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Judgment Sheet

IN THE LAHORE HIGH COURT,
MULTAN BENCH, MULTAN.

JUDICIAL DEPARTMENT

....

Civil Revision No.270-D of 1997.

Mst. Saidan, etc.

Versus

Muhammad Yousaf, etc.

J U D G M E N T.

Date of hearing:	**20.09.2023.**
Petitioners by:	M/s Sajjad Hussain Tangra & Sohail Nawaz Advocates.
Respondents by:	M/s Israr Hayat Sulehri & Ghulam Nabi Tahir, Advocates.

AHMAD NADEEM ARSHAD, J. This Civil Revision is directed against the concurrent judgments and decrees dated 29.03.1992 & 12.04.1997 of learned Courts below, whereby, the suit of the respondents/plaintiffs for declaration was decreed with some modification.

2. Shorn of unnecessary details, the facts required to be brought on record are that respondents/plaintiffs (hereinafter referred to as **the plaintiffs**) instituted a suit for declaration on 15.06.1989 against the petitioners/defendants (hereinafter referred to as **the defendants**) and sought declaration that they are owners to the extent of 5/24 shares in land situated at *Khewat* No.29/39/190 to 199, *khatoni* No.154 to 163, measuring 238 *kanals* 01 *marla* in Chak No.144/EB, Tehsil Burewala, District Vehari and the inheritance mutation No.82 dated 24.01.1975 of their maternal grandmother namely Mst. Alam Khatoon is against facts and law, result of fraud

and misrepresentation and the sale deed dated 14.09.1981, executed on the basis of said mutation in favour of the defendants to the extent of their share, is void, ineffective and having no effect upon their rights and also prayed for issuance of permanent injunction with regard to the suit property. The plaintiffs based their contention on the ground that 1/3rd out of the total land measuring 238 *kanals* 01 *marla* was allotted to one Jam (their maternal grandfather) by the Provincial government in "*Dakheel-Kari-Scheme"* and after his demise, his share was conditionally mutated to his widow namely Mst. Alam Khatoon (their maternal grandmother) as limited owner who died in the year 1974 and impugned mutation No.82 was sanctioned on 24.01.1975 depriving the plaintiffs from their due share; that from the wed-lock of Jam with Alam Khatoon one daughter namely Mst. Rehmat Bibi was born who contracted marriage with Dara and from said marriage the plaintiffs were born, therefore, the plaintiffs are grandchildren of Jam and Alam Khatoon; that at the time of death of Jam, Mst. Rehmat Bibi was alive but thereafter, she was died before the death of her mother Mst. Alam Khatoon; that the defendants got mutated the suit property in their names after the death of Mst. Alam Khatoon fraudulently and secretly and deprived them from their due legal share; that on the strength of impugned mutation No.82, one of the beneficiary namely Warryam transferred his share through registered sale deed No.1574 dated 12.07.1975 in favour of Mahabat and thereafter the defendants succeeded to get registered sale deed dated 14.09.1981 in their favour from the Provincial government and prayed for decree of their suit. The defendants resisted the suit through filing separate contested written statements and raised certain preliminary objections that the plaintiffs have no authority to institute the suit; that the plaintiffs have no cause of action because Mst. Rehmat Bibi was died on 26.09.1958, therefore, the plaintiffs are not entitled any share from the inheritance of Jam because Section 4 of the Muslim Family Law Ordinance, 1961 has no retrospective effect; that the suit is not maintainable in its present form; that the plaintiffs should have

