

**JUDGMENT SHEET****IN THE PESHAWAR HIGH COURT,****PESHAWAR**

(Judicial Department)

**C.R No: 394-P/2012****Fazal Dad and others****Versus****Allah Dad and others**

Date of hearing 09.03.2020

Petitioner (s) by Mr. Amjad Zia, Advocate.

Respondent (s) by Mr. Javed A Khan, Advocate, for respondents Nos. 4 to 20.

**JUDGMENT**

**MUHAMMAD NAEEM ANWAR, J: -** By this revision petition under section 115 of the Code of Civil Procedure, 1908, the petitioners have questioned the judgment & decree of the learned Additional District Judge, Swabi, dated 17.01.2012 whereby the appeal filed by the petitioners was dismissed, resultantly, the judgment & decree of the learned trial court / Civil Judge, Swabi, dated 31.05.2010 was confirmed.

2. Significant facts of the case are that plaintiffs-petitioners filed a suit for declaration to the effect that they were owners of property bearing Khasra No.668 and 4510 on the basis of entries of Jamabandi for the year, 1999-2000 of the Estate of

Swabi, being legal heirs of Mst. Bibi Roshan, the daughter of Torah Baz, and, as such, have challenged the inheritance Mutation No.12044 dated 30.08.1973, vide which the property of Mst. Bibi Roshan was transferred in favour of respondents. The entries of revenue paper were challenged on the ground that the same are fake, wrong, unwarranted, result of fraud and collusion and ineffective upon their rights. Recovery of possession through partition was also prayed for.

3. The suit of the petitioners was contested by the respondents-defendants by alleging therein that the inheritance Mutation No.12044 dated 30.8.1973 was attested in accordance with law and Sharia. It was categorically denied in preliminary objection by contesting the respondents that Mst. Bibi Roshan was alive at the time of death of her father. They alleged that Mst Bibi Roshan died in 1951 whereas Torah Baz died in the year, 1956. On conclusion of the trial, the petitioners were non-suited, as they have not been able to prove their suit. The plaintiffs-petitioners being aggrieved from the judgment & decree of the learned trial court, approached the learned appellate court,

however, the appeal filed by them met the same fate, hence, the instant petition.

4. Arguments of learned counsel for parties heard and available record gone through.

5. Record transpired that one of the defendants-respondents, namely, Razi Khan son of Habibullah Shah has submitted cognovit before the learned trial court. The petitioners-plaintiffs have produced Muhammad Khalid, Vaccination Superintendent from the Office of EDO, as P.W1, Muhammad Siraj (Patwari Halqa) as P.W.2, Gul Manzar (AOK Swabi) as P.W.3. Statement of Fazal Dad (Special Attorney of the plaintiffs) was recorded as P.W.4, while Bahadar Sher and Miskeen Khan were examined as P.Ws.5 & 6 respectively. As against that the respondents-defendants produced their Special Attorney as D.W.1 and Malik Rehan Sher as D.W.2, whereafter, they closed their evidence.

6. It was for the petitioners- plaintiffs to prove that at the time of death of Torah Baz, their predecessor in interest, Mst. Bibi Roshan was alive, regarding which P.W.1 placed on file Death Certificate of Torah Baz son of Shahbaz Khan as Ex.P.W.1/1, wherein Torah

Baz was shown to have been died on 28.11.1946. He also placed on file the Death Certificate of Mst. Bibi Roshan wife of Zardad as Ex.P.W.1/2, wherein her date of death was shown as 03.04.1951. He was subjected to cross-examination, wherein he deposed that he has been transferred to DHO Swabi in the year, 1988. He also deposed that he is unaware as to whether the register was newly prepared or not. The relevant deposition of his cross-examination is reproduced herein below:

*“It is correct that the Register produced by me have got no page numbers. It is correct that every Register in respect of record having got page number. It is incorrect to suggest that this Register have got no page number because I have not prepared the same on the instance of plaintiff. It is correct that the Register produced by me have got so many blank pages”*

