

2012 M L D 1013 [Lahore]

Before Muhammad Ameer Bhatti, J

Mst. RABIA BIBI and others---Petitioners

versus

MUHAMMAD ANWAR and another---Respondents

Civil Revision No.1439 of 2004, heard on 13th October, 2011.

(a) Islamic law---

----Inheritance---Inheritance would always be open according to Sharia.

(b) Islamic Law---

----Inheritance---Deceased being issueless having pre-deceased and surviving brothers---Inheritance mutation of deceased attested in presence of his surviving brother giving half land to orphan sons of their pre-deceased brother even though surviving brother was entitled to inherit entire land---Suit by legal heirs of surviving brother after nine years of his death and after 18 years of attestation of suit mutation in favour of such orphans alleged to be collusive, fictitious and forged---Proof---Surviving brother for about 18 years during his life time and his legal heirs for about nine years after his death remained silent and never agitated such matter---Legal heirs after death of surviving brother/original owner had no locus standi to assert for their inheritance by challenging suit mutation independently after 27 years of its attestation---Legal heirs were not present at the time of attestation of suit mutation, thus, they could not prove alleged collusion---Attestation of suit mutation in presence of surviving brother would give rise to presumption that he himself had advised Revenue Authorities for division of land out of love and affection with his orphan nephews and surrendered his share in their favour---Impugned mutation was legal, in circumstances.

Kala Khan and others v. Rab Nawaz and others 2004 SCMR 517; Sameen Khan and 4

others v. Haji Mir Azad and others 2002 CLC 754; Muhammad Yaqoob v. Hameeda Begum and 4 others 2005 CLC 870; Gul Nawab and others v. Naimatullah and others 2004 CLC 973; Haji Ghulam Sarwar v. Syeda Roohi Begum and 19 others 1996 CLC 172; Fazal Din v. Rehabilitation Commissioner (Lands) and 2 others 1987 CLC 1053; Mst. Mumtaz Begum and others v. Abdur Rashid and others 1988 CLC 2023; Mst. Rehmat Bibi and others v. Punnu Khan and others 1986 SCMR 962; Muhammad Idrees and others v. Muhammad Pervaiz and others 2010 SCMR 5; Moulvi Muhammad Azeem v. Alhaj Mehmood Khan Bangish and another 2010 SCMR 817; Abdul Ghafoor and others v. Kallu and others 2008 SCMR 452 and Nazir Ahmed and others v. Abdullah and others 1997 SCMR 281 **rel.**

Abdul Haq and another v. Mst. Surrya Begum and others 2002 SCMR 1330 **rel.**

(c) Civil Procedure Code (V of 1908)---

----S.115---Concurrent findings of facts by courts below---Revisional jurisdiction of High Court---Scope---Failure of courts below to consider real facts of case and evidence available on record would amount to mis-reading and non-reading of evidence---High Court in such circumstances would set aside such findings of facts.

Khalik Ahmed v. Abdul Jabbar Khan and others 2005 SCMR 911 and Mubarik Ali through L.Rs v. Amroo Khan through L.Rs, 2007 SCMR 1714 **rel.**

Taki Ahmad Khan for Petitioners.

Naveed Ahmad Khawaja for Respondents.

Date of hearing: 13th October, 2011.

JUDGMENT

MUHAMMAD AMEER BHATTI, J.---Through this civil revision the concurrent findings of facts recorded by both the Courts below have been challenged whereby the suit for declaration and permanent injunction of the plaintiff/respondent No.1 was decreed and appeal filed by the petitioners was dismissed by the learned Trial Court and learned First Appellate Court respectively.