file suit for recovery of possession; that value of the suit for the purpose of court fee and jurisdiction is wrongly fixed; that suit is barred by time; that the plaintiffs instituted false and frivolous suit therefore, the defendants are entitled to get special costs u/s 35-A CPC; that the plaintiffs did not assail the registered sale deed dated 14.09.1981 executed by the State, therefore, they are estopped from their words and conduct to institute the suit. While replying on facts, maintained that original *Dakheel-Kar* namely Jam was died on 12.01.1950 and after his death his share was transferred to his widow namely Alam Khatoon through mutation No.39 dated 23.06.1950 as a limited owner who died in the year 1974, therefore, it will be presumed that Jam, predecessor of the plaintiffs, was died in the year 1974 and his succession was open on 1974 whereas, his daughter Mst. Rehmat Bibi was died on 26.09.1958, therefore, according to law the legal heirs of Mst. Rehmat Bibi were not entitled from the inheritance of Jam and impugned mutation was rightly sanctioned and prayed for dismissal of the suit. From the divergent pleadings of the parties the learned trial Court framed 07 issues. Thereafter, issue-6-A and 6-B were framed and parties were invited to produce their evidence in support of their respective version. The plaintiffs produced two witnesses in support of their stance and got exhibited 07 documents, whereas, the defendants produced two witnesses and concluded their evidence. The learned trial Court, after providing opportunity of hearing, decreed the suit vide judgment and decree dated 29.03.1992 and declared that the plaintiffs are entitled to 09/16 shares from the inheritance of Jam. Feeling aggrieved, the defendants preferred an appeal. During the pendency of appeal, they moved an application for amendment of their written statement which was allowed and resultantly two further issues i.e. issues No.6-C & 6-D were framed and matter was remanded on 13.03.1996 to the learned trial Court under Order XLI Rule 25 C.P.C., for decision of said issues after recording of evidence of the parties. In the light of said order, the defendants got recorded two witnesses as DW-3 & DW-4 and produced sale deed No.1636 dated 14.09.1981 as Exh.D-1 and

closed their oral as well as documentary evidence. In rebuttal, the plaintiffs produced copy of *Jamabandi* for the year 1972-73 as Exh.P-8. The learned trial Court vide judgment and decree dated 19.11.1996 decided both the issues against the defendants. The defendants also preferred an appeal against the said findings of the learned trial Court. The learned appellate Court vide judgment and decree dated 12.04.1997 dismissed both the appeals with the modification of the shares of the plaintiffs and declared that the share of the plaintiffs from the property of Jam will be 07/16+1/16 and in this way their total shares from the *khatta* consisted upon 238 *kanals* 01 *marla* will be 1/6. Being dissatisfied the defendants approached this Court through instant Civil Revision.

3. I have heard learned counsel for the parties at full length and perused the record with their able assistance.

4. Facts of the case are almost admitted. The land measuring 238 *kanals* 01 *marla* was allotted to Jam, Noora, Jahana by the Provincial government under *Dakheel-Kari-Scheme* and the share of Jam was 1/3rd in the said land. He died on 12.01.1950 leaving behind one widow namely Mst. Alam Khatoon, one daughter namely Mst. Rehmat Bibi, two nephews namely Sher and Khan and three nieces namely Roshnai, Bhadai and Salamat from one brother namely Noora and two nephews namely Mohabat, Salabat and one niece namely Mst. Mahmuda from his other brother namely Jahana. After the demise of Jam, his inheritance mutation No.39 was sanctioned on 20.06.1950 only in favour of his widow Mst. Alam Khatoon as a limited owner. His daughter namely Mst. Rehmat Bibi contracted marriage with Dara son of Warryam and from said wedlock the plaintiffs were born. Mst. Rehmat Bibi was died on 26.09.1958, thereafter, Mst. Alam Khatoon was also died in the year 1974 and her inheritance mutation No.82 was sanctioned on 24.01.1975 (Exh.P-1) in favour of her brother namely Warryam ¼ share, Sher and Khan sons of Noora equal in share i.e. ½ out of ¾ shares and Mahabat son of Jahana ½ out of 3/4 shares.

5. The plaintiffs challenged said mutation on the ground that they are children of Mst. Rehmat Bibi who was alive when the original allottee namely Jam had died, therefore, after the death of Mst. Alam Khatoon, who was limited owner, property was reverted to Jam and they being grand children of Jam and Mst. Alam Khatoon in the light of Section 4 of the Muslim Law Ordinance, 1961 are entitled their due share from the inheritance of Jam, whereas, the stance of the defendants is that as Mst. Rehmat Bibi was died prior to the introduction of Section 4 of the Muslim Family Law Ordinance, 1961, therefore, the plaintiffs were not entitled to get any share from the inheritance of Jam as Section 4 of the Ordinance, 1961 has no retrospective affect.

