

P L D 2025 Peshawar 110

Before Wiqar Ahmad, J

Mian FAZL-E-KAREEM and others---Petitioners

Versus

KHAN MUHAMMAD and others ---Respondents

Civil Revision No. 556-P of 2016, decided on 19th October, 2023.

(a) Qanun-e-Shahadat (10 of 1984)---

JUDGMENT WIQAR AHMAD, J.---Brief facts of the case are that plaintiffs/petitioners filed a suit for declaration as well as perpetual injunction against respondents to the effect that they were owners of 15/16 shares in the property in Khata Nos.256/784- 785, 260/294 Khasras Nos.881, 884, 867, 877, 3249, 889-890, 891 measuring 86 Kanals situated at Mauza Tehkal Bala No.2 and entry of 4/16 shares in the revenue record in favour of defendants Nos.1 to 13 was illegal, wrong and ineffective upon the rights of plaintiffs/petitioners. The said property was claimed to be owned by Gul Mian who had four sons, namely, Alam Gul, Mir Muhammad, Gul Ahmad and Ayub. Plaintiffs/petitioners were the sons of Alam Gul, Mir Muhammad and Gul Ahmad whereas Ayub died issueless due to which his widow Mst.Bibi Hawa became owner of 1/4 shares in his legacy and the remaining property had devolved upon the plaintiffs/petitioners. The defendants/ respondents, (being brothers and sisters of Mst.Bibi Hawa) were alleged to have transferred the said property in their name, in collusion with the revenue staff which was sought to be illegal and ineffective upon their right. The defendants were statedly asked time and again to acknowledge rights of plaintiffs (and correct the revenue record) but they flatly refused to accede to their request which necessitated filing of instant suit.

2. Defendants/respondents Nos. 1 to 7, 10 and 12 contested the suit by filing written statement wherein they denied claim of petitioners/ plaintiffs. Plaintiffs/petitioners also filed rejoinder for rebutting assertions in the written statement. Conflicting stances taken by the parties resulted in framing of as many as 11 issues, excluding relief. Plaintiffs in support of their case, produced 4 witnesses. Fazal Maula ADK was examined as PW-1 who produced Misl-e-Haqiyat for the year 1929-30 (Ex.PW.1/1), Shajra Nasab (Ex.PW.1/2), Riaz Ahmad Patwari Halqa Tehkal appeared as PW2 who produced Shajra-Nasab of parties in the year 1929-30 as Ex.PW.2/1 and brought on record Mutation No.2844 attested in 1983 as Ex.PW.2/23. Faqir Hussain Patwari PDA was examined as PW-3 who produced Qabzul Wasool (Ex.PW.3/1) vide which compensation had been paid by PDA for acquired 16 Marla of suit property and this witness had further stated that the plaintiffs had not raised any objection on payment of compensation to defendants/ respondents. Last witness of plaintiffs' side was Fazal Karim, plaintiff No.1, who appeared as attorney of rest of plaintiffs and in his cross-examination he had admitted that the suit property was still in possession of plaintiffs. In rebuttal, defendants produced special attorney Mian Fazal Amin as DW.1 who had stated that deceased Ayub, husband of Mst.Hawa Bibi, had transferred his whole property in favour of his wife during his life time and due to this fact and that the impugned mutation had correctly been attested in favour of defendants. The learned civil court after recording pro and contra evidence and hearing arguments of learned counsel for parties, dismissed the suit, vide judgment and decree dated 17.3.2012. Appeal filed by plaintiffs/petitioners

against judgment and decree of the court of first instance also met same fate and was dismissed, vide judgment and decree dated 2.6.2016. Now, petitioners/ plaintiffs have filed instant Revision Petition with following prayer:-- "It is, therefore, humbly prayed that on acceptance of this revision petition, the impugned orders and judgments and decrees dated 2.6.2016 and 17.3.2012 of both the learned courts below, may very kindly be set aside and the suit of the petitioners may very kindly be decreed as prayed for with cost throughout."

