

JUDGMENT SHEET
IN THE LAHORE HIGH COURT,
MULTAN BENCH, MULTAN
JUDICIAL DEPARTMENT

C.R No.73-D of 1993
MUHAMMAD ILYAS & OTHERS

Versus

Mst. AMNA & OTHERS

J U D G M E N T

Date of Hearing.	14.04.2015
PETITIONERS BY:	Rana Muhammad Ashraf Jamil and Wasif Saeed, Advocates.
RESPONDENTS BY:	Nemo.

Shahid Karim, J:-This is an application under section 115 of Code of Civil Procedure, 1908 (**CPC**) by way of revision petition against the judgment and decree dated 09.04.1991 passed by the Civil Judge, Kabirwala whereby the suit filed by the predecessor of the respondents Mst. Amna was dismissed. Upon appeal, the suit was decreed by the Addl. District Judge, Khanewal vide judgment and decree dated 10.12.1992. The instant revision petition assails the judgment and decree passed by the Addl. District Judge, Khanewal.

2. During the course of the pendency of this petition, the respondent Mst. Amna died and her legal heirs were impleaded as respondents No.1-A, 1-B and 1-C. Notices were served upon them and vide order of this Court dated 24.7.2013, the respondents No.1-A and 1-B were proceeded against ex-parte. On 11.3.2014 the respondent No.1-C was also proceeded against ex-parte. No one has appeared on their behalf today.

3. Mst. Amna filed a suit for declaration on the basis of inheritance on 16.4.1989. This suit was dismissed on 9.4.1991. An appeal was filed by Mst. Amna which was accepted by the Addl. District Judge, Khanewal vide the impugned judgment and decree dated 10.12.1992. The parties to the instant petition as well as to the suit are real siblings i.e. Mst. Amna, Muhammad Ilyas and Ameer Ali are all offspring of Muhammad Yasin.

4. The case set up in the plaint is that Muhammad Yasin, predecessor-in-interest of the parties died in the year 1945. He had certain property which devolved upon the parties. Upon migration to Pakistan, the claims were filed by the parties which were granted and the property in dispute was allotted in Mauza Kohiwala, Distt. Khanewal. The respondent/plaintiff Mst. Amna claimed that she had continued to be given her share of the yield/lease money but in the year 1989 it was refused by the defendants, her brothers. Mst. Amna claimed 1/5th share in the disputed property, which is described in the body of the plaint and which comes to 19-Kanals and 16-Marlas.

5. Umaid Ali, defendant No.1 in the plaint conceded the claim of the respondent/plaintiff. However, it was contested by the defendants No.2 and the present petitioner. In the written statement filed by Muhammad Ilyas, it was averred that their father had died in the year 1940 and that according to the

customary law of inheritance which was prevalent at that time, the property devolved upon the two brothers, to the exclusion of the sister. It was further stated in the written statement that the claims filed upon partition of India was as regards the property of the defendants and therefore, no claim with regard to the plaintiffs property was ever filed or granted.

6. The following issues were framed by the civil court:

1. *“Whether the plaintiff is the owner in possession of the suit land as legal heir of Yasin deceased? OPP.*
2. *Whether the plaintiff has no cause of action? OPD.*
3. *Whether the suit is based on mala fide intention? OPD.*
4. *Whether the suit is not maintainable in its present form? OPD*
5. *Whether the suit is barred by time? OPD*
6. *Whether the defendant is entitled to special cost u/s 35-A C.P.C? OPD.*
7. *Relief.”*

7. I have gone through the judgments of the courts below which are at variance to each other and find that the Addl. District Judge, Khanewal has committed a material irregularity in setting aside the judgment of the Civil Judge, Kabirwala and has misread the evidence brought on record. The Addl. District Judge, Khanewal has committed a jurisdictional error by not adverting to the real controversy involved in the suit. In situations where the finding of fact reached by first appellate court is at variance with that of trial court, the following observations of the Supreme Court of Pakistan in

Madan Gopal and 4 others v. Maran Bepari and 3 others (PLD 1969 Supreme Court 617) should serve the guiding principle:

“...If the finding of fact reached by the first appellate Court is at variance with that of the trial Court, the former will ordinarily prevail, although it would not possess the same value or sanctity as a concurrent finding. Such a finding by the lower appellate Court will be immune from interference in second appeal only if it is found to be substantiated by evidence on the record and is supported by logical reasoning, duly taking note of the reasons adduced by the first Court which have been disfavoured in the contrary finding. The finding being at variance with that of the trial judge, the two will naturally come in for comparison for their comparative merits in the light of the facts of the case and the reasons on which the two different findings have respectively proceeded. If the finding of the fact of the first appellate Court cannot be supported on the evidence on record or if it has failed to take into account in material piece of evidence or if it does not reveal a logical basis for differing from the finding of the trial Court, or is otherwise found to be arbitrary or capricious, it will have to be rejected in second appeal.”

This rule was reiterated in Amjad Ikram v. Mst.

Asiya Kausar and 2 others (2015 SCMR 1).

8. The issue No.1 has been the pivotal issue for both the courts below and the entire controversy has been decided and is based upon the said issue No.1. I will thus take up the said issue and bring to fore the discrepancies and material irregularity which has crept in the judgment and decree of the Addl. District Judge, Khanewal.