2. The brief facts of the case necessary for the disposal of this civil revision are that three brothers namely Hakim Khan, Sarbuland Khan and Lal Khan were owners in possession of their respective shares in land. Hakim Khan is survived by his two sons and one daughter namely Anwar Ali, Bashir Ahmed and Rasoolan Bibi. Sarbuland was issueless who died in the year 1966 and Lal Khan also survived by his two sons Abdul Ghani and Said Muhammad. Lal Khan died in the year 1947 before the partition. At the death of Sarbuland, Mutation No.545 dated 28-5-1966 was sanctioned in the presence of Hakim Khan. Although Hakim Khan was the only legal heir and entitled to inherit the entire land but the land was mutated to the extent of half in favour of Hakim Khan and other half was alienated in favour of Abdul Ghani and Said Muhammad, the orphan sons of his brother Lal Muhammad. The presence of Hakim Khan at the time of sanctioning of this mutation is evident to the naked eye, however, the present petitioners were not present at the time of sanctioning of this mutation. It is also important to note that Hakim Khan remained alive till 1984. After his death, mutation of inheritance was sanctioned in favour of Bashir Ahmed, Anwar and their sister namely Rasoolan Bibi. On 2-1-1993, the respondents/ plaintiffs Anwar and Bashir filed a suit for declaration to the effect that the Mutation No.545 dated 28-5-1966 sanctioned in favour of the present petitioners was patently wrong, forged, void, illegal, collusive and inoperative qua the rights of the plaintiffs on the ground that the petitioners/defendants were not entitled to inherit the land left by Sarbuland Khan except their father. During the pendency of this suit, at very initial stage, Bashir Ahmed refused to support Abdul Ghani plaintiff. Consequently, he was transposed as a defendant and amended plaint was filed on 26-12-1995.

3. The present petitioners filed the written statement with legal objections apart from controverting factual position specially the allegation sanction of mutation in their favour with the connivance of the revenue authorities. It was also mentioned in the written statement that Hakim Ali himself got the mutation sanctioned in his presence and acknowledged his share himself for their orphan nephews. Bashir Ahmed, who was transposed as defendant also filed the written statement on 5-3-1996 and surrendered his share as it had been gifted by Sarbuland Khan (deceased) to the present petitioners. He also appeared as D.W and

deposed about the relinquishment of his share in favour of the present petitioners. From the divergent pleadings of the parties, seven issues were framed.

- (1) Whether inheritance Mutation No.545 dated 28-5-1966 is against fact, illegal and void and is a result of fraud and forgery and in-effective upon the rights of the plaintiff ?
OPP
- (2) Whether the plaintiffs have no locus standi and cause of action to file this suit ? OPD
- (3) Whether the plaintiffs are estopped by their words and conduct ? OPD
- (4) Whether the suit is barred by limitation ? OPD
- (5) Whether the suit is not maintainable in its present form ? OPD
- (6) Whether the defendants are in possession of the suit land for more than 12 years and perfected their titled by way of adverse possession ? OPD
- (6-A) Whether Hakim Ali deceased got the impugned mutation sanctioned in favour of defendant, if so, why and with what effect ? OPD
- (7) Relief.

4. Both the parties led their evidence according to their onus on issue. Learned Trial Court vide judgment dated 23-2-1997, decreed the suit in favour of Abdul Ghani respondent against which appeal filed by the present petitioners was also dismissed by the learned Additional District Judge vide judgment dated 9-6-2001. Civil Revision No.1510 of 2001 was accepted by this court and case was remanded back to the learned Additional District

Judge for its decision afresh vide judgment dated 8-12-2003. In the post-remand, the learned Additional District Judge vide his judgment and decree dated 5-5-2004, dismissed the appeal of the present petitioners, resulting in this revision petition.

5. Learned counsel for the petitioners firstly contends that the sister of the plaintiff namely Rasoolan Bibi has not been impleaded being a necessary party, hence non-joinder of necessary/proper party was fatal to the suit and on this score, this suit was incompetent and liable to be dismissed. Further contends that the father of the plaintiff was present at the time of sanctioning of the mutation, rather he himself advised the revenue authorities about the apportionment of shares and revenue authority accordingly sanctioned the mutation with the consent of father of the plaintiff and he never objected to this transaction during his lifetime. Further contends that inaction/acquiescence on the part of the plaintiff and his father for the last 27 years amounts to acceptance of the transaction/mutation which at this belated stage cannot be challenged hence, the mutation sanctioned in favour of the petitioners may not be disturbed and the suit of the respondent No.1/plaintiff be dismissed while setting aside the judgment and decrees of both the Courts below. He has relied on the judgments **Kala Khan and others v. Rab Nawaz and others (2004 SCMR 517)**, **Sameen Khan and 4 others v. Haji Mir Azad and others (2002 CLC 754)**, **Muhammad Yaqoob v. Hameeda Begum and 4 others (2005 CLC 870)**, **Gul Nawab and others v. Naimatullah and others (2004 CLC 973)**, **Haji Ghulam Sarwar v. Syeda Roohi Begum and 19 others (1996 CLC 172)**, **Fazal Din v. Rehabilitation Commissioner (Lands) and 2 others (1987 CLC 1053)**, **Mst. Mumtaz Begum and others v. Abdur Rashid and others (1988 CLC 2023)**, **Mst. Rehmat Bibi and others v. Punnu Khan and others (1986 SCMR 962)**.