3. Arguments heard and record perused.

4. Perusal of record reveals that it was an admitted fact between the parties that property in dispute had originally been owned by Gul Mian who was having four sons namely Alam Gul, Mir Muhammad, Gul Muhammad and Ayub. It was also admitted fact that property had been devolved upon four brothers to the extent of 1/4th each. The disputed part of controversy was relating to legal capacity in which Mst. Bibi Hawa had been entered in the revenue record to be owner in possession. Bibi Hawa was widow of Muhammad Ayub and she had been co-owning property in dispute to the extent of 1/4th share along with Alam Gul, Mir Ahmad and Gul Ahmad sons of Gul Mian. Excerpts of record of rights for the year 1929-30 was brought in evidence as Ex.PW 2/2, where same share of Muhammad Ayub has been shown in the name of Bibi Hawa with the addition, "widow of Muhammad Ayub". This is also not disputed that the property had been acquired by Bibi Hawa through Muhammad Ayub, her deceased husband. Similar entry of Bibi Hawa has been running in the revenue record till death of Bibi Hawa. Her inheritance mutation bearing No.2844 was attested in the revenue estate Tehkal Bala on 5.6.1983 through which the property from name of Bibi Hawa had been transferred in favour of her legal heirs. Contest in suit in hand was between said L.Rs. of Bibi Hawa and petitioners (L.Rs. of Muhammad Ayub), who had been claiming their rights in respect of legacy of Muhammad Ayub.

5. It was case of petitioners/plaintiffs before the civil court below that Bibi Hawa had been inserted in revenue record as limited owner at the time of her first entry in the revenue record (as per Riway of the time) and under the law of Riway the property was supposed to have been reverted to other male L.Rs. of Muhammad Ayub. The entry of Bibi Hawa as full owner continued subsequently after promulgation of Khyber Pakhtunkhwa (NWFP) Muslim Personal Law (Shariat) Application Act, 1935 as well as West Pakistan Muslim Personal Law (Shariat) Application Act, 1962, which was wrong to the extent of showing Bibi Hawa owner of entire property owned by Ayub in his life time. According to them Bibi Hawa being widow of Muhammad Ayub, was entitled to extent of her Shari share i.e. 1/8th in the estate left by Muhammad Ayub but her name had wrongly been running in the revenue record to the extent of 1/4 share in the entire property in which Muhammad Ayub (late) had himself been owner to the extent of 1/4th share.

6. The two Courts below have no doubt concurrently held that plaintiffs had not been able to prove their case but findings of two Courts below in this respect has not been arising from due appreciation of evidence available on record. Most of evidence have been misread by both the Courts below. The appellate Court had rather not applied its mind to facts of case and have disposed of appeal in a very cursory and slipshod manner. The evidence has entirely been misread by both the Courts below.

7. In Jamabandi for the year 1929-30 Bibi Hawa has been shown widow of Ayub and owner to same extent to which Ayub has been owner in his life time. It is also an established fact that Ayub had died in the period of Riway i.e., before Promulgation of Khyber Pakhtunkhwa (NWFP) Muslim Personal Law (Shariat) Application Act, 1935. There is nothing on record from which it could be inferred, how had Bibi Hawa acquired title of entire property of Muhammad Ayub except the explanation that she had been shown as co-owner in the capacity of widow of deceased Muhammad Ayub. In the prevailing custom of society at the relevant time widow used to be having property of her deceased husband but as a limited owner. On her death property used to revert back to male members among the legal heirs of her

