Date of hearing: 24.4.2013.

Order

This appeal is filed against the judgment and decree passed by the learned District Judge, Muzaffarabad on 30.04.2012 whereby judgment and decree passed by the learned Senior Civil Judge, Muzaffarabad on 19.01.2005 has been recalled.

Precise facts of the case are that Kala Khan and others, plaintiffs/respondents, herein, brought a suit for declaration and perpetual injunction-cum-possession against Faqeer and others in the Court of Senior Civil Judge, Muzaffarabad on 08.12.1999. It was averred that land comprising Khewet No. 5 measuring 143 kanal 13 marlas and Khewet No. 6 measuring 50 kanal 8 marlas was in the ownership of Sattar Ali predecessor-in-interest of the plaintiffs and pro-forma Respondents No. 12 to 19 who died in 1951 and was survived by Mst. Phoolan. Mutation No. 80 regarding his estate was entered in the revenue record on 13.04.1951. The statement of Mst. Phoolan was recorded by the Tehsildar whereby she abandoned her share, hence, the whole estate of Sattar Ali deceased was entered in the name of his nephews vide Mutation No. 80. Itwas claimed that the plaintiffs and pro-forma respondents are the legal heirs of Mst. Phoolan and their family was governed by Shariat but nephews of Sattar Ali collusively got attested the mutation by practicing fraud and forgery on the pretext they were governed by Custom at the time of the death of Sattar Ali. It was submitted that as the parties were Muslim, hence, they were governed by the Shariat. The suit was contested by the other side by filing written statement. It was averred that Mst. Phoolan, herself appeared before the Revenue Officer and made her statement whereby she abandoned her share in favour of the nephews of Sattar Ali. They pleaded that suit is time barred, therefore, the same is not maintainable. It was also pleaded that after attestation of Mutation No. 80 the parties have divided the property through family settlement and they are in possession of the same. On the basis of aforesaid settlement they have also transferred the land to the different persons. It was claimed that defendants have effected huge improvements on the suit land and in case of dispossession they are not entitled to the same. The learned trial Court framed issues in light of the pleadings of the parties. The parties led evidence pro and contra. At the conclusion of the proceedings, the learned Senior Civil Judge dismissedthe suit on the ground of limitation and for want of proof. Kala Khan and others, felt aggrieved from the judgment recorded by the Senior Civil Judge, Muzaffarabad on 19.01.2005 and assailed the same through an appeal before the District Judge, Muzaffarabad. After hearing the parties, the learned District Judge vide his judgment and decree dated 30.04.2012 accepted the appeal and granted the decree for possession in favour of respondents, herein. Through this second appeal the illegality and propriety of the judgment and decree passed by the learned District Judge on 30.04.2012 has been challenged.

Mr. Muhammad Yaqoob Khan Mughal, the learned Advocate appearing for the appellants, vehemently argued that Mutation No. 80was entered in the revenue record in presence of Mst. Phoolan D/O Sattar Ali who voluntarily abandoned her share in favour of nephews of Sattar Ali, therefore, she or her legal heirs cannot claim any right in respect of the suit land. The learned Advocate contended that plaintiffs filed a suit for possession after more than 48 years, hence, their suit was hopelessly time barred and they were not entitled to the decree for possession because after attestation of mutation defendants have been entered as owners in the revenue record and in that capacity they have alienated a portion of land to the different people and they have effected huge improvements. The learned Advocate submitted that plaintiffs/respondents, herein, are estopped to claim any right on account of acquiescence and estoppel. In supports of his submissions, the learned Advocate placed reliance on the following cases:--

1. Ghulam Haider V. Hafiz Allah Bakhsah [NLR 1985 Revenue 133];
2. Boota, Etc V. Provisional Govt. etc. [NLR 1986 Revenue 127];
3. Muhammad Ilyas Khan and 05 others V. Sardar Muhammad Hafeez Khan and 04 others, [2001 SCR 179];

In the first case, the apex Court of Pakistan opined that period of limitation starts from the date on which mutation was sanctioned and declaratory suit filed to challenge mutation of inheritance was clearly barred by time in the circumstances of that case.

In the second case, relied upon by the learned Advocate for the appellants, it was observed as under:

"..... The plaintiff did not say as to when and how he come to know of the mutation, dated 18.01.1957, which he challenged in the civil suit."

In the third case, the apex Court opined that the petitioners slept over the matter, thus their indolence and negligence cannot be excused because even a void order adversely affecting the interests of a person should be challenged within a reasonable time.

