

Order Sheet

**HIGH COURT OF SINDH, BENCH AT SUKKUR**

**Revision Application No. S-55 of 1996**

[Muhammad through legal heirs versus Gul Muhammad through legal heirs]

Applicants : (i) Naukhab & other legal heirs of Muhammad; (ii) Haji Sangar; through Mr. A.M. Mobeen Khan Advocate

Respondents 1(a) to 1(i) : Muhammad Islam & other legal heirs of Gul Muhammad, through Mr. Sarfraz A. Akhund Advocate.

Respondents 2 to 4 : Colonization Officer Guddu Barrage, Sukkur & others, through Mr. Ahmed Ali Shahani, Additional Advocate General Sindh

Dates of hearing : 23-09-2020 and 25-09-2020.

Date of order : 05-12-2020

**ORDER**

**Adnan Iqbal Chaudhry J.-** F.C. Suit No. 65/1981 by the predecessor of the Respondents 1(a) to 1(i) (Plaintiffs) for declaration, cancellation *inter alia*, was dismissed by the Senior Civil Judge Ghotki by judgment and decree dated 16-12-1992. However, Civil Appeal No. 2/1993 by the said Respondents was successful, and the suit was decreed by the Additional District Judge Ghotki by judgment and decree dated 9-6-1996; hence this revision by the Defendants 1 and 2 of the said suit.

2. The Plaintiff, Gul Mohammad, pleaded that in 1970 he was granted 7-23 acres in Survey No. 502, Deh Ghari Chakar, Taluka Mirpur Mathelo, by the Colonization Officer Guddu Barrage, Sukkur on permanent *harap*; that he was cultivating the same and paying installments of the grant; that on 02-12-1980, the Defendant No.1 made an application to the Colonization Officer (Defendant No.3) for action against the Plaintiff alleging that the Defendant

No.1 had purchased 2 acres, and the Defendant No.2 had purchased 1-30 acres out of the said 7-23 acres from the Plaintiff by a sale agreement dated 09-01-1974, but that the Plaintiff had resiled from the same. The Plaintiff pleaded that he had not executed any such agreement and the same was a forgery; that on the basis of the application by the Defendant No.1, the Assistant Colonization Officer issued notice dated 03-03-1981 to the Plaintiff; that proceedings by the Colonization Officer were without jurisdiction as the remedy of the Defendants 1 and 2 was before the civil court by way of a suit for specific performance; and that the Plaintiff could not have executed the alleged sale agreement as he had yet to acquire proprietary rights in the land. Therefore, the Plaintiff prayed as follows:

- “(a) To declare that the agreement for sale dated 09.01.1974 alleged to have been executed by the plaintiff in favour of the defendants 1 and 2, is a forgery and is liable to be cancelled;*
- (b) To declare that the defendant No.3 has no jurisdiction to entertain the miscellaneous application dated 02.12.1980 made by the defendants 1 and 2 and the proceedings before defendant No.3 including the notice dated 03.03.1981 issued by him, are illegal, without jurisdiction and null and void;*
- (c) In the alternate, to declare that the alleged sale agreement dated 09.01.1974, if any, is prohibited by law and therefore, is null and void;*
- (d) To issue permanent injunction restraining the defendants from taking any action whatsoever against the plaintiff on the basis of the miscellaneous application dated 02.12.1980 and further restraining them from interfering with the peaceful possession of the plaintiff over the suit land;*
- (e) To pass judgment and decree cancelling the alleged sale agreement dated 09.01.1974;*
- (f) To grant costs .....*
- (g) To grant any other relief .....*”

3. The Defendants 1 and 2 (hereinafter ‘the Defendants’) pleaded that the sale agreement dated 09-01-1974 was duly executed by the Plaintiff after receiving consideration, and possession was delivered to the Defendants; that the Defendants were paying installments of

the grant to the Government on behalf of the Plaintiff; that on the application of the Defendant No.1, the Assistant Colonization Officer made an enquiry, recorded statements, and found the Defendants to be in cultivating possession of 2-30 acres purchased by them; that at the time the Defendants could not sue the Plaintiff for specific performance of the sale agreement as the Plaintiff had yet to acquire proprietary rights in the land; that the suit was time-barred; and that the civil court had no jurisdiction in the matter. The Defendants 3 to 5, i.e. the Colonization Officer Guddu Barrage, the Secretary Revenue Department and the Province of Sindh were *ex parte*.

