

**Journal**

2014 YLR 553

**Court**

BALOCHISTAN]

**Date**

2013-11-18

**Appeal No.**

REGULAR FIRST APPEAL NO. 27 OF 2008,

**Judge**

QAZI FAEZ ISA, C J AND MRS. SYEDA TAHIRA SAFDAR

**Parties**

MUHAMMAD AYUB KHAN AND ANOTHER (APPELLANTS) VERSUS SECRETARY BOARD OF DIRECTORS HASHIM KHAN TRUST QUETTA AND OTHERS RESPONDENTS

**Lawyers**

MUHAMMAD YAQOOB KHAN FOR APPELLANTS. SYED AYAZ ZAHOOR AND SHEHAK BALOCH, ASSISTANT ADVOCATE GENERAL FOR OFFICIAL RESPONDENTS.

**Statutes**

WEST PAKISTAN LAND REVENUE ACT (XVII OF 1967) - S. 52 LIMITATION ACT (IX OF 1908) - ARTICLE 120 SPECIFIC RELIEF ACT (I OF 1877) - S. 42 LIMITATION ACT (IX OF 1908) - ARTICLE 120 SPECIFIC RELIEF ACT (I OF 1877) - S. 42

**Judgment**

MRS. SYEDA TAHIRA SAFDAR, J.-The appellants assailed the judgment and decree dated 27th May, 2008 of Senior Civil Judge-I, Quetta, which had dismissed the Suit bearing No. 172 of 2003 for want of merit.

2. The appellants (plaintiffs) filed a suit for declaration of their title, on the basis of inheritance, in respect of the property bearing Khasra Nos. 189, 190, 191 and 194 (4 Qitas) measuring 85759 square feet (01 acre, 3 rods, 35 poles) situated at Karez Lai Khan Mahal and Mauza Durrani, Ward No. 17 (new Ward No. 46), Tappa Urban-III, Quetta, (hereinafter "the suit property") being the legacy of their predecessor Baz Muhammad Khan, who had died in the year 1911. The appellants also sought cancellation of the mutation entries effected in favour of the legal heirs of Baz Muhammad, and in favour of defendants Nos. 23 to 27 on basis of the sale transactions of several parts of the suit property between them (defendants Nos. 23 to 27) and defendants Nos. 2 to 8. The Deed of Trust executed on 30th July, 1990 was also claimed to be invalidly executed, with a request for its cancellation. The remaining claim pertains to recovery of money deposited in the Bank account operated by Muhammad Hashim Khan of Rs. 1,800,000 (Rupees one million and eight hundred thousand only) pertaining to the rent of the premises allegedly in the unauthorized possession of defendant No.

4, and an amount of Rs.2,400,000 (Rupees two million and four hundred thousand only) as mesne profit, the benefit gained by the contesting respondents by use of the suit property during all these years.

3. It was their (appellants') case that Baz Muhammad Khan died in the year 1911, leaving behind as his legal heirs three sons namely Muhammad Qasim, Muhammad Hashim and Muhammad Kazim and two daughters namely Bibi Wafa and Bibi Saeeda, therefore, on his death all the five legal heirs were entitled to inherit the property left by him. It was further their case that Bibi Saeeda, who died leaving behind three sons and six daughters, therefore, they (appellants) being her legal heirs entitled to inherit the share devolved on her (Bibi Saeeda) as her legacy. But, on the death of Baz Muhammad Khan, the suit property was mutated in the Revenue Record in the names of the three sons and the two daughters were excluded. The appellants further claimed right of inheritance from Bibi Wafa, Hashim Khan and Qasim Khan, who were described to died issueless. It was their (appellants') case that one of the recorded owners Hashim Khan died in the year 1993, but prior to that he was seriously ill, and taking benefit of his state of health defendant No.5 cleverly created the Trust, only to deprive them (appellants) of their right.

Further, respondents Nos. 2 to 8 except the property, described as Trust sold out all the suit property for their personal interest with an intent to deprive them (appellants) of their right. It was emphasized that the right of inheritance under Islamic Law neither can be denied, nor on creation of Trust or entering into sale transaction can put it to an end.

