

**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT HYDERABAD**

II-Appeal No.55 of 2021
II-Appeal No.56 of 2021

Abdul Samad,
Deceased through his legal
Heirs Muhammad Ali & others
appellants through:

Mr. Aslam P. Sipio, advocate

Respondents No.9, 10 and 13
through:

Mr. Qadir Bux, advocate

Respondents No.14 and 15
through:

Mr. Abdul Aziz Memon, advocate

Province of Sindh & other
official respondents through:

Mr. Allah Bachayo Soomro, Additional
Advocate General Sindh

Date of hearing : 31.10.2022

Date of Decision : 28.11.2022

JUDGMENT

Adnan-ul-Karim Memon, J. The Appellants have called in question the legality of the order dated 05.5.2021 passed by learned Additional District Judge/MCAC Hala in Civil Appeals No.04 and 05 of 2021, whereby while allowing the appeal, set aside the judgment dated 19.12.2020 and decree dated 24.12.2020 passed by learned Senior Civil Judge Hala, whereby learned Senior Civil Judge decreed the suit in favor of the appellants.

2. Facts of the case, in brief, are that the appellants filed F.C Suit No.14 of 2017 for declaration, cancellation, permanent and mandatory injunctions, partition, separate possession, and mesne profit, and alleged that the agricultural land bearing R.S. No.18(05-03 acres), 160/2 (04 acres), 399 (4-18 acres), 496/1 (03-33 acres), 496/2 (03-32 acres), 497/1 & 2 (04-05 acres), 502/1 & 2 (7-3 acres), 495/1 & 2 (06-04 acres), 119 (06-32 acres), and 344 (5-20 acres), total admeasuring 51-20 acres situated at Deh Rojhani, Tapo Ghotano, Taluka Hala, District Matiari (hereinafter referred as **suit land**). It is further alleged that Form A issued by the then Barrage Mukhtairkar, respondent No.4, and Form VII issued by respondent No.3, and any other property was originally owned and possessed by deceased Haji Khair Muhammad son of Samoto, who left behind following legal heirs:-

i. Samoto, since died leaving behind him only one son, and legal heir, namely Abdul Samad (father of plaintiffs).

ii. Muhammad Uris, since died leaving behind him 08 sons and daughters, (father of defendants No.9 to 13).

iii. Jan Muhammad, since died leaving behind him 03 sons and 03 daughters (father of defendants No.6 to 8).

3. It is further averred that on the death of Haji Khair Muhammad, the suit land supra ought to have been devolved upon his legal heirs according to Shariat laws, and as per their equal share and any other property sold out by the uncles of the plaintiffs/appellants malafidely, and usurped the legitimate share of appellants/plaintiffs from the inherited properties left by the deceased Haji Khair Muhammad Borano. It is urged that the ancestors of the appellants/plaintiffs and respondents No.6 to 13 had constructed their *Katcha Paka* houses on some portion of the suit land and the remaining suit land had been jointly cultivated by the ancestors of the above-mentioned plaintiffs/appellants and respondent/defendants No.6 to 13. It is next submitted that one acre out of 51-20 acres from suit land was/is in physical possession of all the co-sharers, the appellants/plaintiffs No.1 to 8 in the residential portion of the suit land, with a pretext to give a due share of the appellants/plaintiff in the crop, cultivated over the said land. The appellant/plaintiff being a kind, simple person, and gentleman had blind faith in his uncles and in the interest of family union, remained silent for his share on the good faith, as such the said agricultural land was under cultivating possession of the ancestors of respondents/defendants No.6 to 13 and all documents, detail and records of the properties of Haji Khair Muhammad were/are also in the custody of the forefathers of the respondents/defendants No.6 to 13, but the appellant/plaintiff never got his lawful and legitimate share from the suit land in question.

