

**2015 M L D 1807**

**[Balochistan]**

**Before Muhammad Ejaz Swati and Jamal Khan Mandokhail, JJ**

**Mst. BIBI ZOHRA and 7 others---Appellants**

**Versus**

**HABIB-UR-REHMAN and 12 others---Respondents**

R.F.A. No.142 of 2014, decided on 16th July, 2015.

**(a) Specific Relief Act (I of 1877)---**

----S. 42---Limitation Act (IX of 1908), Art.127---Suit for declaration---Inheritance---Limitation--Pleadings---Admission---Estoppel, principle of---Applicability---Plaintiffs had proved that defendants were regularly making payment of their shares---Defendants had not produced any evidence and their pleadings could not be taken as evidence---Admission would exclude the applicability of principle of estoppel on the part of plaintiffs---Present dispute was with regard to enforcement of right of share of legacy and Art. 127 of Limitation Act, 1908 was applicable---Suit was within time---Impugned mutations were result of misrepresentation, forgery and fraud--No limitation would arise against such void transaction---Findings recorded by the Trial Court were well reasoned---Plaintiffs were real daughters of the deceased and after his death they became co-sharers/co-owners to the extent of their respective shares in the legacy of deceased---Appeal was dismissed in circumstances.

2007 SCMR 1446 ref.

Mst. Jannatan and others v. Taggi through L.Rs. PLD 2006 SC 322; Muhammad Zobair and others v. Muhammad Shareef 2005 SCMR 1217 and Mst. Gohar Khanum and others v. Mst. Jamila Jan and others 2014 SCMR 801 rel.

**(b) Limitation Act (IX of 1908)---**

---Art. 127---Specific Relief Act (I of 1877), S. 42---Suit for declaration to enforce right to share in the joint property---Limitation---Period of twelve years had been provided from the date of exclusion from joint family property to enforce a right to share therein in the legacy.

**(c) Estoppel---**

----Admission would exclude the principle of estoppel.

**(d) Pleadings---**

----Pleadings could not be taken as evidence.

Jahangir Khan for Appellants.

Amanullah Durrani for Respondents Nos. 1 to 5 and 7.

Waseem Khan Jadoon for Private Respondents.

Abdul Latif Kakar, Assistant A.G. for Respondent No.13.

Date of hearing: 3rd June, 2015.

## JUDGMENT

**MUHAMMAD EJAZ SWATI, J.**---This Regular First Appeal has been directed against the judgment and decree dated 10th July 2014 (hereinafter the "impugned judgment and decree") passed by the learned Senior Civil Judge-II, Quetta (hereinafter the "trial Court"), whereby the suit filed by the respondents Nos.1 to 5 and 7 was decreed.

2. The facts of the case arising out of the instant appeal are that the respondents Nos. 1 to 5 and 7 (plaintiffs) instituted a Suit No. 93 of 2012 for Declaration, Cancellation of Mutations, Partition, Injunction and Consequential Relief against the appellants/defendants and respondents Nos. 6 and 8 to 13, wherein it was averred that the late Gul Muhammad son of Abdul Shakoor was owner of properties mentioned at Paragraph No.3 of the plaint, who died in the year 1993 leaving behind following legal heirs:--

Gul Muhammad son of Abdul Shakoor

Haji Muhammad Zahir Son Defendant No.1 Father of appellants Nos. 1 to 7	Muhammad Akram Son Defendant No.2 Appellant No.8	Bibi Jawahir Daughter (Mother of Plaintiffs Nos. 1 to 5) Respondents Nos. 1 to 5.	Bibi Amna Daughter, (Mother of plaintiff No.6) Respondent No.7
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The daughters of late Gul Muhammad namely Bibi Amna and Bibi Jawahir had died in the year 1999 and 2010 respectively leaving behind the following legal heirs:--

Bibi Jawahir

Abdul Rehman Defendant No.5 Husband Respondents Nos. 1 to 5	Habib-Ur- Rehman, Plaintiff No.1 Respondent No.1 in appeal	Jameel-Ur- Rehman, Plaintiff No.2 Respondent No.2	Mujeeb-Ur- Rehman, Plaintiff No.3 Respondent No.3	Mst. Farzana, Plaintiff No. 4 Respondent No.4	Khalil-Ur- Rehman Plaintiff No.5 Respondent No.5
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Bibi Amna

