

(Appellate Jurisdiction)

Mr. Justice Umar Ata Bandial
Mr. Justice Manzoor Ahmad Malik

(On appeal from the judgment dated 16.03.2012 passed by Lahore High Court, Rawalpindi Bench in C.R.324/2003)

Versus

Mohammad Shafi (decd) thr. LRs & others ... Respondents.

For the appellants : Mr. Gulzarin Kiani, Sr. ASC.
Ch. Akhtar Ali, AOR.

For the respondents : Mr. Muhammad Amir Butt, ASC.
Syed Rifaqt Hussain Shah, AOR.

Date of hearing : 20.04.2016.

JUDGMENT

UMAR ATA BANDIAL, J. – The impugned judgment dated 16.03.2012 by the learned Lahore High Court, Rawalpindi Bench reverses the Appellate judgment by the learned Additional District Judge dated 17.03.2003 to uphold the judgment of the learned Trial Court dated 17.05.2001. The appellants/plaintiffs' suit was dismissed by the learned Trial Court as being barred under Order XXIII Rule 1 CPC and Section 3 of the Limitation Act, 1908. As such, the learned High Court disapproved the learned Appellate Court's view to remand the case for allowing the parties to bring evidence

about the terms of an oral compromise claimed between the predecessors of the parties which led to the unconditional withdrawal of an earlier suit filed by the appellants' predecessor for the same relief.

2. The facts constituting the background of the present case are that one Feroze owned property in village Bhoon, Tehsil Kalar Kahar, District Chakwal. He had two wives; one named Mst.Bibi and the other named Mst.Sardaran. Mst.Bibi had two sons, namely, Muhammad Nawaz and Faqir Muhammad. Mst. Sardaran had one son, Muhammad Shafi, and four daughters. When Feroze died before partition, his property was distributed equally amongst his three afore-named male heirs under customary law. Faqir Muhammad died issueless in the year 1950 and was succeeded by two heirs, his real brother Muhammad Nawaz and his mother Mst.Bibi. However, his mutation of inheritance No.1147 dated 21.03.1951 was recorded in favour of the said two heirs and also his consanguine brother and four sisters (**"impugned mutation"**).

3. On 03.01.1957 both Muhammad Nawaz and his mother Mst.Bibi filed a suit challenging the said mutation for being illegal. Notices were issued to the defendants Muhammad Shafi and his four sisters for 30.01.1957. The notices were not served on the defendants who are predecessor of the present respondents, for 30.01.1957; none were in attendance. On that date, however, Muhammad Nawaz got his statement recorded. He stated that a

compromise had been arrived with the defendants. Therefore he prayed for withdrawal of his suit without the permission of the Court for filing a fresh suit. Accordingly, the learned Trial Court passed an order on 30.01.1957 dismissing the said suit as withdrawn. Thereafter, the impugned mutation No.1147 dated 21.03.1951 was neither cancelled nor modified. Muhammad Nawaz did not challenge that mutation until his death in the year 1987.

4. The appellants are the heirs of Muhammad Nawaz. They filed a suit on 12.06.2000 for annulment of the impugned mutation; however, their plaint did not mention the earlier suit filed by Muhammad Nawaz. The appellants' suit claims the same relief of cancellation of the impugned mutation as prayed in the earlier suit because: in the presence of the real brother Muhammad Nawaz and mother Mst. Bibi of Faqir Muhammad deceased his consanguine siblings, Muhammad Shafi and his four sisters are excluded from being his heirs. The respondents/defendants filed their written statement objecting to the maintainability of the said suit under Order XXIII Rule 1 CPC. The basis of that objection is the Court's order dated 30.01.1957 which unconditionally dismisses as withdrawn the earlier suit for the same relief filed by the appellants' predecessor, Muhammad Nawaz against the predecessors of the respondents. In response to the objection, the appellants applied for amendment of their pleadings which was allowed both by the learned Trial Court and the learned Appellate Court.

