

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision No. S – 40 of 2006

Khadim Hussain Rajpar & another v. Muhammad Ibrahim Rajpar & others

Civil Revision No. S – 41 of 2006

Khadim Hussain Rajpar & another v. Muhammad Ibrahim Rajpar & others

Date of hearing: **14-03-2022**

Date of announcement: **22-04-2022**

Mr. Sardar Akbar F. Ujjan, Advocate for the Applicants.
Mr. Abdul Qadir Shaikh, Advocate for the Respondents.
Mr. Ahmed Ali Shahani, Assistant Advocate General Sindh.

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J U D G M E N T

Muhammad Junaid Ghaffar, J. – Through both these Civil Revisions, the Applicants have impugned a common judgment dated 05-12-2005 passed by the IIInd Additional District Judge, Khairpur in Civil Appeals No.67 & 68 of 2003, whereby while dismissing both the Appeals, a consolidated judgment dated 31-05-2003 passed in leading F.C. Suit No.28 of 2001 along with F.C. Suit No.79 of 2001 has been maintained, through which the Suit of Applicants was dismissed and that of the Respondents was decreed.

2. Heard learned Counsel for the parties and perused the record.
3. Record reflects that the Applicants filed F.C. Suit No.28 of 2001 and sought the following relief(s):

- a) *That this Honourable court may be pleased to declare that the plaintiffs are lawful owners of suit land S.NOs:120/3,4, and 121/1,2,3,4 measuring 24 acres in deh Baseero taluka Faiz Ganj as legal heirs of deceased Din Muhammad Rajper.*
- b) *That this Honourable Court may also be pleased to direct the defendant NO: 1 to hand over the vacant possession of suit land to the plaintiffs according to their respective shares as legal heirs of deceased Din Muhammad Rajper as entered in revenue record.*
- c) *It is further prayed that this Honourable Court may be pleased to direct the defendant to pay the mesne profits to the plaintiffs at the rate of Rs:10,000/- per annum for last 3 years and the same rate for future, till the vacant possession of the suit land is handed over to the plaintiffs.*
- d) *That costs of the suit be borne by defendant.*

- e) *Any other relief which this Honourable Court deems proper be awarded to plaintiffs.*

4. Similarly, during pendency of the above Suit, Respondent No.1 and others also filed F.C. Suit No.79 of 2001 before the same Court and sought the following relief(s):

- a) *That this Honourable court may be pleased to declare that the plaintiffs are owners of the suit land by virtue of inheritance from their elder late Haji Mehmood / husband of plaintiff NO: 2 and 3 and father of the plaintiffs NO: 1,4,5 and 6.*
- b) *To declare the orders dated 12.2.98 passed by defendant NO:05 order dated 21.9.2000 passed by the defendant NO:6 and order dated 24.9.2001 passed by the defendant NO:7 and the cancellation note put by the defendant NO:4 in the sale entry NO:39 as illegal, unwarranted, in law unlawful and against the principles of the natural justice and not binding upon the plaintiffs.*
- c) *To issue mandatory injunction in favour of the plaintiffs thereby directing the defendant NO:4 to restore the sale entry NO:39 dated 12.10.76 in favour of the plaintiffs.*
- d) *To grant permanent injunction in favour of the plaintiffs thereby restraining the defendants from interfering with the legal rights, title possession and enjoyment of the plaintiffs over the suit land on the basis of the orders passed by the defendant NO:4 to 7 or creating and further change in any manner whatsoever.*
- e) *To award the costs of the suit and any other relief deems fit and proper in the circumstances of the case.*

5. Learned Trial Court consolidated both the Suits and while treating F.C. Suit No.28 of 2001 filed by the present Applicants, as the leading Suit, settled the following consolidated issues:

1. *Whether the suit is not maintainable according to law? (OPD)*
2. *Whether the suit is time barred? (OPD)*
3. *Whether the sale entries of suit land in favour of defendant No.1 are fictitious and fraudulent? (OPP)*
4. *Whether the possession of defendant No.1 over suit land is illegal and unlawful?*
5. *Whether orders dt. 12-2-1998, 21-9-2000 and dt. 24-9-2001 are illegal unwarranted, unlawful, against the principles of justice and not binding upon the (plaintiffs) in suit No.79/2001 defendant No.1? (OPD)*
6. *Whether plaintiff is entitled for relief sought for by him? (OPP)*
7. *What should the decree be?*

6. After evidence, the learned Trial Court was pleased to dismiss the Suit of the Applicants; whereas, the Suit of Respondent No.1 and others

was decreed. Being aggrieved, two separate Appeals were preferred by the present Applicants and through impugned judgment, both the Appeals have been dismissed and the judgment of the Trial Court has been maintained.

7. From perusal of the record and the issues settled by he learned Trial Court, it appears that there are two issues between the parties which require consideration of this Court and have also been attended to by the Courts below. The first one is that whether the Suit of the Applicants was time barred; and the second is that whether there was any oral sale made on 12-10-1976 by late Din Muhammad, the father of Applicant No.1 and the husband of Applicant No.2, with his brother, the deceased father of Respondent No.1 by appearing before the Mukhtiarkar, Faiz Ganj.

8. It is not in dispute that the Suit land was owned by Applicant No.1's father Din Muhammad by way of an allotment under the Colonization and Disposal of Government Lands Act, 1812 ("**Act**"); whereas, it is the case of Respondent No.1 that Din Muhammad had sold the property to his father (Haji Mahmood Rajpar brother of Din Muhammad) by way of an oral sale (Ex.59/B) by appearing before the concerned Mukhtiarkar, Faiz Ganj. It is a matter of record and insofar as the Suit land is concerned, it was given to Din Muhammad as a tenant under the Act, and apparently, the oral sale was also recorded as per the claim of Respondent No.1 on the very same date when it was allotted. Now whether the purported sale as claimed, was hit by Section 19¹ of the Act and whether if at all a sale with transfer of title was a valid sale or not is a moot question, which is to be addressed in detail. However, before coming to this question, as to the Suit of the Applicants being within limitation or not; as a matter of record, it may be observed that insofar as father of Respondent No.1 is concerned, he, immediately after death of his brother i.e. Din Muhammad, had disowned the Applicants to be the legal heirs of Din Muhammad. According to Respondent No.1's father, Din Muhammad had some other wife namely Mst. Hayat Khatoon, from whom he had no children, and therefore, his case was that he was the main

¹ 19. Except as provided in section 17, none of the rights or interests vested in a tenant by or under this Act, shall, without the consent in writing of the [Commissioner], or of such officer as [he] may by written order empower in this behalf, be transferred or charged by any sale, exchange, gift, will, mortgage or other private contract, other than a sub-lease for not more than one year in the case of a tenant who has not acquired a right of occupancy, and seven years in the case of a tenant who has acquired a right of occupancy. Any such transfer or charge made without such consent in writing shall be void, and if (after the commencement of this Act) the transferee has obtained possession, he shall be ejected under the orders of the Collector:

Provided that the right of sub-letting conferred by this section shall not release any tenant from a condition requiring him to reside in the estate in which his tenancy is situated.