4. Pending suit, the Plaintiff Gul Muhammad passed away and his legal heirs were impleaded in his stead. One of his sons, Muhammad Islam lead evidence (PW-1, Exhibit 108) and also examined his uncle Allah Ditto (Exhibit 130). Though a copy of the disputed agreement dated 09-01-1974 was filed with the plaint, the Plaintiff did not produce the same in evidence. The Defendant No.1, Muhammad son of Nukhab examined himself (DW-1, Exhibit 145) and two others namely Ghulam Hyder and Umeed Ali (Exhibits 150 and 151). No evidence was lead by the Defendant No.2, Sangar. The Defendant No.1 tendered the original of the agreement dated 09-01-1974 for exhibit; however its production was opposed by the Plaintiff's counsel on the ground that such document had not been filed earlier by the Defendants, nor was any application made for its subsequent production under Order XIII Rule 2 CPC. That objection was sustained by the trial court and the agreement dated 09-01-1974 was not exhibited in evidence.

5. In dismissing the suit the trial court observed that the sale agreement dated 09-01-1974 was not exhibited in evidence; and since it was the Plaintiff's burden to prove that the same was forged, the prayer for cancellation must fail. On the issues whether the sale agreement was barred by section 19 of the Colonization & Disposal of Government Lands (Sindh) Act, 1912, and whether the

Colonization Officer had jurisdiction in the matter, the trial court relied on *Rehmat Bibi v. Jhando Bibi* (1992 SCMR 1510) to hold that section 19 did not prohibit an agreement to sell contingent on acquiring proprietary rights, and in the meantime the Colonization Officer could exercise jurisdiction to entertain the application of the Defendants against the Plaintiff.

6. The appellate court observed that though the sale agreement was not exhibited, a copy thereof was part of the record of the suit, and it would be in the interest of justice to examine the same. On examining the sale agreement the appellate court observed that a signature of the Plaintiff Gul Muhammad appeared only as purchaser of the stamp paper which too was different from his signatures on the plaint and vakalatnama; that there was no signature of Gul Muhammad as vendor of the sale agreement, nor signatures of the Defendants as vendees. The appellate court also observed that the Defendants had not produced any receipt to show payment of installments for the grant made on behalf of the Plaintiff, nor any evidence to show possession of the land. In said circumstances, the appellate court concluded that execution of the sale agreement dated 09-01-1974 was not proved. The issue whether the Colonization Officer had jurisdiction to entertain the application of the Defendants, was decided in the negative. On said findings, the appellate court decreed the suit.

7. Mr. A.M. Mobeen Khan, learned counsel for the Applicants (Defendants 1 and 2) had at the start of the hearing placed an application under Order XLI Rule 27 CPC to produce the original of the agreement dated 09-01-1974. He submitted that the trial court had erred in refusing to exhibit the agreement tendered by the Defendant No.1 when a copy of the same was already on record annexed with the plaint. On being confronted with the fact that the Defendants had never appealed such order of the trial court, learned counsel stated that he would be satisfied if the non-exhibit of the

agreement is not held against the Applicants in deciding this revision.

8. On the revision application, learned counsel for the Applicants first submitted that the agreement dated 09-01-1974 was not a sale agreement, but a '*Qabooliat*', whereby the Plaintiff surrendered the land to the Defendants; that such transaction was envisaged and permitted under section 19 of the Colonization & Disposal of Government Lands (Sindh) Act, 1912; and hence, it was within the domain of the Colonization Officer to entertain the grievance of the Defendants. In the alternative, he cited the case of *Sher Muhammad Khan v. Ilam Din* (1994 SCMR 470) to submit that a mere agreement to sell did not violate section 19 of the Colonization & Disposal of Government Lands (Sindh) Act, 1912. Learned counsel submitted that the impugned judgment of the appellate court did not notice Exhibits 146 and 147 which were statements of the attesting witnesses of the sale agreement recorded before the Assistant Colonization Officer and which supported the case of the Defendants; that on the other hand, the Plaintiffs had not called the attesting witnesses of the agreement even though PW-1 had deposed that he had brought the attesting witnesses to give evidence in his favour. He submitted that not only was the suit time-barred, it was also barred by section 36 of the Colonization & Disposal of Government Land (Sindh) Act, 1912 read with section 172 of the Sindh Land Revenue Act, 1967.

