

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

**R.A. No. 317 of 2010**

Applicants: Esso through L.Rs and another through Mr. Rashid Nizam, Advocate.

Respondent No.1: Through Mr. Imdad Ali R. Unar, Advocate.  
Mr. Rafiq Ahmed Dahri, Asstt: A.G.

Date of hearing: 10.12.2021

Date of decision: 10.12.2021

**ORDER**

**ADNAN-UL-KARIM MEMON, J:** - Basically, the Applicants are asking for setting aside the Judgment dated 11.08.2010 and Decree dated 24.09.2010 passed by the learned Vth Additional District Judge, Hyderabad in Civil Appeal No.106 of 2002 whereby the learned Judge while dismissing the said appeal maintained the judgment and decree dated 29.01.2002 & 06.02.2002 passed by the learned Civil Judge, Hyderabad in F.C Suit No. 286 of 1996, hence the instant Revision Application.

2. Brief facts of the case are that respondent No.1 filed F.C suit No.286 of 1996 before learned Vth Senior Civil Judge, Hyderabad for Declaration, Partition, Separate Possession & Mesne profits on the premise that Survey Nos. 197 (5-39 acres), 290(3-38 acres), 291/1 (1-21 acres), 291/2(3-06 acres), 291/3 (2-11 acres) & 292 (5-32 acres) total measuring 22-27 acres (suit land) situated in Deh Sekhat Taluka Matiari are jointly owned and possessed by him and defendants 1 to 7/ applicants; that Mst. Bhambhul daughter of Juman had 16 paisas joint share in the suit land, which was gifted to the plaintiff through a registered gifted deed dated 27.10.1993, which was accepted and possession was taken by the plaintiff, and revenue record was mutated vide Entry No. 134 dated 07.12.1993. The father of plaintiff Taj Muhammad also owned and possessed 17 paisas shares in suit land, which he gifted to plaintiff through statement before defendant No.8 and gift was accepted by the plaintiff and took over join possession in consideration of gift and revenue record was mutated in the name of plaintiff vide entry No.135 dated 07.12.1993;

that one Tahir Muhammad Shah son of Abdul Salam Shah had 11 paisas share in suit land after his death same was inherited by his children namely Amir Ali Shah, Abdul Khaliq Shah, Mir Muhammad Shah, Bibi Khadija ul Kubra, Bibi Shehar Bano, Bibi Anwarzadi and Bibi Alam Khatoon. They sold their 11 paisas joint undivided share to the plaintiff through a registered sale deed dated 26.12.1993 for total consideration of Rs. 70,000/- and revenue record was duly mutated in the name of the plaintiff by defendant No.8 vide entry No.137 dated 19.03.1994, in the record of rights. Thus plaintiff owns and possesses 44 paisas shares in suit land; that the suit land is owned and jointly possessed by the plaintiff and defendants 1 to 7 and their shares as under:-

- |    |   |             |
|----|---|-------------|
| 1. | Zahid Hussain (Plaintiff.....)          | 44 paisas)  |
| 2. | Isso (Defendant No.1.....)              | 21 paisas)  |
| 3. | Mst. Karima (Defendant No.2.....)       | 04 paisas)  |
| 4. | Mst. Amnat (Defendant No.3.....)        | 21 paisas)  |
| 5. | Noor Muhammad Shah (Defendant No.4....) | 04 paisas)  |
| 6. | Mst. Fatima (Defendant No.5.....)       | 02 paisas)  |
| 7. | Mst. Sahibzadi (Defendant No.6.....)    | 02 paisas)  |
| 8. | Hakimzadi (Defendant No.7.....)         | 02 paisas)  |
|    | Total                                   | 100 paisas. |

3. The revenue record has duly been mutated in the names of the above-named persons in Deh Form No. VII. That due to private arrangements the physical cultivating possession of the suit land is with defendant No.1 who also manages on behalf of defendant No.2 and they have 25 paisa share; there is garden of Pharwa (Falsa) of about 5 acres and remaining land is being cultivated of wheat, cotton and onion crops and handsome amount of produce is being received from the suit land by Defendant No.1; that defendant No.1 used to pay share after every crop to co-owners as per private arrangement and plaintiff has been receiving the same till Kharif 1993-94, when he purchased 11 paisas through registered sale deed dated 26.11.1993; that defendants became annoyed on account of purchase of 11 paisa share by plaintiff through registered sale deed dated 26.11.1993; therefore, the defendant No.1 through defendant 3