surviving legal heir of Din Muhammad in addition to his second wife; whereas, insofar as the present Applicants are concerned, his case was that they are not the legal heirs as his brother never entered into any contract of marriage with Applicant No.2. To further substantiate his claim, he filed a Civil Suit No.134 of 1981 in this regard and the said litigation finally culminated by way of judgment passed by the Hon'ble Supreme Court on 22.5.1990 in CPLA No.21-K/1989. Apparently, the matter ended in favour of the Applicants and against the father of Respondent No.1, and their stance that the Applicants were not legal heirs of Din Muhammad was repelled. It is thereafter that the present Applicants initiated some proceedings before the official Respondents and as a first instant approached the Colonization Officer, Sukkur Barrage, who on 27-08-1995 issued a T.O. Form in respect of the Suit land in favour of Din Muhammad, the father of the present Applicants. Pursuant to such T.O. Form, they then approached the Assistant Commissioner, Mirwah, who vide his order dated 12.2.1998 came to the conclusion that the oral sale claimed by the Respondents predecessor in interest had no legal value and accordingly, the entry recorded therein was ordered to be cancelled. Being aggrieved, Respondents father preferred an Appeal before the Deputy Commissioner, who vide his order dated 12.4.1999 set-aside the order of the Assistant Commissioner. The said order was then impugned by the present Applicants and by way of order dated 21-09-2000, the then Commissioner, Sukkur Division, allowed the Appeal by setting aside the order of Deputy Commissioner and restoring the order of the Assistant Commissioner, Mirwah, already passed in favour of the present Applicants and as a consequence thereof, the entry recorded in favour of father of Respondent No.1 was cancelled. The Respondents being aggrieved preferred a Revision Application before Member, Board of Revenue, who vide order dated 24.9.2001 was pleased to dismiss the Revision by maintaining the order of the Commissioner. Despite such order(s) in favor of the Applicants, and no further challenge to the same on behalf of Respondents, it appears that its non-implementation, resulted in filing of Civil Suit first by the Applicants and then by the Respondent, which has now finally resulted in filing of present Revision Applications.

9. The claim of Respondent No.1's father is based on an oral statement of sale recorded before the concerned Mukhtiarkar and it has been pleaded that such sale was recorded way back in 1976 and was never challenged; hence, the Suit of the Applicants was also time barred; whereas, they had

no *locus standi* to challenge such sale. Insofar as the issue of limitation is concerned, it may be observed that the learned Trial Court failed to give any independent finding either in favour of the Applicants or the Respondents; however, the Appellate Court has touched upon this aspect and has come to the conclusion that the Suit was time barred. So far as the finding of the Appellate Court is concerned, I am of the view that the same cannot be sustained for a number of reasons. The learned Appellate Court has dragged itself into an unnecessary issue and has completely ignored the fact that any cause of action for the present Applicants could only have accrued from the date when finally, the matter of they being legal heirs of Din Muhammad was decided. It was immaterial that as to when the oral sale had taken place. From day one, the claim of the Applicants as being legal heirs of Din Muhammad has been continuously denied; rather the father of Respondent No.1 even filed a Suit seeking such declaration and ultimately lost his claim up to the level of Hon'ble Supreme Court. It is only thereafter that the present Applicants kept on searching about the properties of their father and as soon as they were issued a T.O. Form by the Colonization Officer in 1995, they initiated proceedings and were even successful up to the level of Member, Board of Revenue, in the year 2001. The present Suit filed by them in 2001 was within limitation and could not have been non-suited as held by the Courts below. Notwithstanding this, even if they had approached the Court belatedly, the time consumed by them before the Colonization Officer and the Revenue authorities can be looked into and benefit of Section 14 of the Limitation Act ought to have been granted; therefore, it is hereby held that the Suit was within limitation.

10. As to the claim of Respondent No.1's father that the Suit property was sold by way of an oral sale, it needs to be appreciated that in terms of Section 19 of the Act, no such sale between a tenant and a buyer can be held to be absolute and immediate until the mandatory period as prescribed therein has been completed and the entire installments have been paid and right of occupancy has been made absolute in the name of the tenant by concerned authority. It can only materialize after the allottee has acquired a permanent right of occupancy. The law in this regard by now has been settled by the Hon'ble Supreme Court in a number of cases, and it has been held that though such a sale can be entered into by two private parties and there is no legal bar on such a sale; however, the same can only be a deferred sale and as and when the owner / seller has become its absolute