9. As regards the application under Order XLI Rule 27 CPC, Mr. Sarfraz A. Akhund, learned counsel for the Respondents 1(a) to 1(i) (Plaintiffs) stated that he had no objection if the sale agreement dated 09-01-1974 is treated as having been exhibited but without prejudice to his argument that the same was forged and was never proved. On the revision application, Mr. Sarfraz Akhund Advocate replied that the argument that the alleged agreement was a *Qabooliyat*, was an afterthought and contrary to the pleading and evidence of the Defendants; that since the alleged sale agreement

was an unregistered document, once PW-1 had deposed that the agreement was forged, the onus of proof shifted to the Defendants to prove its execution as beneficiaries thereof; that while it was section 68 of the Evidence Act, 1872 that was attracted in the circumstances, requiring the calling of only one of the attesting witnesses, the Defendants had not called any of the attesting witnesses and thus they failed to prove the alleged sale agreement; that statements of attesting witnesses recorded before the Assistant Colonization Officer were inadmissible evidence as those were not statements covered by Article 46 of the Qanun-e-Shahadat Order, 1984; that in any case, the Assistant Colonization Officer had no jurisdiction to record evidence as he was not a 'Court' defined in Article 2(a) of the Qanun-e-Shahadat Order. Learned counsel submitted that the Colonization Officer had no jurisdiction to undertake any proceedings to enforce a sale agreement; and that none of the ouster clauses relied upon by the Applicants go to oust a suit for cancellation. The learned AAG Sindh submitted that the authority of the Colonization Officer was confined to acts under the Colonization & Disposal of Government Land (Sindh) Act, 1912.

10. Heard the learned counsel and perused the record.

The argument on behalf of the Applicants that the suit was time-barred, is premised on the narration in para 15 of the plaint that the cause of action first arose on 09-01-1974 when the Defendants 1 and 2 prepared a forged agreement of sale. Learned counsel submitted that such narration goes to show that the Plaintiff had knowledge of the sale agreement in the year 1974, and thus the suit filed in the year 1981 was time-barred. However, that is reading para 15 of the plaint out of context. In the same para, the Plaintiff has gone on to state that: *"The cause of action again accrued to the plaintiff on 03-03-1981 when he was served with a notice by the Colonization Guddu Barrage, Sukkur"*. From a reading of the plaint as a whole it is clear that it was the Plaintiff's case that he came to know of the alleged sale agreement when he received notice dated 03-03-1981 from the Assistant Colonization Officer. Learned counsel for the

Applicants did not point to any evidence to the contrary. Therefore, it has been rightly held by both the Courts below that the suit filed on 08-04-1981 was within limitation.

11. Mr. Mobeen Khan, learned counsel for the Applicants had attempted to argue that the agreement dated 09-01-1974 was not a sale agreement, but a 'Qabooliat' by which the Plaintiff had surrendered the land in favor of the Defendants, and that in terms of section 19 read with section 17 of the Colonization & Disposal of Government Lands (Sindh) Act, 1912, such surrender was an exception to the restriction on transfer of tenancy rights. However, that argument hardly flies. Firstly, that was never the case set-up by the Defendants before the Courts below. Rather they had categorically pleaded that the agreement in question was a sale agreement. Secondly, even the surrender and exchange envisaged under sections 17 and 19 of the Act of 1912 would have required the prior permission of the Colonization Officer. It was not the case of the Defendants that such permission was obtained.

12. It was common ground that the Plaintiff, Gul Muhammad, held 7-23 acres in Survey No. 502, Deh Ghari Chakar, Taluka Mirpur Mathelo, as a tenant under the Colonization & Disposal of Government Lands (Sindh) Act, 1912; that installments of the price for the grant were yet to be paid-off and the Plaintiff had yet to acquire proprietary rights in the land; and that section 19 of the Act of 1912 prohibited the transfer of tenancy rights/interests without the express consent of the Commissioner. Both learned counsel were in agreement that on the legal plane, a document which does not transfer tenancy rights but is merely an agreement to sell the corpus of the land on acquiring proprietary rights, does not violate section 19 of the Colonization & Disposal of Government Lands (Sindh) Act, 1912, and that such agreement can be enforced only after the seller acquires proprietary rights. For that, reliance can be placed on *Sher Muhammad Khan v. Ilam Din* (1994 SCMR 470) and *Muhammad Sadiq v. Muhammad Ramzan* (2002 SCMR 1821). However, in the present

