

# HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

## II<sup>nd</sup> Appeal No.39 of 2015

[Buxan versus Mst. Maryam & Ors]

## R.A. No. 215 of 2018

[Malook Shah versus Buxan & Ors]

## R.A No.03 of 2019

[Malook Shah versus Buxan & Ors]

Appellant & Applicant : Through Mr. Aghis-us-Salam advocate  
Respondent Mst. Maryam : Through Mr. Gulab Khan Kaimkhani  
advocate  
Official respondents : Through Mr. Allah Bachayo Soomr AAG  
a/w Sidique Memon Sub-Registrar  
Tando Allah Yar  
Date of hearing : **19.09.2022**  
Date of Decision: : **14.10.2022**

### JUDGMENT

**ADNAN-UL-KARIM MEMON, J.** In the captioned revision applications as well second appeal, a common question of law and facts is involved; therefore, all are being taken up together and disposed of by this common Judgment.

2. Through II<sup>nd</sup> Appeal No.39 of 2015 appellant Buxan, who has been arrayed as respondent No.1 in both revision applications, has impugned the Judgment & Decree dated 02.12.2015 passed in Civil Appeal No.11 of 2015 [*Re: Mst. Maryam versus Buxan & Ors*], whereby, learned Appellate Court set aside the Judgment dated 03.02.2015 & Decree dated 07.02.2015 passed by learned trial Court in F.C. Suit No.26 of 2011 [*Re: Mst. Maryam versus Buxan & Ors*] and consequently decreed the suit as prayed.

3. Through R.A No.215 of 2018 applicant Malook has challenged the order dated 06.09.2018, whereby his application filed under Section 12(2) CPC before the Appellate Court against its judgment and decree (**under challenge in above said second appeal**), stood dismissed.

4. Through RA No.03 of 2019 again applicant Malook impugns the order dated 24.09.2018 passed by learned Appellate Court in Civil Misc.

Appeal No.04 of 2018, whereby he challenged the order dated 26.10.2018 passed by learned trial Court in Execution Application No.03 of 2017 (*Mst. Maryam v. Buxan and others*), in terms of which, the Sub-Registrar was directed to cancel the Sale Deed No.2231 dated 11.10.2010 and Mukhtiarkar was directed to keep entry according to share of Decree Holder (Mst. Maryam) with its possession under intimation to the Executing Court within 10 days.

5. Brief facts of the case are that respondent/plaintiff Mst. Maryam filed Suit for Declaration, Cancellation of Sale Deed & Entry, Possession, Mandatory and Permanent Injunction in respect of agricultural land bearing Survey Nos. 219/13 to 16, 220/9 to 16, 221/9 to 11 & 13 to 16, 247/1, 8 & 9, 248/1 to 14, 249/1 to 13, 250/1 to 12 and 251/10 & 12 total admeasuring 58-36 acres situated in Deh & Tapo Halepotani, Taluka Jhando Mari (**Suit Land**) stating therein that her father Qado @ Qadir Bux was the owner of suit land to the extent of 50 paisa share, who died in the year 2000 leaving behind twelve (12) legal heirs including plaintiff Mst.Maryam and defendant Buxan; that after death of her father the suit property devolved upon all legal heirs and she was given 1-25 acres by private partition with physical possession thereof, which she started to cultivate; however, her brother defendant Buxan had always evil eye upon her share, as such she moved an application dated 29.06.2004 to revenue authorities but they did not entertain her application; subsequently she also made representation to the revenue authorities for official partition of suit land and later on she came to know that serious fraud had been committed by her brother Buxan, who got mutated her share in his name by way of registered Sale Deed bearing No.1177 dated 04.08.2005; hence she filed the suit, which was dismissed by the trial Court, whereas in appeal the said suit was decreed, against which appellant Buxan preferred Second Appeal. Whereas, after passing of judgment and decree by the Appellate Court, applicant Malook moved an application under Section 12(2) before learned Appellate Court on the ground that Buxan brother of Mst. Maryam had sold out the suit property to him as such he being subsequent purchaser of suit land was necessary party in the proceedings, but his application was dismissed. Applicant Malook also filed another revision application against the execution proceedings.

6. Mr. Aghis-us-Salam learned counsel for the appellant, while arguing the second appeal submits that the judgment and decree of learned

Appellate Court is against the facts & law, as it has failed to consider that opinion of handwriting expert, which has not been controverted by the plaintiff / respondent by way of objections, hence presumption was inferred that the same had been admitted and there was no need for examination of handwriting expert particularly when the plaintiff herself admitted during cross-examination that on 18.02.2014 Incharge of finger print/examiner had obtained her RTI in open Court; that appellant has proved the execution of sale deed through oral as well as documentary evidence and bare perusal of memorandum of appeal shows that no such plea or ground was agitated by respondent Mst. Maryam regarding Issue Nos. 2 & 3 or even attacked the handwriting expert's opinion; that even if the Court was of the view that the case has not been proceeded in accordance with law, the best recourse was to remand the case back with directions to examine the expert on Oath with opportunity of cross-examination to both parties. As far as revision applications are concerned, he argued that vested right was created in favour of applicant Malook and he is the subsequent purchaser of suit property, as such he was/is necessary party in the proceedings; however, he was not impleaded party by the plaintiff, hence Judgment & Decree were obtained by fraud and misrepresentation. He lastly prayed that impugned Judgments and Decrees as well as orders passed in execution proceedings by both the Courts below may be set aside and the matter be remanded to trial Court for decision afresh after impleading all necessary and proper parties.

