

IN THE HIGH COURT OF SINDH CIRCUIT COURT HYDERABAD

C.P. No.D-1480 of 2011

PRESENT:

Mr. Justice Muhammad Shafi Siddiqui &
Mr. Justice Arshad Hussain Khan.

Muhammad Saleh & Others Vs. Province of Sindh & Ors.

Date of hearing: 12.09.2017.
Date of decision: 12.09.2017.
Petitioners: Through Mr. Jagdish R. Mulani advocate.
Respondent No.1to3. Through Mr. Allah Bachayo Soomro, learned
Additional A.G. Sindh.
Respondents.4to8: Absent.

JUDGMENT

ARSHAD HUSSAIN KHAN, J. - The petitioners through the instant petition have challenged the order passed by the Executive District Officer (Revenue), Hyderabad on the application filed under section 164 (2) of Sindh Land Revenue Act, 1967 by respondents No.4 and 5 with the following prayers:-

- a) To declare the impugned order dated 2.4.2011 (copy supplied on 26.8.2011) passed by Executive District Officer (Revenue) Hyderabad the respondent No.2 as illegal, void, malafide, arbitrary, unspeaking, capricious, in excess of his jurisdiction, without lawful authority having no legal effect.
- b) To restrain the respondent No.3 to implement the order dated 2.4.2011 of Executive District Officer (Revenue) Hyderabad the respondent No.2 in any way and manner whatsoever.
- c) Any other relief which this Honorable Court deems fit and proper may also be awarded.”

2. Brief facts leading to the filing of the present petition as averred therein are that the agricultural land bearing Survey Nos.184, 185, 201, 455 area 19.01 acres (00-67 paisas share), 432/1,2, 433, 434/1,2, 435, 445 area 28.19 acres (00-83 paisa share), 231 (00.87 paisa share) and 181 (00.75 paisa share) total area 45-03 acres situated in deh Rukanpur Taluka Hyderabad was initially in the name of Haji Ghulam Nabi Dahri and upon his death, his Foti Khata Badal was effected on 14.03.1976 in favour of his son namely

Muhammad Ilyas, the father of the petitioners. The said Muhammad Ilyas subsequently made oral gift in favour of the petitioners and thereafter the names of the petitioners were effected in the record of rights vide entry No.148 dated 28.02.1990. That in the year 1990, respondents No.4 and 5 claiming themselves to be sister of the petitioners' father Muhammad Ilyas, filed suit bearing F.C Suit No.246 / 1990, *inter-alia*, against the present petitioners and their father for declaration, permanent and mandatory injunction. The father of the petitioners filed written statement in the said suit, however, the said suit was dismissed for non-prosecution on 26.09.2007. The said suit was never restored nor any attempt has been made in this regard. It is also averred that said Muhammad Ilyas had also filed suit bearing No.362/1990, *inter-alia*, against the petitioners, which too was dismissed on 26.09.2007 for non-prosecution. Further averred that respondents No.4 and 5 claiming to be the sisters of father of the petitioners, filed an application under section 164 (2) of Sindh Land Revenue Act, 1967 before the E.D.O (Revenue) against the petitioners and others. In the said application, it was alleged that Haji Ghulam Nabi Dahri had two wives; from first wife, he has only one son namely Muhammad Ilyas, whereas, from another wife, he has two daughters namely Mst. Mariyam and Mst. Zeenat (respondents No.4 and 5) and being legal heirs of Haji Ghulam Nabi Dahri, both the ladies respondents have also the right over the property left behind by their deceased father. It was alleged that Muhammad Ilyas after the death of Haji Ghulam Nabi Dahri had fraudulently got transferred the entire land of Haji Ghulam Nabi Dahri in his name and favour by way of Foti Khata Badal without intimation and notice by ignoring respondents No.4 and 5. It was also alleged that the fraudulent khata of their brother and also khata of the petitioners being sons of Muhammad Ilyas, were required to be cancelled because the respondents were deprived of their due shares. From the property of the deceased Haji Ghulam Nabi Dahri, the petitioner upon having knowledge of said application before the E.D.O (Revenue) have filed their objections and denied the relationship of the petitioners and respondents No.4 and 5. It is also alleged in the petition that E.D.O (Revenue) after hearing the parties allowed the application of the respondents No.4 and 5 vide order dated 02.04.2011, whereby the original entry No.77 dated 07.12.1976 in the name of Ghulam Nabi Dahri was restored and all the subsequent entries were cancelled.

