Date of hearing : 13.12.2005.

Judgment

This appeal is filed against the judgment and decree of the Additional District Judge, Dudyal, passed on 22.7.2005 whereby the judgment and decree of the Civil Judge Dudyal dated 11.12.2004 has been reversed.

The precise facts forming the background of the case are that Barkat Hussain, respondent herein, filed a suit in the Court of Civil Judge Dudyal for declaration and cancellation of Mutation No. 110 and also challenged the entries of the Record of Rights. The dispute between the parties is with regard to the legacy of Bagh Ali r/o Village Malot Tehsil Dudyal. The Plaintiff, Barkat Ali, is son of Bagh Ali whereas Muhammad Fayyaz, defendant/appellant herein, is his grandson, Bagh Ali had two sons and two daughters namely Barkat Hussain, Muhammad Arshid, Amna Bi and Zanib Bi. Muhammad Arshid died in his life before 1987. The mutation of his estate was attested on 23.6.1987 in presence of Barkat Hussain, plaintiff/respondent who stated before the Revenue Officer that appellant herein, Muhammad Fayyaz, is his nephew and he wants to give him full share of his father who admittedly died in life of Bagh Ali, his father. In this perspective of the matter, Mutation No. 110 was attested in favour of defendant/appellant herein. The legality and correctness of mutation was challenged by Barkat Hussain, respondent, through a suit in the Court of Civil Judge Dudyal on 17.8.2002, alleging therein that Mutation No. 110 had been sanctioned in violation of Shariat and is collusive, hence, is inoperative, against the rights of the plaintiff. It was further alleged by him that entries in the record of rights on the basis of the said mutation were equally without lawful authority and collusive.

The defendant/appellant resisted the suit and pleaded that the plaintiff has no cause of action nor the suit in the present form is maintainable. The defendant also raised an objection that the suit is not maintainable on the ground of estoppel as the plaintiff has himself consented before the Revenue Officer for attestation of mutation under challenge. It was further alleged that the Civil Court has no jurisdiction in the matter as the mutation was only challengeable before the revenue officer. The trial Court framed issued on 26.2.2003 in light of the respective pleadings of the parties. The parties lead evidence in support of their claim. The learned trial Court vide its judgment dated 11.12.2004, dismissed the suit for want of proof. Feeling aggrieved by the said judgment, Barkat Hussain filed an appeal before the Additional District Judge Dudyal which was accepted on 22.7.2005, hence, this second appeal.

Arguing on behalf of the appellant, Sardar Muhammad Azam Khan, the learned Advocate contended that the judgment and decree of the Additional District Judge Duyal is erroneous, capricious and badly suffers from misreading and non-reading of record. The learned Advocate argued that the suit was vague for having been filed without description of the property therefore, no effective decree can be granted rather it was enjoined upon the first appellate Court to dismiss the suit. The learned Advocate further argued that Mutation No. 110 could not be challenged through a declaratory suit in Civil Court nor the correction of Record of Rights can be sought from the Civil Court in view of clear ouster of jurisdiction visualised by Section 172 of the West Pakistan Land Revenue Act, 1972. Moreover, the Officers who have prepared the Record of Rights under challenge and attested the Mutation No. 110 have not been arrayed as a party, thus, the suit cannot proceed in absence of a necessary party. The learned Advocate strenuously argued that the suit was liable to be dismissed on the ground of estoppel. It was contended that the learned Additional District Judge failed to appreciate the relevant provisions of Qanun-e-Shahadat Order 1984 in its true perspective which resulted in erroneous decision. The learned Advocate submitted that the judgment has been given in violation of Order 41 Rule 31 of the Code of Civil Procedure, hence, is nullity in the eye of law and is liable to be declared as such. It was lastly argued by the learned Advocate that there is no statutory law on the basis of which a predeceased son is deprived if from the estate of his grandfather nor the same is against the statutory backing, or is violative of the injunctions of Quran and Sunnah as has been observed by the learned First Appellate Court. In support of his submissions the learned Advocate placed reliance on the following precedents:--

