

JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT,
BANNU BENCH.

(Judicial Department)

C.R No. 42-B of 2013

Rahmatullah Khan etc

Vs

Abu Khan etc.

JUDGMENT

Date of hearing _____ 07.11.2018 _____.

Appellant-Petitioner: ***By Hafeez Ullah Khan, Advocate.***

Respondent : ***By Zafar Iqbal, Advocate.***

MUHAMMAD NASIR MAHFOOZ, J.--- Through instant revision petition the petitioners have called in question the judgment and decree dated 21st November, 2012 of learned Additional District Judge, Lakki Marwat, whereby accepting appeal of respondent/ plaintiff against the judgment and decree dated 23rd October, 2010 of learned Civil Judge-VIII, Lakki Marwat, his suit was decreed.

2. Brief facts of the case are that the respondent/ plaintiff instituted a suit for declaration to the effect that by

virtue of inheritance mutation from his mother Mst. Banata, he was owner in possession of one third (1/3) share in all these suit Khata numbers, mentioned in the plaint, situated at Moza Pahar Khel and that due to her marriage transfer of her share in the name of her sister Mst. Gul Khata vide mutation No. 1354 dated 14.05.2014 followed by mutation No. 2175 dated 29.08.1921, in the names of Fateh Khan etc, are illegal and ineffective upon his rights and liable to be cancelled.

3. The petitioners/defendants contested the suit by submitting written statement alleging therein that the respondent / plaintiff is not the son of Mst. Banata and secondly in the year 1914 to 1921 *shariat* was not in Vogue and both mutations were correctly attested according to customary law. They also took the plea of bona fide purchase and submitted that their rights were protected under section 41 of the Transfer of Property Act. On divergent pleading of the parties the trial Court framed issues and directed the parties to adduce their pro and contra evidence in support of the respective stance. On conclusion of trial, learned trial Court vide impugned judgment and decree dated 23.10.2010 dismissed the suit of

respondent/plaintiff. Not contented with the same he preferred appeal before the learned Additional District Judge, Lakki Marwat, who after hearing the arguments of learned counsel for the parties accepted the appeal of respondent /Plaintiff along with other legal heirs of the deceased. Mst. Banata is declared as owner of one third share in the suit Khata numbers and revenue record is accordingly liable to be corrected. He further held that the fact that how much property in each Khata number should go to respondent/ plaintiff/ Decree Holder shall be assessed by the concerned revenue officer at the time of execution of decree in light of Record of rights for the year 1913-14. Hence, the instant revision petition.

3. I have heard arguments of learned counsel for the parties and perused the record.

4. Under section 7 of the Muslim Personal Law (Shariat) Application Act, 1962, the following laws have been repealed.

(a) The Punjab Limitation (Custom) Act, 1020;

(b) The Punjab custom (Power to Contest) act, 1920;

(c) The Muslim Personal Law (Shariat) Application act, 1937, in its application to West Pakistan.

(d) The North West Frontier Province Muslim Personal Law (shariat) Application act, 1935;

(e) The Punjab Muslim Personal Law (shariat) Application Act, 1948;

(f) The Muslim Personal Law (shariat) Application (Sind Amendment) Act, 1950;

(g) The Bahawalpur State Shariat (Muslim Personal Law) Application Act, 1951;

(h) The Khairpur State Muslim Female Inheritance (Removal of Customs) act, 1952;

5. Under sub section (2) of Section 7 it was provided that this act shall not apply to cases, where the death of the last full owner or the termination of the life estate or the death of the legatee-in-enjoyment, as the case may be, has occurred before the commencement thereof, and all such cases shall be governed by the Acts, repealed in sub section (1), according to territories in which they were operative.