to 7 got filed Pre-emption Suit No. 88 of 1994 (Mst. Hakimzadi v. Amir Ali Shah & others) in the court of learned that 3<sup>rd</sup> Senior Civil Judge, Hyderabad against the plaintiff and others and thereafter avoided to pay share of produce to plaintiff from 1993-94. Plaintiff approached defendant No.1 but he did not give satisfactory reply and failed to pay the share of the plaintiff from Rabi 1994; that defendants 3 to 7 in collusion with defendants 1 & 2 as they are being paid for their 31 paisas share by Defendants 1 & 2 are in collusion with each other. Defendants 1 to 7 also refused to pay 11 paisa share of produce in suit land purchased by the plaintiff vide Entry No.137 dated 19.03.1994; that plaintiff proposed the defendants to handover entire possession of the suit land to him and he will pay them the income of their share in suit land but they refused. The plaintiff also informed that if they are not prepared to maintain the private arrangements, then the suit land should be partitioned and the plaintiff may be given separate possession of the suit land to the extent of 44 paisa share, which comes to 9-39 acres in the suit. The defendants 1 to 7 refused to partition the suit land and refused to pay the share to the plaintiff from Rabi 1993-94. Plaintiff approached defendant No.8 who called defendant No.1 and tried to maintain private arrangement existed or in alternate for partition of the suit land, but defendant No.1 refused to accept the same. The plaintiff was paid the mesne profits at the rate of Rs. 1000/- per acre by defendant No.1 till Kharif 1993-94. Plaintiff is co-owner in joint possession of 44 paisa share, which comes to 9-39 acres, and the plaintiff is entitled to Rs. 9,900/- per year, tentatively an amount of Rs.29,700/- is due against the defendants for the last three years at the rate of Rs. 9,900/-per year. The defendants have refused to partition the suit land and failed to pay mesne profits to the plaintiff hence the plaintiff filed suit for declaration, partition, separate possession, and mesne profits with the following prayers:-

- a. It be declared that plaintiff is in joint possession as co-owner to the extent of 44 paisa share admeasuring 9-39 acres in suit land is entitled for partition and separate possession from defendants and defendant No.1 is bound under the law to pay the mesne profits to the plaintiff as per his shares in the suit land.
- b. To pass a decree for partition directing the defendants to partition the suit land and put the plaintiff in separate possession by meats and bounds of the suit land to the extent of 44 paisa share admeasuring 9-39 acres.

- c. To pass a decree of mesne profits in favour of plaintiff against defendants and defendant No.1 be directed to pay the mesne profits of Rs. 29,700/- for last three years from Kharif 94-95 to the filing of the suit at the rate of Rs.9,900/- per year and for future period at the same rate, till the suit land is partitioned and the plaintiff is put to separate physical possession of the same.
- d. Cost of the suit be borne by Defendants.
- e. Any other relief deemed just and proper be granted to the plaintiff.”

4. After service, defendants 1 and 2 i.e. Isso and Mst. Karima filed their written statement denying the averments of the plaint. According to them Mst. Bhambhul at no time was in possession of the land as such question of making gift does not arise and mutation in the record of rights is collusive, false, fraudulent, and does not confer any right, title, or interest on the plaintiff. According to them the gift of 17 paisa shares by Taj Muhammad to the plaintiff is false, fraudulent as Taj Muhammad had never remained in possession of the land, and entry in the record of rights is false and fictitious. They denied that plaintiff is the owner of 44 paisa share of land and ever remain in possession of land under alleged gifts or alleged sale of shares shown are incorrect, plaintiff has no share in the land and there was no private arrangement as alleged. Defendant No.1 is hari and joint owner of land with defendants 3 to 7. According to defendant No. 1, he is not aware of the alleged sale of filing of Civil Suit No. 88/1994, and defendants 3 to 7 are residing in adjacent Deh Rahuki and managing their share of 31 paisa and remaining share is of defendants 1 and 2. They denied payment of any share to the plaintiff and also raised legal pleas. According to them previous litigation between defendant No.1 and Mst. Bhambhul and others are now pending before this Court of Sindh.

5. Defendants 3 to 6 i.e. Mst. Amnat, Noor Muhammad, Mst. Fatima and Mst. Sahibzadi filed their joint written statements denying the contents of the plaint and stated that defendants 1 to 26 are in physical possession of land in question to the extent of 11 paisa purchased by the plaintiff for which pre-emption suit is pending decision. According to them gift is void under Section 150 of Muhammad Law and is only paperwork and the present suit is counterblast of earlier Suit No. 88/1994 filed by them. Apart from this they also raised legal pleas i.e. suit is not maintainable, no cause of action, etc. Defendants 7 and 8 were declared ex-party vide order

dated 8.7.1997. During the pendency of the suit defendant No.1 Isso and defendant No.3 Mst. Amnat alias Hakimzadi passed away and their legal heirs were brought on record and the title of the plaint was amended by the plaintiff/appellant.