(i) 1992 SCR 214;

(ii) 2003 SCR 77;

(iii) 2005 SCR 53;

Mr. Ali Zaman Raja, the learned counsel for the other side, controverted the arguments advanced on behalf of the appellant, and supported the impugned judgment. The learned counsel argued that a suit or appeal can be disposed of at a preliminary issue without adverting to the other merits of the case if the Court is of the opinion that after the decision of the preliminary issues further decision on the other issues would be academic. The learned counsel further submitted that the impugned judgment is in accordance with the injunctions of Quran and Sunnah, therefore, cannot be assailed on any ground raised by the learned Advocate for the appellant.

I have taken into consideration the respective arguments of the learned Advocates representing the parties and perused the record with my utmost care. So far as the first contention of Sardar Muhammad Azam Khan, the learned Advocate for the appellant, that the suit is vague as no Khasra number is mentioned in the plaint, is concerned that is without substance. A perusal of the plaint as a whole reveals that the plaintiff has challenged Mutation No. 110 alongwith the entries incorporated in favour of the appellant/defendant on the basis of the said mutation which is sufficient description of the property. Under sub-rule (3) of Order VII of C.P.C., it is

Kashmir Interim Constitution Act, 1974 on the ground that the authority whose order is under challenge is a necessary party. So far the petition under Section 44 of the Azad Jammu and Kashmir Interim Constitution Act, 1974 is concerned, I have no quarrel with the proposition laid down in the cited cases because the same was the requirement of the relevant rules.

The contention of the learned Advocate that the suit was liable to be dismissed on the ground of estoppel, has a force. The rule of estoppel contained in Article 114 of the Qanun-e-Shahadat Order, 1984 postulates that when one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such a belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and such a person or his representative, to deny the truth of that thing.

Judging the present controversy in light of the rules and guidelines laid down by the superior Courts the rule of estoppel by conduct is fully attracted in the present case.

The precise case of the defendant/appellant was that it was the plaintiff/respondent who himself appeared before the Revenue Officer and made a statement that he wants to abandon his right in favour of his nephew, appellant herein, thus the abandonment can be regarded as compromise between the parties which was given due effect by recording the mutation in presence of Ghulam Hussain and Raja Muhammad Ayyub Khan, witnesses. Barkat Hussain, also put his thumb impression on the Mutation Register. Mutation, Exh. DE, available at page 57 of the file reveals that the plaintiff, Barkat Hussain, abandoned his right partly in favour of his nephew and this fact is mentioned in the order of the Revenue Officer. This mutation was sanctioned in 1989 in presence of Ch. Ghulam Hussain and Raja Muhammad Ayyub Khan. At that time the age of Muhammad Fayyaz was hardly 5 to 6 years and question of connivance or conspiracy on his part with the revenue staff hardly arises. Barkat Hussain, when appeared as a witness admitted the aforesaid position.

It is also an admitted position that mutation was sanctioned in his presence but he has filed the suit after a period of more than 20 years. His statement coupled with his conduct is sufficient to prove waiver/abandonment on his part. There are number of authorities in support of the proposition and some of which are referred to herein below:--

(i) "Muhammad Nawaz v. Muhammad Khan" (1989 CLC 2140);

(ii) "Mst. Mumtaz Begum etc. v. Abdul Rasheed etc." (1988 CLC 2023);

(iii) "Ghulam Rasool v. Muhammad Rafique" (1990 MLD 112);

(iv) "Mir Ajab Gul v. Noor Nawaz Khan" (1990 MLD 2111);

I would also like to refer two judgments from the Azad Jammu and Kashmir Jurisdiction i.e. "Mustafa Khan and 3 others v. Muhammad Khan and another" (PLD 1978 SC (AJK) 75) & "Walayat Khan v. Mango Khan" (PLD 1976 AJK 17).

