

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Qazi Faez Isa
Mr. Justice Yahya Afridi

Civil Petition Nos. 3041 and 3061 of 2018

(Against the judgment dated 07.05.2018 of the Islamabad High Court, Islamabad passed in C.R. Nos. 117 and 147 of 2017)

Syed Kausar Ali Shah. *(in CP. 3041/18)*
Taqi Developers (Pvt.) Limited through its *(in CP. 3061/18)*
Chief Executive Officer and another. ... *Petitioners*

Versus

Syed Farhat Hussain Shah and others. *(in both cases)*
... *Respondents*

For the Petitioner: Agha Muhammad Ali, ASC.
(In both cases) Ch. Akhtar Ali, AOR.

For Respondent No.2: Mr. Ghulam Nabi, ASC.
(In both cases) Syed Nayab Hassan Gardezi, ASC.
Syed Rifaqat Hussain Shah, AOR.

For other Respondents: Nemo. (in both cases).

Date of Hearing: 18.04.2022.

ORDER

Qazi Faez Isa, J. Jalal Shah died in the year 1963 leaving behind 114 *kanals* and 14 *marlas* of land. He was survived by two sons, namely, Mushtaq Ali Shah and Said Ali Shah, in whose favour inheritance mutation number 71 was approved on 3 December 1965 showing them as the only heirs of Jalal Shah and thus joint owners of his estate. Jalal Shah also had a daughter, Mst. Ghulam Fatima, but she had predeceased him on 3 August 1960. Mst. Ghulam Fatima left behind three daughters, namely, Ummat-ul-Aziz, Akhtar Bibi and Safdar Bibi. Ummat-ul-Aziz invoked section 4 of the Muslim Family Laws Ordinance, 1961, to claim her share in the estate of Jalal Shah. The said section is reproduced hereunder:

‘4. **Succession.** In the event of the death of any son or daughter of the *propositus* before opening of succession, the children of such son or daughter, if any, living at the time succession opens, shall per stripes receive a share equivalent

to the share which such son or daughter, as the case may be, would have received if alive.'

By relying on the aforesaid provision, Ummat-ul-Aziz successfully submitted an application to the revenue authorities on 9 February 2008 for the correction of inheritance mutation number 71, but such correction was disallowed in an appeal preferred before the concerned revenue authority. Therefore, on 2 February 2012 she filed a suit seeking cancellation of inheritance mutation number 71 and a declaration that she was entitled to her share in Jalal Shah's estate. Ummat-ul-Aziz died on 7 July 2013 and her legal heirs, that is, her husband and son, sought to withdraw the suit filed by her subject to being granted permission to file a fresh suit. Permission was granted, and they filed another suit on 2 June 2014, which was decreed. Appeal against the same was dismissed, and so too the civil revision. It is these three concurrent judgments which have been assailed herein.

2. Mushtaq Ali Shah, son of Jalal Shah, died in the year 1989 and inheritance mutation was made in favour of his legal heirs who sold their share in the land, which had been mutated in their favour, to Misbah-ul-Hassan, a third party. The other son of Jalal Shah, namely, Said Ali Shah, died in the year 1992 and inheritance mutation was made in favour of his legal heirs, who sold their share in the land inherited by them, measuring 46 *kanals* and 6 *marlas*, to Syed Kausar Ali Shah, a co-legal heir of Said Ali Shah. Syed Kausar Ali Shah then sold the said 46 *kanals* and 6 *marlas* of land together with the land he had inherited, total measuring 52 *kanals* and 9½ *marlas* ('**the said Land**'), to Taqi Developers (Pvt) Limited¹ through four sale mutations, respectively bearing numbers 1632, 1633, 1636 and 1643, all of which were sanctioned on 15 November 2007.

3. The contentions of the learned Agha Muhammad Ali Khan, representing the petitioners, were recorded in orders dated 9 November 2021 and 2 December 2021. When the learned Mr. Ghulam Nabi, representing the contesting respondents, entered appearance he was told to come prepared on the points noted in the said orders.

¹ The petitioner No. 1 in CPLA No. 3061/2018 and proforma respondent No. 7 in CPLA No. 3041/2018.

