

Mr. Shahzad Shaukat, Advocate for Petitioners. Nemo of Respondents. Date of hearing: 30.1.2003.

judgment

This civil revision is directed against the judgment and decree dated 24.4.1994, passed by the learned District Judge Sheikhupura, accepting the appeal of the respondents by reversing the judgment and decree of the learned Civil Judge Nankana Sahib dated 31.7.1993, whereby the suit filed by the respondent-plaintiff *Mst. Bashiran Bibi* daughter of Chiragh Bibi, widow of Mohabbat, for declaration with consequential relief, was dismissed.

2. The dispute relates to the land measuring 135 *Kanals* and 10 *Marias* situated in Mauzia Khapar, Tehsil Nankana Sahib District Sheikhupura, which was owned by one Mohabbat son of Bhakoo. The said Mohabbat original owner of the property in dispute whose whereabouts were not known since 1939 and the matter of his inheritance came up for consideration before the Revenue Authorities, in the year, 1956, and ultimately Mutation No. 433 dated 19.8.1957 (Exh P. 1) was attested in favour of Muhammada, Jehana, Janat Bibi and Noor Bibi, predecessor-in-interest of the petitioner. Respondents Nos. 1 and 2 namely Bashiran Bibi and Chiragh Bibi claiming themselves to be the daughter and widow respectively of Mohabbat-deceased instituted a suit for declaration claiming 5/8th share of the legacy of Mohabbat-deceased, at Nankana Sahib on 4.10.1989. The suit was resisted by the petitioners. It was contended that the suit is barred by time, and the same was not maintained in its present form. The land is in possession of the defendants-petitioners. On merits it was contended that it is correct that Mohabbat-deceased was the owner of the land in dispute but plaintiffs are not related to him in any manner.

3. From the divergent pleadings of the parties, the following issues were framed by the learned Civil Judge:--

- (1) Whether the plaintiffs are in possession as co-sharers to the extent of 5/8th share out of the estate left by Mohabbat deceased? OPP.
- (2) Whether the suit is time-barred? OPD.
- (3) Whether the suit has not been correctly valued for the purposes of Court-fee and jurisdiction? If not, what is the correct valuation? OP. Parties.
- (4) Whether the suit is not maintainable in its present form? OPD.
- (5) Whether the suit is bad for non joinder of unnecessary parties? OPD.
- (6) Whether the defendants are entitled to special costs under Section 35-A, CPC.
- (7) Relief.

4. Ahmad son of Dil Muhammad, Anwar son of Sohna, appeared as PWs Nos. 1 and 2, whereas *Mst. Chiragh Bibi* and *Bashiran Bibi* plaintiffs appeared as PWs. Nos. 3 and 4. Copy of the impugned Mutation No. 433 dated 19.8.1957, copy of the FIR No. 113 dated 9.11.1938 (Ex. P. 2), copy of Register *Haqdar-e-Zamin* for the year 1949-50, copy of the Register *Haqdar-e-Zamin* for the year 1958-59, copy of register *Haqdar-e-Zamin* for the year 1986-87, were tendered in evidence as Ex. P. 1 to Ex. P. 5, The petitioners produced Shah Nawaz son of Noor Ahmad, Ghulam Ali son of Bahadar and Ghulam son of Gahna as DWs No. 1 to 3, whereas Muhammad petitioner-defendant appeared as DW. 4. The learned trial Court recorded the finding on Issue No. 1 against the plaintiffs-respondents and it was observed that,

"Now I would like to draw kind attention to the entries recorded in Mutation No. 433 Exh. P. 1 where in Said Muhammad who is the brother of second husband namely Ramzan of Chiragh Bibi has stated that Mohabbat-deceased had ousted Chiragh Bibi and divorced her. If such is the position then it is clear as broad day light that said divorce was given by Mohabbat deceased before 1939 the reasons that plaintiff himself has averred in plaint that Mohabbat deceased disappeared since 1939 and in circumstances said Mohabbat deceased would have definitely divorced Plaintiff No. 2 before the year 1939."