4. It is submitted that the appellants/plaintiff's father and grandfather who was illiterate person, so they might be unaware of the records and detail of the properties of Haji Khair Muhammad, therefore, appellant/plaintiff No.1 approached the concerned Taluka Mukhtiarkar office and offices of the other official respondents for searching and obtaining copies of the record of properties left by the deceased Haji Khair Muhammad, but he was refused on the pretext that the record was not available, therefore, the same could not be acquired, except the suit

land. It is further agitated that the father of the appellants / plaintiffs, namely Abdul Samad, who passed away in the year of 2009, and soon after the death of their father they have been approaching respondents / defendants No.6 to 13 with regard to their legitimate share in the suit land from the property left by the their forefathers, they always put them on false hopes with pretext that the Foti Khata of Badal of their deceased forefathers namely Haji Khair Muhammad Borano son of Samotoo, in respect of the suit land in question had not been changed and there were some legal formalities were to be required and to be fulfilled, but all hopes went in vain, when appellant / plaintiff No.1 shocked to know that some portion of the suit land, which was originally owned by the forefathers of the appellants / plaintiffs, was secretly, malafidely and fraudulently sold out and transferred to respondent / defendants No.6 to 13 and such transfer was/is void, illegal and based on the fraud and manipulation of record with collusion of the Revenue Officials. It is added that thereafter the appellants/plaintiffs immediately approached the Assistant Commissioner Revenue Taluka Hala for holding an inquiry in respect of the fraudulent transfer of suit land and properties in the name of deceased Haji Khair Muhammad Borano, with the collusion of revenue officials.

5. The respondent/defendant No.2 advised appellants/plaintiffs to pursue the matter in the Court of Senior Civil Judge for redressal of grievances as the impugned entries and record pertain to the old one. It is submitted that thereafter the appellants/plaintiffs filed F.C Suit No.116 of 2015 (Re: Abdul Samad versus Province of Sindh & others) before learned Senior Civil Judge Hala and said the suit was withdrawn by the appellants/plaintiffs with permission to file a fresh suit, as after filing of said suit some new facts and documents came on record.

6. It is further submitted that the suit land is inherited property of the forefathers of the appellants/plaintiffs and respondents/defendants No.6 to 13, which has not been either privately or officially partitioned as per shares under Muhammadan law and the respondents/defendants No.6 to 13 were requested to give the produce of the suit land as they are bound to pay the income of the suit land to the appellants/plaintiffs according to their share, but respondents / defendants No.6 to 13 avoided the same by giving evasive replies. The appellants submitted that they are entitled to have the suit land/property, partitioned according to law and to be put into separate and exclusive possession of their share and also for the

mesne profit of the suit land of 15,000/- per year; it is further submitted that the forefathers of respondents/defendants No.6 to 13 without lawful authority transferred some acres in suit land in favor of (1) Fayaz Ahmed son of Ghulam Murtaza, and Khuram Khan son of Ghulam Murtaza (respondents No.14 and 15), vide Entry No.34 of Form-VII, S.No.495/2 and 344 of Deh Rojhani, (2) Fateh Muhammad son of Haji Rustam Shah in S. No.344 Deh Rojhani, (3) Abdul Lateef son of Muhammad Moosa, vide entry No.62 of Form-VII of Deh Rojhani S.No.119 and (4) Wali Muhammad Chandio son of Allah Dino thereafter, the L.Rs of defendant No.1 sold out the suit land to defendants No.14 to 17 and any other, unauthorizedly, fraudulently and without lawful authority; it is further submitted that respondents/defendants No.6 to 13 and their forefathers had neither any lawful authority nor lawful title to make such a sale transaction, therefore, the said transaction is forged, manipulated, and concocted. It is urged that illegal and fraudulent transactions have taken place, as such all these transactions are required to be adjudged by this Court.

7. Mr. Aslam P. Sipio learned counsel for the appellants has contended that the impugned judgment is contrary to law and facts; that the learned appellate Court erroneously held that the suit of the appellants was not maintainable under the law. The appellants being legal heirs of the deceased Abdul Samad had sought the declaration of their share in the subject suit property legal heirs of the deceased father and have further sought cancellation of the registered sale deeds and entries thereto in the record of rights, that the learned appellate Court failed to consider the material aspects of the case while passing the impugned judgment and decree; that the learned appellate Court has not assigned any cogent, convincing and plausible reason for passing the impugned judgment and decree, hence the same is liable to be set aside. In support of his contentions, learned counsel for the appellants has relied upon the cases of *Shaikh Abdul Ghaffar* [2018 YLR 2685], *Iftikhar Hussain Shah v. Muhammad Sharif* [2021 MLD 608], *Nemat Ali v. Habib Ullah* [2004 SCMR 604], *Munawar Kashan v. Government of Balochistan* [2000 MLD 2015], *Ehsanullah Khan v. Zia-ud-Din* [2015 YLR 1141], *Abdul Razaq v. Abdul Ghaffar* [2020 SCMR 202], *Mst. Janntan v. Taggi* [PLD 2006 SC 322], *Khan Muhammad v. Khatoon Bibi* [2017 SCMR 1476], *Gohar Khanum v. Jamila Jan* [2014 SCMR 801], and *Muhammad Farooq v. Javed Khan* [PLD 2022 SC 73].