It was also stated by the said witness in his cross-examination that there was no date of closing of register in the December, 1947 and he also admitted it as correct that certain serial numbers were not in proper order as there was no record from January, 1946 to April, 1946. The statement of P.W.1 for number of reasons cannot be relied upon and document referred to above i.e. Ex.P.W.1 and Ex.P.W.1/2 cannot

be given any weight; firstly because there is no proper record; secondly, the register was not in proper order and, thirdly, there were blank papers which could be filled in as per the desires and need of any person at any time.

7. It is not disputed that Mst. Bibi Roshan was the daughter of Torah Baz, however, the relevant fact was the dates of death of Torah Baz and Mst. Bibi Roshan. Besides P.W.1, Fazal Dad, who happened to be the Special Attorney for the petitioners, appeared before the Court and stated that the inheritance Mutation of Mst. Bibi Roshan was attested in the year, 1971 and, as such, the inheritance Mutation of Torah Baz was wrong and against the fact. By seven lines statements, the petitioners -plaintiffs are intending to brush aside the longstanding entries in the revenue papers existing since, 1973. It was for the plaintiffs-petitioners to have placed on file concrete, direct, sufficient, appropriate material, convincing and cogent evidence with respect to the date of death of their mother as the initial onus was upon the plaintiffs-petitioners. Though they have produced number of witnesses but, in fact, none of them has contributed much support to the version of

the plaintiffs-petitioners. It was for them to have prove it through convincing evidence, leading to the fact as alleged by them in accordance with Article 117 of the Qanun-e-Shahadat Order, 1984. They have alleged the factum of date of death of their predecessor in interest and Torah Baz, therefore, they were required to prove the same. Article 117 of the Qanun-e-Shahadat Order, 1984 is reproduced as under: -

***117. Burden of proof: (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.***

***(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.***

Firstly, the petitioners were required to prove that their predecessor in interest was alive when Torah Baz was died and, secondly, that the inheritance mutation was wrong, against the fact and with collusion of respondents-defendants was entered and attested. In this respect, reliance is placed on the case titled **Mian Muhammad Amin and others vs. Mst. Khursheed Begum alias Naseem Begum through LRS (PLD 2006 Lahore page 371)**, wherein it was held that:-

**“The initial onus of this issue/proposition, was upon the plaintiff, her evidence has been scanned; P.W. and P.W.2 have not contributed much to the case of the plaintiff in this behalf, B because they have not stated anything about the fraud, etc., which is the mainstay of the plaintiff's case as set out in the plaint. This also is a very critical deficiency in the statement of P.W.3, Khadim Hussain, who has appeared as the attorney for the plaintiff. The obvious legal consequence of such lapse is, that though the plaintiff has structured her case on the foundation of fraud, but without proving the same and it is settled law that the pleading is not the proof of any assertion. Reliance in this regard, can be placed upon the judgments reported as Mst. Khair-ul-Nisa and others v. Malik Muhammad Ishaque and others PLD 1972 SC 25 at 31; Faqir Muhammad and others v. Abdul Momin and others PLD 2003 SC 594 at 601; Mst. Zareena and 5 others v. Syeda Fatima Bi PLD 1995 Karachi 388 at 391; Bakht Baidar and others v. Naik Muhammad and another 7,QU4 MLD 341 at 351; K.A.H.Ghori v. Khan Zafar Masood and others PLD 1988 Karachi 460 at 463; Anjuman-e-Islamia, Sialkot v. Haji Muhammad Yonas PLD 1997 Lahore 153 at 157.**