"It was further observed that,

"if follows that Plaintiff No. 1 born 14 years after the disappearance of said Mohabbat deceased in the year 1939 and in view of the foregoing conflicting statements of the PWs and material contradictions with regard to place of birth and the age difference of Plaintiff No. 1 coupled with the absence of reliable documentary evidence the Plaintiff No. 1 cannot be held to be a daughter born out of the wedlock of Mohabbat deceased and Chiragh Bibi Plaintiff No. 2".

5. On Issue No. 2 the learned Civil Judge held that the suit appears to be time-barred. Issue No. 4 regarding maintainability, was decided against the petitioner-defendant. The learned Civil Judge recorded the finding on Issue No. 5 and observed that the province of the Punjab-Respondent No. 3 was not a necessary party in the suit. Issue No. 6 regarding the special costs was decided against the petitioner. The suit of the respondents-plaintiffs was dismissed *vide* judgment and decree dated 31.7.1993. The appeal filed by the respondents-plaintiffs was accepted by the learned District Judge, Sheikhupura, on 24.4.1994. The learned District Judge relied on the F.I.R. (Ex. P. 2) by one Noor Muhammad and observed

learned District Judge got support from Section 46(5) of the Qanun-e-Shahadat Order, 1984 which provides that a statement written or verbal of a relevant fact made by a person who is dead or who cannot be found is in itself a relevant fact when such statement relates to the existence of any relationship by blood, marriage, or adoption between the persons as to whose relationship by blood, marriage or adoption, the making the statement had special means of knowledge and when the statement was made before the question in dispute was raised. According to the learned District Judge Noor Muhammad had lodged an FIR much before the question of inheritance of deceased has arisen. He was related to *Mst. Chiragh Bibi*-respondent. He had thus special means of knowledge with regard to the marriage between deceased and *Mst. Chiragh Bibi*. However, he proceeded to record a finding that, "from the other evidence available on record it is also proved that *Chiragh Bibi* had been divorced by deceased-Mohabbat and after taking the divorce she had married with one Ramzan. The appellate Court recorded the above stated finding on the basis of mutation of inheritance (E*. P. <) of Mohabbat deceased. The learned Judge observed that, "from the perusal of the contents of this document it appears that on 11.6.1957 Said Muhammad brother of the deceased had appeared before the Revenue Officer and had stated that *Chiragh Bibi* had obtained divorce from his brother. The statement of Said Muhammad is relevant under Section 47 of the same Statute. He placed reliance on the statement and held that *Chiragh Bibi* had been married with deceased-Mohabbat and out of the wedlock *Mst. Bashiran Bibi* had been borne and further held that *Chiragh Bibi* had been divorced by the deceased-Mohabbat. Finally he relied on the documents (Exh. P. 1 and Exh. P. 2) and oral evidence. *Mst. Bashiran Bibi* was held to be the daughter of deceased Mohabbat and was declared to be the entitled to one half share in the land in dispute, whereas divorced *Mst. Chiragh Bibi* has no share in it. The learned District Judge reversed the finding on Issue No. 1 and decreed the suit to the extent of half share in the land being the daughter of Mohabbat-deceased *vide* his judgment and decree dated 24.4.1994.

6. The learned counsel for the petitioners contends that the evidence of respondents consisting of Ahmad son of Dil Muhammad and Anwar son of Sohna, do not show the special means of knowledge, regarding relationship, therefore, cannot be made basis of evidence under Article 64 of the Qanun-e-Shahadat Order (10 of 1984). Reliance has been placed on the case of *Shah Nawaz and another versus Nawaz Khan* (PLD 1976 Supreme Court 767), *Anwar and others versus Sher Bahadur and others* (1990 CLC 274), and *Mst. Mangti versus Mst. Noori and others* (1995 CLC 210). Further contends that the learned First Appellate Court has fallen in error while relying on Ex. P. 2 (copy of the FIR) in deciding the entire controversy. According to him the said document has not been tendered in evidence and proved in accordance with law and the same could not have been relied upon, as has illegally been done by the learned First Appellate Court. Adds that the provisions of Article 64(5) of the Qanun-e-Shahadat Order (10 of 1984) have been wholly mis-construed and mis-interpreted by the Court of appeal and in this regard the Courts below has illegally proceeded to attribute an admission towards the learned counsel for the petitioners. He states that the suit filed by Respondents Nos. 1 and 2 being patently time-barred, could have not been decreed. He argued that the Respondents Nos. 1 and 2 were out of the possession, and could have not maintained a suit for declaration simpliciter and their suit was hit by provisions of Section 42 of Specific Relief Act. Finally he states that the judgments and decrees of the Courts below are result of complete mis-reading of evidence.