Muhammad Anwar Defendant No.6 Husband In appeal Respondent No.8	Muhammad Munawar Plaintiff No.6 In appeal Respondent No.7
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After the death of late Gul Muhammad, his two sons Haji Muhammad Zahir (defendant) (father of appellants Nos.1 to 7) called Zahir and Muhammad Akram (defendant) (appellant No.8) (called Akram) was looking after the property in question and used to collect the rents/Ajara from the tenants and giving shares to their sisters (mother of plaintiffs) to the extent of their respective shares and after their death, plaintiffs (respondents) received the share. It was further averred that the respondents Nos.1 to 5 and 7 (plaintiffs) in the last week of September 2012 came to know that the father of the appellants Nos.1 to 7 and the appellant No.8 through misrepresentation and fraud vide Intiqal-e-Wirasat Mutation No. 1612 dated 11th March 1993 Ex.P/1, recorded the property of late Gul Muhammad on their names i.e. Haji Muhammad Zahir and Muhammad Akram (defendants) out of which they sold 1900 sq. ft to Abdul Karim vide mutation No. 2444 Ex.P/4 and deprived their sisters namely Bibi Amna (mother of respondent No.7 and wife of the respondent No.8) and Bibi Jawahir (mother of respondents Nos. 1 to 5 and wife of respondent No.6). The plaintiff after coming to know filed an application dated 27th September 2012 Ex.P/8 for obtaining copy of mutation entries. The respondents/plaintiffs sought following relief:--

(A) To declare that the plaintiffs and defendants Nos.5 and 6 are co-owners (sharers) in the properties in question to the extent of shares of their mothers/wives being legal heirs of late Gul Muhammad.

(B) To declare that the Mutation No. 1612 and 2444 made on

11-3-1993 and 22-9-2000 have been effected illegally and fraudulently, as such, has no legal consequence.

(C) To direct the defendant No.4 to cancel both the Mutation No.1612 and 2444 made on 11-3-1993 and 22-9-2000 and mutate the property in favour of all the four heirs of late Gul Muhammad.

(D) To direct the defendants to partition the properties in question as per shares of the parties consequently they be put in their respective possession from the properties in question.

(E) Any other relief as may be deemed fit and appropriate in the circumstances of the case may also be granted including the cost."

3. The appellants/defendants contested the suit by way of filing written statement by raising legal objection as well as on merits. They averred that the mothers of the plaintiffs during their lifetime had received their respective shares in shape of money; that the mutation in question were recorded in the year 1993 and the mothers of the plaintiffs had not raised objection, thus the plaintiffs are estopped from their conduct. The divergent pleadings of the parties necessitated following issues:--

(1) Whether the suit of the plaintiff is not maintainable in view of Preliminary Legal Objection "A" and "G" raised in the written statement of defendant Nos.1 and 2?

(2) Whether after the death of deceased Gul Muhammad, defendants were giving shares initially to the mothers of plaintiffs and then plaintiffs as per Sharia?

(3) Whether defendants fraudulently excluded the shares of plaintiffs through Intiqal-e-Warasat and mutation No. 2444?

(4) Whether plaintiffs are entitled for their share in the legacy of the late Gul Muhammad?

(5) Whether the plaintiffs are entitled for the relief claimed for?

(6) The relief?

4. The respondents Nos.1 to 5 and 7 (plaintiffs) produced PW-1 Abdullah Jan, PW-2 Ali Muhammad, PW-3 Noor Ahmed and thereafter they recorded their statements through attorney/plaintiff Jameel Ahmed. In rebuttal, the appellants/defendants did not produce any evidence, hence recorded their statements through attorney Akhtar Muhammad.

5. The trial Court vide impugned judgment decreed the suit in favour of the respondents Nos.1 to 5 and 7 (plaintiffs).

6. The learned counsel for the appellants contended that the impugned mutations were effected in the year 1993 and the suit filed in the year 2012 was barred under Articles 91, 120 and 127 of the 1st Schedule of Limitation Act. He placed reliance on the case reported in 2007 SCMR 1446; that the mothers of the plaintiffs were compensated in terms of money and they had knowledge of the impugned mutation, but the trial Court has failed to consider this aspect of the matter and decided the issue contrary to law and record; that the mothers of the plaintiffs had not objected the impugned mutations during their lifetime, therefore, the plaintiffs had no locus standi to claim their waived right; that the findings rendered by the trial Court reflect misreading and non-reading of evidence.