8. On the other hand, Mr. Qadir Bux learned counsel for Respondents No.9, 10, and 13 and supported the judgment and decree of the appellate court and submitted that the claim of the respondents is based on the registered sale deed thus, the learned appellate Court appreciated the old registered documents. He emphasized that the possession was handed over to the vendees and the said registered documents were never challenged. Per learned counsel, the legal heirs remained silent and after 29 years the legal heirs came forward and claimed alleged fraud. He also submitted that the suit land sold out was not beyond the share of Abdul Samad and the transfer and possession had never been disputed by the co-sharers. That the appellants failed to produce any evidence about alleged fraud; besides they filed Suit No.116 of 2015, but they withdrew the same, which ex-facie shows that no fraud took place. Per learned counsel, the limitation for cancellation of the instrument is three years, which begins to run when the appellant came to know about the alleged fraud, however, they filed suit in 2017 and the same was subject to the provision of Order 23(2) CPC. Learned counsel added that suit was hopelessly time barred and it was not maintainable as such the learned appellate Court intervened and set the record straight by setting aside the judgment and decree of the trial Court. He prayed for the dismissal of these appeals based on misconceived things. Learned counsel also relied upon the case of *SUBA through legal and others v. Mst. Halima Bibi and others* [2022 MLD 929].

9. At this juncture, I asked the learned counsel for the respondent No.9, 14, and 15 whether the appellants have been declared as legal heirs of deceased Abdul Samad and are entitled to their respective shares in the suit property as such in the suit for inheritance no limitation is applicable. Mr. Abdul Aziz Memon learned counsel for Respondents No.9, 14, and 15 has replied to the query by supporting the judgment and decree of the appellate court by reiterating the findings as recorded in paragraphs 4 to 12 of the judgment of the appellate Court. He submitted that suit filed by the appellants was for cancellation of the registered document and also sought partition in terms of inheritance. He further submitted that the suit for cancellation of the documents is required to be filed within three years in terms of Article 91 of the Limitation Act, 1908 and admittedly they filed the suit in the year 2017, thus, the suit was barred under the law of limitation. The arguments of the learned counsel that in a suit for inheritance no limitation is applicable; is misconceived for the reason that merely describing a suit for inheritance would not bring

the suit within the four corners of limitation if it is barred by time in its essence. On the point of withdrawal of earlier suit with permission to file a fresh suit, he submitted that merely seeking permission to file a fresh suit does not stop the limitation period and the limitation for filing of suit would start from the date when the alleged cause of action accrued or original suit was instituted and it could not start from the date when the permission was granted by the Court for filing of the fresh suit. He also emphasized that the sale deed in favor of the respondents was more than 30 years old, which has the presumption of truth, which ought not to have been canceled by the learned trial Court vide judgment and decree dated 19.12.2020. He further submitted that when there are conflicting decisions and the decision made by the appellate Court is to be relied upon. In support of his above contentions, learned counsel also relied upon the cases of *Zarshad and another v. Mst. Bibi Sultana and 40 others* [2018 YLR 2429], *Muslim Educational Society (Registered) through President v. Madina Masjid through Secretary Intezamia Committee* [2008 CLC 943], *Muhammad Yousuf v. Nazeer Ahmed Khan* [2021 SCMR 17775], *Muhammad Khursheed v. Baroo* [PLD 2013 HC AJ&K 1], *Muhammad Ashraf Khan v. Muhammad Khan* [2004 CLC 1133], *Ilyas Ahmed v. Muhammad Munir* [PLD 2012 Sindh 92]. He prayed for the dismissal of the instant appeals.