case, the allotment order (Exhibit 109) produced by PW-1 to show grant of land to the Plaintiff, was dated 10-11-1980, ie., six years after the alleged sale agreement dated 09-01-1974. Though the Plaintiff had pleaded that he was granted permanent tenancy rights in the year 1970, apart from some receipts of land revenue, the allotment order or lease for the period prior to 1980 was not produced. Effective 20-11-1972, the Statement of Conditions for the grant of agricultural land in the Guddu Barrage area<sup>1</sup> provided that the grant made thereunder was non-transferable for 20 years. In other words, there was nothing to show that the conditions attached to the Plaintiff's tenancy rights in the year 1974 were such that could have prompted the parties to enter into an agreement to sell. The official Defendants including the Colonization Officer, who could have shed light on that aspect of the matter, we all *exparte*.

13. A copy of the sale agreement dated 09-01-1974, of which cancellation was sought, was filed with the plaint. Under '*documents relied upon*', the un-amended plaint also stated that the original of the sale agreement was in the possession of the Defendants 1 and 2. In their written statement, the Defendants owned the very sale agreement and its possession, and relied upon the same. Since the existence of the sale agreement was admitted by the Defendants in their pleading, and the Plaintiff was not out to prove the contents of such agreement, nothing turned on the Plaintiff's failure to produce a copy of the same or to summon the original in evidence.

14. When it was the turn of the Defendants to lead evidence, the Defendant No.1 did tender the original of the sale agreement for exhibit; however, as already narrated above, the Plaintiff objected, and the trial court declined to receive it in evidence on the ground that it had not been previously filed by the Defendants and no application had been made under Order XIII Rule 2 CPC for its subsequent production. Learned counsel for the Applicants

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<sup>1</sup> Notification No. KBI/1/30/72/7179/7784 issued under section 10(2) of the Colonization of Government Lands (Punjab) Act, 1912 as applicable to Sindh.



(Defendants) had submitted that the refusal of the trial court to exhibit the sale agreement was erroneous as a copy of the same was already on the record with the plaint, and therefore the Defendants were not required to seek permission of the Court for its production under Order XIII Rule 2 CPC. The restriction placed by Order XIII Rules 1 and 2 CPC on the subsequent production of documents is to prevent fraud, surprise, filling-in lacunae, and not to penalize a party.<sup>2</sup> Therefore, the exception in Order XIII Rule 1 CPC for a document “which has not already been filed in Court”, would also be available to a defendant to rely on a document already filed by the plaintiff. In other words, in the circumstances of the case, the Defendants did not require permission of the Court under Order XIII Rule 2 CPC to produce the sale agreement which was already on record with the plaint, and the refusal of the trial court to exhibit the same was misconceived. But having said that, such refusal by the trial court did not eventually prejudice the case of the Defendants in that, in passing the impugned judgment the appellate court did in fact peruse and assess the sale agreement; hence the submission of Mr. Mobeen Khan that he would be satisfied if the non-exhibit of the sale agreement is not held against the Defendants in deciding this revision. To that extent Mr. Akhund had given consent. Therefore, the application moved by the Applicants under Order XLI Rule 27 CPC is disposed of by observing that the non-exhibit of the sale agreement dated 09-01-1974 shall not be held against the Defendants in deciding this revision. The office is directed to allocate CMA number to the application. The order dated 25-09-2020 records that the original of sale agreement had been seen and returned to the Applicants.