4. In their joint reply the defendants Nos. 1, 4, 5, 9 to 22 and 27 (the contesting respondents) not only denied the existence of the right of inheritance with the plaintiffs (present appellants) but the maintainability of the suit was also questioned. On merits they contended that the Trust was created by Hashim Khan Ghilzai, in his lifetime in the name of Hashim Khan Ghilzai Trust, and the Deed of Trust was executed on 31st July, 1990,

thereby all his movable and immovable properties and the bank accounts were transferred to the Trust. Further, the intent behind the act was to convert this Trust into a hospital, and to achieve the purpose a proposed site plan was also prepared with approval of the Municipal Corporation on 30th April, 1991. Furthermore, Hashim Khan was the Chairman of the Trust, and several other persons namely Muhammad Naeem Khan, Dr. Inayatullah, Syed Hussain Shah, Abdul Raziq Khan, Professor Muhammad Raees and Professor Abdullah Jan Jamaldini were nominated as its Directors. However, after Hashim Khan's death Muhammad Hafeez (defendant No. 5) was given the authority to look after the affairs of the Trust. While denying the claim of inheritance the only contention raised was that a will was executed by Hashim Khan on 30th October, 1993, which neither described any shares of the plaintiffs, nor the existence of any right of inheritance in their favour in respect to the suit property.

5. Respondent No.4 (defendant No.4) Muhammad Najeeb resiled from his reply, that had been filed jointly, and submitted a separate reply and admitted that Bibi Saeeda and Bibi Wafa had been deprived of their shares by the three brothers. He further alleged that he was also one of the legal heirs of Kazim Khan, and his legal share in the inherited property was also refused by his real brothers and sisters, with the creation of the invalid Trust.

6. Defendant No. 25. (respondent No.25) in his written statement though admitted the claim of the plaintiffs (appellants) to the extent of their share of deceased Baz Muhammad, and their status as of share holders, but stated that he had purchased a portion of the suit property from Mst. Nasreen daughter of Muhammad Kazim Khan vide Mutation No. 2567, Khasra No. 242/314, measuring 2052 square feet, and had acquired a valid title having status of a bona fide purchaser, therefore, his right may not be disturbed.

7. The trial Court framed issues on 27th September, 2004 as under:- (i) Whether the suit is not maintainable in view of preliminary legal objections B to F of the written statement? (ii) Whether the sale transaction between the defendants through Mutation No, 2567 is illegal and void? (iii) Whether the plaintiff is entitled to the relief claimed for? (iv) Relief.

8. The appellants, the plaintiffs in the suit, produced five witnesses and plaintiff No. 1 (appellant No. 1) Muhammad Ayub recorded his statement for himself and on behalf of the remaining appellants as their attorney. In rebuttal defendants Nos. 1 to 3, 5 to 9, 11 to 15 and 22 produced three witnesses, and defendant No. 5 Muhammad Hafeez got recorded his statement for himself and for the remaining respondents being their attorney. The trial Court vide judgment dated 27th May, 2008, held the creation of the Trust to be legal and valid, and that it was performing functions in terms of the will of Hashim Khan Ghilzai, and concluded that the appellants (plaintiffs) were not entitled for the relief claimed, as no case was made out. The appellants feeling aggrieved of the judgment preferred the appeal in hand.

9. The appellants questioned the judgment while contending that the trial Court either misappreciated the evidence or failed to appreciate the same in its true context, which resulted in an erroneous decision. It was contended that though their (appellants') status as legal heirs of Baz Muhammad was not denied, but the right of inheritance was denied by holding the suit property being the personal property of Hashim Khan. In addition sufficient evidence in shape of oral as well as documentary was available on the record, which cannot be ignored. Furthermore, the relevant law was either misunderstood or

misinterpreted, therefore, the findings were in contravention thereof. The prayer was for setting aside of the impugned judgment with an order for decree of the suit.

