

Journal

2005 YLR 2882

Court

LAHORE HIGH COURT

Date

2005-05-05

Appeal No.

C. R. NO. 331 OF 2003

Judge

MUHAMMAD JEHANGIR ARSHAD

Parties

FAQIR BAKHSH AND OTHERS—APPELLANTS VERSUS JINDWADDA AND OTHERS—RESPONDENTS

Lawyers

CH. MUHAMMAD AKHTAR KHAN FOR APPELLANTS. JAWAD-UL-HASSAN FOR RESPONDENTS NOS. 1 TO 6.

Statutes

CIVIL PROCEDURE CODE (V OF 1908) - O.XXIII, R.I SPECIFIC RELIEF ACT (I OF 1877) - S. 42
ISLAMIC LAW

Judgment

MUHAMMAD JEHANGIR ARSHAD, J.—The petitioners Faqir Bakhsh, etc. are successors in interest of Ameer Bakhsh son of Fazal Khan whereas the respondents are successors in interest of Mst. Kundan daughter of Fazal Khan, meaning thereby that Fazal Khan was predecessor-in-interest of both the parties, whose property is in dispute in this Civil Revision.

2. Succinctly the facts relevant for the disposal of this Civil Revision are that on the death of one Bahadur Khan, the agricultural land left by him in Mouza Wari Azeem Khan, Tehsil Rahim Yar Khan was mutated in favour of his three sons namely Fazal Khan, Karim Bakhsh and Allah Ditta. Karim Bakhsh and Allah Ditta died issueless in the life time of Fazal Khan, with the result that property succeeded by Karim Bakhsh and Allah Ditta from their father, also devolved upon Fazal Khan, the only legal heir being their real brother, as such Fazal Khan became the exclusive owner of the entire holding left by Bahadur , Khan. However, when Fazal Khan died his son namely Amir Bakhsh predecessor-in-interest of the present petitioners claiming himself to be the only heir of Fazal Khan got mutated the entire land in his favour through Mutation No.797 sanctioned on 24-9-1925, notwithstanding the fact that Mst. Kundan Mai the predecessor-in-interest of the present respondents being daughter of Fazal Khan was also entitled to inherit the said property along with Amir Bakhsh deceased. The present respondents claiming themselves as heirs of Mst. Kundan Mai filed a suit in the year 1998 seeking a declaration that they being heirs of Mst.

Kundan Mai were entitled to inherit the property left by Fazal Khan to the extent of 1/3rd share and that Mutation No. 797 dated 24-9-1925 which was sanctioned exclusively in favour of Amir Bakhsh his son by excluding Mst. Kundan his daughter and all the subsequent mutations sanctioned in favour of present petitioners from time to time were illegal, void, against facts and ineffective upon their rights, hence, liable to be cancelled and for permanent injunction restraining the petitioners from forcibly interfering with possession and ownership rights of the respondents and also alienating the share of the respondents in the suit property. It was alleged in para-7 of the plaint that before the death of Mst. Kundan Mai firstly the predecessor-in-interest of the petitioners namely Ameer Bakhsh and after his death his heirs present petitioners have been paying due share of produce to Mst. Kundan Mai by keeping her ignorant about the wrongful and incorrect attestation of mutation to her exclusion and also entries in the Revenue Record showing the petitioners as exclusive owner of the suit-land. It was also alleged in the plaint that the family of the parties since the death of Bahadur Khan was governed by Sharia in the matter of inheritance and the attestation of above-mentioned mutation excluding Mst. Kundan Mai on the basis of any alleged custom was without any legal justification, as the family of the parties was never governed by any custom nor there existed any alleged custom in their family, whereby the female-folk were excluded from inheritance of their father. The suit was contested by the present petitioners who besides denying the claim of the respondents on merits, took the plea that respondents were precluded from filing the present suit in view of bar contained in Order XXIII, rule 1, C.P.C. as on the similar facts and circumstances a suit filed by the respondents was withdrawn unconditionally and without permission to file a fresh one. It was further pleaded that the suit was time-barred; respondents had no cause of action; they were estopped from filing the suit; the respondents being not in possession the suit was not maintainable in

its present form and that the respondents had not come to the Court with clean hands, etc.

