

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

**2<sup>nd</sup> Appeal No. 05 of 2015**

**Ali Bux**

Appellant : through Mr. Arbab Ali Hakro, Advocate.

Respondent No 1 to 6: Through Mr. Muhammad Arshad S. Pathan,  
Advocate.

Wali Muhammad Jamari, Assistant  
Advocate General, Sindh

Dates of hearing : 25.10.2019, 1.11.2019, 4.11.2019 and  
08.11.2019

Date of decision : 22.11.2019

**J U D G M E N T**

**ADNAN-UL-KARIM MEMON, J:-** The Appellant is asking for setting aside the Judgment and Decree dated 31.05.2011 passed by learned 1<sup>st</sup> Senior Civil Judge Hyderabad in F.C Suit No. 32 of 2006 (Asghari & others v. Rehmatullah & others) and the Judgment and Decree dated 26.01.2015 & 30.01.2015, respectively passed by learned District Judge, Matiari, in Civil Appeal No.11 of 2012 (Re- Ali Bux v. Mst. Asghari & others) whereby learned District Judge while dismissing the aforesaid Appeal has maintained the judgment & decree passed by learned trial Court.

2. Brief facts of the case, as per pleadings of the parties, are that respondents 1 to 6 had filed F.C. Suit No.32 of 2006 in the Court of 1<sup>st</sup> Senior Civil Judge, Hyderabad, for Declaration, Cancellation, Partition, Possession, Mandatory and Permanent Injunction against the Appellant and others, claiming that Survey Nos. 20, 23 and 24 situated in Deh Bhitshah, Taluka Hala, District Matiari, admeasuring 19-08 acres (hereinafter referred to as the "suit land"), originally belonged to one Rasool, whose right in the property, after his death devolved upon his son Nizam Ali (66 paisa) and daughter Mst. Bibi Rasheedan (34 paisa), the only legal heirs of deceased Rasool.

Mst.Bibi Rasheedan sold her share in the suit land to his brother/ respondent No.8 (Abdul Sattar). Nizam Ali passed away in year 1988-89 leaving behind one widow Mst. Suma (died on 05.12.1999), six daughters (respondents No.1 to 6) and two sons (respondents No.7 & 8) as his only legal heirs. In the month of October 2003, respondent No. 7 filed F.C Suit No.57 of 2003 in the Court of IVth Senior Civil Judge, Hyderabad, against respondents 8 to 10; hence respondents 1 to 6 came to know that Foti-Khata of their father (Nizam Ali) was fraudulently changed by their brothers (respondents 07 and 08) in their names showing themselves as only surviving legal heirs of late Nizam by concealing the facts and the land was mutated in their names vide JiryanNo.57 (as per documentary evidence correct number is 56) dated 27.03.1989. The fotik-khata was changed on basis of manipulated statements of Fateh Muhammad and Shamsuddin. Respondents 01 to 06 by filing F.C Suit No.66/2003 (Mst. Asghari & others v. Rehmatullah & others) challenged the said foti-khata mutation entry and sought declaration of their right in the suit land left by their deceased father and their mother as per law of inheritance. The aforesaid suit was consolidated with F.C Suit No.57 of 2003, but on failure to adduce the evidence, his side was closed. That in 1<sup>st</sup> week of April, 2006, respondents 01 to 06 further came to know that during pendency of F.C. Suit No. 66of 2003, the respondent No.07 sold out his managed share (33 paisa) to Appellant through registered Sale Deed R.D No.27 dated 09.01.2006 and got it mutated in his favour in revenue record. In view of this scenario, respondents 01 to 06 on 15.4.2006 filed an application under Order XXIII Rule 1 CPC read with Section 151 CPC praying for withdrawal of F.C Suit No. 66 of 2003 with permission to file afresh suit, which was allowed on 15.4.2006, whereafter, they filed the instant suit for declaration to the effect that they being the legal heirs of late Nizam Ali are co-sharers in the suit land and change of foti-khata /mutation in revenue records in the names of respondents 07 and08 only is illegal. They also prayed for partition and possession of land as per their share as well as cancellation of registered sale deed executed in favour of the Appellant. The said suit was hotly contested by the Appellant. While facing with the divergent pleas of the parties, learned trial Court captured the disputed area of pleadings and framed the following issues:-

