

2011 Y L R 2725

[Lahore]

Before Muhammad Ameer Bhatti, J

ZULFIQAR and 11 others---Petitioners

Versus

FATEH SHER and 4 others---Respondents

Civil Revision No.398 of 2003, decided on 6th June, 2011.

(a) Islamic Law---

---Inheritance, opening of---Effect---Legal heirs(s) alive at time of death of deceased would get inheritance---Principle.

(b) Qanun-e-Shahadat (10 of 1984)---

---Art. 117---Beneficiary of a document or fact would be bound to prove the same.

(c) Co-owner---

---Limitation would not run against co-owner(s) in land---Rationale.

Limitation does not run against the co-owners. The rationale behind is that the revenue record is prepared periodically and after preparation of every periodical record, fresh cause of action arises to the aggrieved party and the share of all the co-sharers remains intact in each and every inch of the land unless the property is partitioned and the point of limitation is rendered ineffectual.

PLD 1969 SC 617; PLD 2005 AJ&K 15; 1985 MLD 101; 2003 MLD 399; 2000 SCMR 1574; PLD 1993 Pesh. 127 and 2003 MLD 399 ref.

Ch. Khurshid Ahmad for Petitioner.

Farooq Qureshi Chisthi for Respondent.

Date of hearing: 6th June, 2011.

JUDGMENT

MUHAMMAD AMEER BHATTI, J.---Through this civil revision, the petitioners have impugned the judgment and decree dated 6-3-2003 passed by the learned Additional District Judge, Khushab through which he had reversed the findings of the learned trial Court dated 20-3-2002 and dismissed the suit of the petitioners.

2. The brief facts of the case are that the predecessor of the petitioners namely Sultan Ahmed had four brothers and one sister who inherited the land from their father namely Geeba. The dispute arose between the parties when one of the brother namely Zahid died issueless and his land was devolved upon their legal heirs/ brothers and sisters. The suit for declaration was filed by the present petitioners/legal heirs of Sultan against the legal heirs of all brothers and sister of Sultan.

3. Through this suit, the claim of the petitioners was two-fold. One was about the Mutation No.127 dated 21-9-1962 about the land situated in Mouza Mitha Tiwana Shumali about the Khasras Nos.56, 57, 58, 61. Although, this mutation was entered but not incorporated in periodical record. The other claim of the petitioners was that the Mutation No.2418 dated 13-10-1973 had been got sanctioned by the defendants depriving Sultan of the inheritance of Zahid on the ground that Sultan had died before Zahid and sought for necessary correction in the mutation as well as in the Jamabandi. It is added that this mutation relates to the land of Mouza Mitha Taunsa Janubi, Tehsil and District Khushab.

4. The suit was contested by the respondents Nos.1 to 5, predecessor-in-interest of Ahmad Khan to the tooth and nail and raised as many as six preliminary objections apart from controverting all the facts. However, defendants Nos.6 to 8 had filed their conceding written statement.

5. From the divergent pleadings of the parties, the learned trial Court framed the following issues:--

ISSUES

- (1) Whether the plaintiffs have got no cause of action and locus standi to bring the instant suit ? OPD
- (2) Whether the plaintiffs are estopped by their words and conduct to file this suit ? OPD
- (3) Whether the suit is not maintainable in its present form ? OPD
- (4) Whether description of the suit property is incorrect? If so, its effect ? OPD
- (5) Whether the suit is based on mala fide and the defendants are entitled to special costs under section 35-A of C.P.C. ? OPD
- (6) Whether the suit is within time ? OPP
- (7) Whether the plaintiffs are legal heirs of Zahid deceased son of Geeba and are entitled to inherit him ? OPP

(8) Whether Mutation No.127 dated 21-9-1962 and also Mutation No.2418 dated 13-10-1973 are illegal, void, unlawful, ineffective and inoperative qua the rights of the plaintiffs ?
OPD

(9) Relief.

