

SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Justice Shahid Waheed
Justice Salahuddin Panhwar

C.A.44-P/2012 AND C.A.62-P/2012

1. C.A.44-P/2012 Iqbal Ali Khan &
(Against the judgment dated 28.05.2012 others v. Naseeb
passed by the Peshawar High Court, Ali Khan & others
Bannu Bench in CR No.10-B/2006)
2. C.A.62-P/2012 Ali Abbas Khan &
(Against the judgment dated 28.05.2012 others v. Iqbal Ali
passed by the Peshawar High Court, Khan & others
Bannu Bench in CR No.10-B/2006)

For the Appellant(s) : Mr. Altaf Ahmad, ASC in C.A.44-P/2012
Mr. Zia ur Rehman Khan, ASC in C.A.62-P/2012 via video link from Branch Registry Peshawar

For the Respondent(s) : Mr. Altaf Ahmad, ASC in C.A.62-P/2012
Mr. Zia ur Rehman Khan, ASC in C.A.44-P/2012 via video link from Branch Registry Peshawar

Date of Hearing : 26.02.2025

JUDGMENT

Shahid Waheed, J: These two appeals are deeply intertwined because they arise from a singular declaratory suit, and both challenge the judgment issued by the Peshawar High Court on the 28th of May, 2012. Given their interconnected nature, they can be effectively examined and resolved together through a common judgment.

2. The parties involved in these appeals shall be identified by the titles they held in the suit. This approach is intended to provide more explicit context and facilitate a comprehensive understanding of the issues at hand, ensuring that the discussions and analyses accurately reflect

the roles and responsibilities of each party as established during the suit.

3. The legal issues at the heart of these two appeals are straightforward yet significant. The first question is whether, given the facts, the children of the missing person's sibling had the legal standing to challenge the validity of the sale executed by their disappeared relative, thereby allowing them to assert their rightful claim to his property. The second question delves into the sensitive criteria that determine when a missing person could be presumed legally deceased. The third question is equally important, as it addresses which party had the burden of proving that the disappeared person was alive when the inheritance mutation was incorporated in the revenue records. Lastly, the fourth question concerns the inheritance rights of a brother who has predeceased the missing brother.

4. It will be well in place to outline the facts that led to the abovementioned questions and prompted the plaintiffs to institute a suit. The dispute revolved around a parcel of land owned by Sher Baz Khan, located within the revenue estate of Kachozai, Bannu. Sher Baz Khan, who remained unmarried throughout his life, had two brothers—Shad Ali Khan and Ali Sher Khan—and a sister named Mst. Basmina. The children of Shad Ali Khan comprise the plaintiffs and defendant No.17, while those representing Ali Sher Khan are referred to as defendants No.1 and 9 to 16. The legal heirs of Mst. Basmina are identified as defendants

No.2 to 8-A. An important aspect of the dispute involved a portion of the land measuring 4 kanals in Khata No.36, which was transferred to Ali Sher Khan through a sale recorded in the revenue records under mutation No.1542, dated 30th of July, 1961, (Ex.PW-3/3). Sher Baz Khan then disappeared and was never heard from again, and thus, his remaining land was later inherited by Ali Sher Khan and Mst. Basmina, presuming him dead, as documented in inheritance mutation No.2045, dated the 26th of September, 1988, (Ex.PW-3/4). Shad Ali Khan did not receive any share of the land owned by his brother, Sher Baz Khan. This deprivation prompted his legal heirs to seek redress by filing a suit on the 28th of July, 2003, challenging both the said mutations, asserting that Sher Baz Khan was a missing person and they were entitled to a 2/5 share in his inheritance.