10. The pleadings of the contesting parties are in agreement to the extent that Baz Muhammad Khan was the owner of the suit property, and had died in the year 1911, leaving behind three sons namely Muhammad Qasim, Muhammad Hashim and Muhammad Kazim and two daughters Bibi Wafa and Bibi Saeeda as his legal heirs. Three of them namely Muhammad Qasim, Muhammad Hashim and Bibi Wafa died issueless in the years 1940, 1993 and 1974 respectively. Muhammad Kazim was survived by respondents Nos. 2 to 8 being his sons and daughters, and the appellants are the descendants of Bibi Saeeda, the second daughter, who died in year 1981. It was also not denied that on the death of Baz Muhammad the suit property (details whereof have been provided in para No. 1 of the judgment) was transferred and mutated in the revenue record in the names of his three sons namely Muhammad Qasim, Muhammad Hashim and Muhammad Kazim and by leaving out the daughters. The mutation of inheritance effected on 7th October, 1911 with report recorded on 3rd January, 1913 was produced as an exhibit (Exh.P/1).

11. Certain additional facts collected from the pleadings are that defendants Nos. 2 to 8 (respondents Nos. 2 to 8) sold out nearly all of the properties, that existed in the names of their father or in the names of the two co-owners Hashim Khan and Qasim Khan, except the property described to be of the Trust. The Deed of Trust described to be executed by Hashim Khan on 30th July, 1990 with reference to a will duly registered, executed on 17th February, 1987. The contesting defendants (respondents Nos. 2 to 8) also referred to a will executed by Hashim Khan on 3rd October, 1993. However, none of these documents were tendered in evidence nor were a part of the record. Furthermore, the defendants Nos. 9 to 27 had purchased part of the suit property, and some of such property was further sold out; the sale transactions were recorded in the Revenue Record, and the extracts thereof made part of the evidence as Exh.P/6 to Exh.P/11. The status of respondents Nos. 2 to 8 was quite distinct to respondents Nos. 9 to 27, therefore, is to be dealt with separately. The appellants (plaintiffs) were before the court not only for establishment of their right of inheritance against respondents Nos. 2 to 8, but they also questioned the title of respondents Nos. 9 to 27, on basis of the sale transactions effected between the two. Therefore, while determining the right of inheritance between the appellants and respondents Nos. 2 to 8, the legality of the questioned sale transactions was also required to be decided.

12. The learned counsel for the appellants stated that Exh.P/1 was the basic document, which described the legacy of their predecessor Baz Muhammad; however the male legal heirs deprived the female heirs from their legal shares in the property, left by their deceased father. He contended that though the mutation of inheritance was effected in the year 1913, and was not challenged either by Bibi Saeeda or by Bibi Wafa in their life time, but a claim based on a right of inheritance cannot come to an end, even if one of the legal heirs failed to raise any claim in respect of his/her share in the legacy left by his/her predecessor.

The learned counsel urged that the admitted status of the appellants being descendants of Bibi Saeeda, a legal heir of Baz Muhammad, entitled them to inherit the share of Bibi Saeeda from the properties left behind by her father Baz Muhammad. He

referred to the following cases:- Ghulam Ali v. Mst. Ghulam Sarwar Naqvi PLD 1990 SC 1 Muhammad Bashir v Muhammad Hussain 2009 SCMR 1256 While addressing the objection pertaining to limitation with a reference to Article 120 of the Limitation Act, 1908 the learned counsel stated that no time runs against a right of inheritance that will make it time barred and placed reliance on: Shahro v. Mst. Fatima PLD 1998 SC 1512 Allah Pitta v. Aimna Bibi 2011 SCMR 1483 Haji Rana Muhammad Shabbir Ahmed Khan v. Federation of Pakistan through Attorney-General for Pakistan PLD 2001 SC 18 He further stated that the suit property being a joint holding, no question of limitation arises, and referred to: Arshad Khan v. Mst. Resham Jan 2005 SCMR 1859 Muhammad Qasim Khan v. Mehbooba 1991 SCMR 515 Falak Sher v. Mst. Bano Mai 2006 SCMR 884 Mst. Janntan v. Mst. Taggi through Legal heirs PLD 2006 SC 322 Nazeer Hussain v. Muhammad Iqbal 2008 MLD 278 In addition it was contended that the limitation starts running from the denial of the right of a co-sharer by the remaining shareholders and referred to: Abdul Ghafoor v Muhammad Shafi PLD 1985 SC 407 While referring to Fatwa Dar-ul-Aloom Doband by Aziz-ur-Rehman, principles of Muhammadan Law by D. F. Mullah and Sunan Abu Dawood by Imam Abu Dawood, it was asserted that a right of inheritance never comes to an end, nor any of the legal heirs can be deprived of his right.