6. The parties were directed to produce their evidence according to the issues. One of the plaintiffs namely Zulfiqar Ali appeared as P.W.1 and produced documentary evidence Exh.P.1 to Exh. P.6. From defendant's side, defendant No.8 appeared as D.W.1, defendant No.5 as D.W.2 and they also produced their documentary evidence in the shape of Exh.D.1 to Exh.D.8. One Parcha Khatoni was not allowed to be exhibited but it was on the record as Mark "A".

7. The learned trial Court after discussing the entire evidence of both the sides, recorded its findings according to the issues, and decreed the suit in favour of the petitioners/plaintiffs vide judgment and decree dated 20-3-2002.

8. Respondents/defendants Nos.1 to 5 feeling dissatisfied of the judgment and decree of the learned trial Court, filed an appeal before the learned District Judge who entrusted the same to the learned Additional District Judge. The learned Additional District Judge after providing opportunity of hearing to all the parties, vide Judgment dated 6-3-2002 reversed the findings of the learned trial Court and consequently dismissed the suit of the petitioners, hence this revision petition.

9. Learned counsel for the petitioners contends that findings qua three issues which are under challenge, which affect the fate of' this revision petition. Hence he formulated his points as under:--

(1) Since the judgments of both' the Courts below are at variance and learned Appellate Court without discussing the reasons given by the learned trial Court, set aside the same which is against the law laid down by the Hon'ble Supreme Court of Pakistan (reliance is placed on PLD 1969 SC 617).

(2) The evidence led by the plaintiff has been either misread or ignored.

(3) Limitation is immaterial in a dispute relating to inheritance.

(4) The finding of learned trial Court that Sultan died after the death of Zahid, has not been set aside by the learned Appellate Court.

(5) (5) In the presence of earlier Mutation No.172, refusal to extend the benefit from the second mutation is self-contradictory.

10. To substantiate contention and points formulated by the learned counsel for the petitioner, he has referred to para. No.2 of the plaint.

11. He also referred to Para No.2 of the written statement filed by the defendants Nos.1 to 5 where they took the evasive reply of the said Para which amounts to admission. The learned counsel for the petitioner further drew my attention towards the evidence of P.W. about one sentence which is as under:

By referring this piece of evidence from the examination-in-chief of P.W. the learned counsel contends that this portion of statement was not challenged during cross-examination, as such unchallenged part of the statement would be deemed to have been admitted by the respondents/defendants (reliance is placed PLD 20 AJK 15, 1985 MLD 101). Learned counsel for the petitioners also referred to evidence of D.W.1. Sher Zaman, who in his cross-examination admitted the death of Zahid before Sultan predecessor of the petitioners. Since the predecessor of the petitioners had died after the death of Zahid, so, he was entitled to get inheritance of Zahid as his real brother and there was no cross-examination from respondents/defendant's side. The learned counsel further contends that Sultan predecessor of petitioners and respondents were real brother and sister of Zahid deceased. and Mutation No.127 dated 21-9-1962 (Exh.P.2) in favour of Sultan along with others were entered and land was apportioned according to their shares after the death of Zahid who died issueless prior to 1962 in respect of land left by him in Mouza Mitha Tiwana Shumali. The Mutation No.2418 dated 13-10-1973 was subsequently sanctioned and the name of Sultan predecessor of the petitioner was also mentioned but it was wrongly omitted from the mutation regarding the land left by Zahid deceased in Mouza Mitha Tiwana' Janoobi at the time of its sanction by misrepresenting his date of death as two years earlier from the