owner first by making payment of all installments and then by completing the minimum mandatory period as a tenant, only then the property can be sold and a transfer can be affected. Any transfer before acquiring of such right would be void and cannot be acted upon. The Hon'ble Supreme Court in the case of Hakim Ali and another v. Atta Muhammad and another (1981 SCMR 993) had examined the express words of section 19 of the Act that whether any such agreement entered into by the parties had the effect of transferring or changing by sale any right or interest vested in a tenant under the Act. After a thread bare examination of the agreement before it finally the Hon'ble Supreme Court held that *“The sale itself and the performance of the agreement to sell was delayed to a time after the grantees had acquired proprietary rights and it did not in praesenti transfer or have the effect of charging or encumbering the rights or interest of the tenants as such”*. It was further held that *“on the facts of the case we are clear that the document was merely an agreement to sell, the specific performance of which was postponed to a date when the grantees had acquired the proprietary rights. Such a reservation in the deed itself showed the awareness of the prohibition, the recognition of its legal effect and an effort on the part of the contracting parties to keep themselves well within the confines of the law and to act in accordance with the requirements of the law. Such an agreement to sell cannot be said to be violative of either the express provisions of section 19 of the Act or of the public policy behind such a statutory provision”*.

11. In the case of Daulat Ali through Legal Heirs and 2 others v. Ahmad through Legal Heirs and 2 others (PLD 2000 SC 792) it has been held as under;

“6. Indeed the document entered into between the parties was merely an agreement to sell, specific performance whereof was postponed till such time the allottee had acquired full ownership rights. Such a reservation was made in the document itself which reflected the awareness of the constraints, the recognition of its legal effect and an effort on the part of the parties to the contract to keep themselves well within confines of law and to act strictly in consonance with the requirements of the statute. We are of the considered view that such an agreement to sell cannot be held to be violative of either the express provisions of section 19 of Act, 1912 or of the public policy behind such statutory provision. There have been a number of cases in which even oral agreement of sale by vendor in favour of vendee was held to be not hit by the provisions of section 19 of Act, 1912. This Court has already settled the law on the subject in the cases reported as *Hakim Ali v. Atta Muhammad 1981 SCMR 993*, *Muhammad Iqbal v. Muhammad Hussain PLD 1986 SC 70*, *Rehmat Bibi v. Jhando Bibi 1992 SCMR 1510*, *Sher*

Muhammad Khan v. Ilam Din 1994 SCMR 470 and Abdul Ghani v. Fatima Bibi 1994 SCMR 1786.”

12. In the case of *Mst. Rehmat Bibi and others v. Mst. Jhando Bibi and others* (1992 SCMR 1510), the Hon’ble Supreme Court has been pleased to observe that “*In the conclusion, however, learned counsel admitted that in this case when the (alleged) agreement was entered into, the proprietary rights had not been granted to the allottee/grantee. They were subsequently granted to his successors. Otherwise too, he was unable to contest the proposition that the bar in section 19 is against the alienation and not against the agreement and that being so the agreement could be enforced through specific performance after the grant of proprietary rights and this is what has happened in this case.*” Similar view has been expressed in the case of *Abdul Jabbar and others v. Mst. Maqbool Jan and others* (2012 SCMR 947).

13. In the case of *Syed Hussain Naqvi and others v. Mst. Begum Zakara Chatha through LRs and others* (2015 SCMR 1081) again it has been held as under;

“10. So far as the question regarding the bona fide of the appellants is concerned, we have noted that the appellants were aware of the litigation between respondent No. 1 and respondent No 2, as in reply to para 9 of the plaint, they had admitted the litigation. As the appellants were aware of the earlier contract, they should have restrained themselves from entering into subsequent agreement with respondent No. 2. In such circumstances, they are not bona fide purchasers.

