

Journal

2016 YLR 23

Court

PESHAWAR HIGH COURT

Date

2015-06-05

Appeal No.

CIVIL REVISION NO. 311-P OF 2014,

Judge

BEFORE WAQAR AHMAD SETH

Parties

RIAZ AHMAD AND 5 OTHERS—PETITIONERS VERSUS FAQIR AHMAD KHAN—RESPONDENT

Lawyers

NOORUL HAKAM FƏHARI FOR PETITIONERS. ABDUL SATTAR KHAN FOR RESPONDENT.

Statutes

ISLAMIC LAW PARDANASHIN LADY

Judgment

WAQAR AHMAD SETH, J.— Riaz Ahmad and five others, petitioners/ plaintiffs, through the instant revision petition have called in question the legality and propriety of the judgment and decree dated 5-3-2014 passed by the learned Additional District Judge-III, Mardan vide which he accepted the appeal of Faqir Ahmad Khan, respondent/ defendant, set. aside the judgment and decree 23-6-2011 of the learned Civil Judge-VII, Mardan and, dismissed the suit of the petitioners/ plaintiffs.

2. The resume of facts forming the background of the instant revision petition is that the petitioners/plaintiffs filed a suit against the respondent/defendant for declaration to the effect that they are owners in possession of the land measuring 600 Kanal (whatever is to be correctly proved), fully described in the heading of the plaint, being legal heirs of deceased Mst. Zakia and inheritance Mutation No. 392 dated 26/03/1932 as well as entries in the revenue record in the name of the respondent/defendant are wrong, illegal against facts and also against injunctions of Islam, based on fraud and collusion, therefore, ineffective upon their rights. They have also prayed for perpetual injunction and possession as ' consequential relief.

3. The respondent/defendant contested the suit by filing written statement. The divergent pleadings of the parties gave birth to the framing of as many as ten issues including the relief. The parties produced their pro and contra evidence and the learned trial Judge after evaluating the same in the light of the arguments of the learned counsel for the parties decreed the suit of the petitioners/plaintiffs as prayed for in the plaint vide judgment and decree dated 23-6-2011.

4. Feeling aggrieved there from, the respondent/defendant assailed the aforesaid findings of the learned trial Judge through the appeal which was accepted by the learned Additional District Judge-III, Mardan and while setting aside the judgment and decree of the trial Court dated 23- 6-2011 dismissed the suit filed by the petitioners/plaintiffs. Hence this revision petition.

5. I have heard the learned counsel for the parties and have also gone through the record with their able assistance.

6. Admittedly, property in dispute was originally owned by Nawab Khan Predecessor in interest of both the parties. The pedigree table Exh.PW-2/3 for the years 1925-26 and Exh.PW-1/5 is not disputed and according to which petitioners/plaintiffs are the sons and daughters of the grand-daughter of said deceased Nawab Khan. It is also not disputed that the said deceased Nawab Khan died in the year 1932, his death certificate is Ex.DW-1/2, he had one son and one daughter namely Faqir Ahmad (defendant/ respondent) and Mst. Roman Sheda. It is also an admitted fact that the daughter of said Nawab Khan and sister of Faqir Ahmad defendant/respondent was married to one Khawaja Muhammad Khan, who died immediately after the marriage and Mst. Roman Sheda shifted to the house of his brother i.e. Faqir Ahmad defendant and there she gave birth to her only child Mst. Zakia, the mother of the present petitioner. Mst. Roman Sheda died in the year 1990 while living with her brother Faqir Ahmad, the present defendant/ respondent. Her death certificate is Ex.DW-1/3, whereas Mst. Zakia the daughter of said

Mst.

Roman Sheda, mother of present petitioner died in the year 2006 and her death certificate is Ex.DW-1/4. The present suit was filed by petitioners on 13-3-2007 after the death of Mst. Zakia, daughter of Mst. Roman Sheda, in the life time of Faqir Ahmad Khan, in whose favouf the impugned inheritance Mutation No. 392 dated 26-3-1932 Ex. PW-2/1 was attested, when he was about 7/8 years old.

