

ORDER SHEET
IN THE HIGH COURT OF SINDH, BENCH AT
SUKKUR

Civil Revision Application No. S- 215 of 2019

Date of hearing	Order with signature of Judge.
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Hearing of Case (Priority)

1. For Hearing of Main Case
2. For hearing of CMA 59/2020

Date of Hearing: **20-09-2021**

Date of judgment: **20-09-2021**

Mr. Abdul Jabbar Rajput, Advocate for Applicants.

Mr. Mukesh Kumar G. Karara Advocate for Respondents No.1 to 7.

Mr. Mehboob Ali Wassan, Assistant A.G.

J U D G E M E N T

Muhammad Junaid Ghaffar J., Through this Civil Revision Application the Applicants have impugned judgment dated 28.09.2019, passed by Appellate Court/District Judge, Naushehro Feroze in Civil Appeal No. 247 of 2019, whereby, the Judgment dated 25.06.2019 passed by the Senior Civil Judge, Moro, in F. C. Suit No. 18 of 2018, dismissing the Suit filed by the Respondents, has been set-aside and Suit has been decreed.

2. Learned Counsel for the Applicants submits that the Appellate Court has erred in law by setting aside the judgment of the Trial Court, whereby Suit was dismissed; that the Respondents had failed to prove their stance as no official witness was examined; that the Applicants owned property pursuant to various sale deeds, which were not even annexed with the plaint and were never exhibited by them, hence could not have been cancelled; that the Applicants through their written statement brought on record these documents as the Suit propertie(s) were sold to them by Respondent No.7 (mother) of remaining Respondents; that proper evidence was led, hence Trial Court was fully justified in dismissing the Suit of the

Respondents. In view of such position he has prayed for setting aside the judgment of the Appellate Court.

3. On the other hand, Respondents' Counsel has defended the judgment of the Appellate Court and submits that admittedly when the sale deeds were executed, all the Respondents except their mother, were minors; hence, sale deeds were void and therefore, no case is made out. According to him, alternatively, the sale deeds were fake and bogus and were never executed by the mother of the Respondents on her behalf; nor on behalf of the then minors. In support of his contention, he has relied upon *Abdul Hameed v. Shamasuddin* (PLD 2008 SC 140), *Muhammad Haneef v. Abdul Samad* (PLD 2009 SC 751), *Mst. Subhan Bibi v. Mst. Musarrat Jabeen* (PLD 1969 Karachi 563), *Faisal and others v. Mst. Khursheed Akhtar* (PLD 2015 Sindh 46), *Ghulam Muhammad v. Muhammad Jehangir* (2011 MLD 1393), *Jehanzeb and others v. Muhammad Israr and others* (2014 YLR 1939), and *Mst. Saleema v. Mst. Ramzan Bibi* (2007 YLR 910).

4. I have heard both the learned Counsel and perused the record. It appears that the Respondents filed a Suit for declaration, possession, cancellation and permanent injunction and primarily sought cancellation of sale deeds and the entries in revenue record entered in favour of the Applicants along with handing over possession of the Suit land. Learned Trial Court on the basis of pleadings of the parties settled the following issues:

"1. Whether the Suit of plaintiffs is maintainable at law?.

2. Whether the plaintiffs are legal and lawful owners of the Suit property and one Hayyat Khan and plaintiffs had inherited the same from their father and husband and as such they have every right title and interest upon the Suit property?

3. Whether the revenue entries and registered sale deeds shown in the plaint are false, fake null and void and same are liable to be cancelled?

4. Whether the plaintiffs have filed false and fake Suit and they have managed fake story and they are not entitled for any relief ?

5. What should the decree be?"

5. Insofar as the above issues are concerned, the Trial Court came to the conclusion that the Suit is not maintainable; the Plaintiffs were not the lawful owners; nor the sale deeds and revenue entries were liable to be cancelled and dismissed the Suit. Respondents being aggrieved impugned the same by way of appeal, whereby judgment of the Trial Court has been set aside and the Suit has been decreed as prayed. The Appellate Court formulated the following points for determination:

POINT NO.1 Whether the appellant No.7/plaintiff No.7 Mst.Suhni being mother of rest of the appellants/plaintiffs No. 1 to 6 was competent and qualified to sell the immoveable property of the minors/ appellants on their behalf which is valid and enforceable in the eyes of law and same is binding upon them?