6. Before discussing further, it is better to see the status of Jam with regard to the suit property and the law under which the said property was inherited. Admittedly, Jam was allottee of the State land which was allotted to him under *Dakheel-Kari-Scheme* by the Provincial government and his status upon the suit property was of tenant/original tenant. Section 3 of the Colonization of the Government Lands Act, 1912 (hereinafter referred to as the Act, 1912) defines the terms tenant and original tenant which read as under: -

> *"**Tenant**:- Means any person holding land in a colony as a tenant of Government and includes the predecessors and successors-in-interest of a tenant".*
>
> *"**Original Tenant**: Means any person to whom a tenancy is first allotted by the collector and includes the male transferee of such a tenant and any male nominated by the Collector in accordance with the provision of section 21 to succeeds a female to whom a tenancy was first allotted."*

7. Section 20 of the Act, 1912 deals with inheritance of tenancy rights which describes that upon the death of original tenant, in the absence of male lineal descendants, the tenancy shall devolve upon the widow of the tenant until she dies or remarries, failing the widow tenancy to devolve upon the un-married daughters of the tenant until they died or marry or lose their rights under the

provisions of the Act, 1912. For reference Section 20 of the Act, 1912 is reproduced as under: -

> ***"20. Succession to tenants acquiring otherwise than by succession***. *Subject to the proviso to section 14, when, after the commencement of this Act, any original tenant dies the succession to the tenancy shall devolve in the following order upon.*
>
> *(a) the male lineal descendants of the tenant in the male line of descent. (The term 'lineal descendants' shall include an adopted son whose adoption has been ratified by a registered deed);*
>
> *(b) the widow of the tenant until she dies, or remarries or loses her rights under the provisions of this Act;*
>
> *(c) the unmarried daughters of the tenant until they die or marry, or use their rights under the provisions of this Act;*
>
> *(d) the successor or successors nominated by the tenant by registered deed from among the following persons, that is to say, his mother, [his pre-deceased son's widow, his pre-deceased grandson's widow], his married daughter, his daughter's son, his sister, his sister's son, and the male agnate members of his family; and*
>
> *(e) the successor or successors nominated by the Collector from among the persons enumerated in clause (d) of this section."*

8. The rules of succession contained in clauses "a", "b", & "c" of Section 20 of the Act, 1912 provide that a widow inherited the tenancy under Section 20(b) in the absence of male lineal and is subject to the condition that she will hold the estate only till she remarries or dies or otherwise losses her right under the provisions of the Act, 1912. Meaning thereby, the estate being conferred on her was only limited one and the character of this limited estate was determined only by the statute. Whereas, in presence of widow, daughters will not inherit the tenancy rights and they will only succeed under Clause "c" when neither any male lineal descendants are available nor any widow is survived at the time of opening of succession of tenancy rights.

9. Section 20 of the Act, 1912, governs the succession to the tenancy rights of the original tenant whereas, Section 21 of the Act, 1912, contained the rule of successions of the tenant who inherited the same from the original tenant. For reference Section 21 of the Act, 1912 is reproduced as under: -

> *"21.* ***Succession to tenants acquiring by succession****.— When, after the commencement of this Act any male tenant, who is not an original tenant,*

dies, or any female tenant dies, marries or re-marries, the succession to the tenancy shall devolve:-

(a) in the case of a female, to whom the tenancy has been first allotted, on the successor nominated by the Collector from the issue of such female tenant, or from the male agnates of the person, on account of whose services the tenancy was allotted to her;

(b) in all other cases, on the person or persons, who would succeed if the tenancy were agricultural land acquired by the original tenant."

10. Sections 20 & 21 of the Act, 1912, therefore, embodied two different rules of successions to the tenancy of deceased tenant applicable in different situations. Section 20 of the Act, 1912 applies to successions of tenants who are original tenants whereas Section 21 governs the case of the tenants who acquires by the succession the tenancy.