10. Mr. Allah Bachayo Soomro, learned Additional Advocate General Sindh has submitted that the government has no interest as the dispute is between the private parties and the matter may be decided based on evidence adduced by the parties before the learned Courts below.

11. I have heard the learned counsel for the parties and perused the record and case law cited at the bar.

12. It appears from the record PW-1 namely Aijaz Ahmed, the Mukhtiarkar Estate H.Q Matiyari was examined without Oath at Exb-65, who produced an attested copy of Form-A at serial No.5154 for the year 1943-44 in respect of Survey Nos.496/1 (03-33 acres), 495/1 & 2 (06-04 acres) & 502/1 & 2 (07-23 acres) total admeasuring 17-20 acres situated in deh Rojhani, Taluka Hala at Exb-65/A and produced attested copy of Form-A at serial No.2391 for the year 1937 in respect of Survey Nos.18 (05-03 acres), 497/1 & 2 (04-05 acres) & 496/2 (03-22 acres) total admeasuring 12-32 acres situated in deh Rojhani, Taluka Hala at Exb-65/B. PW-2 namely Asif Ali, the Sub-Registrar Hala was examined without Oath at Exb-66. PW-3 namely Waheed Faisal, the Tapedar

appeared on behalf of Mukhtiarkar Revenue Hala and was examined at Exb-67, who produced an authority letter at Exb-67/A, attested copy of entry No.23 dated 14.01.1972 of deh Form-VII-A for the year 1985-86, deh Rajhani, Tapo Ghotano, Taluka Hala, District Matiari at Exb-67/B, , attested copy of entry No.33 of Deh Form-VII-A for the year 1985-86, deh Rajhani, Tapo Ghotano, Taluka Hala, District Matiari at Exb-67/C, attested copy of entry No.34 dated 30.03.1981 of deh Form-VII-A for the year 1985-86, deh Rajhani, Tapo Ghotano, Taluka Hala, District Matiari at Exb-67/D, attested copy of entry No.56 dated 05.06.1956 of deh Form-VII-A for the year 1985-86, deh Rajhani, Tapo Ghotano, Taluka Hala, District Matiari at Exb-67/E

Note:- same entry No.56 has been mutated in the record of right with red ink.

13. He produced an attested copy of entry No.62 of deh Form-VII-A for the year 1985-86, deh Rajhani, Tapo Ghotano, Taluka Hala, District Matiari at Exb-67/F, , attested copy of entry No.67 dated 24.09.1978 of deh Form-VII-A for the year 1985-86, deh Rajhani, Tapo Ghotano, Taluka Hala, District Matiari at Exb-67/G, , attested copy of entry No.122 dated 16.04.1971 of deh Form-VII-A for the year 1985-86, deh Rajhani, Tapo Ghotano, Taluka Hala, District Matiari at Exb-67/H.

Note:- same entry No.122 has been mutated in the record of right with red ink.

14. He produced an attested copy of entry No.149 of deh Form-VII-A for the year 1985-86, deh Rajhani, Tapo Ghotano, Taluka Hala, District Matiari at Exb-67/I, , attested copy of entry No.150 dated 28.03.1980 of deh Form-VII-A for the year 1985-86, deh Rajhani, Tapo Ghotano, Taluka Hala, District Matiari at Exb-67/J, attested copy of entry No.13 dated 20.09.2008 of deh Form-VII-A for the year 1985-86, deh Rajhani, Tapo Ghotano, Taluka Hala, District Matiari at Exb-67/K.

Note:- The original register in respect of same entry No.13 shows stamp of Mukhtiarkar (Revenue) Taluka Hala for scanning, the stamp of DDO (Revenue) and stamp S.T Hala, but the attested copy produced before the court does not show any of such stamps.

15. PW-4 namely Muhammad Ali, plaintiff No.1 was examined at Exb-101, who produced original power of attorney at Exb-101/A.