5. The legal heirs of Mst. Basmina endorsed the claims set up in the plaint by submitting a joint written statement clearly articulating their position. In their response, they stated that sale mutation No.1542, dated 30th of July, 1961, (Ex.PW-3/3) was executed under conditions that were both fraudulent and deceitful. Additionally, they strongly aligned with the plaintiffs regarding inheritance mutation No.2045, dated 26th September, 1988, (Ex.PW-3/4). They asserted that this mutation was equally invalid, emphasising the point that Sher Baz Khan remained missing and had not been legally declared deceased. On the other hand, the legal heirs of Ali Sher Khan rebutted these

allegations, defending the validity of both mutations. They contended that all requisite legal procedures had been followed in executing these transactions, and they maintained that both documents were legitimate and binding. This conflicting narrative gave rise to a legal dispute that necessitated careful scrutiny. The resolution of these issues hinged on the answers to the questions above, which required thorough consideration and deliberation by the courts.

6. The opinions expressed by the courts on the given facts show a notable divergence. Both the trial court and the first appellate court share a consistent view, agreeing that sale mutation No.1542 (Ex.PW-3/3) and inheritance mutation No.2045 (Ex.PW-3/4) were illegal. On the contrary, the High Court offers a different interpretation which differs from the consensus of its two subordinate courts. The High Court holds that sale mutation No.1542 (Ex.PW-3/3) is valid while inheritance mutation No.2045 (Ex.PW-3/4) is void. Due to this discrepancy, the plaintiffs preferred Appeal No.44-P/2012, while the legal heirs of Ali Sher Khan (defendants Nos.1 and 9 to 16) preferred Appeal No.62-P/2012 in this Court. We are faced with these two distinct opinions, and it is essential that we thoroughly scan which one holds valid merit.

7. We begin our discussion with sale mutation No.1542, (Ex.PW-3/3), which was sanctioned on the 30th of July, 1961. The suit challenging the validity of this mutation

was instituted much later, on the 28th of July, 2003. It is crucial to note that at no point did the vendor, Sher Baz Khan, the predecessor of the plaintiffs, or any of Sher Baz Khan's siblings question the validity of the sale during their lifetimes. This factor necessitates a thorough probe of whether, after a lapse exceeding four decades, the legal heirs of any of Sher Baz Khan's brothers had the standing to contest the sale. The implications surrounding this issue are significant, particularly, as they pertain to the limitation period for contesting any transaction. It is, therefore, essential to approach this matter with due seriousness; otherwise, it may introduce uncertainty into the legal and interpersonal affairs of the persons involved. It bears mentioning that the law stipulates that, in such scenarios, the party seeking to challenge the transaction must first affirmatively state in their pleadings that the original owner lacked knowledge of the transaction; and, in addition, they must articulate the reasons why their predecessor did not challenge the transaction during their lifetime, and subsequently provide convincing and credible evidence supporting these assertions. Upon reviewing the plaintiffs' pleadings, we find that these essential assertions are notably absent. However, one of the plaintiffs, Iqbal Ali Khan, appeared as witness P.W.3. He stated in his cross-examination that his father died in the year 1973, and he was a minor at that time. He also said that he was born in the year 1965. He further stated that it was correct that his father had not challenged the sale (Ex.PW-3/3) during his lifetime as he

was unaware of it. This statement of the plaintiff cannot be relied upon as he was a minor at the time of his father's death, and he had not stated who told him that his father was unaware of the sale (Ex.PW-3/3). In these circumstances, his statement would be treated as mere hearsay. In contrast, the special attorney representing defendants No. 3 to 8-A, Muhammad Ayub Khan, who served as the Special Judge of the Anti-Terrorism Court in Dera Ismail Khan, submitted a written statement supporting the plaintiffs' claims. During his appearance before the trial court as D.W.1, he detailed facts that clearly demonstrated that Sher Baz Khan was aware of the sale mutation but chose not to pursue any action for its cancellation. This context leads us to conclude that, in instances where the original owner did not opt to contest the sale mutation while alive, his death does not confer any rights or standing upon his descendants to challenge that sale.¹ Thus, we concur with the findings of the High Court that, concerning the sale mutation, (Ex.PW-3/3), the plaintiffs lacked standing, and their claim was unequivocally barred by the time limitations imposed by law. Accordingly, we respond to the first question formulated above in the negative.