Conversely, Ch. Muhammad Ismail, the learned Advocate appearing for the respondents, contended that entry regarding the statement of Mst. Phoolan is concocted and forged because she never made any statement before the Revenue Officer rather by entering the concocted assertion on her behalf she had been deprived from the right of inheritance. He argued that land even otherwise cannot be transferred by making a statement before the Revenue Officer and such statement does not constitute an estoppel. The learned Advocate maintained that as Mst. Phoolan during her lifetime and after her death her legal heirs are in joint possession of the land, therefore, the question of limitation does not arise in the present case. The learned Advocate contended that parties were Muslim and mutation was attested in 1951 after the Shariat Application Act, therefore, the question of deprivation of Mst. Phoolan and her legal heirs on the basis of Custom does not arise. In support of his submissions, the learned Advocate

mutated solely in his name. The application was marked to the patwari and should have normally come up and been referred to in the mutation order but it was not so. It is true that the plaintiffs presence at the time of mutation is proved beyond doubt and it is also proved that his thumb impression is affixed on the mutation register. However, the facts that the application was not placed before the Tehsildar at the time of mutation nor has any reference been made to it in the mutation order, are circumstances that do create a suspicion that after all. The further fact that the plaintiff is an old man whose age at the time of mutation was 84 years and who was not accompanied by any close relation whom the Court could consider as being competent to properly assist the old man, do in my opinion, tip the scales, further, in his favour. A perusal of the mutation register also shows that the thumb impression of the plaintiff is not on the mutation page but on the reverse of another on which the patwari had entered his report about the death of his brother. Signatures of the other witnesses also appear on the same page. Again, while all other signatures, including the thumb impression of one of the witnesses are in black ink and the order of mutation is in blue-black ink, the thumb impression of the plaintiff alone is in a different ink.

Under these circumstances, the consent of the respondent as embodied in the mutation order, for mutating one half of the property in the name of the appellant, is not free from suspicion."

In case tilted Aurangzeb V. Jalal Din and another, [PLD 1992 SC(AJ&K) 11], an identical proposition was considered. Another case tilted Bostan and others V. Mst. Sattar Bibi and 11 others, [PLD 1993 SC (AJ&K) 24, it was observed that the principle ofestoppel was pleaded against the lady who allegedly abandoned the right by making a statement before the Tehsildar at the time of attestation of the mutation. It was opined that no abundance/estoppel can be pleaded against the statue. At page 31 of the report, it was observed as under:--

"In the instant case the trial Court and the first appellate Court expressed the view that as the entries in the Revenue Record were challenged beyond the period of Six years when the same were made, the suit was time-barred. It may be observed that the entries in the Revenue Record whether of mutation or record-of-rights do not by themselves vest title in heirs; rather the same, at the most, are an evidence of title and if those are proved incorrect in view of facts admitted or proved, the title of an heir is not adversely affected. Thus, we fully endorse the view taken by the Supreme Court of Pakistan in the above-cited case that in case of a Muslim owner, the estate left by him would devolve on heirs on his death and the fact that such heirs did no wish to inherit is of no legal consequence. In the instant case all that can be said is that although the shares of the plaintiff-respondent had devolved on her on the death of her father but the mutation was not attested in her favour because she had relinquished her share in favour of the appellants. If the plaintiff-respondent wanted to transfer her share to the appellants, she could do so as permissible under law, i.e. through a registered document. The mere oral statement before the Collector that she does not want to get share out of the estate left by her father would not extinguish her title in the suit land and vest the same in the appellants to her exclusion, as she was a co-share with the appellants, though was not so recorded in the Revenue Record, she would be deemed to be in continuous possession of her share and any adverse entry in the Revenue Record would not oblige her to challenge the same within a period of Six years of the entry because the cause of action in such cases would accrue only when real threat is posed to her title such as when the defendants/ appellants denied her title in the unequivocal terms. Even if it is assumed for the sake of argument that an adverse entry in the revenue record would furnish her with a cause of action, then every fresh entry made in the Revenue Record to her detriment would give a new cause of action to her. Thus, in that case it cannot be said that the relief sought by the plaintiff pertaining to the entries in `Jamabandi' 1981-82, was also time-barred, because the suit in the instant case was instituted on 04.08.1986 and so was within six years of the entries made in `Jamabandi' of the year 1981-82. Thus, the relief regarding the entries made in `Jamabandi' pertaining to year 1981-82 cannot be refused on the ground of limitation. It is also settled principle of law that subsequent entries in the record-of-rights are preferred to those made earlier. The natural consequence of this would be that the declaratory suit would be within the limitation so far as `Jamabandi' of the year 1981-82 is concerned and, thus, entries in `Jamabandi' previous to year 1981 -82 would not create hindrance to decide the question of the title of the plaintiff-respondent or to pass a decree for joint possession."

It has not been proved by the appellants by giving examples that their family was governed by special custom on the basis of which ladies were not entitled to inheritance. The legal heirs of persons who are entitled to inherit under law cannot be deprived from their right of inheritance mere on speculation.

In view of above discussion, I am of the view that the contention of the learned Advocate for the appellants that suit was barred by limitation has no substance because Mst. Phoolan and her legal heirs would be deemed in the constructive possession of the suit land and they cannot be non-suited on the basis of limitation and estoppel.

The upshot of the above discussion is that finding no force in this appeal, it is hereby dismissed with costs.

(R.A.) Appeal dismissed