

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

...

OWP no.890/2010
c/w CCP(S) no.185/2022

Reserved on: 22.08.2024

Pronounced on: 17.12.2024

1. Ghulam Ahmad Bhat
2. Mohammad Sultan
3. Ghulam Mohammad
4. Ghulam Nabi
5. Mohammad Yousuf
(sons)
6. Mst. Saja
7. Mst. Misree
8. Mst. Mugli
(daughters)
of Mst Mukhti
All residents of Zainakote, Srinagar

.....Petitioner(s)

Through: Mr W.M.Shah, Advocate

Versus

1. State of J&K through Chief Secretary, Srinagar/Jammu
2. Settlement Commissioner, J&K, Srinagar
3. Gafar Ganie S/o Munawar Ganie R/o Zainakoote, Srinagar

.....Respondent(s)

Through: Mr A. M. Dar, Sr. Advocate with
M/s Bhat Shafi and Mehjabeen Gulzar,
Advocates for respondent no.3

CORAM:

HON'BLE MR JUSTICE VINOD CHATTERJI KOUL, JUDGE

JUDGEMENT

1. This is a pathetic case of a woman, who sought share from her father's property being biological daughter some forty-three (43) years back but died midway and her children stepped her in that race who are also still dreaming to have had their mother's right matured and plucked, albeit

having a Division Bench judgement in her favour. Whether in Islam, a woman has no right to inherit the property of her father or husband; in the present case, it is father, and whether Islam provides and gives authority to inflict discrimination upon woman in succession and inheritance.

2. Factual background is worthwhile to be deliberated upon hereinafter.
3. It was 43 years back, i.e., in the year 1981, that Mst. Mukhti, mother of petitioners, filed a suit before this Court. She was admitted to be entitled to share under Muslim Personal Law to the extent of $1/3^{\text{rd}}$, but that suit was dismissed on the ground that no possession was claimed by her (Mst. Mukhti). Against that judgement and decree, an appeal was preferred by petitioners after the death of their mother before the Division Bench of this Court, which set-aside the Single Bench order. It is contention of petitioners that they were misled by ill advice of an advocate and they instituted a suit for partition and possession on 3rd July 1996 and same was returned to them after a period of seven years on 30th December 2003, to be presented before Revenue Authority as the same was barred by Section 139 of the Land Revenue Act. Thus, petitioners presented an application under Section 105 of Land Revenue Act. Settlement Tehsildar (Collector 1st Class) issued notices to other-side and after hearing parties and considering objections of other-side, attested mutation as per decree passed by the Division Bench of this Court. Respondent no.3, feeling aggrieved of mutation, filed an appeal before Settlement Officer, Kashmir, who set-aside the mutation passed in favour of petitioners on flimsy grounds vide order dated 28th July 2009 by misinterpreting the Division Bench judgement.

Against order of Settlement Officer, further appeal was filed before Settlement Commissioner, J&K, Srinagar, who dismissed petitioners' appeal confirming the order of Settlement Officer. Hence this petition.

4. Counter affidavit has been filed by respondent no.3, Gaffar Ganai. He contends that appeal filed by him was allowed by Settlement Officer. Against that, second appeal was filed, which was rightly dismissed because there is no provision under Revenue Laws to file second appeal and the best remedy available to writ petitioners was to challenge the order of Settlement Officer before Special Tribunal by way of a revision which could not be done and, therefore, present writ petition is not maintainable. He also avers that in the year 1987, Civil Suit for Declaration and for quashment of Mutation no.35/87 was filed before this Court, which was initially dismissed by learned Single Judge, but LPA was filed by writ petitioner. The learned Division Bench did not grant any decree for upsetting mutation no.35/87, but only granted declaratory decree and thereby holding writ petitioner's mother entitled to inherit her share under Muslim Personal Law, but since limited decree for declaration simpliciter was granted as there was no consequential and substantial relief like partition and possession either prayed for or granted by the Division Bench. Since the decree for declaration simpliciter was not worth for execution, therefore, writ petition filed a separate suit for partition and possession before 3rd Additional District Judge. There a limitation point was urged. The said suit was dismissed and writ petitioner was advised to approach before proper forum. After gap of more than nine years, writ petitioner firstly approached Settlement Tehsildar by way of application under Section

