IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision No. S – 42 of 2000

Atta Muhammad and others……..Applicants
Versus
Ali Dino Rajper and others……..……..Respondents

Date of Hearing: **22-11-2021**
Date of Decision: **14-01-2022**

Mr. Nishad Ali Sheikh, Associate of Mr. A.M. Mobeen Khan, Advocate for the Applicants.
Mr. Kalander Bakhsh Phulpoto, Advocate for the Respondents No.1&2.

J U D G M E N T

Muhammad Junaid Ghaffar, J. **–** Through this Civil Revision, the Applicants have impugned Judgment dated 07.03.2000, passed by learned District Judge, Khairpur in Civil Appeal No.105 of 1999 *(Ali Dino and others v. Ghulam Muhammad and others)*, whereby Judgment dated 14.10.1999 in F.C Suit No.116 of 1997 (*Ali Dino and others v. Ghulam Muhammad and others),* passed by Senior Civil Judge, Mirwah, through which the Respondents Suit was dismissed, has been set aside by decreeing the said Suit.

2. Heard learned Counsel for the parties and perused the written arguments as well as record placed before the Court. It appears that the private Respondents filed Civil Suit for declaration, possession, mesne profit and permanent injunction on the ground that they were legal heirs of Khan Muhammad, who owned the suit properties and left behind one son, namely, *Piral Khan* and four daughters namely, *Mst. Naseeb Khatoon, Mst Fateh Khatoon, Mst Ghulam Fatima* and *Mst. Umarzadi*, whereas, at the time of filing of the Suit, all had expired except Mst. Fateh Khatoon, whose sons filed the Suit. The precise case of the Respondents / Plaintiffs is to the effect that Suit properties had been transferred fraudulently in the name of Piral Khan and now in the names of his legal heirs to the exclusion of four sisters / mother of Respondents on the basis of some Qabooliat statement, which was a forged and fabricated document. It was further pleaded that Late Prial Khan had been paying batai share to the mother of the Plaintiffs to the extent of her share in the Suit properties.

3. The Learned Trial Court after settlement of issues and recording of evidence was pleased to dismiss the Suit of the private Respondents on the ground that Qabooliat was entered into by the parties and consideration was also paid which amounts to relinquishment of their share by the four sisters in favour of their brother; hence, no case is made out. It further appears that the learned Trial Court had also noted that earlier a Civil Suit No.77 of 1974 was also filed by the four sisters, which was not pursued diligently and was dismissed in Non-Prosecution, as apparently their share had been paid as per Qabooliat. The private Respondents being aggrieved preferred Civil Appeal and the Appellate Court has set aside the Judgment of the Trial Court while decreeing the Suit and has been pleased to observe that the Qabooliat (Exh.33) purportedly executed in favour of the brother by the four sisters was apparently a doubtful document, genuineness of which cannot be accepted for the reasons that the Applicants had failed to discharge the onus which lay on them.

4. On perusal of the record and two Judgments of the Courts below, it transpires that insofar as the Applicants' case is concerned, the evidence which was led by one of the parties i.e. Khan Muhammad [Junior] (D.W-1) in the Suit, is contrary to what has been stated in the written statement as well as against the stance taken all along by the Applicants jointly. The most important and particular point which has been noted by the Appellate Court and which appears to be very crucial is that in the earlier Suit No.77 of 1974, a written statement was filed on behalf of the Applicants and in para-4 of the said written statement, which is Exh.30, it was claimed that the Khata of the land in Suit was mutated in the revenue record in the name of Piral Khan in the year 1941. If that be the case, then why it was necessary for the Applicants to enter into any settlement agreement (Qabooliat) with their sisters and pay their share of inheritance in cash. Moreover, it has also a matter of record that Exh-33 (Qabooliate) was no registered so as to treat the same as a valid instrument to affect transfer of immoveable properties. Similarly, when the evidence of Khan Muhammad (D.W-1) in the present case is examined, it appears that said fact has also been reiterated by him in the following terms:

> "To Mr. Sajjad Hussain Kolachi advocate for Plaintiff's
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> It is fact that suit property was originally property of our grandfather Khan Muhammad. Voluntarily says S.Nos. 503, 504, 506, 74/1/2, 72 are exclusive property of my father. It is fact that I have not mentioned in my

> W.S that S.Nos. 503 & others belongs to my father. It is fact that my grand father had one son who is my father and four daughters. It is fact that my father and his four sisters were legal heirs of my grand father Khan Muhammad. ***Voluntarily says that my grand father changed the khata of suit land in the name of my father during his life time***. I can't say if this fact that my grand father changed the khata in his life time in name of my father is mentioned in my W.S. ***It is incorrect to suggest that my grand father did not change the khata in life time in name of my father***. I can't say if it is not mentioned in agreement dated 13-9-1975 that my grand father changed the khata in his life time. It is fact that plaintiffs are sons of my paternal aunty Mst.Fateh Khatoon. It is incorrect to suggest that agreement at Exh.33 is forged and fabricated. It is incorrect to suggest that this agreement has been prepared in collusion with wadhero Shah Nawaz. It is incorrect to suggest that my father used to give product share to mother of plaintiffs. It is incorrect to suggest that after death of my father we used to give product share to mother of plaintiffs but after death of mother plaintiffs we refused to give product share to the plaintiffs. ***It is incorrect to suggest that my grand father did not change the khata in name of my father***. It is incorrect to suggest that my four paternal aunt are also entitled to share of property left by my grand father".

