(2017) 03 J&K CK 0023

In the Jammu And Kashmir High Court

Case No : 1302 of 2013

Abdul Gani Naik APPELLANT

Vs

Financial Commissioner (Revenue) & ors. RESPONDENT

Date of Decision : 16-03-2017

Acts Referred:

Land Revenue Act, 1956, Section 32, Section 15, Section 15(3)

Citation : (2017) 03 J&K CK 0023

Hon'ble Judges : Mohammad Yaqoob Mir

Bench : SINGLE BENCH

Advocate : M. A. Qayoom, M. A. Rathore, Azhar-ul-Amin

Final Decision : Dismissed

Judgement

1. Petitioner seeks quashment of the orders i.e. dated 10.02.2006, passed by Settlement Commissioner in the revision petition titled ""Mushtaq

Ahmad Tantray alias Naik Vs. Abdul Gani Naik & anr"", order dated 21.02.2011 passed by Financial Commissioner (Revenue), order dated

04.08.2011 passed on mutation No.19432 and order dated 24.08.2013 passed by Naib Tehsildar, Nowgam.

2. In essence, dispute amongst the parties pertains to the estate left behind by one Abdullah S/o Nabir Naik, who had died issueless. For

appreciating the controversy in its correct perspective, the backgroundof the case in the context of genealogy has to be noticed. The genealogy

(pedigree table) of the parties is as under:

FLOW-CHART OMITTED

3. The estate of Nabir Naik (Predecessor-ininterest) situated in Village Natipora, has been mutated vide mutation No.156 on 28th Mag, 1996

(Samvat) (corresponding to 1939-1940 AD) in favour of Qadir (son) and Mst. Khurshi (daughter) in the ratio of 2:1. Another son of Nabir Naik,

namely, Abdullah, had died issueless, that is why said mutation has not been attested in his favour.

4. Abdullah (deceased) and his brother Qadir (father of the petitioner) had a self-acquired property comprising of land measuring 39 kanals 05

marlas situated at Village Natipora in the ratio of two shares to Qadir and one share to Abdullah. The share of Abdullah was mutated in the name

of Qadir vide mutation No.470 dated 10.08.1999 (AD). Mst. Khurshi, sister of Abdullah, was excluded which gave rise to a litigative process.

5. Mushtaq Ahmad Tantray, grandson of Mst. Khurshi, filed a revision petition titled Mushtaq Ahmad Tantray Vs. Abdul Gani Naik & anr. before

the Settlement Commissioner challenging both mutation No.156 and 470 of village Natipora, projecting therein that Mst. Khurshi was a Khana-

nisheen daughter, therefore, she was entitled to inherit estate of her father and the estate of her brother equally with brother Qadir. The Settlement

Commissioner while disposing of revision petition on 10.02.2006, in the concluding part of the order observed as under:

There is consensus of the parties regarding application of Muslim Personal Law to the case in hand. In view of the agreement of the

parties, the order on mutation No.156 is not incorrect because Abdullah had died issueless at the time of attestation of mutation

No.156. From the perusal of the Record of Rights, it transpires that Abdullah and Qadir sons of Nabir Naik had some other landed

property in their own names and it is that property of Abdullah which has been mutated only in the name of Qadir, his brother, vide

orders on mutation No.470. It appears that since the property was recorded in the name of Abdullah and Qadir only, therefore, on

the death of Abdullah it has been recorded in the name of Qadir only. However, from the perusal of the records, it appears that

Abdullah had the self-acquired property in his name and in view of the agreement of the parties, his estate would have devolved both

on his brother Qadir 2 shares and Mst. Khurshi sister one share because both of them were agnates to Abdullah. The counsel for the

non-applicant too has conceded that order on mutation No.470 is not in accordance with the provisions of Muslim law.

Finally, the Settlement Commissioner has opined that the order on mutation No.156 may be left intact and order on mutation No.470 be modified

giving Qadir, brother of Abdullah, two shares and Mst. Khurshi, sister, one share.

The Settlement Commissioner, with the powers of Divisional Commissioner, in terms of Section 15(3) of the Land Revenue Act, had submitted the

report with his opinion thereupon for the orders of Financial Commissioner.

6. The Financial Commissioner has accepted the report vide his detailed order dated 21.02.2011 holding therein that Gh. Qadir (son) and Mst.

Khurshi (daughter) during their life time had accepted the devolution of estate as per Muslim Personal Law in the ratio of 2:1 as is reflected in

mutation No.156 dated 28th Sawan (which, in fact, is 28th Mag), 1996 (BK). Mst. Khurshi has not challenged the said position, therefore, after a

lapse of 60 years her claim as ""Khana-Nisheen"" daughter cannot be reopened. In the concluding part of the order, Financial Commissioner has

also opined that mutation No.470 (inadvertently quoted as 447 in the order) requires modification in accordance with Muslim Personal Law which

makes brother and sister of issueless deceased brother as rightful heirs upon whom the right of inheritance devolve as agnates, therefore, self

acquired landed property mentioned in the said mutation to the extent of share of Abdullah will devolve upon Qadir (brother) two shares and Mst.

Khurshi (sister) one share, accordingly mutation No.470 shall stand modified.