7. Mr. Gulab Khan Kaimkhani learned counsel representing respondent / plaintiff Mst. Maryam; however, argued that there is no denial that Mst.Maryam was not the legal heir of deceased Qado @ Qadir Bux; however, appellant / defendant Buxan by committing fraud managed the sale agreement / deed and tried to deprive her from her inherited right; that since the basic document was based on fraud; therefore, subsequent transfer of suit property, if any, cannot stand; that report of expert is an opinion under the law and it is not binding upon the court; that the opinion of handwriting expert is relevant but it does not amount to conclusive proof, as the evidence of expert is very weak type of evidence and the expert's evidence is only confirmatory or explanatory of direct or circumstantial evidence and the confirmatory evidence cannot be given preference where confidence inspiring evidence is available. More particularly, in a number of judgments, the Hon'ble supreme court has held that in presence of direct evidence, expert evidence carries no legal value; that the impugned judgment / orders passed by the appellate court are in conformity under the

law; that expert opinion must be received with great caution; that the findings of first appellate Court ordinarily could not be disturbed by this court under Section 100 of CPC unless it is originated from improper and perverse appreciation of evidence on record, which is not the case in hand. He supported the Judgment / orders passed by learned Appellate Court and prayed for dismissal of second appeal as well as revision applications.

8. I have heard learned counsel for the parties and perused the record with their assistance.

9. The entire controversy could only be resolved, if the Sub-Registrar is examined on oath subject to cross examination on the issue of registration of sale deed dated 4.8.2004, in favour of Appellant Buxan for the reason that concerned Mukhtiarkar appeared before the trial court and deposed that the Plaintiff Mst. Maryam had sold out her share to her brother / Buxan through registered sale deed dated 4.8.2004 and such entry was kept in the Revenue Record vide entry No.1 dated 22.11.2010 and he produced copy of registered sale deed and entry. Appellant Buxan was also examined and he deposed that his father Qadir Bux was the original owner of disputed land and after his expiry Foti Khata had been changed and entries were kept in Revenue Record. Thereafter, her sister Plaintiff Mst. Maryam had sold out 1 Acre 25 Ghuntas, in the sum of Rs. 65000/- and he had produced copy of Registered Sale Deed, his witness Allah Wasayo was examined and he had fully supported the version, he had admitted that Mst. Maryam sold out the suit land to her brother in the sum of Rs. 65000/- according to her will and wish.

10. During suit proceedings Plaintiff Mst. Maryam submitted application under Article 59 of Qanoon e Shahdat R/W/S 151 CPC with a request to send Registered Sale Deed towards handwriting and fingerprint office for identification of her finger prints and thumb impression, as alleged to had been incorporated by her in the Registered Sale Deed; her application was allowed and copy of Registered Sale Deed along with Thumb Impression were sent to office of Finger Prints for Verification; and on 05.09.2014 opinion received from Forensic Division Sind Karachi and Incharge Thumb Expert with the following findings under:

- i. The Thumb Impression now marked as "Q1 to Q6 on the original Sale Deed Register No. 1177 dated 14.08.2004 are INDIVIDUALIZATION (MATCHED) with left Thumb Impression of Mst. Maryam D/O Qadir Bux on her ten Digit Fingerprint specimen slip now marked as X.

11. In view of above position, learned trial court dismissed the suit of Mst. Maryam /plaintiff. The appellate court vide order dated 24.12.2018 dismissed the 1<sup>st</sup> appeal of the appellant.

12. In principle, the science of identifying thumb impression is an exact science and does not admit of any mistake or doubt. In the present case also, the opinion of Expert prima-facie suggests that the thumb impression on the sale-deed is of Mst. Maryam, which factum has been belied by the respondent on the premise that she never appeared before Sub-Registrar Tando Allahyar to affix the thumb impression on the purported sale-deed, rather her brother has managed all just to deprive her from her due share of inheritance. She also stated that she has not sold the suit land to the appellants brother and has not put her thumb impression on the sale-deed. Thus, the opinion of Thumb Impression Expert is not corroborated by independent evidence.

13. Keeping in view the above position and to ascertain whether the applicant purchased the suit property from the brother of Mst. Maryam / plaintiff through Registered sale Deed; and in this regard this Court summoned the Sub-Registrar Tando Allahyar, who appeared and submitted that sale deed in favour of Buxan brother of Mst. Maryam /plaintiff is still intact.

14. In view of the above, let Sub-Registrar as well as the Thumb Impression of Mst. Maryam /respondent No.1, be obtained by learned District Judge, Tando Allahyar and after sending the Thumb Impression so fixed on the sale deed to the competent authority and after receiving the report examine the expert by allowing the parties to cross examine; and after hearing the parties decide the issue in accordance with law, within a period of one Month. Resultantly, the impugned judgment dated 2.12.2015 passed by learned Additional District Judge, Tando Allahyar in Civil Appeal No. 11 of 2015 is set aside.

15. In view of above all the captioned appeals and revision applications are disposed of in above terms.

JUDGE