

HIGH COURT OF AZAD JAMMU & KASHMIR

Revision petition No.27/2021.

Date of institution 01.02.2021.

Date of decision 22.04.2022.

Gul Mohammad s/o Kalu Khan Caste Mangral r/o Sarsawah,
Tehsil & District Kotli, Azad Jammu & Kashmir

Petitioner

VERSUS

1. Jan Mohammad s/o Kalu;
2. Phal Mohammad s/o Kalu Caste Mangral, r/o Sarsawah Tehsil & District Kotli, Azad Jammu & Kashmir;
3. Gul Hussain;
4. Saien sons of Kalu Khan;
5. Mohammad Bi d/o Kalu Khan Caste Mangral, r/o Sarsawah Tehsil & District Kotli, Azad Jammu & Kashmir.

Respondents

REVISION PETITION

Before:- Justice Syed Shahid Bahar, J.

PRESENT:

Syed Zulqarnain Raza Naqvi, Advocate for the Petitioner.
Abdul Rasheed Abbasi, Advocate for the Respondents Nos.
2 to 5.

JUDGMENT:

The caption revision petition has been filed against the order passed by the learned District Judge Kotli dated 23.01.2021, whereby, while upholding the judgment of the Civil Judge Court No.1 Kotli dated 21.10.2020, the

appeal filed by the appellant/petitioner, herein, was dismissed being weightless.

2. Shortly stated facts of the captioned revision petition are that plaintiff/petitioner, herein, filed a suit for declaration before Civil Judge Kotli Court No.1, pertaining to the land comprising khewat No.3 khata No.47 and other survey numbers mentioned in the revision petition with total land measuring 7 kanal 19 marla and 3 sarsai, situated in Mozia Sarsawa. The petitioner, herein, also filed an application for interim relief with a prayer to restrain the defendants/respondents, herein, from interfering or making any sort of improvement upon the said land. It has further been stated that defendant No.2, therein, forgery and fraudulently obtained the land excess to his fractional share from the defendant No.1, through gift deed dated 19.05.2016, so, the same may be cancelled. A cross suit titled "Phul Mohammad Vs. Gul Mohammad" was also filed, wherein, it has been stated that the land comprising khewat No.67/64, khasra No.1969, measuring 19 kanal 6 marla is under the possession and occupation of the plaintiff and six stories house has been constructed by the plaintiff and the Proforma defendant No.4, therein, has gifted the land to the plaintiff within his fractional share through gift deed dated 19.05.2016 and along with the suit, an application for

interim relief was also moved by the plaintiff. Both the suits were consolidated by the learned trial Court and the case was fixed for arguments on the applications for interim relief. The learned trial Court after hearing the arguments from both sides, vacated the status-quo order already issued in favour of the petitioner, herein, and in file No.253/16, the already issued status-quo order dated 17.08.2016 in respect of the land comprising survey No.1969 measuring 19 kanal 6 marla situated at Mozia Sarsawa Tehsil & District Kotli was confirmed to the extent of house constructed in six marla land, however, the same was vacated to the extent of remaining land, vide order dated 21.10.2020. feeling aggrieved from the aforesaid order, the petitioner, herein, filed an appeal before the learned District Judge Kotli, which also met the same fate, vide order dated 23.01.2021, hence, the captioned revision petition.

3. Syed Zulqarnain Raza Naqvi, the learned counsel appearing on behalf of the petitioner in his written arguments reiterated the grounds already agitated in the revision petition with full vehemence and forcefully portrayed that the orders passed by the learned Courts below are patently illegal, erroneous and against the law which are liable to be set at naught. As per his estimation,

both the Courts below have failed to consider the relevant record appended with the plaint while passing the impugned orders. It has further been alleged that as the petitioner is in possession of the suit land and the respondent No.1 was his real brother and lawfully gifted his share to the petitioner on the reasoning that he has no descendants to inherit his share and the basic ingredients necessary for issuance of ad-interim relief i.e. *prima facie* case, irreparable loss and balance of convenience have also not been taken into consideration by the Courts below and finally it has been prayed that while accepting the revision petition, the orders of both the Courts below may please be set-aside.