6. Conversely, the learned counsel for the respondent No.1/plaintiff contends that the concurrent findings of facts have been recorded by both the Courts below in favour of the plaintiff/respondent No.1 declaring him entitled to the land in dispute on the basis of the evidence available on the record, hence this Court has no jurisdiction, as held by the Hon'ble Sureme Court reported as **Muhammad Idrees and others v. Muhammad Pervaiz and others (2010 SCMR 5)**;

"---S. 115---Revisional jurisdiction of High Court---Findings by Court of competent jurisdiction---Scope---Finding on question of fact or law, how erroneous the same may be, if recorded by court of competent jurisdiction, the same cannot be interfered with by High Court in exercise of its Revisional jurisdiction under S.115, C.P.C., unless such findings suffer from controversial defects, illegality or material irregularity."

Moulvi Muhammad Azeem v. Alhaj Mehmood Khan Bangish and another (2010 SCMR 817), Abdul Ghafoor and others v. Kallu and others (2008 SCMR 452).

7. While relying on **Nazir Ahmed and others v. Abdullah and others (1997 SCMR 281)**;

"We may also observe that the cases which involve inheritance inter se among the legal heirs, the Courts should make efforts to ensure that no legal heir is denied of his legal share in the estate of the deceased concerned on a technical ground. The above approach will also be in consonance with the Injunctions of Islam."

Further contends that the Hon'ble Supreme Court has held in this judgment that inheritance shall have been open according to the entitlement. Further contends that Bashir Ahmed, the brother of the plaintiff/respondent No.1 malafidely joined hands with the petitioners/defendants, as such, the interest of the respondent No.1/plaintiff remains unaffected due to the relinquishment of his right for joining the petitioners/defendants by his brother. So far as non-joinder of the necessary/proper party is concerned, learned counsel contends that no such objection has been raised either in the written statement or at the appellate stage, this point being an afterthought cannot allowed to be raised at this belated stage. Further contends that since the mutation has been sanctioned against Sharia, it is liable to be struck down and the decree has been passed by both the courts below in favour of the plaintiff according to the facts and circumstances of the case and the petition in hand may be dismissed.

8. I have considered the arguments and perused the record.

9. There is no doubt that the inheritance is always open according to the Sharia. As such Hakim Khan was the only legal heir at the time of death of Sarbuland Khan, who died issueless. But it is also not denied that the said Hakim Khan himself provided the pedigree table and his presence at the time of sanctioning of mutation signifies that he, of his own accord, allowed the revenue authority to sanction the mutation to the extent of half land in favour of the petitioners/defendants, keeping in view that had his brother (father of the present petitioners/defendants) been alive, he would have been entitled to the extent of half land. This fact can also be judged from this fact that Hakim Khan remained silent about 18 years (till his death in the year 1984) in the wake of impugned mutation but he never questioned the validity of this mutation during his lifetime. Moreover, he did not receive any produce from the present petitioners/defendants. Even after his death, the

plaintiff/respondent No.1 remained silent for about 9 years and never agitated the matter either in the life of the original owner Hakim Khan nor after his death. It is a case of the plaintiff that the impugned mutation was collusive, fictitious and forged but he failed to prove it and certainly he was not in a position to prove this fact because the mutation was sanctioned in the presence of his father and in the absence of the defendants/petitioners. Since the petitioners were not present at that time, how their collusion can be proved or alleged against them. It was Hakim Khan who was the eldest of all children (petitioners and respondents), hence this allegation appears to be unfounded on the face of record. Since the mutation was sanctioned in the presence of Hakim Khan, it can be presumed (unless proved otherwise by convincing and cogent evidence) that he himself advised the revenue authority for the division of the land out of his love and affection with his orphan nephews, rather he himself surrendered his share in favour of the petitioners/defendants. In the given situation, the respondent No.1/plaintiff, at this delayed stage, has no right to call in question the said mutation or the entries made in the revenue record. The respondent No.1 had no locus standi to challenge the mutation independently after the death of Hakim Khan, through whom he claimed the property as his legal heir by filing a suit about 27 years after the sanction of mutation, which had already been given effect in the record of rights. Since Hakim Khan, the original claimant had never challenged this mutation during his lifespan, the respondent/plaintiff has no right to assert for his inheritance. Reliance is placed on **Abdul Haq and another v. Mst. Surrya Begum and others (2002 SCMR 1330)**;--