POINT NO.2 Whether the appellant No.7/plaintiff has sold out the property in suit to the respondents No. 1 to 3/defendants No. 1 to 3 by registered sale deeds or otherwise and respondents No. 1 to 3/purchasers have proved the same, if yes, what its' effect?

POINT NO.3 Whether the suit of the appellants/plaintiffs is maintainable in the eyes of law?

POINT NO. 4 Whether the appellants/plaintiffs are entitled for the relief as claimed?

POINT NO.5 Whether the impugned judgment and decree did suffer from illegality and irregularity and liable to be set- aside?

POINT NO. 6 What should the judgment be?

6. The Appellate Court in respect of point No.1 came to the following conclusion:

“Both parties have led their evidence in trial Court and closed their sides through their respective statements. On perusal of the evidence it reveals that the suit property said to have been purchased by registered sale deeds dated 12.4.1995 by (Ex.4-D), dated 20.4.1995 (Ex.40-A), dated 24.11.1998 (Ex.4-C) and dated 20.5.2000 (Ex.40-D).

It has come on record that the suit property originally owned by late Gulan Khan son of Hayat Mari. After his death the property was transferred to his legal heirs/appellants/plaintiffs and such mutation had been effected in the record of rights in accordance with Mohammaden law.

On bare reading of the sale deeds Ex.40-A to 40-D it appears that the appellants/plaintiffs No. 1 to 6 were minors at the time of execution of the alleged referred documents and appellant No.7/plaintiff Mst.Suhini being mother of the minors executed sale deeds in respect of land in the question on behalf of the minors/shareholders. It is undisputed fact that original owner Gulan father of the appellants/ plaintiffs No. 1 to 6 and husband of the appellant/ plaintiff No.7 was expired before the date of

execution of alleged sale deeds and the appellant No.7/plaintiff Mst. Suhni being mother of the minors was a defective guardian. There was no evidence/contention that the appellant No.7/plaintiff No.7 Mst.Suhini had ever obtained any sort of guardianship certificate or permission from the competent court of law in respect of property of the minors for the purpose of sale of their property, hence as per law the appellant No.7/plaintiff No.7 being mother of the minors was a defective guardian and she was not competent or authorized to execute the sale deeds in respect of the property of the minors and such unauthorized agreement and transaction is a void and unenforceable in the eyes of law. I may refer the case laws reported in PLD of 2009 SC 751, 2011 MLD 13933, PLD 2015 Sindh 46 and 2011 MLD 337”

7. Perusal of the aforesaid findings reflects that the only point, which has persuaded the Appellate Court in setting aside the judgment of the Trial Court, is to the effect that sale deeds could not have been executed by the mother on her behalf or on behalf of the remaining Applicants, as they were minors at the time of such execution. It is not in dispute that the Respondents owned property in question as it had devolved upon all of them after expiry of their father; however, when the plaint is examined in juxtaposition with respect to their claim, as noted in point No.1 above, it appears that the stance of the Respondents in their Suit was contradictory by itself. If their case (to the extent of minors) had been only to the extent that their mother had sold out their share in the property, without their consent; or for that matter without lawful authority; or in violation of law as they being minors were required to be protected by way of permission from the Guardian Court; then in that case, they ought to have filed their Suit against their mother along with remaining defendants. They were required to sue her for having acted against the law and in allegedly syphoning of their share which was required to be protected in law. This was never their case, as they had come up with the plea that sale deeds were forged and fake, meaning thereby, that this issue as decided by the Appellate Court under point No.1, was never the point in issue. It wasn't required to be pleaded if that was the case. And since this was not their case, then the only plea which the Respondents could have taken in their plaint was that the sale deeds were fake and

