

**IN THE HIGH COURT OF SINDH BENCH AT SUKKUR**

**Civil Revision No. S – 127 of 2010**

*Abdul Khalique Phulpoto & another v. Mehar Ali & others*

**Civil Revision No. S – 152 of 2010**

*Mehar Ali & others v. Shafi Muhammad Dahot & others*

Date of hearing: **25-04-2022**

Date of decision: **25-04-2022**

Mr. Kalander Bakhsh M. Phulpoto, Advocate for the Applicants in Civil Revision No. S-127 of 2010 and for Respondents No.3 & 6 in Civil Revision No. S-152 of 2010.

Mr. Safdar Ali Bhatti, Advocate for the Applicants in Civil Revision No. S-152 of 2010 and for Respondents No.3, 6(a) to 6(h) & 7(a) in Civil Revision No. S-127 of 2010.

Mr. Ahmed Ali Shahani, Assistant Advocate General Sindh.

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

**Muhammad Junaid Ghaffar, J.** – Both these Civil Revisions have impugned a common judgment dated 18-03-2010 passed by 2<sup>nd</sup> Additional District Judge, Khairpur in Civil Appeal No.37 of 2006, whereby while dismissing the Appeal, the judgment dated 28-04-2006 passed by IInd Senior Civil Judge, Khairpur in F.C. Suit No.40 of 1999 (New No.236 of 2004) has been maintained; however, certain observations have been recorded against the Applicants in Civil Revision Application No. S-127 of 2010 (the Respondents / Defendants in the proceedings below), and therefore, they have also filed Civil Revision Application No. S-152 of 2010.

2. Heard both the learned Counsel and perused the record.
3. For ease of reference, the main Applicants of Civil Revision Application No. S-152 of 2010 will be referred hereinafter as the ***Applicants***, whereas, the Applicants in Civil Revision Application No. S-127 of 2010 will be referred hereinafter as the ***Respondents***.
4. It appears that the Applicants had filed a Suit for declaration, partition and permanent injunction seeking the following relief(s):

- a) *That this Honourable court may graciously be pleased declare the mutation / Khata in favour of defendants dated 19.5.1998 and 29.11.1981 are illegal, null void abinitio and further be declare that the plaintiffs are legal heirs of the deceased Mahi Khan and Muhammad Ramzan Dahot according to Muhammadan Hanfi-Law.*
- b) *That the disputed land viz. S.NOS. and Houses mentioned in para No: 3 of the plaint may be partitioned between plaintiffs and defendant No.1 and L.Rs of defendant No.2 as per injunction of Islam Hanfi Muhammadan Law.*
- c) *To issue permanent injunction restraining the defendant No: 1 and L.Rs of defendant No: 2 and defendant No: 3 to 7 not to sell alienate or dispose of the disputed property viz. Agri: land bearing S.Nos: and houses mentioned in Para No: 3 of plaint upto their purchased property or they are in possession and not to dispossess or interfere with the possession of the plaintiff by themselves through their agents, well wishers, servants or any body else in any manner whatsoever.*
- d) *To award the costs of the suit.*
- e) *Any other relief which this Hon'ble Court deem fit and proper.*

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

1. *Whether the plaintiffs have shares in the inheritance left by deceased Mahi Khan and deceased Muhammad Ramzan?*
2. *Whether the plaintiffs are entitled to any share in the suit property. If yes then how much?*
3. *Whether the defendants No:1 and 2 have not got mutations changed in their names illegally?*
4. *What should the decree be?*

6. The learned Trial Court, after evidence of the parties, came to the conclusion that the Applicants have failed to make out a case for grant of any relief, and resultantly, the Suit was dismissed. The Applicants, being aggrieved, approached the Appellate Court by way of an Appeal and though the Appeal has been dismissed, however, there are certain findings of the Appellate Court by which the Respondents are also aggrieved. The Appellate Court settled the following four (04) points for determination, which reads as under:

- i. *Whether the appellants/plaintiffs are legal heirs of deceased Mahi Khan and the Foti khata in favour of Mst: Satbherai, Bherahi and Illahi Bakhsh (respondent No.2/defendant No.2) effected on 28.11.1981 is not lawful?*
- ii. *Whether the sale deed No.153 dated. 7.02.1985 executed by Mst: Satbherai in favour of Shafi Muhammad (respondent No.1/defendant No.1) alongwith subsequent transaction is legal?*
- iii. *Whether the appellants/plaintiffs are entitled to any relief?*

iv. What should the decree be?