1. *Whether the suit is not maintainable under the law?*

2. *Whether the plaintiffs duly executed power attorney in favour of Asghar son of Mansab Ali?*
3. *Whether no cause of action was accrued to the plaintiffs for filing the instant suit?*
4. *Whether Rasool expired leaving behind one son, namely, Nizam Ali and daughter, namely, Mst. Babi as his legal heirs?*
5. *Whether Mst. Babi sold out her 34 paisa share in the suit property to the defendant No.2?*
6. *Whether Nizam Ali also expired leaving behind his legal heirs as mentioned in the para No.5 of the plaint?*
7. *Whether defendant No.1 and 2 got their name mutated in the record of right as owner of 33 paisa of each in the suit land being only legal heirs of deceased Nizam Ali vide Jeerian No.56 dated 27.03.1989?*
8. *Whether deceased Nizam Ali predecessor became owner of 66 paisa share in the suit land by way of inheritance and has given 33 paisa share to the defendant No.1 and 33 paisa share to defendant No.2 during his life time?*
9. *Whether the defendant No.1 filed Civil Suit No.57 / 2003 in the Court if so what is its effect?*
10. *Whether the plaintiffs had failed to challenge any act of defendant No.1 and 2 before any forum as provided under the law?*
11. *Whether plaintiffs filed First Class Suit No.66 /2003 and later on withdraw the same, if so what is its effect?*
12. *Whether the sale deed executed by the defendant No.1 in favour of defendant No.3 is liable to be cancelled?*
13. *Whether the plaintiff is entitled to the relief as prayed for?*
14. *What should the decree be?*

3. Learned trial Court after careful examination of the parties and evidence adduced by the parties decided the aforesaid issues in favour of the respondents 01 to 06/plaintiffs vide impugned judgment and decree. The Appellant being aggrieved by and dissatisfied with the aforesaid Judgment and Decree preferred statutory Appeal which too was dismissed vide Judgment and Decree dated 26.01.2015 and 30.01.2015, respectively passed by learned Appellate court and now he has filed the instant IInd Appeal before this Court on 05.3.2015.

4. Mr. Arbab Ali Hakro, learned Counsel for the Appellant, mainly contended that vested right of the appellant on the subject land,

acquired by him through valuable consideration, could not be interfered; that learned Courts below failed to appreciate the factum that the legal heirs inter-se had committed fraud as alleged in the plaint, relief by way of declaration, which is discretionary in nature, ought not to have been granted to them; that both the Courts below failed to appreciate that respondents 1 to 6/plaintiffs had a remedy by way of filing suit for damages against their brother/respondent No.7 who committed alleged fraud with them and sold out his managed share of 33% in the inherited property/the suit land to the Appellant through registered Sale Deed; that the title acquired by the Appellant over the suit land is protected under Section 41 of the Transfer of Property Act; therefore, the judgments of both the courts below are contrary to law and facts; that the judgments of both the Courts below are based upon misreading / non-reading of evidence, as such, instant Appeal may be allowed and judgments of both the Courts below may be set-aside; that sale of share in the suit land by their brother/Respondent No.7 during his life time in favour of the Appellant is in respect of his 33% share in the suit land, which is/was well within his entitlement, therefore, ought not to have been called in question in civil proceedings as it is protected under the law of inheritance. Learned Counsel for the Appellant relied upon Section 18 of Specific Relief Act and contended that sale in favour of the Appellant can be upheld even on this basis; that learned trial Court failed to consider that when subsequent owner had a valid title to the suit land, his possession could not be disturbed/interfered with and in the circumstances, the respondents 1 to 6/plaintiffs were not entitled to the relief as prayed; that both learned Courts below have failed to consider that under Section 172 of Land Revenue Act, Revenue Courts have hierarchy of their own and until and unless their orders are not found to be passed without lawful authority and jurisdiction, the Civil Court has no jurisdiction to interfere; that the Suit was filed through Special Power of Attorney (Ex.32) which was required to be filed by General Power of Attorney as required Under Order III, Rule 2 of CPC and Form No. V of Sindh Civil Court Rules; thus, the suit was filed by incompetent person; hence, it is/was not maintainable; that both the Courts below have failed to consider that entry No.56 dated 27.03.1989 in Revenue Record about 33 paisa share in the suit land, each in the name of respondents 7 and 8, was mutated in the year 1989, whereas the suit has been filed on

