
(1968) 08 J&K CK 0001
In the Jammu And Kashmir High Court
Case No : Civil second appeal No. 49 of 1968

Ahad Wani

APPELLANT

Vs

Ramzan Ganai & others

RESPONDENT

Date of Decision : 09-08-1968

Acts Referred:

Jammu and Kashmir Big Landed Estates Abolition Act, 2007 — Section 4, 7

Citation : (1971) JKLR 349 : (1971) KashLJ 35

Hon'ble Judges : S.M.F.Ali, C.J and J.N.Bhat, J

Bench : Division Bench

Advocate : R.N.Kaul, P.L.Handoo, K.N.Raina, Advocates appearing for the Parties

Judgement

Bhat, J.

(1) This is a civil second appeal against the decree passed by the learned District Judge, Anantnag dated 981968 whereby he accepted an appeal

against a decree passed by the Sub Judge Anantnag. on 2361965 The respondent had brought a suit against the appellant for possession of 53

kanals 5 marlas of land in Khawat No 89, 3 marlas, 90, 15 marlas, 91, 1 kanal 13 marlas, and Kh. No 92, 59 kanals 17 marlas, 93, 14 marlas,

and 118, 15 marlas situate in village Shangas left bebehind by Rasul Ganai and a declaration that the defendant No. 1 Ahad Wani was not the

PissarParwada of Rasool Ganai. The plaintiff?, averred that Rasool Ganai, their collateral had died issueless and the plaintiffs and the proforma

respondents other than respondent No, 1 were entitled to his property described above, the defendant No. 1 was giving himself out as Rasool's

PissarParwardha which in fact he was not

(2) The present appellant Ahad Wani stated that he was the PissarParwardha of

Rasool Ganai and the deceased had executed a will in his favour on 3112002. He was entitled to the property of the deceased.

(3) On the pleadings of the parties, the following issues were framed :

(1) Whether Rasool Ganai deceased has executed any will in favour of Ahad Wani. if so, what was its effect upon the suit ?

(2) In case of proof of issue No : 1, whether Ahad Wani was entitled to get the land left behind by Rasool Ganai. If so, to what extent ?

(3) Relief.

(4) This case had a some what chequered career. The trial court of Sub Judge initially decreed the suit by his order dated 31121958 and an

appeal was preferred before the Additional District Judge, Srinagar, which was accepted on 313196L remanding the case to the trial court. The

trial court then dismissed the suit by his order dated 1361Â°65 and on appeal the District Judge Anantnag by his order dated 27121968 again

remanded the case to the trial court. Against this order of the District Judge Anantnag an appeal was preferred to this court which was accepted

and the District Judge Anantnag was directed to dispose of the appeal on the material already on the file. The District Judge by his order under

appeal accepted the appeal of the plaintiff and the defendant respondent has come up in appeal to this court.

(5) We have heard the learned counsel for the parties.

(6) It has been held by both the courts that under custom an, agriculturalist in the Kashmir Valley can affect disposition of his entire property, by

will, there being no limit to his testamentary powers. Therefore, on this point both courts have held that Rasool Ganai could will away the entire

property in favour of Ahad Wani. The will has also been held to be proved by both the courts. The only point for determination is how much of his

landed property could Rasool Ganai will away, under the laws promulgated by the State on the subject. The trial court had held that Rasool Ganai

could will away the entire property; but the District Judge has held that under the Big Landed Estates Abolition Act, 2007, Act No; XVII of 2007

(hereinafter referred to as ""the Act"" in this Judgment Rasool Ganai's will about his landed property could have no effect. He has further held that in

view of the Land Alienation Tenancy Restriction Ordinance (hereinafter referred to as ""the Ordinance" in this judgment) Ahad Wani could not get