7. Insofar as Point No. (ii) is concerned, the Appellate Court recorded the following finding by which the Respondents herein are aggrieved. The same reads as under:

**“Point No.ii:-**

20. The sale deed No.153 dated. 07.02.85 available at Ex:45/J of R & Ps shows that Mst: Satbherai sold out in all area of 4-16 acres out of survey Nos: 28/2-36, 339/3-6, 342/0-36, 343/1-12, 354/2-32. The Fouti Khata dated. 28.11.81 available at Ex:45/A shows that area out of survey No.15-12 acres area Mst: Satbherai had 25-paisa share equal to one-fourth. The quarter share in favour of Mst: Satbherai will be less than 4-acres as such it is clear that at the time of sale in favour of respondent No.1/defendant No.1 Mst: Satbherai was not holding 4-16 acres at her credit and she was not competent to enter into the sale of 4-16 acres which was in excess from her own share.

21. The P.W Mehar Ali (appellant No.1/plaintiff No.1) has produced death certificate of Mst: Satbherai showing that she expired on 15.10.84. The sale deed available at Exh:45/J was presented by vendor Mst: Satbherai on 7.2.85 after death of Mst: Satbherai and was registered at serial No.153 on same date.

22. The death certificate has been produced by the P.W-1 on 19.1.2006 and the D.W-1 Ghulam Qadir s/o Allah Bux (respondent No.4/defendant No.4) examined himself on 27.4.2006 but he has not deposed as to when Mst: Satbherai died if not on 7.2.85. During cross-examination the D.W-1 Ghulam Qadir denied the suggestion that Mst: Satbherai expired in the year 1984 but he has not given the date of death of Mst: Satbherai to ascertain if on 7.2.1985 she was alive or not. I do not see any reason to disbelieve the death certificate when there is no other evidence on record except said certificate available at Ex:45/N of R & Ps showing the date of death of Mst: Satbherai on 15.10.84. Thus it is clear that on 7.2.85 when the sale deed was presented on behalf of Mst: Satbherai she was not alive and such sale deed alongwith subsequent transactions automatically becomes illegal, and accordingly point No.ii is replied in negative.”

8. The precise case of the Applicants was to the effect that they are the legal heirs of Mahi Khan and for such purposes they also challenged certain revenue entries and *foti khata badal* by way of their Suit. The Applicants' Counsel vehemently argued that in some other proceedings the right of the Applicants was accepted, and therefore, both the Courts below were not justified in refusing the relief being sought by the Applicants. In support, he referred to an order dated 24-12-1978 passed by the then Deputy Commissioner / Collector, Khairpur. However, on perusal of the said order, it does not appear that the right of the Applicants was ever determined; rather it was only to the extent that the dispute cannot be resolved by the Revenue Courts and the aggrieved parties are to take recourse to appropriate remedy in accordance with law. As to the evidence led by the

Applicants, it would be advantageous to refer to the evidence of Mehar Ali (Ex.45), the Applicant himself. His cross-examination reads as under:

“X X To Mr. Syed Jaffar Hussain Shah Advocate for defendants.

The Mahi Khan was cousin of Muhammad Ramzan. The Loung Fakir was S/O Mehro Khan. Lallah Dino was the father plaintiff Bakhat Ali. Allah Dito was S/O Qadir Bux. Ali Dino was S/O Gahi Khan Dahot. **I do not remember the name of the grand father of Qadir Bux.** The Pir Bux father of plaintiff No:5 was son of Khuda Bux. The Suleman father of plaintiff No:6 was S/O Qadir Bux. Raban father of plaintiff 7 and 8 was also S/O Qadir Bux. Loung Fakir and Qadir Bux were the brothers. Mahi Khan was S/O Murad. The Murad has no brother. **I do not remember the mutation made in the name of Mst: Sat Bherai. It is correct to suggest that I have never filed any appeal against the mutation in the name of Mst: Sat Bherai. I came to the knowledge regarding the sale made by Mst: Sat Bherai to Shafi Muhammad 15 years back.** The said Shafi Muhammad the def. No:1 sold out the property to Qadir Bux there after Qadir Bux transferred the same to Abdul Khaliq by registered sale deed. Def. No:5, 6, 7 purchased the property from Ghulam Qadir. It is correct that I have not produced any land Revenue receipt, Extract form Field book kept by Tapedar, and Form-A which shows possession of the person. **The Mahi Khan expired 50 years back. It is correct that Mst: Sat Bherai was the Widow of Mahi Khan.** I do not know the relation of Mst: Bherai with Mst: Sat Bherai. I do not know the relation of Illahi Bux with deceased Mahi Khan. **It is correct to suggest that after the death of Mahi Khan the Foti Khata was mutated in the name of Mst: Sat Bherai.** I do not know whether Shafi Muhammad purchased the property from Mst: Sat Bherai after verifying her name in the Revenue Record. It is correct to suggest that Mst: Sat Bherai married with Shafi Muhammad. **It is correct that I was explained the averment made in the plaint and fully aware of the relief sought therein.** The enquiry was made by the Revenue Authority after the suit regarding the legal character of the legal heirs. **It is correct that the Mahi Khan belongs to Shia Sect. It is correct that in plaint Para No:6 it has been mentioned that Mahi Khan belongs to Suni Sect.** It is fact that I have not filed the pedigree of my forefathers. **It is correct to suggest that the defendant No:3, 4, 5 and 6 are under the possession of the disputed property.** It is correct to suggest that the present suit has not been filed for possession of the property in dispute. Vol. says that the possession was taken by the defendants after the mutation in their names. I do not know that whether defendants had purchased the suit property after payment of consideration towards sale. **It is correct to suggest that the defendants have not played fraud with me.** It is incorrect to suggest that my suit is not maintainable under the law. **It is correct that deceased Mahi Khan left behind only legal heirs Mst: Sat Bheri, Mst. Bherai and Illahi Bux (defendant No:2).** It is correct that Mst: Sat Bherai was D/o Muhammad Ramzan, she was the only daughter of Muhammad Ramzan. I do not know that after the death of Muhammad Ramzan Foti Khata was changed in the name of Mst: Sat Bherai. I do not know that whether Mst: Sat Bherai sold property through sale deed in year 1985. I do not know Karim Bux filed application before Mukhtiarkar Khairpur and same was dismissed vide order dated: 11.11.1975. It is correct that since year 1975 till 1999 no case has been filed by us in the court of law. It is incorrect to suggest that we have filed the present suit in order harass the defendant. It is incorrect to suggest that I have filed false and fake case.”

