

SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Mazhar Alam Khan Miankhel
Mr. Justice Qazi Muhammad Amin Ahmed
Mr. Justice Amin-Ud-Din Khan

AFR(D.J)

Civil Appeal No. 1295 of 2019

(On appeal from the order dated
11.02.2019 passed by the High
Court of Sindh, Sukkar Bench in
R.A. No. S-25 of 2014)

Muhammad Rafique and another

...Appellants

Versus

Syed War and Ali Shah and others

...Respondents

For the Appellants: Mr. Zulifqar Khalid Maluka, ASC

For Respondent Nos. 1, 15 Mian Abdul Rauf, ASC
to 17:

For Respondent Nos. 12 to Rai Muhammad Nawaz Khasral, ASC
14:

Date of Hearing: 22.02.2021

ORDER

Amin-ud-Din Khan, J.- Leave was granted by this Court in CPLA No. 1189 of 2019 vide order dated 17.5.2019 which is reproduced:-

"The petitioners have impugned the judgment dated 11.02.2019 passed by the learned High Court of Sindh Bench at Sukkar, whereby the concurrent findings of facts recorded in favour of Respondent No.1 decree holder were maintained.

2. It is *inter alia* contended that Respondent No.1 claimed title to the suit land on the strength of purported registered sale deed dated 15.01.1978 purchased from his mother, Mst. Allan Bai. It is urged by the learned counsel for the petitioners that from the same ancestor of Respondent No.1, the petitioners' predecessor in interest claimed title through purchase recorded through oral sale in the year 1971 which was accordingly mutated. According to the learned counsel, the land has been

subjected to various alienations and proceedings of land acquisition were also initiated in respect of the portion of land in the year 1993. According to Notification under Section 6 of the Land Acquisition Act, 1894 (*at Page No. 144 of Court file*) regarding Survey Nos. 6, 7, 8 and 9 (*at Page No. 147 of Court file*) the compensation had been awarded to the petitioners and the same was produced as Ex. 85 (*at Page No. 151 of the Court file*). The matter also came up before this Court and *vide* the judgment of this Court in the case titled **National Highway Authority and others vs. Abdul Qadir and others (Civil Petition No. 3052/2003)** (*at Page No. 156 of Court file*), the controversy as to the compensation has been settled. Besides, the petitioners have been dealing with the property throughout to the exclusion of any other claimant and various alienations of the property have been made as detailed in Ground iii(a) to iii(l) of the petition and; no exception was taken to it. It is further urged that on the strength of sale deed dated 15.01.1978, the respondents have also attempted to challenge the transfer of other claimants and owners in which they were unsuccessful and the suit was dismissed on the ground of limitation. No exception to such transactions was taken by Respondent No. 1. It is also urged that it cannot be believed that the respondent, who was residing in the close vicinity was unaware of the transactions, construction and changes in the suit property. Further, no independent evidence was led to establish that Respondent No. 1 acquired title of the property by giving sale consideration to his mother. It was urged that Respondent's mother had already bartered away her right through oral sale, as recorded in mutation in the year 1971 in favour of the petitioners, had no right left to sell in 1978, which right was also not established on record.

3. Such contentions as noted above call for examination of the record in details. Leave, *inter alia*, is granted to consider the same. Since caveat has been filed, the parties may file additional documents as may be necessary, which have been placed before the learned Trial Court.