3. The petitioners after having aggrieved by the said order of the E.D.O (Revenue) filed the present petition. Upon notice of the present petition, respondents filed objections, which include respondents No.4 and 8.

Respondent No.8, the father of the petitioners, in his objections has stated that the disputed land is inherited property, which belongs to Haji

Ghulam Nabi Dahri and petitioners have no concern with the property as they have no legal character and right over the inherited property; neither any oral gift has been made nor the property in question was ever gifted by said respondent No.8 to the petitioners. The respondent No.8 in his objections has also admitted that respondents No.4 and 5 are the sisters of respondent No.8 and daughters of Haji Ghulam Nabi Dahri. It is also stated that the order of the E.D.O (Revenue) is legal, valid and in accordance with law need not to be interfered with.

Respondent No.4 in her objections while supporting the impugned order passed by E.D.O (Revenue) has stated that the petitioners in order to usurp the shares of respondents No.4 and 5 have filed the present petition, which is not maintainable in law and the same has been filed by suppressing the material facts and as such, the same is liable to be dismissed.

4. Learned counsel for the petitioners during the course of arguments has contended that the respondents No.4 and 5 filed application under section 164 (2) of Sindh Land Revenue Act, 1967 before E.D.O (Revenue) by suppressing the material facts which application was also time barred being filed after the lapse of 34 years. He further contended that E.D.O (Revenue) while passing the impugned order has failed to consider the stance taken up by the petitioners before him, particularly, the dispute regarding relationship between the petitioners and respondents No.4 and 5. He further contended that E.D.O (Revenue) has also failed to consider the objections raised by the petitioners in respect of maintainability of *Suo-Mauto* application under the jurisdiction of E.D.O (Revenue), Hyderabad. It is also contended by the learned counsel that the impugned order is illegal, void, malafide and is in excess of jurisdiction vested in him, hence, the same is liable to be set aside by this Court in the constitutional jurisdiction. It is also contended that the entry of Foti Khata Badal was effected on 13.11.1976 in favour of the father of the petitioners whereas, another entry was effected on 28.02.1990 in favour of both the petitioners which entries were never challenged in appeal before the competent authority as required under Sindh Land Revenue Act, 1967 and as such, the *Suo-Mauto* application was neither entertainable nor it was in proper form. Learned counsel further contended that the impugned order was passed without touching the point of limitation, which is not permissible under the law. It is also argued that this petition is maintainable as there is no other remedy available against the order of E.D.O (Revenue) under section 164 of Sindh Land Revenue act, 1967 and having no any other remedy, the present petition is maintainable. In support of his contentions, he has relied upon the case of 'Syed GHULAM ALI SHAH v. THE DEPUTY COMMISSIONER & INCHARGE, SETTLEMENT CELL, SANGHAR AND 2 others' reported in 1984 CLC 1729,

'JAMILA KHATOON and others v. AISH MUHAMMAD and others' (2011 SCMR 222) and 'ABDUL MAJEED KHAN through L.Rs. and others v. Ms. MAHEEN BEGUM and others' (2014 SCMR 1524).

5. Mr. Allah Bachayo Soomro, learned Additional Advocate General on the contrary supported the order impugned in the present proceedings and has argued that the present petition is not maintainable as the same was filed without availing the remedy available under the law. He further argued that the petitioners should have filed appeal under the hierarchy of Revenue authority instead of approaching this Court directly and filing the present petition. He has relied upon the case of 'Syed MUHAMMAD BAQIR SHAH v. FARIDA SAJID' reported in 2013 CLC 52.