In the later case Mr. Justice Kh. Muhammad Yusuf Saraf, CJ (as his lordship then was) scholarly dealt with the rule of estoppel and the facts of the case were almost similar. Though for the reason recorded in the judgment his lordship has maintained the conclusion reached at by the subordinate Courts against the proposition involved in the present case but has laid down very exhaustive and comprehensive principle of applicability of the rule of estoppel. It was further held that the plaintiff herein was not estopped from ascertaining his right. The view had been formed in the circumstances of that case.

Before parting with the case it may be observed that the inheritance under the Islamic Law does not depend on the attestation of a mutation in the revenue record rather it opens on the death of an individual as has been opined in Ghulam Ali's case (PLD 1990 SC 1). The relevant observation is recorded at page 12 of the report which is to the following effect:--

"The main points of the controversy in this behalf get resolved on the touchstone of Islamic law of inheritance. As soon as an owner dies, succession to his property opens. There is no State intervention or clergy's intervention needed for the passing of the title immediately, to the heirs. Thus it is obvious that a Muslim's estates legally and juridically vests immediately on his death in his or her heirs and their rights respectively come into separate existence forthwith. The theory of representation of the estate by an intermediary is unknown to Islamic law of inheritance as compared to other systems. Thus there being no vesting of the estate of the deceased for an interregnum is any one like an executor or administrator, it devolves on the heirs automatically, and immediately in definite shares and fraction. If is so notwithstanding whether they (the heirs) like it, want it, abhor it, or shun it. It is the public policy of Islamic law. It is only when the property has thus vested in the heir after the succession opens, that he or she can alienate it in a lawful manner. There is enough comment and case-law on this point which stands accepted."

Thus, it is crystal clear that Barkat Ali has become owner of the estate of Bagh Ali at his death to the extent of his legal share which has been abandoned by him. This right was not subject to the incorporation of mutation, therefore, the challenge of mutation was not necessary nor it was directly involved in the case. The plaintiff who has abandoned his right by his conduct cannot be allowed to blow both hot and cold in the same breath and rule of estoppel is meant for the same purpose.

After considering the case law as well as record of the case, I am of the opinion that the plaintiff is estopped by his conduct as he has abandoned his right in favour of the defendant/appellant herein, and this abandonment is a compromise which is fact has been acted and incorporated by the Revenue Officer. The abandonment has been proved by the cogent evidence and negation of the same by the respondent/plaintiff after a pretty long period estopped him from altering his possession on the principle of acquiescence and waiver especially when the impugned mutation is proved to have been sanctioned on respondent's behest. A reference can be made to a case titled M/s Farms, Islamabad vs. National Development Finance Corporation (PLD 1996 Lah. 99).

Date of hearing : 28.3.2005.

Order

This appeal arises out of the following facts:--

Govt. of Azad Jammu and Kashmir decided to acquire a landed property comprising Survey Numbers 1026 measuring 2 marlas, 1020 measuring 3 marlas, 1023 measuring 1 malra, 1024 measuring 3 marlas, 1020 measuring 17 marlas, 874 measuring 3 marlas, 875 measuring 6 marlas, 813 measuring 8 marlas, 788 measuring 4 marlas, 786 measuring 6 marlas, 687 measuring 1 kanal, 789 measuring 5 marlas, 812 measuring 12 marlas, 790 measuring 2 marlas, 826 measuring 4 marlas, 820 measuring 11 marlas, 821 measuring 8 marlas, 823 measuring 5 marlas, 824 measuring 2 marlas, 333 measuring 6 marlas, 345 measuring 3 marlas, 451 measuring 16 marlas, 450 measuring 5 marlas, 454 measuring 12 marlas, 459 measuring 1 marla, 455 measuring 2 marlas, 460 measuring 2 marlas total measuring 11 kanals 5 marlas situated at village Kondal Shahi Tehsil Athmuqam District Muzaffarabad in order to construct a road from Kondal Shahi to Gorian. Per decision of the Govt., Collector Land Acquisition after due process of law announced Award No. 3 dated 16.1.1995. The appellants herein being claimants of the land acquired received the compensation however, under protest. They submitted an objection application and requested the Collector to refer the matter to the reference Judge under Section 18 of Land Acquisition Act. The collector concerned sought a report from his office wherein it was disclosed that reference application was time-barred however, despite this report he referred the matter to reference Judge for its decision. The learned reference Judge, after hearing the learned Counsel for the parties, declared the reference application as time-barred, hence this appeal.