3. In view of divergent and contesting pleadings of the parties, the learned trial Court framed the following:- (Though these issues are neither properly worded nor give any sense yet as the parties were fully aware of the controversy and they led evidence knowing the material proposition of law and facts within the meaning of Order XIV, C.P.C, hence these issues as framed, are kept intact and need not be either amended or corrected after passage of about six years i.e. 11-11-1999 when these were framed).

ISSUES: (1) Whether the Mutations Nos.797 and 798 and subsequent mutations are sanctioned on the basis of false recording thereon, hence, the mutations in question and liable to be illegal and liable to be delivered up? OPP (2) Whether the suit is not proceedable due to earlier withdrawal of suit unconditionally? OPD.

Whether the suit is barred by limitation? OPD.

(4) Whether the suit is not cause of action? (5) Whether the plaintiffs are estopped by their words and conduct to file the suit? OPD.

(6) Whether the suit is not proceedable for the plaintiffs are out of physically possession? OPD.

(7) Whether the suit is bad for nonjoinder and misjoinder? OPD.

(8) Relief.

The respondents in their evidence produced Pir Bakhsh P.W.-2 and Jind Wadda one of the respondents/plaintiffs appeared as his own witness P.W.-1 and they closed their evidence by tendering documentary evidence Exh.P-1 to Exh.P-19. As against that Muhammad Bakhsh one of the petitioners/defendants appeared as D.W.-2 and closed their evidence by tendering documents Exh.D-1 to Exh.D-4. On the conclusion of the trial, the learned trial Court vide judgment and decree dated 30-11-2002 decreed the suit in favour of the respondents/plaintiffs holding that family of the parties was governed under Muslim Law and as such mutations challenged in this suit sanctioned exclusively in favour of Ameer Bakhsh predecessor-in-interest of the petitioners and excluding Mst. Kundan from inheritance of her father Fazal Khan, were void and ineffective upon the rights of the respondents/plaintiffs. Resultantly Issue No.1 was answered in favour of respondents/plaintiffs against the petitioners/defendants. The learned trial Court also decided the remaining issues against the present petitioners/defendants. Feeling aggrieved against the said judgment and decree of the learned trial Court the petitioners/defendants went in appeal which was heard by a learned Additional District Judge, Rahim Yar Khan and vide judgment and decree dated 30-6-2003 while maintaining the findings of the learned trial Court on all the issues, dismissed the same.

4. Through this present civil revision both the judgments and decrees of the learned Courts below have been challenged on the following grounds:- (i) That the respondents/plaintiffs were precluded from filing the A present suit in view of the bar contained in Order XXIII, rule 1, C.P.C, as earlier on the same facts and circumstances the

respondents had filed a suit vide plaint dated 29-10-1997 (Exh.D/1) and withdrew the same vide order dated 27-1-1999 (Exh.D/2). Reliance has been placed on the case of "Karamat Ali Khan and another v. Sardar Ali and 29 others" (PLD 2001 Supreme Court (AJ&K) 30); (ii) That the suit filed by the respondents challenging the mutations sanctioned way back in 1925 was hopelessly barred by time; and (iii) That mutations in favour of Ameer Bakhsh predecessor-in-interest of the petitioners having been sanctioned under the custom in vogue in the family excluding womenfolk from inheritance of their father, hence, Mst. Kundan was rightly excluded from inheritance of Fazal Khan and the present respondents being heirs were estopped from challenging the validity of the said mutation on the touchstone of Shariah being rule of inheritance in the family.

5. On the other hand Mr. Jawad ul Hassan, Advocate appearing on preadmission notice on behalf of respondents/plaintiffs has contended: (i) That the suit filed by the respondents/plaintiffs was not barred by Order XXIII, rule 1, C.P.C as the same was filed during the pendency of earlier suit which was withdrawn after the institution of the present suit and as declared by the Hon'ble Supreme Court of Pakistan in the case of "Ghulam Nabi and others v. Seth Muhammad Yaqoob and others" g (PLD 1983 Supreme Court 344), the present suit was not barred nor hit by the provisions of Order XXIII, rule 1, C.P.C.