7. Record is suggestive that Mst. Roman Sheda after becoming widow, within one year of her marriage was dependent on Faqir Ahmad Khan and were, living together, thus utilizing the inherited property of their deceased father Nawab Khan. Mst. Zakia took birth in the house of joint family and was brought up by said Faqir Ahmad Khan who happened to be her maternal uncle. Record is also suggestive that conscious of the fact that there is no transfer of property as per law of Islamic inheritance, in-favour of Mst. Roman Sheda, her sister, therefore, vide gift Mutation No.4190 dated 19-4-1955 Ex.DW-1/1 respondent transferred 20 Kanals of land out of total 600 Kanals. The plea of the respondent Faqir Ahmad Khan, who lived till the filing of this revision petition and had died in the month of March/May 2015, that the inheritance Mutation No. 329 was attested according to Riwayat, when he was minor and the entire property was transferred in his name. No doubt the period of Riwayat is in the history but the law of Islamic Inheritance is guaranteed in the Qur'an and Sunnah, which is more than fourteen hundred years old and depriving the sister Mst. Roman Sheda by not giving any share in the inheritance of her late father Nawab Khan was against the principles of the Law of Inheritance. The gift mutation No.4190 was attested on 19.04.1955 which is Ex.DW-1/1 in favour of Mst.

Roman Sheda by the respondent vide which some portion of property was gifted from the legacy of deceased Nawab Khan. Undisputedly the grandmother of the petitioners being sister of respondent / defendant Faqir Ahmad Khan was residing with him and the mother of the petitioner Mst. Zakia was also married from the same house of her maternal uncle i.e. Faqir Ahmad Khan and as such under the relationship were not in a position to claim inheritance from the dominant brother and maternal uncle. In spite of the gift mutation the revenue record on file .suggests that the property in question is not yet partitioned nor there is anything on record or alleged by the respondents/defendants that Mst. Roman Sheda and Zakia were having separate burner and utilizing their own resources while staying with brother/maternal uncle house.

8. The Riwayat as claimed by respondent/defendant has no record even otherwise, the area where the property in dispute locates was totally Muslim inhabited area and there is no evidence on record that any non Muslim were residing and the alleged Riwayat was enforced. Even for a moment if it is presumed that the Riwayat of not giving inheritance to the female was enforced in the area then what would be the effect of injunction of Islam which are more than fourteen hundred years old and the law of the land is that no law contrary to injunctions of Islam could be enforced or promulgated.

9. Since there is nothing on record to prove the existence of said Riwayat however, it is an admitted fact that the injunctions of Islam existed at the time of inheritance mutation dated 26-3-1932. The reason advanced by the appellate court regarding the time barred .claim of the petitioner does not seems to be legal one because in view of the relationship of the parties specially the fiduciary relationship both the females' were not

in a position to claim the legacy of father and grandfather and there is nothing on-record to show that they were independent and not Parida Nasheen Ladies, secondly there is nothing on record to show that after gift mutation Mst. Roman Sheda relinquished her right of inheritance in the property, specially in the circumstances when there is no partition of the property in question, on record. Even otherwise every wrong entry in the Jamabandi gives fresh cause of action. Reliance in this respect is placed on 2004 SCMR 1391 (a) wherein it has been held that inheritance under Muslim Personal law takes place automatically and each legal heir is entitled to get his respective share irrespective of any claim or demand therefor. Similarly in 2010 CLC 631 it has been held in reference to inheritance that on the death of owner, legal heirs become entitled for their due share under the personal law without intervention of the court or authority. Likewise, in the case of Atta Muhammad v. Nasiruddin reported in PLD 1993, Peshawar, 127 it has been held that wrong entry in Jamabandi, would give a fresh cause of action and suit for declaration and for correction of wrong entries could be filed within six years from the date when right to sue has occurred and the burden of proof that such entries were correct was on the party in whose favour such entries existed and not on the party challenging correctness of such entries.