4. The parties shall maintain status quo."

2. We have heard the learned counsel for the parties at length and gone through the record.

3. On 08.12.2010, plaintiff-respondent through Javed Ali Soomra as Special Attorney got filed a suit for declaration,

cancellation of mutation of sale in favour of father of respondent No. 1 and father of respondent No. 2 in equal shares attested on 24.8.1971 by Mst. Allan Bai, mother of plaintiff/respondent No. 1, possession, permanent injunction and recovery of mesne profits regarding land measuring 18.23 acres out of survey Nos. 5, 6, 7, 8 and 9 situated in Dch Ranipur, Taluka Sobheder District Khairpur Mirs was also sought. The basis of the right claimed by the plaintiff-respondent as pleaded, in the plaint is that he purchased the suit land in the year 1978 through Sale Deed No. 38 dated 15.01.1978 from his mother Mst. Allan Bai. It is pleaded that in the year 1986 he joined the government service and due to that reason the property remained out of look till the year 2010. It is pleaded that when in the year 2010 he concentrated upon the suit land, he came to know that defendant No. 1 possessed over the land in collusion with the official respondents showing themselves the owners of the suit land and have changed the nature of the suit land. They have also sold out an area of 10/15 Ghunta of the suit land to defendant No. 3, out of Sr.No.8 of the suit land on which defendant No. 3 has got constructed/installed a CNG (Pump). Defendant Nos. 1 and 2 have sold out, rented out, leased out, mortgaged out many other parts/portions of the suit land to various other persons and have also raised illegal construction of shops, hotels etc. by taking illegal advantage of disappearance of the plaintiff. It is also pleaded that defendant Nos. 1 and 2 given wrong consent, showing them the owners of the land, for construction of NHA road through the part of the suit property and they are bound to return the compensation amount received by them from the NHA and if any amount is unpaid by the NHA, the plaintiff is entitled to receive the said amount from the NHA. Prayer of the suit is also reproduced as under:-

- a) That this Honourable Court may graciously be pleased to declare the plaintiff is the legal, lawful, actual and real owner of the Suit Land viz 18-23 Acres, out of Survey No. 5,6,7,8 & 9 Situated in dch Ranipur, Taluka Sobheder, District Khairpur Mirs.
- b) That his Honourable court may be pleased to direct the defendants No. 06, 07 and 08 to

cancel the false, fabricated, fraudulent and bogus entry No. 44, dated 24-08-1971, in the name of the fathers of the defendants No. 01 & 02 and false, fabricated, manipulated fraudulent entries of the suit land in the names of defendants Nos. 01 & 02, so also this Honourable Court may be pleased to cancel the registered sale deeds in the name of any person made on the basis of said false entries.

- c) That this Honourable court may kindly be pleased to direct the defendants No. 01, 02 and 03 to hand over the possession of the entire suit land to the plaintiff in case of their failure the Nazir of this Honourable Court may kindly be directed to cause vacate the suit land Viz 18-23 acresm out of Survey No. 5, 6, 7, 8 & 9, Situated in the deh Ranipur, Taluka Sobhadero, District Khairpur Mirs, with the help of SHO, P.S. Ranipur, & DPO Khairpur Mirs from the illegal possession of the defendants No. 01 to 03, or other persons in possession of any portion/part of the suit land, and hand over the same to the plaintiff on beats of drums in the presence of the defendants No. 05 and 08, being responsible Revenue Officer.
- d) That this Honourable Court may be pleased to issue a permanent injunction in respect of the suit land viz 18-23 Acres, out of Survey No. 5, 6, 7, 8 & 9, Situated in dch Ranipur, Taluka Sobhadero, District Khairpur Mirs, in favor of the plaintiff, restraining the defendants from dispossessing the plaintiff from the suit land, or selling out, mortgaging, alienating, leasing out, renting out the and transferring suit land to any other person, by themselves, through their attorneys, authorized agents, servants, relatives, directly or indirectly what so ever in.
- e) That this Honourable Court may be pleased to direct the Defendants No. 01 and 03, to pay the masne profits amount of the suit land to the plaintiff at the rate of 5000/- per acre for each and every year since when they are in the illegal possession of the suit land, and they may also be directed to return the amount of road cuttings if paid to them by NHA illegally received by them, within three months after the date of decree to the plaintiff, being its real owner, in case of their failure same may be recovered from them through the legal process of law.

f) That the cost of the Suit be borne by the defendants.

g) Any other relief which this Honourable Court deems fit and proper be awarded to the plaintiff.

