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*Judgment Sheet*

IN THE PESHAWAR HIGH COURT, ABBOTTABAD  
BENCH  
JUDICIAL DEPARTMENT

Civil Revision No. 110-A/2008

**JUDGMENT**

Date of hearing..... **12.09.2022** .....

Petitioners (Jehandad Khan through his legal heirs and Khawaidad Khan) By Mr. Aqeel Sarwar Tanoli, Advocate.

Respondents. (Mst. Rokhana) By Haji Ghulam Basit, Advocate.

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WIQAR AHMAD, J.- One Azad Khan, who was occupancy tenant of land situated in Khasras No. 251, 252, 257, 734, 737, 739, 758 and 905 measuring 38 Kanals and 10 Marlas, had died in the year 1937. He had left behind his son namely, Jehandad Khan (defendant No.1) and a daughter namely, Mst. Rokhana (plaintiff). As per revenue record, the occupancy rights, held by late Azad Khan in his life time, had been mutated through inheritance mutation No. 501 attested on 24.01.1938 in the name of Jehandad Khan/ defendant No.1. Aggrieved from attestation of ibid inheritance mutation, Mst. Rokhana / plaintiff had brought a suit against

Khan for declaration and possession as well as permanent injunction to the effect that she, being legal heir of late Azad Khan was entitled to 1/3<sup>rd</sup> share of the entire property and the entries made in the revenue record were wrong, against the facts, ineffective upon her right, thus, liable to correction.

Plaintiff has claimed in the plaint that, being legal heir of late Azad Khan, she had been entitled to her due share in his legacy but was deprived therefrom. On getting knowledge about wrong and illegal entries in the revenue record, she had come to village and demanded her right from petitioner No.1 / defendant No.1 but in vain, and upon final refusal she had brought the suit before learned civil court. Upon filing of the suit, the petitioners and proforma respondent (defendants in the main suit) were put on notice, who appeared and contested the suit by way of filing their separate written statements. Out of divergent pleadings of the parties thirteen (13) issues were framed

vide order dated 16.01.2004 and an ex-parte decree was passed in favour of respondent No.1 / plaintiff. Thereafter, the defendants appeared and upon their application the ibid ex-parte decree was set-aside vide order dated 09.06.2004. The parties were directed to adduce their evidence, who accordingly produced their respective evidence. After closing of evidence, learned counsel for the plaintiff / respondent No.1 filed an application for impleadment of petitioner No.2 namely, Khuwaidad Khan, who was son of petitioner No.1. Said application was allowed and thereafter an amended plaint was filed. Defendants No.1 & 2 relied upon already submitted written statement while the newly added defendant submitted his written statement and thereafter out of divergent pleadings of the parties, the following amended issues were framed;

1) *Whether the plaintiff has got a cause of action?*

2) *Whether the plaintiff is estopped to*

- 5) Whether the disputed property was the ancestral property of plaintiff and defendant No.1?
- 6) Whether the defendant No.1 had purchased the disputed property from on Badri Zaman etc?
- 7) Whether the defendant No.1 has rightly transferred the disputed property to defendants No.2 & 3?
- 8) Whether the defendant No.2 is bonafide purchased?
- 9) Whether the plaintiff is entitled to the decree as per prayers in part "Alif" and "Bay" of the plaint?
- 10) Relief.

Both the parties except defendant No.3 relied upon the already recorded evidence while the latter recorded his sole statement and closed his evidence. The learned trial court after completion of evidence, heard learned counsel for the parties and thereafter passed the following decree in favour of the plaintiff / respondent No.1;

*"Suit of the plaintiff as per prayer in part "Alif" and "Bay" of the plaint is hereby decreed against the defendants No.1 & 3 to the extent of property measuring 10 Kanals 11 Marlas in the suit property and*

as to costs. File be consigned to record room after its completion."