bogus as they were never executed by their mother as she was also one of the Plaintiffs in the Trial Court. Both these pleas could not be agitated simultaneously, as they by itself destroy the case of the Respondents. They appear to be self-destructive. Either there was a sale deed executed by their mother, including their share, as a guardian or attorney; or there was not. It can't be both ways; nor it could be pleaded alternatively. This is so as it goes against the very foundation of the case so built up by the Respondents. While pleading point No.1 as above, they were not required to lead such evidence; rather, the same being a legal issue could have been decided by the Court, and has been done by the Appellate Court. However, this was never their case in the pleadings; as they had joined their mother as a Plaintiff, and there wasn't any prayer to that effect; nor the same is borne out from the record even otherwise. The learned Appellate Court seems to have been swayed by the fact that since this legal issue stands settled by the Superior Courts; hence, it was also applicable in the instant matter. But I may say, with respect, that this was not the case on facts; nor the approach of the Appellate Court could be appreciated in this regard, as this was never an issue coming out of the pleadings specially the plaint in the Suit. Application of a legal principle is always dependent upon the facts and circumstances of the case in addition to other linked issues. If the Plaintiff has not set up its case on any such settled legal proposition, then the Court must always remain cautious so as not to cause any injustice to the opposing party.

8. The case of the Plaintiffs / Respondents along with their mother was that no sale deed had been executed by their mother. Therefore, if there was not any sale deed as alleged, then it was incumbent upon them to prove the same to be forged and fake and lead evidence to that effect. They, in this case didn't do it as required in law. They in fact, have miserably failed to prove their case. They failed to call their mother in the witness box, who was the most

suitable person to testify against the claim of the Applicants / Defendants. The initial burden was on the Respondents, and if once they had been successful, only then the Applicants were required to disprove the same. It must not be lost sight of the fact that it was the Respondents who had come forward to seek cancellation of sale deed. Therefore, they had to prove and substantiate that these sale deeds were fake and bogus and had never been executed by their mother. And for that they were required to call relevant officials and any other witnesses in support of their claim. Mere denial of the sale deeds, so belatedly, would not have sufficed, in absence of cogent and reliable evidence to that effect. On the other hand, learned Appellate Court has come up by pointing defects in the evidence of the Applicants/defendants in the Suit. This on the face of it, appears to be a wrong approach. The applicants were not claiming ownership on the basis of any gift deed, wherein, may be the onus on the donee is on a higher pedestal, if the gift deed has been challenged. Here, the sale deeds had been executed; was a registered instrument; according to the Applicants, a proper power of attorney had been executed in favor of Respondent No.7 (mother) by all the other remaining owners; therefore, it was the responsibility of the Respondents to summon as many official witnesses they wanted, to seek cancellation of the same. They could not have taken benefit of any defects in the evidence of the Applicants. The case as set-up in the plaint was that Applicant / Plaintiff No.7 (mother) had given the suit land to the Applicants / Defendants for cultivation on harap basis since 1992 to 2015, and when possession was demanded in 2015, they refused and the Suit was filed in 2018. It has been further alleged in the plaint, that thereafter the Respondent / Plaintiff No.1 approached the concerned Mukhtiarkar for Roobkari, then it came to his knowledge that the Applicants / Defendants, in collusion with Revenue authorities and Sub-registrar, had managed a forged and fabricated sale deeds. Now if these averments are looked into, the best available evidence was the mother of the Respondents and the

official witnesses through whom the Respondents could have proved their case. However, they never called their mother into the witness box. Nor they have given any explanation or justifiable reason to withheld her evidence.

9. It is settled law that withholding of best evidence always leads to an inference of an adverse view against the person withholding it¹. It is also a settled proposition that when better evidence than that which is offered is withheld, it is only fair to presume that the party has some sinister motive for not producing it, which would be frustrated if it were offered. In Civil cases what is required or considered sufficient is preponderance of probability while weighing the evidence of both the parties and while doing so in the present facts it appears that the Respondent has failed to lead any convincing evidence to rebut or challenge the claim of the Applicants who did his best to prove his claim. If facts, which are required to be proved, are exclusively in personal knowledge of the principal, then evidence of attorney holder on those facts will be in nature of hearsay evidence carrying no weight². They have in fact withheld the best evidence, resultantly, an adverse inference has to be drawn against them. As to official witnesses they never made any such efforts except the bald allegations against them in the plaint. On the contrary, PW-1-Sher Khan (Ex.No.34), [Plaintiff No.1 as well as attorney of all including his mother], came forward to lead evidence, and in response to a question about handing over of the land to the Applicants on harap basis, he has replied that "it is correct to suggest that I have not produced any documentary proof which may suggest to believe that the Defendants No.1 to 3 [Applicants] were our haries". He has further replied that "it is correct to suggest that I have also not produced any documentary proof which may suggest to believe that till we attained the age of majority the Defendants No.1 to 3 used to give share from the production from the suit property"