deceased husband. Hon'ble Supreme Court of Pakistan while giving its judgment in the case of Maqbool Ahmad and others v. Fazal-i-Haq and others reported as 2012 SCMR 917 has dealt with the case of limited owner namely Mst. Lal Sain in the manner that her legacy was held to revert back to legal heirs of her deceased husband and then same was to be distributed according to law of Sharia in the legal heirs of her husband and not those of her legal heirs exclusively. Relevant observation recorded in said judgment are also reproduced hereunder for ready reference:-- "3. Upto this stage, things were shaping smoothly, however, after the death of Mst. Lal Sain on 5-3- 1962, dispute arose between the parties i.e. legal heirs of Rehmat Ali and legal heirs of Mst. Lal Sain, when her estate was mutated in favour of the legal heirs of late Rehmat Ali as well as her own legal heirs, but only to the extent of her share as widow of deceased Rehmat Ali. These mutations were challenged by the legal heirs of Mst. Lal Sain on the plea that she was full owner of land and not its limited owner, therefore, other legal heirs of Rehmat Ali were excluded and not entitled to get any share out of it. Collector Sahiwal, vide his order dated 23- 4-1968, accepted such claim of the legal heirs of Mst. Lal Sain and accordingly set aside earlier mutation with the direction to mutate the land only in favour of her own legal heirs i.e. of Mst. Lal Sain, treating her to be its full owner. The order of Collector was challenged by the respondents (legal heirs of Rehmat Ali) before the Additional Settlement Commissioner, Multan, who, vide order dated 24.6.1969 dismissed their appeal. Revision petition filed by them before the Member, Board of Revenue, Punjab was also dismissed, vide order dated 24-9-1970. It will be pertinent to mention here that in both these orders/judgments of the appellate Court and the revisional Court against the legal heirs of Rehmat Ali, categorical observations were made about the pendency of litigation on the same legal issue regarding the status of legal heirs of a widow acquiring the estate of her husband under the custom as limited owner, which was at that time sub judice before the apex Court. The said judgment of the apex Court was announced on 23-5-1971, in the case of Additional Settlement Commissioner (Land), Sargoda v. Muhammad Shafi (PLD 1971 SC 791) and other connected petitions involving similar controversy, wherein, precisely, it was held that a female, who was recorded in special jamabandis as limited owner under the custom, when allotted property in Pakistan in lieu of such claim, even when such property was permanently settled in her name, would remain its limited owner, therefore, on her demise, such property will revert and devolve on the legal heirs of the last male owner of property in India and not on her own heirs alone. In addition to it, on 31-3-1975, Act No.XXVI of the Punjab Muslim Personal Law (Shariat) Application (Removal of Difficulties) 1975, was also promulgated to the same effect, under which it was further provided that the persons effected by mutations sanctioned in favour of widows of the deceased land owners, who have been declared as limited owners by the apex Court, could move the revenue officer within a period of one year to seek review of these mutations and to get decided inheritance in favour of the legal heirs of last male land holder, in accordance with Muslim Personal (Shariat) Law. This Act was given retrospective effect from 15-3-1948. Further ahead in said judgment it was also held:--

8. In reply to the above submissions of the learned Senior Advocate Supreme Courts for the appellants and some of the respondents, Mr. Gulzarin Kiayani, learned Senior Advocate Supreme Court for other respondents contended that a careful reading of judgment of the apex Court in the case of Additional Settlement Commissioner (supra) clinches the whole controversy involved in these appeals in favour of the respondents/legal heirs of Rehmat Ali, inasmuch as, Mst. Lal Sain could not acquire under the custom any better status than a limited owner, to the extent of 1/3rd share. He went one step further in his arguments and contended that as a matter of fact, in the presence of two sons of late Rehmat Ali, which is an undisputed position, Mst. Lal Sain could not claim her status in the 1/3rd share of the land even as its limited owner, but only as maintenance holder, which legal position will totally disentitle the legal heirs of Mst. Lal Sain to claim any share in her estate in any capacity, as the whole land in her khata, in such eventuality, will revert and devolve solely on the heirs of the last male owner of lands left in India i.e. Rehmat Ali" Further reliance in this respect may also be placed on the judgment of Hon'ble Supreme Court of Pakistan in the case of Additional Settlement Commissioner (Land), Sargodha v. Muhammad Shafi and others reported as PLD 1971 SC 791 and Fayyaz Hussain and others v. Haji Jan Muhammad and others reported as 2018 SCMR 698.

8. The fact that Bibi Hawa had acquired title in respect of whole share of her deceased husband, either by way of purchase or by way of dower, lied on defendant/respondent but they could not produce any reliable evidence in this respect. From available record only one inference could have been drawn by Court below, which was that Bibi Hawa had acquired rights in the property from her husband on his demise but as a limited owner at that time. On Promulgation of Khyber Pakhtunkhwa (NWFP) Muslim Personal Law (Shariat) Application Act 1935, Bibi Hawa was living therefore she would be deemed to have become full owner of property but to the extent of her right of inheritance as per Islamic Law in the estate left by her deceased husband Muhammad Ayub and rest of his property should have been devolved on other L.Rs. as per Islamic Sharia. It is admitted that Bibi Hawa and Ayub had not been survived by any son or daughter. This fact is also evident from impugned inheritance mutation. A custom having force of law need not be proved separately in each case but a Court may take judicial notice in accordance with Article 112(2) of Qanun-e-Shahadat Order, 1984. There was no doubt about prevailing customs in those days (also evident from the earlier referred judgment). On Promulgation of Khyber Pakhtunkhwa Muslim Personal Law (Shariat) Application Act, 1935 the property would be deemed to have been devolved on all the legal heirs of Ayub regardless of entries in the revenue record in the name of Bibi Hawa. Since Bibi Hawa had lived till late therefore, her inheritance mutation had been attested on 05.06.1983. Entire property of Muhammad Ayub running in the name of Bibi Hawa (his widow), had been transferred in favour of L.Rs. of Bibi Hawa deceased to the exclusion of other L.Rs. of Ayub deceased through impugned mutation. Entry and attestation of such mutation was not justified at all and same could not be justified by respondents either in written statement or in the course of evidence.