Mr. Yaqoob Khan, Advocate adverted to the Deed of Trust and the wills dated 17th February, 1987 and 3rd October, 1993 and stated that all the three documents were neither produced before the trial Court nor exhibited, therefore, should not be considered. The legality and the existence of the Trust was also questioned and it was contended that the Trust was created only to deprive the shareholders; therefore, it was of no legal effect. He referred to: - Kthmwar\_\_CooperaLtTv\_\_Houin Society Ltd. v. Macca Masjid Trust 2009 SCMR 574 .

Miskin v. Additional District Judge Mansehra 2003 SCMR 121 Jaffar Hussain v. Muhammad Hanif CLC 2001 628 Pakistan Employees Cooperative . Housing Society v. Messrs Awami Construction Co. Ltd. 2003 CLC 607 13. The learned Additional Advocate General, in attendance on court's notice, only submitted that the Sub-Registrar was not made party to the proceedings; therefore, no effective decree can be passed. He further stated that in view of non-compliance with the requirements of section 92, C.P.C. the suit was not maintainable as part of the property was held by the Trust.

14. The submissions of learned counsel for the respondents Nos. 2 to 8 related to the Deed of Trust, and that the suit was time barred as the daughters during all these years never agitated their right in respect of the suit property. Further, no evidence was produced to establish existence of right of inheritance in their (appellants') favour. He contended that the onus was on the appellants (plaintiffs) to establish that the Deed was a result of fraud and liable to be set aside. The maintainability of the suit was also objected to by contending that as the Trust was questioned by the appellants, therefore, compliance of section 92, C.P.C., which was mandatory in nature, should have been made, but, there was failure on part of the appellants making their suit not maintainable. Further, the Deed of Trust was admittedly a registered document executed on creating of Trust in 1990, in the lifetime of Hashim Khan, who died in the year 1993, with no objection from any corner, making the claim of the appellants not only barred by time, but also without any legal basis. Furthermore, the will dated 17th February, 1987, though it was not made part of the record but this fact was not of much significance as it had no bearing on the merit of the case. In addition except the land consisting of the Trust, there

remained no land to satisfy the demand of the appellants. The learned counsel with reference to section 92, C.P.C. placed reliance on:~ Fakir Shah v. Mehtab Shah Pir Bukhari Masjid Committee PLD 1989 SC 283 Muhammad Hussain v. District Council, Muzaffargarh 1987 CLC Lahore 1098 It was further contended that the Deed of Trust was not questioned in the suit, and the claim of the appellants (plaintiffs) was only to the extent of their inheritance, which had become time barred due to the fact that the suit was filed in the year 2003.

