

SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

Raja Saeed Akram Khan, J.
Ghulam Mustafa Mughal, J.

Civil Appeal No. 29 of 2017
(PLA Filed on 31.8.2017)

Muhammad Yaqoob Khan s/o Said Muhammad
Khan caste Jinhall r/o Tahi Tehsil Hajira District
Poonch.

.... APPELLANT

VERSUS

1. Muhammad Razzaq Khan, son,
2. Mst. Shoqeen Begum,
3. Mst. Rasheeda Begum, daughters of
Muhammad Afsar Khan, deceased,
4. Syed Noor, widow,
5. Maqbool Hussain, son,
6. Majeed Begum w/o Muhammad Razzaq,
7. Fazeelat Jan w/o Munawar Hussain,
8. Pathani widow of Muhammad Arif,
9. Kali w/o Zafar Iqbal, legal heirs of Nazar
Muhammad deceased, p/o Tatapani, Tehsil
and District Kotli.
10. Muhammad Azam Khan sons of Said
Muhammad Khan,
11. Mst. Makhan Jan d/o Said
Muhammad Khan,
12. Mst. Asghar Jan w/o Muhammad Razzaq
Khan,
13. Muhammad Zaheer Khan,
14. Muhammad Zubair Khan,
15. Muhammad Waleed Khan, minor sons of
Muhammad Razzaq Khan, through real
mother Mst. Asghar Jan, caste Jinhall r/o
Tahi Tehsil Hajira District Poonch.

..... RESPONDENTS

16. Muhammad Razzaq Khan,
17. Muhammad Arif Khan,
18. Muhammad Jamil Khan son of Sakhi Muhammad Khan, legal heirs of Mst. Sardari Begum,
19. Mst. Moti Begum d/o Said Muhammad Khan, caste Jinhal r/o Bandhor Tehsil Kotli.

....PROFORMA RESPONDENTS.

(On appeal from the judgment of the High Court dated 12.7.2017 in Civil Appeal No. 31 of 2007)

FOR THE APPELLANT: Syed Nazir Hussain Shah
Kazmi, Advocate.

FOR THE RESPONDENTS: Raja Iqbal Rasheed Minhas
and Sardar Shamshad
Hussain Khan, Advocates.

Date of hearing: 13.3.2019.

JUDGMENT:

Ghulam Mustafa Mughal, J— The captioned appeal with leave of the Court arise out of the judgment dated 12.7.2017 passed by the Azad Jammu & Kashmir High Court in civil appeal No. 31 of 2007.

2. The precise facts forming background of the captioned appeal are that Muhammad Afsar Khan, predecessor-in-interest of

respondents, herein, brought a suit for declaration and cancellation of mutation No.29 and gift-deed dated 17.04.1994, in the Court of Civil Judge Hajira on 04.09.1993. It was averred that the disputed land is the legacy of Said Muhammad who has died and the plaintiff and the defendants are entitled to the same according to the *Shariah*. It was claimed that mutation No.103, attested on 23.04.1993 and the gift-deed dated 17.07.1994 are fake and fictitious. A cross suit No.137 was also filed by the appellant, herein, against Muhammad Afsar, deceased, and others. It was averred in the plaint that land under survey Nos. 1957, 1969, 1767/1, 1959, 1960, 1961, 1962, 1967, 1970, 1971, 1972, 1973, 1974, 1976, 2004, 2005, 2006, measuring 19 *kanal* and Survey Nos. 1958, 1981, 2008, 2009 and 2010, measuring 19 *kanal*, 5 *marla*, out of the total land measuring 65 *kanal*, 8 *marla*, situate at village Tahi, Tehsil Hajira was in the ownership of Said Muhammad. It was claimed that Said

Muhammad, in his life time, transferred the said land along with a house to the plaintiff through a will and mutation No.29 was attested in consequence thereof. The plaintiff claimed for the ownership over the said land. The plaintiff prayed that a decree of perpetual injunction may be passed in his favour. Both the suits were contested by the rival parties by filing written statements. During pendency of the Suits, the appellant, herein, filed another suit for declaration along with the prayer for cancellation of mutation No.103 dated 23.04.1993. This suit was contested by the defendants, therein, who refuted the claim of the plaintiff. The learned Civil Judge Hajira consolidated all the three suits and after necessary proceedings dismissed both the suits filed by the appellant, herein, for want of proof, whereas, suit No.132 filed by Muhammad Afsar Khan and others was decreed. It was declared that the mutation No.29 is null and void. Mutation No.103, dated 23.04.1993 was also

canceled. Feeling aggrieved, both the parties filed separate appeals before the Additional District Judge Hajira on 17.06.2003 and 18.08.2003, respectively. The learned Additional District Judge after necessary proceedings partly accepted appeal No.33, filed by the appellant, herein, and a decree of perpetual injunction was granted in his favour, whereas, appeal to the extent of mutation No.29 was dismissed and mutation No.103 was restored. The cross appeal No.37 filed by Muhammad Afsar Khan & others was dismissed vide consolidated judgment and decree dated 21.02.2007. Both the parties, feeling dissatisfied from the aforesaid judgment and decree, filed separate appeals before the Azad Jammu & Kashmir High Court on 12.07.2007 and 23.04.2007, respectively. The learned High Court after necessary proceedings, accepted appeal No.43 while setting aside the judgment and decree passed by the first appellate Court and dismissed the cross appeal filed by the appellant, herein, vide impugned

consolidated judgment and decree dated 17.07.2017.

