Stereo.HCJDA 38**.**

Judgment Sheet
IN THE LAHORE HIGH COURT,
MULTAN BENCH, MULTAN
JUDICIAL DEPARTMENT
….

Civil Revision No.751-D of 2004.

Mst. Kaneez Fatima, etc.

Versus

Ghulam Hussain (*deceased*)
through Legal Hairs, etc.

J U D G M E N T.

Date of hearing & Decision:	03.10.2023
Date of Announcement:	07.12.2023.
Petitioners by:	Muhammad Maalik Khan Langah, Advocate.
Respondents by:	M/s Muhammad Masood Bilal & Masood Arif Butt, Advocates.

AHMAD NADEEM ARSHAD, J. This Revision Petition has been directed against the judgments & decrees of Courts below whereby the suit of the respondent No.1 namely Ghulam Hussain was decreed concurrently.

2. Facts in brevity are that predecessor of respondents namely Ghulam Hussain (plaintiff) instituted a suit for declaration and permanent injunction on 01.08.1995 against the petitioners (defendants) and sought declaration to the effect that he is owner in possession of the land measuring 1243 Kanals situated at Khata No.210/124, Mauza Khairaywala, Tehsil Chobara, District Layyah, according to the record of rights for the years 1957-58 and land measuring 1067 Kanals situated at Mauza Khairaywala, Tehsil Chobara, District Layyah, in the light of mutation No.2543 dated

12.08.1971 sanctioned on the basis of registered will deed No.1 dated 06.05.1968; that the said mutation and registered will deed have been sanctioned/executed correctly and defendants have no concern with the suit property; that order dated 04.09.1994 of Consolidation Collector, Layyah, order dated 02.10.1994 passed by Consolidation Officer Chobara and order dated 12.07.1995 passed by Consolidation Collector, are against the facts, law, without issuing notice, without providing opportunity of hearing, void, and having no effect upon his rights and as a consequential relief sought issuance of perpetual injunction that the defendants be restrained permanently from interfering in his title, possession and incorporation of the impugned orders in the revenue record. Plaintiff pleaded in his suit that the suit property originally belonged to Diam son of Dulla who transferred the same through registered will deed dated 06.05.1968 in his favour; that after his demise, in the light of said will, with the consent of his legal heirs mutation No.2543 was attested on 12.08.1971; that against said mutation defendant No.1 namely Kaneez moved a review petition; that Collector Consolidation granted permission of review vide order dated 04.09.1994; that in the light of said permission Consolidation Officer reviewed the mutation No.2543 vide order dated 02.10.1994; that he challenged said order by preferring an appeal which was dismissed vide order dated 12.07.1995; that the defendants are estopped from their words and conduct to challenge the will deed and mutation; that Consolidation Officer has no authority to declare that Diam (deceased) was Shia by sect and prayed for decree of his suit. Petitioners/defendants resisted the suit through filing contesting written statement whereby they raised preliminary objections that plaintiff is their real brother who is adamant to deprive them from their inheritance right; that alleged will was neither got executed by Diam (deceased) nor it was acted upon/implemented; that alleged will was not disclosed to the defendants and their father; that the plaintiff is estopped from his words and conduct to institute the suit; that plaintiff has no cause of

action; that the suit is not maintainable in its present form; that consolidation proceedings cannot be challenged in the Civil Court; that suit is barred by time; that plaintiff has efficacious remedy by way of appeal and without availing such remedy the suit is not maintainable. While replying on facts, maintained that Diam was owner of the suit property; that plaintiff prepared the alleged will by practicing fraud and succeeded to get the said will incorporated through mutation which was rightly reviewed by the Collector; that mutation No.2543 was concealed from the legal heirs of Diam and at the time of execution of the alleged will as well as sanction of mutation neither Allah Diwaya (legal heir of Diam) was present nor his consent was obtained. In last, they prayed for dismissal of the suit. Learned Trial Court, in the light of divergent pleadings of the parties framed necessary issues and invited them to produce their respective evidence. After recording evidence of the parties pro & contra, oral as well as documentary, decreed the suit vide judgment & decree dated 28.07.2000. Feeling aggrieved, petitioners preferred an appeal. During the pendency of said appeal, the learned Appellate Court framed two additional issues (1-a & 1-b) vide order dated 23.09.2003 and remitted the matter to the learned Trial Court under Order XLI Rule 25 C.P.C with the direction that after recording additional evidence and giving findings on said issues file be sent back to the Court. Learned Trial Court, after recording evidence of the parties, decided both the issues vide order dated 17.01.2004 and sent the matter back to the learned Appellate Court. Learned Appellate Court, thereafter, dismissed the appeal vide judgment & decree dated 06.05.2004. Being dissatisfied, petitioners filed instant revision petition.