I have heard the learned Counsel for the parties and gone through the record. It is borne out by the record that the reference Court has not decided the case on its merits but disallowed the reference application on the ground of limitation only. I do not agree with the observation of learned reference Judge for the following reasons:--

Section 18 of Land Acquisition Act clearly lays down that a person who is interested in the award and has not accepted it can by application in writing request the Collector to refer the matter to reference Court for determination of his objections in respect of measurement of the land, amount of compensation, and the apportionment of this compensation. The powers of a reference Court therefore, are very much limited to the above mentioned 3 points. A reference Court cannot determine the question of limitation after reference is made to it by Collector under Section 18 of Land Acquisition Act. As regards the question of limitation a proviso has been provided to Section 18 which is very clear on this point i.e. period of limitation. Its clause (a) lays down that such application must be made by a person if he was present before the Collector when this award was made (within 6 weeks from the date of Collector's award). Clause (b) refers to cases in which such persons are absent at the time of making of that award and in that case they can file application under Section 18 within 6 weeks of the receipt of the notice from the Collector under Section 12(2) or within 6 months form the date of the Collector's award whichever period shall first expire. This proviso makes the ambiguity quite clear about the powers of the Court and the Collector regarding the determination of limitation. According to it, it is the Collector who has to determine this question. Even if a time-barred application is referred to the Court the objection regarding limitation cannot be raised on behalf of the Govt. It is the Collector who has jurisdiction to decide the question whether an application under Section 18 of the Land Acquisition Act is time-barred or not. He can refuse to make a reference if he holds that such an application has been made beyond the prescribed time limit. After having regard to Sections 20 and 21 of the Land Acquisition Act, it becomes clear that the inquiry by Court is restricted to a consideration of the objection raised by the interested parties in accordance with sub-section (1) of Section 18 of this Act. It does not contemplate the decision on the question of limitation because that apparently is a matter for the Collector to decide. The question of limitation cannot be agitated before the Court once the Collector has made the reference. Reference may be had to 1992 CLC 1775, PLD 1962 Lahore 292, PLD 1960 Karachi 826 and PLD 1965 (West Pakistan) Karachi 413. Herein this case, as stated earlier that though the office of the Collector disclosed the reference application as time-barred yet the Collector referred the matter to the Court for its decision on merits. He was empowered to dismiss the reference application but when he has referred the matter to the reference Judge it means that he did not agree with the office report and referred the matter to the reference Judge. The reference Judge therefore, under law, was not competent to go into the question of limitation once again which was only in the dominion and powers of Collector alone. The reference Judge while dealing with a reference application was required to confine himself to the measurement of the land, compensation and apportionment of the compensation if any, but he has found to have travelled beyond his scope of jurisdiction under Section 18 of Land Acquisition Act. Before parting with this case, I would like to observe that in Azad Jammu & Kashmir all the Collector Land Acquisition are found very negligent while dealing with objection application in case of an award. They are required to draw a statement in view of Section 19 of Land Acquisition Act which is to be referred to the Court for its decision. What they do is that they simply refer to the Court what has been placed before them by a person interested in an award. They do not care to look into the objection application neither they bather to draw a statement under Section 19 of the land Acquisition Act. The result therefore, is that the judgment and decree impugned before this Court is set-aside by allowing this appeal and the case is remanded to the reference Judge for decision on merits.

(A.A.) Case remanded