sanction of mutation. The contention of the learned counsel for the petitioner is that since Zahid had died in the year 1962, the question of inheritance remained open and all the legal heirs will inherit the estate of deceased whosoever is alive at the time of death of owner of estate (reliance is placed on 2003 MLD 399). Learned counsel for the petitioners further contends that the learned Appellate Court has wrongly reversed the findings of issue of limitation when the parties have admitted their relationship and if one of them inherited the property/land by stripping the others or omitting their names from the inheritance, the settled law is that the share of all the co-sharers remains intact in each and every inch of the land unless the property is partitioned. While referring to 2000 SCMR 1574, Abdul Sattar Khan and another v. Rafiq Khan and others and PLD 1993 Peshawar 127 Gul Khan and others v. Khan Muhammad and others, it was further contended that the limitation does not run against the co-owners. The revenue record is prepared periodically and after preparation of every periodical record, fresh cause of action arose to the plaintiffs. Further contends that mere wrong entries in the revenue record would not adversely affect and oust the joint ownership on the basis of limitation. Co-ownership cannot be made basis for holding that limitation will run on the date of attestation of mutation and for that matter, the findings/ observations of the learned lower Appellate Court that consolidation having taken place, the petitioners did not remain the co-owners is also legally erroneous in view of the principle laid down by the Hon'ble Supreme Court of Pakistan in the matter relating to ownership. It was added that the parties could not be allowed departure from their own pleadings and to plead a ground which they had not raised in written statement and lastly argued that the findings of the learned lower Appellate Court are based on misreading and non-reading of evidence. Hence the findings of the learned lower appellate Court suffer from grave irregularity, same are perverse and reasons given by lower appellate Court are not sustainable in the eye of law.

12. Conversely, learned counsel for the respondents referred to Exh.P-6, the death certificate of Sultan where the date of death was shown as 29-8-1969. Contends that since the Mutation No.2418 was sanctioned in the year 1973, after the death of Sultan the predecessor-in-interest of the present petitioners, so the present petitioners are not entitled to get the land from the inheritance of Zahid. It is further contended that there is no death entry of Zahid on the record. It was duty of the petitioners/ plaintiffs to prove the death of Zahid before or on 1962. Since the Mutation No.2418 was sanctioned on 13-10-1973 where the death has been shown two years earlier from the mutation which may be 1971 and from Exh.D.6, it is clear that Sultan the predecessor-in-interest of the petitioners had died in the year, 1969 before the death of Zahid, so the petitioners/plaintiffs were not entitled to any inheritance of Zahid and the judgment of the learned lower Appellate Court is in accordance with the evidence. It is further contended that Mutation No.127 dated 21-9-1962 does not show that whether it was sanctioned or not. It was just an entry which does not prove the case of the petitioners/plaintiffs. Moreover, it is also violation of section 42 of the Land Revenue Act. Further contends that the mutation is not a document of any right/entitlement. Further contends that the Mutation No.172, if it has been mutated in accordance with law, it must have been incorporated in the periodical record. Since there is no entry in the periodical record, hence it has no value at all. By referring to Exh.D.2, contends that the shares of the land has been divided up according to their shares and incorporated in the Jamabandi accordingly. By referring Exh.P.2, contends that when the

petitioners/plaintiffs are not co-sharers how they can claim or get the benefit of co-sharers for limitation. As they have an independent share according to their own documents as well as Exh.D.2, so after the partition and insertion of their share in the Jamabandi, they cannot get the benefit of co-owners, hence this suit was hopelessly time barred as it was filed after 23 years and rightly dismissed by the learned lower Appellate Court. Lastly argued that the judgment of, the learned lower Appellate Court is in accordance with law and evidence produced by the Parties and there is no justification for setting aside the well-reasoned judgment passed by the learned lower appellate Court.

13. After the arguments of the learned counsel for the respondents, the petitioners counsel reiterated that as regards Exh.P.1, the respondents did not raise any objection at the time of its production nor even in written statement objected about the illegal entry of Exh.P.1. Hence after exhibiting this document, they have no right to raise any objection at a belated stage about its validity (reliance is placed on 2003 MLD 399).

