

## **IN THE HIGH COURT OF SINDH BENCH AT SUKKUR**

**Civil Revision No. S – 42 of 2006**

**Khadim Hussain Rajpar & another v. Mst. Bhan Wari & others**

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

Date of Judgment: **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 this Civil Revision, the Applicants have impugned judgment dated 05-12-2005 passed by the IInd Additional District Judge, Khairpur in Civil Appeal No.66 of 2003, whereby while dismissing the Appeal, the judgment dated 31-05-2003 passed by the Senior Civil Judge, Mirwah in F.C. Suit No.27 of 2001 has been maintained, through which the Suit of Applicants was dismissed.

2. Heard learned Counsel for the parties and perused the record.
3. It appears that the Applicant had filed a Suit for declaration, possession and mesne profits against Respondents seeking the following relief(s);

- a) *That this Honourable court may be pleased to declare that the plaintiffs are owners of the suit land viz: Block NO:31 & 32 measuring 30-00 acres in deh Baseero taluka Faiz Ganj, district Khairpur according their respective shares being legal heirs of deceased Din Muhammad and the oral sale subject to have been executed by deceased Din Muhammad in the name of the defendants NO: 1 as entered in revenue record as false, fictitious, fabricated, fraudulent, prepared in collusion with the staff of defendant NO:2. The same being in violation of the express provisions of law under registration Act and Transfer of property Act is illegal, void, abinitio and of no legal effect, hence nullity and does not confer any right, title or interest upon the defendant NO: 1 in respect of the suit land.*
- b) *That this Honourable court may also be pleased to direct the defendant NO: 1 to handover the vacant possession of the suit land viz: Block NO:31 & 32 total area 30 acres of deh Baseero taluka Faiz Ganj, to the plaintiffs according to their respective shares.*
- c) *That this Honourable Court be also pleased to direct the defendant NO: 1 to pay mesne profits at the rate of Rs.10000/- per annum for past three*

*years total Rs:30,000/- and at the same rate for further till the possession of suit land is handed over to the plaintiffs.*

- d) *That costs of the suit be borne by the defendant.*
- e) *Any other relief which this Honourable court deems fit and proper may be awarded to plaintiff.*

4. The Suit was contested by Respondent No.1; a written statement was filed and the trial Court settled the following issues.

1. *Whether the suit is not maintainable according to law? (OPD)*
2. *Whether the suit is time barred? (OPD)*
3. *Whether the husband of defendant No.1 had forcibly and illegally occupied the properties left by deceased Din Muhammad? (OPP)*
4. *Whether the sale entries of suit land in favour of defendant No.1 are fictitious and fraudulent, arranged by her husband by being in collusion with Revenue authorities? (OPP)*
5. *Whether sale documents executed by defendant Din Muhammad in favour of defendant No.1 during his life time? (OPP)*
6. *Whether plaintiff is entitled for the relief sought for by him? (OPP)*
7. *What shall the decree be?*

5. The trial Court after evidence came to the conclusion that the Applicants had not been able to prove their claim and accordingly the Suit was dismissed against which Appeal of the Applicants has also failed; hence, this Revision Application.

6. The Applicants Suit in question was for declaration, possession and *mesne* profits, and the entire case of the Applicants was premised on the fact that Applicant No.1's late father Din Muhammad was the real brother of Respondent No.1's husband, and as soon as Din Muhammad expired, allegedly, his brother took over all the properties left by Din Muhammad and even denied that Applicants are legitimate legal heirs of Din Muhammad on the premise that he had never entered into a wedlock with Applicant No.2. Insofar as the present Suit property is concerned, it is the case of Respondent No.1 that the same was sold by Din Muhammad in his life time to her, by way of oral statement; whereas, the case of the Applicant No.1 was that no such sale had been effected and all properties including the Suit property were usurped by his uncle i.e. brother of Din Muhammad and husband of Respondent No.1. Though the trial Court had settled various issues; however, for the present purposes, the precise issue which remains to be considered by this Court is "*whether the Suit filed by the present*

*Applicants was time barred” and “whether any oral sale was made by late Din Muhammad in favour of Respondent No.1”.*

