

HIGH COURT OF SINDH CIRCUIT COURT MIRPURKHAS
Civil Revision Application No.S-29 of 2024

Present
Mr. Justice Dr.Syed Fiaz ul Hasan Shah.

Applicants: 1. Mitho son of Budho Khan,
Since dead through his L.Rs:-
i. Mst. Saran wd/o late Mitho,
ii. Abdul Latif s/o late Mtiho,
iii. Abdul Aziz s/o late Mtiho,
iv. Abdul Majeed s/o late Mtiho,
v. Ghulam Shabir s/o late Mtiho,
vi. Bilawal s/o late Mtiho,
vii. Mst Latifan d/o late Mtiho,
viii. Mst Aziza d/o late Mtiho,
ix. Mst Majeedan d/o late Mtiho,

2. Allah Dino son of Muhammad Moosa
Through Mr. Mohan Lal K. Rathore, Advocate,

Respondent: Manthar S/o Abooro & two others.
Through, Mr. Rashid Ali Shah, advocate.
Through, Mr. Ayaz Ali Rajpar, A.A.G Sindh.

Date of hearing: 20.03.2025.
Date of Judgment: .03.2025.

ORDER

Dr. Syed Fiaz ul Hasan Shah, J: Through above Civil Revision Application the applicants have challenged the legality of Judgment dated 16.08.2002 & decree dated 22.08.2002 passed by learned 2nd Senior Civil Judge Mipurkhas in F.C Suit No.78/2000. Thereafter the applicants have challenged the said Judgment and decree by filing Civil Appeal No.96/2002, but same was also dismissed by the 1st Additional District Judge, Mirpurkhas vide Judgment dated 16.03.2007 ,therefore, applicants preferred this revision application with prayer to set aside the aforementioned impugned Judgment & decree.

1. The brief facts of instant case are that agricultural land admeasuring 25-1 acres of situated in Deh 261 Tapo Khudada Taluka Kot Ghulam Muhammad was originally owned by the Moosa and Budho and after their death, foti khata badal was mutated in the names of following legal heirs:-

L.Rs of deceased Moosa

i) Obhayo son of Moosa.....0.44 paisa share.

L.Rs of deceased Budho

i) Sarang s/o Budho.....0.15 paisa share.

ii) Sadik s/o Budho.....0.15 paisa share.

iii) Siddik s/o Budho.....0.15 paisa share.

iv) Mst. Bhagi d/o Budho.....0.02 paisa share.

v) Mst. Assi d/o Budho.....0.02 paisa share.

vi) Mst. Ami w/o Budho.....0.07 paisa share.

2. It is further case of plaintiffs that Siddique s/o Budho died leaving behind his only legal heir namely Abooro son of Siddique. Abooro, father of defendants No.1 and 2 did not get change the foti khata badal of his deceased father Siddique in his name and he also died leaving behind the present defendants/respondents as his surviving legal heirs. It is further pleaded by the plaintiffs that land of deceased Siddique was already with the plaintiffs from the year 1966 till 4.6.2000 on lease and the lease money was being paid to deceased Siddique and to the deceased Abooro by the plaintiffs and they are also paying the land assessment and possession of above land was already with plaintiff on basis of lease. The defendant No.1 and 2 came to plaintiff on 4.6.2000 and offered them that they are ready to sell 2 acres of their share of land out of 25.01 acres coming from their grandfather at the rate of Rs.30,000/- per acre total consideration Rs.60,000/-. The plaintiffs took issue in private Faisla of panchayat in presence of witnesses.

