

(2018) 08 J&K CK 0057

In the Jammu And Kashmir High Court

Case No : Other Writ Petition No..1491 Of 2017

**Mst Amina And Others @APPELLANT@Hash State Of Jammu & Kashmir
And Others**

Date of Decision : 24-08-2018

Acts Referred:

Jammu and Kashmir Laws Consolidation Act, Samvat 1977 — Section 4
Jammu and Kashmir Land Revenue Act, 1996 — Section 24, 25, 27

Citation : (2018) 08 J&K CK 0057

Hon'ble Judges : Tashi Rabstan, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

1. Heard and considered.

Khewat Holder of village Hayatpora, Chadoora, on the grounds detailed out therein.

3. Financial Commissioner (Revenue), J&K, Srinagar, by impugned order dated 19th September 2017, after discussing subject-matter of both revision

petitions have allowed them and mutation order no. 1339 dated 29th August 1995 and mutation order no.46 dated 28th January 2012. Tehsildar

concerned has been directed to conduct de novo enquiry and pass orders afresh under Muslim Personal Law.

4. I have gone through both the writ petitions and I have considered rival submission of learned counsel for parties.

5. Impugned order, on its meticulous examination, divulges that estate holder, namely, Mst. Mukhti was survived by a son â?" Abdul Karim, and two

daughters â?" Mst Fazi and Mst Rehmani. The property owned by Mst. Mukhti was mutated in the name of her son (Karim Mantoo) only excluding

her above-named two daughters. After death of Karim, his landed property was

mutated in the name of his adopted son (Ali Mohammad), daughters (Mst Amina and Mst Masooda) and widow (Mst. Zeba).Â Impugned order also reveals that Mst. Rahimi (mother of respondents 4 to 8 herein) had not been present when mutation was attested. Such practice is in violation of Standing Order 23-A, governing and regulating the instructions and guidelines qua attestation of mutations.Â

6. Mutations, in terms of Standing Order 23-A, are attested by Revenue Officers to keep a correct record of ownership and possession in respect of

the State and proprietary land. Mutation literary means change or alteration and in revenue vernacular means alteration of revenue entry in the

records. The object of mutation proceedings is to bring the entries in the Record of Rights up to date. Sections 24 to 27 of the Land Revenue Act and

Standing Order 23-A (Record of Mutation) lay down procedure required to be observed while attesting a mutation. Necessity of mutation arises in

cases of succession, alienation, partition, decree of a Court of law or abandonment etc. The Land Revenue Act as well as Standing Order No. 23-A

classify the cases for mutations as undisputed cases and other cases. Undisputed cases of changes concerning tenants-at-will except those under the

State and cases of undisputed leases for a period not exceeding one year, are taken straight to the Jamabandi from the Khasra Girdawari. In other

undisputed cases and in other cases of dispute, the procedure laid down by Sections 24 & 25 of the Land Revenue Act and provisions of Standing

Order No.23-A are required to be followed. No change can be made in the entries of the last Jamabandi relating to rights of land holders, tenants,

mortgagees, lease holders and assignees of Land Revenue and any change required in this behalf can be made only on the orders of a competent

Revenue Officers passed on Mutation Register.

While attesting mutations Revenue Officer has to afford every interested party an opportunity of being heard. Paragraph 19 of Standing Order 23-A,

provides that the mutations are recognized by succession and succession also includes succession on account of absence or on the occasion of re-

marriage of widows or marriage of daughters. Mutation is also recognized by partition, exchange, sale, mortgage, redemption of mortgage, gift or

bequest, Nautor from Khata Khalsa, Mills and Gharats, Dast Bardari or relinquishment of cultivation, non-occupancy rights, SehatIndraj,

TabdilHaqiyat, alluvion, Diluvion, Shamilat, consolidation of holdings, decrees or orders passed under any law, etcetera. It is the duty of a Revenue

Officer, attesting a mutation, to carefully see that all necessary points involved in the decision of a mutation have duly been inquired into and properly

decided and all necessary conditions and particulars have been entered, to enable any dispute that may arise in future to be decided satisfactorily,

before the mutation is finally sanctioned. It is trite law that mutation is to be attested on spot, of which interested persons have to be given due notice

and any contravention thereof amounts to violation of Standing Order 23-A and also in violation of Muslim Personal Law.Â