The learned counsel for the respondents Nos.1 to 5 and 7 (plaintiffs) in rebuttal contended that the plaintiffs claimed shares of their mothers from the inherited property left by their maternal grandfather namely late Gul Muhammad; that after the death of late Gul Muhammad, the mothers of the plaintiffs became co-sharers and the co-sharers under the law are deemed to be in possession of each inch of the property in dispute; that the limitation bar cannot come for co-sharer; that late Gul Muhammad had two sons and two daughters; that the impugned mutation of inheritance reveals that two sons through their respective affidavits before the Revenue officers

stated that except them late Gul Muhammad had no other legal heirs, which is sufficient proof of misrepresentation and fraud; that the trial Court after considering evidence on record in its true perspective rightly declared the impugned mutations void having no legal effect; that two brothers deprived their two sisters from their inherited property by committing forgery and submitting false affidavits before the concerned revenue authorities and in this respect, they have no defence; that the attorney for appellants during cross-examination admitted the shares of daughters of late Gul Muhammad and conceded their right in the property in question.

The learned Assistant Advocate General contended that the dispute is between the private parties in respect of their inherited properties and no State interest is involved.

7. We have heard the learned counsel for the parties and have gone through the record of the case. We find that the property in dispute was owned by the late Gul Muhammad son of Abdul Shakoor, who left two sons namely Muhammad Zahir and Muhammad Akram and two daughters namely Bibi Jawahir and Bibi Amna.

8. Both Zahir and Akram through Sharai Fatwa Exh.P/2 and through their respective affidavits Exh.P/3 and Exh.P/3-A, wherein deponent deposed that except them there is no other legal heirs of late Gul Muhammad effected Intiqal-e-Wirasat No. 1612 dated 11th March 1993 Exh.P/1 on their name. The detail is reproduced herein below:--

Thereafter through Mutation No. 2444 Exh.P/4 dated 2nd September 2000, Zahir and Akram sold 1900 sq. ft out of the total property in dispute to the husband of the respondent No.9 and father of the respondents Nos.10 and 11. The above mutation entries have been challenged in the suit by the plaintiffs in the year 2012.

9. As per issue No.1, the appellants/defendants contended that the suit filed by the plaintiffs is barred by time and also hit by the principle of estoppel. On the principle of estoppel, the contention of the appellants is that the mutation of inheritance Exh.P/1 was effected in the year 1993, whereas the mothers of the plaintiffs died on 12th April 1999 and 25th March 2010 respectively. They were well aware of the impugned mutation and during their lifetime they neither raised any objection nor challenged the same and after their death, the plaintiffs had filed the suit, therefore, they are estopped from their conduct. The appellants had not produced any evidence and their pleadings under the law cannot be taken as evidence. The plaintiffs through PW-1 and PW-3 including their statements through attorney proved that during the lifetime of their mother, Zahir and Akram were regularly making payment of their due shares and after their

death, the plaintiffs received the said shares. The attorney for the appellants during cross-examination also admitted this fact and replied as under:--

10. The aforesaid admission itself excludes the applicability of principle of estoppel on the part of the plaintiffs. Whereas the question of limitation is concerned, the appellant raised question of limitation in view of Articles 120 and 127 of the Limitation Act. Article 120 of the Act relates the suit for which no limitation is provided in the schedule and the same is not applicable, as the dispute pertains to enforce a right of share from legacy of maternal grandfather of the plaintiff, therefore, Article 127 of the Act could be invoked, which provides for a period of twelve years from the date when exclusion from joint family property to enforce a right to share therein known to the plaintiff. Admittedly the impugned entries were effected in the year 1993 and the plaintiff came to know about the exclusion of such right in the year 2012, therefore, same was within time. Even otherwise, the impugned mutations were result of misrepresentation, forgery and fraud against such void transaction no limitation arise. In the case of Mst. Jannatan and others v. Taggi through L.Rs. (PLD 2006 SC 322) plaintiff and predecessor-in-interest of the defendant in the case were brothers and sisters. After the death of their father, a mutation was attested in the year 1909 in favour of predecessor-in-interest of defendants by excluding the sisters. The plaintiffs filed a suit after 70 years. The Hon'ble Supreme Court of Pakistan on the point of limitation held that "as plaintiff was proved to be the daughter of predecessor in interest of parties and the dispute was governed by law of shariah under inheritance. The land automatically devolved on the plaintiff and her brother, the moment their father died. It was further held that as plaintiff was co-sharer in land in dispute to the extent of her share, thus the suit was not barred by time". In the case of Muhammad Zobair and others v. Muhammad Shareef (2005 SCMR 1217), it was held that the law of succession would not be defeated by law of limitation.