10. In the case Muzaffar Khan v. Mst. Roshan Jan and others reported in PLD 1984 SC 394 the apex Court has discussed the succession to property before promulgation of KPK Muslim Personal Law (Shariat Application Act, 1935) when customary law was enforced in the following terms:—

"N.-W.F.P. Muslim Personal Law (Shariat) Application Act, 1935 to be given retrospective effect—Dispute with respect to succession to estate of deceased Muslim—deceased Muslim to be deemed to have died under domain of Muslim Law, even if death had taken place before coming into force of N.-W.F.P. Muslim Law (Shariat) Application Act, 1935. Alienation by person inheriting property of such deceased held could not be challenged in view of amendment in West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 by Ordinance of 1983 interpretation of statutes.

11. In view of the judgment of the apex court as referred above the view of Peshawar High Court, Peshawar in the case of Mirza Muhammad and others v. Muhammad Shfrin and others reported in (PLD 2011 Peshawar 41) it has held as under:—

"—Ss. (sic) & 42—West Pakistan Muslim Personal Law (Shariat Application) Act (V of 1962), Ss. 2 & 2-A—North West Frontier Province Muslim Personal Law (Shariat Application) Act (V of 1935), S. 3(2)—Suit for declaration and possession— Inheritance mutation of plaintiffs father attested in year 1937 according to prevailing custom depriving her from his inheritance—Defendants plea was that suit was time-barred — Validity—Provision of S. 2 of West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 had already been declared to be violative of injunctions of Qur'an and Sunnah—West Pakistan Muslim Personal Law (Shariat Application) Act, 1962 had retrospective effect —Plaintiffs father died in year, 1937, who after enforcement of Act, 1962 would be deemed to have died under domain of Muslim Personal Law and his property would be divided even today in accordance with Shari share—Right of inheritance had no nexus with attestation of mutation—No impediment in distribution of inheritance under Islamic Law existed even before 15-3-1948— Plaintiff being daughter of deceased was entitled to 1/2 share in his inheritance—No-payment of produce to legal heirs would be ineffective regarding right

required through inheritance as all owners in property would be deemed to be interested in each and every inch thereof— Possession of one co-owner would be considered for benefit of remaining owners in Khata—Suit was decreed for being within time.

Likewise in the case of *Abdur Rehman v. Mosam Khan and others* reported in 2012 YLR 2710 it has been held as under:—

"—Ss. 3 & 5—Specific Relief Act (1 of 1877), S. 42—Suit for declaration—Plaintiff had sought declaration to the effect that he and other legal heirs of deceased last full owner, were entitled to the Shari share in legacy of the deceased who died issueless and that mutation attested solely in favour of the widow of the deceased, before independence was ineffective on the rights of the plaintiffs—Suit filed by the plaintiff was concurrently dismissed by the courts below— Validity—West Pakistan Muslim Personal Law (Shariat) Application Act, 1962, which was promulgated on 31st of December 1962, was made the rule of decision, in the matter of inheritance, notwithstanding any custom or usage in vogue in the society —By virtue of S. 3 of said Act all the limited estates, held by females under the custom, law were terminated and the life estates so terminated under S. 3 of the Act, by operation of law, were to devolved in pursuance of S.5 of the Act, on such persons who were entitled to succeed under the Muslim Personal Law, upon the death of last full owner— Entitlement of such female limited owners in the legacy of last full owner, under the Muslim Personal Law (Shariat) Application Act, 1962, however, was protected— Limited estates, held by all the Muslim females under custom, were terminated by operation of law and were restored to the actual legal heirs of the last full owners— Plaintiffs and other legal heirs of deceased had become owners of his legacy to the extent of 3/4th share, excluding 1/4 share of the widow of the deceased, who died issueless—Rights ensuing from the statue, would prevail against the mutation or any entry in the Revenue Record, based thereon— Courts below had non suited the plaintiff without considering the legal aspect of the case in the light of its factual backdrop; and had committed gross illegality while rendering the impugned judgments, which were not tenable—Impugned judgments were set aside to the effect that 3/4 share from the legacy of deceased would go to the plaintiffs and proforma defendants being the descendents of his brothers, whereas 1/4th would go to the legal heirs of the widow of the deceased last full owner.