6. In order to assist the Court on the point as to whether the order passed by E.D.O (Revenue) can be challenged under constitutional jurisdiction directly or under the hierarchy of Board of Revenue, Mr. Jhamat Jethanad a Senior Advocate present in Court has referred sections 8, 53, 161, 164 and 179 of Sindh Land Revenue Act, 1967 and according to him, the order of E.D.O (Revenue) under section 164 of Sindh Land Revenue Act, 1967 can be challenged under the hierarchy of Board of Revenue.

7. Learned counsel for the petitioners during rebuttal has reiterated his stance in the case and submitted that there is no remedy available to the petitioner against the order passed by E.D.O (Revenue) under section 164 of The Sindh Land Revenue Act 1967 [Act of 1967], hence, they have filed the present petition, which is absolutely within the four corners of the law and maintainable.

8. We have heard the learned counsel for the parties and with their assistance have perused the record available as well as the law cited at the bar.

9. We have considered the submissions especially in the context of; **(i)** *as to whether the present petition filed by the petitioners challenging the order passed by E.D.O (Revenue), Hyderabad is maintainable under constitutional jurisdiction;* and **(ii)** *as to whether the respondents No.4 and 5 are legal heirs of Haji Ghulam Nabi Dahri.*

10. From the fact it has been emerged that respondent No.2 (E.D.O Revenue) by exercising suo mauto powers, under section 164 of the Act of 1967, restored the original entry No.77 DK Book No. 19613 dated 07.12.1976 in the name of Ghulam Nabi Dahri and cancelled all subsequent entries made in record of rights. He directed the Mukhtiarkar (Revenue) concerned to hold

Jalsa-e-Aam and mutate the Foti-Khata of deceased Ghulam Nabi Dahri after observing all legal and Codal formalities as prescribed in the Act of 1967. Since, instant petition has been preferred against the order passed by E.D.O. (Revenue) Hyderabad (respondent No.2) under section 164 of the Act of 1967, which is an "Original Order", and the said Act of 1967 itself provides the remedy of appeal and revision against the orders passed under the Act of 1967 by the revenue officers; therefore, primary question before us is of maintainability of present Constitutional petition.

Before going into further discussion it would be appropriate, for the sake of convenience, to reproduce section 161 of the Sindh Land Revenue Act, 1967 as under:--

"161. Appeals.---(1) Save as otherwise provided by this Act, an appeal shall lie from an original or appellate order of a Revenue Officer as follows, namely--

- (a) to the Assistant Collector of the first grade when the order is made by the Assistant Collector of the second grade; and
- (b) to the Collector when the order is made by an Assistant Collector of the first grade;
- (c) to the Commissioner, when the order is made by a Collector;
- (d) to the Board of Revenue only on a point of law, when the order is made by a Commissioner:

Provided that---

- (i) when an original order is confirmed on first appeal, a further appeal shall not lie.
- (ii) when any such order is modified or reversed on appeal by the Collector, the order made by the Commissioner on further appeal, if any, to him shall be final.

Explanation (1):- Omitted

- (2) An order shall not be confirmed, modified or reversed in appeal unless reasonable notice has been given to the parties affected thereby to appear and be heard in support of or against the order appealed from.
- (3) No Revenue Officer other than the Board of Revenue shall have power to remand any case in appeal to a lower authority.

11. In the instant case, instead of challenging the impugned order in hierarchy of the Act of 1967, the petitioners have filed instant Constitutional petition seeking declaration that the impugned order, passed by the Executive District Officer (Revenue) Hyderabad is illegal, unlawful and void ab initio. The impugned order may or may not be strictly in accordance with law, but it cannot be said that it has been passed without jurisdiction, as under section 164 of the Act of 1967, an Executive District Officer (Revenue) has jurisdiction to hear a suo mauto revision and pass an order. Revenue Courts have exclusive jurisdiction to determine the matter pertaining to making and maintenance of record-of-rights, the assessment and collection of land

revenue, the survey and demarcation of boundaries of the land, the appointment and functions of Revenue Officer and other matters connected with the Land Revenue Administration in the Province of Sindh under the Act of 1967.