"Plaintiffs claiming property through A as his heirs had filed the suit in 1979, about nine years after sanction of mutation, which had already been given effect to in record of rights---Plaintiffs had no locus standi to challenge the mutation independently, for A through whom they claimed inheritance had not challenged the same during his lifetime."

It is indisputable that the inheritance must have been opened according to Sharia but here, taking into account the peculiar circumstances of case in hand, no question involving Sharia arises. In this case, the moot point is about the relinquishment of entitlement of inheritance. As a matter of fact, the man who had to inherit the land himself surrendered half land in favour of his nephews (whatever the underlying intention at that time in his mind), cannot give permission to the plaintiff (as his legal heir) to challenge this transaction which was sanctioned in favour of the defendants/petitioners in the presence the man entitled to inheritance. This factum of relinquishment has also been admitted by the other brother of the plaintiff and during the pendency of suit, he surrendered the land whatever had been got sanctioned by his father. Hence at this stage, I am disinclined to deem it appropriate to undo the mutation at the sweet-will of the plaintiff. The brother of the plaintiff namely Abdul Ghani appeared as D.W.3 and deposed that Sarbuland at the time of his death, himself advised his brother Hakim Khan to mutate the half land in favour of the petitioners/defendants. The record amply disproves that his testimony was based on mala fide or collusiveness. He not only deposed to the legality of the mutation but even also made the statement that he will not get the share back from the defendants/petitioners. This

statement of Abdul Ghani was of an independent witness and real brother of the plaintiff/respondent No.1 coupled with the proceedings of the mutation reflected from the mutation where Hakim Khan was present at the time of sanction of the mutation and on his instance, the mutation was sanctioned. Suffice is to hold that Hakim Khan did, at the time of sanctioning of mutation, what was the clarion call at that time. Viewed from both angles, it could be adjudged as correct if he himself decided to give half share/portion to his orphan nephews or as deposed by Abdul Ghani, the brother of the plaintiff that Sarbuland Khan, the original owner at the time of his death, made a request to his brother Hakim Khan that half portion of his land shall go to the petitioners/defendants his orphan nephews. If seen from both the angles, result would be that the transaction was legal and backed by the logic of circumstances. In such-like cases, where both the Courts below have not taken into consideration the real facts of the case and failed to consider the available evidence, amounts to misreading and non-reading of the evidence and this is what has been committed by both the learned courts below and this Court is persuaded to set aside the concurrent findings of facts by relying on the guidelines from the judgments of the Hon'ble Supreme Court reported as **Khalik Ahmed v. Abdul Jabbar Khan and others (2005 SCMR 911)**, **Mubarik Ali through L.Rs v. Amroo Khan through L.Rs, (2007 SCMR 1714)**;

"----S. 115---Revisional jurisdiction of High Court---Scope---Concurrent findings of fact by the courts below---Interference in judgments of Courts below in exercise of Revisional jurisdiction was justified when findings were based on conjectural presumptions, erroneous assumptions of facts and wrong proposition of law and where unreasonable view on evidence had been taken."

Muhammad Rafique v. Muhammad Iqbal and others, (2007 SCMR 863), Raja Hamayun Sarfraz Khan and others v. Noor Muhammad, (2007 SCMR 307) and Mushtari Khan v. Jehangir Khan 2006 SCMR 1238.

10. In view of the above, the concurrent findings of facts by the courts below are found perverse and diametrically opposed and contradicted the settled view of the apex Court supra and call for interference in exercise of Revisional jurisdiction of the High Court under section 115, C.P.C. which authorize the High Court to interfere and correct gross and obvious errors of Subordinate Courts so as to prevent gross injustice in non-appealable cases. Resultantly, the judgments and decrees passed by both the learned Courts below dated 23-2-1997 and 5-5-2004 are hereby set aside. The suit filed by the respondent No.1/plaintiff fails and hereby dismissed. No order as to costs.

S.A.K./R-63/L

Revision accepted.