4. The learned Agha Muhammad Ali Khan also represents Syed Kausar Ali Shah, and states that Syed Kausar Ali Khan had sold the said Land to Taqi Developers (Pvt) Limited through four sale mutations, bearing numbers 1632, 1633, 1636 and 1643, attested on 15 November 2007, and that no objection with regard thereto or the said sale was raised. He states that the *cause of action*, if any, which may have arisen to the daughters of Mst. Ghulam Fatima, arose in the year 1963, on the death of their grandfather, Jalal Shah, but Mst. Ghulam Fatima's daughter did not assert their purported rights. And, this was done after forty-five years of the death of Jalal Shah by only one granddaughter, namely, Ummat-ul-Aziz. The learned counsel further submits that Ummat-ul-Aziz's husband, namely, Syed Intikhab Hussain (PW1), testified that his wife had demanded her share in the estate of Jalal Shah from her brothers in the year 1992. Therefore, the *cause of action* as per her own showing arose in 1992, and the prescribed period of limitation would commence from then. That for cancellation of a mutation, Article 91 of the First Schedule of the Limitation Act, 1908 (**'the Act'**) prescribes a limitation period of three years from date of knowledge. With regard to a declaration concerning ownership, Article 120 of the Act prescribes a limitation period of six years from date of knowledge. However, Ummat-ul-Aziz agitated her right to ownership for the first time when she filed the said application in 2008, sixteen years after first asserting her rights in 1992. Thereafter, she filed a suit on 2 February 2012, after twenty years. He submits that the withdrawal of the suit and the filing of a fresh one on 2 January 2014 would not extend the limitation period, because of the prescription in Order XXIII Rule 2 of the Code of Civil Procedure, 1908 (**'the Code'**) that, *'In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.'* Therefore, the suits, both the first and the second one, were hopelessly time-barred, submits learned counsel. To rebut the contention of the learned Mr. Ghulam Nabi that Ummat-ul-Aziz was a sole helpless lady, the learned Mr. Khan states that she was married as far back as 1974 to Syed Farhat Hussain Shah and also had a son, namely, Syed Intikhab Hussain Shah. Therefore, the contention of her helplessness is contrary to the record. Reliance was

placed upon the judgment of this court in the case of *Noor Din v Additional District Judge*² to contend that the Act is applicable, and to the judgments in the cases of *Grana v Sahib Kamala Bibi*³ and *Intelligence Bureau Employees Cooperative Housing Society v Shabbir Hussain*⁴ for the proposition that unchallenged and longstanding property record entries should not be disturbed.

5. The learned Mr. Khan also submits that the property record revealed a number of inheritance and sale mutations with regard to Jalal Shah's estate prior to Taqi Developers (Pvt) Limited buying the said Land in 2007. Taqi Developers (Pvt) Limited, a corporate entity, and a third party, had bought the said Land without suspecting that there was any other interest in the said Land, or that the property record had any defect therein; the said Land was bought from the person shown to be its owner. Reliance is also placed on section 41 of the Transfer of the Property Act, 1882 to contend that the sale of the said Land was by its ostensible owner, who transferred it for valuable consideration, and the buyer had acted in good faith and had taken reasonable care to ascertain that the transferor had the power to transfer the said Land; for this proposition he also referred to the decisions in the case of *Grana* and *Intelligence Bureau Employees* (above).

6. The learned Mr. Khan further submits that Taqi Developers (Pvt) Limited had bought the said Land on which it developed a housing scheme by the name of 'Fatima Valley Housing Scheme' ('**the Scheme**'), which was duly approved by the Capital Development Authority, and that 444 plots in the Scheme had already been allotted. In this regard the learned counsel referred to the testimony of Syed Javed Shah (DW-2), representing Taqi Developers (Pvt) Limited, and states that no cross-examination on this part of the testimony of the said witnesses was conducted, which meant that the plaintiffs admitted this fact. The learned counsel has also pleaded acquiescence on the part of Ummat-ul-Aziz stating that valuable third party rights were being created in the said Land

² 2014 SCMR 513.

³ PLD 2014 Supreme Court 167.

⁴ Civil Appeal Nos. 1079 and 1080 of 2015, decided on 18 March 2022; approved for reporting but as yet unreported.

and she let this happen. It is probably for this reason that the plaint had no clause referring to when the *cause of action* had accrued. Further submits that limitation is a mixed question of law and fact and that, admittedly, the suits filed by Ummat-ul-Aziz and then her legal heirs were time-barred. A plaintiff has to assert knowledge to save the suit from the bar of limitation and to have pleaded the ground, as envisaged by Order VII Rule 6 of the Code, but the said plaintiffs did not do so. It is submitted that although issue No. 4 was cast on the point of limitation, it was cursorily dealt with by the learned Judges and by disregarding the applicable provisions of the Act. Moreover, the contesting defendants' defence and the accrual of third party rights were not appreciated, and the case was decided on the assumption that it was a simple one regarding a denied inheritance.