(ii) That it has been held in unequivocal terms by the Hon'ble Supreme Court in the case of "Ghulam Ali and 2 others v. Mst.

Ghulam Sarwar Naqvi" (PLD 1990 SC 1) in the matters of inheritance the questions of limitation, maintainability and estoppel, etc.

do not arise and that in case of wrong distribution of inheritance there is continuous wrong and suit can be filed at any time even after the last attack and since mutation creates no rights, hence, the suit cannot be considered as time-barred on mere attestation of mutation, especially when the same has been sanctioned in violation of law of inheritance under the Muslim Law and that as the respondents have alleged in the plaint as well as in their evidence that Ameer Bakhsh in his life time and after his death his heirs had been paying the share of produce to Mst. Kundan, hence, no question of limitation arose at all; and (iii) That petitioners have produced no evidence to prove that family of the parties was governed by custom in the matter of inheritance and that there was in fact a custom in vogue in the family whereby womenfolk of the family were excluded from inheritance of their father, which is ' a condition precedent for claiming inheritance on the score of custom. Learned counsel further contends that in view of the pronouncement of Hon'ble Supreme Court in the case "The Federation of Pakistan through Secretary Law and Parliamentary Affairs, Islamabad v. Muhammad Ishaque and another" (PLD 1983 Supreme Court 273) declaring custom as repugnant to the injunctions of Islam, the custom was no more a rule of inheritance, hence; neither the custom can be pleaded nor be used as defence in the matters of inheritance. Reliance is placed on the case of "Abdul Ghafoor and others v.

Muhammad Shafi and others" (PLD 1985 Supreme Court . 407) whereby all the decrees passed by any Court in Pakistan recognizing the custom as rule of inheritance, were abated and the matters of inheritance were ordered to be decided according to Sharia.

6. I have appraised the evidence and have also considered the arguments advanced by learned counsel for the both the parties.

7. At the very outset the question whether the suit filed by the respondent was barred by Order XXIII, rule 1, C.P.C. required to be answered in the light of the evidence as well as the law on the subject. This being a mixed question of law and fact as is evidence from Issue No.2 which runs as under:- " Whether the suit is not proceed-able due to earlier withdrawal of the suit unconditionally? OPD." This issue may be decided with reference to the evidence produced by the petitioners who in order to discharge onus under this issue have produced copy of earlier plaint titled "Jind Wadda v. Faiz Bakhsh" Exh.D-1 and copy of the order passed in that suit Exh.D-2. A perusal of both these documents indicates that respondents earlier filed a similar suit on 29-10-1997 and the same was unconditionally withdrawn on 27-1-1999 vide Exh. D-2, whereas the present suit was filed on 12- 12-1998 i.e. during the pendency of the earlier suit. The learned counsel for the petitioner by placing reliance on the case "Karamat Ali Khan and another v. Sardar Ali and 29 others" (PLD 2001 Supreme Court (AJ&K) 30) has argued that since the earlier suit was withdrawn unconditionally hence, the present suit was not maintainable even by its institution during pendency of the earlier suit in view of the bar contained in sub-rule (3) to rule 1 of Order XXIII, C.P.C. On the other hand, learned counsel for the respondents has argued that despite the abovementioned judgment of the Hon'ble Supreme Court of AJ&K, the judgment rendered by the Hon'ble Supreme of Pakistan in the case "Ghulam Nabi and others v. Seth Muhammad Yaqoob and others" (PLD 1983 Supreme Court 344) holding that where fresh suit has already been instituted and pending at the time of withdrawal of the earlier suit, fresh suit was neither hit nor barred by Order XXIII, rule 1, C.P.C, still holding the field and as such the two Courts below rightly answered the Issue No. 2 against the petitioners.