14. Heard. Record perused.

15. According to the parties the land situated in Mouza Mitha Tiwana Jenooobi is totally transferred in the name of the defendants by ignoring the predecessor of the petitioners namely Sultan. Since Sultan was one of the heirs of Zahid, it is settled law that whenever the inheritance is open, it will be devolved upon all the living heirs at the time of death of deceased. This means not only at time of sanctioning of mutation but also at the time of death of the deceased, whosoever is alive, will get the inheritance irrespective of the fact whether he may have died even before the sanction of mutation. In this case, parties are at dispute about the factum of Zahid's death. Although, there is no document about the death through which any party could succeed in proving the Zahid's year of death. Nevertheless, there are two documents on record which show about the death of Zahid. One is Exh.P.1 and other Exh.P.2 (both mutations) Exh.P.1 was entered in year 1962, relating to the devolution of the land of Mouza Mitha Tiwana Shumali of Zahid to his legal heirs. It will not be out of place to mention that in the mutation all the living brothers and sister were included accordingly. So, keeping in view this document, the claim of the petitioners is that Zahid had died before 1962 and Sultan has died in the year 1969 (as to Sultan's death there is no dispute).

Consequently, petitioners are entitled to get their shares but on the other hand, the respondents took the stand that Exh.P.2 sanctioned (about the land Mouza Mitha Tiwana Janooobi) in the year 1973 and date of death of deceased is two years earlier as mentioned in this mutation. It might be 1971 and Sultan died in 1969, hence Sultan died before Zahid and he was not entitled to any inheritance but remained silent about Mutation No.172. I have also gone through all the evidence

oral as well as documentary to ascertain the year of death of Zahid. There is evidence of D.W.1 Sher Zaman who admitted that Zahid died before Sultan but he was inimical towards the defendants/respondents (due to dispute between the parties), hence his evidence alone cannot be considered trust worthy for arriving at a just decision of the case. To probe the matter, I have gone through the evidence of defendants appearing as D.W.2. He stated in his examination-in-chief that Zahid had died in the year 1973. He even stressed in cross-examination that Zahid uncle died in 1973. Although, Mutation No.2418 under challenge through this litigation was sanctioned in the year 1973 in favour of Ahmed Khan, the predecessor of the defendants Nos.1 to 5 and Fatiha Bibi but in this mutation Zahid was shown to have died two years earlier. So, D.W.2 one of the defendants was himself not fully aware of the year of the death of Zahid.

16. Moreover, the defendants/ respondents are the beneficiaries of the disputed Mutation, hence they were obligated to prove the year of death of Zahid as the mutation No.2418 was sanctioned in favour of their predecessor and Tatiyah Bibi. But they have failed to prove the death of Zahid after the death of Sultan. They cannot shift the onus on the petitioners to prove the death of Zahid. It is settled law that beneficiary must prove the fact/document. Since from the earlier Mutation No.172 predecessor of the petitioner was not only beneficiary as all the alive brothers and sister including the predecessor of the respondents. Obviously, Ahmad Khan derived the benefit and not raised any objection about the land which they obtained from Zahid through the Mutation No.172 situated in Mouza Mitha Tiwana Jenooobi and even not challenged it before any forum. Moreover, there is no reply from the defendants of the specific stand of the plaintiffs about this mutation, rather they accepted the division of land of the mouza Mitha Tiwana Jenooobi. Thus to my mind, the date of death of Zahid would be the date as mentioned in the Mutation No.172 and much after this mutation Sultan had died (1969).

17. So far as the question of limitation is concerned, the respondents are in possession of all the land which would have been devolved on all the legal heirs of Zahid, hence they all became co-owners and it is settled law that limitation does not run against the co-owners. The rationale behind is that the revenue record is prepared periodically and after preparation of every periodical record, fresh cause of action arises to the aggrieved party and the share of all the co-sharers remains intact in each and every inch of the land unless the property is partitioned and the point of limitation is rendered ineffectual

18. It is also settled law that whenever the inheritance is opened, all the legal heirs will get the inheritance whosoever would be alive at the time of death of owner of the estate.

19. In the above perspective, I am of the view that the learned trial Court while deciding the matter has neither committed any illegality nor any material irregularity, thus I am inclined to

interfere in the impugned judgment dated 6-3-2003 passed by the learned Additional District Judge, which is set aside and the judgment and decree dated 20-3-2002 of the learned Civil Judge is restored. This civil revision is accepted in above terms with no order as to costs.

S.A.K./Z-28/L

Petition accepted.