IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision No. S – 143 of 2004

Arfan Ahmed and others v. Jhangal and others

Date of hearing: **21-03-2022**

Date of announcement: **29-04-2022**

Mr. Mian Abdul Salam Arain, Advocate for the Applicants.
Mr. Soomar Das R. Parmani, Advocate for private Respondents.
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 Revision, the Applicants have impugned judgment dated 01-10-2004 passed by District Judge, Ghotki in Civil Appeal No.103 of 2002, whereby, the Appeal has been allowed and Suit of private Respondents has been decreed by setting aside judgment dated 30-11-2002 passed by Senior Civil Judge, Ghotki in F.C. Suit No.128 of 1992, through which the Suit of private Respondents was dismissed.

2. Heard learned Counsel for the parties and perused the record including R&Ps.

3. It appears that the private Respondents filed a Suit for declaration and permanent injunction praying therein that it may be declared that the clearance certificate as well as allotment orders issued in respect of 50 *paisa* share in the Suit property by the Settlement Rehabilitation Authorities in favor of the Applicants are null and void; that the orders dated 24-11-1973 and 13-06-1974 passed by Deputy Custodian Evacuee Property, Khairpur Division at Sukkur and Custodian Evacuee Property, Sindh at Hyderabad are legal, lawful and valid; that mandatory injunction be passed for implementation of these two orders.

4. The learned Trial Court, after evidence of the parties, came to the conclusion that the Respondents have failed to prove their case, and accordingly, the Suit was dismissed. Being aggrieved, the Respondents approached the Appellate Court, and through impugned judgment, the

learned Appellate Court has set aside the judgment of the Trial Court and has decreed the Suit as prayed.

5. The precise case of the Respondents, as setup in the plaint, was to the effect that the Suit property was originally owned by two brothers namely Arjan Mal and LalDino Mal; whereas, both of them entered into an agreement with the father of the Respondent to the effect that if he improves the Suit land, he will be given 50 *paisa* share in the Suit land in lieu of his labour and expenses etc. It is their further case that this part of the agreement was acted upon and by way of an oral statement dated 25-11-1947 both the brothers appeared before the Mukhtiarkar, Ghotki and mutated their 50% share in the Suit land. It is further case of the Respondents that both the brothers then sold out the remaining 50 *paisa* share to their father against consideration and gave their separate statements before the concerned Mukhtiarkar by mutating their equal share in the Suit property on 17-03-1949 and 06-04-1949, respectively. It appears that thereafter in 1954-55, for some reason, the Revenue record of rights in favour of the Respondents was cancelled and the Suit land was reverted in the names of original owners i.e. the two brothers as above for want of sanction from the Custodian Department. It further appears that one of the brothers namely Arjan Mal remained in Pakistan, whereas, the other brother LalDino Mal migrated to India in 1958. It is further case of the Respondents that notwithstanding the above, Arjan Mal, once again, to the extent of his *50%* share transferred the Suit land by way of a registered sale deed dated 23-12-1967 without any further consideration, whereas, the entire land has remained in their peaceful possession and is being cultivated by them. It is their further case that in 1959, they moved an application under Section 16(3) read with Sections 20 and 22 of the Pakistan (Administration of Evacuee Property) Act XII of 1957 to the Deputy Custodian Evacuee Property for grant of necessary permission to sue LalDino Mal who had then migrated to India for transfer of his *50%* share, and in the alternative, declare the said property as non-evacuee for the reason that he had migrated after the cut-off date i.e. 01-01-1957; whereas, the property till then was never declared as evacuee property in the central pool nor anybody was there as a claimant. The said application was decided on 24-11-1973 with the observation that the requisite declaration may be granted subject to approval of the Custodian of the Evacuee Property who also vide his order dated 13-06-1974 affirmed the order of the Deputy Custodian Evacuee Property, Khairpur. It further appears that somewhere

in 1985 a clearance certificate was issued in respect of this remaining *50%* share in the name of predecessor-in-interest of the Applicants, and the Respondents being aggrieved, approached the concerned Deputy Commissioner for necessary action and implementation of the two orders of the Custodians as above. However, the said request was decided on 21-12-1991 by directing the Respondents to seek remedy from the competent Court of law; hence, the Suit of the Respondents.

6. On the other hand, the case of the Applicants is that the property was declared as evacuee; whereas, the entire property was initially allotted to them against their claim, and subsequently, it was reduced to *50%* share of LalDino Mal, who had migrated to India. Their further case is that once a property was declared as evacuee, it cannot be declared as non-evacuee simply for the reason that the migrant had returned from India; or for that matter some interest is being claimed by anyone else. It is their further case that notwithstanding the legal impediments, they were never a party before the Custodians; hence, the said orders are applicable to the extent of their *50%* share.