105 and after detailed objections were filed by respondent, another application was filed before this Court seeking declaratory decree to be transferred to the court of District Judge for execution, in which respondent filed detailed objections. When writ petitioner could not succeed to get the decree transferred to the Court of District Judge for execution, the said application, being CTA no.92/2004 was dismissed as withdrawn. It is also averred that Settlement Tehsildar upset mutation no.35/87; against which respondent no.3 preferred an appeal before Settlement Officer. The appeal was allowed vide judgement dated 28th July 2009. Second appeal was preferred which was not proper remedy for writ petitioner. It is also stated that for long 13 years writ petitioners did not succeed in getting decree for declaration simpliciter executed and even failed at all levels and before all forums including dismissal of transfer applications, writ petition is not maintainable. Respondent no.3 also makes reference to Section 34 of the Specific Relief Act, which says that unless consequential relief is granted by the Court, a decree for declaration simpliciter cannot be executed and that this hurdle could not be cleared by petitioners for last more than a decade of litigation.

5. I have heard learned counsel for parties and considered the matter.
6. First and foremost, the learned Division Bench of this Court vide judgement dated 9th February 1996 in CLA no.65 of 1987 titled as *Ghulam Ahmad Bhat and others v. Gaffar Ganai*, has in clear cut terms held that writ petitioners herein are entitled to inherit the share of property under Muslim Personal Law. It has also been made clear that mother of petitioners, Mst. Mukhti, is sister of respondent and being

common lineal descendant, she is a co-owner and co-sharer of the property and that the parties are Muslims and are governed by Muslim Law. The Muslim Personal Law recognizes the right of sister in respect of property of her father. The learned Division Bench has also held that the learned Single Judge has committed an error in holding that the suit is not maintainable being simpliciter declaratory suit. The Division Bench also held that suit was maintainable and appellants entitled to decree.

7. As is evident from perusal of record on file, Tehsildar, Settlement, Srinagar issued order on Mutation no.35 dated 18th October 2004. Against that mutation, respondent – Gaffar Ganie preferred an appeal before Settlement Officer (Collector) Kashmir. There is no denial to the fact that mother of petitioners, Mst. Mukhti and Gaffar Ganai are brother and sister. Their father was Munawar Ganai. Mst. Mukhti, being daughter, sought her share from the property of her father, Munawar Ganai. The parties are entangled into litigation since the year 1981, i.e., for last 43 years. The litigation after litigation is being instituted by parties about the share of a woman, who is/was mother of petitioners and has/had acquired and inherited from her father. Can she be denied the right under the guise of technicalities as is at galore and evident from the pleadings of private respondent.
8. It is already well-settled that procedural defects and irregularities which can be cured, should not stand in the way of justice.

Whenever there is a conflict between substantial justice and hyper-technicality then substantial justice is to be preferred to avoid defeat for the ends of justice.

Attestation of mutation is only for updating the revenue records and such records are maintained for fiscal purposes. Upholding or setting-aside the order of mutation will not deprive a person from having recourse to other remedies as may be available and permissible. There are plethora of judgements ruling that mutation entries are only for fiscal purposes and do not confer any right, title or interest. The Supreme Court in *Sawarni v. Inder Kaur and others*, (1996) 6 SCC 223, has held that mutation in revenue records neither creates nor extinguishes title, nor does it have any presumptive value on title. All it does is entitle a person in whose favour mutation is done to pay the land revenue in question. This was reiterated and affirmed by the Supreme Court in *Balwant Singh and others v. Daulat Singh (Dead) by LRs and others*, (1997) 7 SCC 137, holding that mere mutation of records would not divest owners of their right, title and interest in the land. This principle of law was also reiterated by the Supreme Court in *Jitendra Singh v. State of Madhya Pradesh and others*, 2021 SCC OnLine SC 802. Reference to a decision of the Supreme Court in *Sita Ram Bhau Patil v. Ramchandra Nago Patil (Dead) by LRs and others*, (1977) 2 SCC 49, is also profitable. It was held that there existed no universal principle that whatever would appear in the record of rights would be presumed to be correct, when there exists evidence to the contrary.

9. Even if one of the co-sharers is in possession of property, his possession cannot be considered to be adverse against other co-sharer(s). The right of the latter will not be lost by the mere fact that one co-sharer is in exclusive possession. The same is the case with one of the heirs of a

deceased Muslim being in possession of the whole estate. He will be deemed to be in possession on behalf of other co-heirs. His possession will not be adverse possession to that of the other co-heirs whose rights in respect of the property will not be lost.