7. I have heard the learned counsel for the petitioners and has gone through the evidence and record with his assistance. The only question for determination in this case before the Court is that whether *Mst. Chiragh Bibi* and *Mst. Bashiran Bibi* are widow and daughter of Mohabbat deceased or not.

Both the parties have produced the oral evidence to prove the relationship. The evidence produced by the plaintiffs-respondents *Mst. Bashiran Bibi* and *Chiragh Bibi* is consisting of Ahmad son of Dil Muhammad and Anwar son of Sohna. The evidence of the above stated witnesses ought to be examined and can be relied on the touch stone of Article 64 of the Qanun-e-Shahadat Order (10 of 1984), which is reads as follows:

"64. Opinion on relationship when relevant. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact:

Provided that such opinion shall not be sufficient to prove a marriage in proceeding under the Divorce Act, 1896 (IV of 1869) or in prosecution under Section 494 or 495 of Pakistan Penal Code (Act XLV of 1860)".

8. Ahmad son of Dil Muhammad PW. 1 belongs to the Kharl brotherhood. He has expressed an opinion as to the relationship of Mohabbat-deceased to *Mst. Bashiran Bibi* and *Chiragh Bibi* as widow and daughter. Similar statement has been given to Anwar, who appeared as PW. 2. He is also from Kharl brotherhood. He stated that Mohabbat deceased was from his Kharl brotherhood. In the peculiar circumstances of the case when this Court has to form the opinion as to the relationship of Mohabbat-deceased to *Mst. Chiragh Bibi* and *Mst. Bashiran Bibi*, the opinion expressed by the above stated two witnesses as to existence of such a relationship so relevant because, the above stated persons are members of the Kharl family, and therefore, have special means of knowledge of the subject, when no suggestion whatsoever has been put to these witnesses by the petitioners- defendants that Mohabbat-deceased or he witnesses do not belong to the same Kharl family.

9. In the F.I.R. (Exh. P. 2) lodged by Noor Muhammad on 9.11.1938, it is stated, that *Mst. Chiragh Bibi* was the daughter of Karam Din, who was

the maternal uncle of Noor Muhammad. It has been categorically stated by the said Noor Muhammad in the F.I.R. (Exh. P. 2) that a daughter from the wedlock of *Mst. Chiragh Bibi* and Mohabbat-deceased, was borne. An objection has been taken by the learned counsel for the petitioners regarding the method of proof of the F.I.R. (Ex. P. 2). Firstly, no objection was taken by the petitioners-defendants during the trial. Objection as to formality of proof was to be taken at earliest stage. Once a document is admitted in evidence objection against admission cannot be allowed at appellate or revisional stage. It has been ruled in the case of *Malik Din and another vs. Muhammad Aslam* (PLD 1969 Supreme Court 136), that

"Objection regarding the defect, -if any, in the method of proof of a document, cannot be raised at the appellate stage. For where a document has been admitted into evidence without any objection in the trial Court, it is now well settled that an objection, as to the formality of proof, must be taken at the earliest stage and if it has not been taken then, it cannot be allowed to be taken at the appellate stage."

