

Journal

2000 CLC 1018

Court

LAHORE HIGH COURT

Date

1999-12-23

Appeal No.

CIVIL REVISION NO. 310-D OF 1998

Judge

MUHAMMAD AKHTAR SHABBIR

Parties

KAURA AND OTHERS PETITIONERS VERSUS ALLAH DITTA AND OTHERS—RESPONDENTS

Lawyers

MIAN SHAMSUL HAQ ANSARI FOR PETITIONERS. SARDAR MUHAMMAD RAFIQ KHAN FOR RESPONDENTS.

Statutes

CIVIL PROCEDURE CODE (V OF 1908) - O. XIV, R.1 CIVIL PROCEDURE CODE (V OF 1908) - O. XIV, R.1 AND S. 115 CIVIL PROCEDURE CODE (V OF 1908) - O. VII, R. 3 CIVIL PROCEDURE CODE (V OF 1908) - S. 99 AND O. XXXII, R. 3 SPECIFIC RELIEF ACT (I OF 1877) - S. 42 LIMITATION ACT (IX OF 1908) - ARTICLE 120 WEST PAKISTAN LAND REVENUE ACT (XVII OF 1967) - S. 42

Judgment

This civil revision under section 115, C.P.C. has been filed by the petitioners to call in question the judgment and decree, dated 2-3-1998 passed by the Appellate Court, whereby, the judgment and decree, dated 14-1-1996 passed by the learned Civil Judge, D.G. Khan, decreeing the suit of the plaintiffs/respondents was affirmed.

2. The facts giving rise to the present revision petition are that a suit for declaration with permanent injunction was instituted by Mst. Taggi, the plaintiff/predecessor-in-interest of the respondents in respect of 100 Kanals, 5 Marlas of land situated in Mauza Chorata Sindh Shumali, Tehsil and District Dera Ghazi Khan against the defendants/petitioners claiming to be the legal heir of Lakhu deceased, her father and entitled for 1/6th share of inheritance. The suit was contested by the defendants/petitioners herein, denying the averments of the plaint alleging herein that Taggi deceased predecessor-in-interest of the present plaintiffs was not the daughter of Lakhu and according to customary law, was not entitled for inheritance and prayed for dismissal of the suit. One Walia was the owner of the property. He left three sons Lakhu, Pheri and Masso. They were owners in possession of the property in equal shares. In 1944, Lakhu died and his property was transferred in favour of his legal heirs. After the transfer of the land in favour of Pheri and Masso they subsequently, transferred their share in favour of different persons. So much so consolidation proceedings were also held about 22 to 25 years back and since then till the institution of the suit no one objected to it. In 1992 Taggi deceased predecessor-in-interest of the present plaintiffs instituted a suit claiming to be the daughter of Lakhu and entitled for 1/6th share of the property; who died during pendency of the suit. Defendants Nos.1 to 33, 35 and 37 contested the suit and filed their written statements and the rest of the defendants were proceeded against ex pane.

3. Factual controversy appearing on the pleadings of the parties led to the framing of following issues:~ (1) Whether the plaintiffs are entitled to inherit the estate of Lakhu, Masso and Pheri to the extent of 1 /6th share as a whole? OPP (2) Whether the subsequent transfer of the property in dispute to the defendant is illegal and ineffective against the rights of the plaintiff? OPP (3) Whether Lakhu deceased was governed by custom in the matter of inheritance and his inheritance mutation were rightly executed in favour of his son? OPD-1 to 33, 35 to 37 (4) Whether the suit is time-barred? OPD (5) Relief.

After recording and appreciating the evidence pro and contra of the parties, the trial Court vide judgment and decree, dated 18- 12-1995 decreed the suit observing that Taggi daughter of Lakhu was entitled to 1/6th share of his inheritance.

4. Feeling aggrieved the contesting defendants/petitioners preferred an appeal, which came up for hearing before the learned Additional District Judge, D.G. Khan, who, vide judgment and decree, dated 2-3-1998 dismissed the same and affirmed the findings of the trial Court.

5. Learned counsel for the petitioners contended that the trial Court has not framed the issues in accordance with objections raised in the pleadings of the parties and settled in violation of the Order 14, Rule 1(5) which is mandatory in nature, which vitiate the whole suit. He relies on Bashir Ahmad and others v. Ch. Nawab Din and others 1990 SCMR 1229.