6. Sub section 2 of section 7 was later on repealed by the amendment in the Muslim Personal Law (Shariat) Application act, vide Amendment Act, XXVIII of 1964. Sub section (2) of section 7 was omitted on 15 April, 1964. Its effect remained the same as provided in section 6 of the ibid act, which had given retrospective effect to section 3, 4 and 5 of the

Act. Section 3 of the *ibid* act provides that the limited estates in respect of immovable property held by a Muslim female under the Customary Law are hereby terminated. Giving it retrospective effect, means that whenever, a Muslim dies her or his legacy shall devolve according to shariat. Under Section 4, where a will providing for more than one legatee succeeding to the testator's property, one after the other is operative at the commencement of this Act, its further operation shall cease upon the death of the legatee-in-enjoyment. Under section 5 the life estate terminated under section 3 or the property in respect of which the further operation of a will is ceased under section 4 shall devolve upon such person as would have been entitled to succeed under the Muslim Personal Law (Shariat) upon the death of last full owner of the testator as though he has died intestate; and if any such heir has died in the meantime, his share shall devolve in accordance with Shariat on such persons as would have succeeded him if he had died immediately after the termination of the life estate or the death of the said legatee. Provided that the share to which a Muslim female holding limited estate under Customary Law would have been entitled

under the Muslim Personal Law (Shariat) upon the death of the last full owner shall devolve on her.

7. In light of above, a careful scrutiny of the whole record reveals that the controversy revolves around the inheritance of Mst. Banata, who was daughter of Munawar Gul. She had one sister Mst. Gul Khata and her cousins Fateh Khan was son of her paternal uncle Shah Jehan, in whose favour the impugned mutation No.2175 was attested on 29.08.1921 and another inheritance mutation No.1354 attested on 14.05.1914 both these mutations are alleged by the respondent /plaintiff to be against law and sharia and therefore, liable to be set aside. Relationship of the parties is not denied by the petitioner who has admitted the same in cross examination, when he appeared as DW-1. Now the question, which needs to be resolved is that, whether these mutations were attested according to law and the respondent/plaintiff was rightly held entitle to the decree and his share in the inheritance of his mother. Though the petitioner was not born at that time, when the said mutations were attested, but since he is claiming inheritance under sharia and invokes applicability of NWFP Muslim Personal Law (Shariat)

Application Act, 1962, regarding termination of limited estates, which was given retrospective effect and, whenever, inheritance reopens it would be distributed according to sharia. In this respect first of all it is to be seen as to whether the suit is within time and would not be hit by the period of limitation. Hon'ble Supreme Court has declared this issue finally and has held that suit filed by a co-sharer could not be barred by limitation. In this regard judgment reported as 1997 SCMR 1218 titled "Muhammad Bakhsh Vs Muhammad Shafi etc" is reproduced below.

8. It was next contended by the learned counsel that the cause of action, if any, accrued to Sohney Khan when after the death of Mst. Zainab, the mutation of inheritance was sanctioned in the year 1949 but he brought the suit on 29-5-1974 which was hopelessly time-barred. This objection incorporated in Issue No.3 has been duly attended to by the learned Additional District Judge and he has held and rightly so that Sohney Khan and the present petitioners were co-sharers in the suit property and, therefore, limitation did not run against Sohney Khan particularly when in the Jamabandi for the year 1973-74, parties were shown in the

disputed property as co-sharers. It may pertinently be observed that even the trial Court which had decided the issue of limitation against the plaintiff (holding that the suit was brought by him six years after the alleged death of Mst. Zainab in December 1967) had found on the basis of Jamabandi Exhs.P-2 and P-3 that "the plaintiff and the defendants are owners of joint Khata"

8. The legal proposition could be answered in accordance with provision of Muslim Family Laws Ordinance, 1961, which allows inheritance to the children section 3 of the Ordinance provides that the provisions of the ordinance shall have effect notwithstanding any law, custom or usage. This is further elaborated in Judgment reported as 1997 SCMR 281 in case titled, "Nazir Ahmad and others Vs Abdullah and others" and the relevant part is reproduced below.

9. The above legal position has been affirmed by a Full Bench of this Court comprising five learned Judges in the case of Sardar v. Mst. Nehmat Bibi and 8 others (1992 SCMR 82), wherein the facts were that the last male owner died in 1947, whereas life estate of the widow of deceased terminated in 1962. The question arose, as to whether on the termination of

above life estate in 1962, section 4 of the Ordinance could be pressed into service though the last male owner had expired in 1947. The said question was answered as follows:--