7. As to the question of limitation is concerned, though both the Courts below have concluded that the Suit was time barred, however, it needs to be appreciated that insofar as the present Applicants and husband of Respondent No.1 are concerned, they were in litigation since the death of Din Muhammad inasmuch as the husband of Respondent No.1 not only denied that the present Applicants were legitimate legal heirs of Din Muhammad; but so also filed a Civil Suit seeking such declaration, as according to him, Din Muhammad only had one wife namely Mst. Hayat Khatoon; from whom he had no children, and therefore, he by himself (to the extent of 75% share) and the said wife (to the extent of 25% share) were the legal heirs and entitled for the entire property left by Din Muhammad. Ultimately, the matter ended before the Hon'ble Supreme Court and by way of judgment dated 22-05-1990 passed in CPLA No.21-K of 1989, it was held that the present Applicants were the legal heirs of Din Muhammad and the entire claim of the husband of Respondent No.1 was disbelieved, and as a consequence thereof, various properties which had been left by Din Muhammad and had been acquired by the Husband of Respondent No.1 as legal heir of Din Muhammad were declared as properties of the present Applicants being lawful legal heirs. The present Suit is in respect of a property, wherein it was claimed that the same was sold by Din Muhammad in his life time; therefore, the question of limitation, if any, would only arise from the date of order passed by the Hon'ble Supreme Court. On the contrary, the Courts below have observed that the Suit was time barred on the ground that though the Applicant Khadim Hussain in the year 1978 when his father died was approximately 08 years old, and therefore, he became major somewhere in 1988 or 1989 and had to file a Suit within three (03) years from attaining the majority age as per Article 44 of the Limitation Act; whereas, the Suit was filed in 2001, and therefore, it was time barred. However, the Applicants' case is that though the litigation ended in their favour in the year 1990, but since Din Muhammad had left various properties and they kept on searching for the same, and finally, in the year 1998, it came into their knowledge that the Suit property was also usurped by the husband of Respondent No.1 and Applicant's No.1 uncle in the manner that it was purportedly sold by Din Muhammad by way of oral statement. According to the Applicants, upon this development, in the month of February 1998, they came to know about this fraud in respect of

the Suit land as the Respondent No.1 filed a Civil Suit bearing No.21 of 1998 before Senior Civil Judge, Thari Mirwah, for declaration and injunction; whereas, the Applicants contested the above Suit and filed their written statement. However, ultimately, Respondent No.1 filed an application under Order 23 Rule 1 CPC, and withdrew the same with permission to file a fresh, for which no notice was given to the Applicants, and thereafter, the Applicants, being aggrieved, also filed a Civil Revision Application before the Court of District Judge, Khairpur, and therefore, the cause of action accrued to them in 1998 in respect of the Suit property and continued till its withdrawal and the disposal of the Revision Application; hence, their Suit was within time. It may also be relevant to examine the response of Para 8 of the plaint in the written statement of Respondent No.1 which reads as under;

8. That the contents of para No.8 are not admitted as stated. The plaintiffs were fully aware of the sale of the suit land to the answering defendant but they did not challenge the same even before any revenue authority who remained silent in spite of the knowledge that the possession of the suit land is lying with the answering defendant since the date of its purchase but even did not file any proceedings before the competent court of law except the present civil suit which has been filed after a long time, after thought and with malafide intention to get back the suit land from the answering defendant illegally. *As regards the filing of the Civil Revision against the order of the Senior Civil Judge is concerned, the answering defendant is not aware of the same because she has not received any notice of the said revision. Let the plaintiffs to prove.*

Perusal of the aforesaid reply to Para 8 of the plaint reflects that no specific denial to the very filing of Suit by Respondent No.1 is given; whereas, the denial, if any, is generic and evasive. The Applicants had even mentioned the Suit number which was filed by Respondent No.1; but in the written statement an altogether irrelevant response has been given. It is quite surprising that such fact of the matter has neither been discussed by the two Courts below nor they have dilated upon the same, and apparently, the findings given by the two Courts below as to limitation does not appear to be correct as it has not considered the facts available on record. Even otherwise, it needs to be appreciated that this is a case wherein the Applicants are claiming their right in property after a decision from the Hon'ble Supreme Court as being legal heirs of Din Muhammad, and in such cases, the rule of limitation it not to be applied so strictly so as to non-suit the said legal heirs. In view of such position, it appears that the two Courts below have erred in holding that the Suit was time barred, and therefore, such finding in respect of limitation is hereby overturned and it is held that the Suit was within limitation.

8. As to the second issue that whether any oral sale was made, it would be advantageous to refer to the evidence of Respondent No.1 (Exh-41) and her two witnesses namely, Habibullah (Exh-42) and Rahib (Exh-43) which reads as under;

**Evidence of Mst.Bhanwari (Ex.41)**

Examination in Chief to Mr. Mushtaq Ahmed Shaikh Advocate for Defendants;

Deceased Din Muhammad is known to me. He was my brother in law. He sold out an agricultural land to me in presence of witnesses Habibullah and Imdad Ali for consideration of Rs.15,000/- such sale was brought in writing. I put my RTI on it and also the witness put their thumb impression such record is mutated. I see attested copy of record of right No.16 it is same true and bears my thumb impression. I produce the same as Exh-41-A, it also bears thumb impression of witnesses. I produce deh jo form No.VII-Alaf as Exh-41-B. After sale and mutation, the possession of the land was delivered to me which is in my possession till today. Plaintiff Khadim Hussain was no concern with the land in suit. The present suit filed by the plaintiff is false one.