3. Heard. Record perused.

4. Respondent No.1 in his suit basically challenged the orders dated 04.09.1994, 02.10.1994 and 12.07.1995. From the record it appears that petitioner No.1 (Kaneez) moved an application in the year 1994 before the Consolidation Officer, Layyah, for review of the mutation No.2543 dated 12.08.1971. After receiving said

application, the Consolidation Officer sought permission of review and forwarded the matter to the Addl. Deputy Commissioner Consolidation vide order dated 01.09.1994, who granted permission of review through order dated 04.09.1994. In the light of said permission, the Consolidation Officer, vide order dated 02.10.1994 reviewed the mutation No.2543 and passed fresh order by giving 1/3 share to the plaintiff in the light of will and rest of the 2/3 share was given to Allah Diwaya (father of parties) being lineal ascendant of Diam (deceased). Plaintiff challenged said order through preferring an appeal which was dismissed vide order dated 12.07.1995. Being aggrieved, plaintiff assailed said orders by instituting the suit in hand.

5. Now the basic point for determination is that whether mutation No.2543 passed on the strength of registered will deed could be reviewed or not by the Consolidation Officer.

6. Admittedly, the suit property belonged to Diam who died issueless. During his lifetime, he transferred his entire property to plaintiff (Ghulam Hussain) through a registered will deed dated 06.05.1968 (Exh.P.10). Diam died on 02.02.1970 as evident from his death certificate (Exh.D.3). He neither cancel nor challenge said will deed during his lifetime. At the time of his death, the only surviving legal heir was Allah Diwaya (father of the parties) being his lineal ascendant. Although, the petitioners alleged that at the time of demise of Diam, Mst. Fateh wife of Diam was also alive and she was legal heir of said Diam but the petitioners failed to prove said fact by producing cogent and trustworthy evidence. Diam was died on 02.02.1970 as evident from his death certificate (Exh.D.3), whereas, Mst. Fateh w/o Diam died on 22.11.1968 as is evident from her death certificate (Exh.P.11), therefore, the findings of learned Appellate Court that at the time of demise of Diam, his only surviving heir was Allah Diwaya, his lineal ascendant are correct.

7. Perusal of mutation No.2543 dated 12.08.1971 (Exh.P.2) it appears that said mutation was sanctioned in presence of Allah

Diwaya, the legal heirs of Diam in favour of plaintiff. Said Allah Diwaya did not raise any objection at the time of attestation of said mutation which was sanctioned on the strength of registered will deed. It also suggests that said will deed was came into the knowledge of said Allah Diwaya at the time of attestation of mutation but he neither challenged the will nor questioned said mutation during his lifetime. He died in the year 1979 as evident from his inheritance mutation No.797 dated 07.10.1980 (Exh.P.13). His presence at the time of mutation and silence till his death speaks a lot and appears to his consent over will deed.

8. It is matter of record that husbands of the petitioners namely Muhammad Murad, Laal Khan and, Sultan along with others being reversionaries of Diam challenged the veracity of said registered will deed dated 06.05.1968 and mutation No.2543 dated 12.08.1971 by instituting suit for declaration on 17.05.1974 against the plaintiff. The suit was resisted by the plaintiff and the learned Trial Court after contest dismissed the same vide judgment & decree dated 03.04.1978. Said decree was not assailed any further and it attained finality. Copies of said proceedings are available on file as Exh.P.1.

