

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision No. S – 112 of 2005

Abdul Hakeem through LR's v. Mst. Allah Dini and others

Date of hearing: **15.11.2021**

Date of announcement: **17.12.2021**

Mr. Abdul Naeem Gaddi along with Faisal Naeem Advocates, for the Applicants.

Mr. Qalandar Baksh Phulphoto Advocate for Respondents.

Mr. Mahboob Ali Wassan, Assistant Advocate General Sindh.

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J U D G M E N T

Muhammad Junaid Ghaffar, J. – Through this Civil Revision, the Applicant has impugned judgment dated 20.6.2005, passed by 2nd Additional District Judge, Khairpur, in Civil Appeal No.04 of 2004, whereby the judgment dated 10.12.2003 passed by the Senior Civil Judge, Mirwah, in F.C. Suit No.45 of 2003, through which the Suit of the Applicant was decreed, has been set aside and by allowing the Appeal, the Suit has been dismissed.

2. Learned Counsel for the Applicant has contended that the Appellate Court has failed to appreciate the facts and law and has non-suited the Applicant without any justifiable reason; that no cogent and convincing reasons have been recorded for setting aside a well-reasoned judgment of the Trial Court; that it had come on record through evidence as well as record of the officials that the Applicant was a legal heir of deceased Makhan Khan; that the appeals filed by Respondents were time barred, whereas, the Foti Khata had already been recorded in favor of the Applicant after thorough inquiry including a Jalsa-e-Aam; that it was never challenged in accordance with the provisions of Land Revenue Act, 1967; that mere non-disclosure of a pedigree table in the Suit by itself is not fatal and cannot be made the only basis of non-suited the Applicant when it has come on record that the Applicant was a legal heir of Makhan Khan; that it was never established that Respondents belonged to Shia Sect. In view of these submissions he has prayed for setting aside the impugned judgment by restoring the judgment of the trial Court. In support he has relied upon the

cases reported as S. M. Waseem Ashraf v Federation of Pakistan (2013 SCMR 338), Muhammad Suleman v Additional Deputy Commissioner (PLD 2000 Lahore 262), Bashir Ahmed v Muhammad Hussain (2010 SCMR 822), Ghulam Shabbir v Mst. Bakhat Khatoon (2009 SCMR 644), Pathana v Wasai (PLD 1965 SC 134) & Pir Sabir Shah v Shad Muhammad Khan (PLD 1995 SC 66).

3. On the other hand, Respondents' Counsel has supported the impugned judgment on the ground that no pedigree table was disclosed in the plaint; that a Suit was incompetent against the impugned orders and a Revision ought to have been filed before Member, Board of Revenue; that no evidence was led on behalf of the Applicant, whereas, it was never established that the Applicant was related to Makhan Khan in any manner, whereas, the Respondents belong to Shia Sect; hence, even otherwise, the Applicant was not entitled to any share in estate of deceased Makhan Khan. He has prayed that Revision Application merits no consideration.

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

5. It appears that the Applicant being aggrieved of order(s) dated 11.12.2002 and 4.6.2003 passed respectively by District Officer (Revenue), Khairpur and Executive District Officer (Revenue), Khaipur, filed F.C. Suit No.45 of 2003, wherein, the after exchange of pleadings and recording of evidence the Trial Court passed its judgment dated 10.12.2003, whereby the Suit of the Applicant was decreed as prayed. The Respondents being aggrieved, preferred Civil Appeal No.04 of 2004, which has been allowed through impugned judgment.

6. From perusal of the record, it appears that the Applicants had filed Suit for declaration and permanent injunction seeking declaration that the two orders impugned were void, illegal and contrary to law, and with a further declaration that the Applicant is a consanguine brother (cousin to cousin) of Makhan Khan, the deceased father of Respondents No.1 & 2; hence, entitled for share in the estate left by him as he had left only two daughters as his legal heirs. It is a matter of record that after death of Makhan Khan, the concerned Assistant Mukhtiarkar, on an application by the Applicant had passed an order dated 8.2.2002, whereby, the Applicant was held to be a legal heir of Makhan Khan along with Respondent No.1 & 2 and thereafter, the Foti Khata Badal was also recorded. To that extent there appears to be no dispute. It further appears that respondents No.1 &

2 had also filed a Suit for declaration and injunction against the present Applicant bearing F.C. Suit No.11 of 2002 which was unconditionally withdrawn and thereafter, an Appeal was filed before District Officer, Revenue, which was allowed vide order dated 11.12.2002 against which the Appeal filed by the Applicant was dismissed by E.D.O. Revenue vide order dated 4.6.2003. These two orders were challenged by way of present proceedings.