15. But even taking the sale agreement dated 09-01-1974 to have been exhibited by the Defendants, that by implication would not be proof of its execution when execution was denied by the Plaintiff. It is settled law that provisions of the statute of evidence governing

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<sup>2</sup> See *Kohinoor Tobacco Co. (Pvt.) Ltd. v. S.M. Idrees Allahwalla* (2013 CLC 1789).

modes of proof of document cannot be dispensed with even if the document is exhibited under Order XIII Rule 4 CPC.<sup>3</sup>

16. The sale agreement in question was signed by two persons as attesting witnesses, namely Ghulam Qadir and Ali Akbar. The sale agreement was allegedly executed on 09-01-1974, prior to the promulgation of the Qanun-e-Shahadat Order, 1984. It has been held by the Supreme Court in *Rasheeda Begum v. Muhammad Yousuf* (2002 SCMR 1089) and *Noor Muhammad v. Nazar Muhammad* (2002 SCMR 1301) that where an agreement to sell had been reduced into writing prior to the Qanun-e-Shahadat Order, 1984, and had been attested by witnesses, it had to be proved in accordance with the provision of section 68 of the erstwhile Evidence Act, 1872, even though at that time the Evidence Act, 1872, unlike Article 17(2)(a) of the Qanun-e-Shahdat Order, 1984, did not require an agreement to sell to be attested. The requirement of section 68 of the Evidence Act was that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witnesses alive, and subject to the process of the Court and capable of giving evidence. (There was a proviso for a registered document, but that is not relevant for the present purposes). Admittedly, none of the attesting witnesses to the sale agreement were called by the Defendants for giving evidence in the suit. It was not the case of the Defendants that the attesting witnesses were incapable of giving evidence in the suit. The fact that the attesting witnesses may have given statements in favor of the Defendants before the Assistant Colonization Officer, and that those statements were produced in the suit as Exhibits 146 and 147, that did not fulfill the mandatory requirement of section 68 of the Evidence Act, 1872. Consequently, and such consequence having been provided by section 68 of the Evidence Act itself, the sale agreement cannot be used as evidence. Furthermore, no receipts had been produced by the Defendants to

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<sup>3</sup> See *Muhammad Yusuf Khan Khattak v. S.M. Ayub* (PLD 1973 SC 160); *Muhammad Akram v. Faridi Bibi* (2007 SCMR 1719); and *Province of Punjab v. Syed Ghazanfar Ali Shah* (2017 SCMR 172).

show payment of consideration under the sale agreement. In fact, the Defendant No.2 (Sangar), the other beneficiary/vendee of the sale agreement, had never stepped into the witness box in support of the sale agreement. In other words, the sale agreement was never proved. In these circumstances, I need not examine the discrepancies highlighted by the appellate court in the alleged sale agreement.

17. As regards the issue framed on the jurisdiction of the civil court to entertain the suit, that was to the extent of relief sought against proceedings by the Colonization Officer. There is no cavil that the suit was maintainable for the relief of cancellation under section 39 of the Specific Relief Act, 1877. With regards to the relief sought against proceedings by the Colonization Officer, learned counsel for the Applicants had submitted that the jurisdiction of the civil court was ousted by section 36 of the Colonization & Disposal of Government Land (Sindh) Act, 1912 read with section 172 of the Sindh Land Revenue Act, 1967. The law with regards to such ouster clauses is settled, viz. that an act without jurisdiction cannot be said to be an act 'under' the special law that ousts jurisdiction of the civil court, and in such circumstances the plenary jurisdiction of the civil court under section 9 CPC can be invoked as an exception.<sup>4</sup> Admittedly, the proceedings commenced by the Colonization Officer was on the complaint of the Defendants (Exhibit 128) that the Plaintiff had resiled from their sale agreement. The notice dated 03-03-1981 (Exhibit 129) issued to the Plaintiff was also in that regard. Learned counsel for the Applicants could not point to the provision in the Colonization & Disposal of Government Lands (Sindh) Act, 1912 or the Sindh Land Revenue Act, 1967 under which the Colonization Officer could redress said grievance of the Defendants. It would have been a different matter if the Colonization Officer was proceeding to see whether the terms of the tenancy had been violated.

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<sup>4</sup> See *Punjab Province v. Federation of Pakistan* (PLD 1956 Federal Court 72); and *Abbasia Cooperative Bank v. Hakeem Hafiz Muhammad Ghaus* (PLD 1997 SC 3).

18. Having seen that the sale agreement in question was never proved, and that the proceedings in question by the Colonization Officer were without jurisdiction, I see no reason to interfere with the judgment and decree passed by the appellate court in Civil Appeal No. 2/1993. Therefore, this revision application is dismissed with the observation that the judgment and decree passed by the appellate court shall not be construed to prevent the Colonization Officer from taking action in the event there is a violation of the conditions of the grant of land.

**JUDGE**