Further contends that issue No.3 was framed wrongly which is as under:- "Whether Lakhu deceased was governed by custom in the matter of inheritance and his inheritance mutations were rightly executed in favour of his son? OPD-1 to 33, 35 to 37." This was not the plea of any of the parties. It was not reflected in whole of the evidence of the parties that Lakhu deceased had any son and it was not held by the Courts below that if the parties were governed by custom, then which was the custom prevailing at that place, where the suit property was situated.

6. The proper issue which should have been settled is "Whether Lakhu was governed by Zamindara custom, if so, what was that custom, and whether mutation of inheritance in favour of his brother and subsequent mutations based thereon were void and ineffective qua the rights of the plaintiffs". Further contended that issue No.2 in respect of preliminary objection raised by the defendants/petitioners to the effect that the plaintiffs were estopped to file the suit by their words and conduct, has not been settled, and that issue on objection No.4, raised in the written statement has also not been framed, because description of the suit property has not been narrated in the suit, which is sufficient reason for dismissal of the suit. The plaintiffs have averred in para. 11 of the plaint that Khuda Bakhsh son of Masso had alienated 14 Kanals in favour of Naseer son of Jalal-ud-Din the detail of which has not been given in the plaint. Whether Taggi was the daughter of Lakhu has not been framed and defendants/petitioners have not been afforded opportunity to advance evidence on this point. Contends that issue to the effect has also not been framed; on what date the plaintiffs came to know about the alleged fraud by the petitioners/defendants", which was the plea of the plaintiffs/respondents in para. 14 of the plaint. It is further contended that the trial Court in its judgment had observed that the parties belong to Khosa family of D.G. Khan and it is pertinent to mention here that none of the parties claimed to be Khosa, while they were Khalol by caste. It is evident from the pleadings of the parties, wherein, they have claimed to be the Khalol. The trial Court had illegally and beyond the evidence of the parties gave the abovesaid finding. Relies on Mst. Jannat Bibi v. Sher Muhammad 1988 SCMR 1698 wherein it has been held by Honourable Judges of the Supreme Court that the party is not permitted to deviate from his pleadings nor can Court settle an issue on different plea for the party and decide the suit on that basis. Both the Courts below were under obligation in accordance with provision of Order 41, Rule 31, C.P.C. to discuss the evidence of the parties that they belong to Khalol family. It is established principle of law that the judgment passed in violation of the aforesaid provisions of law, is not sustainable. He continued that Khalol is sub-caste of Balooch and the petitioners to establish the facts that law of custom was applicable to the Balooch Tribe, has produced in evidence Exh.D.I, copy of the Register of Rawaj-i-Aam of District D.G. Khan wherein women of Balooch Tribe i.e. widow, daughter, sister and any other woman were not entitled for inheritance under the customary law except the maintenance. Relies on Shahzada Bibi v. Amir Hussain Shah PLD 1956 SC 227 wherein it has been observed that in Rawaj-i-Aam which is public record, prepared by Public Officer in the discharge of his duty and under governing rules, are strong piece of evidence, that without custom their contentions are true and must be accepted unless rebutted to substantiate his stand on Khalol Balooch.

According to Rawaj-i-Aam, women are deprived of the inheritance. The petitioners have produced Exhs.D.4 to D.7 and also produced D.I and D.2. It is further argued that the plaintiffs/respondents have produced in evidence Exh.P.16 to Exh.P. 19 and supported the version of the defendants/ petitioners. The plaintiff Taggi appeared as P.W. 1 in support of

