

**ORDER SHEET**  
**IN THE HIGH COURT OF SINDH BENCH AT SUKKUR**  
*Civil Rev. Application No.S-87 of 2015*

Date of hearing: 23.04.2021  
Date of decision: 23.04.2021

Applicant(s): Ahmed & others through Mr. Jam  
Jamshed Akhtar, Advocate.

Respondent No.1: Moran Khan through Mr. Soomar  
Das R. Parmani, Advocate

**ORDER**

**KHADIM HUSSAIN TUNIO, J-** Through captioned revision application, the applicant has impugned the order dated 24.06.2015, passed by learned Additional District Judge Ubauro in Civil Appeal No.42 of 2013 (*Re-Ahmed alias Sukhio v. Moran Khan*), filed against the judgment and decree dated 30.03.2013, passed by learned 2<sup>nd</sup> Civil Judge, Mirpur Mathelo in FC Suit No. 08 of 2006 involving agricultural land bearing S. 282 (3-24) acres in Deh Sher Khan Bozdar, Taluka Mirpur Mathelo, Ghotki to the extent of 50 paise share by virtue of inheritance through *Fouti Khata badal* of deceased Hashim son of Qmbir Gabole effected in the revenue record of right vide mutation entry No. 20 dated 11.04.2005, however the plaintiff/respondent found the applicants/defendants harvesting the wheat crops he had cultivated on 16.05.2005 and unlawfully encroached upon it, which led to the filing of the suit which was decreed in favour of the plaintiff/respondent. Being aggrieved, the applicants/defendants filed a civil appeal against preliminary decree passed by the learned trial Court. Learned Additional District Judge Ubauro thereafter dismissed the Civil Appeal on the basis that the appeal was filed against preliminary decree and during this time, final decree had been drawn, therefore the appeal had become infructuous, hence this civil revision application.

2. Learned counsel for the applicant has argued that the impugned order passed by the appellate Court is bad in law and on facts; that the order is illegal, perverse, arbitrary, against the law, justice and

equity; that the learned judge fell in error and passed illegal order ignoring the legal position that the passing of final decree would not affect the appeal filed against the preliminary decree; that the learned appellate Court and trial Court exercised jurisdiction illegally with material irregularity; that both the Courts below have utterly failed to thoroughly and deeply examine and appreciate the oral and documentary evidence brought on record.

3. Learned counsel for the respondent on the other hand supported the impugned order.

4. I have heard the learned counsel for the parties and perused the record available before me.

5. Undoubtedly, the appeal to the Appellate Court, had it been successful, would have had effect of discharging the final decree passed by the trial Court as well as preliminary decree. It seems to follow, therefore, as a matter of course that the appeal in this case was not only an appeal from the preliminary decree but from all that naturally followed by passing of that decree. Cases, much like the present one, where an appeal is filed against a preliminary decree and during the pendency of the appeal a final decree is passed stands on a different footing altogether. Lest it needs pointing out, a decree is only preliminary when the suit is still to be completely disposed of. It becomes final when such adjudication completely disposes of the suit. Therefore, it can safely be said that a final decree merely carries out the fulfillment of a preliminary decree passed in the suit. If an appeal from the preliminary decree succeeds, the final decree automatically falls to the ground for the reason that it is based on the preliminary decree, and is merely a superstructure upon it which must fall when the base is taken away. Even otherwise, per the dicta laid down in the landmark case of *Gul Muhammad and others v. Habib Muhammad Khan and another* [PLD 1960 (W.P) Peshawar 37], the presence or passing of a final decree does not affect the preliminary decree nor does it affect any appeal against the former. Relevant portion of the judgment is reproduced hereunder for ready reference:-

“Preliminary decrees in cases where the statute makes a provision for them stand on an independent footing as independent entities and there is no question of merger of these decrees in the final decrees that follow them. In fact under section 97, C.P.C. a party aggrieved by a preliminary decree not filing an appeal against it, will be precluded from disputing its correctness in any appeal which may be filed against a final decree. A preliminary decree does not become extinct after the passing of the final decree, nor does the latter affect the maintainability of an appeal against the former and this will be so even if the appellant has not asked for stay of proceedings after the institution of his appeal...”

*(emphasis supplied)*

6. From the above provision of law and the case of *Gul Muhammad* (supra), it is quite clear that the passing of a final decree bears no effect whatsoever on an appeal that is filed against a preliminary decree, in fact the only effect if borne is the opposite where in case an appeal succeeds on preliminary, the final decree shall fall with it. Having said that, the appellate court was incorrect in holding that merely because the final decree had been passed, an appeal against preliminary decree had become infructuous. Such an exercise was unlawful and the judgment of the Court below, so far as it holds that the appeal had become infructuous, must be set aside.

7. Resultantly, instant civil revision application was partly allowed and the impugned order dated 24.06.2015, passed by learned Additional District Judge Ubauro was set aside and matter was remanded back to the Additional District Judge Ubauro for decision afresh in accordance with law, fully on merit within two months, under intimation to this Court. Parties were directed to appear before trial Court on 05.05.2021 without claiming further intimation notice.

These are the reasons for the short order dated 23.04.2021.

**JUDGE**