8. Though the rule declared by the Hon'ble Supreme Court of AJ&K is in favour of petitioners' case yet in the presence of law declared by the Hon'ble Supreme Court of Pakistan which is binding on all the Courts under Article 189 of the Constitution and that too fully applicable to the facts and circumstances of the present case, it is not possible for this Court to follow the law declared by the Hon'ble Supreme Court of AJ&K. Resultantly, I am constrained to hold that the two Courts below have committed no illegality or irregularity while deciding Issue No. 2 against the petitioners.

9. It has next been argued by the learned counsel for the petitioners that suit filed by the respondents was barred by limitation having challenged the mutations in the year 1998 which were sanctioned in 1925. Prima facie the contention of the learned counsel may be correct yet this being suit based on inheritance of a father claimed by a daughter against her brother alleging that brother having got the mutation attested exclusively in his favour by excluding her from inheritance of her father on the basis of so-called ground of custom which was neither in vogue in the family nor having been proved by the petitioner in his evidence, therefore, the question of limitation does not arise at all because it is an established principle of Muslim Law that on the death of a person, his inheritance automatically devolves on his legal heirs and mere fact that one of the legal heirs has been in continuous possession of the property even exclusively neither makes him exclusive owner in possession nor oust the entitlement of the other legal heirs under the recognized principle "possession of one heir enures on behalf of all the legal heirs"

and in such-like matters suit by one of the heirs can be filed any time even after the last attack of denial by the person in possession and such suit can neither be defended nor be defeated on the ground of limitation, estoppel, maintainability, etc. If any authority is required "Ghulam Ali and 2 others v Mst. Ghulam Sarwar Naqvi" (PLD 1990 SC 1) is an answer to the same and by applying the rule of law laid down in the cited judgment of the Hon'ble Supreme Court of Pakistan, this Court is constrained to overrule the objection of the learned counsel for the petitioner reduced in Issues Nos.3 to 6 which not only have been correctly answered by the two Courts below against the petitioner but also reflect the true proposition of law on the subject.

10. Finally the question requiring determination is whether the petitioners are right to claim that as their family was governed by the custom which excluded the femalefolk of the family from inheritance of their father. Hence, Mst. Kundun was rightly excluded from the inheritance of her father namely Fazil Khan this question has two legs; firstly whether as a matter of fact there did exist any custom in the family and petitioner have successfully proved the existence of said custom? And secondly the custom can anymore be based a rule of inheritance either as a claim in a suit or defence after the judgment of the Hon'ble Supreme Court of Pakistan given in Ishaq's case (PLD 1983 Supreme Court 273) under Article 203-D of Constitution of Islamic Republic of Pakistan, 1973 declaring the custom as repugnant to Injunctions of Islam as laid down in Qur'an and Sunnah. So far as the first leg of the question is concerned, except oral assertion by the petitioners no documentary evidence in the form of "Shart Wajib- ul-Arz" or mutation attested on the basis of any such custom showing precedents about existence of such custom in the family, has been produced. It is an established principle of law that custom as a rule of inheritance be proved through a very strong and cogent evidence and mere statement of a person unconcerned with the family can neither be based nor accepted to hold the existence of such custom. As there is no such evidence having been produced by the petitioners, the only conclusion which can be drawn by the Court is that the parties were governed by Shariah in the matter of inheritance and the same is applicable to the facts and circumstances of the present case.

D 11. Lastly after the pronouncement of Ishaq's case, supra, the Hon'ble Supreme Court of Pakistan in the case of "Abdul Ghafoor and others v. Muhammad Shafi and others" (PLD 1985 Supreme Court 407) sealed the fate of custom being rule of inheritance by abating all the appeals, revisions, etc. pending before the Hon'ble Supreme Court wherein either decree based on custom had been passed and was sought to be confirmed or prayer for passing a decree on the basis of custom had been made on the touchstone of abovementioned judgment in the Ishaq's case. I have therefore, no doubt in my mind that the abovementioned judgment of the Hon'ble Supreme Court of Pakistan is on all force applicable to the facts and circumstances of the present case and the two Courts below have correctly applied the same by decreeing the suit of the respondents and dismissing the appeal of the petitioners.

12. For what has been discussed above, I find no force in this Civil Revision and same is hereby dismissed with no order as to costs.