Felt aggrieved from the findings of learned trial court, the petitioners / defendants filed an appeal before the learned District Judge Mansehra. The appeal was entrusted to the court of learned Additional District Judge Mansehra for disposal. The learned appellate court after hearing learned counsel for the parties and reappraising the entire evidence, dismissed the appeal vide impugned judgment and decree dated 02.04.2008. Aggrieved from findings of both the courts below, the petitioners have filed the instant civil revision.

2. I have heard arguments of learned counsel for the parties and gone through the record.

3. In this case claim of plaintiff / respondent No.1 namely, Mst. Rokhana, was arising from her entitlement in the legacy of her deceased father namely, Azad Khan. His father Azad Khan had died and vide

property had been transferred to defendant No.1 (predecessor in interest of the petitioners). It was a mutation in respect of rights of occupancy tenancy regarding the property in dispute. This was the basic mutation challenged by way of filing suit before the learned Civil Court on 15.11.2002.

Through other mutation bearing No. 3721 attested on 26.02.2003 defendant No.1 had transferred part of property to defendant No.2 in lieu of sale consideration while through mutation No. 3758 attested on 20.05.2003 defendant No.1 had transferred some property by way of gift in favour of his son i.e. defendant No.3. The property acquired by defendant No.2 through sale mutation No. 3721 attested on 26.02.2003 has been kept intact by learned trial court while gift mutation No. 3758 attested on 20.05.2003 has been set-aside and it was directed that share of plaintiff / respondent No.1 to the extent of 10 Kanals and 11 Marlas should be adjusted in the remaining property.

objected by learned counsel for the petitioners, however, he has mainly argued that vide mutation No. 501 dated 24.01.1938 the occupancy rights of Azad Khan (deceased) had been transferred to his son namely, Jehandad Khan (petitioner / defendant No.1). He contended that Azad Khan was not owner of the property but occupancy tenant and as per law prevailing at that time i.e. Punjab Tenancy Act, 1887 rights of occupancy tenancy was transferable in favour of male legal heirs and not the female legal heirs of an occupancy tenant. He added that Section 59 of Punjab Tenancy Act had though been amended subsequently but said amended Act has been promulgated in the year 1951 (declaring devolution of tenancy rights subject to the law of Shariat) which has not been given any retrospective effect, according to learned counsel and, therefore, the Act would not affect the already effected mutations. The learned counsel while relying upon judgment of Hon'ble Supreme Court

*Public at Large*" reported as PLD 1991 SC

731 contended that since Azad Khan was not owner of the property at the time of death but occupancy tenant, therefore, the rights that had been devolved on defendant No.1 could not be treated as a legacy. In support of his case, the learned counsel also placed reliance on the judgments delivered in the cases of Mst. Musahib Khatoon & 02 others Vs. Mst. Begum Noor & another (1972 SCMR 530), Aslam & another Vs. Mst. Kamalzai & others (PLD 1974 SC 207), Rab Nawaz Vs. Mst. Jahana (PLD 1974 SC 210), Abdul Ghafoor & others Vs. Muhammad Sham & others (PLD 1985 SC 407), Ghulam Muhammad Vs. Mst. Amiran Khatoon & another (1987 SCMR 1232), Sardar Muhammad Yousaf & others Vs. Government of Pakistan (PLD 1991 SC 760), Misri through legal heirs & others Vs. Muhammad Sharif & others (1997 SCMR 338), Mada Son of Fateh Ali Vs. Muhammad Sharif & 39 others (PLJ 1997 SC 459), Bashir Ahmad Vs. Abdul Aziz

SCMR 760), Ghulam Haider & others Vs. Murad through legal representatives & others (PLD 2012 SC 501), Ghulam Abbas & others Vs. Muhammad Shafi through legal heirs & others (2016 SCMR 1403), and Khalid Mehmood & 03 others Vs. Umara Khan deceased through legal heirs & others (2021 YLR [Peshawar] 391).