5. Perusal of the aforesaid cross-examination clearly reflects that it is the case of the Applicants by themselves that their grand-father, who had one son, (father of the present Applicants) and four daughters, had changed the khata of suit land in the name of their father (Piral Khan) during his life time. It has been further deposed that "*It is **incorrect** to suggest that my grand father **did not change** the khata in life time in name of my father".* Now if the grand-father of the parties had voluntarily, and on his own, during his life time had transferred the khata in the revenue record in the name of his son to the exclusion of his daughters; and without commenting on such act of the grand-father, it may be observed that in that case there was no occasion for the Applicants father to enter into any Qabooliat or compromise with his four sisters and purportedly pay any cash amount to them in lieu of their share so inherited from their father. This creates serious doubts as to the very authenticity and existence of Qabooliat (Exh.33).

6. Moreover, by and large, it is now settled that in cases of inheritance where the share of sisters and daughters is excluded to the benefit of male family members by way of some deed or compromise; or as in this case Qaboliat, the same has to be looked into with utmost care and with suspicion, as and when the same is under challenge by the female members of the family, unless proved otherwise to the fullest extent. The reason is that it is nowadays a common feature in our society. The onus in such cases is always upon the parties who seek support from any such document when the matter is before the Court in respect of shares of the female legal heirs of a family. Vulnerable women are also sometimes

compelled to relinquish their entitlement to inheritance in favour of their male relations[1]. Moreover, in such cases even limitation cannot be pressed upon so strictly so as to non-suit the parties, who are deprived of their share by any means. Similarly, the Hon'ble Supreme Court in the case reported as GHULAM ALI v Mst. GHULAM SARWAR NAQVI **(PLD 1990 SC 1)** has been pleased to hold as under;

> Here in the light of the foregoing discussion on the Islamic point of view, the so-called "relinquishment" by a female of her inheritance as has taken place in this case, is undoubtedly opposed to "public policy' as understood in the Islamic sense with reference to Islamic jurisprudence. In addition, it may be mentioned that Islam visualized many modes of circulation of wealth of certain types tinder certain strict conditions. And when commenting on one of the many methods of achieving this object, almost all commentators on Islamic System agree with variance of degree only, that the strict enforcement of laws of inheritance is an important accepted method in Islam for achieving circulation of wealth. That being so, it is an additional object of public policy. In other words, the disputed relinquishment of right of inheritance, relied upon from the petitioner's side, even if proved against respondent, has to be found against public policy. Accordingly, the respondent's action in agreeing to the relinquishment (though denied by her) being against public policy the very act of agreement and contract constituting the relinquishment, was void.

7. Lastly, as to filing of an earlier Suit and its dismissal in non-prosecution and applicability of the principles of *Resjudicata* and *Estoppel*, it may be observed that firstly, in the present facts and circumstances, wherein, the inheritance rights of female members as against deprivation of the same by a brother is involved, the same hardly matters. Even otherwise as per order of the trial Court dated 13.10.1975 in earlier Suit No.77 of 1974 (Exh-31), it appears that on such date none was present before the Court, which means the order has been passed under Order IX Rule 3 C.P.C, whereas, in terms of Rule 4[2], ibid, a fresh suit is not barred. Even if an application for setting aside such order has been dismissed; a plaintiffs' fresh suit is not barred, and both the remedies are open and if he fails to have the order of dismissal set aside it is open to him to file a fresh suit[3]. Thus under Order IX Rule 4, two option are given to an aggrieved person; one by filing a fresh suit and the other with a prayer for setting aside the dismissal[4]. If the suit was dismissed under rule 3 of Order IX, C.P.C. Rule

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[1] Mirza ABID BAIG V. ZAHID SABIR (DECEASED) (2020 SCMR 601)

[2] Where a suit is dismissed under Rule 2 or 3, the plaintiff may (subject to limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside.

[3] Ramzanali Premji Khoja v Kassim Brothers & Co [PLD 1957 (W.P.) Karachi 224]

[4] Abdul Rasheed v Abdul Hafeez (2008 YLR 2)

4 enables the Court to restore the Suit; and if no application is filed, the subsequent Suit is not barred under the provision of rule 4[5]. Similar view has been expressed in the case of ***Mst. Shahnaz***[6]. It is also needless to state that the earlier Suit being in the nature of an administration Suit, ought not to have been dismissed for Non-prosecution as it requires adjudication of dispute on merits, whereas, the interest of Plaintiffs and Defendants is to be equally protected by the Court as for such purposes the Defendants can also be transposed as Plaintiffs. Therefore, even on that account as well the said order of dismissal of the earlier Suit was no bar on the second Suit. And lastly, it is also a matter of record that the earlier Suit was not filed by all sisters as one of them namely was not a party to the said Suit; hence, any result of that suit was not applicable to her case or hit by *Resjudicata* and *Estoppel* as contended on behalf of the Applicants.

8. In view of hereinabove facts and circumstances of this case, it appears that the learned trial Court was misdirected in giving credence to the purported Qabooliat, which even otherwise was not fully proved as it did not pass the test of strong, credible and convincing evidence so required in these matters; had misread the evidence; and lastly wrongly assumed that a valuable claim was relinquished without proof and without consideration. On the other hand, Appellate Court was fully justified in decreeing the Suit of the private Respondents by setting aside the Judgment of the Trial Court. No case for indulgence is made out by the Applicants; hence, this Civil Revision being misconceived is hereby dismissed.

Dated: 14.01.2022

J U D G E

Ahmad

[5] Mst. Amina Bai v Karachi Municipal Corporation (1985 CLC 1979)
[6] Mst. Shahnaz v Syed Ahtisham Ali Shah (2015 CLC 672)