

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

2nd Civil Appeal No. S – 03 of 2010

Mst. Hakima and others v. Province of Sindh and others

Date of hearing: **14-03-2022**

Date of decision: **14-03-2022**

Mr. Shafqat Rahim Rajput, Advocate for the Appellants.
Mr. Ahmed Ali Shahani, Assistant Advocate General Sindh.

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J U D G M E N T

Muhammad Junaid Ghaffar, J. – Through this 2nd Appeal, the Appellants have impugned judgment dated 07-04-2010 passed by 2nd Additional District Judge, Khairpur, in Civil Appeal No.70 of 2006, whereby, while allowing the Appeal, judgment dated 06-09-2006 passed by 1st Senior Civil Judge, Khairpur, in F.C. Suit No.116 of 2004, through which the Suit of Respondents No.11 to 21 had been dismissed, has been set aside and the Suit has been decreed.

2. Learned Counsel for the Appellants has contended that the Appellate Court has erred in facts and law by setting aside a well-reasoned judgment of the Trial Court, through which the Suit of Respondents No.11 to 21 was dismissed; that the said Respondents had failed to prove their case with any cogent or reliable evidence; that the Suit by itself was not maintainable and was also barred by limitation; that the Appellants had purchased a property for valuable consideration from Respondent No.4; that Respondent No.4 had properly executed a sale deed in favour of the Appellants as she was the rightful owner of the entire property pursuant to its sale by Respondents No.11 to 21 duly recorded before the concerned Mukhtiarkar; hence, this second Appeal merits consideration and be allowed by setting aside the impugned judgment of the Appellate Court.

3. I have heard the Appellants' Counsel and perused the record. Insofar as private Respondents are concerned, it appears that despite being served nobody has turned up; whereas, this matter is pending since 2010, hence,

the same is being decided with the assistance of the Appellants' Counsel and on the basis of available record.

4. It appears that Respondents No.11 to 21 (**hereinafter contesting Respondents**) had filed a Suit for declaration, cancellation and injunction seeking the following prayers:

- (i) *This Hon'ble Court may be pleased to declare that the plaintiffs are bonafide, rightful, and exclusive owners of the land in suit having been devolved upon them from their elders and alleged oral sale of same land in the name of defendant No:4 and subsequent sale deed and mutation entry in the name of defendant No:5 are illegal, malafide, void ab-initio; ultra vires, unwarranted, and nullity in the eye of law and not binding upon the plaintiffs.*
- (ii) *To cancel Oral Sale Mutation Entry No: 155-B dated: 18.11.1993, in the name of defendant No:4, and also cancel subsequent registered sale deed dated: 10.9.2003 followed by Mutation Entry No:349 dated: 30.3.2004 in favour of defendant No: 5.*
- (iii) *To grant permanent injunction thereby restraining the defendants 4 and 5 from snatching the possession of suit land from plaintiffs or interfering with their peaceful possession and enjoyment in any manner whatsoever.*
- (iv) *To award costs of the suit and other relief deemed fit and proper in circumstances of case.*

5. The learned Trial Court, after exchange of pleadings, settled the following issues:

1. *Whether the suit is bad for mis joinder and non joinder of necessary parties?*
2. *Who is the owner of the suit land?*
3. *Whether the mutation entry / registered sale deed are false and managed?*
4. *Who is in possession of the suit land?*
5. *Whether the plaintiff are entitled to the relief claimed?*
6. *What should the decree be?*

6. After hearing the parties, the learned Trial Court came to the conclusion that none of the issues have been proved in favour of the contesting Respondents; hence, their case does not merit any consideration and was dismissed accordingly.

7. Being aggrieved, they impugned the said judgment before the Appellate Court, and the Appellate Court, through impugned judgment, has been pleased to set aside the judgment of the Trial Court and has decreed the Suit. The learned Appellate Court formulated the following points for

determination and has been pleased to decide all these points in favour of the contesting Respondents by decreeing the Suit:

- i) *Whether the sale by and on behalf of appellants/plaintiffs recorded through oral statement on 18.11.1993 is illegal & valid?*
- ii) *Whether the suit is not maintainable being bad for non joinder or necessary parties?*
- iii) *Whether the appellants/plaintiffs are entitled to relief sought?*
- iv) *What should the decree be?*