9. Regarding existence of estoppel against the plaintiffs of the suit, both the courts below have relied on a fact that a part of property in dispute to the extent of 16 marlas had been acquired and when some of the respondents were receiving compensation thereof, Mian Fazal Karim (petitioner No.1) had identified them by signing the receipt/acquittance role on 05.08.2000. Said fact was found creating estoppel against petitioners and their suit was dismissed. This document has been brought on record as Ex. PW. 3/D-3. It was a simple receipt whereof one of the contesting respondents, i.e. Mian Shaukat Ali had received certain amount in respect of the acquired part of the property. In this respect, it is important that petitioners have not been denying title of the respondents, particularly the proportionate share to which they were entitled as legal heirs of Mst. Bibi Hawa. It was their case that Mst. Bibi Hawa was co-owner in the property in disputed but to the extent of her sharee share. It was also their case that legal heirs of Mst. Bibi Hawa would be entitled to the property owned by Mst. Bibi Hawa. The property in dispute had not been acquired as a whole but only part of that i.e. 16 Marlas had been acquired In such circumstances, if petitioner No.1 had not raised objection on receipt of compensation by the respondents, regarding acquired property, same fact could not be considered to be creating an estoppel against the petitioners. To said extent the property or compensation received by them may be adjusted according to their share in the property in dispute which was not denied by the petitioners in toto. The Plea of estoppel raised by learned counsel for contesting respondents was therefore not holding water.

10. So far as the second plea of respondents regarding limitation is concerned, it is important to be noted that physical possession of the property in dispute had remained with the petitioners. This fact has sufficient been proved in evidence. Khasra Girdawari have been brought on record as Ex.PW 2/18 and same was showing the property in dispute to be in possession of the owners as self cultivated property (Khud Kasht). It was true that in the column of ownership Mst. Hashmat Bibi has been shown to be owner to the extent of 1/4 share but it cannot be perceived that she had herself been cultivating the property. Naturally the three brothers of her deceased husband have been cultivating the same. In all the Jamabandis brought on record same position of self cultivation of the owners have been shown which was expressly indicating that the three brothers of the deceased husband of Mt. Hashmat Bibi, have been cultivating the property in dispute. Mian Fazal Karim, plaintiff No.1, while appearing as

PW.4, has also affirmed that the suit property was still in their possession. From the above discussion, it can safely be concluded that petitioners have been in continuous possession of the property in dispute. When they were in possession thereof, then mere wrong entries in the revenue record would be deemed to be refreshing cause of action with each repetition.

