

**HIGH COURT OF AZAD JAMMU AND KASHMIR**

Civil Appeal No.59/2014;  
Date of inst. 23.10.2014.  
Date of decision 18.02.2022.

1. Khalil Khan;
2. Idrees Khan S/o Muhammad Akram Khan, caste Chib R/o Khanka Kotera Tehsil Charhoi District Kotli.

..... Appellants

**VERSUS**

1. Fazalddad Khan S/o Muhammad Hafeez Khan, caste Katoch R/o Khanka Kotera Tehsil Charhoi District Kotli.

.....Real Respondent

2. Naseem Akhtar, widow;
3. Jamil Khan;
4. Jahangir Khan, sons;
5. Nabila d/o Akram Khan, caste Katoch R/o Khanka Kotera Tehsil Charhoi District Kotli.

.....Proforma Respondents

**CIVIL APPEAL**

**Before: Justice Chaudhary Khalid Rasheed, J.**

**PRESENT:**

Raja Rafiullah Sultani, Advocate, for the appellants.  
Raja Javaid Akhtar, Advocate, for the respondents.

**JUDGMENT:**

The captioned civil Appeal has been filed against the judgment and decree of learned District Judge Kotli dated 16.10.2014 qua a judgment and decree passed

by learned Civil Judge Charhoi dated 23.07.2013 was upheld.

Detailed facts giving rise to this appeal are, present appellant filed a suit for declaration and cancellation of mutation No.796 regarding land situated in Charhoi dated 19.03.1997 in which it was alleged that above stated mutation was attested by the revenue authorities which is not in accordance with the principles of inheritance and family tree mentioned in the plaint. It is further alleged that respondents maliciously and without informing the plaintiff managed to register the impugned mutation showing them as among the half share holders and legal heirs of the deceased Aziz-Ullah Khan S/o Diwan Ali Khan and requested its cancellation by declaring that the plaintiff/appellant and proforma respondents are only among the legal heirs of the deceased Aziz-Ullah Khan S/o Diwan Ali Khan. Diwan Ali had one son and two daughters. Aziz-Ullah Khan and Sarwar Begum were expired before the death of Ashraf Begum. Plaintiff/appellant further claimed that they only remained among the legal heirs of Ashraf Begum and real respondent neither come within the category of sharers nor in residuary. The suit was

contested by the real respondent by filing written statement on 15.03.2007, the real respondents admitted para No.1 of the plaint in which family tree was drafted by the plaintiff/appellant. It was further claimed that real respondent was among the half share holder of property of Aziz-Ullah Khan and defended the impugned mutation with further request to dismiss the suit of the plaintiff/appellant. Real respondent also claimed that suit is time barred and plaintiff has got no locus standi to file the suit. In the light of pleadings of the parties six issues were framed by the trial Court and recorded evidence pro and contra. At completion of evidence the suit filed by the plaintiff/appellant was dismissed on the ground that the suit was time bared and plaintiff failed to prove the stance taken in the plaint. Feeling aggrieved from the judgment and decree of the learned Civil Judge Charhoi dated 23.07.2013 the present appellant preferred an appeal before the learned District Judge Kotli on 05.08.2013 which met the same fate and was dishonoured hence, this second appeal.

The learned counsel for the appellants strenuously argued that Fazal Dad real respondent No.1

does not come within the list of legal heirs of Aziz-Ullah Khan and the learned Civil Judge despite the fact that issue regarding cause of action was decided in favour of the appellant erroneously held that the plaintiffs failed to prove their stance. He further stated that appellant in para No.1 of plaint produced original and factual family tree of Aziz-Ullah Khan which is admitted in the written statement filed by the real respondents and being admitted fact need not to be proved. He further contended that real respondent No.1 Fazal Dad in his court statement also admitted the claim made by the appellant in the plaint. He also pleaded that both lower Courts fell in error while declaring the suit as time barred because in claim of inheritance limitation cannot be considered as a hindrance and it is also not sine qua non that mutation should be attested after the death of deceased of a Muslim faith. He further claimed that mere failure to exhibit a document which is otherwise worthy of acceptance cannot be treated inadmissible in evidence. The learned counsel further pleaded that appellant proved their stance with cogent and tangible evidence and even statement of respondent No.1 also lends support to the claim made by the appellant,

respondents No.1 miserably failed to prove any relationship with Aziz-Ullah Khan and Dewan Ali. The family tree mentioned in the impugned mutation itself negates the version of the real respondent as the family tree printed on the front side of mutation is in negation of family tree illuminated on the back side of the said page. In support of his submissions the learned counsel placed reliance on following case law:-

1. 2017 SCR 269.
2. 1996 CLC 1403.
3. PLD 1993 SC AJK 24.
4. 1993 CLC 185.

While controverting the arguments advanced by the learned counsel for the appellant, the learned counsel for the respondents stated that it is an admitted fact that Aziz-Ullah Khan was son of Dewan Ali but as Aziz-Ullah Khan expired issueless hence, all the property cannot be transferred to his sister who also expired before the attestation of the impugned mutation. He further stated that share recorded in mutation is half in favour of the appellant which was their legal right but they cannot claim their right on the whole property. He further stated that sisters of Aziz-Ullah Khan cannot claim the whole

inheritance of their brother and being the residuary real respondent was entitled to get half of share in the property of Aziz-Ullah Khan, hence the impugned mutation has been registered in accordance with the spirit of Islamic Inheritance Law. Lastly he defended the impugned judgments and decrees and requested for dismissal of the appeal.

I have heard learned counsel for the parties and perused the record of case with utmost care and caution.