9. Although, the petitioners (defendants) were in knowledge of the will deed and mutation No.2543 as their husbands challenged said will deed and mutation, but they did not challenge said will deed and mutation before any competent forum at the relevant time. The Civil Court has the ultimate jurisdiction to see legality and validity of any registered or unregistered document. It is also matter of record that petitioners instituted a suit for declaration against their mother namely Mst. Dolat and plaintiff with regard to inheritance mutation of their father namely Allah Diwaya in the year 1986. Said suit was decided on the basis of compromise. In this regard, plaintiff as well as defendants No.2 & 3 executed undertakings on 27.02.1990. Said proceedings were placed on record as Exh.P.5. Through compromise agreement executed by petitioners No.2 & 3/ defendants No.2 & 3 (Glulam Fatima and Mureed), they undertook as under:

"ہر دو فریقین بدرستی ہوش و حواس اقرار کرتے ہیں اور ایک دوسرے کو لکھ کر دیتے ہیں بدیں طور پر فریق اول اور فریق دوئم کے درمیان مسمی دائم ولد دولہ و مسماۃ دولت بیوہ اللہ ڈیوایا کی اراضی کا جھگڑا ہے اور اس بارے میں پنچائت اور معززین دیہہ نے ہر دو فریقین کے مابین راضی نامہ کروادیا۔ اور فریق دوئم نے فریق اول کو انکا حق دے دیا ہے اور بروئے اشٹامپ نمبر 3019/27-2-90 آراضی تعدادی 6-5k ایکڑ دے دیا ہے۔ اور آج سے فریق اول کا مسمی دائم اور مسماۃ دولت مائی کی جو ملکیت آراضی ہے اس سے کوئی تعلق واسطہ نہ رہا ہے اور آج سے مسمی دائم اور مسماۃ دولت مائی مذکوران کی جائیداد کا حقدار فریق دوئم ہو چکا ہے۔ اور آج سے فریق اول مسماۃ دولت مائی مذکور اور دائم مذکور کی جائیداد کے بارے میں کسی قسم کا کوئی مطالبہ نہیں کریں گے اور نہ ہی کوئی دعویٰ، مقدمہ یا دیگر کوئی قانونی چارہ جوئی نہ کریں گے۔"

In the light of said undertaking, petitioners were estopped to challenge the veracity of mutation No.2543, sanctioned on the strength of will with regard to legacy of Daim s/o Dullah.

10. The Consolidation Officer, Layyah, while reviewing the mutation No.2543 admitted the will deed as correct and awarded 1/3 of the suit property to the plaintiff. However, reviewed the mutation on the ground that testator could not bequest more than one third of his property. The petitioners did not challenge said findings of the Consolidation Officer.

11. In order to reach a just conclusion, it is better to understand the terminology of '*Will'*, its effect and how much property a testator can bequest. The *Will* is defined under Section 2(h) of the Succession Act, 1925, which reads as under:

> *"will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death."*

A will or testament or *Wassiyat* has been defined as "an instrument by which a person makes disposition of his property to take effect after his death and by the virtue of its nature is rescindable.

A will is essentially a legal declaration which signifies the intention of the testator with regard to the distribution of his or her property. A will does not affect the power of the owner to transfer the property either inter vivos or by any other testamentary

disposition. It is not binding upon the testator in any manner, especially before his or her death.

Ameer Ali says "a will from the Mussalman point of view is a divine institution since its exercise is regulated by the Quran".

Tyabji says that a will means "the legal declaration of the intentions of a Muslim with respect to his property which he desires to be carried into effect after his death."

According to the Hedaya, composed by Sheikh Burhan Ud-din Ali "a will is the endowment with the property of anything after death".

