

**Before Shaleen Kabra, IAS, Financial Commissioner (Revenue) J&K /
Commissioner Agrarian Reforms, J&K**

File No.
1112/FC-AP

Date of Institution
20.04.2022

Date of Decision
08.06.2022

In case titled:

Shaheen Akhter Aged 54 years W/o Mohd Zubair R/o Topa Darhai Tehsil Darhal District Rajouri Through her Attorney Mohd. Zubair Aged 54 years S/o Badar Muneer R/o Topa Darhai Tehsil Darhal District Rajouri.

(...Petitioner)

Versus

Rawail Akhter D/o Late Wazir Ali W/o Mohd. Mushtaq R/o Topa Darhai Tehsil Darhal District Rajouri.

(...Respondent)

In the matter of: Revision petition against the order dated 24.02.2022 passed by the Court of Additional Commissioner, Jammu with powers of Divisional Commissioner Jammu, whereby appeal against the mutation of inheritance No. 1599 dated 26.12.2013 and mutation No. 1736 dated 13.11.2013 has been allowed and both the mutations have been set aside.

Present:

1. Advocate M/s Ved Raj Wazir & Associates for petitioner.
2. Advocate Z.S. Malik for respondent.

ORDER

1. The dispute concerns the landed estate of one Wazir Ali (father of the parties herein) owned by him in villages Dodaj and Chowkian, Tehsil Darhal, which after his death has been mutated in the name of the petitioner to the exclusion of the respondent through attestation of mutations 1599 dated 26.12.2013 and 1736 dated 13.11.2013 respectively on the basis of a registered will deed. Aggrieved, the respondent herein challenged these mutations by way of an

appeal before Deputy Commissioner Rajouri, but alleging inaction on part of the Deputy Commissioner, moved a transfer application before the Divisional Commissioner who vide order dated 21.09.2019 transferred the case to Additional Commissioner, Jammu (with powers of Divisional Commissioner) for disposal and the latter vide order dated 24.02.2022 set aside the mutations and remanded the matter to Tehsildar concerned for a denovo enquiry and orders afresh in presence of both the parties. It is this order of Additional Commissioner, which has been put to challenge in the present Revision petition.

2. After completing the service of the parties, the matter was argued by Ld. Counsels for both the parties. The records were also provided by the court below and same have been placed on record.
3. Ld. Counsel for the petitioner in his arguments at the outset raised the issue of limitation by stating that mutations have been attested in 2013 and appeal preferred in 2017, beyond the prescribed period of 60 days and even application seeking condonation of delay has not been filed. The respondent is said to be in know of the attestation of mutation, being sister of the petitioner and as such cannot plead ignorance. The court below is said to have exceeded its jurisdiction by deliberating upon the genuineness of the "will", which is the exclusive domain of civil court. The mutations having been attested on the basis of a registered will deed cannot be interfered with unless and until the will deed is set aside by a court of competent jurisdiction and the respondent is said to have challenged the will deed before the civil court, the outcome of which will be binding on the revenue authorities. It is also said that the mutations having been attested by the Assistant Collector 1st class, are to be appealed before the

Collector and the court below on this count also lacks jurisdiction. The judgments relied upon by the Ld. Counsel in support of his arguments are as under:-

(i) Civil appeal no. 3226-3227 of 2016 (a) SLP (C) Nos 17948-17949 of 2011. Dated 29.03.2016, titled Sukhpal Singh V/s Jaswinder Kour and Ors.

B. Civil Procedure Code, 1908 Section 100 decision of time barred second appeal on compromise – condonation of delay in filing appeal – High court must deal with question of limitation first in case the appeal is time barred – without condoning delay, High court should not pass order on compromise petition – not proper.

(ii) Madhya Pradesh High Court – WP 225 of 2016. Dated 04.07.2019 titled Pehalvan Singh and Anr V/s Sitaram and Anr.

“will”- validity of will can be determined in the civil court of competent jurisdiction – Revenue courts have no authority of determination of the validity of will.

(iii) High Court of J&K at Srinagar OWP No. 24 of 2013 titled Mst. Zaina and Ors V/s State of J&K & Ors.

“In this case, the issue has been settled in terms of the registered will deed and cannot be re-opened, as already said, until such time the will deed is called in question and is declared to be illegal by the court of competent jurisdiction.

4. Ld. Counsel for the respondent on the other hand denies any “will”, which he describes as a writing only. Will as stated means only declaration of intentions and no enquiry is made at the time of its registration, which the revenue authorities are duty bound to do to ascertain whether the same is in



consonance with law or not. (*Mst. Jana and Ors V/s State of J&K & Ors OWP No. 343/2018, TA No. 01/2018 dated 23.09.2021*)

It is also said that among muslims, Muslim Personal Law governs the matter of succession and a Muslim can make the will only to the extent of 1/3rd. (*RijiaBibi and Ors V/s Ab. Kachem and Anr; Case No. R.S.A No. 40 of 2002; Dated 02.01.2013*).