5. In response to arguments of learned counsel for the petitioner, Haji Ghulam Basit, Advocate, representing the respondent / plaintiff has relied upon judgment in the case of Abdul Ghafoor & others Vs. Muhammad Sham & others (PLD 1985 SC 407). He also contended that Punjab Tenancy (Amendment) Act, 1951 would be deemed to be having retrospective effect so as to cover impugned transaction according to ratio of judgment, delivered by Hon'ble Supreme Court of Pakistan in case of "Muzaffar Khan Vs. Mst. Roshan Jan & others" reported as **PLD 1984 SC 394**. The learned counsel also relied upon the judgment delivered in the

1983 SC 273. He next contended that it has been clarified in Muzaffar Khan's case that notwithstanding the fact that no amendment had been made in West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 so as to make it retrospective (in accordance with the ibid judgment of Hon'ble Supreme Court of Pakistan) the Shariat Application Act, 1935 would be deemed to have retrospective effect to the effect that whenever a Muslim deceased died he would be deemed to have died under the domain of Muslim Law even if the death had taken place before coming into force of the Act. The learned counsel also placed further reliance on the judgments delivered in the cases of Mst. Farida & 02 others Vs. Rehmatullah & others (PLD 1991 SC 213), Mir Afzal Khan Vs. Ijaz Akbar (PLD 1991 SC 215), Muhammad Zubair & others Vs. Muhammad Sharif (2005 SCMR 1217), Mst. Gohar Khanum & others Vs. Mst. Jameela Jan & others (2014 SCMR 801), Khan Muhammad through legal heirs & others

6. From the arguments of learned counsel for the parties, two questions have emerged for determination of this court which are: -

Q.A. Whether the right of occupancy tenancy is an inheritable right to be treated as inheritance for the purpose of giving retrospective effect to the Punjab Tenancy (Amendment) Act, 1951?

Q.B. Whether amendment brought to Section 59 of the Punjab Tenancy Act, 1887 can be given retrospective effect, so as to cover the impugned transaction that had taken place in the year 1938?

**Resolution of Question-A.** Learned counsel for the petitioners in order to substantiate his argument that rights of occupancy tenancy could not be equated with ownership of land and that same would not come within the definition of "Taraka" (inheritable property) has relied on the judgment of Hon'ble Supreme Court of Pakistan reported as PLD

reason that in said case the Hon'ble Shariat Appellate Bench of Supreme Court of Pakistan was seized with determining the questions of devolution of terminal benefits of an employee which terminal benefits included gratuity, pension, benevolent fund and group insurance etc. The definition of inheritable part of terminal benefits has been given in same context and findings arrived at by the Hon'ble Court in said judgment cannot be applied to the case of inheritance of immoveable property. The right of occupancy tenancy has on the other hand always been treated as inheritable right in law as well as in customs. The un-amended as well as amended Section 59 of the Punjab Tenancy Act itself bears testimony to this fact. The rights of occupancy tenancy was inheritable even in the un-amended Section 59 but to a limited class of legal heirs i.e. only male legal heirs and in case of non-existence of male legal heir same was supposed to be entrusted to his widow if any, until she died or remarried

Section 59 of Punjab Tenancy Act, 1887 is reproduced herein: -

**"59. Succession to right of occupancy.- (1) When a tenant having a right of occupancy in any land dies, the right shall devolve: -**

**(a)** on his male lineal descendants, if any, in the line of descent, and;

**(b)** failing such descendants, on his widow, if any, until she dies or remarries or abandons the land or is under the provisions of this Act ejected therefrom; and

**(c)** failing such descendants and widow on his widowed mother, if any, until she dies or remarries or abandons the land or is under the provisions of this Act ejected therefrom;

**(d)** failing such descendant and widow, widowed mother or if the deceased tenant left a widow or widowed mother, then when her interest terminates under clause (c) or (b) of this sub-section, on his male collateral relatives in the male line of descent from the common ancestor of the deceased tenant and those relatives.