11. After the demise of Jam, his inheritance mutation No.39 was sanctioned in favour of his widow Mst. Alam Khatoon under Section 20(b) of the Act, 1912 as a limited owner with some conditions i.e. until she dies or remarries or loses her rights under the provision of the Act, 1912. Mst. Alam Khatoon died in the year 1974. At that time Section 19-A was incorporated through the Colonization of Government Lands (Punjab) amendment Act No.III of 1951. If the said provision was not introduced/incorporated at that time, then the inheritance will be decided in the light of Section 21 of the Act, 1912. But as Section 19-A has been introduced, therefore, the succession was to be settled according to the newly added Section 19-A of the Act, 1912. Section 19-A speaks as follow:-

*"**19-A. Succession to the tenancy**. When after the coming into force of the Colonization of Government Lands (Punjab) Amendment Act, 1951, any Muslim tenant dies, succession to the tenancy shall devolve on his heirs in accordance with the Muslim Personal Law (Shariat), and nothing contained in sections 20 to 23 of this Act shall be applicable to his case.*

Provided that when the tenancy rights are held by a female as a limited owner under this Act, succession shall open out on the termination of her limited interest to all persons who would have been entitled to inherit the property at the time of the death of the last full owner had the Muslim Personal Law (Shariat) been applicable at the time of such death, and in the event of the death of any of such persons before

> *the termination of the limited interest mentioned above, succession shall devolve on his heirs and successors existing at the time of the termination of the limited interest of the female as if the aforesaid such person had died at the termination of the limited interest of the female and had been governed by the Muslim Personal Law (Shariat):*
>
> *Provided further that the share, which the female limited owner would have inherited had the Muslim Personal Law (Shariat) been applicable at the time of the death of the last full owner shall devolve on her if she loses her limited interest in the property on account of her marriage or remarriage and on her heirs under the Muslim Personal Law (Shariat) if her limited interest terminates because of her death."*

12 No doubt the newly inserted section 19-A of the Act, 1912 purports to apply the Muslim Personal Laws to all cases formally governed by Section 20 to 23 of the Act, 1912. The newly inserted Section 19-A, the provisos to which are couched in practically, the same language as Section 3 of the West Punjab Muslim Personal Law (Shariat) Application Act, 1948, but the same has also brought a few minor changes in the course of succession in cases formerly governed by clause (b) of Section 21 of the Act, 1912. One of these changes is that, whereas, formerly if succession opened out on the termination of the interest of a female tenant, the tenancy rights were to be deemed to be agricultural land acquired by the original tenant, after the insertion of Section 19-A, such tenancy rights are to be deemed to be the property of the last male owner who may or may not have been the original tenant.

13. This case clearly falls under Section 19-A of the Act, 1912 which provides that "when the tenancy rights are held by a female as a limited owner under this Act, succession shall open out on the termination of her limited interest to all persons who would have been entitled to inherit the property at the time of the death of the last full owner, had the Muslim personal law (Shariat) been applicable at the time of such death, and in the event of the death of any of such persons before the termination of the limited interest mentioned above, succession shall devolve on his heirs and successors existing at the time of the termination of the limited

interest of the female as if the aforesaid such person had died at the termination of the limited interest of the female and had been governed by the Muslim Personal Law (Shariat)".

It was further provided that "the share, which the female limited owner would have inherited had the Muslim Personal Law (Shariat) been applicable at the time of the death of the last full owner shall devolve on her if she loses her limited interest in the property on account of her marriage or remarriage and on her heirs under the Muslim Personal Law (Shariat) if her limited interest terminates because of her death."

14. In the light of above said discussion, it is apparent on the record that at the time of the death of Jam, his widow namely Mst. Alam Khatoon was alive, who inherited 1/8 share as his widow, Mst. Rehmat Bibi will get ½ share out of 7/8 shares (left after the deduction of widow share) and the remaining i.e. 7/16 shares will be devolved amongst the collaterals of Jam i.e. his nephews, sons of his brothers namely Noora and Jahana. After the death of Mst. Alam Khatoon, his share 1/8 will be distributed to her daughter i.e. ½ share out of 1/8 and the remaining ½ share out of 1/8 share will be gone to her brother namely Warryam. In this way, Mst. Rehmat Bibi inherited 7/16 shares from his father namely Jam and 1/16 shares from her mother namely Mst. Alam Khatoon. Jam was owner of 1/3rd share in the *khatta* consisted upon 238 *kanals* 01 *marla*, therefore, the share of Mst. Rehmat Bibi in the whole *khatta* will be 01/6.