7. So far as position of mutation No.156 attested on 28th Mag, 1996 (BK) is concerned, same after a gap of more than six decades, could not be

interfered with, as has been rightly opined by both Settlement Commissioner as well as Financial Commissioner. Mst. Khurshi, no doubt, had a

claim as ""Khana-Nisheen"" daughter, in such capacity, she could succeed to the estate left behind by her father equally with her brother Qadir but

since they have admitted the sharing in the ratio of 2:1, as permissible under Muslim Personal Law, therefore, such a position, at this stage, is not

open to question.

8. Coming to mutation No.470 which pertains to self-acquired estate of Abdullah, same could not be exclusively attested in favour of brother

Qadir to the exclusion of his sister Mst. Khurshi when the agnatic relationship of both is not open to question. During the proceedings before the

Settlement Commissioner as well as Financial Commissioner, position of applicability of Muslim Personal Law has not been denied, therefore how

could Mst. Khurshi (sister) be excluded from succeeding to the estate left behind by her brother Abdullah, therefore, mutation No.470 was

unsustainable as has been rightly set aside on the recommendations of Settlement Commissioner by the Financial Commissioner.

9. Learned counsel for the petitioner contended that the filing of revision petition after a long gap was impermissible even though for invoking

revisional powers under Section 15 of the Land Revenue Act, no time limit has been prescribed but when the delay is unreasonable, such power

cannot be invoked. The submission is correct so far as mutation No.156 is concerned having been attested on 28th Mag 1996 (BK), i.e. more

than six decades back, thereafter Record of Rights and Annual Records have been prepared. When it is so, then the remedy could not be the

revision but a suit under Section 32 of the Land Revenue Act. Now the position of mutation No.156 is not open to be deliberated upon any further

because the parties, admittedly, have accepted the application of law of inheritance under Muslim Personal Law and it is under the same law estate

of Nabir Naik has devolved upon Qadir (son) and Mst. Khurshi (daughter) in the ratio of 2:1.

10. Learned counsel for the petitioner would next contend that even mutation No.470 could not be challenged by medium of a revision petition.

The mutation has been attested on 10.08.1999, thereafter Record of Rights as well as Annual Records have been prepared, the position of

mutation has merged into those proceeding. When it is so, only remedy available to the aggrieved party was to file a suit under Section 32 of the

Land Revenue Act, that too within a period of one year which has not been filed. Learned counsel was pointedly asked to show whether after

attestation of mutation No.470 on 10.08.1999 any Record of Rights and Annual Records have been prepared, he could not show any such record

so as to justify his argument. No doubt, Record of Rights and Annual Records have been placed on record which pertain to the year 1982-1983

wherein both Qadir and Abdullah are recorded as owners. Same position is reflected in Column No.3 of mutation No.470, therefore, it is clear

that on 10.08.1999, in the Record of Right, position of Qadir and Abdullah being owners in the ratio of two shares and one share is reflected and it is the share of Abdullah which has been mutated in the name of Qadir to the exclusion of Mst. Khurshi, that too at the back of the respondents.

11. Mutation No.470 has been attested on 10.08.1999 whereas revision petition has been filed on 01.07.2005, means within a gap of six years.

Mutation has been attested at the back of Mst. Khurshi and even at the back of respondents No.7 to 12 coupled with the fact that no period of

limitation is prescribed for filing a revision petition, the delay is not so enormous which could not be ignored; when substantial justice is pitted

against technical justice, it is the substantial justice which has to be promoted. Reliance placed by learned counsel for the petitioner on the judgment

rendered by this Court in OWP No.1833/2015 titled ""Mst. Mali Vs. Financial Commissioner (Revenue) & Ors"" dated 27.05.2016, is of no help

to him because in the said judgment it was observed that the mutation was attested in the year 1994, appeal against said mutation was dismissed in

the year 1999, revision petition had been filed after a lapse of 14 years, it is in that background, it was held that the learned Financial

Commissioner has not looked into the question of delay and then reasonability of entertaining the revision petition after a long lapse of time,

therefore, has committed an error which rendered the order unsustainable. In the case on hand, mutation No.470 has been attested on 10.08.1999

at the back of respondents No.7 to 12, no appeal was filed, therefore, facts are different and distinguishable, as such, law laid down in the referred

judgment will not apply to the present case. Both the orders passed by learned Settlement Commissioner dated 10.02.2006 and order dated

21.02.2011 passed by learned Financial Commissioner do not call for any interference, same are upheld.

12. Coming to the order passed by Naib Tehsildar, Nowgam, dated 24.08.2013 providing for constitution of a Committed for demarcation of the

land (self-acquired estate of Abdullah S/o Nabi Naik), same is not open to question because Naib Tehsildar, while constituting the team ordering

demarcation, has also ordered that demarcation shall be done without interference into the physical possession of the parties. Therefore, the team

constituted by Naib Tehsildar has to demarcate the land and then to submit the report for further follow up action. There is nothing wrong in the

said order. Learned counsel for the petitioner tried to project that which land is to be demarcated. It is to be made clear that in terms of mutation

No.470, one share of Abdullah out of 39 kanals i.e. 13 kanals, have to be demarcated and located. There shall not be any doubt about position of

those 13 kanals. The Committee so constituted shall demarcate the land for which the entries as reflected in mutation No.470 shall be made the

base.

13. In the totality of facts and circumstances, petition is found to be without any merit, as such, dismissed.