3. Syed Nazir Hussain Shah Kazmi, the learned Advocate appearing for the appellants argued that mutation No. 103 has wrongly been cancelled by the learned High Court because the same was attested in accordance with Sharia and should have been maintained. The learned Advocate argued that the learned High Court has not properly appreciated the controversy as well as the record of the case and conclusion reached at is perverse and illegal. He argued that the High Court has relied upon a mutation which was not part of the record.

4. Conversely, Sardar Shahmshad Hussain and Raja Iqbal Rasheed Minhas, the learned Advocates appearing for the respondents argued with vehemence that will in favour of a legal heir cannot be made in view of Sharia, therefore, mutation No. 29 has rightly been declared illegal by the learned Courts below. The learned Advocates further argued that mutation

No. 103 has also been cancelled by the Collector because the same was to be attested afresh after cancellation of mutation No. 29. The learned Advocates argued that even the cancellation of mutation No. 103 does not affect the legal shares likely to be devolved on the legal heirs of Said Muhammad, deceased. They argued that mutation No. 278 has been attested in accordance with Sharia, which does not affect the gift executed in favour of the appellant to the extent of donors.

5. We have heard the learned Advocates representing the parties and have gone through the record of the case. The contention of Syed Nazir Hussain Shah Kazmi, the learned Advocate appearing for the appellant that mutation No. 29 has wrongly been cancelled by the Courts below, is devoid of any force. Mutation No. 29 has been attested on the basis of the will which was made in favour of the legal heir, Said Muhammad without the consent of the other legal heirs. Law is well settled that under Sharia, no will can be

executed in favour of legal heirs until and unless the other legal heirs who have to inherit from the legacy give consent. Therefore, to the extent of cancellation of mutation No. 29 the findings recorded by the Courts below are correct. The mutation No. 29 cannot be maintained after declaring the will illegal and against the Sharia. The other contention of the learned Advocate for the appellant that mutation No. 103 could not be entered in presence of mutation No. 29, was also devoid of any force as the will legally could not be made, therefore, mutation No. 103 has rightly been entered. It is brought into our notice by Sardar Shamshad Khan, one of the Advocates for the respondents that a fresh mutation has been entered by the Tehsildar after cancellation of mutation No. 103, which has not been challenged by the plaintiffs. Be that as it may, the right of inheritance devolves on the legal heirs soon after the death of a deceased Muslim. The attestation of mutation is not sine-qua-non for devolving inheritance, therefore, the gift-deed

executed in favour of the appellant would not be affected due to the attestation of mutation as both the parties admit that gift is within the respective shares of the donee. Reference can be made to a case reported as *Ghulam Ali and 2 others vs. Mst. Ghulam Sarwar Naqvi* (PLD 1990 Supreme Court 1). At page 12 of the report, it has been observed as under:-

“The main points of the controversy in this behalf get resolved on the touchstone of Islamic Law of inheritance. As soon as an owner dies, succession to his property opens. There is no State intervention or clerk’s intervention needs for the passing of the title immediately, to the heirs. Thus it is obvious that a Muslim’s estates legally and juridically vests immediately on his death in his or her heirs and their rights respectively come into separate existence forthwith. The theory of representation of the estate by an intermediary is unknown to Islamic Law of Inheritance as compared as compared to other systems. Thus there being no vesting of the estate of the deceased or an

interregnum in any one like an executor or administrator, it devolves on the heirs automatically, an immediately in definite shares and fraction. It is so notwithstanding whether they (the heirs) like it, want it, abhor it, or shun it. It is the public policy of Islamic law. It is only when the property has thus vested in the heir after the succession opens, that he or she can alienate it in a lawful manner. There is enough comment and case-law on this point which stands accepted.

Reverting to the vesting of the property in a Muslim heir, as a corollary to what has already been said, it is further to be held that if the State, the Court, the clergy, the executor, the administrator does not intervene, no other body intervenes on any other principle, authority, or relationship—even of kinship.

Thus the brother, the father, husband, son or vice versa, does not or cannot intervene as an intermediary. Here we are dealing with the brothers trying though illegally, as if a guardian-in-inheritance-so-called, of a sui juris sister, on allegedly

“moral” basis, to oust her. It is clearly prohibited by Islam. The females cannot be treated so in our system. And we cannot in the present constitutional and legal system import or apply any foreign system or so-called common law, or law of nature in preference to our own. (See Haji Nizam’s case PLD 1976 Lahore 930); as approved in Mohammad Bashir’s case (PLD 1982 Supreme Court 139).”

Even otherwise, the parties are co-sharers and the transfer of the land by a co-sharer is always subject to partition, therefore, if the property, on the basis of mutation No. 29 is excluded from the purview of the gift, the same remains valid to the extent of legal share of the donee. It may be observed that mutation No. 103 was attested after excluding the land transferred through will. The will and mutation No. 29 were declared illegal. Mutation No. 103 was also cancelled by the Collector, which order has not been challenged by the appellant, herein, therefore, fresh mutation has rightly been sanctioned in accordance with Sharia.

The upshot of the above discussion is that no interference is required in the impugned judgment of the High Court and the appeal is disposed of in light of the observations made hereinabove. No order as to costs.

JUDGE

JUDGE.

Mirpur.
18.3.2019.

Muhammad Yaqoob **vs.** M. Razzaq Khan & others.

ORDER:

Judgment has been signed. It shall be announced by the Registrar after notice to the learned counsel for the parties.

JUDGE

JUDGE

Mirpur.
18.3.2019.