Rasheeda Akthar Vs. State

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SooperKanoon Citation : sooperkanoon.com/901604

Court : Jammu and Kashmir

Decided On : Oct-07-2005

Reported in : 2006(2)JKJ384

Judge : Hakim Imtiyaz Hussain, J.

Acts : Jammu and Kashmir Land Revenue Act - Sections 15, 24 to 27 and 33(4); ;Big Landed Estates Abolition Act, 2007; ;Jammu and Kashmir Constitution - Article 226 - Section 103; ;Code of Civil Procedure (CPC) - Section 115

Appeal No. : SWP No. 284/05

Appellant : Rasheeda Akthar

Respondent : State

Advocate for Def. : N.H. Shah and; G.A. Lone, Advs.

Advocate for Pet/Ap. : Z.A. Qureshi, Adv.

Disposition : Appeal dismissed

Judgement :

Hakim Imtiyaz Hussain, J.

1. This petition under Section 103 of the Constitution of Jammu & Kashmir read with 226 of the Constitution of India has been filed by one Rasheeda Akhtar for

quashing the order passed by Ld. Financial Commissioner dated 14.6.2005 in revision petition titled Syed Jalal-ud-din Shah v. Rasheeda Akhtar by means of which mutation No. 620 dated 13.1.1977 ordered by the Naib Tehsildar Chadoora and mutation No. 1170 dated 16.1.1979 ordered by the Tehsildar Chadoora were set aside.

2. The facts relevant for the disposal of this petition are as under:

Parties namely Rasheed Akhtar W/o Syed Abdul Rashid Qadiri R/o Lasjan (hereinafter referred to as the petitioner) and Syed Jalal-ud-din S/o Syed Mustaffa R/o Lasjan (hereinafter referred to as the respondent No. 2) are the descendants of one Syed Kabir who had some landed property at village Lasjan Tehsil Chadoora District Budgam Kashmir. Syed Kabir had two sons namely Mohd. Syed and Syed Mustafa who inherited the estate of Syed Kabir. Mohd. Syed died issueless whileas the petitioner and respondent No. 2 are the issues of Syed Mustafa. By means of mutation No. 620 dated 13.1.1977, the land left by late Syed Mustafa was mutated in favour of the petitioner and respondent No. 2 in equal shares. The petitioner claimed and got 1/2 of the share as a Khan-nisheen daughter. By means of the second mutation No. 1170 dated 16.1.1979 the property of late Mohd. Syed, the uncle of the petitioner and respondent No. 2 was also mutated in their favour in equal shares. The mutation was effected in their favour as Mohd. Syed had died issueless without leaving behind a widow. Respondent No. 2 challenged both the mutations by means of the two revision petitions which were heard and disposed of by the Financial Commissioner by means of the impugned order dated 14.1.2005.

3. The learned Financial Commissioner came to the conclusion that the impugned mutations have not been attested correctly in terms of the law. He, therefore, accepted the revision petitions and set aside the impugned mutations. He remanded the case back to the Tehsildar Chadoora for fresh enquiry and orders in terms of law.

4. Being aggrieved by the order passed by the Id. Financial Commissioner the petitioner has through the medium of this revision petition challenged the same on three main grounds; firstly that the revision petitions have been filed beyond the

period of limitation without applying for condoning the delay but the learned Financial Commissioner has condoned the delay of more than 15 years on the ground that it could not be ascertained from the Part Sarkar as to whether the respondent was present at the time of attestation of mutation or not; secondly that the Financial Commissioner while setting aside the mutations has taken resort to the personal law of the parties and found that the parties being Syeds, the customary law was not applicable to them. The Commissioner by holding that the parties were not governed by the customary law has exceeded its finding jurisdiction as it is only a civil court who can adjudicate upon such an issue; thirdly that the finding of the Financial Commissioner that the mutation was attested by Naib Tehsildar as such is non-est in the eye of law was not correct. The , petitioner has prayed for a writ of certiorari quashing the order impugned passed by the learned Financial Commissioner.

5. Heard. I have considered the matter. The Id. Financial Commissioner has while dealing with the matter and arriving at the conclusion given due reasons to set aside the impugned mutation orders.

6. So far mutation No. 620 is concerned the same has been attested by the Naib Tehsildar. The Financial Commissioner found that under Standing Order 23-A in cases involving Khannisheen status of a daughter the mutation is to be attested by a Tehsildar only. Since the impugned mutation was attested by the Naib Tehsildar, he found that the same was without jurisdiction and non-est. So far the other mutation was concerned the Financial Commissioner found that the family was governed by the personal law and not by the customary law in matters of inheritance as such the mutation was not in accordance with law.

7. The petitioner is aggrieved of the findings arrived at by the Id. Financial Commissioner. Besides contesting the findings of the Id. Financial Commissioner on both these grounds, the petitioner is aggrieved that a revision which was barred by limitation was entertained and allowed without even condoning the delay as required for the purpose.