The will in favour of a heir is also invalid without the consent of other heirs (*J&K High Court – Civil second appeals No. 70 and 44 of 65; dated 12.06.1969 and MP High Court in Kallobai V/s Babu Khan – Second Appeal No. 37 of 1994 dated 06.04.2009*). Ld Counsel resisted the stand of the petitioner with regard to limitation by stating that the mutations being against law can be challenged at any stage and more so, having been attested at the back of the respondent are presumed to be have been challenge within time from the date of knowledge.

5. Heard.

6. After hearing the parties and also perusing the records, the following issues are required to be deliberated upon by this court:-

- (i) Can a will under Muslim Law be made in favour of an heir to the exclusion of other heirs and beyond the ceiling of 1/3rd;
- (ii) Are the legal heirs of the testator required to be heard at the time of attestation of mutation; and
- (iii) Whether the revenue authorities are required to ascertain that the document which is a registered one is in consonance with law or not;

7. Before coming to the issues framed herein above, the issue of limitation raised by the Ld. Counsel for the petitioners addressed in the first instance. The petitioner, though has not raised this issue before the court below, but before this court, the same has been agitated by stating that the appeal filed by the



respondent being time barred was not even accompanied with an application seeking condonation of delay. The issue of limitation loses significance in the instance case in view of the mutations having been attested at the back of the respondent (appellant before the court below) and also the court below clearly has mentioned that the matter needs to be decided on merits in view of the remittance of the matter to the said court by the Divisional Commissioner and also the matter not having been heard effectively by the appellate court (Deputy Commissioner) for a period of more than two years. It is also to mention here that there is no need to file application seeking condonation of delay separately as held by the Hon'ble Supreme Court of India in Civil Appeal No. 9198 of 2019 titled Sesh Nath Singh & Anr. Versus Baidyabati Sheoraphuli Co-operative Bank Ltd and Anr, the relevant of para of which is placed on record as under:-

"At the cost of repetition it is reiterated that delay can be condoned irrespective of whether there is any formal application, if there are sufficient materials on record disclosing sufficient cause for the delay".

8. The question of jurisdiction of the court below to adjudicate upon the appeal filed against mutations although has been dealt with by the court below, but as rightly pleaded by the Ld. Counsel for the petitioner, an appellate forum has been reduced, which ordinarily should not have been done, however, in the instant case, the matter is only remanded and that too due to an order which is illegal being in violation of the law, hence this aspect loses significance. In ordinary course, however, remedial forums cannot be reduced from what is provided under law.

9. Now coming to the issues framed by this court, the same are discussed as under:-

- (i) Under Muslim Law, heirs cannot be deprived of the right of inheritance, thus the ceiling of 1/3rd only can be bequeathed through will.



- (ii) Under Muslim Law, "will" in favour of an heir is not valid without the consent of other heirs.
- (iii) Even though the will as in the instant case is a registered deed, the mutating officer while attesting the mutation is required to hear all the affected parties and properly enquire in the matter. A similar view has been held by the Hon'ble High Court of J&K in case Mst. Jana V/s State of J&K and Ors decided on 23.09.2021, relevant para reproduced as under:-

"The attestation of mutation at the back of these persons vitiates the mutation. That apart whenever revenue officer entrusted with the job of attesting mutation take up particular mutation for attestation on the basis of a testamentary disposition or gift deed etc, he is obliged to atleast find out as to whether such instrument is, on the face of it, in consonance with law. He cannot blindly accept the document and atleast mutation and enquiry though brief, is required to be made in the matter to find out the prima-facie validity of the document".

Furthermore, para 104 of Standing Order 23-A (Record of Mutations) clearly provides that mutations cannot be carried out against transactions not recognized under law.

10. Thus, for the reasons mentioned hereinabove, the Revision petition being devoid of any merit is dismissed and the order impugned is upheld. Since the mutations under discussion have been attested in disregard of Muslim Personal Law the matter has been rightly remanded to the Tehsildar who shall pass orders strictly in accordance with the said law in presence of both the parties. Parties to appear before the Tehsildar concerned on 17.06.2022 and the Tehsildar shall not issue fresh summons as the parties have been present here

and informed for their appearance before the Tehsildar on the above said date. Interim orders, if any issued by this court shall continue till the matter is heard by the Tehsildar. File of the court below be returned forthwith and the file of this court consigned to records after due completion.

Announced
08.06.2022


Shaleen Kabra IAS
Financial Commissioner Revenue
J&K