11. Another aspect of the case was that entries in the revenue record had been running in the name of Mst. Hashmat Bibi but there had not been any actual dispute regarding ownership of the property between Mst. Hashmat Bibi and brothers of her deceased husband throughout her life. There is no such evidence in this respect. Her inheritance mutation impugned mutation was entered and registered in the revenue record. The impugned mutation would also have been all right, had it been entered and registered to the extent of devolution of shari share of Mst. Hashmat Bibi in her legal heirs. It was not that the petitioners/plaintiffs were aggrieved of entry and attestation of inheritance mutation of Mst. Hashmat Bibi in favour of her legal heirs but they were in fact aggrieved of assigning them more than their due share. It appears that on the acquisition of property and asserting of ownership by the contesting respondents (L.Rs. of Hashmat Bibi) in respect of the property in dispute to the extent as mutated in their favour, (on dent of impugned mutation), that the petitioners/plaintiffs had found a real threat of invasion of their rights and in this respect the assertion in paras 3, 4 and 5 of the plaint were believable. Learned counsel for petitioners has placed reliance on judgment of this Court in the case of Feroz Khan and others v. Mir Azam and others (C.R. No. 1196-P/2010), but situation in said case has totally been different. In said case, the predecessors of the plaintiffs had not challenged wrong entries in the revenue record in their life time while in this case the petitioners were themselves adversely affected by the inheritance mutation entered and attested in the year, 1983. Petitioners herein have themselves brought the suit. Additionally they have also been in continuous possession of the property in dispute and therefore, each successive Jamabandi may be dealt to be renewing their cause of action, as per judgment of the Hon'ble Supreme Court of Pakistan in the case of Salamat Ali v. Muhammad Din reported as PLD 2022 Supreme Court 353. Before acquisition of land and receipt of compensation or asserting of right as mentioned in the plaint, there has not been any evidence on record showing that rights of the petitioners/plaintiffs had actually been invaded either by Mst. Hashmat Bibi or by her successor. Mere wrong entries in the revenue record would therefore be deemed to be threatened denial of rights only and in such cases each Jamabandi shall be deemed to be refreshing cause of action for the petitioners/ plaintiffs. Further reliance in this respect may also be placed on judgment of Hon'ble Supreme Court of Pakistan in the case of Saadat Khan and others v. Shahid ur Rehman and others (PLD 2023 Supreme Court 362).

12. It is also true that a revisional court does not normally interfere with concurrent finding of facts of the courts below unless there is a case of misreading or non-reading of evidence. In the case in hand it is apparent that there was not only misreading and non-reading of evidence but law of limitation and estoppel have also been wrongly applied against the petitioners/plaintiffs, by both the courts below. A revisional court is not supposed to follow wrong findings of facts of the two courts below and to become a contributory thereto. Hon'ble Supreme court of Pakistan while giving its judgment in the case of Muhammad Akhtar v. Mst. Manna and 3 others repored as 2001 SCMR 1700, has held that concurrent findings of facts which are perverse or fanciful, could not be treated as sacrosanct for the revisional court and that a revisional court may well reverse such findings. Relevant part of observations of the august Apex Court is reproduced hereunder for ready reference:-- "We are of the considered opinion that if the concurrent findings are perverse, arbitrary or fanciful the same cannot be termed as 'sacrosanct' and can be interfered with." Further reliance in this respect may also be placed on judgment of Hon'bk Supreme Court of Pakistan in the case of Samar Gul and others v. Mohabat Khan and others reported as 2000 SCMR 974.

13. In light of what has been discussed above, judgments and decrees of the two courts below are set aside. The suit of the petitioners/ plaintiffs is decreed but to the effect that Mst. Hashmat Bibi deceased shall be deemed to have been owner to the extent of Shari share in the legacy left by her deceased

husband and similarly to said extent her shari share would be deemed to have been devolved upon her legal heirs. Petitioners and their predecessor would be deemed to be entitled to the legacy of Muhammad Ayub in accordance with their shari share. The revenue officials shall redraw entries in the revenue record to said effect and shall enter inheritance mutation in respect of legacy of Mst. Hashmat Bibi. The earlier mutation bearing No.2844 attested on 28.04.1983 in revenue estate of Tehkal Bala No.2, Peshawar is set aside. It also needs to be mentioned here that although petitioners had not specifically challenged the mutation in the plaint but as a corollary of a declaration sought in the plaint and particularly the relief in respect of necessary correction in the revenue record, grant of this relief has become inevitable. Besides a civil court or revisional court is also having jurisdiction to mould the relief and after recording findings to the above stated effect moulding of the relief and setting aside of the inheritance mutation was required in the interest of justice.

14. So far as prayer 'Bai' in the plaint is concerned, it is decreed to the effect that whatever compensation has been received by the parties shall be re-adjusted in accordance with their rights proportionately and the compensation received by the respondents shall also be adjusted against their share in the property in dispute at the old rates. If they have received amount of compensation for an area in accordance with their entitlement then it shall be deemed that their property had been acquired and if any part remains outstanding, same shall be adjusted in the proceedings of final decree. In both these respects the instant decree granted shall be deemed to be preliminary in nature and for grant of final decree in accordance with terms of this preliminary decree the petitioners/ plaintiffs shall be at liberty to move an application before competent civil court. MH/6/P Revision allowed. ;