Agreement of sale of 2 acres at rate of Rs.30,000/- each acre was mentioned therein the plaintiffs paid Rs.4500/- earnest money of sale price of 2-00 acres land and defendants promised that they will register the same on payment of the remaining amount of Rs.55000/- to the plaintiffs on 8.8.2000 after getting mutation of land in and obtaining clearance certificate from Mukhtiarkar Kot Ghulam Muhammad. It was further mentioned in agreement that defaulting party would pay a fine of Rs. 50,000/-. It is further case of plaintiffs that on 8.8.2000 they brought remaining amount in panchayat where defendants were called and stated through their cousin Moula Bux that NIC of defendant No.1 is not yet obtained nor khata is mutated in their names and still they have to obtain clearance certificate hence 15 days more time was enhanced in presence of panchayat but on due date they avoided to register the sale deed. Further the defendants moved application to respondent No.3 who called plaintiff in his office where the plaintiffs were threatened to return the possession of the land. On 12.10.2000 defendants No.1 and 2 came alongwith Tapedar, deputed by defendant No.3 to dispossess the plaintiffs forcibly therefore, the plaintiffs filed the present suit for the following reliefs:-

a) That honourable court may be pleased to direct the defendants to get register the sale deed of suit land in the names of plaintiffs before the Sub-Registrar, Mirpurkhas or on their failure, the Nazir of this court may get register the sale deed after deposit of remaining amount of Rs.55,500/- in court.

b) The permanent injunction against defendants No.1 to 3 be issued not to interfere with the peaceful possession of suit land in possession of plaintiffs themselves or through their agents, servants whatsoever till the decision of this suit.

3. The Respondents/Defendants No.1 and 2 contested the matter and filed written statement and denied the allegations of the plaintiffs/respondent and pleaded that deceased Sadik Juma left behind two sons Budho, Abooro and two daughters Mst. Sami and Zainab who has been expired and left behind their legal heirs Mst. Allah Bachi d/o Abooro who is still alive. Defendants further pleaded that the owners of the land leased out the land to Muhammad Hashim Leghari for 5 years and after expiry of lease period the plaintiffs are tress-passer and occupied 1½ acres of Manthar forcibly neither plaintiff is paying the lease money nor lease has been extended.
4. From the pleadings of thee parties, the learned trial Court framed the following issues;
 1. Whether the agreement of sale in respect of two acres at the rate of Rs.30,000/- each acre total Rs.60,000/- were decided wherein the plaintiff paid Rs.4500/- as an earnest money of sale price to the defendants?
 2. Whether no cause of action accrued to the plaintiff for filing the present suit and the suit is not maintainable under the law?
 3. Whether the plaintiff is entitled for any relief?
 4. What should the decree be?
5. Parties produced their evidence and during such course, the plaintiff appellant Mitho examined himself at Ex.39 and produced Dhal receipts, letter agreement of sale at Ex.39/A to 15: PW-2 Allahdino at Ex.40, PW-3 Mir Ghulam Nabi at Ex.41, PW-4 Kamal Dars and then plaintiffs appellants closed their side through statement at Ex.43. On the other hand, the defendant/respondent Manthar examined himself, DW-2 Samoo and DW-3 Badal and then their side was closed by their advocate.

6. Heard the learned advocate for the Applicants. The Counsel for the Respondent Mr.Rashid Ali Shah has been served with the notices despite that he remained absent. I have perused the Judgments impugned before me so also the record with the assistance of the Counsel for the Applicant.
7. It is contended by the counsel for the applicants that applicants and respondents are close relative and the Respondents No.1 & 2 approached to the Applicant on 04.06.2000 and offered to purchase 02-00 acres of land out of 25-00 acres, which is inherited from the grandfather by the said Respondents No.1&2. It is the case of Applicant/plaintiffs that he paid Rs.4500/- as earnest money with the condition that the balance sale consideration amount will be paid at the time of registration of sale deed and for that sale deed the defendants/respondents were bound to mutate the property in the record of right by way of inheritance from their deceased father.
8. The Respondents have failed to mutate the land as "Fotki Khata badal". Ultimately, the dispute was referred in Punchayati Faisla Ex.39/15 dated 06.10.2000. The reading of the said exhibit reveals that it has been mentioned that it was duty of Respondents to get mutate the property by way of Foti Khata Badal as well as clearance certificate from the Mukhtiarkar Kot Ghulam Muhammad, which has not been done by the respondents' side.
9. Consequently, the applicants filed suit of specific performance on the basis of oral sale and in support of their claim. The Applicants examined themselves as well as marginal witnesses

