

creation of Pakistan on 14.08.1947 migrated to India.

Respondent No.5 / Khalid Mehmood son of Ch. Fazal Muhammad [one of the vendors] through Muhammad Akram filed a suit for declaration on 01.10.1951 [as the suitor was minor at that time] against his father Ch. Fazal Muhammad s/o Mola Bukhsh and Muhammad Aslam, predecessor-in-interest of the appellants [the vendors] as well as against S. Dhana Singh, Nazar Singh and Sarwar Singh sons of Kartar Singh [the vendees] challenging therein the validity of the sale deed dated 05.06.1944 on the ground that the suit land was their ancestral property which under prevalent custom could not be sold out and he is entitled to get back the said land. The suit was decreed ex-parte by the learned Civil Judge, Lyallpur (now Faisalabad) vide judgment & decree dated 19.04.1952. The said decree was partially implemented in favour of Khalid Mehmood to the extent of 1/2 share of total land/properties and remaining ½ share was given to him on lease.

Appellant No.1/Najeeb Aslam son of Muhammad Aslam deceased (the other vendor) filed an application on 04.07.1962 for cancellation of land from the name of Khalid Mehmood/respondent No.5, which application was accepted on 14.02.1963. Being aggrieved, Khalid Mehmood/respondent No.5 filed an appeal against order dated 14.02.1963 before Additional Settlement & Rehabilitation Commissioner, Sargodha at Lyallpur which was accepted on

17.09.1963 and the case was remanded. In post-remand proceedings, the application of appellant No.1/Najib Aslam was dismissed by the Deputy Settlement Commissioner (Land), Lyallpur vide order dated 05.06.1964. Being dejected, appellant No.1/Najib Aslam challenged the said order before the Additional Settlement Commissioner (Lands), Lyallpur through an appeal which was accepted on 30.10.1965. Against the said order, Khalid Mehmood /respondent No.5 filed revision which was dismissed by the Settlement Commissioner, Sargodha Division on 26.10.1966. This order was not challenged any further.

The appellants filed Writ Petition [No.241473/2018] with the prayer for issuance of a direction to the respondents/revenue hierarchy to implement the judgment & decree dated 19.04.1952 in the revenue record and order dated 30.10.1965 passed by the Additional Settlement Commissioner (Lands), Lyallpur (now Faisalabad). The learned Single Judge dismissed the writ petition vide order dated 16.03.2021. Hence, this appeal.

3. We have heard the arguments of learned counsel for the appellants and have gone through the record with his able assistance.

4. The major controversy in this case revolves around the following points:

- i. Whether the transaction through registered sale of ancestral property was hit by the principle of reversion and was nullity in the eyes of law?
- ii. Whether a Muslim owner is debarred to alienate his ancestral property?
- iii. Whether the Civil Court had jurisdiction to decide any *lis* regarding evacuee property?

5. It is an appropriate to understand the literal dictionary meaning of words “ancestral property/estate” as well as a “custom”. As per Black’s Law Dictionary 9th Edition, the meanings of “ancestral estate” and “custom” are as under:-

“Ancestral estate. An estate that is acquired by descent or by operation of law with no other consideration than that of blood.

Custom. A practice that by its common adoption and long, unvarying habit has come to have the force of law.”

(emphasis supplied)

Before delving with the moot issue of this case, it is an appropriate to seek guidance from Quran and Sunnah which are the main foundational sources of law of inheritance of the Muslims as well as renders guidance with reference to the powers of a Muslim owner with regard to utilization or alienation of land devolved upon him or the land owned by him. Admittedly, Muslim follows the teachings and principles of Quran and Sunnah with regard to the inheritance. The share of each and every Muslim has been described in Surah Al-Nisa. Undoubtedly Quran & Sunnah have the universal approach and provide guidance to the humanity for all the times to come particularly to the Muslims. Despite above absolute determination, certain codified laws were enacted and promulgated with regard to holding of assets, or ancestral properties by a Muslim. In this regard reference is made to Section 2 of The Muslim Personal Law (Shariat) Application Act, 1937 which reads as below:-

2. Application of Personal Law to Muslim

Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) 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, ulla, zihar, lian, khula and mubar'at, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decisions in cases where the parties are Muslims shall be the Muslim Personal law (Shariat).