8. We will now size up inheritance mutation No.2045, dated 26th of September, 1988, (Ex.PW-3/4), which pertains to the property inherited by Ali Sher Khan and Mst. Basmina from their missing brother, Sher Baz Khan, who was declared dead. An important factor in this case is the

¹ Gauhar Rehman v. Jan Ashbi and another (1990 SCMR 1586) and Abdul Haq and another v. Mst. Surrya Begum and others (2002 SCMR 1330)

exclusion of the plaintiffs' predecessor, Shad Ali Khan, from this inheritance mutation. This absence had led to a legal challenge questioning the legitimacy of the mutation itself. The plaintiffs argued that they had a rightful claim to Sher Baz Khan's inheritance based on the assertion that, at the time the mutation (Ex.PW-3/4) was processed, he was not deceased but rather missing or "*mafqood-ul-khabar*." This raises a legal questions about their entitlement, which first require careful consideration of the principles relating to inheritance rights. Under Islamic jurisprudence, the right to inherit property is contingent upon a person being legally recognised as deceased. Specifically, regarding a person categorised as missing, the rights to his inheritance are determined by the provisions that state that inheritance rights arise only from the date a person is presumed dead, not retroactively to the date of his disappearance.² It is also important to highlight that any person who dies prior to the presumed death of the missing person is disqualified from inheriting his property.³ Thus, in this case, understanding the timeline and circumstances surrounding Sher Baz Khan's disappearance and the subsequent evaluation of his presumed death is essential for determining the rightful heirs and the distribution of his estate. This leads us to study the legal principles regulating the declaration of a missing person as either alive or deceased. Under Hanfi law, a person considered missing is presumed to be alive for up to ninety years from his date of birth. However, the Full

² Mst. Rakhi Bivi v. Rahat Bibi (7.N.W.191 at 192-93)

³ The Hedaya, Page-216

Bench of the Allahabad High Court⁴ has already clarified that this presumption operates as a rule of evidence rather than a rule of succession, and we agree with this interpretation. This distinction is important, as it indicates that the provisions of the Evidence Act of 1872, now the Qanun-e-Shahadat of 1984, take precedence. Articles 123 and 124 of this Qanun-e-Shahadat are particularly pertinent to the matter at hand. Article 123 maintains that when a state of things is demonstrated to exist, there is a legal presumption regarding its continuity, reflective of the typical duration of such a state of things. It specifies that if evidence shows a person was alive within thirty years prior to the date when the question of his status arises, there is a presumption that he is still alive. The burden of proof then falls upon the party asserting his death. However, this presumption is susceptible to rebuttal under Article 124, which states that if it can be demonstrated that such a person has not been heard of for a period of seven years by those who would naturally have maintained contact with him, the burden of proof then shifts to those claiming the person is still alive.⁵

9. In light of the legal principles stated above, we must scrutinise the pleadings and evidence presented. A review of that shows that the plaintiffs acknowledged that Sher Baz Khan had disappeared many years ago and had not been heard of for over forty years by the time the

⁴ Mazhar Ali and others v. Budh Singh and others (1884) ILR 7 All. 297

⁵ Sir John Woodroffe and Amir Ali's "Law of Evidence", 15th Edition (1991) at PP 672-673.

