HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

C.P No. D-686 of 1995

[Moula Dino & Ors versus Metloob Hussain & Ors]

BEFORE:
MR. JUSTICE MAHMOOD A. KHAN
MR. JUSTICE ADNAN-UL-KARIM MEMON

Petitioners:	Through Mr. Parkash Kumar advocate
Respondent No1:	Through Mr. Muhammad Arshad Pathan advocate
Respondents No.2&3:	Through Mr. Bashir Ahmed Almani & Ms. Shamim Mughal, Assistant Attorney Generals
Respondents No.4&5:	Through Mr. Allah Bachayo Soomro, Add: A.G Sindh
Date of hearing:	06.09.2022
Date of Order :	14.09.2022

O R D E R

ADNAN-UL-KARIM MEMON, J:- Petitioners have impugned the order dated 16.08.1995 passed by Federal (Judicial) Board of Revenue Sindh / respondent No.3, whereby their revision application, preferred against the order dated 18.05.1993 passed by Commissioner Hyderabad / respondent No.4 stood dismissed.

2. Mr. Parkash Kumar learned counsel for the petitioners has submitted that respondent No.2 has the jurisdiction to entertain the revision application under paragraph 29 of the Land Reforms Ordinance; as such he has committed illegality by not entertaining the Revision Application; that respondent No.5 had no jurisdiction to entertain and allow pre-emption application based on the order dated 20.07.1980 passed in tenancy matter, in which petitioners were not a party. He pointed out that the findings of the revenue officers in the present case are erroneous without any evidence available on record, thus liable to be discarded. Hence, the instant petition may be allowed and the impugned orders of the Revenue officers may be set-aside; that respondent No.4 illegally dismissed the appeal without going into the merits of the case and without verifying the legality and propriety of the order; that the order passed by respondent No.5 was void ab-initio, as such there was no question of limitation, even otherwise delay was explained, hence the appeal was not liable to be dismissed; that the official respondents have not decided the case of the petitioners on merits rather dismissed it on technicalities. He emphasized that law always demands decisions on merits rather than on technicalities.

3. Mr. Muhammad Arshad S. Pathan advocate, representing respondent No.1, while supporting the impugned orders has contended that petitioner No.3 was the owner of subject land and respondent No.1 was her Hari at that time; however, petitioners No.1 & 2 being big Zamindars of the area made clash with the Haris of petitioner No.3 and behind the door filed false application under Tenancy Act before Mukhtiarkar / Tenancy Tribunal Tando Adam and obtained the order dated 06.05.1979; however, the order passed by Assistant Commissioner, setting aside the order of Mukhtiariar, has deliberately not been annexed by the petitioners with the present petition. He next contended that upon filing of proceedings under Section 25 of the Land Reforms Act, the Deputy Commissioner had passed the order, whereby he declared respondent No.1 as pre-emptor, but the said order was not challenged by the petitioners before the competent forum, as required by Land Reforms Act, rather challenged it in C.P No. 844 of 1981, which was dismissed. He further contended that the order passed by this Court in C.P No.844 of 1981 provides no leniency or permission to petitioners to file any proceedings; however, after the dismissal of the above petition, petitioners filed a timed barred appeal before the Commissioner in the year 1992, challenging the order dated 24.08.1981, which has rightly been dismissed by the Commissioner. He also contended that in the third round of litigation petitioners filed present petition and had obtained stay order and are enjoying the possession of the subject land under the cover of said stay; however, during pendency of the present petition respondent No.1 expired on 4.2.2021 and thereafter petitioners have taken the plea of abatement, which is not available to them. He added that in a judgment reported in PLD 1986 SC 360 there is no discussion regarding abatement but the crucial date has been discussed where from the Martial Law Regulation 115 were deemed to be not applicable being repugnant to Injunction of Islam with effect from specified date and by such means the very judgment also does not affect the status of respondent No.1. He also added that tenant's rights under para-25(4) cannot be taken away by giving retrospective effect to Hon'ble Supreme Court's judgment before its operative date viz: 31.07.1986, which has been held in the subsequent case of Hon'ble High Court as well as Hon'ble Supreme Court (NLR 1987 Rev. Abbottabad 61 & NLR 1987 SCJ 474). He prayed for dismissal of the petition. He also placed reliance on NLR 1986 SCJ 449 and 1992 CLC 571; since respondent No.1 has been successful under the hierarchy of Revenue and Rehabilitation Authorities/ Land Commission, therefore their decision on the subject land is final and cannot be called into question under paragraph 19 and 26 of the Land Reforms Regulation, 1972 which, explicitly provide that the decision of Government shall not be called in question before any court, including the Honorable Supreme Court and this Court, on any ground whatsoever. Learned Counsel concluded by submitting that under regulation 115 a tenant shall not be ejected from his tenancy unless it is established in Revenue Court. He prayed for dismissal of the instant petition.