27.04.2006, which is time barred as per Section 120 of Limitation Act; thus, in view foregoing legal position, findings of both the Courts below are against the law and liable to be set-aside; that both the Courts below have exercised the jurisdiction illegally by relying upon Section 53 of Land Revenue Act and Section 42 of Specific Relief Act as respondents 1 to 6 were not in possession of the suit land, therefore, could not file a Suit for declaration; that both the Courts below have failed to appreciate that registered Sale Deed dated 09.01.2006 executed by respondent No.7 in favour of Appellant, therefore, respondents 1 to 6 had no locus standi to pray for cancellation of sale deed under Section 39 of Specific Relief Act; that both the Courts below have committed illegality and material irregularity by not considering that the power of attorney was insufficiently stamped and not proved through evidence as burden of proof was upon the respondents 1 to 6 and learned trial Court erred in holding that burden of proof was upon the Appellant; that this Court could reject the concurrent findings of Courts below if same are/were based on improper and perverse appreciation of evidence; that this Court could mould the relief according to merits of the case; that this Court has to see that the technicalities could not be allowed to create any hurdle in the way of substantial justice. He lastly prayed that instant Appeal may be allowed. In support of his contention, learned counsel relied upon the judgments reported as Sardara and Allah Ditta through L.Rs v. Mst. Bashir Begum & another (PLD 2016 Lahore 587), Muhammad Mashooq & another v. Rehmat Ali and others (2007 CLC Lahore 1679), Mst. Rashida v. Mrs. Shahzad Khanem & others (1999 YLR Karachi 910), Dilbar Hussain v. Muhammad ul Hassan & others (PLD 1986 Quetta 198), Shoukat Ali & others v. Jalaluddin & others (1999 CLC Lahore 1396) and Sardar Khan v. Ghulam Hussain & others (2003 YLR SC (AJ&K) 1788).

5. Conversely, Mr. Muhammad Arshad S. Pathan, learned Counsel for Respondents 1 to 6/plaintiffs, supported the impugned Judgments and Decree passed by learned Courts below and contended that the captioned Appeal is liable to be dismissed; that there are concurrent findings recorded by the Courts below under the law and the grounds raised in the instant Appeal are untenable; that both the aforesaid Judgments and Decrees are passed within the parameters of law. At this stage, learned Counsel attempted to give

brief history of the case and submitted that originally the suit land was owned by one Rasool, who passed away , leaving behind one son and daughter namely Nizam Ali, who got 66 paisa share, whereas his sister Mst. Bibi Rasheedan got 34 paisa share in the suit land; that Nizam Ali, whose share is 66 paisa passed away, leaving behind **“six daughters-Respondent No.1 to 6”** and two sons namely **“Rehmatullah-Respondent No.6 and Abdul Sattar-Respondent No.8”**; that, Rehmatullah with malafide intention got Foti-khata badal/ Death Entry in his name and the name of Abdul Sattar fraudulently, without disclosing his sisters and mother. Abdul Sattar in his evidence categorically stated that he had no knowledge of this fraudulent act of mutation by his brother Rehmatullah, who had sold out his so-called share of 33 paisa in the suit land to the Appellant, without intimation to other shareholders, which was illegal, unlawful act on his part, which deprived them from their respective share in the suit land; that foti-khata entry being based upon fraud, issuance of subsequent Sale Certificate was also illegal; that registration of Sale Deed in favour of the Appellant is/was outcome of fraud therefore the subject sale transaction cannot be termed to be bonafide act of selling of inherited suit land; that under the Registration Act, there is no provision for reducing the Sale Deed in respect of the area which is outcome of the fraud; that the Sale Deed of undivided share of agricultural land or residential house is unwarranted under law unless partitioned; that sale of undivided share to the stranger / appellant was unlawful; that Sale Deed has rightly been canceled by learned trial Court and concurred by the Appellate Court. He lastly prayed for dismissal of instant Appeal.

6. Mr. Wali Muhammad Jamari, learned Assistant Advocate General, submits that the dispute is between private parties and no Government interest is involved. However, he assisted this Court on legal issue and argued that apparently fraud has been committed by the parties *inter se* in foti-khat /mutation; therefore, the deceased respondent No. 07 had no better title to sell out his managed share to the Appellant, thus the superstructure built on the illegal/wrong foundation will certainly fall. However, the Appellant being *bona fide* purchaser has done nothing wrong on the premise that deceased sold out his share during his life time and if the matter is reversed then the Appellant is still entitled for his right in the suit land, which he has purchased with *bona fide* intention keeping in view the entry of

the said suit land in the revenue record and Sale Certificate issued by the revenue authorities, therefore the instant Appeal to that extent may be allowed. During the course of arguments, I queried him whether respondent No.7 had sold out his actual share in the subject property to the Appellant or exceeded from his share and sold out the portion of the share of his sisters' i.e respondent No.1 to 6 in the subject property. He replied that he was not entitled to 33% share in the subject property; certainly there was share of his sisters, therefore *prima facie* sale of 33% is against the law; however which act can be rectified at Appellate stage. Be that as it may, however I intend to decide this lis on merit.