her version, but her statement was not corroborated by any other evidence and this solitary self-supported statement of the plaintiffs is not sufficient to rebut the stand of defendants/petitioners. In this context, learned counsel relied on the case of Muhammad Hussain and others v. Muhammad Nawaz PLD 1991 Lah. 262. Learned counsel further contended that Mutations No.672, dated 29-5-1944 and No.2884, dated 20-4-1944 have been sanctioned with reference to Mutation No.2238, dated 22-3-1944 from where it is established that the mutation was sanctioned under customary law of inheritance. Further, contended that when in tribe the customary law of inheritance is prevailing, the daughter if alive shall be considered to be non-existent. Article 59 of Muhammadan Law by Mullah enshrines that "Where daughters are excluded from inheritance either by custom or by statute, they should be treated as non-existent. The property devolved on Pheri and Masso, brother of Lakhu, deceased. The male heirs had inherited the property before the promulgation of the Shariat Act, 1948 and as such, they would be considered as full owner of the property under section 2-A(a) of West Pakistan Muslim Personal Laws (Shariat Act) (Amendment) Ordinance, 1983. He relied on Mst. Fazal Nishan v. Ghulam Qadir and others 1992 SCMR 1773; Lai and others v. Mst. Rehmat Bibi and another PLD 1991 SC 582. He further, contended that the suit is awfully barred by limitation. The mutations of inheritance Exh.P.5, Exh.P.6, Exh.P.7 were sanctioned in the year 1944 in favour of Pheri and Masso and suit had been instituted on 1-11-1992 such after the attestation of the mutations of inheritance. The plaintiffs in paragraphs Nos.7, 8, 9, 10, 11 and 13 of the plaint have admitted the sanctioning of different gift- deeds, sale-deeds and other transactions which is sufficient to establish that the mutations of inheritance in favour of Masso and Pheri were in the knowledge of the plaintiffs. Many record of rights were prepared during the period of 52 years. The Article 120 of the Limitation Act has provided limitation for filing a suit for declaration six years from the date of adverse entries in the record of rights. He relied on the case of Muhammad Ali reported as PLD 1994 SC 245. The plaintiffs have taken the plea of fraud but to substantiate this plea, no evidence has been produced by them on record. So much so, the plaintiff Ditta, who appeared as P.W.I uttered not a single word to this effect. While on the other hand, D.W.I and D.W.2 have categorically stated in their statements that they never paid crops to the plaintiffs. Further, contended that the petitioners Nos.8, 9, 11 to 15, 20, 21, 24 were the minors and their guardian-ad-litem was not appointed by the Court nor they were properly represented in accordance with law. If the minors are not properly represented in the Court, the decree passed against them is not binding on them. He relied on Shaukat Ali v. Sultan Mahmood 1988 SCMR 118. He added that Exh.P.8 and Exh.P.15, copies of record of rights, wherein entries have been made and the gift-deeds and sale-deeds which were specifically attested by the plaintiffs and in the plaint they have not prayed for the cancellation thereof as further relief under section 42 of the Specific Relief Act. Therefore, the suit on this ground is liable to be dismissed. The plaint is silent about the particulars of fraud, which is the requirement of law. He relied on a case of Sahib Noor v. Haji Ahmad 1988 SCMR 1703. According to the entries of Exh.P.8 and Exh.P. 15, the plaintiffs were not in possession of the suit property for the last about 50 years and mere bald allegation of the plaintiffs that she has been receiving the share of Batai from the petitioners has not been corroborated by an iota of evidence, and the petitioners being owners of the land, had been paying the land revenue to the Government. The plaintiffs did not pay a single penny as land revenue and remained silent for such a long lime and now she cannot take the plea that she has been receiving the share. The plaintiffs are restrained from claiming to be the owners of the property in dispute and a doctrine of approbation and reprobation is hurdle in their way. Reliance is placed on A.R. Khan v. B.N.

Boga PLD 1987 SC 107 as the petitioners are out of possession for the last about more than 50 years. She has not prayed for relief of possession and hence the suit is not maintainable in the present form. The learned counsel for the petitioners stressed that point, that boils down for the determination in the case who is the last male owner of the property whether Lakhu or Pheri and Masso. This question has not been determined by the Courts below.

7. On the other hand, the learned counsel for the respondents vehemently opposed the arguments of the learned counsel for the petitioners and supported the judgments and decrees of the learned Courts below contending that "even if the issue is not happily worded and correctly framed by the Court keeping in view the pleadings of the parties - Parties, throughout trial were fully cognizant of issue which really arose out of pleadings of the parties and they had adduced their evidence in respect thereof. No prejudice, held was caused to any of the parties by failure of Court to frame a proper issue in suit arising out of pleadings of parties. He relied on the cases of Mst. Sughra Bibi alias Mehran Bibi v. Asghar Khan and another 1988 SCMR 4; Mst.