Deceased

“XXX Mr. Sardar Akbar F. Ujjan Advocate for plaintiffs.

Deceased Din Muhammad had one wife namely Hayat Khatoon. It is correct to suggest that Mst. Mubarak Khatoon was also of deceased Din Muhammad. It is correct to suggest that plaintiff No.1 is son of Din Muhammad. It is incorrect to suggest that plaintiff No.1 was 8 years old at the time of death of Din Muhammad. Voluntarily says that he was 10 years old. It is correct to suggest that plaintiff No.2 is illiterate woman. It is correct to suggest that plaintiff No.2 was house old women folk. It is incorrect to suggest that after death of Din Muhammad plaintiff No.1 and 2 were ousted from the house by my husband Mahmood. It is incorrect to suggest that he occupied the entire property of Din Muhammad including property papers. **It is correct to suggest that my husband Mahmood has record the statements that plaintiff No.1 is not son of Din Muhammad before Mukhtiarkar, F/Ganj.** I do now know whether Mukhtiarkar F/Ganj has forwarded the statement/report to D.C Khairpur prepared on the basis of statement that plaintiff No.2 is not son of Din Muhammad. It is incorrect to suggest that the landed property situated in deh Bago Dhoro taluka Bhiria was mutated in the name of Mst. Hayat Khatoon to the extent of 0-25 paisa share and remaining in the name of Mahmood. It is incorrect to suggest that the mutation was reversed in favour of plaintiffs to the extent of their share on the instruction judgment of Hon'able High Court of Sindh. **I do not remember the survey numbers of the land in the suit.** The area of the land is 32-20 acres. The land was given to me for the consideration of Rs.15000/- and not at price per acre. **I do not remember the year of sale. The sale took place in the office of Mukhtiarkar F/Ganj in my presence.** It is incorrect to suggest that I do not had the land in my name prior to the land in suit. I had 4/5 acres of land prior to the land in suit. The land was given to me after the land in suit. The amount of consideration was given to me by my husband. It is incorrect to suggest that my husband did not give me the amount of consideration for land in suit. It is incorrect suggest that I was not married with Haji

*Mahmood at the time of purchase of land in suit. It is correct to suggest that the property was mutated in my name with my father's name and not with husband name. I see Exh.41-A I can not say which of thumb impression of mine. It is incorrect to suggest that the document Exh.41-A does not bear my thumb impression it is correct to suggest that two thumb impression of witnesses Habibullah and Imdad Ali. It is incorrect to suggest that impression of Imdad Ali was in personated by some one else. **Witness Imdad is resident of Hussain pato which is near Baseero. Witness Habibullah Rajpar reside in village Baseero.** It is incorrect to suggest that thumb impression was not put by witness Habibullah Rajpar. **I can not say where Din Muhammad signed at documents Exh.41-A because at that time I was not present.** It is incorrect to suggest that Din Muhammad did not signed on the documents. It is correct to suggest that I can not say who identified the witnesses and Din Muhammad. **It is correct to suggest that I did not appear before Mukhtiarkar F/Ganj.** It is incorrect to suggest that I have prepared false document therefore both the witnesses have not appeared in this court for evidence. It is correct to suggest that the sale was not registered. It is incorrect to suggest that the false documents were prepared by Haji Mahmood due to his influence in official circle. It is incorrect to suggest that the land in suit pertains to the plaintiff. It is incorrect to suggest that I have occupied that land playing fraud in collusion with my husband. It is incorrect to suggest that I am deposing falsely.”*

#### **Evidence of Habibullah (Ex.42)**

Examination in Chief to Mr. Mushtaq Ahmed Advocate for Defendants.

Defendant No.1 is known to me and so also deceased Din Muhammad was known to me. There was talk about sale of Agricultural land between defendant No.1 and deceased Din Muhammad. Din Muhammad sold out the land to defendant No.1 Mst.Bhanwari. The sale was brought in writing in my presence. I put my thumb impression on the writing of sale. I see document Exh-41-A it bears my thumb impression on the left side of the document. The statement of sale was brought in the knowledge of the vendor vendee and the witnesses. *At the time of sale, I was the witness so also Rahib Ali Lashari was the witness.*

“XXX Mr. Sardar Akbar F. Ujjan advocate for plaintiff.