7. On the other hand the learned Mr. Ghulam Nabi, representing the contesting respondents, states that three well reasoned concurrent judgments which accord with the law should be sustained and the instant petitions be dismissed. He further states that Ummat-ul-Aziz had submitted an application on 9 February 2008 to the District Collector (Exhibit P.11) stating therein that she was entitled to a share in the estate of her grandfather (Jalal Shah) in view of section 4 of the Muslim Family Ordinance, 1960, and had sought the inheritance mutation No. 71 to be corrected, as it was made in disregard of the said provision of law. Her application was allowed *vide* order dated 21 January 2011, which Syed Kausar Ali Shah⁵ assailed in an appeal preferred by him, which was allowed *vide* order dated 19 December 2011, necessitating the filing of the suit by her on 2 February 2012. However, the suit on account of some *formal defects* had to be withdrawn and a fresh one filed, after obtaining requisite permission from the court. With regard to the petitioners plea that the suit was time-barred, the learned counsel submits that in respect of rights to property on account of inheritance there can be no limitation. He refers to the case of *Munir Ahmed v Rawalpindi Medical College*⁶ to submit that no limitation runs against a void order. The decision in the

⁵ Petitioner in Civil Petition No. 3041 of 2018 and respondent No. 3 in Civil Petition No. 3061 of 2018.

⁶ 2019 SCMR 648.

case of *Farhan Aslam v Nuzba Shaheen*⁷ and *Ghulam Qasim v Razia Begum*⁸ are cited to submit that property, as per Islamic law, devolves immediately upon the death of the predecessor-in-interest, and the latter case for the proposition that possession by an heir is considered to be constructive possession on behalf of all heirs. And with regard to the defence of section 41 of the Transfer of Property Act, 1882 the decisions in the cases of *Muhammad Shamim v Nisar Fatima*⁹ and *Ghulam Rasool v Noor Muhammad*¹⁰ are relied upon.

8. We have heard the learned counsel for the parties and with their able assistance examined the documents on record and the cited precedents. The first challenge made to the inheritance mutation number 71 was when Ummat-ul-Aziz asserted her rights to the estate of Jalal Shah by submitting an application for the correction of the said mutation's on 9 February 2008, which was forty-five years, after Jalal Shah's death. It would be appropriate to reproduce the following extract from the order dated 19 December 2011 passed in appeal, which disallowed this challenge:

'6. I have heard the arguments of learned counsels for both the parties at length and perused the record carefully. The plea of the appellants that "Revenue Courts cannot alter/rectify the entries in question being long standing" is justified and valid. It is settled principle of law that long standing entries cannot be altered through summary manner of mutation proceedings. The review/cancellation of subject mutation is a complicated question of law and fact which involves the rights of multiple parties and the court cannot grant relief in the said case without injuring the rights of 3rd parties involved.'

Ummat-ul-Aziz did not assail the above order and instead filed a suit on 2 February 2012.

9. The suit filed by Ummat-ul-Aziz, on the oral request of her counsel, without notice to the defendants, was unilaterally withdrawn and the learned Judge, *vide* order dated 9 December 2013, accorded permission to file a fresh suit after noting the contention of the plaintiff's counsel that

⁷ 2021 SCMR 179.

⁸ PLD 2021 Supreme Court 812.

⁹ 2010 SCMR 18.

¹⁰ 2017 SCMR 81.

there were some *formal defects* therein, but these *defects* were not mentioned. However, since permission was granted, and as subsequently a fresh suit was filed on 2 January 2014, we need not concern ourselves with the mode and manner of the withdrawal of the suit and the accord of permission to file a fresh suit. The sisters of Ummat-ul-Aziz had the very same interest in the said Land but only one sister, namely, Safdar Bibi, was arrayed as defendant No. 2 and the other sister, namely, Akhtar Bibi, was not made a party. Safdar Bibi did not contest the suit, nor did she file a written statement either supporting the plaintiff/s or opposing their claim; she also did not come forward to testify nor was called as a witness. However, this aspect of the case and some of the contentions of the learned Mr. Khan are not being dilated upon as they are not necessary for this decision, and we are restricting our decision on the following aspect of this case.

