

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision No. S – 108 of 2009

Peer Bux alias Peeral and others..... Applicants

Versus

Mushtaque Ali and others.....Respondents

Hearing of Case(Priority)

- 1.For orders on CMA 1132/21
- 2.For hearing of Main Case
- 3.For orders on CMA 1047/16
- 4.For orders on CMA 219/16
- 5.For orders on CMA 433/209

Date of Hearing: **06.12.2021 and 18.04.2022**

Date of Decision: **18.04.2022**

Mr. Sardar Akbar F.Ujjan, Advocate for the Applicants.

Mr. Safdar Ali Kanasero, Advocate for Respondents.

Mr. Mehboob Ali Wassan, Assistant A.G a/w Salahuddin Avesi, Mukhtiarkar (Revenue), Gambat.

J U D G M E N T

Muhammad Junaid Ghaffar, J. – Through this Civil Revision, the Applicants have impugned judgment / Order dated 23.06.2009, passed by Additional District Judge-III, Khairpur in Civil Appeal No.20 of 2001 (*Piral alias Pir Bux and others v. Mushtaque Ali and others*), whereby the Judgment dated 14.02.2001, passed by Senior Civil Judge, Gambat in F.C Suit No. 35 of 1995 (*Mushtaque Ali v. P.O. Sindh and others*), through which the Suit of Respondent No.1 was decreed, has been maintained by dismissing the Civil Appeal.

2. Heard both leaned Counsel for the parties and perused the record.

3. It appears that the Respondent No.1, who at the relevant time, was about 11 years, filed a Civil Suit for declaration, cancellation of registered Gift / Bakhshish deed entries, damages, mandatory and permanent injunction and sought the following prayers:

“i). Declare the plaintiff as owner of 1-31½ acres in S.No. 218 and as owner of 2-9½ acres in S.No.219 of deh Razidero totally measuring 4-1 acres as suit land.

ii). Declare the entries No.227 dated 12.4.1995 of suit land in favour of defendants 5 to 9 in the mutation register and other revenue record as illegal, null and void.

iii). Cancel the registered Bakhshishnama gift deed dated 2.5.1988 to the extent of suit land.

iv). Order the defendants 4 to 9 to pay Rs.30,000/- to the plaintiff as damages.

v). Issue Mandatory injunction ordering thereby defendants 2 should to enter the name of plaintiff in the revenue record as owner of the half of each of S.No.218 and 219.

vi). Pass permanent injunction against the defendants 5 to 9 restraining them thereby not to interfere with the peaceful possession and enjoyment of suit land by the plaintiff.

vii). Allow costs of suit to plaintiff.

viii). Give any other suitable relief to plaintiff if deemed fit and proper".

4. Precise case, as set up on behalf of Respondent No.1, was that his grandfather Allah Rakhio on or about 14.01.1987 sold out his share of land, as mentioned in para-04 of the Plaint, to him by recording a statement before the Mukhtiarkar, Gambat and the same was also entered into the Revenue record including information to the other co-sharers. Admittedly, the Respondent No.1/Plaintiff, at the relevant time, was approximately two years old.

5. Trial Court after exchange of pleadings settled the following issues:

1. Whether grandfather of plaintiff namely Allah Rakhio was exclusive owner of survey numbers shown in para No.4 of the plaint situated in deh Razidero, taluka Gambat or he was in possession and enjoyment of the same?
2. Whether the plaintiff is in illegal possession of the suit property through his next friend Mehar Ali?
3. Whether the father of defendant No.5 to 9 was full owner of survey numbers 218, 219 of deh Razidero?
4. Whether whole area of S.Nos. 218, 219 was in the name of late Ghulam Hyder the father of defendants No.5 to 9 in revenue record of Deh Razidero and was in peaceful possession of above S.Nos?
5. Whether the gift deed dated 2.5.1988 by Ghulam Hyder in favour of defendant No.5 to 9 is not illegal?
6. Whether the entries in respect of S.Nos. 218, 219 of deh Razidero in the name of plaintiff and grandfather Allah Rakhio are bogus and not binding upon the answering defendants?
7. What should the decree be?

6. The learned trial Court held that Respondent No.1 had led a confidence inspiring evidence; hence, entitled for the relief as prayed for. It appears that primarily the Trial Court was persuaded by the evidence of *PW-5 i.e. Tapedar Gul Muhammad Solangi (Exh.50)* while decreeing the Suit. The said finding was recorded while deciding issue No.6 as the first issue and the relevant portion of the Judgment of the Trial Court reads as under:-

“Issue No.6

This issue is very much relevant therefore I will take up first the same. It is very much clear from the evidence of Tapedar Gul Muhammad Solangi P.W No.5 at Ex.50, so also the original entry No.27 at Ex.50-A.