4. We have heard learned counsel for the parties and perused the material available on record as well as case-law cited at the bar.

5. The questions involved in the present proceedings are whether the petitioners are the owner of Survey bearing No.199 admeasuring 8-06 acres situated in Deh Belaro Taluka Tando Adam District Sanghar by way of registered Sale Deed dated 13.05.1980; And whether the respondent was / is Hari / tenant of Mst. Khursheed Khatoon-petitioner No.3 at the relevant time, in Khasra Girdwari register, for the subject land and was / is entitled to the right of pre-emption under 25(3)(d) MLR 115; and in occupation of the subject land in terms of orders passed by Revenue hierarchy under the Tenancy-Act.

6. To appreciate the aforesaid propositions, let us have a glance at the factual aspect of the case. The parties have informed that respondent No.1 (since died), preferred an application before Deputy Commissioner Sanghar to pre-empt Survey bearing No.199 admeasuring 8-06 acres situated in Deh Belaro Taluka Tando Adam District Sanghar (**subject land**). Respondent-Deputy Commissioner allowed the said application vide order dated 24.08.1981, which was challenged by the petitioners through Constitutional Petition No.844 of 1981 before this Court; however, said petition was dismissed on 16.03.1989 on the ground of availability of alternate remedy of appeal before the competent forum. Thereafter petitioners preferred an appeal before Commissioner Hyderabad / respondent No.4, however, the same was dismissed being time-barred vide order dated 18.05.1993. The said order was challenged by the petitioners in revision before Federal (Judicial) Board of Revenue Sindh Hyderabad / respondent No.3, which too was dismissed vide order dated 16.08.1995, then petitioners preferred another revision application before Federal Land Commission Islamabad / respondent No.2; however, the same was held to be not maintainable.

7. It is admitted position that there is no definition of tenant given in para 25 of MLR 115. The definition of the tenant as contemplated in section 4(26) of the Land Revenue Act, 1967 is as under: -

> "(26) `tenant' means a person who holds land under another person, and is, or but for a special contract would be, liable to pay rent to that other person, and includes the predecessors and successors-in-interest of such person, but does not include: (a) mortgagee of the rights of land ownership or. (b) a person to whom a holding has been transferred, or an estate or holding has been let in from, under the provisions of this Act, for the recovery of an arrears of Land Revenue or a sum recoverable as such an arrear. (c) a person who takes from the Government land of unoccupied land for the purpose of sub-lettings it. Similarly, I tenancy means a parcel of land held by a tenant under one set of conditions and this has been defined under section 4(27) of Land Revenue Act."

8. From the foregoing narration of facts, the circumstances of the case, and the material available on record, this Court has to consider whether the private respondent was in occupation of the subject land as tenant and so possessed better

right qua the petitioners in terms of registered sale Deed dated 13.05.1980. No doubt first right in respect of the land comprising tenancy of a tenant was conferred under sub-para (3) (d) of para 25 of the MLR 115, but the above-stated clause prescribes three attributes of tenant; firstly, that he shall hold land; that he shall hold it under another person/landlord, and thirdly, that he is liable to pay rent for the use and occupation of it to such a person. All these three attributes concur to creating the legal relationship between the landlord and tenant.

