

HIGH COURT OF AZAD JAMMU AND KASHMIR

Civil Appeal No.113/2012;
Date of institution 01.08.2012;
Date of hearing. 01.02.2023;
Date of decision. 01.02.2023.

1. Rashid Ali Khan S/o Najabat Ali Khan;
2. Ansar Qadeer S/o Shabbir Khan, caste Ghakhar R/o Thalyara Tehsil Sehnsa District Kotli.

.....Appellants

VERSUS

1. Aurangzeb S/o Ali Akbar/Nazir Begum, caste Ghakhar;
2. Sanmbu Begum D/o Lal Khan;
3. Zulfiqar Begum;
4. Sanmbu Begum D/o Ali Akbar, caste Gakhhar R/o Thalyara Tehsil Sehnsa;
5. Muhammad Akhlaq S/o Ali Akbar, caste Gakhhar R/o Thalyara;
6. Ali Qadeer;
7. Azad Khan;
8. Qammar Zaman;
9. Zulfiqar Khan;
10. Ghaffar Khan, sons;
11. Guftar Begum;
12. Irshad Begum;
13. Shazia Begum D/o Jannat Begum, caste Gakhhar R/o Amb Tehsil Dadyal District Mirpur.

....Real Respondents

14. Khadijah Begum;
15. Rasheed Begum D/o Najabat Khan;
16. Imtiaz Begum D/o Najabat Ali Khan, caste Gakhhar R/o Thalyara Tehsil Sehnsa District Kotli.

.... Proforma Respondents

CIVIL APPEAL

Before:- Justice Chaudhary Khalid Rasheed, J.

PRESENT:

Chaudhary Manzoor Ahmed, Advocate for the appellants.

Syed Tufail Hussain Shah, Advocate for the respondents.

JUDGMENT:

The captioned appeal has been filed against the judgment and decree recorded by the learned Additional District Judge Sehnsa on 29.05.2012, whereby, appeal filed by respondents herein against judgment and decree recorded by Civil Judge Sehnsa dated 30.04.2009 has been accepted and the suits filed by respondents have been decreed.

Brief facts forming background of the instant appeal are, Aurangzeb and others filed a suit for declaration against appellants herein in the Court of Civil Judge Sehnsa on 25.10.2005 stating therein that land comprising khewat No.1/1 Khata No.1 to 5 measuring 17 kanal 8 marla situated in village Thalyara alongwith Shamlat-e-Deh land is in the ownership of plaintiffs as ancestral property and defendants No.1 to 5 have no concern with the suit land, thus mutation No.71 to the extent of condition of Nikkah and mutation No.82 being mala fide and fraudulent are illegal, arbitrary, ineffective and inoperative against the rights of plaintiffs, hence liable to be cancelled. It was prayed that plaintiff and proforma defendants are entitled to the possession of land from defendants No.1 to 5 and are also entitled to decree for perpetual injunction by restraining the respondents from

change the nature of suit land. Defendants contested the suit by filing written statement, wherein claim of the plaintiffs was refuted in toto. Ali Qadar and others being legal heirs of Jannat Begum also filed a suit for declaration and cancellation of mutation No.71 on the ground that Jannat Begum was daughter of Lal Khan, hence intentionally her name was not included in the mutation. This suit was also resisted by the defendants by filing written statement. The learned trial Court consolidated both the suits, framed issues in the light of pleadings of the parties, provided them opportunity to lead evidence, heard arguments pro and contra and dismissed both the suits vide judgment and decree dated 30.04.2009 for want of proof and barred by limitation. Feeling aggrieved plaintiffs/respondents preferred two separate appeals before learned Additional District Judge Sehnsa. The learned Additional District Judge Sehnsa after hearing the parties, accepted the appeals and decreed the suits vide its impugned judgment and decree dated 29.05.2012, hence the captioned appeal.

The learned counsel appeared on behalf of appellants strenuously argued that Lal Khan died in Dogra Regime and the family of Lal Khan was followed by the customs, hence mutation No.71 was rightly attested as per

customs followed by the family of Lal Khan. He further argued that suits filed by plaintiffs/respondents were barred by limitation, thus, the trial Court rightly dismissed the same but the learned first appellate Court failed to appreciate the evidence brought on record in its true spirit and perspective and wrongly decreed the suits on the basis of assumptions, hence the impugned judgment and decree is liable to be set aside and the judgment and decree recorded by the trial Court entails to be restored.