6. On the pleadings of the parties learned trial court framed the following issues.

- i. Whether the suit is not maintainable?
- ii. Whether this Court has no jurisdiction?
- iii. Whether the suit is barred by law?
- iv. Whether the suit of plaintiff is undervalued?
- v. Whether gift in favour of plaintiff by his father Taj Muhammad in respect of 17 paisa share in suit land is legal and according to law?
- vi. Whether Mst. Bhambhul was in joint possession as co-owner to the extent of 16 paisa share, which she gifted to plaintiff and handed over possession?
- vii. Whether L.Rs of one Tahir Muhammad Shah sold out their 11 paisa share to plaintiff?
- viii. Whether the plaintiff is in joint possession as co-owner to the extent of 44 paisa share in suit land and he is entitled to partition and separate possession?
- ix. Whether the plaintiff is entitled to relief claimed?
- x. What should the decree be?

7. Learned trial court after recording evidence and hearing the parties decreed the suit of the plaintiff vide judgment dated 29.1.2002 and decree dated 6.2.2002. An excerpt of the judgment dated 29.1.2002 is reproduced as under:-

“ISSUE NO.08

Vide Issues No. 05 & 07, it has been held that the plaintiff's father Taj Muhammad had transferred his share of 17 paisas in suit land to the plaintiff and that he had purchased 11 paisas share from the L.Rs of Tahir Muhammad Shah. In this way as per my findings on issue No. 05 & 07 of above I hold that the plaintiff is in joint possession as co-owner to the extent of 28 paisas (Twenty Eight Paisas) in the suit land.

Accordingly to the contents of the plaint, the total area of the suit land consisting of the shares of all the contesting parties is 22-27 Acres, jointly owned by them. As per my findings on the above issues the plaintiff is owner of 28 paisas, which is less than 16 acres. The defendant Sain Bukhsh Ex.27, as per suggestion of plaintiff's counsel during cross examination has admitted that his father Isso

owned 21 paisas share in the suit land. The remaining 51 paisas share as per contention of the parties belongs to someone else i.e. the remaining defendants and Mst. Bhambul, therefore none of the contestant parties is holder of land within economic holdings, therefore, Martial Law Regulation-115 comes into play against the partition and separate possession. Under these circumstances, if the prayer for partition and separate possession is granted, that will be in violation of provisions of Land Reforms Regulation (MLR-115).

The paragraph 22 of Land Reforms Regulation is as under:-

“ A joint holding with an area equal to or less than that of a subsistence holding shall in no circumstances be partitioned.”

The aggrieved party has only remedy for his share by invoking the provisions of paragraph-23 of Land Reforms Regulation. Accordingly I hold that this court is not competent to allow the prayer of plaintiff for partition and separate possession of his share of 28 paisas in suit land as decided above vide issues No.5 & 7.

#### ISSUE NO. 09

The plaintiff has claimed mesne profits at the rate of Rs.9,900/- per year from 1994-95 and onwards. The defendants, no where either in their written statement or in their evidence have disputed the rate of mesne profits but they have denied the right of plaintiff over the suit land. It has already been held vide findings on issue Nos. 05, 7 and the 08 above that the plaintiff is entitled to the ownership and title over 28 paisas share in the suit land. The plaintiff has claimed ownership of 44 paisas share in the suit land and he has calculated Rs. 9,900/- mesne profits for 44 paisa share but he has only 28 paisas share. Under these circumstances, he is entitled to mesne profits in respect of 28 paisas share at Rs. 6300/- per year for the period from 1994-95 to date and onwards.

The plaintiff is joint owner and in joined possession of his share, therefore, he has to pay court fee only in respect of amount of mesne profits, which is less than 50,000 (in words 50,000/-), hence the plaintiff has valued the suit properly.

#### ISSUE NO.10

In view of my findings on issues No. 05, 7, 8 and 09 I hereby decree the suit of plaintiff accordingly with no order as to costs”.