Noor Jehan v. Muhammad Rafique and others 1995 CLC 43. He further contended that it is not only the function of the Court but it was the duty of the parties to point out to the Court for framing of proper issues left by the Court or through an application for framing of additional issues. He relied on the case of Hakim Ali v. Din Muhammad 1994 CLC 879. He further contended that while instituting the suit the minors were represented through guardian ad litem and an application for the appointment of the same was also filed and this objection was raised by the petitioners before the First Appellate Court. When the defendants have filed their written statement, the minors were represented through guardian ad litem and memo, of appeal was also shown that the minors were represented through guardian ad litem. Learned counsel further argued that from the record it reveals that the guardian of the minors was appointed. If formal order is not passed by the Court for the appointment of the guardian, it will cause no prejudice to the parties. He relied on the case of Nadeem Shahid and 2 others v. Muhammad Sharif and another PLD 1986 Lah. 373. He added that the plaintiffs have alleged in the plaint for the cancellation of the entries made in the record of rights against the plaintiffs and the plaintiffs have prayed for the same. So far as the relief of possession is concerned, the petitioners being legal heirs become co-owners of the property and a co-owner need not to ask for the relief of possession.

Further submitted that Lakhu was the last male owner of the property in dispute and the lower Court can determine him to be the sole owner. He further contended that the Honourable Supreme Court has already observed that the last male owner of the property is a person from whom the parties derive their rights. He continued that D.W.2 has admitted in his statement that:— rfW* * Learned counsel further submitted that only in Khosa Tribe customary law was prevailing in D.G. Khan and on all other Tribes Muslim Law of Inheritance was prevailing. He relied on a case of Sharoo v.

Fatima 1993 CLC 625. He further argued that Muslim Law of Inheritance was to be effected retrospectively and that in either way whether the Muslim Law of Inheritance or Customary Law of Inheritance is applicable. Lakhu is the last male owner of the property and plaintiff Mst. Taggi as legal heir (daughter) of Lakhu will get 1/2 share of his

inheritance. He relied on the case of *Mst. Zainab Bibi v. Muhammad Yousaf and 4 others* 1995 SCMR 868. Learned counsel lastly contended that there is no illegality in the impugned judgments and decrees of the Courts below.

8. I have heard the learned counsel for the parties and perused the record. The Court under Order 14, Rule 1, C.P.C. is under legal obligation to frame the issues from factual and legal controversies appearing on the pleadings of the parties, alleged or denied by them. It is the duty of the Judge to frame proper issue and where the parties are not satisfied, it is their duty to get proper issue framed. It has been objected by the learned counsel for the petitioners that the trial Court has not settled the issues in accordance with the objections raised in the pleadings and that issue No.3 was framed wrongly. The petitioners during trial had not objected to the framing of wrong issue or not framing the issue in accordance with the objections raised in the written statement. The petitioners were duty bound to apply to the trial Court for this purpose and in case of unsuccessful shall have challenged the order before the next higher Court or at least should raise this objection in their memorandum of appeal, while they challenging the judgment and decree of the trial Court. If they failed to raise the objection in the trial Court or to the appellate Court, their objection could not be raised at revisional stage. A reference can be made in this context to the cases of *Mir Afzal and 2 others v. Muhammad Raza Khan and 13 others* 1990 CLC 1617. In this case, it was observed by the Court that if the learned counsel for the parties had felt an handicap in the production of evidence on account of omission of improper framing of issues, it was equally their duty to have pointed out the defect. Moreover, the failure to do so would lead to presume that the counsel was satisfied with the issues.

9. The other aspect of the case is that mere omission to frame the issue is by itself not fatal where substantial justice has been done, for instance, where parties may have been aware of points requiring determination and (have led evidence and the matters have been decided by the Court, then, decision rendered by the Court would not be illegal. Reliance can be placed in this respect on the case of *Fazal Muhammad Bhatti v. Mst. Saeeda Akhtar and 2 others* 1993 SCMR 2018.

10. In the instant case, if the issue is not happily worded and correctly framed' or wrongly framed by the trial Court keeping in view of the pleadings of the parties the petitioners throughout trial of the case were fully cognizant of issue No.3 which had arisen out of the pleadings and the petitioners had adduced their evidence in respect thereof.