4. In the written statement it was pleaded by defendant Nos. 1 and 2 that Allan Bai was full owner of the suit land who sold out the same to Mehmood Ahmad and Ahmad Din the fathers of defendant Nos. 1 and 2 respectively for a consideration of Rs:15,000/- vide mutation dated 24.8.1971. After the purchase they remained in possession and through different registered gift deeds dated 21.3.1977 coupled with peaceful possession they transferred the land in favour of defendant Nos. 1 & 2 respectively. Record of rights and periodical record were maintained in favour of defendant Nos. 1 & 2 accordingly. The alleged registered Sale Deed dated 15.1.1978 of sale of land by mother of plaintiff in his favour is forged and fabricated one. Mst. Allan Bai was not competent to sell the suit land to the plaintiff and the plaintiff has manufactured and crafted the alleged registered sale deed taking undue advantage of burning of record of the office of Sub Registrar, Gambat. It is pleaded that the business of fabrication and manipulation of sale deeds in Taluka Gambat and Subhodero have become the order of the day. The Government has constructed a dual carriageway N-5 National High Way and issued the notification dated 25.11.1993 under section 4 of the Sindh Land Acquisition Act for acquiring the portion of land out of the suit land. Further notifications under the relevant provisions of Land Acquisition Act were issued in the name of owners i.e. defendant Nos. 1 and 2 and through the order dated 18.9.2000 the Award was announced in favour of defendant Nos. 1 and 2. The remaining land was made cultivable by defendant Nos. 1 and 2 by installation of pumping machine sanctioned vide order dated 25.10.1981 at the command of Rohri Canal. Defendant Nos. 1 & 2 have, thereafter, raised construction of the shops, buildings, hotels and established residential colony over a part of the suit land. A portion was transferred to defendant No. 3 Mst. Rukhsana Nusrat and other persons. Defendant No. 3 got installed a CNG station

and has constructed buildings over the portion of the suit land. The other persons to whom defendant Nos. 1 and 2 had transferred the portion of the suit land have also constructed the buildings of different nature at the site since long. The facility of the electricity and other utility services are allowed to the said buildings by the authorities after satisfaction of requirement of law. Without joining the said persons the suit is bad due to non-joinder of the necessary parties. The transfer of suit land by the mother of the plaintiff-respondent in favour of predecessors of defendant Nos. 1 & 2 was in the knowledge of the plaintiff from day first, neither his mother in her life time nor the plaintiff disputed the sale transaction of suit land in favour of the predecessor of defendant Nos. 1 & 2 till filing of the suit. The matter of compensation agitated by defendant Nos. 1 & 2 against the NHA ended vide judgment dated 28.9.2006 passed by the Hon'ble Supreme Court of Pakistan in CPLA.No.3052 of 2003 titled "NHA vs. Abdul Qadir and others". Prayed for dismissal of the suit.

5. Defendant Nos. 14 and 15 filed their written statement. They fully supported the case of defendant Nos. 1 & 2 and contested the suit. Issues were framed on 28.5.2011. Plaintiff produced Rehmatullah witness No. 1 who is Mukhtiarkar Tal Sobhodero who produced entry No. 44 of Dch Form 15-A dated 24.8.1971 of Deh Ranipur as Exh.65/B. Further stated that "*I see Exh.65/B and say that the entry is signed by Tapedar of Deh Hinjorja whereas the suit land is situated in Deh Ranipur.*" In cross-examination admitted that "*At the time when the entries being Exh.65/B to D, I was not posted as Mukhtiarkar at Taluka S.Dero. In those days when the entries were made there was Taluka Gambat and Taluka Sobhodero was not created. The suit property is situated within deh Ranipur. I do not know that village Gadeji was part of Tapo Ranipur at that time. It is correct to suggest that from the Tapedar up to the level of Commissioner under the rules use to verify the entries made in the revenue record.*" In the later part admits that he cannot say that the Exh.65/B is genuine or false document. Plaintiff produced Javed Ali as his Attorney and opted not to appear in the witness-box himself. Plaintiff came before the civil court with a prayer that

she has been declared owner of the suit land and also for cancellation of mutation in favour of predecessor of defendant Nos. 1 & 2 and also challenged the further transfers through registered gift deeds and sales etc. Basic suit is under section 41 of the Specific Relief Act for grant of a declaration as well as under section 39 of the Specific Relief Act for cancellation of mutation. When questioned to the learned counsel for the respondents/plaintiffs whether there was a mutation attested on 24.8.1971 in favour of predecessor of defendant Nos. 1 and 2, admits that the mutation was attested but states that the plaintiff has prayed for cancellation of the same as the said mutation was attested in Taluka Gambat District Khairpur whereas suit land is situated in Deh Ranipur and mutation was not attested in Taluka Sobhodero. This objection has little value when plaintiff's own witness No. 1 Rehmatullah Mukhiarkar, Taluka Sobhodero admitted in the cross-examination that at the time of attestation of entries of Exh.65/B there was Taluka Gambat and Taluka Sobhodero was not created, therefore, this objection is meaningless. Plaintiff being third party for the purposes of transaction claiming to be purchaser from his mother real owner in the year 1978 whereas the impugned transaction of oral sale mutation in favour of predecessors of defendants is of the year 1971. It was plaintiff's duty to prove the case through valid and reliable evidence and bring enough material for a court to cancel the mutation of sale in favour of predecessor of defendant Nos. 1 & 2. The plaintiff himself opted not to appear before the Court and make his statement on oath as required by law for appearance of a witness to take oath before the court for making a correct statement. He appointed his attorney to appear before the court for which inference is drawn that when without any justifiable reasons the plaintiff opts not to appear as his own witness when the case pleaded requires his personal statement to substantiate the facts in his own knowledge i.e. for making a statement that his mother never appeared before the revenue officials for making a statement of sale of suit land and that she never received the consideration amount when admittedly she never disputed the sale in favour of predecessor of defendant Nos. 1 and 2 in her life time who survived long after the sale in favour of