4. On the other hand, Mr. Abdul Rasheed Abbasi, the learned counsel for respondents Nos. 2 to 5 stanchly contended that the instant revision petition is not competent on the ground that the same has been filed against the dead person, as respondent No.1, Jan Mohammad had died on 20.03.2017, approximately 4 years prior to the filing of the instant revision petition and this fact regarding the death of Jan Mohammad was very much in the knowledge of petitioner. He further contended that according to the principle laid down by the Hon'ble Apex Court, any appeal, revision etc. filed against a dead person

is a nullity in the eye of law and merits dismissal. As per estimation of the learned counsel both the parties are co-sharer in the suit land and the answering respondents are being deprived from their certain legal rights by way of lawful construction over the land in question.

5. Be that as it may, the parties are co-sharer and the suit land is yet to be partitioned in accordance with law between the co-sharers. Prima-facie peaceful possession of the respondents over the suit land to the extent of gift-deed made by (the late Jan Mohammad) is oozing from the record. As per law in joint property all co-sharers have equal rights until and unless the same is partitioned in accordance with law in meters and bounds as well as possession of one co-share is always deemed on behalf of the rest of the co-sharers upon the undivided joint property.

6. Now I have to see whether the appeal, revision or suit against the dead person or on behalf of the dead person can be filed. The Hon'ble Supreme Court in a case titled "Ch. Mohammad Altaf and another Vs. Mohammad Sadiq & 9 others" 2004 SCR 47, has held that under the code of Civil Procedure no suit can be filed on behalf of a dead person or against a dead person. The relevant portion of the judgment is as under:-

"From the survey of the reports of the aforementioned authorities, it is clear that under the Code of Civil Procedure no suit can be filed on behalf of a dead person or against a dead person. Moreover, the substitute service through proclamation is the last resort which can be adapted in the light of the reports submitted by process server while effecting service upon the defendants. In this case the plaintiff-appellants had admitted the death of Ahmed Din in their plaint but still they impleaded him as defendant No.2, therefore, the decree obtained against this defendant was nullity in the eye of law."

In another case titled "Mohammad Ibrahim Vs. Custodian Evacuee Property & others" PLJ 1999 SC AJ&K 413, the Hon'ble Apex Court reiterated the same view by ordaining that appeal, revision or lis against a dead person is not competent. In the case in hand, a copy of the application has also been brought on record by the learned counsel for respondents Nos. 2 to 5, wherein, the petitioner herein, has categorically stated in the application filed before the Civil Judge Court No.1 Kotli, that defendant No.1, therein, Jan Mohammad had died on 20.03.2017, therefore, his legal heirs, i.e. brothers and sisters mentioned in the application may be impleaded as a party, which shows that in 2017, the plaintiff/appellant, herein, was well in the knowledge about the death of respondent No.1, herein, Jan Mohammad.

As per Order XXII Rule 1 of CPC, sole factum of death of plaintiff or respondent, is not suffice to non-suit the party on this count if the right to sue survive. It is well settled legal proposition that all right of action existing in favor or against a party survive but personal activities connected with the individuality of the deceased do not survive on the rational of this principle of law "***Actio Personalis Moritur Cum Persona***" i.e. Personal rights of action dies with person.

7. In the case in hand the proposition is different, revision has been brought against the dead person (respondent No.1) despite fact the petitioner himself has filed an application before the trial Court for impleading his legal heirs as party. To determine as to when abatement occurs in totality and when in partiality, the following criteria has been laid down by the Supreme Court of Pakistan:-

- (i) That the suit or appeal would be imperfectly constituted in the absence of the deceased party;
- (ii) That a decision on merit may result in inconsistent decrees; and

(iii) That an effective decree cannot be passed against the living party. (reference PLD 2004 SC 185).

Thus nub of the above discussion is that in case of survival of cause of action even one of the appellant-respondent is alive, lis can proceed legally on his behest but any lis by way of suit, revision or appeal is not competent against the dead person leaving aside this aspect instant revision petition has no fate on merits as well.

8. In my opinion, both the orders passed by the learned Courts below i.e. learned Civil Judge Kotli and the learned District Judge Kotli dated 21.10.2020 and 23.01.2021 respectively are well reasoned and speaking as the basic ingredients necessary for issuance of ad-interim relief are simultaneously titling in favor of the respondents and no illegality or perversity has been committed by the Courts below while passing the impugned orders.

For the above multiples reasons, the titled revision petition is meritless and not maintainable in the eye of law, therefore, the same is hereby dismissed with no order as to costs.

Muzaffarabad.
22.04.2022 (Saleem)

-Sd-
JUDGE