7. Mr Ratanpuri, learned counsel for respondents 4 to 8 has stated, and rightly so, that it is well known that under Muslim Personal Law adoption is not

permitted. This Court in Yaqoob Laway and others v. Gulla and another, 2004 (II) SLJ 761, reiterated in Ahad Sheikh v. Murad Ahmad Shah and

others, 2012 (4) JKJ 860 [HC], that in the matters of inheritance, it is the personal law that would apply to the parties and there can be no presumption

in favour of any custom and that no civil court can presume the existence of custom. There was also an observation that the customary law prevalent

in the State, has resulted in chaos and was giving rise to endless litigation and delay in disposal of cases. It was further observed that there was no

authentic record of customs that the code of tribal custom was outdated and obsolete and that certain incidents of customs recorded, on the face of it,

were unreasonable. It was in the above stated background that the Act no.IV of 2007 came to be enacted and was published in the Jammu and

Kashmir Gazetted Vo. 119 Jammu dated 26th February 2007.Â

8. It may not be out of place to mention here that it is common ground that prior to coming into being of Act No.IV of 2007, parties were governed by

the provisions of Shri Partap Jammu and Kashmir Laws Consolidation Act, Samvat 1977. Section 4 of the Act of 1977 provided that any question as

regards succession, special property of females etcetera, the rule of decision was the Mohammedan Law in case where parties were Muslims and

Hindu Law where parties were Hindus. Learned counsel for respondents 4 to 8 has also placed reliance on a judgement rendered in Mohammad

Yunus v. Syed Unissa and others 1962 (1) SCR 67, in which the Supreme Court has dealt with Shariat Act, 1937, and has declared the legal position

as under:

Under the Shariat Act, 1937, as framed, in questions relating to charities and charitable institutions and charitable and religious endowments, the

custom or usage would prevail. But the Act enacted by the Central Legislature was amended by Madras Act 18 of 1949 and a. 2 as amended

provides:

Notwithstanding any custom or usage to the contrary, in all questions regarding intestate succession, special property of females including personal

property inherited or obtained under contract, or gift or any other provision of personal law, marriage, dissolution of marriage, including Talaq, Ila,

Zihar, Ila, Khula and Mubarrat, maintenance, dower, guardianship, gifts, trusts and trust proper. ties and wakfs the rule of decision in cases where the

parties are Muslims shall be the Muslim Personal Law (Shariat).

Manifestly by this act 'the rule of decision' in all questions relating to intestate succession and other specified matters including wakfs where the

parties to the dispute are Muslims is the Muslim Personal Law. The, terms of the Act as amended are explicit. Normally statute which takes away or

impairs vested rights under existing laws is presumed not to have retrospective operation. Where vested rights are affected and the question is not one

of procedure, there is a presumption that it was not the intention of the legislature to alter vested rights. But the question is always one of intention of

the legislature to be gathered from the language used in the statute. In construing an enactment, the court starts with a presumption against

retrospectivity if the enactment seeks to affect vested rights: but such a presumption may be deemed rebutted by the amplitude of the language used

by the Legislature. It is expressly enacted in the Shariat Act as amended that in all questions relating to the matters specified, 'the rule of decision' in

cases where the parties are Muslims shall be the Muslim Personal Law. The injunction is one directed against the court: it is enjoined to apply the

Muslim Personal Law in all cases relating to the matters specified notwithstanding any custom or usage to the contrary. The intention of the legislature

appears to be clear; the Act applies to all suits and proceedings which were pending on the date when the Act came into operation as well as to suits

and proceedings filed after that date. It is true that suits and proceedings which have been finally decided would not be affected by the enactment of

the Shariat Act, but if a suit or proceeding be pending even in appeal on the date when the Act was brought into operation, the law applicable for

decision would be the Muslim Personal Law if the other conditions prescribed by the Act are fulfilled. In our view, the High Court was right in holding

that it was bound to apply the provisions of the Shariat Act as amended by Madras Act 18 of 1949 to the suit filed by the plaintiffs.â??

9. The above categoric pronouncement of the Supreme Court qua Shariat Act, 1937, also applies to the case in hand inasmuch as there is no scope for

any further discussion on the subject-matter of the case. Having said that, writ petitions on hand lacks in merit and is liable to be dismissed, as such,

and impugned order need not be interfered with. The matter is still open and parties can agitate and exhort their claims before Tehsildar concerned.

The observations made herein above shall, however, not prejudice rights of any of the parties in the proceedings before Tehsildar.

10. For all what has been discussed above, writ petitions are dismissed with connected MP(s). Interim direction(s), if any, shall stand vacated.