

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT

Mr. Justice Maqbool Baqar
Mr. Justice Qazi Muhammad Amin Ahmed

(AFR)

Civil Appeal Nos. 1079 and 1080 of 2015

(Against the judgment dated 22.05.2015 of
the Islamabad High Court, Islamabad
passed in CR Nos. 475 & 552/2001)

***Intelligence Bureau Employees Cooperative
Housing Society thr. its Secretary***

Appellant(s)

Versus

Shabbir Hussain & others

Respondent(s)

For the Appellate(s) : Syed Nayab Hassan Gardezi, ASC
Mr. Ahmed Nawaz Ch. AOR

For Respondent No. 1 : Malik Attat Hussain Awan, ASC

For respondent No. 6 : Mr. Agha Muhammad Ali, ASC
Syed Rifaqat Hussain Shah, AOR

Others : Ex-parte

Date of Hearing : 10.06.2021

J U D G M E N T

Maqbool Baqar, J. The instant appeal with leave of the Court has arisen out of judgment dated 22.05.2015 of the Islamabad High Court, whereby the learned Judge in Chambers dismissed the Civil Revisions filed by the appellant and maintained the judgment and decrees of the fora below.

2. The respondent No. 1, Shabbir Hussain, on 27.06.1990, brought a suit for declaration, possession and permanent injunction against Muhammad Aslam, the respondent No. 2, and Mst. Channo Bibi, the predecessor-in-interest of respondent Nos. 3 & 4. He claimed that his maternal grandfather, Niaz Ali owned and possessed, 50% of lands, bearing various khasra numbers, as

mentioned in the plaint, in the revenue estates of village Lohibher, village Panwal and village Phokar ("**the suit lands**"). It was averred that the only child of Niaz Ali, Mst. Ghorī, who was the mother of respondent No. 1, passed away in the year 1953. Niaz Ali also expired in the year 1970, and on 14.04.1970, respondent No. 2, who was the father of respondent No. 1, and was also the nephew of Niaz Ali, and Mst. Channo Bibi, who was sister of Niaz Ali, got the mutation of succession of the suit lands recorded in their favour to the exclusion of respondent No. 1, of which mutation, respondent No. 1 came to know two months before filing of the suit, whereupon he requested the said two respondents to transfer the suit lands to him, as he being the grandson of Niaz Ali, was legally entitled to the same. However, they refused to comply and thus the respondent No. 1 was constrained to file the suit.

3. Muhammad Aslam, the respondent No. 2 filed a conceding written statement, whereas Mst. Channo Bibi, through her written statement contested the suit on the ground of its being barred by limitation. It was contended that the suit was bad for misjoinder of different causes of action and was *mala fide*.

4. There is no denying the fact that the suit lands were owned by Niaz Ali. It has also not been disputed that Niaz Ali was the maternal grandfather of Respondent No.1. It is also an admitted fact that Mst. Ghorī, the only child of Niaz Ali and the mother of respondent No.1, died in the year 1953. It is also a

common ground between the parties that upon demise of Niaz Ali in the year 1970, the only persons left behind to succeed to the estate of the deceased were respondent No.1, 2 and Mst. Channo Bibi. The respondent No.1 being the son of the pre-deceased daughter of the deceased, which daughter was his only child, was, under the relevant law, entitled to inherit $\frac{1}{2}$ share of the estate of the deceased at the time of his succession. However, through mutations dated 14.4.1970, the succession of the lands were recorded in favour of respondent No.1 and Mst. Chanoo Bibi, to the exclusion of respondent No.1.