Reliance was placed on the following cases:-- Atta Muhammad v. Maula Bakhsh 2007 SCMR 1446 Luqman v. Gul Muhammad 1984 SCMR 63 Allah Pitta v. Aimna Bibi 2011 SCMR 1483 Article 100 of the Qanun-e-Shahadat Order, 1984 was also referred to contend that a 30 years old document shall be presumed to be duly executed, therefore, the mutation of inheritance effected in year 1911, need no further proof to establish its due execution, until the appellants succeeded to establish the contrary. The learned counsel further urged that the house in possession of Bibi Zahra, which was a part of the suit property, established satisfaction of the share of her predecessor (Bibi Saeeda), and also negated their (appellants') claim. In addition the Deed of Trust was registered on 31st July, 1990 in the life time of Hashim Khan, which remained unchallenged during all these years, nor the mutation entries in names of the three brothers were questioned from any corner, therefore, after lapse of considerable time no right remains with the appellants. With reference to section 18 of the Limitation Act, 1908 the learned counsel contended that the appellants and their predecessor were in the knowledge of the acts, but failed to approach the court in time, therefore, they have to suffer the consequences.

Reliance was placed upon:~ Atta Muhammad v. Maula Bakhsh 2007 SCMR 1446 15. In reply the learned counsel for the appellants stated that as the property devolved on the parties on the death of their predecessors, therefore, they (appellants) being the co-owners cannot be deprived of their respective shares, nor the right of inheritance is affected by the law of limitation. Further, the Trust was created with an intention to deprive them of their legal shares describing the mala fides on part of the respondent, which cannot be ignored. Further, the trial Court committed error while placing reliance on the documents that were not part of the record. The Deed of Trust was not established, the marginal witnesses of the Deed neither produced, nor its execution was confirmed, therefore, it cannot be relied upon. As regards section 92, C.P.C. it was replied that the said section has no application to the instant case. Furthermore, the issues were not properly framed and they failed to cover the actual controversy between the parties, therefore, the decision arrived by the trial Court also suffered with the same defects. The learned counsel completed his submissions while asserting that the daughters were deprived of their right of inheritance, an act not appreciated either by law or by Shariah.

16. The miscellaneous applications still pending were considered, and need to be decided before giving findings on the main appeal.

17. C.M.A. No. 993 of 2008 was filed by the appellants seeking appointment of a receiver during the pendency of the appeal, and to direct the tenants to deposit the rent of the premises in their occupation with the Civil Nazir of the court. Since, the matter is now for a final decision, therefore, issuance of any interim order would neither be appropriate nor just.



18. Through application C.M.A. No. 2829 of 2011 the appellants relinquish their right in the properties already sold to respondents Nos. 9 to 27. The appellants state that they would not claim their shares from those who have already purchased any part of the suit property. This application was allowed on 1st December, 2011 in the following terms:-- "C.M.A. No.2829 of 2011: Through this application, learned counsel for the appellants states that the appellants are forgoing the claim in respect of all such property that has been sold out to third parties and restricts his claim only to 35,000 sq.ft. Mr. Arthur Victor, Advocate states that 35,000 sq'.ft belongs to Hashim Khan Trust', which the appellants cannot claim. The question whether the appellants can claim or not the said property is yet to be decided. However, the appellants are within the rights to forego any part of the claim if they so desire and as they have foregone the claim as noted above, therefore, the application is allowed to such extent." However, order dated 1st December, 2011 was rectified/clarified vide order dated 15th December 2011 on the application C.M.A.

No. 4166 of 2011 in terms:- "C.M.A. No.4166 of 2011: Learned counsel states that the order passed on C.M.A. No.2829 of 2011 on December 1, 2011 may be misconstrued as restricting the claim of the appellants to only a portion of the area of 35000 Sq.Ft. and not to the entire 35000 Sq. Ft. Learned counsel states that in C.M.A. No.2829 of 2011 he had prayed that, "if remaining property measuring 35000 Sq.Ft. are decreed and ordered to be mutated in favour of the appellants/ plaintiffs." Learned counsel for the respondents fairly concedes to the proposition and as it was so prayed in C.M.A. No. 2829 of 2011.

Accordingly, order dated December 1, 2011 is clarified to the extent that the appellants restrict their claim to 35000 Sq.Ft. out of 88000 Sq. Ft. and pray that the entire 35000 Sq. Ft. be decreed and mutated in their favour. It is further clarified that this order does not mean that the appeal of the appellants has been allowed or accepted to such extent." 19. The details of the legal heirs of late Baz Muhammad son of Atta Muhammad Khan was filed through C.M.A. No. 2225 of 2012 by the appellants describing names and relations of such persons with Baz Muhammad, and their status of being alive or dead, it was filed in compliance of order dated 12th September, 2012. Since the particulars of the legal heirs are not denied there is no need to pass any further order in this regard on the application.