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14. In *Abdul Jabbar v. Maqbool Jan* (2012 SCMR 947) this Court while relying upon the earlier case-law reported at *Mst. Rehmat Bibi and others v. Mst. Jhando Bibi and others* (1992 SCMR 1510) and *Abdul Jabbar v. Abdullah* (2006 SCMR 1541) has specifically held that “Section 19 of the Act bar “sale” and not to an agreement of sale.” In *Nasir Ali Shah v. Ahmad Yar* (2011 CLC 1566) the learned Lahore High Court in similar circumstances where vendor in prior agreement had undertaken to execute sale-deed in favour of plaintiff (prior purchaser) on grant of proprietary rights and had agreed to sell corpus of property to plaintiff, which would come into operation after grant of proprietary rights, has held that “according to terms of such prior agreement, plaintiff was carrying a risk to lose his money, if proprietary rights were not granted to vendor. According to such prior agreement, in case of failure of vendor to execute sale-deed after grant of proprietary rights, he was bound to pay to plaintiff amount specified therein in addition to earnest money already paid. Such prior agreement did not necessitate obtaining of prior permission under Section 19 of Colonization of Government Lands (Punjab) Act; 1912.” Same was the view of the learned Lahore High Court in *Muhammad Aslam v. Muhammad Anwar* (2006 YLR 2607) and *Muhammad Aslam v. Ghulam Aslam* (2002 MLD 1860) that such an agreement to sell did not fall within the mischief of section 19 of the Colonization of Government

Lands (Punjab Act), 1912 and that Provisions of section 19 of the said Act do not debar vendors to execute agreement to sell with vendees.”

14. In the case of *Muhammad Sadiq v. Muhammad Ramzan and 8 others* (2002 SCMR 1821) it has been held as under;

“..... The temporary transfer of rights and interest in the property either in full or in part is not a sale and the sale of Government land by an allottee without obtaining proprietary rights would not convey the title due to the legal bar contained in section 19 of the Act 1912 and such sale would take effect only on the acquisition of proprietary rights by the vendee/allottee. The sale of the Government property without proprietary rights through registered or unregistered document would not confer title in the transferee and being only a contract of sale may be relevant to establish title on the acquisition of proprietary rights by the transferor. The transfer of ownership rights through a document compulsorily registrable without its registration, would not create title but in exceptional circumstances even an unregistered document can also create a valid title.

..... Thus the sale and transfer of ownership rights of the suit property without prior sanction in terms of section 19 of the Act of 1912 either through registered sale-deed or unregistered document would not be a sale and would only be a contract of sale which would not be hit by the provisions of section 19 of the Act, 1912 and would be enforceable in law as sale after acquisition of proprietary rights by the vendee/allottee. Thus the restriction contained in section 19 of the Act 1912 would not prohibit the vendee from executing a document relating to the sale of the property for consideration and delivery of possession. The bar is only confined to the extent of permanent transfer of ownership rights in the property and therefore, the registered sale-deed in such a situation would not get preference over the unregistered sale-deed to claim better title.

This is settled law that the title of the property cannot be conferred to a third person by the allottee of the Government land without obtaining the proprietary rights due to the prohibition contained in section 19 of the Act of 1912 and the sale in either form would not be validated till the acquisition of proprietary rights by the vendor. The value of each sale-deed executed in favour of the respondents was less than rupees 100 and was not required to be registered, therefore, the same at the time of execution would acquire the status of contract of sale which would be enforceable as a legal document for the purpose of establishing the title on the acquisition of proprietary rights by the vendor.

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In the light of the above discussion, we hold that sale of Government land by the allottee without proprietary rights would not take legal effect and operation of the same would remain suspended till the proprietary rights of the property are not acquired by the vendor.”

15. From perusal of the case law as above, it can be seen that any sale entered into by a tenant who has been allotted a land under the Act, to a proposed buyer, would not ipso facto be void or hit by section 19 of the Act, if two basic conditions are met. First being, it has to be admitted by the parties that this is merely a private sale and though possession is being handed over; however, it is a deferred sale and land cannot be conveyed