*At the time of sale Din Muhammad used to reside at Bago Dharo. I was taken by Haji Mahmood to witness the sale. The sale was about 30/32 years back. The sale was made in village Baseero. **At the time of sale defendant No.1 was present. At the time of writing of sale defendant No.1 was also present.** The statement of sale was recorded in the office of Mukhtiarkar and I was know to every person. The amount of consideration was Rs:15000/- paid by Haji Mahmood. It was in my knowledge that Haji Mahmood ousted the plaintiff from the house after death of Din Muhammad on the pretext that plaintiff No.1 is not the son of Din Muhammad and plaintiff No.2 is not wife of Din Muhammad. I do not know that the entire property was occupied by Haji Mahmood after death of Din Muhammad. I do not know the land situated in deh Bago Dharo was mutated in the name of Haji Mahmood. I do not know that the present document were prepared fraudulently by Haji Mahmood under his influence and got my thumb impression. It is incorrect to suggest that I am giving false statement on the instance of defendant No.1.”*

**Evidence of Rahib (Ex.43)**

*“XXX Mr. Sardar Akbar F. Ujjan Advocate for plaintiff.*

***It is correct to suggest that I have not signed the statement of sale. It is correct to suggest that I was not present at the time of statement of sale. It is correct to suggest that I am hari of Muhammad Ibrahim. I am brought by Muhammad Ibrahim for evidence in this suit. I have no knowledge about the dispute between plaintiffs and defendant No.1.”***

9. From perusal of the aforesaid evidence, which has been led on behalf of Respondent No.1, along with her two witnesses it can be safely held that is neither confidence inspiring; nor it establishes the case that whether any oral sale was entered into by late Din Muhammad. Firstly, Respondent No.1 has said that the two witnesses of the oral sale recorded before the Mukhtiarkar were Habibullah and Imdad Ali, whereas, the witness Habibullah who was also examined has said that the other witness was Rahib Ai Lashari. Not only this, Rahib was also examined by Respondent No.1 in her support and he has candidly conceded that *he is not the witness of sale nor he was ever present at the relevant time.* Secondly, Respondent No.1 at one place says that the sale took place in the office of *Mukhtiarkar Faiz Gunj in my presence*, whereas, she in response to a suggestion says that *“I cannot say where Din Muhammad signed at the document Exh-41-A because at that time I was not present.”* She again replies that *“it is correct to suggest that I did not appear before Mukhtiarkar Faiz Gunj”*. On the other hand, witness Habibullah says that *“at the time of sale defendant No.1 (Respondent No.1) was present, at the time of writing of sale defendant No.1 was also present”*. Now there is too much of contradiction in the evidence of Respondent No.1 and her witnesses and it seems that both the Court below have completely failed to notice this. How could the evidence of Respondent No.1 and her two witnesses could be relied upon as they have given contradictory answers to the very stance of Respondent No.1. In fact, nothing stated by them could be believed when the evidence is looked into as a whole. It is really surprising and mind boggling that how the Courts below have relied upon this piece of evidence. It may be of relevance to observe that it was Respondent No.1 who had pleaded an oral sale, and therefore, it was incumbent upon her to prove it and not upon the Applicants to disprove it in the given facts and circumstances of the case coupled with state of relations between the Applicants and Respondent No.1’s husband. Moreover, the concerned Revenue official / Mukhtiarkar Faiz Gunj, before whom purportedly the oral

sale was recorded, was never examined nor any other supporting material from the Officials was brought before the Court. Similarly, the second attesting witness as claimed by Respondent No.1 was never examined; instead another person was examined as a witness, and therefore, merely for the reason that Respondent No.1 entered into the witness box and made some assertions, the Suit ought not to have been decreed by holding that Din Muhammad in his lifetime had sold the property by way of oral sale agreement. It was never proved to satisfaction. It needs to be appreciated that from day one, the husband of Respondent No.1 has made all efforts to deny the heirship of the Applicants Vis-à-vis Din Muhammad, and considering such conduct, the evidence so led on behalf of Respondent No.1 has to be looked into with utmost care, and on such basis, it does not appear that the oral sale agreement has been proved with any degree of acceptable evidence. Rather its execution is belied from her own evidence and that of her witnesses.

10. 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-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 dismissing the Suit of the Applicants; therefore, this Civil Revision Applications merits consideration and is 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.27 of 2001 filed by the present Applicants is hereby decreed to the extent of prayer clauses (a) & (b).

**Dated: 22-04-2022**

J U D G E

Abdul Basit