15. Next question for determination is that whether the plaintiffs were entitled to receive said shares of Mst. Rehmat Bibi or not, as she had been died on 26.09.1958 before the promulgation of Muslim Family Laws Ordinance, 1961 (hereinafter referred to as "**Ordinance 1961**") Undeniably, under the Islamic Sharia, predeceased children are not entitled to any inheritance as only the survivors to a deceased are entitled to inheritance. In the year 1961, the Muslim Family Laws Ordinance, 1961 was promulgated on 15.07.1961 and was commenced after issuance of Notification which was published in PLD 1961 Central Statutes at Page 337, wherein

section 4 was introduced, by virtue of which, legal heirs of pre-deceased son or daughter of propositus would be entitled to inheritance on re-opening of the succession, which reads as under: -

> ***Section 4***.-*In the event of the death of any son or daughter of the propositus before the opening of the succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stripes receive a share equivalent to the share which such son or daughter, as the case may be, would have received, if alive."*

Admittedly, later on section 4 of Ordinance, 1961 was declared un-Islamic by the Federal Shariat Court in a case titled "*ALLAH RAKHA and others versus FEDERATION OF PAKISTAN and others"* (**PLD 2000 FSC 1**) and had also fixed cut-off date 31.03.2000 i.e., said section shall cease to have effect after the target date, the relevant portion is as under:-

> *"In view of the foregoing discussion, we hold that the provision contained in section 4 of the Muslim Family Laws Ordinance, 1961, as presently in force is repugnant to the Injunctions of Islam and direct the President of Pakistan to take steps to amend the law so as to bring the said provision in conformity with the Injunctions of Islam. We further direct that the said provisions which have been held repugnant to the Injunctions of Islam shall cease to have effected from 31st day of March, 2000."*

The aforesaid judgment has been challenged by the Government before the august Supreme Court of Pakistan, therefore, said judgment of the Federal Shariat Court suspended automatically till the disposal of appeal in view of Article 203(D),1(A)(2) proviso of the Constitution of Islamic Republic of Pakistan, 1973. Hence, section 4 of the Ordinance, 1961 shall remain in field till the decision of appeal by the Hon'ble Supreme Court of Pakistan, Shariat Appellate Bench.

16. The plaintiffs cannot be said to have had any vested right with regard to property/estate of Jam during the life time of Mst. Alam Khatoon. Their right to succession came into existence on the death of Mst. Alam Khatoon who died in the year 1974 as the property reverted to the original owner i.e. Jam. According to Section 19-A of the Act, 1912, on the termination of limited

interest of Mst. Alam Khatoon the succession shall open out to all persons who would have been entitled to inherit the property at the time of the death of the last full owner and admittedly Mst. Rehmat Bibi was alive at that time, therefore, the plaintiffs are entitled to inherit the share of Mst. Rehmat Bibi from her father.

With regard to share from the inheritance of their grandmother namely Mst. Alam Khatoon, it is observed that their right to succession came into existence on the death of propositus (Mst. Alam Khatoon) as at that time the ordinance 1961 was in the field and operative. The words "In the event of death of any son or daughter of propositus before the opening of succession" appearing in Section 4 of the Ordinance, 1961 are very important and were interpreted by in a case titled as "*YUSUF ABBAS and others versus MST ISMAT MUSTAFA and others*" reported as (**PLD 1968 Karachi 480**) in the following terms:-

