Judgment Sheet

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Revision Application No. 174 of 2010

Date of hearing : 26.02.2013.

Applicant : Muhammad Ibrahim through
Mr. Saeeuddin Siddiqui, Advocate.

Respondent Nos. 1 to 4 : The Province of Sindh and 03 others
through Mr. Muhammad Azeem Panhwar,
the State Counsel.

Respondent No. 5 : Ahmed through
Mr. Ejaz Ali Hakro, Advocate.

J U D G M E N T

NADEEM AKHTAR, J.- This Civil Revision Application has been filed by the applicant against the judgment delivered on 29.03.2010 by the VIIth Additional District Judge, Hyderabad, in Civil Appeal No. 32/2007 filed by respondent No.5 against the judgment delivered on 15.01.2007 and decree passed on 18.01.2007 by the Vth Senior Civil Judge, Hyderabad, in F.C. Suit No. 79/1994 filed by the applicant. By the said judgment and decree, the Suit filed by the applicant against respondent No.5 for partition, restoration of possession, recovery of mesne profits, permanent and mandatory injunction, was decreed by the trial court as prayed by the applicant, with no order as to costs. Through the impugned judgment, the decree passed by the trial court has been modified by holding that, in addition to the applicant and respondent No.5, their deceased mother, and after her death, all her legal heirs are also the co-owners of the property which was / is the subject matter of litigation.

2. This case has a chequered history. The dispute pertains to property No. A/1051, measuring 92-2 sq. yds, situated in Dugga Mohallah, Hala, District Hyderabad (now District Matiari), hereinafter referred to as **"the property"**. The property was owned by one Hafiz Shafi Muhammad, who passed away in the year 1976, hereinafter referred to as **"the deceased"**. The deceased left behind him eleven (11) surviving legal heirs ; namely, his widow Hajiani Fatima, six (06) sons (including the applicant and respondent No.5), and four (04) daughters. The deceased owned several properties including the property, which was inherited by all his aforementioned legal heirs according to their respective shares. According to the applicant, a dispute arose between the

legal heirs of the deceased regarding distribution of their shares in the properties left by the deceased, due to which the applicant was constrained to file a Suit for determination of the shares of each of the legal heirs. As the Suit filed by the applicant was dismissed, he filed Civil Appeal No.161/1991 against the dismissal of his Suit.

3. Before the trial court in F.C. Suit No.79/1994, it was the case of the applicant that all the legal heirs of the deceased arrived at a family settlement / compromise in the said Civil Appeal No.161/1991, whereby the property became the joint property of the applicant and respondent No.5 having 50% share each therein, and the other properties were distributed amongst the other legal heirs. It was also the case of the applicant that, as the consideration for acquiring 50% share in the property, he paid a sum of Rs.65,160.00 in addition to the surrendering of his rights in the other properties. It was alleged by the applicant that he asked respondent No.5 / co-owner to get the property partitioned by metes and bounds, but respondent No.5 refused to do so. In the above background, the applicant filed F.C. Suit No. 79/1994 before the Vth Senior Civil Judge, Hyderabad, against respondent No.5 for partition, possession, mesne profits, permanent and mandatory injunction. The Suit was strongly contested by respondent No.5. Both the parties produced their respective evidence, whereafter the Suit was decreed vide judgment dated 15.01.2007 and decree dated 18.01.2007. In Civil Appeal No. 32/2007 filed by respondent No.5, the said judgment and decree were modified by holding that, in addition to the applicant and respondent No.5, their deceased mother, and after her death, all her legal heirs are also the co-owners of the property.

4. With the consent of the learned counsel appearing for the parties, it was ordered on 08.02.2011 and then again on 26.02.2013 that this case will be heard and finally decided at the stage of katcha peshi.

5. Mr. Saeeduddin Siddiqui, the learned counsel for the applicant, submitted that there was sufficient material before both the courts below to show that the applicant was the owner of 50% undivided share in the property, which was acquired by the applicant through the family settlement / compromise arrived at by all the legal heirs before the lower appellate court in Civil Appeal No.161/1991. He contended that, on the basis of a compromise application filed by the parties in the said appeal, a consent decree was passed on 10.10.1992 whereby 50% undivided share in the property was given / surrendered by all the other legal heirs in favour of the applicant. He also contended that the decree, being a consent decree, was/is binding on all the parties including respondent No.5. The learned counsel further submitted that prior to the afore-mentioned family settlement / compromise, the real mother of

the applicant and respondent No.5 (Hajiani Fatima, the widow of the deceased) gifted the property to the applicant and respondent No.5 in equal proportions through a registered instrument dated 22.10.1991. He contended that though the said instrument was titled as “Deed of Will”, but the same was actually a gift because it was mentioned therein that the same was executed in favour of the applicant and respondent No.5 by Hajiani Fatima out of love and affection. Mr. Siddiqui argued that the applicant had successfully discharged his burden in proving that he was the undisputed owner of 50% undivided share in the property, therefore, there was no justification for the lower appellate court to hold that Hajiani Fatima, and after her death, all her legal heirs are also the co-owners of the property in addition to the applicant and respondent No.5. The learned counsel urged that the decree passed by the trial court in favour of the applicant ought to have been maintained.