7. I have heard learned Counsel for the parties at considerable length and also reviewed the record available before me as well as the case law cited at the bar.

8. There is no denial of the fact that Respondent No.7/ Rehmatullah got Foti-khata badal/ Death Entry in his and his brother's favour by showing them to be the only legal heirs of deceased Nizam Ali by excluding other legal heirs and subsequently selling out his purported share of 33% paisa in favour of the Appellant through registered Sale Deed. Apparently, the Sale Deed of the subject land in favour of Appellant being based upon fraudulent entry/foti-khata, the subsequent sale transaction of the said land cannot be termed as *bona fide* transaction in law.

9. The affidavit in evidence / deposition of the Attorney of Respondents 1 to 6 clearly depicts the factual position of the case. The reasoning of learned trial Court on the factual position of the case is that the subject land was inherited by Nizam Ali and Mst. Bibi Rsheeda and the said property was mutated in the record of rights as per their share i.e. 66 paisa and 34 paisa, respectively. As per record, Nizam Ali passed away in the year 1988-89 and left behind one widow, six daughters and two sons. The respondent No.8 deposed before the learned trial Court that after the death of his grandfather the suit property was transferred in the name of his father Nizam Ali and his aunt Mst. Rasheeda Bibi. The share of his father was 66 paisa, while the share of his aunt was 34 paisa. However, he added that he also purchased share of his aunt by way of registered sale deed. In support of his contention, he produced original registered sale deed and original copy of Village Form-VII, which *prima-facie*

show that he purchased the share of Mst. Rasheeda Bibi. The main controversy between the parties is whether deceased Nizam Ali during his life time had given his 66 paisa share to Respondents 7 and 8 by mutation, excluding his daughters/Respondents 1 to 6. On this point, learned trial Court framed the issue and gave its elaborate finding; an excerpt of the same is reproduced as under:-

“As defendant No.1 has claimed that his father late Nizam Ali during his life time had given his respective share 66 paisa share to defendant No.1 & 2 by mutation and in other toward of the ensuing family disputes he gave in shape of cash and 2 dwelling homes to her daughters viz the plaintiffs which were in Bhit Shah and Bhirya City, therefore in the light of above clarification plaintiffs and her mother are not entitle for their share in the suit property as his mother had already waived her right and her share in favour of her daughters. Since 1989 to 2003 none of them have claimed any right of inheritance in the property.

While defendant No.2 has claimed that defendant No.1 himself got mutated in complete names of the legal heirs in Foti-Khata of suit property and on 15.4.2006 he came in his knowledge that defendant No.1 has sold out part of suit property to other person without intimation to other co-owners. For that he has filed suit for pre-emption against defendant No.1 and 3 vide F.C Suit No.67/2006 which is still pending before this court.

During evidence of defendant side No.1 has failed to appear before this court but after filing his written statement he remained absent without any intimation as well as also failed to produce any single witness to prove that their deceased father Nizam Ali during his life time has given 33 paisa share to defendant No.1 and 33 paisa share to defendant No.2 but defendant No.2 Abdul Sattar during his evidence has deposed at Ex.57 that his elder brother after the death of his father got mutation in the record of rights suit property in the name of only two brothers defendant No.1 and 2 while names of his 6 sisters were not shown in record of rights. He further deposed that if the names of his 6 sisters will mentioned and Foti-Khata of his father will be cancelled and mutated in the names of all legal heirs of his deceased father he has no objection as his sisters and his mother are legal heirs of his father and if partition will be made amongst the legal heirs he has also no objection.

During his cross he has also admitted that still they are paying share amount of crop to their sisters in every year of suit land.

On the basis of evidence produced during trial by the both parties. I am convinced that defendant No.1 and 2 mutated Foti-Khata of their father in their names only and names of their sisters and mother not mentioned in the record of rights on the basis of false statements of two person namely Fateh Mohammad S/o Ibrahim Khan @ Shamsuddin S/o Mohammad Qasim is totally illegally and with their malafide intention. Deceased Nizam Ali became owner did not give his 66 paisas share to his two sons only defendant No.1 and defendant No.2 during his life time.”