Further Section 2 of The West Punjab Muslim Personal Law (Shariat) Application Act, 1948 is as under:

“2. Notwithstanding any rule of custom or usage to the contrary in all questions regarding succession (whether testate or intestate), special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, legitimacy or bastardy, family relations, wills, legacies, gifts, religious usages or institutions including waqfs, trusts and trust property, the rule of decision shall be the Muslim Personal Law (Shariat) in cases, where the parties are Muslims”

Furthermore, Section 2(b) of The West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 (As amended by Ordi. XIII of 1983) dictates that any decree or order of any Court affirming the right under custom or usage calling in question such an alienation of agricultural land by a Muslim owner shall be valid and any decree of the Civil Court contrary to the above shall be void, inexecutable and of no legal effect, which provision is reproduced as under:

“2-A. Succession prior to Act IX of 1948.— Notwithstanding anything to the contrary contained in section 2 or any other law for the time being in

force, or any custom or usage or decree, judgment or order of any Court, where before the commencement of the Punjab Muslim Personal Law (Shariat) Application Act, 1948, a male heir had acquired any agricultural land under custom from the person who at the time of such acquisition was a Muslim:-

(a) he shall be deemed to have become, upon such acquisition, an absolute owner of such land, as if such land had devolved on him under the Muslim Personal Law (Shariat);

(b) any decree, judgment or order of any Court affirming the right of any reversioner under custom or usage, to call in question such an alienation or directing delivery or possession of agricultural land on such basis shall be void, inexecutable and of no legal effect to the extent it is contrary to the Muslim Personal Law (Shariat) Act;

(c) all suits or other proceedings of such a nature pending in any Court and all execution proceedings seeking possession of land under such decree shall abate forthwith;

Provided that nothing herein contained shall be applicable to transactions past and closed where possession of such land has already been delivered under such decrees.

(emphasis supplied)

Thus, it could safely be observed that the principles of Quran & Sunnah (Shariah) shall prevail over any kind of social or regional customs. Even under Article 227 of the Constitution of Islamic Republic of Pakistan, 1973 the Quranic principles are declared as the Supreme Law of the country. With regard to the transaction of ancestral land, the absolute owner is competent to use and hold the land or alienate the same. Reliance in this regard is placed on a case titled as “*Haider Shah and 5 others versus Mst. Roshanaee and 9 others*” (1996 SCMR 901). Relevant paragraph No.7 is reproduced as under:-

“Apart from what has been said above, the right claimed by the respondents in their suit which has been decreed by the Courts below namely, the reversioners’ right under Custom to challenge the alienation made by a limited owner was clearly hit by section 2-A of Muslim Personal Law (Shariat) Application Act V of 1962, Clause (b) whereof provided that “any decree, judgment or order of

any Court affirming the right of any reversioner under Custom or usage, to call in question such an alienation or directing delivery of possession of agricultural land on such basis, shall be void, inexecutable and of no legal effect to the extent it is contrary to the Muslim Personal Law (Shariat) Act". This provision quite clearly nullified the judgments/decrees of the Courts below based on the customary right of reversioners but it appears that it was not brought to the notice of learned Judge in the High Court even though section 2-A was added by Punjab Muslim Personal Law (Shariat) Act (Amendment) Ordinance (XIII of 1983) during the pendency of the second appeal in the High Court."

Further reliance can also be placed on a case titled as "Muhammad Bakhsh etc. Vs. Syed Ghulam Shabir Shah etc." (**KLR 2001 Revenue Cases 73**).

Relevant paragraph No.10 is reproduced as under:-

"10. Section 2-A (c) provides that all suits or other proceedings of such a nature pending in any Court and all execution proceedings seeking possession of land under such decree shall abate forthwith. Therefore, the respondents' suit stood abated on the promulgation of above-said Ordinance XIII of 1983 whereunder Section 2-A was inserted in the West Pakistan Muslim Personal Law (Shariat) Act, 1962."

Similar, proposition has been decided in a case cited as "Zahid and 6 others versus Muhammad Akram" (**1994 CLC 453**), wherein in has been observed as under:-

"In terms of aforesaid section 2-A, the alienator shall be deemed to be an absolute owner of the land as if it had fallen to him, under the Muslim Personal Law (Shariat). With the above transformation, inhibitions attaching to the alienation of the land under Custom evaporated altogether. Islamic Law knew of no restriction on intervivos transfer of the property by its owner, the decree passed by the appellate Court was rendered void, inexecutable, and of no legal effect to the extent it was contrary to Muslim Personal Law (Shariat) Act and the suit shall be deemed to have abated forthwith."