5. The respondent No.1, even if his age is counted from the year 1953, when his mother died, was of 17 years when the impugned mutation entries dated 14.4.1970, were recorded. He became a major the very next year i.e. in the year 1971. The lands in dispute, as came to light before the trial Court, during the testimony of DW-1, the attorney of Mst. Chanoo on 10.3.1996, were subsequently sold by respondent No.2 to the appellant society. However it was as late as on 27.06.1990, that the respondent No.1 filed the suit, and that too just in respect of the inheritance mutations dated 14.4.1970 and against respondent No.2 and Mst. Chanoo Bibi only. It was only after the factum of sale of the lands came to fore as noted above, that the respondent No.1, on 31.5.1997, filed the amended plaint challenging the sale mutations in respect of the suit lands in favour of the appellant, i.e. almost 10 years after the impugned

sales, the lands, as noted in detail hereunder, having been sold in the years 1986 and 1987.

6. The appellant society through their written statement raised various preliminary objections to the maintainability of the suit. It was, inter alia, contended that the suit was hopelessly barred by limitation. They denied the claim as set up by respondent No.1 in the plaint, it was averred that the appellant had purchased, 11 Kanals and 7 Marlas of the suit lands from respondent No.2, through registered sale deed dated 01.1.1987, and from Mst. Chanoo Bibi, land measuring 3 Kanals and 7 Marlas, through registered sale deed dated 03.11.1986, respectively. The appellant claimed that they had, before purchasing the lands, verified the vendor's title from the relevant revenue record. It was alleged that the suit has been filed just to blackmail the appellant.

7. After conclusion of evidence, the Civil Judge, decreed the suit as prayed. The appeals against the said judgment and decree were dismissed. Revision filed by the appellant and the legal heirs of Mst. Chanoo Bibi, were dismissed through the impugned judgment.

8. As noted earlier also the respondent No.1 was at least 17 years of age when the impugned inheritance mutations were recorded in favour of his father, the respondent No.2 and his grandmother, Mst. Chanoo Bibi, the sister of late Niaz Ali. The address of the respondent No.1, in the record throughout is the same as that of his father, the respondent No.2. Mst. Chanoo Bibi,

also lived in the same village. The suit lands are situated where the respondent No.1 has lived throughout. As noted earlier, the respondent No.1 attained majority at the most, a year after the impugned inheritance mutations were recorded. Even at the time of impugned mutations, he was, by all accounts, of a sensible age. In any event if the said respondent was truly and genuinely aggrieved by the said impugned mutations, he ought to have challenged the same within three years of his attaining majority. However he filed the suit as late as on 27.06.1990. Although in his plaint, the respondent No.1 claimed that he came to know about the inheritance mutations only a month before filing of the suit. However, neither has he disclosed as to on what date, how, and through whom he acquired the knowledge as claimed. He further claimed that having known about the mutations, he requested the respondent No.2 and Mst. Chanoo Bibi, to transfer the suit land in his favour, but they refused. However in that regard also neither has he given any details, nor produced any evidence or material. In fact the attorney of respondent No.1, namely, Iftikhar Ahmed, the PW-1, who appeared as his sole witness, has not even claimed that the respondent No.1, received any information regarding the inheritance mutations at all. It has come in the evidence that the subject lands, after being sold to the appellant society, have, way back in the year 1988, been developed into a housing society, and the plots so created have been allotted to the members of the society, who have built their houses/buildings

thereon. It has also gone unrebutted that roads have been built and basic amenities have been provided in the housing society so developed. The respondent No.1 did not even plead that he remained away from his house/village anytime during the relevant period.

9. In view of the foregoing, it is difficult to believe that respondent No.1, throughout the long period of about 20 years, remained ignorant of the impugned inheritance mutations, and came to know about them only a month before filing the suit that he filed on 27.06.1990. In fact there is not even a verbal utterance by the plaintiff's witness in this regard at all. It is equally difficult to believe that respondent No.1 remained ignorant of the impugned sales till the time he filed the amended plaint, impleading the appellant society as defendant, more so, when throughout the relevant period he lived in the same village with his father, and by the time the lands were sold, the respondent No.1 has attained the age of about 33 years. It is inconceivable that living in the same village where the lands are situated, the respondent No.1 would not have noticed the fact that not only the physical possession of the lands were delivered to the appellants but the appellants also changed the usage/status of the land from agricultural to residential/commercial, and developed them into a housing society, with necessary infrastructure and amenities, and that the lands were sold/allotted to the members of the society who raised construction of their houses/buildings therein.