16. On the other hand the respondent/defendants' side was examined. (DW-1) namely Masood Ali, defendant No.11 and attorney of defendants

No.9, 10 (i, ii & iv) and 13 and appointed as guardian of defendant No.10 (v, vi & vii), who has examined himself at Exb-133. DW-2 namely Khair Muhammad, defendant No.7, and attorney of defendants No.6 & 8, who examined himself at Exb-135. Thereafter, Mr. Shuhabuddin Shah, the advocate for defendants No.6 to 8 closed the side of evidence of defendants No.6 to 8 vide his statement dated 20.12.2019 at Exb-136. DW-3 namely Mujeeb Ahmed, the attorney of defendant No.14, who was examined at Exb-137 and produced registered sale deeds No.721 at Exb-P/1 & No.722 at Exb-P/2. DW-4 namely Ali Nawaz, defendant No.9 appeared himself, however, he had given power of attorney to defendant No.11 namely Masood, who had already been examined at Exb-133. Defendant No.9 examined himself at Exb-138. DW-5 is the official witness namely Naseem, Junior Clerk of the office of Sub-Registrar Hala was examined without Oath at Exb-139, who produced an authority letter at Exb-P/1, attested copy of registered sale deed bearing No.721 dated 27.09.1980 at Exb-P/2, attested copy of registered sale deed bearing No.722 dated 27.09.1980 at Exb-P/3.

17. The entire case of the appellants is based on the assertion that sale deed No. 721 and 722 in favor of the respondent/defendants were based on fraud and misrepresentation as the father of the appellants/plaintiffs was deprived of his lawful share of the deceased father's property and Plaintiff's attorney. On the other hand, though respondent/defendant No.14 and 15 have claimed that the land area of 11-05 acres of land bearing S.No. 495/2,497/1,2, and 334 were purchased by them from Jan Muhammad son of Samoto (father of defendant Nos.6 to 8) through a registered sale deed bearing No.721 dated 27.09.1980.

18. Record reveals that Mukhtiarkar Estate Head Quarter (H.Q) District Matiari/defendant No.4 submitted his report before the learned trial Court with the narration that the land bearing S.No. 495/1,2, 496/1, and 502/1, 2 total areas 17-20 acres and S.No. 497/1,2 and 496/2 total 12-32 acres was granted to Khairo and Form VII was issued by the then Mukhtiarkar showing the re-grant of land to Urs was/is a bogus one, thus, the above property i.e S.No. 495/2,497/1,2 was already entered in the name of Khairo; admittedly Samoto's name was not entered in the record of right in foti khata Badal and the property was distributed among all the legal heirs except Samoto, thus, not distributed lawfully among all the legal heirs and devolving of such property on the name of any legal heirs would not be considered as lawful and any such entry in the record of

right and further transaction would have no sanctity in the eye of the law, which factum has been appreciated by the learned trial Court by deciding the issues No.2 to 4.

19. The learned trial Court has appreciated the evidence by resolving issues No.5 to 16 with the findings that the respondent/defendants also failed to prove the execution of the registered sale deed through confidence-inspiring evidence as not only the written statement but also the attorney and the witnesses were silent concerning essential details qua venue, date to assert as to when, where original transaction was settled leading to the execution of impugned sale deeds. Further, the scribe was also not examined though the defendants have taken the plea that the witness Meero had passed away, however, they neither pleaded so in their written statement nor did produce his death certificate. Furthermore, since Article 84 of Qanun-e-Shahadat, 1984 empowers the court to compare the signatures or thumb impression of any person by itself though the court had all requisite powers of undertaking the exercise of comparing handwriting or signatures on its own and thereafter concluding as to the genuineness or otherwise of handwriting or signatures.

20. The learned trial Court while appreciating issues No.10 to 12 has held that while comparing the signatures of deceased Abdul Samad available on registered sale deed No.722 differ from each other and on the very face do not appear to have been put by the same person where same is the case with the signature of Jan Muhammad. The learned trial Court further held that the defendants failed to produce any evidence to prove the signature of the vendors, thus, they failed to prove the execution of sale deeds.