Therefore, no prejudice has been caused to them by not framing the proper issue. In this respect, a reference can be made to the cases of *Mst. Sughran Bibi alias Mehran Bibi* (supra), *Mehr Din v. Dr. Bashir Ahmad Khan and 2 others* 1985 SCMR 1 and *Ahmad Khan v. Malik Fazal Dad* 1983 CLC 74.

11. So far as the objection of the learned counsel that the petitioners were not given chance to produce the evidence on the issue that whether Taggi plaintiff was daughter of Lakhu is concerned, it is pertinent to mention here that Jammo D.W.2, one of the defendants/petitioners had admitted in his statement in cross-examination that Taggi plaintiff was daughter of Lakhu. The portion of the statement of D.W.2 is reproduced as under:-- After the above statement of D.W.2, no further evidence was required. Therefore, the contentions of the learned counsel for the petitioners relating to the non-framing of

proper issue or wrong framing of issue No.3 are of no consequence.

12. As to the objection of the learned counsel for the petitioners that the suit is liable to be dismissed for non-description of the suit property, it is suffice to observe, that Khata numbers of the property in dispute have been given in the plaint.

13. The Customary Law when it was prevailing in the Punjab differed from place to place and tribe to tribe. The plaintiff Mst.

Taggi who died during trial of the suit claimed herself to be Balooch Khalol. Therefore, the parties were Balooch Khalol. The petitioners have not denied this fact specifically that they were not Balooch Khalol. It was incumbent on the petitioners to establish on record that a customary law was applicable to their tribe and the daughter was deprived of the inheritance of her father. They have produced a copy of Riwayat-e-Aam as Exh.D.I in support of their version. From plain reading of this document, it reveals that this was pertaining to Tamman Khosa Balooch, while the parties are not Khosas. This document Exh.D.I is not concerned with the Khalol Balooch. It was also the duty of the petitioners to produce the evidence to the effect that the Khalol is one of the Branch of Khosa Tribe. No such evidence has been proved. The petitioners have been miserably failed to establish that any custom was prevailing in their Tribe Khalol Balooch, where, the daughters were declared not entitled for the inheritance of the father.

14. The last male holder of the property in dispute was Lakhu whose property devolved on Pheri and Masso, his brothers. The learned counsel for the petitioners argued that Pheri and Masso were the last male holder of the property and not the Lakhu and they would be considered the full owner of the property under section 2-A of West Pakistan Muslim Personal Law (Shariat Act) Amendment Ordinance, 1983. The question that boils down for determination is whether Lakhu or Masso and Pheri were the last male holder of the property.

15. Section 2-A of the West Pakistan Muslim Personal Laws (Shariat Act) Amendment Ordinance, 1983, has enumerated that, where before the commencement of Punjab Muslim Personal Law Shariat Application Act, 1948, a male heir had acquired any agricultural land under custom from the person, who at the time of such acquisition was a Muslim:- He shall be deemed to have become, upon such acquisition, an absolute owner of such land, as if such land had devolved on him under Muslim Personal Law (Shariat Act) Amendment Ordinance, 1983. Firstly, Lakhu had not acquired the land under custom from any person. There is no such evidence on the record that the deceased Lakhu had acquired the land under any custom. He was already full owner of the land. Secondly, the matter in issue is of his inheritance and not of Pheri and Masso. Thirdly, when the inheritance was opened, Pheri and Masso were alive at the time of enforcement of Punjab Muslim Personal Laws Shariat Application Act, 1948. The word "deceased" is used for determination of dispute and the deceased in the instant case was Lakhu. Therefore, the last male holder of the property was Lakhu predecessor-in-interest of the party. Furthermore, the petitioners have not been able to prove on record that the inheritance in Khalol Balooch was governed under custom. Reliance can be placed on Abdul Ghafoor and others v.

Muhammad Shafi and others PLD 1985 SC 407. The contention of the learned counsel for

the petitioners that Pheri and Masso were the last male holder of the property is misconceived and repelled.