5. A new paragraph 6A was accordingly incorporated by the appellants in their plaint. This paragraph explains that the predecessors of the respondents had conceded the claim of Muhammad Nawaz, predecessor of the appellants, and had renounced any entitlement in the legacy of Faqir Muhammad deceased. Therefore, they handed over to Muhammad Nawaz possession of the land taken by them from such legacy. The possession of the returned land had thereafter remained with the appellants/plaintiffs. The amended written statement filed by the respondents denied paragraph 6A of the plaint and claimed that Muhammad Nawaz predecessor of the appellants had withdrawn his suit unilaterally after receipt of adequate compensation.

6. In the background of the foregoing pleas of the parties, a preliminary issue was framed by the learned Trial Court to the effect:

"Whether the suit is hit by the provisions of Order XXIII Rule 1 CPC and the suit is not maintainable?"

The learned Trial Court vide judgment dated 17.05.2001 concluded that the bar under the said provision of law applied to the suit filed by the appellant in the year 2000. This suit was also held to be time barred for having been filed 43 years after the cause of action admittedly accrued in favour of the appellants' predecessor. Vide judgment dated 17.03.2003, the learned Appellate Court remanded the case to the learned Trial Court by observing that it was proper to grant an opportunity to the parties for recording their evidence on

the plea of compromise taken by the appellants. In exercise of Revisional jurisdiction the learned High Court on 16.03.2012 reversed the appellate judgment and reaffirmed the view taken by the learned Trial Court in its judgment dated 17.05.2001. Hence, this appeal.

7. The learned counsel for the appellants has submitted that by mentioning compensation the amended written statement by the respondents impliedly admits the compromise averred by the plaintiffs in their plaint; that a compromise is also mentioned in the statement of Muhammad Nawaz, predecessor of the appellants, recorded by the learned trial Court on 30.01.1957 due to which his suit was dismissed as withdrawn. The respective stands taken by the parties showed a dispute between them about the terms of the compromise. It is contended that the appellants had a right to lead evidence for proving such terms, which has wrongly been denied by the impugned judgment. In any event, the learned High Court ought to have confined itself to whether recording of evidence was necessary for deciding the preliminary issue about the effect of Order XXIII Rule 1 CPC. It was wrong for the learned High Court to decide the said preliminary objection and to dismiss the appellants' suit. Reliance has been placed on Mir Alam Shah vs. Adam Khan (2004 CLC 1100), Mohsin Khan vs. Ahmad Ali (PLD 2004 Lahore 1), Subha Jayan vs. Meenakshy Kumaran (AIR 2004 Kerala 39),

Kaluvaroya vs. Ganesa (AIR 1969 Madras 248) and Muhammad Shafique vs. Muhammad Rafique (2012 YLR 2801).

8. The learned counsel appearing for the respondents submits that the order dated 30.01.1957 passed by the learned Trial Court shows unconditional withdrawal of the suit filed by the appellants' predecessor which tantamounts to abandonment of the claim by the plaintiff/ predecessor of the appellants. Secondly, he submits that even if the compromise claimed in paragraph 6A of the amended plaint is presumed, it is an established fact that such compromise was not implemented through cancellation/ modification of the impugned mutation No.1147 dated 21.03.1951 and the transfer of title of the corresponding land in favour of Muhammad Nawaz, the predecessor of the appellants. For 30 years until his death the said Muhammad Nawaz was satisfied with the impugned mutation remaining in the field. The compromise terms alleged in paragraph 6A of the amended plaint cannot survive to the extent that these conflict with the conduct of Muhammad Nawaz. Accordingly, no right can vest in the appellants to now claim relief conflicting with the impugned mutation. He also argued that, in any case, the right available to Muhammad Nawaz was for enforcement of the compromise terms. A suit for such a claim is time barred.

9. After hearing the learned counsel for the parties and having carefully perused the record, it seems useful to first read the provisions of Order XXIII Rule 1 CPC:

"1.Withdrawal of suit or abandonment of part of claim.- (1) At any time after the institution of a suit the plaintiff may, as against

all or any of the defendants, withdraw his suit or abandon part of his claim.

(2) Where the Court is satisfied—

- (a) that a suit must fail by reason of some formal defect, or
- (b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as a Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others.”