*Provided with respect to clause (d) of*

**Explanation.-** For the purpose of clause (d), land obtained in exchange by the deceased tenant or any of his predecessors in interest in pursuance of the provisions of sub-section (1) of Section 58-A shall be deemed to have been occupied by the common ancestor if the land given for it in exchange was occupied by him.

(2) As among descendants and collateral relatives claiming under sub-section (2) the right shall, subject to the provisions of that sub-section, devolve as if it were land left by the deceased in the village in which the land subject to the right is situate.

(3) When the widow of a deceased tenant succeeds to a right of occupancy she shall not transfer the right by sale, gift or mortgage or by sub-lease for a term exceeding one year.

(4) If a deceased tenant has left no persons as are mentioned in sub-section (2), on whom his right of occupancy may devolve under that the sub-section shall be extinguished."



"Jahana" reported as PLD 1974 SC 210 but going deep into merits of the case, would reveal that main ratio decidendi of the judgment was that the amended Section 59 of the ibid Act had been applied to case of Mst. Sian and her other collaterals, whom happened to be legal heirs of a common predecessor namely, Fazal. Said Fazal had died issueless on 06.03.1950 leaving behind his surviving widow namely, Mst. Sian. Her mother Mst. Jehana was also alive at that time and according to the then existing legal regime particularly the un-amended Section 59 of the Act ibid, the occupancy rights in the property had devolved on Mst. Sian to the limited extent provided therein. On coming into force of the Punjab Tenancy (Amendment) Act, 1951 on 20.01.1951, a dispute had arisen between Mst. Sian and rest of legal heirs of Fazal (who had died in the earlier dispensation) wherein Mst. Sian had been claiming that on coming into force of the amended Act her capacity as holder of

the entire estate, she had therefore succeeded to the entire property to the exclusion of other legal heirs of Fazal. This stance of Mst. Sian had not been accepted by the courts below and said judgments had been upheld by the Hon'ble Supreme Court of Pakistan. In this respect, I would like to reproduce concluding para of the judgment;

*For the foregoing reasons I am in no manner of doubt that it was not the intention of the legislature to constitute a widow succeeding to her husband under the un-amended Section 59 an absolute owner of the entire holding of her husband on acquisition by her of proprietary rights in the holding under Section 114 of the Act, so as to become a fresh stock of decent excluding the Muslim Law heirs of her husband. Nor any such conclusion can otherwise be sustained for a proper interpretation of Section 114. Accordingly, the High Court and the two courts below rightly found the material issues in favour of the respondent.*

*However, the judgment and decree*

has been declared ineffective. But this is inconsistent with the observation in the concluding paragraphs of the judgment of the High Court that the gift will hold good to the extent of Mst. Sian's Muslim Law share in the estate of her deceased husband. Therefore, the impugned gift in favour of the appellant to the extent of her  $1/4^{\text{th}}$  share as widow would be perfectly valid. On that view of the matter, I would partially accept the appeal and modify the judgment and decree of the High Court and declared that the impugned gift shall not affect the respondent's right of inheritance to the extent of the remainder  $3/4^{\text{th}}$  share in the suit land, as residuary of Fazal deceased.

*I the circumstances of the case I make no order as to costs."*

3. Mst. Sian had gifted the entire property in favour of Rab Nawaz, appellant of the case, but after promulgation of Punjab Tenancy (Amendment) Act, 1951, the Hon'ble Supreme Court had found Mst. Sian as owner to the extent of  $1/4^{\text{th}}$  share as widow and to

mention here that not only occupancy tenancy of a prepositor who had died before coming into force the ibid Act had been treated as inheritable right but the Islamic Law of Shariat was found applicable thereto.