7. Insofar as the legal issue as raised on behalf of the Applicants is concerned, there appears to be no cavil to it; however, the law is that a person who becomes evacuee, no provision of law makes him non-evacuee merely on his return to Pakistan[1]. Here the question is not that whether a person has been declared as an evacuee or non-evacuee. Rather the real issue is that the property in question was never strictly declared as evacuee. The owners had sold it much before any Evacuee Laws could have come into force, whereas, they stood by such sale even subsequently. Therefore, reliance on the case law by the Applicants Counsel to this effect is of no help in the given facts of this case, wherein, as per record, the entire property was sold to the Respondents' father much prior to enforcement of the Evacuee Law and any declaration of the property as evacuee. Such facts have been placed before the Court and are a matter of record which have not been disputed seriously insofar as the present Applicants or for that matter the official Respondents are concerned. It was only that in 1954 or 1955, as pleaded, the Revenue entries were cancelled, but not only this, even to the extent of 50% in the year 1967 the property was once again transferred by way of a sale deed. If that be the case, then how a property

[1] Naraindas v Pakistan Ministry of Rehabilitation (1975 SCMR 123)

could have been treated as an evacuee property by the official Respondents. It is also a matter of fact that insofar as the Applicants are concerned, it is only in 1985 that some clearance certificate was issued to them when apparently the property was never available as evacuee property, whereas, the two orders passed by the Custodian dated 24-11-1973 and 13-06-1974 were already in field. In that case, there could not have been any occasion to allot the Suit property either to the extent of 50% or for that matter the entire share to any of the claimants as by that time the property was not part of the common pool. In fact, as per record, it could not have been declared as evacuee property for the reason that the original owners remained in Pakistan at least till 01-01-1957, and therefore, the property could not have been declared as evacuee. It would also be advantageous to refer to the evidence led on behalf of the Applicants through Irfan Ahmed as Ex.146, which reads as under:

> **"***Examination in chief To Mian Abdul Salam Advocate for the defendant No.4 to 11.*
>
> *I am defendant No.6 in the present suit. The remaining defendants No.5 and 7 to 11 are my relatives. Late Alim Ali was my uncle and we all the private defendants are legal heirs of deceased Alim Ali. Disputed S.No. is 25 situated in Deh Labana.* ***The disputed land was originally belong to Lal Dino Mal and his brother Arjanmal****. After partition both the Hindus migrated to India and whole S.No. was declared evacuee property and the whole S.No. was allotted to our predecessor in interest Alim Ali, against his claim. After about 10 years Arjan Mal returned back and moved an application to the custodian authority seeking the declaration as non-evacuee of his share from disputed S.No.25. Therefore the custodian authority declared his 50 paisas share as non-evacuee though he was no right, and we have no knowledge regarding such decision. We came to know according to revenue record that said Arjan Mal has sold out his 50 paisas share to plaintiff Jhangal, and presently in the revenue record 50 paisas share stands in the name of Jhangal and 50 paisas stands in the name of deceased Alim Ali. After the death of Alim Ali the Foti Khata was changed in favour of Alim Ali. I produce certified copy of page No.55 of Dakhil Kharij Register showing the entry of Alim Ali s/o Akbar Ali at Exh.147. I produce order of Deputy Commissioner Sukkur dated 21.12.91 at Ex.148. I produce clearance certificate at Exh.149. I produce the proposal for the allotment made by Mukhtiarkar Ghotki dated 14.11.1956 at Ex.150. I produce original Khatuni at Exh.151. I produce the order of Mukhtiarkar Ghotki dated 28.6.1960 passed on the application of Mr. Pohu Mal at Exh.152. The disputed S.No. was allotted to the Alim Ali in year 1957/58 again says or in the year 1956. I do not know regarding the clearance certificate of remaining share. The plaintiff Jhangal was paying the Batai share to the said Alim Ali up to 1991 to the extent of 50 paisas share. Alim Ali was died about 45 years back from today. After the death of Alim Ali we legal heirs were receiving the Batai share. The plaintiff Jhangal tried to sold out his share, we raised objection and stated that we are prepared to purchase his share therefore he stopped paying the batai share to us. The plaintiff has sold out one Jerib to one Labana by caste and has also handed over the possession one Jerib to its*

purchaser. Due to this objection the plaintiff annoyed and filed the present suit in order to usurp our share.

Cross examination to Mr. Soomardass advocate for the plaintiff.