8. Mutations are attested by the Revenue officers to keep a correct record of ownership and possession in respect of state and proprietary land. Mutation

literary means change or alteration and in revenue parlance means alteration of revenue entry in the records. The object of mutation proceedings is to bring the entries in the Record of Rights upto date. Sections 24 to 27 of the Land Revenue Act and Standing Order 23-A (Record of Mutation) lay down the 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 the Standing Order No. 23-A classify the case 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 case and in other cases of dispute the procedure laid down by Sections 24 & 25 of the Land Revenue Act and provisions of the Standing Order No. 23-A are required to be followed. No change can be made in the entries of the last Jamabandi relating to the rights of the 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 the Mutation Register. While attesting the mutations the Revenue Officer has to afford every interested party an opportunity of being heard.

9. Mutations in favour of Khan-nisheen daughters is governed by paragraph 64 (b) of the Standing Order No. 23-A which reads as under:

(b) Khana Nashin Daughter - (i) In the (Vally of Kashmir and the District of Ladakh) the custom of having a Khana Nashin daughter is generally recognised. The custom of bringing in a Khana Damad for a Khana Nashin daughter is equally prevalent in the Valley. In such cases the mutation shall be entered and attested in favour of Khana Nashin daughter. The estate cannot devolve on a Khana Damad. On the death of a Khana Nashin daughter; the names of her sons and daughters should be substituted. In the case of Khana Nashin daughter dying heirless, the estate can devolve on her husband till his death or remarriage. On the death or re-marriage of the Khana Damad the property will pass on to the heirs of the father of the Khana Nashin daughter. It shall be 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.

10. Paragraph 29 of the said order prescribes the authorities empowered to attest the mutations. The paragraph provides as under:

Powers. - Under Section 33(4) of Jammu and Kashmir Land Revenue, Regulation (No. 1 of 1980), any Revenue Officer can pass such order as he thinks fit with respect to each new entry brought on the mutation register by the Patwari. In practice, however, nearly the whole of the attestation of mutation of work is disposed of by (Assistant Collectors of first and second class). Provided:

(i) that no Assistant Collector of the Second Class unless specially empowered by the Financial Commissioner shall attest a disputed mutation;

(ii) that mutations

(a) under paragraph 64 (a) of this Standing Order concerning adoption;

(b) under paragraph 64(b) (1) concerning Khana Nishin daughter etc,

(c) omitted.

(d) Omitted

(e) Under paragraph 85 for grant of occupancy or protected tenancy right

(f) Under paragraph 87 (b) regarding Nautor in Ladakh and Gilgit Districts;

(g) Under paragraph 92 for construction of Charats etc;

(h) Under paragraph 95 regarding (abandonment or relinquishment by or ejectment of occupancy or protected tenants); (i) Omitted.

(j) Under paragraph 99 Sub-para 8 (a) for direction to omit the entry of Ghair Hazir or Ghair Qabiz in undisputed cases;

(k) Under paragraph 100 Clauses (2 and 3) regarding Sehat Indraj;

(1) Under Rule 9 of the Rules [x x x] regarding entry of Shamilat for the Jammu Province issued in connection with Raj Tilak Boon No. 4;

(m) Shamilat mutations in connection with Raj Tilak Boon No. 4 in the Kashmir Valley;

(n) under the Big Landed Estates Abolition Act, Act, 2007;

Should be attested by the [Assistnat Collector of first class or any other class of Revenue Officers of higher rank];

(iii) Provided further that mutations under the Big landed Estates Abolition Act, 2007 shall be attested in accordance with the provisions of the said Act;

(iv) Omitted

(v) Omitted

(vi) Omitted.

11. Thus under the paragraph mutation concerning Khan-nisheen daughter is to be attested by the Assistant Collector 1st Class or any other class of Revenue Officers of higher rank . A Naib Tehsildar is, therefore, not competent to attest the mutations in such cases. Vide mutations No. 620, attested by a Naib Tehsildar landed property of Syed Mustafa has been mutated in the name of the petitioner and respondent No. 2. Since the petitioner was claiming as Khan-nisheen daughter, under the paragraph 29 read with paragraph 69 of the Standing Order No. 23-A such mutation was required to be attested by a Tehsildar and not by a Naib Tehsildar. Since the Naib Tehsildar had no jurisdiction to attest the mutations the Financial Commissioner has rightly observed that the mutation was without jurisdiction and non-est. The findings of the Financial Commissioner on this issue therefore, being in accordance with law cannot be interfered with.