10. In our opinion there is a clear distinction between (a) cases in which an heir alleges that his/her rights to inheritance have been disregarded and his/her share not mentioned in the inheritance mutation, and (b) those cases in which such an heir sits idly by, does not challenge mutation entries of long standing, or acquiesces, and only comes forward when third party rights in the subject land have been created. To succeed in respect of the latter (b) category cases an heir must demonstrate that he/she was not aware of having been deprived, give cogent reasons for not challenging the property record of long standing, and show complicity between the buyer and the seller (the ostensible owner) or that the buyer knew of such heir's interest yet proceeded to acquire the land. If these two categories are kept in mind, then the judgments of this court, respectively relied by both sides, which are apparently at variance, become reconcilable.

11. The three courts, whose judgments are challenged, did not pay heed to the interest in the said Land created in a third party, that is, Taqi Developers (Pvt) Limited. And, also disregarded the fact that third party interest was created before objecting to the inheritance mutation number 71. The significance of the fact that Taqi Developers (Pvt) Limited had created further interest in the said Land by earmarking plots in the

Scheme and allotting as many as 444 plots was also not considered. Despite the fact that it would be the allottees of these 444 plots who would suffer the consequences, and do so for something for which they were not responsible. In our opinion once the interest of the said 444 came to light they should have been arrayed as defendants in the suit by the plaintiffs, and if the plaintiffs failed to amend the plaint it was incumbent upon the learned Judge of the Trial Court to do so. It would be legally indefensible if we permit these 444 allottees to be deprived of their valuable property rights without them being heard by the Trial and/or Appellate Courts, the courts of fact, and by the High Court and then by this Court.

12. In the case of *Grana* (above) this Court considered the conduct of the plaintiff and whether the plaintiff had acquiesced, and held as under:

‘It merges from the afore discussed case-law that the law of limitation is not entirely to be ignored or brushed aside whenever property is claimed on the basis of inheritance. The conduct of such claimant may become relevant and material when the bar of time limitation is pleaded by the adversary. A defendant may show that the plaintiff by her or his acts, overt or implicit, had demonstrated acquiescence in the defendant’s title to the suit properly thereby allowing him to deal with it as exclusive owner, for instance regularly and openly disposing of parts of the property or developing it at his own expense over a period of time within the knowledge of the plaintiff. When in such circumstances the defendant/heirs transfers the property for valuable consideration the transferee is entitled to believe that the transferor had a valid title to transfer.’¹¹

The aforesaid principle was more recently upheld and further articulated in the *Intelligence Bureau Employees* case. In the case of the *Intelligence Bureau Employees* a housing scheme was also developed and plots allotted. It would be appropriate to reproduce the following extract from that case:

‘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

¹¹ PLD 2014 Supreme Court 167, pages 172-173, paragraph 11.

infrastructure and amenities, and then of allotting the plots so created to its members, who raised construction thereon.’¹²

13. The learned Judges of the subordinate courts and the learned single Judge of the Islamabad High Court disregarded the abovementioned judgments of this Court, the principle of acquiescence, and the fact of third party interest having been created in the said Land, and that further third parties had acquired proprietary rights in the said Land. And, that such interest was acquired in land which was shown in the record of rights of long standing, which remained unchallenged. The learned Judges also ignored the fact that Ummat-ul-Aziz took no action for forty-five years, and that she submitted her application to the revenue authorities only after the creation of the third party interest in the said Land. The plaintiffs, having stood idly by allowed third party interest to be created in the said Land, and could then not complain and claim the said Land.

14. Therefore, for the afore stated reasons, we convert these petitions into appeals and allow them by setting-aside all three impugned judgments. Consequently, the suit filed by the Ummat-ul-Aziz is dismissed. However, if there is any land left in the estate of Jalal Shah, wherein third party interest has not been created then Mst. Ghulam Fatima’s daughters, or their respective heirs, as the case may be, may claim their rights thereto in terms of section 4 of the Muslim Family Laws Ordinance, 1960. There shall be no order as to costs since three concurrent judgments have been set aside.

Judge

Judge

Islamabad
18.04.2022
(M. Tauseef)

Approved for Reporting

¹² Civil Appeal Nos. 1079 and 1080 of 2015, decided on 18 March 2022, paragraph 11; approved for reporting but as yet unreported.