
(2009) 10 J&K CK 0011
In the Jammu And Kashmir High Court

Mst. Mubina and Others

APPELLANT

Vs

Mushtaq Ahmad Raina and Others

RESPONDENT

Date of Decision : 20-10-2009

Acts Referred:

Citation : (2010) 1 JKJ 299

Hon'ble Judges : Barin Ghosh, C.J;Muzaffar Hussain Attar, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. A suit for declaration of possession having been dismissed by the trial court, a learned Single Judge of this Court, in appeal, decreed the suit.

Aggrieved thereby, the present letters patent appeal has been filed.

2. One Ahad Alai had a son, named Salam Alai, and a daughter, named Mst. Noori. Plaintiffs, being the children of Mst. Noori, claimed title

through her. They contended that Mst. Noori inherited her father to the extent of 50% of the land, being the subject matter of the suit. Ahad Alai,

his children and grand children are Muslims and, accordingly, governed by the Muslim Personal Law. In terms thereof, on the death of Ahad Alai,

he having died leaving a son and a daughter, the daughter, Mst. Noori, was entitled to only one-third of the properties left by Ahad Alai, and the

remaining were to go to the son, Salam Alai. In order to show that Mst. Noori was entitled to one-half share of the 'property of Ahad Alai, it was

pleaded in the plaint that the family was governed by the custom known as Khana Nishin and, in terms thereof, a Khana Nishin daughter is entitled

to one-half share. Khana Nishin daughter is such a daughter who remains, after marriage, with her father alongwith her husband. However, it was

pleaded that Mst. Noori became such Khana Nishin daughter after the death of her father, Ahad Alai. It was contended that her status as Khana

Nishin daughter was recognized by her brother Salam Alai. In the written statement, the appellants, namely, the children of Salam Alai, contended

that Mst. Noori was the adopted daughter of Mohammad Alai, brother of Ahad Alai and, accordingly, she inherited Mohammad Alai and could

not inherit Ahad Alai. The trial court declared that Mst. Noori was not Khana Nishin daughter of Ahad Alai but, instead, was adopted daughter of

Mohammad Alai, so she has inherited properties of Mohammad Alai and, therefore, she has no claim over properties left by Ahad Alai. The

learned Single Judge, while dealing with the appeal, held that if a daughter fails to establish her status of resident daughter, i. e., Khana Nishin

daughter, she is still entitled to succeed as a daughter simplicitor and, accordingly, while did not interfere with the finding of the trial court to the

effect that Mst. Noori was not a Khana Nishin daughter of Ahad Alai, but there being no dispute that she was the natural daughter of Ahad Alai,

decreed the suit to the extent of one-third share of the property, being the subject matter of the suit.

3. Before us, in the present appeal, it is being contended that if a daughter fails to establish the custom of Khana Nishin daughter, then she is

entitled to seek inheritance under the general law applicable to Muslims, but not when the daughter claims existence of the custom of Khana Nishin

daughter and fails to prove that she was a Khana Nishin daughter. In other words, it was contended that, in terms of the custom by which the

parties were governed, if a daughter is not a Khana Nishin daughter, she does not inherit her father. In order to put home this contention, reliance

was placed on question 58 of Pt. Sant Ram Dogra's Code of Tribal Custom in Kashmir. The question was, in what circumstances are daughters

entitled to inherit? The answer was, the daughters inherit only when they reside with their husband in their father's home, and are made Dukhtar-i-

Khana-nishin, otherwise not. The words 'only' and 'otherwise not' given in such answer was considered by a Full Bench of this Court in the case of

Mohammad Akbar Bhat v. Mohammad Akhoon and Ors. reported in AIR 1972 J&K 105. The Full Bench, in paragraph 12 of the judgment,

dealt with the said question and answer, and while doing so, referred to the observations of a Division Bench of this Court in the case of Mst. Zebi

v. Resha Mir J & K LR Vol. IV page 264 and quoted the following observations of the said Division Bench:

It is contended that the words 'only' and 'otherwise not' imply that a daughter who was not a Khana Nishin daughter was excluded from inheritance

absolutely and not merely as against particularly relations. A literal construction may lend support to this argument but it is extremely doubtful to say

the least that the implications of that construction were present either to the mind of Mr. Dogra or that of the person on whose information the

custom was recorded. It is in the highest degree improbable that the answer would have been as recorded if the question had been put clearly as to

whether such a daughter could not be allowed to inherit whoever else may take the property, for instance, the Crown by escheat or a very distant

kindred. Probably they had such relations in their mind as a widow, cousins and the like and it may be as against such heirs the daughter's right

under Mohammadan Law is not to prevail. For these reasons the answer to question No. 58 cannot be regarded as free from ambiguity where

total exclusion of the daughter is in question. Evidence in proof of a custom in derogation of personal law should be unambiguous.