16. Learned counsel for the petitioners objected that the minors were not sued through the guardian ad litem and the decree passed against them is not binding upon them. Alongwith the minors there were other defendants who contested the suit seriously and defended the rights acquired by them from their predecessor in suit property and thereby rights of minor were sufficiently safeguarded. Substantial justice has already been done in the case. A reference can be made in this context on the case of Kameen Khan and 15 others v. Ghazi Marjan and 9 others 1990 MLD 1865. The Court would be bound to appoint guardian ad litem of minor in suit having brought against them. The object of such appointment is that minor would have proper representation in suit as Court is to appoint a proper person to be his guardian irregularity if any as to omission to pass final order to appoint guardian ad litem of the minor would stand covered by section 99 of C.P.C. which has envisaged that no decree shall be reversed or substantially varied nor any case shall be remanded on account of any error, defect or irregularity in any proceedings in the suit not effecting the merit of the case or the jurisdiction of the case. Reliance can be placed on the cases of Nadeem Shahid and 2 others v. Muhammad Sharif and another PLD 1986 Lah. 373 and Muhammad Ismail and others v. Muhammad Sarwar and others 1980 SCMR 254.

17. The plaintiff being legal heir of deceased Lakhu is co-sharer and coowner of the property in case of decree of the suit her name would be entered in the column of ownership of the suit land and the Revenue Record would be corrected accordingly and all other subsequent mutations sanctioned after the mutation of inheritance of deceased Lakhu be reviewed automatically. If the plaintiff has not prayed for declaring some mutations as illegal has not prayed for relief of possession would not be fatal to the suit of the plaintiff. The suit in the present form is rightly maintainable.

18. As to the contention of the learned counsel for the petitioners that the suit has been filed after the expiry of a period of 52 years and Articles 120 of the Limitation Act has provided limitation for suit for declaration six years only. The case of the plaintiff is that she came to know about the adverse entries in the Revenue Record about a years before the institution of the suit and secondly a month before when the petitioners/defendants had denied the right of plaintiff and refused to pay the share of Battai. The right of the plaintiff in the inheritance of her father is the continuous right and under Article 120 of the Limitation Act, the time for filing the suit for declaration will start when the right to sue accrued to the plaintiff, while her right was denied by the defendants/petitioners and they refused to pay the Battai. There can be no right to sue until there is an accrual of right asserted in the suit and it's infringement or it's clear unequivocal threat to infringe that right by the defendant against whom the suit is instituted. The plaintiff had prayed for declaring illegal the adverse entries in record of right that the defendants have permanently occupied the rights in the suit land by making adverse entries in the record of rights. The entries in the record of rights afforded fresh cause of action to the plaintiffs and adverse entries in the record of rights even if allowed to remain unchallenged does not necessarily extinguished the rights of the party against whom such entry had been made. Every entry in the record of rights is denial of right of plaintiff. Plaintiff has the option to file suit for declaration on every denial of her rights.

Every denial of right would furnish the plaintiff a fresh cause of action. Reliance can be placed in this respect to the case of Wali and 10 others v. Akbar and 5 others 1995 SCMR 284, Atta Muhammad v. Nasiruddin PLD 1993 Pesh. 127 and Muhammad Yousaf v. Noor Din and others 1993 MLD 763.

19. The plaintiff Taggi was deprived of inheritance of her father vide mutation of inheritance which was not legal and proper and entries structure built on it would crumble and limitation would not be hurdle in the way of the plaintiff. Plaintiff in such case is presumed to be a co-sharer being the legal heir of Lakhu deceased and shall be presumed to be in possession of suit property alongwith other co-owners. In this context, a reference can be placed on the case of Mst. Salabat Bibi and 3 others v. Gul Muhammad and 13 others PLD 1996 Pesh. 1. Therefore, I have no hesitation in observing that the suit has been filed within limitation.' In view of the above, this contention of the learned counsel for the petitioners that the suit is barred by time is also repelled.

20. Both the Courts below have given concurrent findings that the deceased Lakhu was the last male holder of the property and the plaintiff is entitled to 1/2 share of the property as legal heir (daughter) of the deceased Lakhu. The Courts below have committed no illegalities in the impugned judgments and decrees which are unexceptionable and call for no interference.

21. For the foregoing reasons, there is no force in the revision petition which is dismissed.

Q.M.H./M.A.K./K-17/L Revision dismissed.