any land left behind by Rasool Ganai. The argument of the learned counsel for the appellant is that the District Judge has entirely misconstrued the provisions of the Act or the Ordinance. According to him the proviso to Section 5 of the Land Alienation Act prohibited alienation of more than one-fourth of the land belonging to a member of an agriculturist class for a period of ten years from October 1934 but "fourteen years" were substituted for the words "ten years" by Ordinance No: 7 of 2001 which would mean that the prohibition to alienate permanently agricultural land beyond one-fourth by a member of an agriculturist class would continue upto 10th Oct : 1948 This will has been executed on 31/12/2002 which is somewhere in the year 1915 when the prohibition was still there. According to Mr. Raina's argument on this point the prohibition was not absolute but the Deputy Commissioner could sanction permanent alienation of more than one-fourth of land belonging to an agriculturist under the 2nd proviso to sec 5 The prohibition in the Act spent its force after 2nd October 1948. Even if this will is bit by Section 2(3) of the Land Alienation Act as the will was executed during the prohibition period the invalidity would be cured because the testator Rasool Ganai could get the sanction of the Deputy commissioner for executing this will upon his death which has taken place somewhere in the year 2010. Therefore after 2/10/1948 there was no necessity of getting the sanction and the will would be operative without the sanction of the Deputy Commissioner.

(7) According to the learned counsel for the appellant a will becomes effective on the death of the testator For this purpose he has referred to two authorities viz: AIR 1929 P. C 121 and AIR 129 Pat 85.

In AIR 929 P C. 121 it is held that:

The will of a testator without any intimation there to be found of any contrary intention, must in relation to the property comprised in it be regarded as speaking from his death, and its validity with reference to the devise of any particular property thereby made must depend upon the testator's statutory or other lawful disposing power over the property at that time.

(8) In AIR Patna 585 it has been held that :

The word "will" is widely known and used, and it has a well understood significance as meaning of disposition which is to take effect on the death of a person...

(9) His other argument is that the learned District Judge has misapplied the provisions of the Act to the facts of this case' Section 4 of the Act lays

down in what land the rights of ownership of a proprietor shall be extinguished and Sec. 7 of the Act further gives a further list of property which

shall be held to be land for purposes of Sec. 4 and Section 7 (v) of the Act says that :

Lands which after the date of commencement of the Land Alienation (Temporary Powers) Restriction Ordinance, 2005, in the Kashmir Province

and after the date of commencement of the Jammu Province Land Alienation (Temporary Powers) Restriction Ordinance, 2006, in the Province of

Jammu, have without any valid authority, been transferred by the proprietor by sale, gift, bequest, family settlement or change made for the

purpose of consolidation of holdings".

shall be deemed to be the land for purposes of Sec. 4 which in other words means that any transfer of land by sale, gift, bequest, etc. shall not

affect the nature of the land if the transfer has been made after the Ordinance so far as Kashmir is concerned. This Ordinance came into force in

2005. The will in question has been executed in 2002 i.e. before the Ordinance came into operation. Therefore, section 7 (v) of the Act would not

at all affect this will. The Sec 7 (v) has also undergone some amendments. In the original Act the word "'will'" was there after "'bequest'" or in other

words the section read without any .. . by the proprietor by sale, gift, bequest, will, family settlement....." But it was deleted vide Act. XV of

2008 Mr. Raina argued that the will is not included after this deletion in the word transfer and he has tried to make a distinction between a bequest

and a will. According to him if any land has been transferred (if at all we may use that expression with respect to wills) even after the above

mentioned ordinance it would not be hit by the provisions of Section 7 (v) of the Act. In the original Act there were two words bequest" and

will". But we do not find that there is any difference between 'bequest' and 'will' in law. The word 'will' was perhaps omitted because it was thought

superfluous and unnecessary. He has further argued that even this ordinance was repealed by means of Section 41 of the Act which reads as under

:

The Land Alienation (Temporary Powers) Restriction ordinance, 2005 and the

Jammu Province Land Alienation

(Temporary Powers) Restriction Ordinance, 2006 shall be repealed."

(10) So when the will came into operation on the death of Rasool Ganai in 2010, the Ordinance had been repealed because the Act came into

force on the 1st : of Katie 2007.

(11) On the basis of these two arguments advanced by Mr. Raina one that the will could be got validated with the sanction of the Deputy

Commissioner during the life time of Rasool Ganai but as the restriction of one-fourth was over before his death and thereafter no sanction of the

Deputy Commissioner to validate the will was necessary the will remained effective and secondly as it was not at all hit by the Ordinance, which

was repealed in 2007, we are clearly of the opinion that the will in question considered from any point of view is a valid document.

(12) Other findings being there already, we hold the will to be operative and effective. The judgment of the lower appellate court has to be set

aside. We therefore accept this appeal, set aside the order and decree of the lower appellate court and restore the decree passed by the trial

court. There will be no order as to costs.