In the case of Mst. Gohar Khanum and others v. Mst. Jamila Jan and others, 2014 SCMR 801, co-sharer's right in the inherited property was extended after 50 years and the Hon'ble Supreme Court of Pakistan held as under:--

"The main emphasis of the learned counsel for the appellants was that the suit was time barred having been filed 50 years after the mutation dated 31-8-1940. This contention is, however, easily dispensed with as Mst. Zarina Jan admittedly came to own a 1/3rd share of the land by operation of law and not by any mutation. The mutation was meant to record the legal entitlement of Dost Muhammad and Mst. Zarina Jan. If the mutation was erroneously made in favour of Dost Muhammad, such mutation would not create title in favour of Dost Muhammad in accordance with Sharia Law of inheritance. Learned counsel for the appellants repeatedly emphasized that Mst. Zarina was fully aware of the decision and assertion of title by her brother Dost Muhammad and Dost Muhammad had also constructed a house on the disputed land. This, however, does not attract the



provisions of the Limitation Act in the circumstances of the present case. Mst. Zarina Jan being the sister was co-owner and the possession/occupation of the land by her brother as the other co-owner could only be construed as possession on behalf of all co-owners including Mst. Zarina. In order to relinquish or transfer her interest in the property, there had to be a positive and affirmative act. We have not been shown any document or deed of relinquishment, sale transfer or gift which would establish that Zarina Jan had either relinquished her interest in the disputed property or had actually conveyed or transferred the same in favour of Dost Muhammad. In the absence of any such affirmative act on the part of Mst. Zarina Jan, it cannot be said that the property came to vest entirely in Dost Muhammad."

11. Following the dictum laid down by the Hon'ble apex Court and considering the evidence on record, the findings of the trial Court in respect of issue of limitation and right and entitlement of share of two sisters from the inherited property of their father are based on well-reasoned, warrant no interference. Regarding issue No.2, besides plaintiffs' evidence, the attorney for the appellants, as discussed hereinabove admitted that they were giving share initially to the mothers of plaintiffs and then to the plaintiffs, therefore, no question arises to disturb the findings on issue No.2. The findings related to issue No.3, of the trial Court are also well reasoned. Admittedly the mothers of the plaintiffs were real daughters of late Gul Muhammad. The father of the appellants Nos.1 to 7 and appellant No.8, being real brothers, on the basis of Fatwa Exh.P/2 and through their respective affidavits Ex.P/3 and Exh.P/3-A had provided false information to the concerned revenue authorities that except them there is no other legal heirs of late Gul Muhammad and obtained Intiqal-e-Wirasat No. 1612 Exh.P/1 and thus through misrepresentation and fraudulent manner excluded their two sisters from their right of inheritance, therefore, the respective shares of late Bibi Jawahir and Bibi Amna is to be included on the name of the plaintiffs. Whereas, Mutation No. 2444 is concerned, the vendee was bona fide purchaser (i.e. respondents Nos.9 to 11) and he be compensated from the shares of the father of the appellants No.1 to 7 and appellant No.8. The issue is decided accordingly. Whereas the issues Nos. 4, 5 and 6 are concerned, the mothers of the plaintiffs were real daughters of late Gul Muhammad and after his death, they became co-sharers/co-owners to the extent of their respective shares in the legacy of late Gul Muhammad. Now the plaintiffs being legal heirs of Bibi Amna and Bibi Jawahir were rightly held entitled by the trial Court to the extent of their respective share in the property in dispute. The findings of the trial Court in respect of shares of the plaintiffs from the legacy of late Gul Muhammad are well reasoned and warrant no interference.

In view of the above, the Regular First Appeal No.142 of 2014, having no merits is dismissed. The parties are left to bear their own cost.