The august Supreme Court of Pakistan in its recent judgment titled "*ZAKIA BEGUM AND OTHERS V. NASIR-UL-ISLAM KHAN AND OTHERS (***2022 SCMR 2130***)*", defines the will as under:

> ***"****A will can therefore be considered as a formal document drawn up by a natural person wherein he expresses his wish as to how he would want his estate to be distributed after their death. By virtue of the fact that wills operate after the death of the donor, they are considered testamentary instruments i.e. instruments that come into effect after the death of the donor/testator.****"***

The following terms are important to note in terms of wills:

a) *Testator:-The person, who makes/creates a will.*

b) *Legatee:- The person/persons, in whose favour, the will is created.*

c) *Legacy:- The subject matter of the will. It is the property to be distributed among the heirs.*

d) *Executor:- The testator, while executing the will, may appoint a person to execute the will in accordance with its contents (after his death).*

When a Muslim dies there are four duties which need to be performed. These are:

- *Payment of funeral expenses*
- *Payment of his/her debts*
- *Execution his/her will*
- *Distribution of the remaining estate amongst the heirs according to Shariat.*

When a person dies his/her property devolves upon his/her heirs. A person may die with or without a will (Testament). If he or she dies leaving a will, the property is distributed among his/her heirs according to the rules of Testamentary Succession. In other words, the property is distributed as per the contents of the testament or will. On the other hand if a person dies leaving no testament (will), that is dies intestate, the rules of intestate Succession are applied for distribution of the property among heirs.

Will is declared lawful in the Qur'an, though the Qur'an itself does not provide for the testamentary restriction of 1/3rd. The permissibility of bequest upto 1/3rd is traced to a *Hadiath* of the Prophet which has been stated by Sa'd Ibn Abi Waqqas and the information was reported by Bukhari. The story behind this was one of the fellow associates of Prophet was very ill and there were chances of his death, as was very old as well, also he canceled his Mecca due to ill-health. He was asked by the Prophet about the distribution of his wealth, for which replied that he will give all his property in charity (not to the family), to which Prophet said he should give only 1/3 of his total property to any one of his choices so that the major portion remains within the family and they will not become destitute in future. The Said Hadiath reads as under:

> *"The Messenger of God used to visit me at Mecca, in the year of the Farewell Pilgrimage on account of my illness which had become very serious. So I said, "My illness has become very severe and I have much property and there is none to inherit from me but a daughter, shall I then bequeath two-thirds of my property as a charity?" He said, "No." I said, "Half?", He said "No." Then he said: "Bequeath one-third and one-third is much, for if thou leavest thy heirs free from want, it is better than that thou leavest them in want, begging of other people; and thou dost not spend anything seeking thereby the pleasure of Allah but thou art rewarded for it even for that which thou puttest into the mouth of they wife"*

12. A will can be made in favour of heir as well as non-heir. In case of heir, the bequest is not valid unless the other heirs consented to the bequest after the death of the testator as defined in Section 117 of D.F. Mulla's Mohammadan Law, reads as under:

> *"A bequest to an heir is not valid unless the other heirs consent to the bequest after the death of the testator. Any single heir may consent so as to bind his own share.*
> *Explanation - In determining whether a person is or is not an heir, regard is to be had, not to the time of the execution of the will, but to the time of the testator's death."*

The testator is also entitled to make a bequest in favour of a non-heir.

13. The next question is how much property of a testator can be disposed of through bequest. Section 118 of D.F. Mulla's Mohammadan Law defines that a Mohammadan cannot dispose of more than third of the surplus of his estate after payment of funeral expenses and debts, but in excess of one third cannot be taken effect, unless the heirs consented thereto which is reproduced as follows:

> *"A Mohammadan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot take effect, unless the heirs consent thereto after the death of the testator."*

14. B.J. Verma in Section 188 of the Commentaries of Muhammadan Law describes that a bequest to an heir is not valid except to the extent to which the heirs of the testator make consent expressly or impliedly. Meaning thereby, there is no restriction upon the testator and he can bequest his entire property to his legal heir but said bequest will require consent from the legal heirs after the death of testator impliedly or expressly. Said section reads as under:

> *"A bequest to an heir is not valid except to the extent to which the persons who are the heirs of the testator at the time of his death, expressly or impliedly consent to the bequest after his death."*