7. Insofar as the impugned judgment of the Appellate Court is concerned, it has primarily relied upon the fact that since in the plaint the Plaintiff had not presented a pedigree table, as to his relationship with Makhan Khan, then how he had claimed to be a consanguine brother, therefore, his claim was not maintainable; hence, the trial court had erred in passing a decree in favor of the Applicant. Though, this argument on the face of it appears to be attractive; however, it is not so in every run of the mill case. It is by itself not a proof of relationship which has to be proved independently by evidence in support thereof¹. It is settled law that pedigree table by themselves could not prove the factum of relationship between the parties in absence of any affirmative evidence regarding claim of such relationship². It needs to be appreciated that in the instant matter, firstly, when Makhan Khan expired on 29.10.2001, the Applicant claimed his right as a legal heir by having Foti Khata Badal, against which Respondents No.1 & 2 approached the concerned officer of the Revenue Department i.e. Assistant Mukhtiarkar who vide order dated 8.2.2002 came to the conclusion that on spot enquiry was made and it revealed that Applicant was a legal heir (consanguine brother-cousin to cousin) of Makhan Khan along with Respondents No.1 & 2. It was also held that deceased was a follower of Sunni Sect. Accordingly, an order for mutation was made which was then implemented as well. It further appears that apparently the claim of the Applicant regarding he being legal heir of deceased Makhan Khan was initially challenged in Suit No.11 of 2002 by Respondents No.1 & 2, which was then withdrawn vide order dated 2.4.2002 unconditionally. Thereafter, an Appeal was preferred against order dated 8.2.2002 before D. O. Revenue, which was allowed vide order dated 11.12.2002, against which the Applicants appeal failed vide order dated 4.6.2003. It is also a matter of record that when the matter came before the D.O. Revenue, he

¹ Bahir Ahmed v Muhammad Hussain (2010 SCMR 822)

² Rehman V Noora (1996 SCMR 300)

vide his letter dated 22.6.2002 (Exh-22-A) asked the Deputy District Officer to conduct enquiry and verify the claims of the parties, who vide his report dated 17.7.2002 informed that the Applicant is a legal heir of deceased Makhan Khan. The said report (Exh-22-B) reads as under;

“OFFICE OF THE DEPUTY DISTRICT OFFICER (REVENUE)
MIRWAH.

NO. SM/-1216/2002, Mirwah, Dated: 17-07-2002.

To

The District Officer,
(Revenue) Khairpur.

SUBJECT: APPLICATION OF LEGAL HEIRS OF DECEASED MAKHAN KHAN S/O TAHIR PHUL AND ALSO RELATIONSHIP OF ABDUL HAKEEM PHUL WITH DECEASED MAKHAN KHAN PHUL.

Reference: Your office letter No.(R)DOR/-2494/2002 dated 22.6.2002.

The undersigned held spot enquiry and recorded the **statements of Nek mards of the locality namely Haji Ali Khan s/o Bhai Khan Phul, Janib s/o Behan Khan Phul and Haji Hussain Ali s/o Wadan Khan Phul all r/o village Kharirah taluka Mirwah** in the above matter.

From the statements of the above Nek mards it has come on the record that Makhan (Elder) s/o Muhammad Salik Phul died long time ago who left five surviving legal heirs at the time of his death namely Tayab, Tahir, Malhan, Mataro and Malang. It has also come on the record that above five legal heirs of deceased Makhan (Elder) are also expired long time on issue less except legal heir Tahir. Tahir had only one legal heir namely Makhan (Junior). Now Makhan (Junior) is also expired and he left behind only two daughters as his surviving legal heirs for his entire estates.

From spot enquiry it has also come on record that Abdul Hakeem s/o Bakhsho by caste Phul is a relative of Makhan (Junior) with relationship of cousin to cousin.

Moreover, the statements of three Nek Mards are submitted herewith for kind perusal.”