10. However the respondent No.1 concealed the impugned sales from the Court and sought amendment in the plaint with regard thereto only after DW-1, the attorney of Mst. Chanoo Bibi, deposed about the sale before the trial Court on 10.3.1996, and filed the amended plaint challenging the sale mutations for the first time on 31.5.1997.

11. It is not the case of the respondent No.1 that he was not aware that Niaz Ali has left behind the suit lands and/or that he (the respondent No.1) was entitled to 50% share therein, (although even the plea of ignorance of his entitlement would not have been of any avail), he however neither objected to the inheritance mutations dated 14.4.1970, nor made any efforts to seek amend, and for the entries to be corrected to represent his 50% share in the lands till filing of the suit on 27.6.1990, although the respondent No.1 attained majority in the year 1971 within about one year of the date of impugned mutations, and had become legally capable and competent to seek enforcement of his legal rights. The respondent No.1 has also not pleaded any circumstance which may have mislead him into believing that his title/rights in the land were secure, and were not jeopardized. He did not claim that he ever remained in possession of the lands, actual or constructive, and/or he was getting his share in the produce of the lands. The lands were sold by respondent No.2 and Mst. Chanoo Bibi, for valuable consideration through registered sale deeds in the year 1986 and 1987, respectively, it hardly needs any mention that the registration of a sale deed is a

notice of the sale embodied therein to the whole world. The respondent No.1 has also not explained as to how and why he failed to notice the delivery of physical possession of the lands to the appellant society and as to how he lost sight of the appellant society converting the status of the lands from agricultural to residential/commercial, and its development into a housing society with necessary infrastructure and amenities, and then of allotting the plots so created to its members, who raised construction thereon. It is really difficult, nay impossible, to imagine someone not noticing the above occurrences and development in his very lands situated in his vicinity over a long period of about 10 years, the respondent No.1's inaction, indifference and indolence in the circumstances cannot be interpreted as anything but his acquiesce in the respondent No.2's and Mst. Chanoo Bibi's title in the suit lands and manifestation of waiver of his rights in respect of the suit lands. The following judgments of this Court may well be referred to in this regard, *Atta Muhammad v. Maula Bakhsh* (2007 SCMR 1446), *Mst. Grana v. Sahib Kamala Bibi* (PLD 2014 SC 167), *Dilbar Jan v. Sohrab Khan* (1992 SCMR 743) and *Lal Khan v. Mohammad Yousaf* (PLD 2011 SC 657).

12. The appellant society, as noted earlier, purchased the suit lands from respondent No.2 and Mst. Chanoo Bibi, in the years 1986 and 1987 respectively. The suit lands were unabatedly standing in the revenue record in the name of the said vendors. The appellant's claim that they purchased the land after verifying

the vendor's ownership from the revenue record has not been rebutted. In terms of section 52 of the West Pakistan Land Revenue Act 1967, presumption of truth is attached to the land revenue record. Judgment of this Court in the cases of *Muhammad Shamim v. Mst. Nisar Fatima* (2010 SCMR 18), *Lal Khan v. Muhammad Yousaf* (PLD 2011 SC 657), *Mst. Phaphan thr.LRs. v. Muhammad Bakhsh* (2005 SCMR 1287), may be referred to in this regard.

13. The learned counsel for the appellant society submitted that since section 4 of the Muslim Family Ordinance, 1981, which enabled the children of the pre-deceased children of a propositus, to inherit from the propositus, like their father or mother, would have received had he/she been alive at the time of opening of the succession; has been declared against the tenants and injunctions of Islam by the Federal Shariat Court in its judgment in the case of *Allah Rakha and others v. Federation of Pakistan and other* (PLD 2000 SC 1), the respondent No.1 was/is not entitled to any share in the suit lands and was thus rightly excluded from succeeding to the same.