10. The document produced and exhibited during the trial shall be read in evidence. The provisions of Article 64 of the Qanun-e-Shahadat Order are in the nature of existence and the onus of establishing circumstances that would bring statement within any of the exceptions contemplated by Article 64 lies clearly upon the party which wishes to avail itself of the statement. If a statement is sought to be given in evidence under the provisions of Article 64, the party seeking to tender such a statement in evidence has to show that the maker of the statement is dead or that he cannot be found or that he has become incapable of giving evidence or that he cannot be called as a witness without reasonable delay or expense. In the present case FIR (Exh. P. 2) was lodged on 9.11.1938. The FIR (Ex. P. 2) was tendered in evidence on 19.3.1992, after about 54 years. If the age of Noor Muhammad is taken to be 21 years on 9.11.1938, then the FIR lodged by Noor Muhammad about seventy five years ago as to the relationship of the parties is relevant because he is presumed to have died in the year 1992. In this view of the matter the statement relates to the existence of the relationship of marriage of *Mst. Chiragh Bibi* and the daughter *Mst. Bashiran Bibi* when the same was made by Noor Muhammad before the question of inheritance was raised is relevant fact and can be relied by the Court under Article 64(5) of the Qanun-e-Shahadat Order. Even this fact that Noor Muhammad has since been died, was not controverted by the petitioners-defendants. The statement made by Noor Muhammad in FIR is therefore very much relevant. It is a statement made by a person who cannot be called as a witness as a dead. Article 64(5) of the Qanun-e-Shahadat Order (10 of 1984) clearly says that a statement written or verbal of a relevant fact made by a person who is dead or who cannot be found is itself a relevant fact when such a statement relates to the existence of any relationship by blood, marriage, or adoption between a person as to whose relation by blood, marriage or adoption, the person making the statement had special means of knowledge.

11. From the above stated documentary evidence (FIR Ex. P. 2) it is proved on the record beyond any shadow of doubt that *Mst. Chiragh Bibi* was the lawfully wedded wife of Mohabbat-deceased and out of the wedlock of *Mst. Bashiran Bibi*-respondent, was borne.

12. Now the question is whether *Mst. Chiragh Bibi* is entitled for any share in the inheritance of Mohabbat-deceased being the widow. In

46(5) of the Qanun-e-Shahadat Order 1984. The learned District Judge observed that the statement of Said Muhammad is relevant under Section 47 of the same statute. All the ingredients of Section 47 are co-existing in the present case because Said Muhammad had appeared before the Revenue Officer. The Revenue Officer was authorised by law to record his statement. His statement was recorded by the Revenue Officer in the proceeding between the parties. The learned District Judge was right in relying the statement of Said Muhammad. He has rightly concluded that Chiragh Bibi was married with the deceased-Mohabbat and out of the wedlock Ms?. Bashiran Bibi respondent had been borne and further that *Mst.* Chiragh Bibi had been divorced by the deceased-Mohabbat. The document (Ex. P. 1 mutation) was produced by the plaintiffs-respondents by themselves as such, the respondents were bound by it and cannot be allowed to wriggle out of it. The learned District Judge rightly ignored the minor discrepancies in the statement of the witness produced by the plaintiffs-respondents and on the basis of the document Ex. P. 1 (Mutation) and Ex. P. 2 (the FIR) as well as the evidence on the record and proceeded to reverse the finding on Issue No. 1. A co-sharer always admitted to be in possession of the land in dispute. *Mst.* Bashiran Bibi-respondent being the daughter of Mohabbat-deceased was a co-sharer of the petitioners, who are the collaterals of the deceased and

that the co-sharer is deemed to be in possession of the land in question. The suit filed by *Mst.* Bashiran Bibi was not barred by limitation. The learned District Judge rightly set-aside the finding of the learned Civil Judge on Issue No. 2 and decided the same in favour of the respondent.

13. The suit of the respondents-plaintiffs *Mst.* Bashiran Bibi etc. was also not hit by the provisions of Section 42 of the Specific Relief Act because a co-sharer is deemed to be in possession of the land with his co- sharer. There was not complete ouster of the plaintiffs-respondents from the possession. It has been stated by Ms?. Bashiran Bibi that the "Bati" was used

to be given to the plaintiffs. The learned Civil Judge, dismissed the suit of *Mst.* Bashiran Bibi etc. by mis-reading the FIR (Exh. P. 2) and misinterpreted the provisions of Section 46(5) of the Qanun-e-Shahadat Order 1984 which has been rectified by the learned District Judge, Sheikhpura who rightly proceeded to accept the appeal of *Mst.* Bashiran Bibi etc. respondents-plaintiffs. There is no illegality or irregularity in the impugned judgment and decree of the learned District Judge, therefore, this revision petition fails and is dismissed with costs.

(A.A)

Revision dismissed.