Mir Ghulam Nabi at Ex.41 and Kamal Dars at Ex.42 who have appeared and recorded the evidence in favor of the applicants. The evidence of the Applicant/Plaintiff remained unshaken. In order to disprove the case, the Respondent No.1 appeared and he has admitted the oral sale so also Exh-38/15 (Faisla) while the Respondents have taken the defence that with an analogy that in the said decision, it was observed that the defaulter party would have to pay Rs.50,000/- as fine amount and the Respondent No.1 claimed that the applicants have committed default and the Respondents are not liable to transfer suit property in the favor of the applicants and on the contrary he is entitled to pay fine of Rs.50,000/-. For the convenience, the evidence is reproduced as under;

“I am defendant in the matter. Sadik was my grandfather. of mine, who left behind two sons namely Allah Bachayo and Abooro, and two daughters Mst. Zainab and Sami. The sons and daughters of my grandfather, subsequently expired. Abooro father of mine expired and left behind, me and Urs and our sister namely Allah Bachai, and my sister Allah Bachai about 13 months ago. Mst. Bhagbhari mother of mine expired about five years ago. The property in question was leased out to my uncle Badal, then leased out to one Leghari, then our brotherly raised objection that he is outsider and does not come in our community and subject matter is near to the village. Then the said land was taken from Leghari and given to one Samoo son of my Phuphi on lease. After some time the land in question was leased to Mitho plaintiff in the suit. My father thereafter died, and after death of my father I demanded the possession of the suit land from Mitho, and the plaintiff disclosed that the land in question have been sold out by my father to the plaintiff, and the plaintiff refused to give any convincing evidence or did not show any document of sale and then filed the present false suit against us. After death of my father till today the plaintiff also has not given me leased amount. The matter was referred to Brothery where punchait was held, and plaintiffs insist us to sell the suit land to him, but I refused in presence of witnesses, and then I asked him to mutate the names of legal heirs of deceased in the record of rights. The suit land was in the name of our grandfather. There was

garden of Mangoes in the suit land and all the Mangoes trees were cut and sold out by the plaintiff without our consent. Komal Dars and Mitho are in possession of the suit land.

Cross to Mr. Khuda Bux Khaskheli advocate for defendant.

I am residing in my village since my birth. Occasionally I came in the village of Mitho. The disputed land is situated in the village of Mitho. Mitho is son of my Phuphi. Allah Dino is also relative of mine. Abooro expired about 16/17 years ago. The age of Urs would be 24/25 years. Allah Bachai expired about 12/13 months ago. Bhagbhari expired about five years ago. After expiry of Abooro Manthar and Urs are the legal heirs of Abooro, both are brothers intersee entries are in favour of grandfather as yet in the record of right. Brothery has decided to give two acres share in the land left by my grandfather. I see Ex:39/14 which bears my signature. It was decided in our Panchait that two acres be sold out to the plaintiff on consideration of Rs.60,000/- and I received Rs.4500/- as sale consideration in the Panchait and sale deed was to be registered in the month of August by the plaintiff, and it was mentioned in that Faisla/agreement that clearance certificate was to be obtained by the purchaser. It was mentioned in the Panchait that in case of violation the defaulted party has to pay Rs.50,000/- as compensation. The khata was not transferred as the same in joint property. I reached at the Registrar office on the date mentioned in the agreement decided by Panchait. I also asked for further 15 days period. Again I reached before panchait. I also asked application to the Mukhtiarkar for entries in favour of legal heirs of my grandfather and in our names. I did not make application against Mitho about the forcible possession, but I made application for the entries in respect of foti khata badal in the record of rights. I had returned the earnest money to the plaintiff. I am not willing and ready to receive the balance amount of sale. I do not want to sell the suit land. The mother of Mitho has got two acres share. 3/4 times the faisla was made by Panchait”.

