

PESHAWAR HIGH COURT, MINGORA BENCH
(DAR-UL-QAZA), SWAT

FORM OF ORDER SHEET

Court of

Case No..... of.....

Serial No. of order or proceeding	Date of Order or Proceedings	Order or other Proceedings with Signature of Judge and that of parties or counsel where necessary.
1	2	3
	30.06.2022	<p><u>C.R No.429-M/2018</u></p> <p>Present: <u>Mr. Zahid Hussain, Advocate for the Petitioner.</u></p> <p style="text-align: center;">***</p> <p><u>MUHAMMAD NAEEM ANWAR, J.-</u> Impugned herein is the judgment & decree dated 14.11.2018 of the learned Additional District Judge/Izafi Zila Qazi, Matta, Swat whereby the appeal of petitioner against judgment & decree dated 05.11.2016 of the learned Civil Judge/Ilaqa Qazi-I, Matta, Swat decreeing the suit of the respondents and dismissing that of the petitioner, was dismissed.</p> <p><u>2.</u> Arguments heard and record perused.</p> <p><u>3.</u> Scrutiny of record reveals that suit No.65/1 was instituted by the respondents against the petitioner and others on 08.06.2013, whereas suit No.38/1 was filed by the present petitioner on 11.02.2014. Through former suits, the respondents were seeking declaration to the effect that the property bearing <i>Khasra</i> No.3155 of the revenue estate of <i>Bara Drushkhela</i> Tehsil <i>Matta</i>, District Swat is the legacy of Shah Kamin Khan, wherein the parties are owners to the extent of their <i>shari</i> shares but the petitioner/defendant No.1,</p>

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with the connivance of the officials of the revenue hierarchy, has succeeded in getting wrong entries in the revenue papers in her name, whereby they were deprived of their *shari* shares in the disputed property; that the entries of the revenue papers in favour of the petitioner are ineffective upon their rights and if there is any *gift/tamleek* in favour of the petitioner that is also ineffective upon their rights. A relief for recovery of possession was also sought, with the plea that they are entitled for the recovery of possession if they could not prove it. After institution of suit No.65/1, the petitioner also filed suit No.38/1 seeking therein injunction against the respondents to the effect that they be restrained from interfering in her possession of the property bearing *Khasra* No.3155 because this property was transferred to her by her husband in lieu of dower and as such, she is in possession of the same. Record reveals that on 1403.2016, the learned trial Court framed consolidated issues from the divergent pleadings of the parties. Recording of evidence was followed by hearing of the parties, which resulted into decreeing the suit of the respondents against the petitioner while dismissing the suit of petitioner vide consolidated judgment & decree dated 05.11.2016. Being aggrieved, the petitioner filed Civil Appeal No.61/13 of 2016, however, same was dismissed by the learned Additional District

Judge/Izafi Zila Qazi, Matta, Swat on 14.11.2018.

4. It was the plea of the petitioner that the property was transferred to her by her husband in the year 1991 as her dower, but neither the factum of the fixation of initial dower nor enhancement thereof was proved by the petitioner through direct or convincing evidence. The petitioner, being beneficiary of mutation No.471 dated 29.10.1991, was required to prove its authenticity and correctness in accordance with law. During the course of arguments, when learned counsel for the petitioner was confronted with the copy of the mutation No.471, in response to which, he produced photocopy of "*pert sarkar*" of mutation No.471, which unfolded that through report No.77 in Daily Diary, this mutation was entered on 25.10.1991 in favour of the petitioner in lieu of Rs.20,000/-. Copy of the mutation further elaborates that Aziz-ur-Rahman and Habib-ur-Rahman sons of Shams-ul-Qamar were marginal witnesses of the mutation but neither they were produced before the learned trial Court nor their non-production was explained through any plausible justification. This document/mutation was required to be proved within the parameters of *Qanun-e-Shahadat* Order, 1984 but the petitioner has badly failed to prove it.