10. Insofar as case in hand is concerned, mother of petitioners (Mst. Mukhti) was a co-owner and co-sharer of the property left behind by her father. Mere rhetoric that petitioners or their mother had not sought a particular relief in a particular style/motion/petition/suit/appeal will not divest her and her children from the right of inheritance.

11. It is very painful to say that a brother cannot be heard saying that his sister is entitled to property of his/her father only when she moves a suit in a particular style/manner and then only she can be after long drawn litigation entitled to inherit property. Such absurd contentions are unacceptable rather deprecative.

12. Quranic injunctions command inheritance of daughter in the property left behind by her father.

13. The parties hereunto this controversy are Muslims. They are practising in daily and routine life all rituals of Islam strictly in accordance with Quranic injunctions and Ahadith, which include ablution for performing daily prayers; celebrations of Eids; performing Hajj and sacrifice of lamb/camel; paying Zakah; burying of dead body in strict accordance with Islam. All these acts and activities are being performed by parties strictly in conformity with Quranic commandments and Shariat, but it has been seen when it comes to giving share to daughter/sister, certain individuals come up with a pretext of Custom. Such a practice is even deprecated by Islam. It is worthwhile to

mention here that *Surah An-Nisa, Verse 11*, of *Holy Quran*, stipulates inheritance laws, specifically distribution of inheritance amongst inheritors. It provides guidelines on how the estate of a deceased person should be divided, taking into account the shares for children, spouse, and other family members. In this verse, it is ordained that the portion of the son will be two times that of the daughter. During the time of ignorance, the people were only giving from inheritance to their sons and daughters were being deprived of their portions completely, but in Islam such discrimination has been removed and daughters have been given their right of inheritance. The son is given two times the amount of the daughter because he (son) is required to spend from his wealth to maintain the household and fulfil the needs of his wife and children and other family members, including parents.

14. It would be appropriate to reproduce English Translation of Verse 11 of *Surah An-Nisa* of Holy Quran by various Islamic Scholars hereunder: -

English Translation:

By Dr Muhammad Tahir ul Qadri:

“11. Allah commands you concerning (the inheritance of) your children: The share of a son is equal to that of two daughters; then if there are only daughters (two or) more, they are entitled to two-thirds of the inheritance; if there is only one daughter, her share will be one half; the mother and the father of the deceased will get one-sixth of the inheritance each if the deceased leaves children behind; but in case the deceased has no children and the heirs are only his mother and his father, the mother’s share is one-third (and the rest is the father’s); then, if he has brothers and sisters, the mother will have a sixth portion. This distribution will be (executed) after (the fulfilment of) the will he may have made or after (the payment of) the debt. You know not which of them, whether your parents or your sons, are closer to you in bringing you benefit. This (distribution) is a duty assigned (i.e., fixed) by Allah. Surely, Allah is All-Knowing, Most Wise.

By Mohammad Asad:

Concerning [the inheritance of] your children, God enjoins [this] upon you: The male shall have the equal of two females' share; but if there are more than two females, they shall have two-thirds of what [their parents] leave behind; and if there is only one, she shall have one-half thereof. And as for the parents [of the deceased], each of them shall have one-sixth of what he leaves behind, in the event of his having [left] a child; but if he has left no child and his parents are his [only] heirs, then his mother shall have one-third; and if he has brothers and sisters, then his mother shall have one-sixth after [the deduction of] any bequest he may have made, or any debt [he may have incurred]. As for your parents and your children - you know not which of them is more deserving of benefit from you: [therefore this] ordinance from God. Verily, God is all-knowing, wise.

By Muhammad Farooq-i-Azam Malik:

In regard to inheritance Allah commands you concerning your children: that the share of a boy shall be twice that of a girl. In the case where there are more than two girls, their share will be two thirds of the estate; but if there is only one girl, her share will be one half of the estate. If the deceased left children behind, each of the parents shall get one sixth of the estate, but if the deceased left no children and the parents are the only heirs, the mother shall get one third of the estate, but if the deceased left brothers and sisters, then the mother will get one sixth of it. The distribution in all cases shall be after fulfilling the terms of the last will and the payment of debts. With regards to your parents and your children, you do not know who is more beneficial to you, therefore, Allah issued this ordinance. Surely Allah is the Knowledgeable, Wise.

By Mustafa Khattab:

Allah commands you regarding your children: the share of the male will be twice that of the female. If you leave only two 'or more' females, their share is two-thirds of the estate. But if there is only one female, her share will be one-half. Each parent is entitled to one-sixth if you leave offspring. But if you are childless and your parents are the only heirs, then your mother will receive one-third. But if you leave siblings, then your mother will receive one-sixth - after the fulfilment of bequests and debts. 'Be fair to' your parents and children, as you do not 'fully' know who is more beneficial to you. 'This is' an obligation from Allah. Surely Allah is All-Knowing, All-Wise.