6. On the other hand, Mr. Ejaz Ali Hakro, the learned counsel for respondent No.5, submitted that the entire case built up by the applicant before the trial court was based on incorrect and misleading facts. He did not dispute the family settlement / compromise recorded through the consent decree passed on 10.10.1992 in Civil Appeal No.161/1991, but submitted that the said settlement / compromise was in respect of the shares inherited by all the legal heirs out of the estate / properties, including the property, left by the deceased. In order to further clarify his contention, the learned counsel submitted that the widow of the deceased (Hajiani Fatima) was admittedly one of the legal heirs of the deceased, and she was alive at the time of the family settlement / compromise, therefore, her share in any of the properties left by the deceased, including the property, could not have been the subject matter of the family settlement / compromise. Mr. Hakro submitted that the correct factual position was that, as per the family settlement / compromise and the consent decree passed in pursuance thereof, the applicant, respondent No.5 as well as their mother Hajiani Fatima, became the co-owners of the property to the extent of 44 Paisa, 44 Paisa and 12 Paisa, respectively. The applicant and respondent No.5 never

acquired the shares of 50 Paisa each in the property. Regarding the gift alleged by the applicant, it was contended by Mr. Hakro that the same was not a gift, and at best, it could be treated as a will of Hajiani Fatima. He submitted that the alleged will was void to the extent of 2/3rd share in the property in view of Section 118 of the Muhammad Law, as Hajiani Fatima could not legally bequeath more than 1/3rd of her share in favour of the applicant and respondent No.5 by excluding the other legal heirs. The learned counsel argued that after the demise of Hajiani Fatima, her share of 12 Paisa in the property was

inherited by all her surviving legal heirs / children. The share of 08 Paisa in the property was inherited by her four sons, including the applicant and respondent No.5, each having 02 Paisa share, and the remaining share of 04 Paisa was inherited by her four daughters, each having 01 Paisa share. It was contented that, after inheriting their respective shares, the applicant and respondent No.5 became owners of 92 Paisa collectively and of 46 Paisa each (44+2) in the property, and the remaining six legal heirs of Hajiani Fatima became the owners of the remaining 08 Paisa as per their aforementioned entitlements. Mr Hakro prayed that the impugned judgment and decree should not be disturbed as the same have determined the correct and actual shares of all the co-owners in the property as per the Shariah.

7. After hearing the respective contentions of the learned counsel at length, I would like to discuss some important aspects of this case that have been noticed by me from the record. Paragraphs 5 and 8 of the compromise application filed and the consent decree passed in Civil Appeal No.161/1991 are relevant and extremely important. For the sake of convenience and ready reference, the same are reproduced here :

> **"** *5. That the share of Mohammad Ibrahim, Ahmed and Hajiani Fatima in both the properties comes to 37 Paisas the value of which is Rs.1,59,840/-. Since they are taking property No. A/1051, Hala, value of which comes to Rs.2,26,000/- as such they have to pay Rs.66,100/- to the remaining respondents as under :*
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> *9. .....* **".**
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> **"** *8. That the names of Mohammad Ibrahim, Ahmed and Hajiani Fatima shall be mutated in property No. A/1051, Hala, after 31.12.1992 when the payment of rest of the respondents as above is made by the appellant.* **"**

It is pertinent to note here that the name of Hajiani Fatima was not mentioned in the list of the eight beneficiaries named in paragraphs 5 of the compromise application and the consent decree, and that her name was mentioned as one of the three co-owners of the property in the same paragraph as well as in paragraph 8 reproduced above. As per paragraphs 5 of the compromise and the consent decree, the applicant, respondent No.5 and Hajiani Fatima, were required to pay the agreed amount of Rs.66,100.00 as the share of the other

eight legal heirs in the property. After payment of the said agreed amount of Rs.66,100.00 to the other eight legal heirs, the property was transferred and mutated in the Property Register on 19.08.1993 in the names of the applicant, respondent No.5 and Hajiani Fatima. It may be noted that the applicant had admitted in his cross examination that the entries in the Record of Rights in respect of the property were made at the instance of the applicant on his application. The above admitted facts clearly show that the applicant and respondent No.5 were not the only co-owners of the property, but Hajiani Fatima was also a co-owner thereof.

8. On 03.01.1993, the applicant filed an application in his Civil Appeal No.161/1991 seeking permission of the appellate court to deposit the amount of Rs.40,168.58 as the share of only four legal heirs mentioned in the said application. This admitted fact shows that the entire agreed share of Rs.66,100.00 was not paid by the applicant alone to all the eight legal heirs, and that the share of Hajiani Fatima in the property was never purchased by the applicant. In view of this admitted position, the claim of the applicant that the entire amount of Rs.66,100.00 was paid by him alone, had no basis.