20. The matter in hand pertains to a right of inheritance claimed in respect of the property left by Baz Muhammad (the deceased). The appellants (plaintiffs) describe themselves to be the descendants of Bibi Saeeda, one of the legal heirs of the deceased. Baz Muhammad was survived by his two daughters and three sons namely Bibi Saeeda, Bibi Wafa, Hashim Khan, Kazim Khan and Qasim Khan. The appellants claimed their right from Bibi Saeeda, and the status of respondent Nos. 2 to 8 was described to be the legal heirs of Kazim Khan, one of the sons of Baz Muhammad. The remaining legal heirs namely Bibi Wafa, Hashim Khan and Qasim Khan had died issueless; therefore, the appellants and respondents Nos. 2 to 8 also claimed the property in the capacity of being the legal heirs of the remaining three.

21. The contesting defendants (respondents Nos. 2 to 8) admitted the interse relations between the parties and of their predecessors with Baz Muhammad Khan, but denied the existence of right of inheritance in favour of the appellants (plaintiffs).

Denial was firstly, on the ground that due to lapse of time there remains no claim,

secondly, at present no property was left from the inheritance except the property of the Trust and, thirdly, compliance with the law while questioning a Trust was not made by the appellants.

22. The maintainability of the suit was questioned with reference to the law of limitation contending that the suit property was mutated in favour, of Hashim Khan, Qasim Khan and Kazim Khan in the year 1911 (attested in 1913), but was challenged in the year 2003, after a lapse of 92 years, making the claim time barred. Article 120 of the Limitation Act, 1908 would be relevant, as no other Article describes the period for a suit filed for declaration of a right. The stipulated limitation period is six A (6) years, while the time is to be counted when the right to sue arises. The appellants before the court sought declaration in respect of their right of inheritance. There was denial of their right from the other side with a claim of title on basis of the mutation effected in favour of their (respondents Nos. 2 to 8's) predecessor in year 1911 finalized in 1913, the only document describing title of the original owner, but, the claim was of inheritance in respect of the suit property left by Baz Muhammad Khan and on his (Baz Muhammad) death the suit property was entered in the names of his three sons, namely Hashim Khan, Qasim Khan and Kazim Khan, leaving out the daughters namely Bibi Saeeda and Bibi Wafa. The relevant mutation entry Exh.P/1 affirmed the fact. The perusal of Exh.P/1 reveals that the orders (f&b/ ) written by the concerned Tehsildar only mentions the three sons as the sole legal heirs but does not mention the said ladies. Further, the area of the property described as (A\_r'i) (J/T\_L») recorded in the names of Pir Muhammad & Baz Muhammad in equal shares, which was entered in the names of three sons of the deceased in equal shares, therefore, the area thereby transferred was described as (lir-n)(#\_t/17'0 the total area of the suit property.

23. The objection pertaining to the filing of the suit beyond the stipulated period needed to be properly considered, as it would be the determinative factor of the maintainability of the suit, for grant of the relief claimed. The right of succession arises in favour of successors from the date of death of a person, without any interruption. Property automatically, without any delay, vests in the persons having status of heirs as per the personal law of the deceased. In view thereof the factor of time cannot affect a right of inheritance accrued in favour of an heir. Therefore, on death of such a person his legal heirs immediately and automatically become co-owners and co-sharers of the property left behind by the deceased, irrespective of who is in possession. The right is further strengthened by the principle that the possession by one cosharer is deemed to be possession by all cosharers. Further, the fact of remaining out of possession neither ousts the remaining legal heirs of their entitlement, nor makes a person in possession the exclusive owner of such property. An entry in shape of mutation in the Revenue Record is not a document of title but is a presumptive piece of evidence for establishment of title, and a presumption of truth attaches to the entries in the revenue record made in due course. But this presumption is always rebut able as provided under section 52 of the Land Revenue Act, 1967. Therefore, in such cases where property is claimed on the sole basis of an entry recorded in the revenue record, it either can be challenged on having knowledge thereof, or if a person does not consider himself to be aggrieved of such an entry, but having an interest in it can approach a court when he becomes aggrieved of the entry or someone denies his right.