Not even an iota of the evidence, apart from Ex.P.W 1/1 and Ex.P.W.1/2, which could be relied upon for the decision with respect to different dates of death of Torah Baz and Mst. Bibi Roshan as well. By simple narration alleging that the mutation of inheritance of Torah Baz was against the fact was not

sufficient enough to consider it otherwise, that too when it was attested in the year, 1973. Learned counsel representing the petitioners, during the course of arguments, stressed upon the fact that why the mutation attested in the year, 1973 when Torah Baz had died in the year, 1946. Undeniably and undisputedly, the inheritance transfers, the moment the person dies, it does not require the attestation of mutation, for the reason that attestation of mutation is meant for fiscal purpose and to keep the record up to date. From the evidence, the plaintiffs-petitioners have not been able to substantiate their version with respect to a specific date of death of Mst Bibi Shahan.

8. Admittedly, Khaliq Dad is in possession of the property, the predecessor in interest of respondent No.1 to 3, as per the statement of P.W.3 (Attorney for the plaintiffs), who, in his cross-examination, stated that he is 55 years old and since his minority, Khaliq Dad and Khoidad are in possession of property in dispute. Neither P.W.4 nor anyone else has stated a single word with respect to a specific date of death of Torah Baz and for that matter, Mst. Bibi Roshan. When the plaintiffs were not in



possession of the property since long then the suit of the plaintiff was also to be seen within the purview of Article 120 of the Limitation Act, 1908 read with Section 42 of the Specific Relief Act, 1877. The suit was instituted in the year, 2002, wherein they challenged the entries of revenue papers on the strength of Mutation No.12044 dated 30.8.1973, almost after thirty years of attestation of the mutation. When it was alleged by the plaintiffs that Mst. Bibi Roshan was alive at the time of death of Torah Baz and that he happened to have died somewhere in early 40's or late then admittedly, at the time of attestation of mutation, the petitioners were major and being not in possession they could challenge and took a positive step for their redressal. The petitioners have also alleged their right on the strength of Muslim Family Laws Ordinance, 1961. Apparently, this plea was taken with the intention to get a relief under the provision of Section 4 of the Muslim Family Laws Ordinance, 1961, even then there was no such evidence which could be considered for the reason that date of death of both Turabaz and Mst Bibi Shahan was much earlier to the promulgation of Muslim Family Laws Ordinance,

1961 to which no retrospective effect was given. This court in case titled **Muhammad Quraish Khan and others vs. Roohul Amin (1996 MLD 1156)** has held that:

**“5. Moreover, the decree in Suit 412/1 is not obtained by Fazal Habib (D-25) on ground of purchase but on ground of his being owner through inheritance from his father Ghulam Haqqani who had predeceased his grandfather Fazal Rahim, the latter having died in the year 1952 and his inheritance mutation having been attested on 29-6-1952 under number 6667. the suit of Fazal Habib was not maintainable on another ground as well, that he had no cause of action and the locus standi to bring the suit the child of a predeceased son could not inherit from the grandfather, the latter having died in the year 1952 because such right was given to a grandchild only in the year 1961 through section 4 of the Muslim Family Laws Ordinance, which was not given any retrospective effect.”**

Reference in this behalf can also be made to the case law **“Muhammad Yaqoob and others vs. Muhammad Ibrahim and others (2002 CLC 819).**

It was also not denied by the plaintiffs-petitioners that the mutation was attested in open assembly “Jalsa-e-Aam”, wherein it was verified by the residents of the locality.

9. The petitioners-plaintiffs were non-suited for insufficient evidence, however, for proper administration of justice, the learned counsel for the

petitioners was heard at length but he has not been able to prove any illegality, irregularity or jurisdictional defect. This court, under section 115 of the Code of Civil Procedure, 1908, has got limited jurisdiction to interfere with the concurrent findings of the courts below being based upon the principle as laid in case titled **“Abdul Mateen .Vs. Mst. Mustakhia” (2006 SCMR 50).**

10. In view of the above, the instant petition, being without substance is hereby dismissed.

**Announced:**  
**09.03.2020**

**J U D G E**

**(Nazir)**