14. No doubt section 4 *ibid* has been declared repugnant to Shariah, however, since an appeal is pending against the said judgment before the Shariat Appellate Bench of this Court, the judgment, in terms of the provisions of Article 203-D(2) of the Constitution, cannot be given effect until the same is upheld by this Court and in that eventuality also, it shall, as specified in the judgment itself, take effect from 31.2.2000, [the date, it may be noted was so specified in consonance with the provisions of Article 203-D(2)] and therefore in any event cannot effect the previous

operation of law or a succession taking place before the said date. Reliance in this regard is placed on the judgments of this Court in the cases of *Mahmood Shah v. Syed Khalid Hussain Shah* (**2015 SCMR 869**), *Mst. Samia Naz v. Sheikh Pervaiz Afzal* (**2002 SCMR 164**) and *Mst. Sawar Jan v. Mukhtar Ahmed* (**PLD 2012 SC 217**)

15. However the contention of Mr. Gardezi, that the suit is a collusive endeavour of respondent Nos. 1 & 2, the father and the son, in the facts and circumstances of the case seems to be plausible. This view gains strength also by the fact that respondent No. 2, the father, has filed a conceding written statement in the suit. In almost similar circumstances in the case of *Dilbar Jan (supra)*, where the sale of a property owned by the sons of the vendor by virtue of its purchase by the vendor father in their name, when they were minors, was, after ten years of the sale, challenged by the sons on the ground that since at the time of the impugned sale they had attained majority, it was only them, and not their father, who could have lawfully sold the property, this Court, whilst observing that since the impugned sale was affected through a registered sale deed, of which the plaintiff sons are presumed to have the knowledge, but they failed to challenge the same for a long period of ten years and filed the suit ten years after the impugned sale, held the suit to be collusive.

16. The learned counsel further submitted that since respondent No. 1 by his conduct permitted respondent No. 2 and Mst. Channo Bibi to hold themselves out as the real owners, the appellant's Society, who has purchased the land for valuable consideration in good faith, has acquired a good title to the land

against respondent No. 1, and the transaction cannot be voided on the ground that respondent No. 1 has not explicitly authorized to make it. The learned counsel further submitted that the impugned sales and transfer of the lands in the circumstances is protected under and in terms of the provisions of section 41 of the Transfer of Property Act, 1882.

17. Indeed, section 41 of the Transfer of Property Act, 1882, provides an exception to the rule as embodied in the maxim, *he gives not who hath not*, and thus, nobody can transfer to or confer upon another a right or a title better than he himself possesses. Generally, a purchaser cannot take more than the vendor has to sell however, section 41 of the Transfer of Property Act provides an exception to the rule. It underpins the principle of equity that whenever one of the two innocent person has to suffer by the act of third person, he who has enabled that person to occasion the loss, must sustain it, or where one of the two innocent person suffer from the fraud of third party, the loss should fall on him who has created, or could have prevented the opportunity for fraud. However in order to invoke the protection of the provisions of section 41, a transferee is essentially required to demonstrate that (a) the transferor is the ostensible owner (b) He was so by consent, express or implied, of the real owner (c) The transfer is for consideration (d) The transferee has acted in good faith, taking reasonable care to ascertain that the transferor had power to transfer. Whereas in the facts and circumstances of the present case as discussed hereinbefore,

one can clearly see that all the above ingredients are available to the appellant to seek protection of the impugned transactions.

18. The respondent No.1 having acquiesced in the title of respondent No. 2 and of Mst. Channo Bibi, the predecessor-in-interest of respondent Nos.3 and 4, and having waived his right to the lands, leading the appellants to believe that the said vendors were in fact the owners of the lands. The appellant society thus having purchased the lands for valuable consideration, without knowledge of respondent No.1's purported entitlement were/are entitled to protection under section 41 of the Transfer of Property Act. We would therefore allow these appeals, and set aside the impugned judgment rendered by the High Court. No order as to cost.

Announced in open Court
at Islamabad on 18-03-2022

"APPROVED FOR REPORTING "
(Amir Sh.)

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