4. After having had thus quoted, the Full Bench pronounced the following:

This authority has been followed since then. Reference may be made to 3 J & K LR 23 Vol. 12 page 16 where a Division Bench of this Court

relying on this authority 8 J & K LR117 observed that if a daughter failed to establish a custom under which she claimed as a Dukhtar Khana

Nashin nominated by her mother she is entitled to fall back upon Mohammadan Law and claim a share to which that law entitled her unless of

course it is proved that by custom she is excluded by some other heir and that Mohammadan Law has been superseded by such custom to that

extent.

5. A look at the observations of the Full Bench of this Court, therefore, makes it clear that the daughters only inherit when they are Khana Nishin

daughters and not otherwise, i. e., if they are not Khana Nishin daughters, they are disinherited, is not a universally acceptable custom. Such a

custom is required to be proved. No such attempt was made. There is no dispute that there is another custom known as Khana Berun. What is the

effect of being a Khana Berun daughter does not crop up for consideration in the

instant case, inasmuch as there was neither such pleading, nor any evidence thereon. In the circumstances, when the plaintiffs failed in the suit to establish that their mother was a Khana Nishin daughter of their grandfather, Ahad Alai, the plaintiffs were entitled to a declaration that they as heirs of their mother were entitled to one-third of the suit property, which had been left by Ahad Alai, to which there is no dispute.

6. The learned Counsel for the appellant submitted that there is no dispute that Mst. Noori inherited her uncle Mohammad Alai. Such inheritance could only be had if she had been adopted by Mohammad Alai. It was submitted that once Mst. Noori had inherited Mohammad Alai, as her adopted daughter, she could not inherit her natural father, Ahad Alai.

7. There appears to be no dispute that Mst. Noori was married and was living separately with her first husband and not with her father, Ahad Alai, at the time when Ahad Alai died. According to Muslim Personal Law inheritance opened only on the death of Ahad Alai. On the death of Ahad Alai, Mst. Noori inherited her father to the extent of one-third of the suit property, which belonged to Ahad Alai. The appellants have not brought on record any evidence suggesting that adoption of Mst. Noori by her uncle Mohammad Alai took place when Mst. Noori was still married with her first husband. In such view of the matter, the appellants, in no circumstances, can deny right of Mst. Noori in the suit property belonging to Ahad Alai, which stood vested in her the moment Ahad Alai died.

8. The learned Counsel appearing in support of the appeal also contended that Ahad Alai died prior to 1958 whereupon, in 1958, his son, Salam Alai, got himself mutated as the sole owner of the suit land. It was contended that the suit was filed in 1996. It was submitted that in the written statement it was pleaded that after the death of Ahad Alai, his son Salam Alai and after Salam Alai the appellants are in exclusive possession of the land in question. It was contended that in such circumstances, the suit for possession was barred by limitation. It was contended that when there was a pleading of exclusive possession that signified exclusion of Mst. Noori and her heirs. It was submitted that in such circumstances there was enough pleading of adverse possession. It was submitted that despite there being such pleading, no issue to that effect was framed although there is enough evidence to support such contention. It was submitted that in such

circumstances, the matter should be remitted back for re-consideration of that issue.

9. When more than one person inherit a property, they are tenants-in-common. Possession by one of such tenants-in-common, in law, is possession on behalf of all tenants-in-common. It is only when a tenant-in-common acts in a manner by which he disowns the other tenants-in-common, it may be said that he has acted in his personal capacity and that is the starting point of a claim for adverse possession. From the pleadings, it does not appear that, apart from the mutation effected in 1958 in the sole name of Salam Alai, there is any incident by which it can be said that either Salam Alai or his heirs held out that they are holding the land in question only for themselves and not in their capacity as tenants-in-common. Applying for and obtaining mutation is basically for the purpose of letting the authorities of Revenue to know who is liable to pay revenue pertaining to the land. Such an action alone is nothing to suggest that a tenant-in-common is seeking to disown other tenants-in-common. That apart, there had to be specific pleading of the exclusion, the time when such exclusion took place, since when and until when such exclusion continued perfecting the title of the person claiming such exclusion. There was no such pleading and, accordingly, consciously, no issue was raised by the defendants themselves in the suit.

10. We, accordingly, find no reason to interfere with the judgment and order under appeal. The appeal fails and the same is dismissed.