8. Plaintiff-Zahid Husain being aggrieved by and dissatisfied with the impugned judgment and decree challenged the same to the extent of findings on Issue Nos. 6 and 8 preferred the appeal No.92 of 2002, while defendant-Mst Hakim Zadi and others filed Civil Appeal No. 105/2002 and 106/2002 have challenged the judgment and decree and prayed for setting aside the same. Learned appellate court after framing the point for a determination as required under order Rule XLI rule 31 CPC also dismissed all the appeals vide judgment dated 16.8.2010 and decree dated 24.8.2010. An excerpt of the judgment is reproduced as under:-

“16. Perusal of record further show that defendant Sain Bux admitted that they have been paying produce of suit land to defendants 3 to 7 and the plaintiff Zahid Hussain also stated that defendants No.1 and 2 had been giving him share of produced to the extent of his share right upto 1993 but when he purchased 11 paisas share in suit land from L.Rs of Tahir Muhammad Shah defendant Nos. 1 and 2 were displeased and with hold the payment of share of produced which assertion of the plaintiff / appellant Zahid Hussain lend support from the admission of Sain Bux who deposed that defendants No. 3 to 7 filed suit for preemption against the plaintiff at the instance of defendant No.1 Issa in respect of 11 paisas share and need not to be discussed further in view of the admission of defendant No.1 Sain Bux.

17. Appellant no doubt produced extract of record of rights as Ex. 49 and entry No. 134 dated 07.12.1993 shows that Taj Muhammad father of plaintiff by way of registered gift deed No. 125 dated 26.03.1993 on the basis of special power of attorney executed by Mst. Bhambhul in his favour, gifted the 16 paisas share of Mst. Bhambhul to plaintiff Zahid Hussain but admitted the said gift deed and said power of attorney executed by Mst. Bhambhul have not been brought on record, therefore, in absence of such important documents the said transaction is not believable, particularly when defendants denied ownership of Mst. Bhambhul over suit land.

18. Perusal of Ex. 50 i.e. entry No. 137 dated 19.03.1994 shows that plaintiff Zahid Hussain purchased 11 paisas share in suit property from L.Rs. of Tahir Muhammad Shah by way of registered sale deed 26.12.1993. The defendant Noor Muhammad Shah Ex. 60 has admitted that preemption suit in respect of above 11 paisas share against the plaintiff was filed and same was dismissed, therefore, at this juncture it is proved by the plaintiff Zahid Hussain that he is owner of 11 paisas share in the suit property purchased by him through registered sale deed.

19. In view of my above discussion it has borne out from the record that plaintiff is co-owner in the suit land to the extent of 28 paisas share as 17 paisas was gifted to him by his father while 11 paisas were purchased by him from the L.Rs of Tahir Muhammad Shah.

20. From what has been discussed above I am of the opinion that the learned trial Court has rightly decreed the suit of the plaintiff / appellant by correct appraisal of oral as well as documentary evidence and the findings arrived at by the learned trial Court does not call for any interference of this Court in appellate jurisdiction. Resultantly, I do not find any merit in the above three appeals and the same are hereby dismissed. The parties are left to bear their own costs.

9. Mr. Rashid Nizam learned counsel for the applicants has argued that the judgments and decrees of both the courts below are against the canon of justice, equity, and a good conscience; that at no stage, there is evidence plaintiff-Zahid was put in possession of the land or he is entitled to it; that gift deed of the individual share of Mst. Bhambhul was improper and that the plaintiff-Zahid was put into possession; that no independent evidence was brought on record that actual possession was given and there was joint cultivation through any hari or partner or Zahid Hussain had been paying a

share of cultivation expenses of the crop which has been cultivated, there was the separation of the produce, payment, and settlement of accounts. If so, with whom; that learned lower courts again failed to take notice even about the sale deed and there was no actual possession of the land given and cultivation by Zahid; that even in the 3<sup>rd</sup> transaction of the gift all facts are not considered about possession, cultivation, and raising of crop and separating of the share, settlement of accounts. There is no evidence, who was cultivating; that the courts below have illegally took it for granted that the legal heirs of Defendants were hari except Esso and his legal heirs; that plaintiff was not given the possession of the property which is not recognized as proper legal gifts of immovable property under Muhammad law; that plaintiff/respondent No.1 had not even produced any payment of and Dhal and taxes of the said land as alleged harap account. No independent evidence is given; that Mst. Bhambhul had never been the owner of the property or shareholder of it; that even the other shareholders who had alleged to have given the property to Zahid had no right title or interest in the property; that mere entry in the record of rights does not create ownership of the property by the person; that there was no alleged private arrangement of physical possession of the suit land with deceased Esso; that opponent No. 1 Zahid has not produced the special power of attorney of Mst. Bhambhul; that even the other transaction of Taj Muhammad is not produced as no possession was given to Zahid. He lastly prayed for allowing the instant Revision Application and to set the judgments of both the courts below.