5. Insofar as the contention of learned counsel for

petitioner that initial onus to prove the fraud was on the part of respondents is concerned, suffice it to say that when the respondents put their appearance in the witness-box and have got recorded their statements on oath with the plea that the entries of the revenue papers are the result of fraud and distortion of truth, they have discharged their onus and the onus was shifted to the petitioner. In such circumstances the principle laid down in the case of "Sikandar Hayat and another Vs. Sughran Bibi and 06 others" (2020 SCMR 214), does not apply to the matter in hand. Likewise, learned counsel for the petitioner, while relying upon the case of "Muhammad Faisal Sultan and another Vs. Muhammad Ajmal through his Legal Heirs" (2018 CLC 1782, Lahore) contended that the ingredients of fraud were not given in terms of Order VI Rule 4 C.P.C. The respondents have challenged the entries of the revenue papers in favour of the present petitioner being based upon any deed and they termed it to be the result of connivance of the petitioner with the officials of the revenue hierarchy and the petitioner asserted her to be the owner being the widow of Shah Kamin Khan and that the property was transferred to her as her dower and in that respect the mutation was also attested. Record indicates that Shah Kamin Khan had died in the year 1991 while the marriage of petitioner with him was

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solemnized much earlier to that, so, the factum of fixation of initial dower and enhancement thereof was required to be proved through positive and convincing evidence by the petitioner but she has not been able even to place on record an iota of evidence that when, where, in whose presence and under what circumstances her dower was enhanced by her husband.

6. Adverting to another aspect of the case that though the respondents have taken the plea of *marz-ul-mout* (death bed illness) of Shah Kamin Khan, however, the factum of said *marz-ul-mout* could not be proved by them, in accordance with law. It has become an admitted fact on record that Shah Kamin Khan had died in the year 1991 and the property was also mutated in the name of the petitioner in the year 1991 then, in order to justify the correctness and legality of attestation of mutation and entries of revenue papers were required to be proved by her but unfortunately, no such evidence was placed on record by her.

7. No doubt, long standing entries of the revenue papers carry presumption of truth, however, these entries are not sacrosanct or cannot be termed as a gospel truth and when same are challenged, the beneficiary thereof is required to prove it in accordance with law. When learned counsel for the petitioner was confronted with regard to the evidence,

especially the non-production of marginal witnesses of the mutation, he was unable to wriggle out of the situation and to substantiate the contention of the petitioner.

8. More-so, transfer of the property through gift or enhancement of dower are two different legal propositions, as such, the petitioner will not be allowed to approbate and reprobate by alleging the gift in her favour and by transferring of the disputed property through enhancement of her dower. It is pertinent to mention here that learned counsel for the petitioner, while referring to the cases of "Mst. Imtiaz Begum Vs. Mst. Sultan Jan and others" (2008 SCMR 1259), "Muhammad Zamin Mian and 04 others Vs. Shamshad and 16 others" (2014 MLD 1384, Peshawar), and "Abdul Jabbar Shahid and others Vs. National Bank of Pakistan and others" (PLD 2019 Lahore 76), argued that an application was filed by the petitioner before the learned Appellate Court for recording of additional evidence, which remained unattended, therefore, the matter be remanded to the learned Appellate Court for decision afresh, with further directions to decide the fate of that application. The application under Order XLI Rule 27 of the C.P.C, no doubt, could be submitted before the Appellate Court, however for any such application, the requirement and criteria reflecting in *ibid* provision of law must be

fulfilled. The object of allowing parties to lead evidence at appellate stage is to enable the Court to decide the controversies finally and the necessity for such evidence should be felt by the Court and parties to an appeal have no right to lead additional evidence if no such request was made before the trial Court. The learned Appellate Court has considered almost all the contentions of the petitioner in the impugned judgment, therefore, simply on the ground that an application remained undecided, the matter cannot be remanded when the petitioner could not prove her case through rest of the evidence as produced by her before the learned trial Court. It was the bounded duty of the petitioner to authenticate her contentions in accordance with the dictates of the superior Court but she could not do so. Furthermore, complete order sheets of the learned Appellate Court have not been appended with the instant petition in order to justify that the application for production of additional evidence was left undecided by the learned Appellate Court.

9. Furthermore, neither the fact that another view on re-appraisal of evidence nor insufficiency of evidence alone is a ground for interference with the concurrent findings of facts arrived at by the two Courts below. The conclusion arrived at by the Courts below is neither based on

misreading of evidence nor the learned counsel for petitioner was able to point out any perverse appreciation of evidence by the Courts below in this regard. It is by now the established law that this Court cannot interfere in the findings of fact on the ground that on the re-appraisal of evidence it is possible to reach to a different conclusion unless it is shown that such a finding by the lower Court suffered from misreading or non-reading of evidence which had affected the findings on merits. Ref: *Abdul Wali Khan through Legal Heirs and others Vs. Muhammad Saleh (1998 SCMR 760)*. Learned counsel for petitioner could not point out any illegality, perversity or jurisdictional defect in the impugned judgment and decree.

10. Thus, for the reasons discussed above, the instant petition, being bereft of merits, stands dismissed in *limine*.

Announced
30.06.2022



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Office
19/7/2022