12. Respondent/defendant has not denied, nor there is nothing on record showing that both the ladies i.e. grandmother of the petitioners and their mother were educated or were not parda Nasheen Ladies. Way back in the years 1929-30 the privy counsel has declared and defined the Parda Nasheen women as a' women of rank, Hindu or Muhammadian, who lives in seclusion, shut in Zanana, and c having no communication excepts from behind the Parda or screen without any male person save a few privilege relation or dependents. There is nothing on record that both the ladies were having some independent advice or were having any male except the deceased Faqir Ahmad Khan, who was beneficiary of the inheritance mutation. There is nothing on record to contravert the Fiduciary relationship or the isolation and subserviency of the Parda Nasheen ladies/mother and grandmother of the petitioners.

13. In this part of the world where the property and parties locates, the female kids are not given education in the school etc. rather they are taught Qur'an and Sunnah through an elderly women inside house and as such no one is expected to know the Riwayat of the

area, nor the same are taught to the female folk. Normally and generally the female folks know the Qur'an and the Haddis, which guarantees inheritance to the female, as well. Petitioners Nos.1 to 4/plaintiffs were the only male members and after the death of deceased Nawab Khan excluding the beneficiary i.e. Faqir Ahmad Khan and upon becoming major they put their claim on the table which in-fact their right to claim inheritance in the said property.

14. In the case of Mst. Zainab Bibi and others v. Muhammad Yousaf and others reported in 1995 SCMR 868 it has been held as under:—

"Person who as "made heir" had inherited agricultural land before 15-3-1948 under custom would be deemed to have inherited such land under Shariat Law. If such male person had inherited the agricultural land before 15.03.1948 his mother and two sisters would inherit 1/6th and 2/3rd shares respectively and the residue 1/6th share would go to the person who was his paternal uncle."

Likewise in the case of Muhib Shah and 3 others v, Mst. Janet Bibi and others reported in 1997 CLC 659 it has been held as under:—

"In this case the daughter of last male owner claiming to be governed by Muslim personal Law in matter of inheritance filed a suit for declaratory decree to this effect in respect of estate left by their deceased father. Defendants claimed that deceased having died before partition, his inheritance was governed by Custom. Plaintiffs (daughter) suit was dismissed by Trial Court but decreed by appellate court which came to conclusion on basis of evidence that deceased in matter of inheritance was governed by Muslim Personal Law not by Custom.

Wajib-ul-Araz of three villages where property of deceased was situated clearly mentioned that deceased being Syed was governed by Muslim personal Law in matters of inheritance and such entries related to year 1927-28 about 11 years before death of deceased.

As against such documentary evidence produced by plaintiffs, defendants oral evidence relating to applicability of custom was of no significance and was insufficient to prove that deceased in matters of inheritance was governed by Custom. Defendants were required to prove not only that deceased in matters of inheritance was governed by Custom but also to establish as to what that particular Custom was. Defendants could not prove either of such factum. Shariat law in matter of inheritance of deceased thus governed parties and plaintiffs (daughters) were entitled to inherit their shares in accordance with Shariat Law."

15. Record is further suggestive that special attorney of the respondent/defendant namely Nigar Ahmad while appearing as DW has admitted on page five of his cross examination, that it is incorrect that at time of death of Nawab Khan the Riwaaj was applicable. Even otherwise there is nothing on record to show that any Riwaaj where the property locates, was in field, nor it can be because it was a Muslim inhabited area, as a whole and the predecessor of the parties were Muslim, therefore, in the presence of law of inheritance which is based on Qur'anic injunctions it could not be presumed that un-Islamic Riwaaj was enforced, hence under the law of inheritance, the daughter of Nawab

Khan, had become co- owner in the legacy of her deceased father to the extent of her share, and thereafter, when she died her only daughter Mst. Zakia, mother of the petitioners/plaintiffs inherited 2/3rd share as only daughter and rest under the principle of return. The judgment and decree of the appellate court does not seems to be based on Islamic Injunction, nor could referred to any Riwaj, which was allegedly enforced in the area.

16. In view of the above the impugned judgment and decree of the appellate court dated 05.03.2014 is set aside and that of Civil Judge-VII Mardan, dated 23.06.2011 is restored. Suit of the petitioners/plaintiffs stands decreed as prayed for with no order as to cost. Revision accepted.