predecessors of defendant Nos. 1 & 2. Further his own claim is on the basis of registered Sale Deed from his mother in his favour that transaction when the plaintiff presses for grant of a declaration in his favour, he was required to make a statement himself by appearing in the witness-box otherwise when without any justification the plaintiff opted not to appear in the court in such like situation the inference can be drawn against the said plaintiff in the light of judgments of this Court reported as "Mrs. Zakia Hussain and another versus Syed Faroog Hussain" (**PLD 2020 Supreme Court 401**), "Niaz Rasool through Muhammad Bilal versus Mst. Parveen Ikram and others" (**2013 SCMR 397**) and "Mir Ajam Khan versus Mst. Quresha Sultana and others" (**2006 SCMR 1927**).

6. The third factor considerable for determination of question before the courts was a period of time the plaintiff admits that till 2010 he has not seen the suit property and admits its development, permanent constructions in the shape of CNG station after sale of portion of land in favour of defendant No. 3 in the year 1977 and construction of residential colony, shops, hotels etc. and acquisition of land by NHA, admittedly during the period i.e 1971 to 2010 no objection was ever raised by the plaintiff about the construction and changing the nature of suit land.

7. Further the land was acquired by the NHA for construction of a road in the year 1993 when a notification under section 4 of the Land Acquisition Act was admittedly issued and further notifications and award issued in due course of law for grant of compensation to the land owners the matter was never agitated by the plaintiff when the matter was ended before this Court through decision of CPLA No. 3052 of 2003 titled NHA vs. Abdul Qadir & others. In these circumstances, all the three fora below ignored the law laid down by this Court that pleadings cannot be equated with the evidence and a person claiming a right or interest in the property is bound to prove a case pleaded by it through valid reasonable oral as well as documentary evidence acceptable by the court. It is not a matter of inheritance. Certainly the case was

under sections 39 and 41 of the Specific Relief Act. The plaintiff/respondent was required to prove the case pleaded by him. He miserably failed to prove the case as pleaded by him. The circumstances and evidence noted supra clearly state that suit was not only barred by time but the long silence of plaintiff when continuous change of hands through sale, gifts of the suit land and its acquisition and construction of roads as well as construction of houses, commercial buildings etc. continuously were going on in the suit land and no objection was raised by the plaintiff for a long period of more than four decades speaks volumes. All the three fora below failed to take up in mind the real question of controversy between the parties. For showing locus standi to file the suit the plaintiff was required to prove that he is having a valid registered sale deed though it is seven years later than the impugned sale mutation in favour of predecessor of defendant Nos. 1 & 2 but first the plaintiff was required to prove the registered sale deed in his favour of the suit land thereafter he was having a right to challenge the sale transaction of the suit land in favour of predecessor of defendant Nos. 1 & 2 attested by the revenue officials on 24.8.1971. The mukhtiarkar produced by the plaintiff admits the attestation of mutation Exh.65/B. The judgments of all the three fora below whereby the suit of the plaintiff was decreed and appeal and revision filed by the defendants/appellants were dismissed are reversed. This appeal is allowed, suit stands dismissed with costs throughout. These are the reasons for short order of even date which is reproduced:-

"For the reasons to be recorded later this civil appeal is allowed. The judgments and decrees of the three courts below are set aside."

Sd/-
Sd/-
Sd/-

Islamabad, the
22nd of February, 2021
(Mazhar Javed Bhatti)

APPROVED FOR REPORTING