10. The core issue is whether the Appellant was bonafide purchaser of the suit land viz. 6-13 acres. Learned trial Court gave findings that the dispute between the respondents/plaintiffs 1 to 8 was under adjudication in Suit No.66 of 2003, which was subsequently withdrawn with permission to file afresh suit on the premise that the Appellant purchased the subject land from respondent No.7 through registered Sale Deed, which was fraudulently registered without private partition. There is no cavil to the proposition that one can competently transfer a title but he cannot transfer what he does not have. In the instant matter the appellant has not sought any declaration about the title of Rehmatullah under whom he is claiming his right in the subject property and which is the basic/route. Even for a moment the plea of the appellant is allowed with regard to his own title yet his title shall fail for the well-established principle of law that where foundation is found defective the whole superstructure, raised thereon, shall collapse'. Noteworthy to add here that the benefit of law (Section 41 of Transfer of Property Act) would be available to a bona fide owner but this benefit/protection is not available to one who acquires a title from an unauthorized and incompetent person or from the person who acquired title through fraudulent means. A bona fide claim cannot save 'fraud' from action of process of law as and when it comes to light.

11. Reverting to plea of learned counsel for the appellant that civil court is not competent to cancel the registered sale deed as a whole. On this proposition I am of the view that Civil Court is only competent to cancel the registered deed but here question is only with regard to cancellation of mutation and Sale Deed based upon that mutation which was challenged by respondents 1 to 6 and learned trial Court framed issues and discussed the same on evidence produced by both the parties and while reaching at the conclusion that subject property was fraudulently mutated as whole in favour of Rehmatullah and Abdul Sattar, hence one cannot be entitled to derive his legal character from a fraudulent transaction, therefore, this plea taken by learned counsel has no force. Besides, learned counsel for appellant has failed to point out any illegality or irregularity in impugned judgments. Reference can be made to the cases of Nawab Khan v. Raisa Begum and others (2003 SCMR 1498), Talib Hussain and others v. Member

Board of Revenue and others (2003 SCMR 549), Yousuf Ali v. Muhammad Aslam Zia (PLD 1958 SC (Pak.) 104), Lal and another v. Muhammad Ibrahim (1993 SCMR 710) Government of Sindh through Chief Secretary and others v. Khalil Ahmed and others (1994 SCMR 782), Abdul Hameed through L.Rs and others v. Shamsuddin and others (PLD 2008 SC 140).

12. Summing up the matter, in my view, deliberate statement was made before revenue authorities as well as before concerned Sub-Registrar of Registration, without disclosing the complete status of legal heirs of deceased Nizam Ali, who were/are entitled to their respective share in the subject property, amounts to a fraud and would vitiate the basic documents relied upon by the Appellant. Even claim of the Appellant is based upon false representation made to the competent authority by the seller therefore, learned trial court rightly directed Mukhtiarkar concerned to carry out the inspection of the suit land for partition and distribution of share of the legal heirs of deceased Nizam Ali. The Commissioner was directed to attach and put the suit property in public auction as per law, if there is no scope of partition. On the aforesaid proposition I am fortified by the decision rendered by the Hon'ble Supreme Court of Pakistan in the case of Barkat Ali through L.Rs and others v Muhammad Ismail through L.Rs and others (2002 SCMR 1938) has held that in the wake of frivolous gifts generally made to deprive the females from the course of inheritance, the Courts are not divested of the powers to scrutinize the reasons and justification for a gift so that no injustice is done to the rightful owner and no course of inheritance is bypassed. Besides above, the question of limitation with regard to claim of inheritance has been discussed by the Hon'ble Supreme Court of Pakistan in the case of Ghulam Ali and 2 others v Ghulam Sarwar Naqvi (PLD 1990 SC 1). The above said principle has been reiterated by the Hon'ble Supreme Court in the case of Muhammad Anwar and 2 others v Khuda Yar & 25 others (2008 SCMR 905).

13. In my view, the Judgment and Decree passed by learned trial Court is based upon sound reasoning and proper appreciation of evidence, which has been maintained by the 1<sup>st</sup> Appellate Court. Two Courts below, while recording findings of fact have neither misread evidence nor ignored any material piece of evidence. No other point worth consideration has been raised in support of this Appeal. The

concurrent findings on the face of record are neither arbitrary nor fanciful or perverse; hence, interference of this Court is not warranted, scope of which is restricted.

14. Case laws cited by learned Counsel for the Appellant are not relevant to the facts obtaining in the present Appeal.

15. For the aforesaid facts and reasons, I have come to the conclusion that there is no merit in this appeal, which is dismissed accordingly along with pending application(s) if any.

**JUDGE**

*\*FahadMemon\**