C 24. Therefore, the date of recording entry in the Revenue Record would not be the



starting point for running of the time for filing a suit for declaration of a title, instead when the grievance arises would be the relevant time. In view thereof option lies with the person for filing a suit for declaration of his title when his right is, denied, and in such cases every denial of right furnishes him with a fresh cause of action. But, in each case this right is to be exercised within the period of six (06) years as described by Article 120 of the Limitation Act, 1908 on accrual of cause of action. Therefore, the time in a suit for declaration of such right shall be counted from when the right to sue accrues and the same is refused by the other side. The date of mutation entry would be immaterial.

C D 25. It was not denied that Bibi Saeeda and Bibi Wafa were daughters of Baz Muhammad, therefore, entitled to inherit the property left by him. Admittedly, while recording mutation of succession the names of both the ladies were dropped. And no justification to exclude the names of the daughters from the list of the legal heirs was provided. The facts, however established that the ladies namely Bibi Saeeda and Bibi Wafa were the legal heirs of Baz Muhammad, therefore, cannot be deprived of their right. They were entitled for their respective shares in the estate left by their deceased father under Islamic Law. They further gained status of co-sharers, therefore, deemed to be in continuous possession of the suit property with the remaining co-sharers.

26. In view of above discussion it is established that span of time neither can extinguish right of inheritance nor adverse to title of a legal heir, because on death of an owner succession opens and all the inheritors become co-sharers, and the fact that one of them is in continuous possession neither makes him the exclusive owner nor ousts the remaining inheritors. It is a recognized principle of law that possession of one heir is deemed to be possession by all the legal heirs. Therefore, the possession by Kazim Khan and Hashim Khan would be deemed to be possession also by the remaining legal heirs.

27. The worthy Judges of the honourable Supreme Court while deciding a controversy of the same nature, set down the principles for the rights claimed under inheritance in the case of Anwar Muhammad v. Sharif Din, reported in PLD 1983 Supreme Court page 62; they held:- "It is contended that when Lakhwera died the petitioners were in possession of the land and were so recorded excluding the plaintiffs-respondents. Thus the learned counsel for the petitioners wants to transform into principle of inheritance. Such a claim is based neither on custom nor on Shariat. What law prevails in the matter of preparation of Revenue Record or what practice is followed by, the officers cannot be determinative of the devolution of the estate of a deceased person. It appears that the plaintiffs-respondents were the heirs of Lakhwera and entitled to inherit in the same manner as the petitioners. The land being joint there was no question of their remaining out of possession or the suit being time-barred. The possession of the one co-sharer is for the benefit of all the other cosharers and a co-sharer is deemed to be in possession through his other co-sharers.

Simply because the mutations were attested in 1907 or 1908 does not bless the transaction with sanctity. These mutations conferred no right in the property and are at best arrangements made on the fiscal side for ensuring realization of land revenue and ensuring the correctness of the Revenue Record for that purpose." The same view was taken by their lordships in the case of Ghulam Ali v Mst. Ghulam Sarwar, reported in PLD 1990 Supreme Court page 1.

28 A right of inheritance was established in favour of Bibi Saeeda, and through whom it devolved on the appellants, who stand entitled to inherit the share of their predecessor Bibi Saeeda and also entitled to inherit from the shares of Qasim Khan, Hashim Khan and Bibi Wafa, which devolved on their death to Bibi Saeeda. Therefore, the shares of all the legal heirs need to be determined in view of their personal law, and need to be satisfied.

