

*Judgment Sheet***IN THE HIGH COURT OF SINDH BENCH AT SUKKUR****Civil Rev. Application No.S-22 of 2016**

Applicant : Shah Muhammad through Mr. Soomar
Das R. Parmani, Advocate

Respondents : Deen Muhammad and others through
Mr. Jam Muhammad Jamshed Akhter, Advocate

Date of hearing : 19.02.2024

Date of Decision : 29.03.2024

JUDGMENT

Arbab Ali Hakro, J: Through this Civil Revision filed under Section 115 of the Code of Civil Procedure, 1908 (“**the Code**”), the applicant has impugned the Order dated 12.01.2016, passed by the II-Additional District Judge, Ghotki (“**appellate Court**”) whereby an application under Order XLI Rule 27 of the Code, for production of additional evidence was dismissed.

2. The respondent No.1/plaintiff filed a suit for possession through pre-emption against the applicant/defendant No.1 and respondents No.2 to 4, in respect of suit land measuring 1-6 ½ Acres as detailed in the plaint. The plaintiff/respondent No.1 claimed a superior right of pre-emption as Shafi-i-Sharik, Shafi-i-Khalit, and Shafi-i-Jar, in addition to other rights, while the applicant was alleged to be a stranger. It was further pleaded that respondent No.1 has fulfilled all the requirements of the Talbs, as envisaged under the law. Upon the applicant’s refusal to receive the sale consideration amount of Rs.70,000/- and transfer the Khata to respondent No.1, respondent No.1 has filed the suit. The applicant and respondents No.2 to 4 contested the suit by filing a written statement. After recording evidence from both parties, the trial Court decreed the suit vide Judgment dated 16.12.2014 and Decree dated 18.12.2014. Feeling aggrieved, the applicant preferred an appeal under Section 96 of the Code and then

moved an application under Order XLI Rule 27 of the Code for the production of additional evidence. The appellate Court dismissed the application after inviting/receiving objection vide the impugned Order dated 12.01.2016. Therefore, the applicant assailed the said Order through the instant Revision.

3. At the very outset, the learned counsel for the applicant argued that the document sought to be produced is a public record and the backbone of the case. He asserted that it is relevant to the controversy involved in the matter. He claimed that refusal of permission to produce such a Foti-Khata entry would prejudice the applicant's case. He further contended that the Appellate Court erroneously dismissed the application without considering the document's relevance to the dispute. According to him, this course of action was not permissible under the law. He elaborated his arguments by stating that it had admittedly come on record that the deceased Budho Khan, the applicant's father, held a share in the suit land bearing Survey No. 245 (7-38) Acres. After his death, the applicant became a co-sharer in the suit land. He also argued that the Foti Khata Badal was effected vide entry No. 51 dated 28.4.2015, and the applicant obtained a certified copy of the same on 09.9.2015. He did not have the same at the time of evidence before the trial Court; therefore, he could not produce the same. In support of his contention, he placed reliance upon the case law reported as **2015 SCMR 58, 2007 SCMR 231, PLJ 2009 SC 347, MLD 2005 Lahore 1 & 2005 CLC Lahore 1719.**

4. Conversely, the learned counsel for respondent No.1 refuted the applicant's arguments, supported the impugned Order of the Appellate Court and argued that accepting the applicant's application would amount to filling up the lacunas in his case. He further submits that the applicant has not explained why he did not obtain such a Foti-Khata Badal entry, even though his father died in 2001, before filing the suit and recording of evidence. The applicant had sufficient time to obtain it and produce the same in evidence. Without such an explanation, permission to produce the additional evidence prayed for cannot be allowed.

5. I have heard learned counsel for the parties at length and perused the record with their assistance.

6. Perusal of the record, it appears that the applicant wants to produce a certified copy of *Foti Khata Badal* of his deceased father, Budho Khan, bearing entry No.51, dated 28.4.2015. Respondent No.1 filed the suit in the year 2012; the same was decreed vide Judgment dated 16.12.2014 and Decree dated 18.12.2014. Against said Judgment and Decree, the applicant preferred an appeal on 06.01.2015. During the appeal's pendency, the applicant moved the above mentioned application on 15.09.2015. The applicant contends that the said *Foti-Khata* entry was not in his possession at the time of the trial of the suit as the same was effected on 28.04.2015, and a certified copy of the same was granted to him on 09.09.2015.