Another reliance is placed on a case titled as "Sultan Ali and others versus Mst. Mehro and others" (**1996 CLC 483**), wherein in has been held as under:-

"However, after the Commencement of the process of Islamisation of Laws in Pakistan, the situation has changed further. Thus, in Federation of Pakistan v. Muhammad Ishaq (PLD 1983 SC 273) it was held that restrictions placed on the power of alienation of persons

inheriting the agricultural land under the Customary Law (as prevailing in the Punjab before 16-3-1948, namely before the coming into force of the West Punjab Muslim Law (Shariat) Application, Act, 1948 were opposed to the Injunctions of Islam. It was, accordingly, directed that amendments be carried out for removing all such restrictions, which has since been done. In view of this approach of the law Maker in regard to the existing laws, we consider that the impugned judgment of the High Court wherein the prayer for setting aside the sale was refused a view taken which is consistent with the spirit of the judgment consequently delivered by this Court, referred to above and in consonance with which all law-making is being done; does not need any interference.”

6. In view of above, any assets, estate, property which comes to the ownership of Muslim as ascendant or descendent, sharer or distant kindred or inheritor according to principles of Islam, that land is vested to a Muslim without any restriction or embargo for its utilization or on disposal of such land and any regional usages or custom and tradition if any that would be inconsequential and ineffective qua his such right and authority, thus it is observed that propositus of the appellants and respondent No.5 were fully competent to sell their owned land without any barrier of usage or custom. Even under Article 23 of the Constitution of Islamic Republic of Pakistan, 1973 every citizen has a right to dispose or transfer of his own property.

7. As far as sale of land by a Muslim to a non-Muslim or vice versa is concerned, suffice it to say that a substantial definition of sale has been provided under Section 54 of Transfer of Property Act, 1882 which is reproduced as under:-

54. “Sale defined”. 'Sale' is a transfer of ownership in exchange for a price paid or promised or part paid and part promised.

Sale how made. Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered

instrument. In the case of tangible immovable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property. Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs in possession of the property.

Contract of sale-A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself create any interest in or charge on such property.

Invariably, a sale transaction contains following constituents:-

- i. *Identity of seller and purchaser*
- ii. *The amount of sale consideration.*
- iii. *Identity and accurate description of the property agreed to be sold*
- iv. *Parties to the agreement to sell an immovable property are at consensus ad idem.*

Thus, it could conveniently be observed that the sale of the land by Muslim to Non-Muslim does not suffer from any infirmity or illegality. Admittedly, the propositus of the appellant and respondent No. 5 sold the land/property in question on 05.06.1944 against receipt of total consideration to the non-Muslim who became absolute owner of the said chunk of land for all legal intents and purposes.

8. After creation of Pakistan, all the evacuee properties, abandoned by the non-Muslim evacuees, stood vested with Central Government of Pakistan who by operation of law became owner of the suit land under Section 6 of the Pakistan (Protection of Evacuee Property) Ordinance 1948. Under Section 12 of the Ordinance *ibid* bar was imposed regarding transfer of any evacuee property on or after 01.08.1947 and all the issues regarding the said evacuee land stood vest in the jurisdiction of Custodian. But the appellant as well as respondent

No.5 as per available record had not agitated the matter before the said statutory forum whereas respondent No.5 after lapse of a period of about 7 years challenged the transaction/ sale deed dated 05.06.1944 before the civil court on 01.10.1951. There is another significant aspect that knowingly the vendees after abandoning their land migrated to India, respondent No.5 instituted a civil suit in the civil court without arraying in the said civil suit the Central Government or Custodian as party and suit was malafidely filed against Non-Muslim vendees, who were not living in Pakistan rather they had migrated to India in 1947 and suit land had vested to Government. Thus, respondent No.5 by committing brazen fraud obtained decree from the civil court without arraying the necessary parties. The said decree is inexecutable being passed without jurisdiction and is in itself void in nature and is devoid of creating any right.