The claim of the appellants, based on a claim of right of inheritance, therefore, neither can be affected by time, nor there would be any question of limitation, the suit was very much maintainable.

29. The trial Court decided the case on mere presumptions. The findings in respect of existence of right of inheritance and the claim being time barred is neither based on the law nor is in conformity with the facts. As discussed hereinabove a right of inheritance existed in favour of Bibi Saeeda, which neither can be denied nor the appellants, being her legal heirs, can be deprived of their right due to lapse of time, to this extent the appellants had established their case. The question however remains that from which property the shares of the appellants be satisfied. The existence of Trust, on a part of the suit property devolved as a share of Hashim Khan, is not a denied fact. However, the legality of the Trust and its effect on right of the appellants is yet to be determined. The fact evident from the record is that the Trust Deed, cancellation whereof was prayed, was not made part of the record, as it was neither tendered in evidence nor exhibited. The legality of the alleged Trust Deed has to be also decided.

30. C.M.A. No. 1307 of 2009 sought framing of additional issues, as the trial Court failed to frame proper issues, to cover the actual controversy between the parties. The request for re-framing of issues was followed by the proposed issues as under: – Whether property in dispute is inherited left by predecessor of appellant/respondent namely Baz Muhammad Khan his and issueless sons and daughters ? (2) That name of predecessor of appellant being legal heir of Baz Muhammad has been excluded at the time of attestation of Intiqal-e-Warasat Mutation No. 4 dated 3-1-1913 of property in dispute.

(3) Whether remaining property in dispute fall in the share of appellant? (4) Whether alleged Trust is established just to usurp the property right of appellant?" The re-framing of the issues were strongly objected to by the learned counsel for the contesting respondents, but thereafter he conceded that the issues framed by the trial Court had failed to cover the matter in dispute between the parties.

31. The main controversy between the parties was the existence of right of inheritance in the appellants and their shares in the property left behind by Baz Muhammad. However, the issues framed by the trial Court failed to cover the actual controversy.

The issues proposed by the appellants also do not cover the dispute between the parties. It has already been decided that a right of inheritance existed in favour of the appellants and their claim to said extent was not hit by law of limitation. The respective shares of the parties and legality of the wills and the Trust yet to be determined, therefore, the issues are reframed as under: Whether the wills dated 17th \* February, 1987 and 3rd October, 1993 were executed by late Hashim Khan and if so to what effect? (2) Whether the property left behind by late Baz Muhammad or any part thereof could be transferred/ assigned/granted to the Trust set up by Muhammad Hashim Khan Ghilzai ?

(3) If issue No. 2 is decided in negative what would be the share of the plaintiffs in the said property ? (4) What should the decree be? 32. The appeal is, therefore, partly allowed. The impugned judgment dated 27th May, 2008 of Senior Civil Judge-I, Quetta is hereby set aside. It is declared that the suit property is legacy of Baz Muhammad, and the appellants are entitled to inherit the share of Bibi Saeeda devolved on her on death of her father Baz Muhammad. It is further declared that Bibi Saeeda was entitled to inherit from the shares of Hashim Khan, Qasim Khan and Bibi Wafa, along with her surviving brother Kazim Khan, the predecessor of respondents Nos. 2 to 8, to the extent of their respective shares.

33. The case is remanded to the trial Court with direction to decide the issues framed in paragraph 31 above. As far as the relief pertaining to cancellation of mutation entries existed in favour of respondent Nos. 22 to 27 is concerned, the relief to the extent was relinquished by the appellants, therefore, the entries shall not be disturbed and to remain intact. Further, as a Trust and its Deed is under question, therefore, it would be appropriate to make Government of Balochistan, through concerned Secretary a party to the suit. The appellants (plaintiffs in the suit) are directed to file amended plaint-excluding defendant Nos. 22 to 27 and the properties purchased by them and by arraying the Government of Balochistan as a party. The trial Court is directed to proceed with the suit expeditiously since it is quite an old matter.

There shall be no orders as to costs.

Decree sheet be prepared. AG/121/Bal Case remanded.