7. The pivotal question is the necessity of the document, specifically the *Foti Khata* entry, that the applicant wishes to introduce. This document is deemed crucial to a certain degree in order to dispel any doubts regarding the applicant's status as a co-sharer following his father's demise. This status forms the basis of his claim to the preferential right of pre-emption as *Shafi-i-Sharik*. The appellate Court disallowed the applicant's application because the applicant did not seize the opportunity to present evidence in the trial court. Therefore, the applicant is not permitted to enhance or rectify any deficiencies or omissions at the appellate stage. However, the appellate Court failed to consider the trial court's ruling that

*“The contesting defendant No.1 (applicant herein) has not denied the claim of plaintiff regarding ownership of plaintiff over suit land to the extent of his share in it, **excepting that his father is also co-sharer in the suit survey number which does not mean that the defendant himself is co-sharer in the suit survey number.**”*

Through his application, the applicant merely seeks to record the certified copy of the *Foti Khata Badal* entry, a public document, which is inherently admissible. This document could potentially clarify the ambiguity surrounding the applicant's status as a co-sharer. Even otherwise, under the Mohammadan Law, the legal position is that the right

to inheritance is established immediately upon the death of an ancestor. This principle signifies that the heirs' entitlement to the deceased's property is instant and automatic, occurring at the moment of the ancestor's death. It is not contingent on any subsequent administrative or legal procedures. On the other hand, the sanction of mutation is an administrative procedure that records the transfer of title in the revenue records. While this is an important step, it is merely an executive action that gives effect to the law of inheritance. It does not create or confer the right to inheritance. However, it merely acknowledges and records the transfer of property rights that has already occurred by virtue of the law of inheritance. Therefore, mutation sanction is a crucial step for administrative and record-keeping purposes, but it does not influence the immediate opening of inheritance under the Mohammadan Law. The law establishes the heirs' legal rights to the property and is not dependent on the sanction of mutation.

8. The granting of permission to introduce additional evidence does not inherently imply an admission of the document's authenticity or its evidentiary value in favour of the party presenting the document. In the case at hand, the document sought to be introduced is part of the public record. Despite disallowing the applicants' application, the appellate Court has not cast any doubt on the authenticity or genuineness of said document. As previously mentioned, the document in question, i.e., the *Foti Khata Badal* entry, is admissible as part of the public record. The permission to introduce said document as additional evidence should not be misconstrued as if the said document has been mechanically recorded. The appellate Court retains the discretion to determine the relevance of the said document and its probative value in relation to the matter in dispute. In the case of Syed Muhammad Hassan Shah and others vs. Mst. Binat-e-Fatima and another(PLD 2008 S.C 564), the Supreme Court of Pakistan has held as under: -

“It may be noted here that power available under Order XLI, Rule 27, C.P.C. though cannot be exercised in allowing a party to fill up lacunas or making up deficiency in a case as it has to be exercised

cautiously and sparingly yet, where the evidence sought to be produced before the Court has a direct bearing on an important issue in the case and the controversy is not likely to be resolved without taking further evidence, the Court must take additional evidence in order to render a just decision in the case. In such a situation, as it was in the instant case where decision on issue No.4 only was rendered by the trial Court and the rest of the issues remained undecided, a duty is cast upon the Court to collect further evidence so as to decide the case effectively, as rules of procedure are not made for the purpose of hindrance in providing justice. It would also be not out of place to mention here that power available under Order XXI, Rule 27 of C.P.C. is not meant to cater the needs of a particular party but is available for exercise by the Appellate' Court in appropriate cases where need for taking' additional evidence appears essential to the Court for just decision of the case."

[Emphasis is supplied]

In the case of Ghulam Muhammad vs Mian Muhammad and another (2007 SCMR 231), the Supreme Court of Pakistan has also held as under: -

"So far the second contention that the additional documents could not have been allowed by the Court has also no merit considering the said documents permitted to be brought on record were public documents and their authenticity and genuineness could not be doubted and the same were admitted to be brought on record in view of the provisions contained in rule 27(1)(b) of Order XXI, C.P.C. which empowered the Court to allow production of additional evidence to do the substantial justice between the parties."

[Emphasis is supplied]

9. For the foregoing reasons, the Revision application is **allowed**, and the appellate Court is directed to allow the production of a document mentioned in the application as additional evidence and decide the appeal in accordance with law. However, it is needless to mention here that the appellate Court shall, of course, decide the appeal in accordance with the law without being influenced by the observation made by this Court hereinabove.