4. The law itself has treated said right to be inheritable. The un-amended Section 59 had been carrying the title succession to the right of occupancy. Heading and sub-heading of a section may well be referred to, in aid of construction after the legislature started using headings and sub-headings in the enacted laws. Reliance in this respect may be placed on the judgment delivered by this Court in the case of "*Khalid Mehmood & 03 others Vs. Umara Khan deceased through legal heirs and others*" reported as **2021 YLR [Peshawar] 391**. Not only heading of Section but body of the main section was also aiming at providing a complete code for devolution of occupancy rights of deceased occupancy tenant. With the amendment brought in 1951 the matter of devolution which had earlier

of occupancy has always been treated inheritable by law and the only difference that has been made by the amendment Act was to the effect of substituting the governing law and changing it from Customs to Shariat. This court, therefore, can confidently answer the question that the right of occupancy tenancy has always been inheritable one.

**Resolution of Question-B.** The un-amended Section 59 of Punjab Tenancy Act, 1887 was aiming to regulate tenancy rights on the basis of customary law. Customs have also been governing succession of properties of deceased Muslims in the earlier dispensation. By substituting said regime through amending Act of 1951, Shariat was introduced as rule governing succession of occupancy rights.

Question before the Court is “whether tenancy amending Act of 1951 can be given retrospective effect, so as to make it applicable to impugned inheritance mutation entered and attested in the year 1938”. In the

the context of N.W.F.P Muslim Personal Law (Shariat) Application Act, 1935 and West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 and this Court would seek guidance from the principles laid down therein, because the matter in hand is akin to the question of retrospective effect of Shariat to those cases of inheritance which had got opened before promulgation of the abovementioned dates. In this respect, reference may be made to judgment delivered by Hon'ble Supreme Court of Pakistan in the case of "Muzaffar Khan Vs. Mst. Roshan Jan and others" reported as **PLD 1984 SC 394**. In said case Hon'ble Supreme Court of Pakistan, while relying upon earlier judgment given in the case of "*Sahib Jan Vs. Wali Dad*" (**PLD 1961 Peshawar 09**) had held that the N.W.F.P Muslim Personal Law (Shariat) Application Act 1935 would be treated to have a retrospective effect. Relevant part of the discussion is reproduced hereunder for ready reference;

some earlier decisions of the Punjab High Court, was of the view that these decisions were based on the interpretation of the Punjab Muslim Personal Law (Shariat) Application Act, 1951. In the last-mentioned Act, section 5 specifically provided that except in so far as provided in section 3 thereof, the Act shall have no retrospective effect. The said Act applied to those cases where the death of the last male owner took place after the passing of the 1948 Act and unlike the 1935 N.-W. F. P. Act it did not extend to the cases where the death of the last full male owner had taken place prior to the passing of the said Act. In this connection, reference was made to a Division Bench judgment of the Peshawar Bench of the West Pakistan High Court viz. Sahib Jan v. Walt Dad P. L. D. 1961 Pesh. 9, wherein their Lordships had traced the history of the application of Shariat Acts in the N.-W. F. P. and had held that the provisions of the 1935 Act were retrospective. We may here usefully reproduce the following passage from the said

*Application Act of 1935 is retrospective in effect. Whenever a dispute comes before a Court of Law with respect to succession to the estate of a deceased Muslim the deceased will be deemed to have died under the domain of Muhammadan Law, even if the death had taken place at any time before the 6th of December, 1935. This view has support from PLD 1956 Pesh. 115."*

Said Judgment was also followed by August Supreme Court of Pakistan in subsequent case of "Mst. Farida & 02 others Vs. Rehmatullah & another" reported as **PLD 1991 SC 213** wherein it has been held;