10. Mr. Imdad Ali R. Unar learned Counsel representing respondent No.1 has supported the judgments and decree of the learned Courts below with the assertion that as per Ex. 50 i.e. entry No. 137 dated 19.03.1994 respondent/plaintiff Zahid Hussain purchased 11 paisas share in suit property from L.Rs. of Tahir Muhammad Shah by way of registered sale deed 26.12.1993. he further added that the defendant Noor Muhammad Shah at Ex. 60 has admitted that pre-emption suit in respect of above 11 paisas shares against the plaintiff was filed and same was dismissed, therefore, it is proved through evidence that plaintiff Zahid Hussain is the owner of 11 paisas share in the suit property purchased by him through registered sale deed. He also submitted that as per record respondent/plaintiff is co-owner in the suit land to the extent of 28



paisas share as 17 paisas were gifted to him by his father while 11 paisas were purchased by him from the L.Rs of Tahir Muhammad Shah, whereas 16 paisas share of Mst. Bhambhul was gifted to plaintiff Zahid Hussain thus he became the owner of 44 paisa shareholders in the suit land; that the learned trial Court has rightly decreed the suit of the respondent/ plaintiff by correct appraisal of oral as well as documentary evidence and the findings arrived at by the learned trial Court as well as the appellate court does not call for any interference of this Court in revisional jurisdiction. He prayed for dismissal of the instant revision application.

11. I have heard learned counsel for the parties and have gone through the record available before me.

12. Undoubtedly, Revision is a matter between the higher and subordinate Courts, and the right to move an application in this respect by the Applicant is merely a privilege. The provisions of Section 115, C.P.C., have been divided into two parts; the first part enumerates the conditions, under which, the Court can interfere and the second part specifies the type of orders which are susceptible to Revision. In numerous judgments, the Honorable Supreme Court was pleased to hold that the jurisdiction under Section 115 C.P.C. is discretionary. However in the present case situation is quite different, primarily there are glaring illegalities available on record, which are sufficient to call into question the judgment and decrees of both the courts below.

13. I have scanned the evidence available on record and found that plaintiff Zahid Hussain failed to substantiate his claim through cogent evidence to the extent of 16 paisas share of Mst. Bhambhul, who purportedly gifted to him, neither the registered gift deed No. 125 dated 26.03.1993 made based special power of attorney allegedly executed by Mst. Bhambhul in his favour, was produced in evidence nor the said power of attorney executed by Mst. Bhambhul has not been brought on record, therefore, in absence of such important documents the said transaction is not believable, particularly when the applicants/defendants denied ownership of Mst. Bhambhul over the suit land. Primarily the aforesaid factum has been endorsed by the learned appellate court while deciding the point of determination.; besides that plaintiff, Zahid filed suit for partition as well as possession, which shows that he has never been put in possession of

the suit land thus the question of alleged gift is shrouded in mystery as the basic ingredients of the gift deed are missing; besides that the learned trial court has held that if the prayer for partition and separate possession is granted, that will be in violation of provisions of Land Reforms Regulation (MLR-115) and that the aggrieved party has only remedy for his share by invoking the provisions of paragraph-23 of Land Reforms Regulation. The learned trial court held that the court is not competent to allow the prayer of the plaintiff for partition and separate possession of his share of 28 paisas in the suit land. So far as the claim of mesne profits at the rate of Rs.9,900/- per year from 1994-95 and onwards is concerned, under these circumstances, no mesne profits could be awarded to the plaintiff.

14. I am of the view that the learned trial Court has failed to dilate upon the issue of 16 paisas share of Mst. Bhambhul, who purportedly gifted to the plaintiff, neither the registered gift deed No. 125 dated 26.03.1993 based on special power of attorney allegedly executed by Mst. Bhambhul in his favor, was produced in evidence nor the said power of attorney executed by Mst. Bhambhul has not been brought on record thus decreeing the suit to that extent is an erroneous decision. The Appellate Court has failed to remand the case on this score alone, therefore, ground existed for re-evaluation of evidence, thus, I do not maintain the Judgment(s) and Decree(s) passed by learned Courts below. Hence, the above Revision Application is allowed and the matter is remanded to the learned trial court to decide the aforesaid issues by allowing the plaintiff to prove his case to the extent of the gift of the suit land made in his favor either by his father or Mst. Bhambhul under law after providing meaningful hearing to all concerned, within two months, and submit a compliance report to this court accordingly.

**JUDGE**