By Marmaduke Pickthall:

Allah chargeth you concerning (the provision for) your children: to the male the equivalent of the portion of two females, and if there be women more than two, then theirs is two-thirds of the inheritance, and if there be one (only) then the half. And to his parents a sixth of the inheritance, if he have a son; and if he have no son and his parents are his heirs, then to his mother appertaineth the third; and if he have brethren, then to his mother appertaineth the sixth, after any legacy he may have bequeathed,

or debt (hath been paid). Your parents or your children: Ye know not which of them is nearer unto you in usefulness. It is an injunction from Allah. Lo! Allah is Knower, Wise.

By Abdullah Yusuf Ali:

Allah (thus) directs you as regards your children's (inheritance): to the male a portion equal to that of two females: if only daughters two or more their share is two-thirds of the inheritance; if only one her share is a half. For parents a sixth share of the inheritance to each if the deceased left children; if no children and the parents are the (only) heirs the mother has a third; if the deceased left brothers (or sisters) the mother has a sixth. (The distribution in all cases is) after the payment of legacies and debts. Ye know not whether your parents or your children are nearest to you in benefit. These are settled portions ordained by Allah and Allah is All-Knowing All-Wise.

15. It is from Verse 11 of Surah An-Nisa, a duty, obligation, command, ordain, injunction to assign/give the share to the daughter(s). Even its plain reading, in my opinion, bestows right of inheritance first to a female, then to a male survivor.

16. Thus, petitioners and/or their mother cannot/could not be expelled by any excuse/pretext to inherit the property.

17. Revenue Officers, including Settlement Officer and Settlement Commissioner, have oblivious of Muslim Personal Law, passed impugned orders. In essence and core, they have declared Mst. Mukhti as not being the daughter of Late Munawar Ganie. As a matter of fact, she has been excluded to inherit the property of her father's property.

Not only this, Settlement Officer and Settlement Commissioner have sat over the judgement of the Division Bench of this Court and have tried to show as if the judgement of the Division Bench is a mere plain paper, having no force in law. The Division Bench has held Mst. Mukhti entitled to inherit the share of property under Muslim Personal Law. The said judgement has long since attained finality and all that has been said and observed therein, in law, is a binding precedent and

as a consequence whereof subordinate courts, which includes revenue courts, and in the present case Settlement Commissioner and Settlement Officer were under legal obligation to follow it in letter and spirit. However, they have startlingly done contrary thereto.

In such circumstances impugned orders or for that matter any other order/injunction/relief passed/given by any forum/ court in contravention to the aforesaid Division Bench judgement, *per se*, is/are illegal and is/are set at naught.

18. For the reasons discussed above, writ petition is **allowed**. Impugned order dated 8th December 2010 passed by Settlement Commissioner, J&K, Srinagar, in appeal bearing File no.722/SC/APP titled as *Ghulam Ahmad and others v. Gaffar Ganie*, as also order of Settlement Officer dated 28th July 2009 in Appeal bearing File no.722/SC/APP titled as *Ghulam Ahmad and others v. Gaffar Ganie*, are *quashed*.

Respondent-Revenue Department is directed to implement the judgement of the Division Bench of this Court *dated 9th February 1996 passed in CLA no.65/1987* titled as *Ghulam Ahmad Bhat and others v. Gaffar Ganai*, in letter and spirit, by giving petitioners the share of their mother, Mst. Mukhti, in the property of Munawar Ganai (*which is property/land falling under Khewat no.48148 to the extent of 69 Kanals 02 Marlas situate at Zainakote Tehsil Srinagar*) as per Muslim Personal Law within three months from today.

19. It is also made clear that in the event, respondent has created any third-party interest in the property in question, then in such situation, it shall be responsibility of respondent to give landed property at some other

place(s) having equivalent market value and/or according to the market value of the property in question.

20.Disposed of.

21.Registry to forthwith send copy of this judgement to Divisional Commissioner, Kashmir, for implementation/compliance and submission of compliance report.

22.Registry to maintain an Index and put up it after three months.

(Vinod Chatterji Koul)
Judge

Srinagar

17.12.2024

Qazi Amjad, Secy.

Whether approved for reporting? Yes