10. The case of the applicants has successfully passed the test of Article 79 of Qanun-e-Shahadat Order, 1984 as the two marginal witnesses, i.e. one is the head of Panchayat who has acted as Head of Arbitration, has appeared and supported the version of the Applicant. Comparatively, his social status is high in locality as per his evidence he owns over 100 acres of land

and his evidence is firm and trust worthy. On the other hand, the oral testimony of the Respondent No.1 does not confirm the pleadings and documentary evidence. The Respondent No.1 claimed that the Applicant is liable to pay fine amount Rs.50,000/- as per at Ex.39/15 (available at page-89 of file). On the contrary it has proved facts that oral sale has freely been held between the parties. The Respondent No.2 has not stepped into the witness box to dispute the claim of the Applicants. It is/was mandatory upon him to proof his case and in failure to step in into Witness box and failure to depose on oath and failure to voluntarily come for cross-examination or to challenge the applicants and witnesses on this material point is an admission to be extent of his share.

11. I have seen the impugned Judgment passed by the Appellate Court which does not meet the basic requirement of law and formal observation and holding that the Respondent Manthar is not sole legal heirs of the deceased Abooro as such he was not alone entitled to enter into oral sale of entire land of the deceased father without the consent of remaining legal heirs is illegal and does not come within definition of competent person under section 7 of the Transfer of Property Act, 1882. I am in agreement with the learned 1st Additional District Judge Mirpurkhas that without consent or sale of shares of co-sharers/legal heirs in the absence of co-sharers /legal heirs is illegal and unauthorized but the learned Appellate Court has failed to appreciate that this Sale was not for the complete share of all legal heirs and for this purpose surviving daughter (now deceased) was not included as party in the suit. The Applicant has impleaded only two sons and he is asking for the

enforcement of oral sale from the Respondents No.1&2. In other words, both the sons of the respondents No.1 & 2 have offered and further endorsed by the Panchayat Faisla and entire evidence is trustworthy-inspiring. The examination of documentary evidence reveals that it is encircling around the share of respondents No.1 & 2 being surviving sons of the deceased Abooro and they can only sale their respective share whatever they would have inherited under Muhammadan Law from their deceased father.

12. The Appellate Court has also ignored the core point of the Ex.39/15 that the Respondents were under obligations to mutate the land by foti khata badal along with clearance certificate from Mukhtiarkar Kot Ghulam Muhammad. Therefore, the question of privy is irrelevant and the oral sale was confined to the extent of the share of Respondent No.1 & 2 and nobody else.
13. The second point has observed by the Appellate Court that oral sale and Panchayat Faisla at Ex.39/15 is in violation of Section 4 of The Transfer Property Act, 1882 while ignoring the prayer clause of the plaint. The relevant prayer clause is re-produced hereunder:

“That Honourable Court may be pleased to direct the defendants to get register the sale deed of sold suit land in the names of plaintiffs before the Sub Registrar Mirpurkhas or on their failure, the Nazir of this court may get register the sale deed after deposit of remaining amount of Rs: 55,500-0 in court”.

14. It may be observed that the Applicants/plaintiffs filed suit for specific performance of contract under section 12 of the

Specific Relief Act in order to get decree for enforcement of contractual obligation by enforcing the Respondents to execute Sale Deed in favor of the Applicants. The Appellate Court has erred in considering the legal terminology and has not appreciated that the Applicant has not claimed ownership in term of section 54 of the Transfer of Property Act but the Applicant was seeking the compliance of Section 54 of the Transfer of Property Act under the available remedy as stipulated in Section 12 of the Specific Relief Act which is a discretionary relief in its nature. Therefore, the impugned Judgment dated 16.03.2007 is set aside and the matter is remanded back to the Trial Court to decide the matter afresh after hearing the parties and needless to say that the trial Court will be at liberty to take further evidence if it deem necessary.

15. Consequently, the Revision application stands disposed of with directions to the Applicant to deposit entire balance consideration with the Nazir of District Court within 10 days, which will be subject to final determination by the learned trial Court. Further the Nazir of District Court will approach to the Mukhtiarkar Kot Ghulam Muhammad on behalf of legal heirs Respondents No.1 & 2 for mutation/ foti khata badal of deceased father Abooro for transparency, convenience of trial Court to decide lis and in order to safeguard the shares of legal heirs including legal heirs of deceased Allah Bachai who is not participant of oral sale. The Applicant shall pay the Nazir fees Rs.15000/-.

JUDGE