9. The onus to prove the issue No.1 was on the respondent/plaintiff Mst. Amna. The issue as couched by the Civil Judge, Khanewal is whether the plaintiff is the owner-in-possession of the suit land as legal heir of Yasin deceased. The issue is not happily worded and is not in consonance with the respective pleadings of the

parties. It was not the case of the plaintiff Mst. Amna that she was in possession of the suit property and it was not a dispute between the parties that the parties were legal heirs of Yasin deceased. The controversy was whether the property of Yasin had devolved upon the defendants in accordance with the customary law of inheritance or according to the Muslim Family Law of Inheritance. The defence set up in the written statement was that it was on the basis of customary law that the property of Yasin had devolved upon the defendants to the exclusion of their sister Mst. Amna. Thus, it was for the plaintiff to prove that she became the owner of her share of the property in the year 1940 when their father died. It was also for the plaintiff to allege and prove that the claim had been validly filed upon partition by the plaintiff and had been granted in her favour. No documents to that effect have been produced by the plaintiff to establish any claim having been filed or having been granted as a consequence. Therefore, in my opinion, the important ingredients which were necessary for proving the issue No.1 are conspicuously missing and the plaintiff has not brought home the said issue.

10. Here I shall pause to observe that the nub of the controversy at the heart of the dispute was the assertion of the plaintiff that her entitlement flowed from Shariah and not custom. The trial court has proceeded to recognize and appreciate this vital aspect as the real and

determinative issue and thereafter render a finding. The observations of the Supreme Court of Pakistan in Bashir Ahmed v. Abdul Aziz and others (2009 SCMR 1014), epitomizes the rule which ought to govern such matter. It was stated thus:

“9. Once it is settled that rule of inheritance at certain time was custom and some person acquired the property under custom from a Muslim, he shall be deemed to have become an absolute owner of such land as if such land had devolved on him under the Muslim Personal Law (Shariat) provided such acquisition had occurred prior to the enforcement of Punjab Muslim Personal Law (Shariat) Application Act, 1984. Such devolution has been declared absolute by section 2-A of West Pakistan Muslim Personal Law (Shariat) Application Act, 1962, the relevant portion of which is reproduced as under:---

“2-A Succession prior to Act (IX of 1948).--- 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 agricultural land under custom from 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);

(b).....
.....(c).....
.....”

10. In the instant case it has sufficiently been proved through oral as well as documentary evidence that the rule of inheritance at the relevant time was custom. Once inheritance had devolved under such custom and prior to 1948, the person acquiring such agricultural land becomes absolute owner thereof. The learned High Court has rightly appreciated the evidence as well as the law, in favour of Abdul Aziz, the defendant. The revisional jurisdiction has rightly been exercised by setting aside the concurrent findings of the Courts below. There being no force in the appeal, it is hereby dismissed with no order as to costs.”

11. The oral evidence produced by the plaintiff is unconvincing and does not inspire much confidence. Umaid Ali defendant No.1 appeared as PW.1 and

ostensibly supported the stance of the plaintiff. However, he admitted to strained relations between the plaintiff and defendant No.1/petitioner Muhammad Ilyas on account of divorce between their children. He feigns ignorance whether the property of their father had devolved on the two brothers and their sister was ousted from the inheritance. He is also ignorant as to the custom which ousted the sister. He admits to filing a joint claim by the brothers and the property having been allotted to the brothers only. PW.2 is a witness who does not have any concern with the transaction nor does he have knowledge of contemporaneous events. He is ignorant regarding the payment of share to the plaintiff and as to how it was handed over to her.

12. There are certain important facts which escaped the attention of the Addl. District Judge, Khanewal and which impacted the outcome of the matter. It is common ground that the plaintiff knew about the property being in the name of her brothers yet did not challenge it in the year 1989. She also admits that her father died in the year 1945 (although the defendants say that it was the year 1940). In the suit which has been filed, the plaintiff did not challenge the aspect of inheritance on the sons only and simply claims that the parties were allotted land in dispute against the claims that the parties filed yet she does not produce any document in respect of her independent claim. This is a grey area and no proof is forthcoming nor is there any

justification on behalf of the respondent/plaintiff for ignoring to do so. The plaintiff also did not produce any evidence showing that she had some property in India which was claimed upon partition and which was accordingly granted. She has alleged that she received her share of the yield/lease money but again there is no proof forthcoming except for the bald assertion made by PW.4, her attorney as also by PW.1. It is not disputed that in the revenue record which has been produced in evidence, the property is in the name of the defendants. PW.4 who appeared for the plaintiff did not utter a word in the examination-in-chief as to the assertion that share of the lease money was being given to the plaintiff through all these years. The plaintiff did not seek cancellation of the entries in the revenue record as a relief in the suit. Most importantly, no proof was adduced to establish that at the time of their father's death, the Shariat and not custom regulated matters of inheritance.

13. The Addl. District Judge, Khanewal has, while deciding the issue No.5 which relates to the question of limitation, held that in such matters of inheritance the issue of limitation is not relevant. This is based on the rulings of the superior courts and there is no cavil with this proposition. However, the question of limitation though cannot be used as a lever to oust and set at naught the right of a person on the basis of inheritance, however, the said issue assumes importance in a case of

the instant nature where the conduct of the plaintiff starkly comes into focus and the plaintiff does not offer a valid justification for the delay in the filing of the suit to assert a right on the basis of inheritance. In such matters that right must be squared against rights of the said parties on the basis of the principle that certainty has to be given to the affairs of men and concluded rights cannot be upset on the basis of flimsy challenges. Therefore, the finding of the Addl. District Judge, Khanewal on the issue No.1 is set aside.

13. In view of the above, this revision petition is **accepted** and the suit filed by the respondent/plaintiff Mst. Amna is dismissed consequently.

(SHAHID KARIM)
JUDGE

Announced in open Court on 17.04.2015.

JUDGE

Approved for reporting.

JUDGE

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Rafiqat Ali