It is correct to suggest that I have not produced the power of attorney in my evidence. Voluntarily says that I produce its photocopy and the original was given to my counsel. ***It is correct to suggest that the application of Arjan Mal for seeking the declaration of non-evacuee certificate regarding his share was decided in favour of Arjan Mal in presence of deceased Alim Ali. It is correct to suggest that Alim Ali had not filed any appeal against the order of Deputy Custodian declaring the share of Arjan Mal as non-evacuee.*** *I have no knowledge whether the disputed land was purchased by the father of Jhangal namely Suleman in the year 1947 and 1949. It is correct to suggest that due to the Government policy and Notification the mutation entries in favour of Suleman were cancelled. I do not know whether the Jhangal has filed an application in the year 1959 for seeking the non-evacuee declaration which was allowed. I do not know whether the said order was subject to confirmation from custodian authority. I do not know whether the said order was confirmed by custodian. I do not know the both orders were produced by the plaintiff Jhangal to the Mukhtiarkar for correction in the revenue record.* ***It is correct to suggest that Khatooni was issued by Mukhtiarkar Ghotki on 4.12.1958****.* ***It is correct to suggest that Khatooni was issued to us after 1.1.1957****.* ***It is correct to suggest that disputed S.No.25 was whole shown in the Khatooni. It is correct to suggest that the clearance certificate was issued on 2.1.1985.*** *It is correct to suggest that the area of S.No.25, is shown 1-09 acre to the extent of half share. It is incorrect to suggest that after having mutation on 6.1.1985, we preferred an application to the Mukhtiakar for getting Batai share from Jhangal, previously he was not paying any Batai share to any of the legal heir of Alim Ali. It is correct to suggest that after change of Khata in the revenue record in favour of Alim Ali plaintiff Jhangal moved an application to the Deputy Commissioner for cancellation of the said entry. I do not know whether the orders of Custodian and Deputy Custodian were produced before the Deputy Commissioner Sukkur. It is correct to suggest that Deputy Commissioner Sukkur directed in his order to seek remedy for title from the competent court of Law. It is incorrect to suggest that after 13.6.1974 the status of disputed land was become non-evacuee. It is incorrect to suggest that the Khata in the year of 1985, was illegal. It is incorrect to suggest that I along with one Khosa and some other persons went on the disputed land for getting forcible possession.* ***It is correct to suggest that we have ourselves have not paid the land revenue personally. Voluntarily says that the plaintiff Jhangal was paying the batai share after deducting the land revenue etc.*** *It is incorrect to suggest that plaintiff Alim Ali has not paid Batai share at any time to Alim Ali or his legal heirs. It is incorrect to suggest that the Arjan Mal has never migrated to India and still residing in Ghotki. It is incorrect to suggest that Arjan Mal is personally known to me he is running grain shop in Ghalla Mandi Ghotki.* ***It is correct to suggest that we have never preferred any appeal against the sale of disputed land by Arjan Mal to the extent of his share, through Registered Sale Deed.*** *It is correct to suggest that I have not produced any proof to show that the plaintiff has sold out one Jarib. Voluntarily says that orally one Jarib has been sold out and the possession was delivered to the purchaser by plaintiff Jhangal.* ***It is correct to suggest that I have not filed any case for batai****. It is incorrect to suggest that I am deposing falsely in order to usurp the land.***"**

8. Perusal of the above evidence of the Applicant reflects that insofar as the proceedings, if any, in respect of declaration of the property as non-evacuee is concerned, it was within the knowledge of the predecessor-in-interest of the Applicants. It has been further admitted that Alim Ali, the predecessor-in-interest never filed any Appeal against the order of Deputy Custodian at least to the extent of Arjan Mal as non-evacuee. The witness has further admitted that it is correct to suggest that the *khatooni* was issued by Mukhtiarkar, Ghotki on 04-12-1958, and he has further admitted that it is correct to suggest that the *khatooni* was issued to us after 01-01-1957. He has further admitted that it is correct to suggest that disputed Survey No.25 was whole shown in the *khatooni*; whereas, he has further admitted that it is correct to suggest that the clearance certificate was issued on 02-01-1985. The entire evidence in effect belies the case of the Applicants. As to the Applicants' claim over the property, it was pleaded that they owned the property to the extent of 50% and were being paid *batai* share by the Respondents. However, in the evidence, it has been admitted that they never paid any land revenue personally; whereas, as to denial of any *batai* share, it is further admitted that no proceedings were ever initiated. In fact, no evidence has been led to support such stance as taken in the written statement and so also in the evidence. It may be of relevance to observe that not all properties of Hindus are to be regarded as evacuee properties. Here, it has come record that both the brothers at the time of sale were Pakistanis and merely for omission of an entry in the revenue records, the properties could not have been declared as evacuee. Similarly, no sale confirmation order was to be obtained from the Custodian.

9. In view of herein above facts and circumstances of this case, it appears that the learned Appellate Court has come to a correct and valid conclusion; as apparently, the learned Trial Court had erred in law and on facts while dismissing the Suit of the private Respondents. The evidence available on record fully affirms that case of the Respondents and in any manner, their suit ought not to have been dismissed. Accordingly, this Civil Revision Application does not merit any consideration and is accordingly **dismissed.**

Dated: 29-04-2022

J U D G E

Abdul Basit