8. Perusal of the record reflects that the case, as setup by the contesting Respondents, was that they were legal heirs of Faiz Muhammad along with Respondent No.4 herein and the Suit property had devolved to all legal heirs including Respondent No.4. It was their case that Respondent No.4, being their aunt, discretely got the share of the contesting Respondents transferred into her name on the basis of a purported sale agreement recorded before the concerned Mukhtiarkar, on the basis of which the ownership was then recorded in the name of Respondent No.4 exclusively, and thereafter, somewhere in 2003, the said Respondent No.4 allegedly with intention to deprive the contesting Respondents further sold the property to the present Appellants. It is a matter of record and an admitted position that when this purported sale agreement was executed in favour of Respondent No.4 allegedly by the contesting Respondents, majority of them were minors, and while confronted, the Appellants' Counsel has not been able to controvert this admitted position in any manner. Per settled law, any agreement on behalf of the minors for alienation of an interest in a property is always void and cannot be enforced in law. Therefore, the first and foremost question, which was overlooked by the learned Trial Court and which has been corrected by the learned Appellate Court, appears to be in consonance with the settled proposition of law as above. To that, there cannot be any exception; whereas, even otherwise, the Appellants' Counsel has also failed to overcome this legal impediment in the execution of the sale agreement as claimed by Respondent No.4.

9. The learned Trial Court also non-suited the contesting Respondents on the ground that all legal heirs of Faiz Muhammad had not been joined in the Suit, and therefore, it was hit by misjoinder and non-joinder of the parties. Again the learned Appellate Court has corrected this observation which also appears to be in consonance with law inasmuch as in cases of succession and claim of shares as legal heirs; it is neither mandatory nor

appropriate to dismiss a Suit if some of the legal heirs have not been joined either as plaintiffs or defendants for that matter. Any claim for and on behalf of any or some of the legal heirs, in absence of others is maintainable and the Court is fully empowered to issue directions for joining such remaining legal heirs, and cannot under such circumstances, dismiss a Suit as being not maintainable for such non-joinder or misjoinder of the parties.

10. It is also a matter of record that the statement of sale (Ex.33/B) was never proved in evidence by Respondent No.4 as she failed to examine the two attesting witnesses, which were required to be brought before the Court for proving the execution of the statement of sale. This was more important in this case, as apparently, the parties are related to each other; whereas, the contesting Respondents have denied execution of any sale agreement, hence, the burden, which lay upon Respondent No.4, has not been discharged.

11. It further appears that surprisingly Respondent No.4 and the present Appellants had filed a joint written statement; whereas, the present Appellants put themselves into the witness box to even justify the execution of the sale agreement; whereas, in law they had no *locus standi* to do so. Neither they had signed or executed the agreement nor they were the witnesses; hence, in law couldn't have testified for or against the very execution of the agreement. Their best case was that if no agreement was executed, as contended by the contesting Respondents, then they could have claimed damages with allegations of fraud and cheating against Respondent No.4 and could have sought return of their amount, which purportedly was paid by them for execution of sale deed in their favour. This was the maximum relief they could have asked for, but instead they chose to contest the matter along with Respondent No.4 and sailed in the same boat; whereas, the said Respondent No.4 miserably failed to establish the execution of the sale agreement between her and the contesting Respondents.

12. Lastly, an argument was also made on behalf of the Appellants that the Suit was by itself time barred, however, it appears that it is the case of the contesting Respondents that they were always in possession and were never aware of any purported sale agreement executed in favour of Respondent No.4 in the year 1993, and as soon as it came into their knowledge, they filed a Suit and thereafter it transpired that even a further

sale deed has been executed, hence, they withdrew their Suit and filed a fresh Suit by impleading the present Appellants and also seeking cancellation of their sale deed. There is nothing on record to establish that the contesting Respondents ever had any knowledge about the purported sale agreement, hence, this argument also does not appeal to this Court that the Suit was time barred. Nonetheless, even otherwise, in cases where interest of legal heirs are involved, the Courts have always been of the view that in such cases, the strict rule of interpretation regarding limitation would not apply.

13. In view of hereinabove facts and circumstances of this case, it appears that the Appellate Court was fully justified in setting aside the judgment of the Trial Court by decreeing the Suit of the contesting Respondents and there does not appear to be any justification to interfere with such finding of the Appellate Court; nor a case of any exception is made out; hence, this Second Appeal does not merit any consideration and is accordingly **dismissed**.

Abdul Basit

J U D G E