12. It is now a well-established that Article 199 of the Constitution casts an obligation on the High Court to act in the aid of law and protects the rights within the frame work of Constitution, and if there is any error on the point of law committed by the courts below or the tribunal or their decision takes no notice of any pertinent provision of law, then obviously this court may exercise Constitutional jurisdiction subject to the non-availability of any alternate remedy under the law. This extra ordinary jurisdiction of High Court may be invoked to encounter and collide with extraordinary situation. This Constitutional jurisdiction is limited to the exercise of powers in the aid of curing or making correction and rectification in the order of the courts or tribunals below passed in violation of any provision of law or as a result of exceeding their authority and jurisdiction or due to exercising jurisdiction not vested in them or non-exercise of jurisdiction vested in them. The jurisdiction conferred under Article 199 of the Constitution is discretionary with the objects to foster justice in aid of justice and not to perpetuate injustice. However, if it is found that substantial justice has been done between the parties then this discretion may not be exercised. So far as the exercise of the discretionary powers in upsetting the order passed by the court below is concerned, this court has to comprehend what illegality or irregularity and or violation of law has been committed by the courts below which caused miscarriage of justice. Reliance is placed on the case *MUSLIM COMMERCIAL BANK LTD. through Attorney v. ABDUL WAHEED ABRO and 2 others* (2015 PLC 259).

Furthermore, this Court being Court of Constitutional Jurisdiction does not step in where an adequate remedy to aggrieved person is available by way of appeal and full-fledged machinery for the redressal of his grievances is provided by the Act of 1967. The Honourable Supreme Court in the case of *MUMTAZ AHMED and another v. ASSISTANT COMMISSIONER and another* (PLD 1990 SC 1195) has held that the petitioners should not have approached the High Court without exhausting other remedies provided in law in the hierarchy of the Revenue Forums and a Constitutional Petition being premature thus could be dismissed on that ground alone.

13. Reverting to second question *whether the respondents No.4 and 5 are legal heirs of Haji Ghulam Nabi Dahri* or not? From the perusal of the record it appears that both the ladies, that is, respondents No.4 and 5 had filed their suit bearing F.C Suit No.246 of 1999 for declaration, permanent and

mandatory injunction in the year 1999 and the respondent No. 8 herein (defendant No.4 in the said suit) filed written statement in that suit had also admitted them to be legal heirs of deceased Haji Ghulam Nabi Dahri, in para No.5 of his written statement, which, for the sake of convenience, is reproduced as under:-

“5. That the contents of plaint para No.5 are denied as the defendant No.4 has paid the due share in terms of money and with their consent the Foti khata was mutated after giving due share to them. The petitioner is strict to prove the same.”

14. Admission on the part of respondent No.8, who is father of petitioners, is sufficient to believe that the respondents No.4 and 5 are the legal heirs of Haji Ghulam Nabi Dahri.

15. In view of above facts and circumstances of the case, the case-law cited by the learned counsel for the petitioners are distinguishable from the facts of the case in hand.

16. Accordingly, without going into the validity of the impugned order, we deem it fit to dismiss this petition on alternate ground that the petitioners should have approached Forum under the hierarchy of Revenue Laws, as held in the case of Mumtaz Ahmed (supra). The proper forum, i.e. Hierarchy of Board of Revenue is available with the petitioner and the writ jurisdiction can only be invoked when there is no other alternate remedy available, consequently, instant petition being devoid of merits is not maintainable.

Foregoing are the reasons for our short order dated 12.09.2017, whereby the petition along with listed application was dismissed with no order as to cost.

Any observation made hereinabove will not prejudice the case of either party in the proceedings if initiated before the Revenue Forum.

JUDGE

JUDGE

Abdullah Channa/PS