21. The learned trial court decreed the suit of the appellants on the premise that the respondent/defendants failed to prove their claim that deceased Samoto died in the lifetime of Khair Muhammad and further the late Abdul Samad was given the share of Mst Samho, Mst Noori and Ms. Bhambo surrendered through bakhshish to Abdul Samad which he sold out in life as such the appellant/plaintiffs as being deprived of their lawful share as per the law of inheritance thus without proper distribution of shares, the subsequent transfer even if by the registered sale deed and mutation in the relevant record of rights would not be considered as sacred as per law and thus liable to be canceled accordingly. Finally, the suit of the appellants/plaintiffs was decreed vide judgment and decree

discussed supra. Additionally, the appellants/plaintiffs were declared as the legal heirs of deceased Abdul Samad son of Samoto son of Haji Khair Muhammad, and their respective shares as per law in suit property the Agriculture Land bearing R. S. Nos. 18 (5-3 acres), 496/1 (3-33 acres), 496/2 (03-32 acres), 497/1&2 (4-5 acres), 502/1&2 (7-23 acres), 495/1&2 (6-4 acres), situated at Deh Rojhani, Tapo Ghotano, Taluka Hala, District Matiari.

22. The learned trial court canceled the sale deed No.722 dated 27.09.1980 and registered the sale deed bearing No.721 dated 27.09.1980 and all the entries thereto in the record of rights. The concerned Revenue Authorities were directed to act under the law in respect of the partition of the subject suit property among the legal heirs as well as entries in the record of rights accordingly.

23. The findings of the appellate court are as under:-

"11. The suit was therefore hopelessly time-barred and also it was not maintainable at all. The facts and circumstances and evidence on the record in favor of appellants preponderated over the case of the plaintiffs. Learned trial Court miserably failed to balance the probabilities, and mis-appreciated the factual and legal aspects and on the basis of misreading and through illogical conclusions committed miscarriage of justice, hence impugned judgment and decree requires interference. Point No.1 is therefore answered as in affirmative."

24. It is established from the evidence brought on record that the appellants are the legal heirs of deceased Abdul Samad son of Samoto son of Haji Khair Muhammad and once they are declared legal heirs are entitled for receiving a share from the property left by their father or grandfather. So far as the sale deed so purportedly executed in the year 1980 and entries based on the sale deed were brought on record of rights, suffice it to say that the respondents failed to prove their claim that deceased Samoto died in the lifetime of Khair Muhammad and late Abdul Samad was given the share of Mst. Samho, Mst. Noori and Mst. Bhambo surrendered through Bakhshish to Abdul Samad which he allegedly sold out in his lifetime supports the claim of the appellants as being deprived of their lawful share as per the law of inheritance, thus, without the proper distribution of shares of the inherited land and subsequent transfer through sale deed and mutation in the relevant record of rights was/is liable to be canceled and has rightly been canceled by the learned trial Court while deciding issues No.13 and 15. The findings of the appellate Court to upset the decision of the trial Court are based on the technical ground on the plea that the suit was hopelessly time-

barred and was not maintainable though the evidence explicitly shows that the trial Court appreciated the evidence and concluded the matter under law, thus, ought not to have been interfered by the first appellate Court, thus, the appellate Court committed grave illegality in upsetting the decision which was based on merit.

25. As to the objection of limitation, the view taken by the learned appellate court is based on erroneous understanding of law. The dispute in this case related to the right of inheritance. In suchlike cases the consistent view is that on the opening of succession, the property automatically devolves upon the legal heirs and that efflux of time does not extinguish the right of inheritance and that the limitation in such matters, starts from the date when right of any co-sharer/inheritor is denied by someone. Reference can be made in this respect to the case of *Mst. Suban v. Allah Ditta and others* (2007 SCMR 635) where the Honorable Supreme Court observed to the effect that it was well-established that as soon as owner of a property dies succession to the property opens which gets automatically and immediately vested in the heirs and that such vesting is not dependent upon any intervention or any act on the part of state and that limitation against co-inheritors would start running not from the time of the death of their predecessor-in-interest nor even from the date of mutation, if there be any, but from the date when the right of any such person was denied. This being so, the objection to the point of limitation that suit was bared under law of limitation was illusory and not well-founded.

26. In these circumstances, the learned Trial Court was justified in decreeing the Suit, filed by the appellant/ Plaintiffs Learned Appellate Court erred in law while ignoring all these facts and points of law noted above and set aside the well-reasoned judgment passed by the learned Trial Court, thereby reversing the same, is erroneous decision which is hereby set-aside, maintaining the judgment and decree of the trial court.

JUDGE