The learned counsel for the other side supported the impugned judgment and decree and vehemently submitted that mutation No.71 on the face of it appears to be fraudulent because if the same was attested under the customs only the name of widow of Lal Khan should have been entered, thus, the first appellate Court rightly appreciate the controversy in a legal manner and reached at a just conclusion which hardly requires any interference by this Court.

I have heard the learned counsel for the parties and gone through the record of the case with due care and caution.

In view of pleadings of the parties and arguments advanced at bar the question which required to be resolved is

that whether mutation No.71 is justified or not and whether the suits filed by plaintiffs/respondents were time barred? So far the question of limitation is concerned, the controversy with regard to inheritance of the parties is agitated in the suits and it is now a well settled precept of law that no limitation runs against a party for claiming his right of inheritance, thus the suit filed by plaintiffs was not barred by limitation.

As far the mutation No.71 is concerned, it is not denied by the other side that Nazir Begum, Sambu Begum and Jannat Begum were daughters of Lal Khan. It is also not disputed that suit land was in the ownership and possession of Lal Khan who died in Dogra regime and left behind three daughters and a widow. Though defendants took a specific stance that family of Lal Khan was followed by customs and mutation No.71 with regard to inheritance of Lal Khan was registered according to custom, however, the burden to prove the custom in derogation of personal law is on the party who alleges it by cogent evidence. Once custom is pleaded, it must be proved by satisfactory evidence because there is no presumption in favour of custom. Reliance may be placed on 1998 SCR 333, 1985 CLC 217, 2000 SCR 328 and 2002 CLC 1539. Defendants failed to prove through any solid and

reliable evidence that family of Lal Khan was followed by the custom rather it would be presumed that being a Muslim, the family of Lal Khan was governed by Muslim Laws. In 2006 MLD 1422, the learned Lahore High Court observed that custom is no more rule of inheritance in Pakistan being repugnant to the injunctions of Islam and decrees passed before the judgment rendered in Ishaq's case, (PLD 1983 SC 273) giving any right to any person on the basis of such custom were declared as void ab-initio hence the parties will be presumed to be governed by the Muslim Law unless they proved that they are followed by custom and the custom abrogates their personal law. The Sri Partab Jammu & Kashmir Laws Consolidation Act, 1977 (B.K.) empowers the Courts to apply Islamic Law where the parties to a case are Muslim, and the case involves any of the matters mentioned in the said Act. Section 4 of Sri Partab Jammu & Kashmir Laws Consolidation Act, 1977 B.K. provides that law of Shariah, will apply in which cases. For proper appreciation, section 4 of the Sri Partab Jammu & Kashmir Laws Consolidation Act, 1977 B.K. is reproduced as under:

“The Mohammedan law in cases where in parties are Mohammedans and the Hindu law in cases where the parties are Hindus, except in so far as such law has been, by this or any other enactment, altered or abolished or has been modified by any custom applicable to the parties concerned which is not contrary to

Justice, equity or good conscience and has not been by this or any other enactment altered or abolished, and has not been declared to be void by competent authority.”

This Act was promulgated in the year 1920 A.D. and was enforced for a period of two years from 1st Baisakh, 1978 (13th April, 1921). Enforcement of this Act was extended from time to time and on 1st Baisakh, 1981 B.K. (13th April, 1924) it was ordered that State Council Resolution No.1, dated 8th April, 1925 shall remain enforce without the limit of time.

As stated earlier, Lal Khan was a Muslim and as defendants could not prove that family of Lal Khan was governed by customs therefore, it would be presumed that family of Lal Khan was governed by Muslim Law, hence, mutation No.71 was attested wrongly. The argument advanced by the learned counsel for the respondents has the substance that if the family of Lal Khan was governed by custom and mutation No.71 was attested under the customs then only the name of widow of Lal Khan should have been entered as limited owner but a perusal of mutation No.71 reveals that Sambu and Nazir Begum daughters of Lal Khan were also entered as owners till marriage, thus the mutation was also not attested under the custom rather was fraudulent. The learned Additional District Judge Kotli has

appreciated the controversy in a legal fashion and reached at a just conclusion which hardly justifies any indulgence by this Court.

The sum and substance of the above discussion is, finding no essence the instant appeal is hereby dismissed.

Circuit Kotli:
01.02.2023.

JUSTICE

Approved for reporting.

JUSTICE