10. Keeping the foregoing legal provision in view, there are some established factual points of the case that may be noted first. By the order dated 30.01.1957 Muhammad Nawaz withdrew his suit unconditionally without seeking permission to file a fresh suit. An oral compromise between Muhammad Nawaz and the defendants was cited by the former as the basis of the withdrawal of his suit but neither the terms of the compromise were stated before or recorded by the learned Trial Court nor was any defendant examined before the Trial Court to state or admit the terms of any compromise. The impugned mutation No.1147 dated 21.03.1951 remained in existence notwithstanding the compromise. Muhammad Nawaz did not file any proceedings to enforce the terms of his compromise. In other words, the impugned mutation and the unconditional withdrawal of

the suit satisfied the oral compromise and Muhammad Nawaz lived with it till his death in the year 1987.

11. The amended plaint filed by the appellants claimed that in the oral compromise Muhammad Shafi and his four sisters accepted the impropriety of the impugned mutation No.1147 dated 21.03.1951; that they also returned possession of the land inherited by them from the legacy of Faqir Muhammad deceased to Muhammad Nawaz. Even if those statements of fact are assumed to be correct, it may be observed firstly, that merely holding the possession of land cannot confer its title through prescription. [Ref: **Maqbool Ahmad vs. Hakoomat-e-Pakistan** (1991 SCMR 2063)]. Secondly, the inaction and acquiescence of Muhammad Nawaz to challenge the impugned mutation No.1147 dated 21.03.1951 for 30 years is evidence that it complied with his compromise. Thirdly, in the year 2000, when the appellants' suit was filed, neither of the parties to the oral compromise survived to prove its terms. At best the appellants could bring hearsay evidence and that too after a delay of 43 years. In the said circumstances, it is a futile argument by the learned counsel for the appellants to ask for grant of an opportunity to the parties to lead evidence about the terms of the oral compromise. These facts establish that the withdrawal of the earlier suit by Muhammad Nawaz was unconditional or that the impugned mutation did not infringe any terms of the compromise claimed by him with the predecessor of the respondents. In the

circumstances, the later suit filed by the appellants on the same cause of action is barred under Order XXIII Rule 1(3) CPC. Reliance is placed upon **Ghulam Rasool vs. Nusrat Rasool** (PLD 2008 SC 146), **Shahid Mehmood vs. Afzal Mehmood** (2011 SCMR 551) and **Muhammad Yar vs. Muhammad Amin** (2013 SCMR 464).

12. Be that as it may, there is another important principle of law laid down by this Court which is applicable to the facts of the present case. An heir, who is directly affected by a wrongfully recorded mutation of inheritance, fails to challenge such mutation for a considerable length of time until his death, thereby deprives his heirs of *locus standi* to dispute such mutation on the ground of his estoppel, abandonment of claim/cause of action. Reference in this regard is made to **Abdul Haq vs. Surraya Begum** (2002 SCMR 1330), **Kala Khan vs. Rab Nawaz** (2004 SCMR 517) and **Muhammad Rustam vs. Makhan Jan** (2013 SCMR 299). The appellants' suit is not maintainable under that principle as well.

13. The argument of the learned counsel for the appellants that the aforementioned case law on *locus standi* is distinguishable on the facts of the present case because Muhammad Nawaz had not acquiesced to the impugned mutation but had once challenged the same does not carry weight. The forbearance by Muhammad Nawaz to dispute the impugned mutation on the basis of his oral compromise either constitutes the satisfaction of his claim or the abandonment to his grievance and cause of action. In either case, the result deprives the

appellants of their *locus standi* to assert and allege the forgone claim or entitlement. Finally, the judgments of the learned Trial Court and the learned Revisional Court were required to and have given their findings on the preliminary issue framed in the case. The avoidance by the learned Appellate Court to give its finding on that issue without giving reasons misdirects the proceedings. A short question of law is involved for which the requisite material was available on record for the learned High Court to decide the same in order to nip the appellants' still born claim in the bud. Accordingly, we consider that the impugned Revisional and Trial Court judgments have arrived at the right conclusion that the suit filed by the appellants is barred by law.

For the foregoing reasons, we do not find any merit in this appeal; as such the same is dismissed. No order as to costs.

Islamabad,
20.04.2016.
Irshad Hussain /*

APPROVED FOR REPORTING.