or transferred; and second, the sale would only be complete or performed when the tenant / seller has acquired his rights of occupation after payment of installments and completion of period as provided therein. For a sale to be valid of such a land, these two conditions are to be met and have to be part of the agreement between the parties. Here, the question is not that whether the sale by itself was void for having been entered into by violating the express terms of section 19 of the Act; but the real question is as to how on the same date when land was allotted to Din Muhammad an oral sale was entered into as claimed; and even if so; how and in what manner the land could have been conveyed or transferred by way of a mutation entry by the concerned Mukhtiarkar. At the most it could have remained as an agreement of sale; but in no manner it could have materialized into a sale deed or for that matter transfer of the same by way of a mutation entry. When considered that from day one the father of Respondent No.1 (buyer) had denied the Applicants being legal heirs of his brother Din Muhammad, and the manner in which he has claimed sale of the land and its subsequent transfer in his name, all appears to a sham. It is but a managed transaction with no legal basis as the Mukhtiarkar was not authorized to record the mutation entry. Notwithstanding that even otherwise, a mutation entry by itself is not a title document and is merely a record of fiscal purpose. It is well settled that mutation entry is not a document of title, which by itself does not confer any right, title or interest, and the burden of proof lies upon the person, in whose favor it was mutated to establish the validity and genuineness of transfer in his/her favor; it is also well settled law that if the foundation is illegal and defective then entire structure built on such foundation, having no value in the eyes of law, would fall on the ground². It is settled principle of law that mutation confers no title, whereas, once a mutation is challenged, the party that relies on such mutation(s) is bound to revert to the original transaction and to prove such original transaction which resulted in the entry or attestation of such mutation in dispute³.

16. Here in this matter, the sale has been recorded immediately on the day or a day thereafter when the Suit property was allotted to Din Muhammad, and not only this, a mutation entry has been recorded in the Revenue record. How this could have been done has gone unexplained and it is only the mutation entry which is the entire basis of the Respondents'

² Nasir Rahim v Province of Sindh (2021 CLC 579)

³ Muhammad Akram v Altaf Ahmed (PLD 2003 SC 688) & Ahmed v Nazir Ahmed (2019 CLC 1841)

case. If no sale could have been affected in absolute terms and the sale ought to have remained a deferred sale, then how the property could have been transferred or recorded in the mutation records of the Revenue Department. Such a sale could have only been to the extent that possession be given and the land can be utilized by the buyer who can also make payments of the installments on behalf of the allottee, but under no circumstances the property could have been transferred without following the mandatory procedure and overcoming the impediment as prescribed under Section 19 of the Act.

17. There is another aspect of this issue as well that if the property was sold to the father of Respondent No.1 in 1976 and a mutation entry was also recorded in his favour, then as to how in the year 1995, the Colonization Officer could have issued a T.O. Form in favour of the father of Applicant No.1 i.e. Din Muhammad. This question has escaped the attention of both the Courts below and they have miserably failed to look into this very important aspect of the matter. In that case, it ought to have been the Respondents who should have sought specific performance of the oral sale agreement as alleged after 1995 and not before the issuance of T.O. Form. Admittedly, this is not the case nor the parties have so pleaded.

18. The question that the oral sale was proved on behalf of Respondent No.1 which has also heavily persuaded the Courts below in decreeing the Suit of Respondent is of no material consequence and has not been touched upon by this Court after coming to the conclusion that no absolute sale with transfer of title could have been made and entered into by Din Muhammad, the deceased father / husband of the Applicants.

19. 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, whereas, the Courts below were misdirected to hold that the Suit of the Applicants was time barred; and such question of limitation goes to the root cause and improper exercise of jurisdiction, and therefore requires interference by this Court while exercising its revisional jurisdiction, in view of the dicta laid down by the Hon'ble Supreme Court in the case of, ***Nazim-Ud-Din v Sheikh Zia-UI-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 and dismissing the Suit of the Applicants; therefore, both these Civil Revision Applications merits consideration and are accordingly **allowed**. The impugned judgment of the Appellate Court dated 05-12-2005 and that of the Trial Court dated 31-05-2003 are hereby **set aside**. The F.C. Suit bearing No.28 of 2001 filed by the present Applicants is hereby decreed to the extent of prayer clauses (a) & (b) and F.C. Suit bearing No.79 of 2001 filed by the Respondents stands dismissed.

Dated: 22-04-2022

J U D G E

Abdul Basit