

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE MAZHAR ALAM KHAN MIANKHEL
MR. JUSTICE QAZI MUHAMMAD AMIN AHMED

CIVIL PETITION NO.989/2015

(On appeal from the judgment dated 6.4.2015 passed by the Peshawar High Court, Mingora Bench (Dar-ul-Qaza), Swat in C.R.No.88-P/2008).

Mst. Brikhna d/o Habib Khan

...Petitioner

Versus

Faiz Ullah Khan s/o Habib Khan & others

..Respondents

For the petitioner:

Mr. Rehman Ullah, ASC
Syed Rifaqat Hussain Shah, AOR

For the respondent-1:

Mr. Arshad Hussain Yousafzai, ASC
alongwith respondent No.1

Date of hearing:

01.7.2020

JUDGMENT

Mazhar Alam Khan Miankhel, J.-

CMA No.10545/2019:

During the course of writing the judgment, we have noted that instant CMA has not been decided so far, wherein, factum of demise of the petitioner was reported by the learned AOR with the request therein that her legal heirs be impleaded and arrayed as petitioners. To set the record straight we allow this CMA and direct the office to include the names of legal heirs in the array of the petitioner. CMA disposed of

accordingly. We have also noted that the actual name of the petitioner is “Mst. Brikhna” but in the civil petition and other relevant documents in this court filed by the Advocate-on-Record (AOR) wrongly reflect her name as “Mst. Brehna”. Such an insouciant conduct of AOR is deprecated. Such a slackness sometimes lead to a complex situation. So, one should be very careful specially in the matters concerning the records.

Civil Petition No.989/2015:

Mst. Brikhna, the deceased petitioner, had filed a suit for declaration against her brothers and other defendants (vendees of her brothers) wherein she had claimed her *Sharai* share in the legacy left by her father. The suit of the petitioner was decreed by Civil Judge-II/Illaqa Qazi Buner (Trial Court), vide his judgment and decree dated 27.4.2007. Appeal filed by some of the defendants was allowed and judgment and decree passed by the trial court *ibid* was set aside by Additional District Judge-I/Izafi Zilla Qazi, Buner (Appellate Court), vide his judgment and decree 6.12.2007. The petitioner being dissatisfied of such findings filed a civil revision before the Peshawar High Court, Mingora Bench (Dar-ul-Qaza), Swat but that was dismissed by the learned single Judge in chambers vide his judgment dated 6.4.2015. The petitioner still being dissatisfied has questioned the judgment of Peshawar High Court through instant petition for leave to appeal.

2. Learned counsel for the parties were heard and record of the case was perused.

Perusal of the record reveals that in the controversy referred above, defendant No.1/respondent No.1 (brother of the petitioner) had filed his separate written statement wherein he took a stance that

petitioner Mst. Brikhna was not the daughter of his predecessor Habib Khan so was rightly excluded from his inheritance whereas defendant No.2/respondent No.8 herein (being brother of petitioner) submitted his cognovit and accepted the stance of the petitioner that she being the real daughter of Habib Khan and their real sister was entitled in the legacy of their common predecessor Habib Khan to the extent of her *Sharai* share which in the circumstances comes to 1/7 share. It is also on the record that the 3rd son of Habib Khan namely Amrood Khan, respondent No.9 herein, had already given her (petitioner) the due share lying with him (in his name and possession), she was entitled for. The learned single Judge of the Peshawar High Court had based his findings mainly on the ground of limitation and acquiescence by relying on the case of Grana v. Sahib Kamala Bibi (PLD 2014 SC 167) but to our view, case of Mst. Grana ibid is not applicable in the facts and circumstances of this case and there is no question of acquiescence. In the case of Mst. Grana ibid suit property had been sold hand to hand and petitioner lady therein remained silent for sixty (60) long years. Mst. Brikhna, the plaintiff/ petitioner, claiming her share in the legacy left by her father, was on the basis of operation of law and not on the basis of any mutation. It is well settled by now that mutation is not a document of title. The sole purpose of a mutation is to keep the record of rights updated and to maintain the fiscal records straight. When she being one of the legal heir of deceased Habib Khan then she becomes entitled to inherit the legacy of her father from the day her father died and as such becomes co-sharer/co-owner in the property and this entitlement of petitioner is based on operation of Mohammadan Law and the Law of Inheritance. We in the peculiar circumstances of the case can lay hands on the case of Mst.Gohar Khanum v. Jamila Jan (2014 SCMR 801). The learned Judge of the Peshawar High Court

though has based his findings on the basis of case of Mst. Grana ibid but the parties to the suit have not developed their case in line with the findings of the case of Mst. Grana ibid. So, we, in the circumstances, leave the question of limitation and acquiescence in the matter of Muslim inheritance open for any other appropriate case. Record of the case would further make it clear that amongst the three sons, it is the respondent No.1 Faiz Ullah alone who is avoiding to give the petitioner her due share. We have also noted that respondent No.1 has also failed to establish the stance taken by him in his written statement that their father died by leaving only the three sons i.e. defendants No. 1 to 3 and Mst. Brikhna was not the real daughter of their father. In support of his stance, he appeared alone as his own witness. He during the course of his cross examination, admitted that PW-5 Miraj Khan and PW-6 Fateh Khan were the elders of the locality. While going through their statements i.e. PW-5 and PW-6, it appears that both of them being elderly persons, have supported the stance of petitioner. We would also like to mention here that people in this region normally avoid to give the daughters/sisters i.e. women folk, their due shares in the inheritance of their predecessors which is totally against *Sharia* and the law of inheritance prevailing in the country. Preponderance of the evidence would also make it clear that the petitioner being one of the legal heir of Habib Khan is entitled to get her due *Sharai* share which in the circumstances comes to 1/7 share. Learned counsel for respondent No.1 was heard at length but he was unable to satisfy us regarding the stance of respondent No.1. Needless to mention that revenue records be corrected accordingly.

3. In this view of the matter, we convert this petition into appeal and allow the same with costs, set aside the impugned judgment

dated 6.4.2015 passed by the Peshawar High Court, Mingora Bench (Dar-ul-Qaza), Swat and that of the appellate court and restore the judgment & decree dated 27.4.2007 passed by Civil Judge-II/Illaqa Qazi Buner,.

Judge

Judge

Islamabad, the

1st July, 2020

Sarfraz /-‘

‘Not approved for reporting’