"As a result amongst others one consequence visualized and held in the case of Muzaffar Khan was that "the N.-W.F.P. Act of 1935" is to be given retrospective effect and that whenever a dispute comes before a Court of law with regard to succession to the estate of a Muslim deceased, he will be

coming into force of the West Pakistan Muslim Personal Law (Shariat) Application Act of 1935. Accordingly, in this case the fact that the Act of 1962 was not in force in the area concerned on 15-1-1976 would not make any difference because as observed above the Islamic dispensation contained therein read with the same dispensation contained in 1935 Act had taken over retrospectivity even prior to 15-1-1976 and even before the 1962 Act was formally applied to the area concerned. To what extent the law would be retrospective, as noticed above, it was held that the same would be definitely beyond 1935. Farthest limit we need not go into because in the present case Nadir Khan the last male-holder admittedly died in 1972 or 1973. Therefore, the appellants being his 'daughters would get their share in his inheritance in accordance with Islamic Law. This appeal thus is allowed. The remaining share in addition to what was granted to them by the High Court shall now be equally divided among the three daughters.

Further reliance in this respect may also be placed on judgment of august Supreme Court of Pakistan in the case of "*Muhammad Zubair & others Vs. Muhammad Sharif*" reported as **2005 SCMR 1217**.

2. The underlying principle, on which Hon'ble Supreme Court of Pakistan had given retrospective effect to the Act of 1962 as well as N.W.F.P Muslim Personal Law (Shariat) Application Act, 1935 was that Sharia, being supreme law in the matter of governing inheritance of Muslim, should be deemed applicable to the cases and would govern the matter of succession of estate of deceased Muslim whenever he happened to have died and succession got opened. No reason existed that a different view be taken for succession of occupancy rights which have also been found as an inheritable right vide discussion made in resolution of Question "A" above.

3. In the case of Rab Nawaz (PLD 1974

case of a Muslim occupancy tenant who had died before promulgation of the amendment Act and accordingly the legacy had been ordered to be owned by the legal heirs according to principles of Shariat. A similar treatment has also been given to the facts of case by Hon'ble Lahore High Court in the case of "*Nasir Hussain & 03 others Vs. Fazal Elahi & 02 others*" reported as **1988 CLC [Lahore] 1259**. Hon'ble Supreme Court of Pakistan, while giving its judgment in the case of "*Mst. Gohar Khanum & others Vs. Mst. Jamila Jan & others*" **2014 SCMR 801**, having before it a dispute relating to succession of occupancy tenant and the mutation earlier entered and attested in respect of legacy, recorded on 31.08.1940, had also upheld judgment of the High Court whereunder the matter had been ordered to be governed by the law of Shariat notwithstanding the fact that the occupancy tenant had died in the year 1940. Facts of said case were also similar to the case in hand. There thus

governed by amended Section 59 of the Punjab Tenancy (Amendment) Act, 1951 even if the deceased occupancy tenant had died before the promulgation of said Act, because of its retrospective effect and question "B" is answered accordingly.

4. One of the grounds raised by learned counsel for the petitioner was related to the fact that defendant No. 1 i.e. predecessor in interest of petitioners had solely deposited the amount of compensation as required under Section 4 of the NWFP Tenancy Act, and therefore, he had acquired exclusive title of the tenancy rights. This question has also been settled by the august Supreme Court of Pakistan in the case of Mst. Khanum's case reported as **2014 SCMR 801**. Relevant part of the discussion of honourable Supreme Court is reproduced hereunder;

*"We next come to the question of the amount which was paid by Dost Muhammad under section 4 of the N.W.F.P. Tenancy Act to acquire proprietary rights in the suit property.*

*in the disputed property which admittedly was undivided between Dost Muhammad and Zarina Jan. Thus, the act of making payment was for the purpose of securing the ownership rights in the suit property. The payment in the circumstances of the case, where it was the brother who made payment at the time when the revenue record showed him as owner/occupancy tenant of the entire land, must be seen as a payment made on behalf of the co-owner/occupancy tenant as trustee by virtue of sections 82, 89, 90 and 94 of the Trusts Act, 1882."*

5. In case in hand also, payment made by brother may also be deemed made on behalf of sister who had been plaintiff before the learned Civil Court.

6. In the light of what has been discussed above, the revision petition in hand was found meritless and same is accordingly dismissed.

Announced:  
12.09.2022.



JUDGE