From perusal of the aforesaid cross-examination of the Applicant, it appears that the Applicant had miserably failed to lead any confidence

inspiring evidence, which could convince the Court to pass a decree as prayed for. He has admitted in his evidence that he never filed any appeal in respect of the mutation and the *foti khata badal* of the Respondents. He further admits that it was in his knowledge that sale of the property to Shafi Muhammad was made 15 years back, and lastly, he himself admits that ***“It is correct that deceased Mahi Khan left behind only legal heirs Mst: Sat Bherai, Mst. Bherai and Illahi Bux (defendant No:2).”*** He has further admitted that Respondents have not played any fraud with him. The Applicants’ Counsel was confronted as to the admission of the Applicant, wherein he admits that the Respondents were not only the legal heirs of Mahi Khan; but were in fact the *only legal heirs*, and in that case, how could his claim be justified seeking a declaration that he is also one of the legal heirs of Mahi Khan. In response, the Applicants’ Counsel was unable to satisfactorily respond and submits that it may be a slip of tongue. However, except this assertion now being made, there is nothing on record to suggest that any attempt was ever made to have this answer corrected. Once the Applicant by himself admits that the Respondents namely Mst. Sat Bherai, Mst. Bherai and Illahi Bux were the *only legal heirs* of Mahi Khan, then perhaps he has no case to seek a declaration to the effect that he is also one of the legal heirs. As to the rest of his evidence, again nothing has been adduced by him which could support his case for seeking a declaration of being one of the legal heirs of Mahi Khan.

9. In view of such position, it appears that he has no case; whereas, the two Courts below have come to a correct conclusion and have recorded concurrent findings against the Applicants; hence, Civil Revision Application No.152 of 2010 stands **dismissed**.

10. As to the other Revision Application of the Respondents, it may be observed that the learned Appellate Court, as noted hereinabove, has given certain observations against the interest and case of the Respondents. It appears that though the Appellate Court settled a point for determination in respect of the sale deed dated 07-02-1985 in favour of Shafi Muhammad; however, it is a matter of record that neither there was any prayer in the Suit in respect of this sale deed nor the Trial Court had settled any such issue with regard to the validity of the sale deed. The prayer was only to the extent of the Applicants being legal heirs or not and whether they are entitled for any share or not, and finally, as to the mutation so recorded. The main prayer regarding sale deed was never made by the Applicants, and

therefore, the Appellate Court has seriously erred in law by giving observations in respect of the validity of the sale deed and the death certificate as observed in Para-22 of the impugned judgment. Accordingly, the finding of the Appellate Court to the extent of Point No. (ii) cannot be sustained and is hereby set aside, and this Revision Application of the Respondents bearing No. S-127 of 2010 is **allowed** to that extent.

11. In view of hereinabove facts and circumstances Civil Revision No. S-152 of 2010 is **dismissed**; whereas, Civil Revision No. S-127 of 2010 is **partly allowed**.

Abdul Basit

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