However, in case of non-heir, Mohammadan can dispose of his property, in excess of one third, if qualify the conditions as stated in section 190 of B.J Berma's Commentaries of Mohammadan Law, which reads as under:

> *"A Mohammedan is not entitled to dispose of his property (which would otherwise devolve on his heirs under*

Mohammedan Law) by will in favour of a person who is not a heir, in excess of one third except in the following cases:-

(1) Where, subject to the provisions of any law for the time being in force, such excess is permitted by a valid custom;
(2) where there are no heirs of the testator;
(3) where the heirs existing at the time of the testator's death, consent to such bequest after his death;
(4) where the only heir is the husband or the wife and the bequest of such excess does not effect his or her share."

There are two exceptions to the one third Rule:

a) When the testator does not have any heir. In such cases, if the restriction of permissible one-third is applied, then the beneficiary is the Government who will take the property by doctrine of Escheat, while the primary purpose of applying the bequeathable permissibility to the extent of one-third is to protect the rights of the heirs, and not that of the Government. An heirless person can thus make a bequest of the total property.
b) Where the heirs themselves consent to the bequest in excess of one-third. As the chief objective is to safeguard the interests of theirs, the excess bequest can be validated by consent.

The august Supreme Court of Pakistan in the case titled "*MUHAMMAD TUFAIL V. ATTA SAHBBIR AND 5 OTHERS (**PLD 1977 SUPREME COURT 220**)*", with regard to Shia School of thought held as under:

"*……according to Shia Law, a testator can leave a legacy to an heir even without the consent of the other heirs but where it exceeds one-third, it is not valid without the consent of all the other heirs who may give their consent before or after the death of the testator.****"***

The will covering the entire property of the testator instead of being confined to one-third is not void-ab-initio as held by the Supreme Court of Pakistan in Muhammad Tufail's case (referred supra), wherein the Court observed as under:

> *"The first question to be addressed to is as to what is the effect of the will covering the entire property of the testator instead of being confined to one-third. As observed earlier, this restriction on the extent of testamentary disposition confining it to one-third of the entire property of the testator is not based on any injunction of the Holy Qur'an but is traced to a tradition of the Holy Prophet (peace be upon him) to which no less sanctity attaches as a source of Islamic Law. Since, however, according to the Shia doctrine based on Verses 180 and 181 of Sara AI-Baqara, a bequest could be made to an heir and even in excess of one-third subject course to the assent of other heirs it is clear that bequest comprising the entire property is not void ab initio and of course depends on its validity on the assent of all the heirs which is not available in the instant case."*

The will made in favour of non-heir will be effective without the consent of other heirs as held by the august Supreme Court of Pakistan in the case titled *"ABDUL HAQ AND ANOTHER V. MST. SURRYA BEGUM AND OTHERS (***2002 SCMR 1330***).* The facts of the case are that one Samad Khan who was allotted evacuee land in lieu of his verified claim, died in the year 1960 leaving behind a son namely Atta Muhammad and children of Ali Muhammad, his pre-deceased son. His inheritance mutation was sanctioned on the basis of will in favour of children of his pre-deceased son. Atta Muhammad appeared before the Revenue Officer at the time of sanction of mutation and objected to giving effect to the will. It was apprised to the Revenue Officer that Atta Muhammad had been dislodged by Samad Khan, therefore, he was deprived of right of inheritance in the property of Samad Khan. Said Atta Muhammad did not challenge said mutation, however, sons of Ali Muhammad instituted a suit for declaration against their sisters with the allegation that they are daughters of Muhammad Bibi from her previous husband namely Nazir Ahmad and are not daughters of Ali Muhammad, therefore, they are not entitled and they (plaintiffs) are only entitled to inherit whole property of Samad Khan. The suit was dismissed, however, appellate Court reversed the findings and decreed the suit but this Court while accepting the Revision Petition, set-aside the decree of appellate Court and restored the decree of learned appellate Court. The august Supreme Court held as under:

> ***"****The findings of the First Appellate Court that will having not been consented to by Atta Muhammad as is clear from the proceedings in mutation, the same could not be given effect to as according to Muhammadan Law, disposal of property through will by a Muhammadan in favour of one of the heirs is not effective unless the other heirs after the death of the maker of will had consented to are not tenable as it was altogether ignored that none of the parties in the presence of Atta Muhammad son of Samad Khan were entitled to inherit the property from Samad Khan being heirs of his predeceased son at the time of his death in 1960, therefore, the will made in favour of respondents was not a will made in favour of any heir of Samad Khan as such the same was effective even without the consent of Atta Muhammad.****"***

From the above discussion, conclusion can easily be drawn that a testator can bequest his entire property to a non-heir through will in the following cases i.e. where subject to the provision of any law for the time being in force, such excess is permitted by a valid custom, where there are no heirs of the testator, where the heirs existing at the time of the testator's death, consent to such bequest after his death and where the only heir is the husband or the wife and the bequest of such excess does not affect his or her share.

15. The consent given by the heirs may be express or implied. It may be oral or in writing. It can also be implied from conduct. Where the testator makes a bequest and on his death, the other heirs help the legatee in affecting a mutation in name or allow the legatee to take exclusive possession of the property, it is proof of the heir's consent.

16. In the present case Daim, the testator bequested his entire property to Ghulam Hussain (a non-heir) through registered will deed dated 06.05.1968. After the death of said Daim, his inheritance mutation No.2543 was attested on 12.08.1971 (Exh.P-1). At the time of sanction of this mutation, his sole legal heir namely Allah Diwaya (father of the parties) was present but had not objected upon the sanction of mutation on the basis of will. It means that he impliedly consented the mutation. Allah Diwaya was deprived of right to inherit property as a consequence of mutation No.2543 but he did not challenge the same during his lifetime. The

petitioners claimed the property through Allah Diwaya as his heirs. Petitioner No.1 filed the review petition in the year 1994 after about 23 years of sanctioning of the mutation which had already been given effect in the record of rights. The petitioners who are not legal heirs of Daim, therefore, had no *locus standi* to move any petition of review. Similarly the Consolidation Officer has no authority to review the mutation after lapse of such long time, which otherwise had been sanctioned in accordance with law.

17. The learned Courts below keeping in view facts and circumstances of the case and evidence available on the record rightly dismissed the suit concurrently. Learned counsel for the petitioners failed to point out any mis-reading, non-reading or jurisdictional defect in the impugned judgments and decrees of learned Courts below.

18. I have also seen no illegality, irregularity and mis-reading or non-reading of evidence on the part of learned Courts below while passing the impugned judgments and decrees. There are concurrent findings of facts recorded by learned courts below and the courts below while passing the impugned judgments and decrees have considered every piece of evidence, oral as well as documentary, produced before them and nothing is shown to have been overlooked any part of the record from their judicious consideration. The findings of the learned courts below on question of facts and law having based upon proper appreciation of oral as well as documentary evidence produced in the suit, are not liable to be reviewed or substituted by this Court while exercising jurisdiction under section 115 of the CPC. In this regard, reliance is placed upon "*Syed HUSNAIN NAQVI and others versus Mst. BEGUM ZAKARA CHATHA through LRs and others*" (**2015 SCMR 1081**), "*NOOR MUHAMMAD and others versus Mst. AZMAT-E-BIBI*" (**2012 SCMR 1373**), "*Muhammad Akhtar versus Mst. Manna & 3 others*" (**2001 SCMR 1700**), "*Ghulam Muhammad & 3 others versus Ghulam Ali*" (**2004 SCMR 1001**), "*Abdul Mateen and others versus Mustakhia*" (**2006 SCMR 50**) and "*Malik Muhammad Khaqan*

versus Trustees of the Port of Karachi (KPT) and another" (**2008 SCMR 428**).

19. For what has been discussed above, the instant Civil Revision is without any merits, hence, the same is hereby ***dismissed*** with no order as to costs.

(AHMAD NADEEM ARSHAD)
JUDGE.

APPROVED FOR REPORTING.

JUDGE.

ANNOUNCED IN OPEN COURT ON _____

JUDGE.

*M. Arsalan**