9. The appellants seek implementation of the alleged decree dated 19.04.1952 after lapse of about 4 decades. Thus, this Court for satisfaction of its judicial conscious requisitioned the record of the suit & decree dated 19.04.1952 but as per report of the District & Sessions Judge, Faisalabad, the requisite record i.e. the institution and other registers maintained by the Ahlmeds pertaining to the year 1951 could not be traced out. However, as per uncertified copy of decree appended by the appellants with the Writ Petition [at page No.14 & 15], the suit was seemingly instituted on 01.10.1951

and was decreed on 19.04.1952. Admittedly the property in question was abandoned by evacuees [S. Dhana Singh etc.] in 1947 about four years prior to the institution of the suit which land stood vested in Central Government. Moreover, the Government of Pakistan in order to protect, safeguard and preserve the evacuee land from mischief of the fraudsters and to prevent the unwarranted alienation of the evacuee land established an authority of Custodian who has the jurisdiction with regard to the evacuee land, management, resumption, taking possession etc. and every transaction of evacuee land was subjected to mandatory permissive certificate of the said Authority. It is appropriate to mention here that any Non-Muslim who was found missing since 28.02.1947 should be considered as a migratee and his or her abandoned estate shall be treated as an evacuee land and that would be fallen in the pool of evacuee property as per provisions of Section 7 of Pakistan (Administration of Evacuee Property) Ordinance (XV of 1949). As per the law mentioned above, dispute regarding the evacuee property/land could only be adjudicated or settled by the forum of Custodian or its successor Department whereas under Section 14 of the Ordinance 1948 ibid as well as Section 34 of the Pakistan (Administration of Evacuee Property) Ordinance, 1949, the Civil Court has no jurisdiction to intrude into the vested jurisdictional realm of the Custodian / Settlement Department and even if any decree passed by the Civil Court, that would be without jurisdiction and nullity in the eyes of law or void ab-initio and same

is inexecutable. Reliance is placed on the cases titled as *Ghulam Rasul & 5 Others Vs Jannat Bibi & 11 Others* (1990 SCMR 744), *Muhammad Sadiq (decd.) through L.Rs & Others Vs Mushtaq & Others* (2011 SCMR 239), *Nasir Fahimuddin & Others Vs Charles Philips Mills & Others* (2017 SCMR 468) and *Allah Rakha (deceased) through LRs and others Vs. Additional Commissioner (Revenue) Gujranwala and others* (2020 SCMR 502).

10. Even otherwise, Najib Aslam/appellant No.1 himself filed an application dated 19.11.1989 before the Settlement Wing of Board of Revenue for grant of proprietary rights of the land in question which nullifies his entire claim on the basis of the decree passed in the year 1952 and he is debarred to assert implementation of the said decree. There is another significant aspect of the matter that father of the appellants was defendant in the said suit and decree was passed in favour of respondent No.5. Appellant No.1 resisted the implementation of the decree before the Settlement Department as well as restoration of ½ share in favour of respondent No.5 which was set at naught by the Settlement Authorities, thus now by making summersault he is pressing vehemently for implementation of the said decree, so he is debarred to blow hot and cold in same breath and is prevented to approbate and reprobate.

Nutshell of the above discussion can be summarized in the following words:

- i. The predecessor-in-interest of the appellants and respondent No. 5 were fully

competent to sell their owned land to any person.

- ii. After creation of Pakistan, land left by evacuees vested to Custodian which was the only forum to decide any controversy regarding evacuee land/properties including determination of title.
- iii. The Civil Court has no jurisdiction to decide any lis pertaining to evacuee property/land and if any decree is passed that would be void, nullity in the eyes of law and inexecutable, as such the alleged decree dated 19.04.1952 is declared as void and inexecutable.

11. The learned Single Judge, while keeping in view the aforesaid circumstances of the case, has rightly declined the constitutional petition through the impugned order which does not require any interference.

12. Resultantly, this Intra Court Appeal having no merits is hereby ***dismissed*** with cost of Rs.200,000/- and after recovery of cost, same be deposited into account of Fatimid Foundation.

13. Before parting with this order, as discussed above, the alleged decree dated 19.04.1952 has been declared void and inexecutable. But as contended by the appellants, respondent No.5/ Khalid Mehmood on the basis of said decree has got entered mutation No.137 regarding 1/2 share of the evacuee land in question in his favour, as such the Chief Settlement Commissioner, Punjab and Senior Member, Board of Revenue, Lahore are directed to look into the matter and take necessary action as per law. Office is directed to dispatch copies of this order, writ

petition as well as its all annexures to the aforesaid authorities.

(Muzamil Akhtar Shabir) (Ch. Muhammad Iqbal)
Judge Judge

Approved for reporting.

Judge

Judge

Abdul Hafeez