"9. After hearing the learned counsel for the parties and perusing the precedents cited by them, we are of the view that while enforcing section 5 of the Muslim Personal Law (Shariat) Application Act, 1962 for the purpose of devolution of the estate of the last full owner we will have to apply Muslim Personal Law (Shariat) wherein is included the Muslim Family Laws Ordinance, 1961. The contention of the learned counsel for the respondents in this behalf is supported by the judgment of the Supreme Court (Shariat Bench) in Federation of Pakistan v. Mst. Farishta PLD 1981 SC 120 that Muslim Personal Law (Shariat) is a comprehensive term to cover all laws relating to personal matters of Muslims. Section 4 of the Muslim Family Laws Ordinance, 1961, allows inheritance to the children of the pre-deceased son or daughter to the extent that the son or daughter would have got. Section 3 of the latter Ordinance, 1961 also provides that 'The provisions of this Ordinance shall have effect notwithstanding any law, custom or

usage'. Therefore, it appears to us that the learned Judge in the High Court was right in holding that by providing for devolution of the property under section 5 of the Muslim Personal Law (Shariat) Application Act, 1962 on termination of the life estate, the children of predeceased daughter of the last full owner will inherit the share which their mother would have got as if she were alive at the time of the opening of the succession, that is to say, on the demise of her father Ilam Din in 1947. "

9. Learned counsel for the petitioner strongly objected to the grant of decree and submitted that it is barred by time, but the said question has been finally resolved when the Muslim Personal Law Shariat Application Act provided that a male heir who had acquired any agricultural land under the custom from the person who at the time such acquisition was a Muslim he shall be deemed to have become upon acquisition an absolute owner of such land as if such land had devolved on him under the Muslim Personal Law Sharia. Reference in this regard is made to 2009 SCMR 1014 "Bashir Ahmad Vs Abdul

Aziz and others"

9. Once it is settled that rule of inheritance at certain time was custom and some person acquired the property under custom from a Muslim, he shall be deemed to have become an absolute owner of such land as if such land had devolved on him under the Muslim Personal Law (Shariat) provided such acquisition had occurred prior to the enforcement of Punjab Muslim Personal Law (Shariat) Application Act, 1948. Such devolution has been declared absolute by section 2-A of West Pakistan Muslim Personal Law (Shariat) Application Act, 1962, the relevant portion of which is reproduced as under:---

"2-A. Succession prior to Act (IX of 1948).--- Notwithstanding anything to the contrary contained in section 2 or any other law for the time being in force, or any custom or usage or decree, judgment or order of any Court where before the commencement of the Punjab Muslim Personal Law (Shariat) Application Act, 1948, a male heir had acquired any agricultural land under custom from the person who at the time of such acquisition was a Muslim:--

(a) he shall be deemed to have become, upon such acquisition, an absolute owner

of such land, as if such land had devolved on him under the Muslim Personal Law (Shariat);

(b) -----

(c) -----"

10. In another case reported as 2016 SCMR 763 "Muhammad Ahmad Chatta Vs Iftikhar Ahmad Cheema" the Hon'ble Supreme Court observed that the custom of surrendering land by female legal heirs in favour of male legal heirs is against the injunctions of Islam and the said observation passed by learned subordinate forum was expunged and declared illegal, while applying the ratio as resolved in aforementioned judgments. It is well established on the record that respondent/plaintiff is entitled to share inheritance of his mother. In this respect it also requires to be mentioned that DW1 in cross examination admitted that Mst. Banata died twenty or twenty five years back and to what extent the law would be retrospective it has been resolved that it would be definitely beyond 1935. The objection of learned counsel for the petitioner can also be answered if we perused mutation

No.1354 attested on 14.05.1914. This mutation is attested in favour of Mst. Gul Khata in share of Mst. Banata mother of respondent Abu Khan, when she remarried the father of respondent. If she was alive then why her share was transferred to her sister, it was only because under custom when a women remarried she was deprived of the property, therefore, when the said property was again transferred in the name of Fateh Khan, after death of Mst. Gul Khata, distant relative of respondent vide mutation 2175 on 28.09.1921, but he could not, because when Mst. Banata had a male son then the distant kindred could not get all the property.

11. Learned appellate Court has discussed all the evidence and the question of law as well as the question of facts and it does not require to be interfered with in the instant revision petition. No material irregularity and illegality and exercise of jurisdiction as vested by law, has been pointed out, therefore, the instant revision petition stands dismissed.

Announced.
07.11.2018

J U D G E