to be dealt with under Evacuee Property and Displaced Persons laws and further could have only been allotted to a displaced person. There is nothing on record to establish that the ancestors of the Applicants were in fact displaced persons within the meaning of the Evacuee Laws and land in question was allotted to them by way of claim pursuant to any orders and after fulfilling the mandatory requirements for allotment of such land in terms of the prevalent Evacuee Laws. There is nothing on record to establish this transaction that how, and in what manner, the same was allotted to the father and grandfather of the applicant as claimed. At the same time, if it was in possession of the Respondent No.1 / Plaintiff, then again it was to be dealt with in terms of section 3(1)(b) of the Evacuee Property and Displaced Persons laws (Repeal) Act, 1975. A proper procedure was required to be adopted and only then the property could have been allotted to anyone of the parties or for that matter to any other person. To that extent, the Applicants' case does not seem to have any weightage as merely a mutation entry could not suffice in this matter once it has come on record that there is no proper allotment or conferring of ownership on the Applicants. Lastly, the mutation entry and the exercise so carried out was done as late as purportedly in the

---

[2] 3. Transfer of property ---(1) All properties, both urban and rural including agricultural land, other than such properties attached to charitable, religious or educational trusts or institutions, whether occupied or unoccupied, which may be available for disposal immediately before the repeal of the aforesaid Acts and Regulations, or which may become available for disposal after such repeal as a result of final order passed under subsection (3) of section 2, shall stand transferred to the Provincial Government, on payment of such price as may be fixed by the Federal Government in consultation with the Provincial Government. for disposal--

"(b) in the case of rural properties, by the Board of Revenue of the Province under a scheme to be prepared by the Provincial Government in this behalf:

"Provided that agricultural land occupied by any person continuously for four harvests immediately preceding Kharif 1973 shall first be offered for sale to such person unless an order of ejectment has been passed against him in respect of such land:

"Provided further that only so much land shall be offered to such person as does not together with land already held by him, exceed a subsistence holding within meaning of the Land Reforms Regulation, 1972.

year 1987 on the basis of a Clearance Certificate, which by itself was issued on the basis of an affidavit of the Applicants.

11. Then there have been various other issues which have come on record and also have been dilated by the Trial Court as well as the Appellate Court not only once but twice, but with utmost respect, it may be observed that such exercise was needless inasmuch as Respondent No.1 never claimed that he is the owner, (except that as a *hari* the property was in his possession and was being cultivated); but was only seeking a relief to the effect that firstly the mutation entry of the Applicants be declared as null and void and then the property be transferred to Respondent No.1 under Section 3(1)(b) of the Evacuee Property and Displaced Persons Laws (Repeal) Act, 1975. In that case, the issue that as to whether Respondent No.1 was a *hari* or not and as to who owns the property was a futile exercise, and resultantly, has wasted precious time of the Courts below including this Court. The appropriate way was to only see that whether the mutation entry of the Applicants was valid or lawful and whether the Evacuee property could have been given to a person who does not fall within the contemplation of a displaced person in accordance with law. This has come on record that there is no such order either the P.T.O. or a P.T.D. or any other order, whereby, the property was allotted or given to the father or grandfather of the Applicants. If that is so, then this was the end of the matter and an order could have been passed to the extent that the mutation entry be cancelled; whereas, the other reliefs could not be granted. In fact, the Appellate Court has though come to such conclusion, but at the same time, has decreed the Suit in totality, which was not the proper way. Even if this Court agrees with the findings of the learned Appellate Court as recorded in the second round of litigation after remand, even then, the Suit could not have been decreed as prayed. There are various reasons for this; the first being that as to filing of a Suit for declaration under Section 42 of the Specific Relief Act, the Respondent No.1 had no lawful authority to seek such a declaration as it was only a possession with him which does not create a title. Even being a *hari*, he could not seek a declaration of ownership, except lodging of claim under s.3 ibid. In fact, he had only sought the prayer that the land be transferred under Section 3 of the 1975 Act. To succeed in these proceedings Respondents No.1 has to establish that he was in possession of the disputed parcel of land for the last 4 crops in terms of section 3 of the

Act[3]. For that the Court was never competent to grant a decree and at most could have observed that if so, Respondent No.1 could approach the notified authority, if any, and seek his remedy which shall be dealt with in accordance with law. The Court was not competent to pass a decree by itself to that extent; as it was to be done by the notified officer only. At the most matter could have been referred to the competent authority in law to pass an appropriate order in accordance with law, whereas, if aggrieved, the parties could have taken recourse to remedies as may be available in law. It was never available to the trial Court to assume the function of the officer notified under the Act of 1975.

12. Once it has come on record that the land was owned by the Central Government and was an Evacuee Property, whereas, no final order of disposal of the Suit property to anyone else as required in law was on record, including a final order on the purported application of Respondent No.1 allegedly made to Defendant No.2 (Deputy Commissioner) as stated in the plaint without even annexing the same, then dealing the matter on the basis of a mutation entry of one party, and the claim of the other party as a *hari* by the Courts below was not a proper approach. The final adjudication of the matter was to be done by notified officer / competent authority under the Evacuee laws. At the most directions could have been issued to Respondent No.1 / Plaintiff to approach the said authority which shall decide the issue and pass an order to that effect. It is needless to state at this stage of the proceedings that the law under which Respondent No.1 rests his claim came into force on 28.1.1975, whereas, he never approached the authorities or even the Court till 1989 or when he received notice from Mukhtiarkar as averred in the plaint. In that case his claim was hopelessly time barred, if not, then much delayed inasmuch as by virtue of section 3(1) of the 1975 Act, the property vested in the Provincial Government as per his own pleadings; and secondly, even if claim was considered to be correct and genuine in law, even then an order was required to be passed in terms of section 3(1)(b) ibid and that too was to be done against payment / consideration. He was required to specifically establish his claim in terms of s.3(1)(b) ibid, that the land was occupied by him continuously for four harvests immediately preceding Kharif 1973. There is nothing to establish this very fact. The only piece of evidence which can be considered is Exh-52) the Khasra GIrdwari which does not prove his case exactly as require

[3] Bakhsha v Assistant Commissioner / Additional Settlement Commissioner (2000 SCMR 1341)

in terms of section 3 ibid; hence, the learned Appellate Court was not justified in decreeing the Suit as prayed.

13. Lastly, it is also to be seen that as what would be the effect of the delay caused by the own conduct of Respondent No.1 in lodging its claim under section 3 of the 1975 Act. It is not a case of any pending proceedings as all Evacuee Laws stood repealed much before any action was initiated by Respondent No.1. It is settled law that mere possession of any evacuee land as claimed by Respondent No.1 in the Suit would not make his case, a case of pending proceedings within the contemplation of provisions of section 2 and 3 of 1975 Act[4]. Again this aspect of the case has been left out completely by the Appellate Court while decreeing the Suit of Respondent No.1 as prayed.

14. In view of hereinabove facts and circumstances of the case, the order of the Appellate Court, whereby, the Suit of Respondent No.1 has been decreed as prayed, cannot be sustained in its totality; but only partly. The decree to the extent of declaring the mutation of the Applicant as null and void is maintained, whereas, to the extent of rest of the prayer clauses it stands dismissed. However, this would not debar or preclude Respondent No.1 to seek remedy, if available and as may be entitled, in terms of section 3(1)(b) of the 1975 Act, by approaching notified officer, if any. The Revision Application is partly allowed in the above terms. Order accordingly.

Dated: 6.12.2021

J U D G E

Abdul Basit

[4] Government of Punjab v Muhammad Yaqoob (PLD 2002 SC 5)