I reproduce the relevant portion of evidence of Tapedar Gul Muhammad Solangi as under;-

“I have brought the record of suit land and mutation register. I produce the same register showing the entry No.27 in the name of Allah Rakhyo son of Khuda Bux Kurk as per such entry Allah Rakhyo had sold out 9-17 acres out of S.No. 218 50 paisa, S.No.219 4-19 acres, 50 paisas S.No.821 6-14 acres, 25 paisa S.No.21/8-35 acres 25 paisas, and S.No.15/3-06 acres, 25 paisas to Mushtaque Ali son of Shahmeer Khan by caste Kurk. The mutation was effected on the basis of statement of Allah Rakhyo, such mutation entry was signed by Tapedar Belharo Supervising Tapedar Belharo and Mukhtiarkar Gambat.”

Since it is also admitted fact that the plaintiff is still minor and under the law of land, minor cannot sale his property except with the permission of the court, but he can purchase under the law and as per statement of P.W 5 Gul Muhammad Solangi Tapedar it is very clear to all four corners as well as the evidence of three P.Ws who have supported the version of the plaintiff.

In view of the above facts it is proved that the minor plaintiff is the owner of S.No.218, 219 to the extent of 50 paisas each in both S.Nos. as stated above, therefore, the question about any bogus entry in the record by grandfather of the plaintiff deceased Allah Rakhio does not arise and that the defendants No.5 to 9 have failed to prove about the sale and thus the minor plaintiff is the owner as stated above of the suit survey number to his respective share as stated by P.W.5, Tapedar Gul Mohammad Solangi as Ex.50 as per entry No.27 as Ex.50-A. Findings accordingly.”

7. Perusal of aforesaid evidence reflects that the said witness was a witness of Respondent No.1, as he appeared as PW-5 and on perusal of record, it reflects that the Trial Court by placing reliance upon a part of the evidence; and that too, from his *examination-in-chief* has not only answered the issue in favour of Respondent No.1, but so also, mainly relying upon this portion of the evidence, the Suit has been decreed in respect of the main prayer regarding declaration and cancellation of Gift deed / Bakhshish deed and the entries thereon. In Appeal the said findings have been maintained by the Appellate Court and after going through the same, it appears that the Appellate Court has failed to give any solid reasoning of its own and has just reproduced wordings of the Trial Court, which order does not appear to be a reasoned order of the Appellate Court. However, since entire record including (R&Ps) are before this Court, it would be a futile exercise to remand the matter to the Appellate Court to rewrite the judgment as this matter originally pertains to the year 1995, when the Civil Suit was filed. Hence, the matter is being decided on the basis of available record.

8. *PW-5 i.e. Tapedar Gul Muhammad Solangi (Exh.50)* in his cross-examination has responded in the following terms:

“Cross to Mr. Shaib Khan Kanasiro Ld: Counsel for Defendants No.5 to 9

I have been posted at Razidero deh about 4 months back. I do not know about the names of Tapedar posted at Tapo Belharo on 14-1-1987. I do not confirm the signature put by then Tapedar on 14.1.1987 on entry No.27. I have brought the record regarding the suit S.No. from 1952. *The S.No.218, 219 of deh Razidero were in the name of Ghulam Hyder son of Peeral Kuruk in the year 1952. The said Ghulam Hyder sold out S.No.218, 219, 821, 21 and 15 to Peeral son of Ghulam Hyder Kuruk, Ali Gul son of Ghulam Hyder Kuruk, Ali Dino son of Ghulam Hyder Kuruk, Gul Sher son of Ghulam Hyder Kuruk and Ghulam Shabbir S/o Ghulam Hyder Kuruk in equal share to them vide registered sale deed dated 2.5.1988 and such entry was mentioned No.227 and 257 of Form VII-B. There is no any entry in the revenue record about the acquiring of S.No:218 and 219 of the suit land by Allah Rakhyo.* As per record from 1952 up to date, the S.No: 218 and 219 of suit land were in the name of Ghulam Hyder and thereafter he sold out the same to his sons the defendants No: 5 to 9 in the year 1988. It is not a fact that entry No.27 of Dakhil Kharij register is suspected. As per record the S.No.218 and 219 of suit land stands in the name of defendants No.5 to 9, viz. Peeral, Ali Gul, Aldino, Gul Sher, Ghulam Shabbir son of Ghulam Hyder vide entry No.227 and entry No.257 (written above the same entry written in red ink).

Cross to defendants No.1 to 4

Nil as they are already ex-parte.

Re-Examination to Mr. Abdul Sattar Desi Advocate for Plaintiff.

As per Number Shumari register the S.No: 218 and 219 of the suit land stands in the name of Ghulam Hyder since 1952 to 1988 till the sale but no any other record is available with me.”

