

Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Civil Revision No. 02 of 2014.

Ashiq Hussain Shah, etc.

Vs

Mst. Sarwar Jan, etc.

DATE OF HEARING: 10-2-2014.

PETITIONERS BY: Mr Muhammad Nazir Jawad Advocate.

RESPONDENTS BY: Ch. Haseeb Muhammad Advocate, for respondents No. 1 & 2.
Syed Tanvir Haider Shah Advocate, for respondents No. 3 & 4.

RIAZ AHMAD KHAN, J.- This judgment is directed to
dispose of Civil Revision No. 02 of 2014.

2. Facts constituting the background of the present revision petition are that one Gulab Shah was owner of agricultural land, situated at Mouza Shah Allah Ditta Tehsil & District Islamabad. Detail of the land is given in the plaint. Said Gulab Shah died prior to 1946, when custom was the order of the day. He was survived by two sons namely Walyat Shah and Shah Ali Gohar. His son Walyat Shah died during those days and under the customary law his property devolved upon his widow Mst. Said Nishan. Walyat Shah deceased in addition to his widow had also a daughter by the name of Mst. Sarwar Jan. Mst. Said Nishan widow of Walyat Shah (son of the original owner) died on 19-10-1946. After her death, the property which Mst. Said Nishan had inherited from her husband Walyat Shah was transferred into the name of Shah Ali Gohar, the second son of Gulab Shah, vide mutation Nos. 1407 and 1408 dated 27-5-1947. At that time Mst. Sarwar Jan, daughter of Walyat Shah

was alive and is presently the respondent. Thereafter, Shah Ali Gohar also died and he was survived by three sons and four daughters, presently petitioners. Mst. Sarwar Jan instituted suit for declaration, permanent and mandatory injunction, to the effect that she being the legal heir of Walyat Shah deceased was entitled to whole of his legacy and the transfer of the said land into the name of her paternal uncle Shah Ali Gohar, vide mutation Nos. 1407 and 1408 dated 27-5-1947, was illegal, void ab initio and the two mutations were liable to be cancelled. Needless to mention that parties to the suit are Muslims; however, belong to Sheea Sect. The suit was contested by the defendants/legal heirs of Shah Ali Gohar deceased.

3. Pleadings of the parties were reduced into the following issues:

1. Whether the plaintiff is entitled for decree of declaration, cancellation of mutations, permanent and mandatory injunction as prayed for? OPP
2. Whether the plaintiff has no cause of action and locus standi to file the suit ? OPD
3. Whether the suit of the plaintiff is not maintainable, hence liable to be dismissed? OPD
4. Whether the suit of the plaintiff is false, frivolous and vexatious hence the defendants are entitled for compensatory costs u/s 35-A of CPC? OPD
- 4-A. Whether the suit of the plaintiff is barred by time? OPD
5. Relief.

Plaintiffs examined son of Mst. Sarwar Jan namely Syed Dilawar Hussain Shah as PW-1; whereas, the defendants examined one Nawaz Awan as DW-1. The learned Civil Judge vide judgment dated 02-3-2011 passed the decree as prayed for in favour of plaintiff Mst. Sarwar Jan and against the defendants. Feeling aggrieved of the same, the defendants filed appeal, which was heard by the learned Addl. District Judge, Islamabad, who vide judgment dated 03-1-2014 by maintaining the judgment of the learned trial Court

dismissed the appeal. Feeling aggrieved of the same, present civil revision was filed.

3. Learned counsel for the petitioners/defendants, submitted that the property in dispute originally belonged to Gulab Shah. On his death, the property was transferred into the names of his two sons namely Walyat Shah and Shah Ali Gohar. Thereafter, Walyat Shah also died; so, the property was transferred into the name of his widow Mst. Said Nishan. She also died during the prevalence of customary law and therefore, on the basis of two mutations attested on 27-5-1947, the property of Walyat Shah was also transferred to his brother Shah Ali Gohar. In such a way, the predecessor in interest of the petitioners/defendants had become full owner in the year 1947. The learned counsel relying on *Section 2-A of Muslim Personal Law (Shariat) Application Act, 1962* as well as judgment delivered in case *re: Ghulam Haider and others Versus Murad through Legal Representatives and others*, reported as PLD 2012 Supreme Court 501, submitted that Shah Ali Gohar had become full owner prior to the commencement of the Punjab Muslim Personal Law (Shariat) Application Act, 1948 and therefore, he is to be considered as owner under the Muslim Personal Law. Once, he is considered as the full owner of the property, then Mst. Sarwar Jan, legal heir of Walyat Shah, will have no claim in respect of the suit property. The two Courts below had erred in holding Mst. Sarwar Jan as owner of the suit property.