The perusal of the impugned judgments and decrees reveals that only points which are required to be determined by this court are whether limitation runs against the right of inheritance of female and whether recording of share in mutation is sine qua non for claiming the right of inheritance. Both the learned Courts below while recording the impugned edicts held that suit filed by the appellant hit by the law of limitation and that the impugned mutation has been attested after the death of Ashraf Begum who has been claimed as predecessor of the appellant and proforma respondents. The said observations recorded by both the learned lower Courts are not sustainable because it is a bedrock principle of law

which has been upheld by the apex Court of Azad Jammu and Kashmir in 2017 SCR 269 that no limitation runs against the right of inheritance reliance can also placed on 2002 CLC 587 and the point which was required to be determined is that whether at the time of death of Aziz-Ullah Khan, Ashraf Begum was alive or not and it is on record and admitted by real respondent No.1 that Aziz-Ullah Khan and Sarwar Begum expired whereas Ashraf begum died in the year 1975-80 which blatantly proved that at the time of death of Aziz-Ullah Khan and Sarwar Begum who expired before 1947, Ashraf Begum was alive so it makes no difference if at the time of attestation of mutation Ashraf Begum was expired or alive and this point is very much clear that registration of mutation is not a precondition to claim the right of inheritance and as soon as a person of Muslim faith dies his/her legal heirs step into his/her shoes regardless of fact that whether mutation has been attested or not because mutation does not itself confer any title and it is only maintained for realization of land revenue, as held in 2012 YLR S.C. (AJK) 713 and 2007 SCMR 635. Moreover it was also enjoined upon the real respondents to prove his relationship with Aziz-Ullah Khan

as being beneficiary of the document burden of proof to that extent also lies upon him to prove the relation in order to justify his entitlement to half of his share in the property owned by Aziz-Ullah Khan as held in PLD 1984 SC AJK 138, 2009 SCR 38, 1991 MLD 2389 and 2017 CLC 996 (Lahore). It is also pertinent to mention that in impugned mutation Exh.PA the family tree chalked on its front page is totally out of line from the family tree engraved at its reverse, as according to front page Qadir Baksh had four sons whereas on the back page Qadir Baksh had only two sons so family tree composed in the impugned mutation is not trustworthy and in presence of this situation the family tree referred by the plaintiff/appellant in para No.1 of the plaint which was admitted and endorsed by the real respondent not only in his written statement but also in Court statement which turned it into an admitted piece of evidence which requires no further proof under Article 113 of Qanoon-e-Shahadat Order as held in 2010 SCR 208 and 1997 SCR 325 and respondents No.1 being beneficiary of the impugned mutation is expected to prove the same, particularly when he has claimed his relationship with Aziz Ullah Khan, the relevant portions of the statement of real



respondent recorded on 08.04.2013 are reproduced hereunder:-

"دیوان علی کے بیٹے بیٹیوں میں اشرف بیگم، ولایت بیگم، عزیز اللہ تھے۔۔۔۔۔ عزیز اللہ ڈوگرہ دور میں اور سرور بیگم بھی ڈوگرہ دور میں فوت ہو گئے تھے۔ اشرف بیگم انتقال سے 18/20 سال قبل فوت ہو گئی تھی۔۔۔۔۔ انتقال 1997ء میں ہوا تھا۔ اشرف بیگم 75/80 میں فوت ہوئی ہوگی۔۔۔۔۔ عزیز اللہ کے والد کا نام دیوان علی تھا۔ شجرہ نسب مظہر نے نہ لگایا ہے بلکہ خلیل نے لگایا ہے۔ دیوان علی کا انتقال مظہر نے کروایا تھا جس کا نمبر 796 ہے۔ مظہر نے انتقال درج کرواتے وقت شجرہ نسب نہ لگایا تھا۔ پٹواری جانتا ہو گا۔"

The above statement of real respondent depicts in a loud and clear manner that at the time of death of Aziz-Ullah Khan and Sarwar Begum the predecessor of appellant Ashraf Begum was alive and she expired after the death of her brother and sister which ipso facto proves that her legal heirs are entitled to get the share regardless of the fact that at the time of attestation of the impugned mutation in the year 1997 she had died. So far as the claim of the appellant regarding the whole share of deceased Aziz-Ullah Khan is concerned, in this regard it is observed that as real respondent failed to prove his relationship with Aziz-Ullah Khan, thus, the principle of radd (return) comes into operation which postulates that if there is a residue left after satisfying claims of sharers but there is no residuary, the residue revert to the sharers in proportion to their share and this right of reverter is technically called

return or radd. Where there is no sharer by blood the residuary or distant kindred person but only a sole surviving daughter, the daughter is entitled to inherit share in the estate of deceased as per the Muhamadan Law and by the principle of rudd she will also take remainder because when daughter of deceased is in existence the absence of residuary entitled her to take the whole share keeping in view of the principle of rudd. Reliance can be placed on 1980 CLC S.C. A.J.K. 121, 1990 MLD 725 and PLD 1986 Karachi 269.

Another aspect of the case in hand which has also not been attended by both learned lower Courts is that Revenue authorities have not been impleaded in the case as party but law is also clear on this proposition that when no rights of that authority have been disturbed as nothing has been claimed which can prejudice the rights of the revenue department, hence declaration can be awarded to settle the controversy involved between the parties. A reliance can also be placed on 2010 SCR 102.

The upshot and crux of the above discussion is that by accepting the instant appeal both the impugned judgments and decrees are hereby discarded by setting

aside the impugned mutation No.796 and the suit filed by the plaintiff/appellant is decreed in the terms that only plaintiff/appellant and proforma respondents are among the real and lawful owners of the estate of deceased Aziz-Ullah Khan S/o Diwan Ali Khan, hence entitled to get attestation accordingly.

Circuit Kotli,  
18.02.2022.(M.N.K)

-Sd\_  
**JUDGE**

Approved for reporting.

**-Sd-**  
**JUDGE**