¹ Muhammad Sarwar v Mumtaz Bibi (2020 SCMR 276), Dilshad Begum v Nisar Akhtar (2012 SCMR 1106), Mhammad Boota v Mst. Bano Begum (2005 SCMR 1106).

² Muhammad Siddique v Noor Bibi (PLD 2016 Lahore 140)

to us". When this piece of evidence is examined in juxtaposition to what has been narrated in the plaint in Para Nos.6 & 7, the same is in total negation of the same and is belied by its own evidence. He has further deposed that "it is correct to suggest that prior to filing of this suit, we all the legal heirs executed special power of attorney in favour of our mother, after the death of my father". When this response is examined as against the claim of the sale deed being forged and fabricated, it is also belied and as noted, at best, their case would have been that, yes; a sale deed was executed by our mother, but she did it unlawfully, without any consent of minors etc. etc. and for that, they ought to have sued their mother. This was not done and apparently, an alternate plea has been created to overcome this difficulty of retracting from the actual facts of the case. It is also a matter of record that part of the Suit land was not purchased directly by the Applicants from Respondents mother; but from someone else, to whom it was sold by Respondents mother; however, for reasons best known, these persons were never arrayed in the Suit as Defendants. The Respondents also led evidence by PW-2-Sikandar Ali (Ex.No.36) who claimed in his deposition that he knows both the parties very well. While being cross examined he has stated that Mst. Suhni [mother of Plaintiffs and Plaintiff No.7] is my cousin, whereas, presently he has no talking terms with Defendants No.1 to 3. He has further replied that "I don't know as to whether any registered sale deed has ever been executed or not" and that "I don't know as to whether Mst. Suhni and her sons had registered sale deed to the defendants No.1 to 3 and others in lieu of sale considerations." This piece of evidence by itself negates the stance of the Respondents as their own witness has not denied in categorical terms that no sale deed was ever executed; he is rather unaware and that's it. This at least is not a confidence inspiring evidence by any means to seek cancellation of the sale deed in question. Lastly the Respondents / Plaintiffs did not make any efforts to summon any of the officials as witnesses to substantiate their allegation.

10. It is also a matter of record that the learned Appellate Court while deciding Point No.2 has observed “that it has come in the evidence that she is an illiterate and Parida Nasheen lady and she has categorically denied the sale transaction and so also the execution of the aforesaid documents and in such circumstances, burden of proof lies upon the purchasers / respondents No.1 to 3 to prove by producing credible and convincing evidence that they have purchased the property in question from lady Mst.Suhni appellant No.7....”. With respect this finding of the Appellate Court is flawed and is hearsay and without any such material on record. I have categorically asked the learned Counsel for the Respondents to show such piece of evidence led by Mst.Suhni; but nothing has been placed before the Court. She never came in the witness box to assert this stance. And that is why, I had observed hereinabove, that until that was done, the burden never shifted upon the Applicants. May be, the conclusion drawn by the Appellate Court to this effect is correct; but it never happened and the lady never turned up to deny the execution of such documents.

11. Since the Respondents have failed to prove their case as to the declaration and cancellation of the sale deeds in question on the ground of they being fake, bogus and forged, whereas, the Appellate Court has erred in law to arrive at a conclusion contrary to the Trial Court; hence impugned judgment of the Appellate Court being based on incorrect appreciation of the evidence, warrants interference and therefore, the same was set aside and the Suit filed by the Respondents was dismissed by means of a short order on 20.9.2021 and these are the reasons thereof.

12. The Civil Revision Application stands allowed in the above terms.

JUDGE