9. Perusal of the aforesaid cross-examination clearly reflects that the said witness had brought the entire record of the suit land starting from 1952 and according to him, survey Nos. 218 and 219 of Deh Razidero-Gambat, which is in dispute between the parties, were in the name of Ghulam Hyder son of Peeral Kuruk since 1952; whereas, he then sold out the said land to the present Applicants in equal share through a registered sale deed dated 02.05.1988 and thereafter, requisite entries were also recorded in Form-VII-B. He further stated that there is no entry in the revenue record about acquiring of Survey Nos. 218 and 219 of the suit land by Allah Rakhio. This Allah Rakhio is the grandfather of the Respondent No.1, from whom purportedly the land was purchased when Respondent No.1 was purportedly 2 years old. He has further deposed that as per record from 1952 till today, survey Nos. 218 and 219 of the suit land were in the name of Ghulam Hyder and thereafter in the name of the Applicants and after his cross-examination, he was again called for re-examination by the Counsel of the Respondent No.1, as he was their witness and in his re-examination, he once again stated that as per *Number Shumari Register, survey Nos. 218 and 219 of the suit land stands in the name of Ghulam Hyder since 1952 to 1988 till the sale and no other record is available with him*. It is really surprising and mind boggling that as to how the Courts below have only appreciated the evidence of this witness partly, and that too from his examination-in-chief; whereas, per settled law, the evidence has to be read as a whole and especially when it has passed through the test of cross-examination. Cross-examination of a witness affirms what he has stated in his examination-in-chief and when in his cross-examination he cannot defend his examination-in-chief, then the Court cannot rely upon his examination-in-chief, but has to see and decide the matter on the basis of his cross-examination. In fact, here in this matter, the entire evidence of this PW-5 is against the Respondents. It is settled law that evidence of a witness has to

be looked into as a whole; specially the cross examination so as to ascertain the veracity and truth of his assertion in his examination in chief. This is the only way the Court can appreciate the evidence of a witness, and if not, then every witness will take benefit of his examination-in-chief, which at times would not depict the true facts which can only come through his cross examination. The Court has to adopt the proper way while appreciating the evidence of a witness. Picking and choosing of such minor portion of statement does not amount to pragmatic and positive inference and approach. The court is supposed to draw a conclusion keeping in view the substance of entire deposition of witness and one sentence cannot be torn out of context¹. While considering the evidence as a whole and arriving at a certain conclusion on the basis thereof, there are three things which are kept in view; the volume of evidence, the weight of the evidence and the probability of evidence. It is the cumulative effect of all the three aspects of the evidence that finally determines a certain question of fact². It is also a settled proposition of law that any documents either filed with the evidence or relied upon in the written statement cannot be taken into consideration unless the witness enters into the witness box and is tested with the rigors of cross examination and only then the said piece of material or evidence can be relied upon or looked into. Purpose of cross examination of a witness is to test the veracity of the statement of the witness made out in examination in chief. Therefore, equal importance should be attached by the court to the cross examination of a witness during evaluation of the evidence of such witness. In the peculiar facts and circumstances of this case, the trial court as well as the appellate court should not have believed the evidence of this witness. The court must make every attempt to separate falsehoods from the truth, and it must only be in exceptional circumstances, when it is entirely impossible to separate the grain from the chaff, for the same are so inextricably intertwined, that the entire evidence of such a witness can be relied upon or for that matter be discarded. Thus viewed, the version of PW-5 hereinabove is totally unacceptable and not even remotely credible. It is also a cardinal principle of appreciation of evidence that the court in considering as to whether the deposition of a witness and/or a party is truthful or not may consider his conduct as the court has to assess to what extent the deposition of a witness can be relied upon.

¹ 2016 C L C Note 73 RIAZ AHMAD V. FAZAL HUSSAIN

² Fatima Bai v Shaikh Muhammad Zaki (1990 CLC 1064)

10. As to the evidence of other witnesses, it is word against word and neither has been appreciated nor relied upon by the Courts below. Moreover, this witness, who is the custodian of record and was brought in evidence as the witness of the Respondent No.1, has clearly in his examination-in-chief supported the case of the Applicants and not of Respondent No.1.

11. The upshot of the above discussion is that both the Court(s) below have miserably failed to appreciate the evidence properly and it is a fit case of misreading and non-reading of evidence led by the parties, and therefore requires interference by this Court while exercising its revisional jurisdiction under Section 115 CPC, in view of the dicta laid down by the Hon'ble Supreme Court in the case of, ***Nazim-Ud-Din v Sheikh Zia-Ul-Qamar (2016 SCMR 24); Islam-Ud-Din v Mst. Noor Jahan (2016 SCMR 986); Nabi Baksh v. Fazal Hussain (2008 SCMR 1454); Ghulam Muhammad v Ghulam Ali (2004 SCMR 1001), & Muhammad Akhtar v Mst. Manna (2001 SCMR 1700)***. Since both the Court(s) below have failed to exercise the jurisdiction so vested in them and have completely misread the evidence on record while decreeing the Suit of the private respondents; therefore, this Civil Revision Application merits consideration and was therefore **allowed**, by means of a short order in the earlier part of the day by setting aside the impugned judgment of the Appellate Court dated 23.06.2009 and that of the trial Court dated 14.02.2001 and as a consequence, thereof, F.C. Suit No. 35 of 1995 filed by the private Respondents stands dismissed. These are the reasons in support of such short order.

12. The Civil Revision Application is **allowed**.

Dated: 18.04.2022

J U D G E

Ahmad