witnesses were examined in the year 2004. To this effect, we may conveniently refer to the statement made by the plaintiff, Iqbal Ali Khan (PW-3), in his cross-examination, when he said that his uncle, Sher Baz Khan, had disappeared sometime after the sanctioning of sale mutation dated 30th of July, 1961, (Exh.PW-3/3). This statement fully attracted the provisions of Article 124 of the Qanun-e-Shahadat, 1984, leading to the presumption that he was dead. However, there was no presumption concerning the exact year, date and time of his death; therefore, actual evidence was needed to be presented to establish the specific date or year of his death.⁶ It is greatly to be regretted that the plaint lacked any specific assertion regarding the date or year of Sher Baz Khan's death or his disappearance. Consequently, the central issue for determination was whether inheritance rights had been established prior to the attestation of mutation No.2045 (Ex.PW-3/4). Given the circumstances, the burden of proof rested on the plaintiffs to prove that Sher Baz Khan was alive when mutation No.2045, dated the 26th of September, 1988, (Ex.PW-3/4), was sanctioned and that he subsequently passed away after his brother Shad Ali Khan. The plaintiffs failed to present such evidence that Sher Baz Khan was alive at that time. Instead, they and their witnesses maintained that Sher Baz Khan was missing and that there was no information regarding his actual date or year of death. The statement of Muhammad Ayub Khan, DW-1, who, despite being a defendant in the

⁶ In the Goods of Ganesh Das Aurora (deceased) AIR 1926 Cal. 1056)

suit, supported the plaintiffs, indicated that the plaintiffs' position was that if a person goes missing, he cannot be considered dead for the next seventy years. This argument, as explained above, was incorrect. It is important to reiterate here that the law is well established for addressing such an out of the ordinary situation. It states that when there is a dispute in a case regarding the date of death of a person who has not been heard from by their relatives for more than seven years, the burden of proof lies with those who assert a specific date. They must provide affirmative evidence to support their claim. However, if no one can demonstrate a particular date or year, the Court should presume that the person was deceased as of the date the suit was instituted rather than at any earlier date⁷. Considering this principle, when we review the testimonies of the witnesses who testified on behalf of Ali Sher Khan's heirs—specifically the statements made by DW-3 and 4 during their cross-examination by the plaintiffs—it is established that Sher Baz Khan had died in the year, 1978. Now, it remains to be seen when Shad Ali Khan passed away. Although the plaintiffs failed to provide any evidence to establish Sher Baz Khan's status as alive at the time the inheritance mutation No.2045 (Exh.PW-3/4) was sanctioned, one of the plaintiffs, Iqbal Ali Khan, testified as a witness (P.W.3) and revealed in cross-examination that his father had died in the year 1973. This admission implies that Shad Ali Khan was neither alive when

⁷ Jeshankar Revashankar v. Bai Divali (1919) 22 Bombay Law Reporter 771
Ramabai and others v. Sarawathi and others (AIR 1953 Tra.Co.114),
Muhammad Sarwar and another vs. Fazal Ahmad and another (PLD 1987 SC 1)
Lal Hussain v. Mst. Sadiq and another (2001 SCMR 1036)
Perveen Shoukat v. Province of Sindh and others (PLD 2019 SC 710)

inheritance mutation No. 2045, dated 26th of September, 1988, (Ex.PW-3/4), was sanctioned nor at the time the suit was instituted. This also means that, since he predeceased his brother, he had no claim to any inheritance from him. Thus, the plaintiffs lacked the legal standing necessary to challenge the validity of mutation No. 2045, (Ex.PW-3/4), as they could not substantiate their claim to any share of Sher Baz Khan's inheritance. None of the courts below properly appreciated this aspect of the matter, and as a result, they misdirected themselves, holding that inheritance mutation was void. We, therefore, accordingly disapprove of their viewpoint.

10. The outcome of the discussion is that both sale mutation No.1542, dated 30th of July, 1961, and inheritance mutation No.2045, dated 26th of September, 1988, are declared valid. As a result, Civil Appeal No.44-P of 2012 is dismissed, while Civil Appeal No.62 of 2012 is accepted, thereby dismissing the plaintiffs' suit in its entirety. There shall be no order as to costs associated with these proceedings.

Judge

Judge

Islamabad
26.02.2025
APPROVED FOR REPORTING
Rashid*/