> *"The words 'in the event of' refer only to the death of the son or daughter of the propositus occurring before the succession opens. These words would bring within their compass the sons and daughters dying before as well as after the Ordinance came into force. The only condition is that the death should occur before the succession has opened and if the succession opens after the promulgation of the Ordinance, Section 4 would apply with full force and the children of the predeceased son or daughter of the propositus would be entitled to be included in the succession to the estate of the propositus. One consideration, which has to be borne in mind in construing of section 4 of the Ordinance is the purpose for which this law was passed. The Ordinance aims at alleviating the sufferings of the children whose unfortunate lot it is to lose their father or mother during the lifetime of their grandfather or grand-mother as the case may be. The construction of such statutes should be just, sensible and liberal so as to give effect to the purpose for which they are passed. The meaning, which Dr. I, Mahmood, seeks to give to the word 'in the event of' in section 4, is not only against the plain and unambiguous language of the section but would lead to unjust and harsh consequences and would defeat the very intent and purpose for which this law was brought. My conclusion, therefore, is that it is not the requirement of section 4 of the Muslim Family Laws Ordinance 1961 that the occurrence of the death of the son or daughter of the propositus as well as the opening of succession should both take place subsequent to the promulgation of the Ordinance. The only requirement of the section is that succession should open after the Ordinance is brought into effect even though in some cases a part of the requisites for its operation such as the death of the plaintiff's mother is drawn from a time antecedent to the promulgation of the Ordinance."*

This observation was later on followed by this Court in judgments reported as "*SAKHI MUHAMMAD versus AHMAD KHAN and 3 others"* (**1980 CLC 1006**), and "*IBRAHIM and 3 others versus NEHMAT BI and 5 others"* (**PLD 1988 Lahore 186**). This court in another case titled "*Kamal Khan alias Kamala versus Zainab Bibi*" (**PLD 1983 Lahore 546**) laid down the following principle:-

> *"The Starting point is that notionally the offspring of the propositus is deemed to be alive for the purpose of succession, at the time of the death of the propositus, and the succession of the grandchild is to be calculated again notionally as if the parent of the grandchild died after the death of the original propositus."*

17. The ratio of aforesaid judgments is that the grandchildren are entitled to receive share equal to the share of their mother or father in view of section 4 of the Ordinance, 1961 irrespective of the fact their mother or father died before or after the promulgation of the Ordinance, 1961 and the only condition is that the succession should be open after the promulgation of the Ordinance, 1961.

18. It is settled law that no limitation runs against a wrong entry, mutation is also not a starting point of limitation. In a matter of inheritance, the limitation does not preclude a person to get his share from inheritance. Learned trial Court framed issue No.6-B with regard to limitation in the light of preliminary objection raised by defendants and placed its onus upon defendants. The defendants failed to produce any evidence to discharge the initial onus, therefore, learned trial Court decided the issue against them. Learned appellate Court also agreed with the findings of learned trial Court and also held that suit for declaration as to legal status of plaintiffs is quite maintainable in matter of inheritance. The plaintiffs being co-sharer will be considered as in joint constructive possession of property with other co-sharers. Defendants did not challenge those findings by filing any cross-objection; therefore, the objection of defendants that the suit is time-barred at this stage is misconceived.

During the course of arguments much emphasis has been laid by the learned counsel for the defendants that the mutation validly sanctioned way back decades together which carried the presumption of truth, has unlawfully been upset by the Courts below and in recording the adverse findings, both the Courts below have committed illegalities and irregularities in exercise of their jurisdiction. This limb of argument of learned counsel for the defendants carries no weight. Mutations are never the instrument of title and the same are also not a part of the record of right and do not create any title and they are sanctioned only for fiscal purpose, with a view to keep the record straight. Entries embodied in the mutation and the endorsement made by the Assistant Collector of either grade can conveniently be challenged and brought under impeachment before the Civil Court. Mutation which has been sanctioned to the exclusion of the legal heirs of the deceased was nothing but a waste paper, running counter to the Shariah by which the Muslim right holders are governed.

19. All pending C.Ms., are also decided today through separate orders.

20. Epitome of above discussion is that the instant Civil Revision is without any force; hence, the same is **dismissed**. Parties are left to bear their own costs.

(AHMAD NADEEM ARSHAD)
JUDGE

***Approved for reporting*:**

JUDGE.

A.Razzaq.