8. Perusal of the aforesaid report reflects that on spot enquiry was made through 3 persons (Nek-Mards) from the locality namely Haji Ali Khan S/o Bhai Khan Phul, Janin S/o Behan Khan Phul and Haji Hussain Ali S/o Wadan Khan Phul, whereas, the entire pedigree of Makhan Khan was

revealed and it came on record that the Applicants claim was correct. The said report / enquiry was conducted on the Appeal of Respondents and on the directions of D.O. Revenue. In that case the D.O. Revenue, could not have disagreed with the same without any further inquiry and deliberations. But it is not so and an order has been passed which appears to be contrary to the facts on record. It would be advantageous to reproduce his order dated 11.12.2002 which reads as under;

IN THE COURT OF DISTRICT OFFICER (REVENUE) KHAIRPUR

“ORDER
11.12.2002

Appellant Mst. Allah Dini Phul D/o Makhan Khan Phul is present. Respondent's attorney Imdad Ali S/O Abdul Hakeem Phul is present. Advocate of appellant Mr. Abdul Qadir Bhatti is present. Advocate of respondents Mr. Abdul Khaliq M. Veesar is not present. Tapedar of the beat Mr. Imamuddin Dasti is present with Revenue record.

Brief facts of the case are that appellant Mst. Allah Dini Phul has stated in her appeal that late Makhan Khan Phul father of appellant and her sister, had left behind him legal heirs including appellant and her sister Mst. Hawa only. Whereas, respondent Abdul Hakeem s/o Bakhsho Phul falsely and fraudulently claimed to be surviving legal heir of the deceased Makhan Khan Phul. The respondent No.1 Abdul Hakeem Phul in collusion with respondent No.2 is trying to declare himself to be one of the legal heir of deceased Makhan Khan Phul. And to achieve this purpose, respondent No.2, had passed an ORDER, in which it was held out that the respondent No.1, Abdul Hakeem Phul, is also one of the legal heir of deceased Makhan Khan Phul and had further ordered that 1/3rd share of the Agriculture land left behind by deceased Makhan Khan Phul, be mutated in his name.

The respondent Abdul Hakeem Phul stated that he is a residuary legal heir of deceased Makhan Khan Phul and an enquiry was made by the Revenue authorities in presence of the Nek mards of village. Respondent's attorney Imdad Ali Phul further stated that the ORDER of mutation of khata has been passed by the Assistant Mukhtiarkar Assistant Collector (G-II) Mirwah within the scope of jurisdiction after spot enquiry.

Heard both the parties, witnesses, and perused the Revenue record minutely. The respondent has failed to produce any authenticated evidence to prove his residuary relationship with deceased Makhan Khan Phul. In this respect statements by the witnesses and enquiry report by Deputy District Officer (Revenue) Mirwah were examined carefully and that were found unclear and equivocal. The respondent Abdul Hakeem Phul cannot be declared as a legal heir to the deceased Makhan Khan Phul. The impugned

ORDER, passed by Assistant Mukhtiarkar/Assistant Collector (G-II) is hereby set-aside. The Mukhtiarkar (Revenue) Mirwah is directed to mutate the Khata of the land of deceased Makhan Khan Phul in the name of appellant Mst. Allah Dini Phul and her sister Mst. Hawa Phul, both daughters of late Makhan Khan Phul. However, if respondent feels aggrieved, he can knock the door of competent Civil Court.”

9. When the aforesaid order is examined it appears that in a very slipshod manner he has discarded this report without any reason or rhyme and has given his own judgment which is not based on any reasoning or logic including documents, if any, except that the report of D.O. Revenue submitted to him was *unclear* and *equivocal*? How this was arrived at is totally bereft of any reasoning. The report was furnished on his directions contained in letter dated 22.6.2002 and is on the basis of evidence and field / on spot enquiry, as well as statements of Nek Mards of the locality. To overrule the same in this manner was not only illegal but uncalled for. Once a report is called by any functionary, then the same is either has to be accepted; and if not, then it can only be discarded with sound reasoning and not in a slipshod manner as has been done in this case.

10. It further appears that the said officer had then set-aside the order of the Assistant Mukhtiarkar and the Applicant preferred Appeal against that order which was also dismissed by E.D.O. Revenue vide his order dated 4.6.2003. The said order reads as under;

“ORDER

4-6-2003

Appellant Abdul Hakeem Phul and his Attorney Imdad Ali Phul are present with their Advocate Mr. Ghulam Hussain Kubar. Respondent Mst. Allah Dini Phul is present with her Advocate Mr. Qalandar Bux Phulpoto.

This is a Revenue Appeal filed by the appellant Abdul Hakeem Phul against the order dated 11-12-2002 passed by the District Officer (Revenue) Khairpur, regarding mutation of landed property of deceased Makhan Khan Phul, situated in Deh Habib Phul Taluka Mirwah.