9. On the aforesaid proposition, we have noticed that petitioners 1 and 2 had purchased the subject land from petitioner No.3, through registered Sale Deed dated 13.05.1980, which was duly mutated in Record of Rights, and during the hearing, we have been informed that, since then petitioners 1 & 2 are cultivating the subject land and are also paying the land revenue. Per counsel for petitioners respondent No.1 was/is neither Hari nor a resident of Deh Belaro; however, he applied to pre-empt the subject land, though he was well aware of the factum of sale deed of the subject land; besides in presence of sale deed the revenue officer under the revenue hierarchy was not competent to pass the order in favor of tenant, under the revenue law and/or under the Land Reforms Regulation, 1972; however, he succeeded to obtain favorable and ex-parte order from Deputy Commissioner Sanghar, which is violative of the principles of audi alteram partem and natural justice. Prima-facie, the sale transaction had taken place on 13.05.1980 and there is nothing on record to prove that respondent No.1 was cultivating the suit land as tenant on that day; even after the death of respondent No.1, the right to claim pre-emption, would not survive the pre-emptor under the law; further the Honorable supreme court in Ghulam Nabi's case; and Muhammad Younas v. Khushal (1989 SCMR 69) had declared that the right of pre-emption was not heritable and got extinguished with the death of pre-emptor.

10. Record does not reflect that the private respondent owned the suit land and his tenancy right existed at the relevant time for the simple reason that the petitioners had already purchased the subject land through registered sale deed and is still in possession. Looking from this angle, it can safely be said that the private respondent to succeed was required to establish by unimpeachable evidence that he was in possession of suit land at the time of aforesaid transaction and used to pay rent. Besides, the purported tenancy of private respondent has not been established by the competent court of law. Merely saying of Assistant and/ or Deputy Commissioner was / is not sufficient to establish such tenancy right to claim pre-emption. However, the earlier decision of this court in C.P No.844 of 1981 will not be construed in stricto-senso as constructive res-judicata, for the reason that the petitioners were left at liberty to avail the alternate remedy. An excerpt thereof is reproduced as under:-

> "The relief under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 can only be granted if a High Court is satisfied that no other adequate remedy is provided by law. To the present _ pointed out hereinabove the adequate remedy was available to the petitioners by way of filing appeal and revision before the authorities specified in the law, itself, and they having failed to avail of the same cannot approach this Court for remedy under the said Article.
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> It may be worthwhile to point out here that the right of pre-emption granted to tenants of agricultural land by the Land Reforms Regulations, 1972 was declared to be against the injunctions of Islam by the Judgment of the Shariat Appellate Bench of the Supreme Court of Pakistan reported as Government of N.W.F.P. thorugh Secretary Law Department versus Malik Saeed Kamal Shah in PLD 1986 Supreme Court 360 and has become non-existent. This decision can also not help the petitioners as the decision in favour of respondent Matloob Hussain had long before become final and operative as explained here-in-above.
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> In view of above, we had by our short order, dismissed the petition, while the above are the reasons for the same.

11. In this view of the matter, the private respondent could not be considered as tenant within the above definition of tenant for the simple reason that he has no right title in his favor of the subject land as such, the impugned decisions of revenue hierarchy are erroneous and nullity in the eyes of law, thus are liable to be set-aside. On the aforesaid proposition, we are fortified with the decision of Honorable Supreme Court in the case of Sher Muhammad v. Ghulam and others 1989 SCMR 543.

12. We have observed that the Sale Deed of petitioners as discussed supra has not been called into question by the private respondent before the competent court of law; however, the vires of said document could not be assailed before the Revenue hierarchy and Rehabilitation/Land Commission Authorities. Besides the decision of Hon'ble Supreme Court in the case of Qazalbash Waqf v. Chief Land Commissioner reported in PLD 1990 SC 99 is clear in its terms and needs no further discussion. As pointed out in the aforesaid judgment of Qazalbash Waqf supra, the declaration given therein was/is to take effect on 23.3.1990, and such provisions of the Regulation which were self-executory were not to be in any manner affected thereby. However, the aforesaid decision shall not affect those cases in which any decisive step has been or was/is taken in the ordinary course at any stage of proceedings, in implementation of the provisions which would cease to have effect as a result of the Court order, before the date to be fixed therein.

13. For the aforesaid facts and reasons, we have concluded that there is merit in this petition which is allowed; and, subsequent proceedings, adversely affecting their rights, will not come in their way.

JUDGE

JUDGE

Karar_Hussain/PS*