4. On the other hand, learned counsel for the respondents submitted that after the death of Walyat Shah, his property had devolved upon his widow Mst. Said Nishan and the widow was survived by her daughter Mst. Sarwar Jan, the present respondent and under the Sheea Law, whole of the property of Walyat Shah was to be transferred into her name. The learned counsel further submitted that Shah Ali Gohar by playing fraud, did not mention name of Mst. Sarwar Jan in the two mutations, by virtue of which the property of

Walyat Shah was transferred into the name of Shah Ali Gohar. The name of Mst. Sarwar Jan was concealed and in that way the property was transferred into the name of Shah Ali Gohar.

5. I have heard learned counsel for the parties and have also perused the record.

6. Section 2-A was inserted in Muslim Personal Law (Shariat) Application Act, 1962 through Amendment Ordinance, 1983 dated 01-8-1983; the same is to the following effect:

“2A. Notwithstanding anything to the contrary contained in Section 2 or any other law for the time being in force, or any custom or usage or decree, judgment or order of any Court, where before the commencement of the Punjab Muslim Personal Law (Shariat) Application Act, 1948, a male heir had acquired any agriculture land under custom the person who at the time of such acquisition was a Muslim:-

(a) he shall be deemed to have become, upon such acquisition, an absolute owner of such land, as if such land had devolved on him under the Muslim Personal Law (Shariat) Act;

(b) any decree, judgment or order of any Court affirming the right of any reversioner under Custom or usage, to call in question such an alienation or directing delivery of possession of agriculture land on such basis shall be void, inexecutable and of no legal effect to the extent it is contrary to the Muslim Personal Law (Shariat) Act; and

(c) all suits or other proceedings of such a nature pending in any Court and all execution proceedings seeking possession of land under such decree shall abate forthwith:

Provided that nothing herein contained shall be applicable to transactions past and closed where possession of such land has already been delivered under such decree.”

Interpreting this section the Hon'ble Supreme Court of Pakistan

(my lord Mr Justice Asif Saeed Khan Khosa, J) held, as under:

“It is abundantly clear to us that section 2-A introduced through Ordinance XIII of 1983 was meant to cover all successions prior to introduction of Act IX of 1948, i.e. all successions before March, 15, 1948; it dealt with only male heirs; and it was restricted to only those male heirs who had acquired any agricultural land under custom from a person who at the time of such acquisition was a Muslim. In plain terms section 2-A introduced through Ordinance XIII of 1983 was meant to be applicable to only those

male heirs who had acquired some agricultural land from a Muslim before March 15, 1948 and such acquisition had come about under the customary law of inheritance. According to section 2-A introduced through Ordinance XIII of 1983 such a male heir acquiring any agricultural land under the customary law of inheritance from a Muslim was to be deemed to have become, upon such "acquisition", an absolute owner of "such land", as if "such land" had devolved on him under the Muslim Personal Law(Shariat)."

7. The plain reading of Section 2-A of Muslim Personal Law (Shariat) Application Act, 1962 as well as judgment of the Hon'ble Supreme Court of Pakistan would clearly show that Section 2-A applied to the male heir, who had acquired any agricultural land under the customary law. In other words, the section applied only to male heir. If there were many heirs of deceased and the land was transferred to one of the male heirs, prior to commencement of the Punjab Muslim Personal Law (Shariat) Application Act, 1948; that male member had to become full owner even after the commencement of the Punjab Muslim Personal Law (Shariat) Application Act, 1948.

8. The present case is totally different and is distinguishable from the aforementioned judgment. In the present case, Gulab Shah was the original owner. He was survived by two sons namely Walyat Shah and Shah Ali Gohar. On the death of Walyat Shah, his property had been transferred to his widow Mst. Said Nishan. On death of Mst. Said Nishan, Shah Ali Gohar was not the heir of Mst. Said Nishan, because at that time her daughter Mst. Sarwar Jan was alive. Shah Ali Gohar could not be considered as a male heir of Mst. Said Nishan. No doubt Shah Ali Gohar was brother of her late husband Walyat Shah, but under Sheea Law, the property of Mst. Said Nishan had to be transferred into the name of Mst. Sarwar Jan. Mutation No. 1407 is available on file as Exh.P-6, which shows that the name of daughter of Walyat Shah was concealed. Same is the case with mutation No. 1408, which is Exh.P-5. By virtue of these two mutations Shah Ali Ghar had illegally

become owner of the land of Mst. Said Nishan and then of Mst. Sarwar Jan.

The two mutations are therefore, illegal and are liable to be set aside.

9. Since, Mst. Sarwar Jan was actual owner of the suit land and being co-sharer, every new entry in the revenue record, gave her a fresh cause of action; therefore, limitation would not run against her.

10. In the circumstances, I hold that the suit of Mst. Sarwar Jan was properly decreed and by maintaining the two judgments of lower Courts, instant revision petition is dismissed with costs.

(RIAZ AHMAD KHAN)
JUDGE

Approved for reporting.

Tanveer Ahmed.

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