9. In paragraph 02 of the memo of this revision application as well as in paragraph 02 of his plaint in F.C. Suit No. 79/1994, it was admitted by the applicant that the family settlement / compromise arrived at by all the legal heirs in Civil Appeal No.161/1991 was in respect of the properties inherited by them from the deceased, and that the share in the property which was surrendered by the legal heirs in favour of the applicant, was inherited by all the legal heirs of the deceased. Similar statement was given by the applicant in his examination-in-chief. In his cross examination, many important admissions were made by the applicant, such as, the deceased left behind him eleven (11) surviving legal heirs, including Hajiani Fatima ; after the death of the deceased, the property was inherited by all his legal heirs ; Hajiani Fatima had 13 Paisa share in the property ; in the compromise before the appellate court, the share of Hajiani Fatima was declared as 15 Paisa ; according to the private *faisla* before the appellate court, the shares of the applicant and respondent No.5 in the property were 11 Paisa each, and the share of Hajiani Fatima was 14 Paisa (the applicant then corrected himself by admitting that the share of Hajiani Fatima was 15 Paisa) ; after depositing the amount as per the *faisla*, the applicant became the owner of 50 Paisa share in the property, and respondent No.5 and Hajiani Fatima became the owners of the remaining half share in the property ; Hajiani Fatima died after the family settlement / compromise before the appellate court ; Hajiani Fatima left behind her surviving all those legal heirs who were the legal heirs of the deceased ; and that the entries in the Record of

Rights in respect of the property were made at the instance of the applicant on his application.

10. In paragraph 11 of his plaint, the applicant had stated that the cause of action for filing F.C. Suit No.79/1994, out of which this revision application has arisen, had accrued to him in the month of October 1992 when the compromise in Civil Appeal No.161/1991 was accepted. Thus, admittedly the entire Suit was based by the applicant on the compromise, which was admittedly in respect of the properties left by the deceased, whereby Hajiani Fatima admittedly became the co-owner of the property along with the applicant and respondent No.5.

11. Regarding the instrument dated 22.10.1991, it was contended by the learned counsel for the applicant that though the said instrument was titled as “Deed of Will”, but the same was actually a gift because it was mentioned therein that the same was executed in favour of the applicant and respondent No.5 by Hajiani Fatima out of love and affection. In this context, I would like to observe that the said instrument could not be treated as a valid and legal gift. There was no acceptance of the alleged gift by the alleged donees, and it was not mentioned anywhere in the said instrument relied upon by the applicant that possession of the property had been handed over to the alleged donees. In the absence of the aforementioned two basic and mandatory ingredients of a valid gift, the said instrument could not be treated as a valid gift. Moreover in the said instrument, a condition was imposed by Hajiani Fatima that the alleged donees will be entitled to her share after her death, and during her life time, she will remain as the owner of the property to the extent of her share. It is a well established principle that a gift should be absolutely unconditional, and in case any condition is imposed by the donor, the gift becomes void. In view of the aforementioned major defects in the said instrument, I hold that the same was not a gift as claimed by the applicant. The question of execution of a will by Hajiani Fatima does not arise, as the applicant himself has claimed that it was a gift and not a will.

12. In his written statement, respondent No.5 had categorically and vehemently denied that he and the applicant were the only co-owners of the property having 50 Paisa each therein. It was all along asserted by respondent No.5 that Hajiani Fatima had also a share in the property, and after her death, her share devolved upon all her legal heirs including the appellant and respondent No.5. Due to this reason, it was pleaded by respondent No.5 that the property was not capable of being partitioned. The above pleas of respondent No.5 were rejected by the trial court and the suit for partition filed by the applicant was decreed.

13. By the impugned judgment, the error committed by the trial court has been corrected by the appellate court by holding that the applicant and respondent No.5 hold equal shares in the property, their mother Hajiani Fatima was also a shareholder in the property, and after her death, her share has devolved upon all her legal heirs including the applicant and respondent No.5 according to law. However, the appellate court has erred by holding that the applicant holds equal share in the property with other shareholders ; namely, respondent No.5 and Hajiani Fatima. As discussed above, the correct position is that the applicant, respondent No.5 and Hajiani Fatima became the owners of 44 Paisa, 44 Paisa and 12 Paisa, respectively, in the property after the compromise and the consent decree.

14. In view of the above discussion, I conclude that the impugned judgment and decree do not require any interference to the extent that the applicant and respondent No.5 hold equal shares in the property, their mother Hajiani Fatima was also a shareholder in the property, and after her death, her share has devolved upon all her legal heirs including the applicant and respondent No.5 according to law. The impugned judgment and decree are, therefore, maintained to the above extent, but are set aside to the extent that the applicant holds equal share in the property with other shareholders ; namely, respondent No.5 and Hajiani Fatima. I hold that the applicant, respondent No.5 and Hajiani Fatima became the owners of 44 Paisa, 44 Paisa and 12 Paisa, respectively, and after the demise of Hajiani Fatima, her 12 Paisa share in the property devolved upon all her legal heirs, including the applicant and respondent No.5, as per their respective shares / entitlements.

15. It was submitted by the learned counsel that execution proceedings are pending before the executing court. If it is held by the executing court that the property cannot be partitioned by metes and bounds between all the co-owners as per their respective shares mentioned in the preceding paragraph, the executing court shall follow the procedure provided in the Partition Act, 1893.

This Revision Application is disposed of in the above terms.

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