Heard both the parties and arguments of their Advocates at length and perused the relevant record. The Advocate for the appellant did not produce any documentary proof about the relationship. I, therefore up-held the decision of District Officer (Revenue) Khairpur, passed on 11th. 2002.”

11. Again this officer has even failed to dilate upon the issue and has not given his own finding, except that no documentary evidence was produced; hence, the order is maintained. This order was also a non-speaking order and without any reasoning; hence, could not have been sustained. It is a matter of record that on the directions of D.O. Revenue an enquiry was conducted and even three persons of the community were examined who supported the claim of the Applicants. In that case the orders of the two officers i.e. D.O. Revenue and E.D.O. Revenue are not proper; nor in accordance with law and have been passed in a cursory manner without adverting to the real facts and ground realities available on record; hence, cannot be sustained.

12. As to the evidence on record it appears that respondents had miserably failed to dislodge the claim of the Applicants in any confidence inspiring manner. Firstly, they chose to withdraw their Suit without seeking any permission for agitating the controversy either in the departmental hierarchy; or by way of a fresh suit. Secondly, their witnesses i.e. Muharram Ali (DW-1-Exh-28) and Muhammad Usman (DW-2-Exh-29) have failed to bring on record any material or justification to substantiate their claim regarding Makhan being a shia sect follower. Rather, in response to one question DW-1 replied that “it is a fact that I have produced a Tahreer obtained from Jamia Islamia Hamidia Khaipur and it is a fact that institute is of Sunni Sect”. Now why a person who asserts that the deceased was a follower of shia sect, would bring some document in his evidence issued by a Sunni Sect institute. This has gone unexplained. It is settled law that initial presumption in Indo Pak is that a Muslim party to a Suit or a *lis* is a Sunni unless it is pleaded otherwise and also shown with evidence, whereas, the burden in this regard is upon the person who pleads that the deceased was a follower of shia sect. It is further settled that the contrary can only be proved with good and cogent evidence³. The Respondents have completely failed to substantiate this fact with any reliable evidence. Thirdly, they admit that the proceedings initiated by them were neither within the limitation period; nor the officer having jurisdiction had been approached by them. It has been replied by DW-1 “it is fact that I have not filed an appeal against the order of Mukhtiarkar, before D.D.O Revenue and I do not know that appeal filed before D.O was time barred by one month and five days”. It is not in dispute that the appeal ought to have been filed before D.D.O

³ 2009 SCMR 644 & PLD 1965 SC 134

Revenue. This has deprived the aggrieved party with one forum of appeal, whereas, per settled law where any forum or court decides or adjudicate a matter without jurisdiction, then such decision would be void and of no legal effect⁴.

13. The Appellate Court has perhaps failed to take these things into consideration and has, rather shifted the entire burden upon the Applicants for having failed to bring on record a pedigree table. Moreover, it is also a settled proposition of law that weakness in evidence of one party, cannot benefit the other. The Defendants / Respondents were required to establish their case with their own independent evidence, as it is they, who approached the Revenue authorities after aborting their civil remedy already availed. Hence, the burden upon them was on a higher pedestal as compared to the one on the Plaintiff who comes to assert some right or breach of his right. Here in this case, the Applicants had already been declared as legal heirs of Makhan Khan by way of Foti Khata Badal and the inquiry conducted by the Revenue Officials, which was impugned first by way of a Civil Suit which was then withdrawn unconditionally; and thereafter, by way of orders by the D.O and then E.D.O, Revenue, at the behest of Respondent No.1 & 2, the entries and foti khata badal was upset, for which apparently, the officers lacked jurisdiction as well as the manner in which the orders were passed speaks for itself.

14. In view of hereinabove facts and circumstances of this case, it appears that the Appellate Court was misdirected in allowing the Appeal, as it appears to be a case of misreading and non-reading of the evidence on record; whereas, the learned trial had arrived at a fair and just conclusion, being based on the evidence and the applicable law; and had rightly decreed the Suit of the Applicants. Therefore, this Civil Revision Application merits consideration and is hereby allowed; the impugned judgment of the Appellate Court dated 20.6.2005 is hereby set-aside and that of the trial court dated 10.12.2003 is restored.

15. The Revision Application is allowed.

Dated: **17.12.2021**

Abdul Basit

⁴ 2013 SCMR 338

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