12. So far mutation No. 1170 is concerned I find the Tehsildar while attesting the same has ignored the basic principles of the rules governing succession. The

mutation has been entered in favour of the petitioner and respondent No. 2 in equal shares treating the petitioner again as a Khan-nisheen daughter. The attesting authority has, while effecting the mutation, lost sight of the fact that he was attesting the mutation of Mohd. Syed, who had died issueless, in favour of his brother's issues. This was not a case of a daughter inheriting a father but a nephew and a niece inheriting their uncle. A Khannisheen daughter may inherit like a son under custom, to his father but she cannot lay a similar claim to the property left by her uncle as the relationship of Khannisheen daughter relates to father and father alone who can confer such a status on his daughter. On that basis, therefore, the Khan-nisheen daughter cannot claim a greater share in any other capacity. There is a common mistake made in that the status as a daughter of a female is almost invariably confused with her status in another capacity. In Amina Begum v. Ghulam Mohd 7 J & KLR 139, it was observed that if a female has or has no rights as a daughter, it does not have reflection upon her rights in some other capacity namely as a sister or any other relation. When a daughter is spoken of a khana nisheen, the conception seems to be that the father treated such daughter in all respects as a son and that by custom she is entitled in the matter of inheritance to occupy the same position as a son would have done. This however does not mean that she should be treated for the purposes of inheritance as a brother of brothers, and given a share in the estate left by other relations, if the same is not otherwise due to her under the personal law. It is not possible to conceive that if a particular custom prevailing in the valley give a daughter right to inherit a greater share from one source, she should ipso facto be presumed entitled to inherit a similar share from another source. There is no recognized custom nor is such a custom recorded in the Code of Tribal Custom in Sant Ram Dogra that a Khannisheen daughter will inherit like a son even the property left by her uncle. The Tehsildar has expressed complete ignorance of law by mutating the property left by Mohd. Syed in favour of the petitioner and respondent No. 2 in equal shares. Under the personal law, the estate left by Mohd. Syed would go to the respondent No. 2 as he falls within the category of residuries while as the petitioner is a distant kindred. Under the principle the 'nearer in degree exclude the more remote', a distant kindered will inherit only when there be no sharer or a residuary. The Financial Commissioner has therefore, arrived at a right conclusion by holding that the mutation No. 1170 has not been attested correctly in accordance with law, though he has given his own reasons for the same.

13. I find the argument of Ld. counsel for the petitioner's devoid of a merit that the Financial Commissioner by entertaining a time barred revision has fell into an error. Section 15 of the Land Revenue Act vests revisional jurisdiction in the Financial Commissioner. It provides as under:

15. (1) The Financial Commissioner may at any time call for the record of any case pending before or disposed of by any Revenue Officer under his control;

(2) The Commissioner may call for the record of any case pending before or disposed of by any Revenue Officer subordinate to him;

(3) If in any case in which, the Commissioner has called for a record he is of opinion that the proceedings taken or order made should be modified or revised, he shall report that case with his opinion thereon for the orders of the Financial Commissioner;

(4) The Financial Commissioner may, in any case called for by him under Sub-section (1) or reported to him under Sub-section (3) pass such order as he thinks fit;

Provided that, he shall not under this section pass an order reversing or modifying any proceedings or order of subordinate officer affecting any question of right between private persons without giving these persons an opportunity of being heard.

14. It is now settled law as has been held by the Full Bench of this Court in Babu Ram v. Financial Commissioner and Ors. 1971 JKLR 41 that under Section 15 of the Land Revenue Act, the powers of Financial Commissioner to interfere in revision are very wide and extensive. It was further held that unlike the powers of his counter part in Punjab, the powers enjoyed by the Financial Commissioner in our State are not subject to the limitations and restrictions contained in Section 115 of Civil Procedure Code. Sitting on the revisional side it is open to him to pass any order which he may deem proper in the circumstances of a case.

15. In Bishno Devi v. State 2001 SLJ 86, the issue has been settled now as it was held that the Financial Commissioner can exercise the suo moto powers of revision even after expiry of limitation period. The court further held that suo moto power can be exercised even if attention of the concerned authority is drawn by third person. The court observed:.Suo moto power can be exercised even if attention of the concerned authority is drawn by third person. When some illegality is brought to the notice of the authority vested with suo moto power by a third person, and action is taken then even that action would be an action taken in exercise of suo moto jurisdiction.

16. Reference in this behalf may also be made to Mst. Azizi v. Mst. Fata 2003 (II) SLJ 599 cited at the Bar, where this Court dismissed the writ petition challenging the order of Financial Commissioner in revision where the Financial Commissioner had condoned a delay of over 60 years and had disposed of the revision petition observing that order of the Naib Tehsildar on the mutation impugned was without jurisdiction. The Court found that the Financial Commissioner had passed the impugned order within jurisdiction and that the order does not suffer from any jurisdictional error or legal infirmity. The Court further observed that while exercising writ jurisdiction under Article 226 of the Constitution this Court is not to examine the matter as an Appellate or Revisional Court. Decision even if erroneous cannot be corrected in writ jurisdiction. The Court further pointed out to the settled legal position that no title or right to Matruka estate is conferred, acquired, attained or otherwise dealt with by the mutation.

17. A perusal of the order impugned in the present case would show that learned Financial Commissioner has on accepting the revision and setting aside the impugned mutations remanded the matter to Tehsildar Chadoora for a fresh enquiry and order in terms of the law. This I find was the proper course to be adopted in such cases. The matter is still open and the parties can agitate and put-forth their claims before the Tehsildar concerned. I do not find any legal infirmity in the order impugned nor in my view does it suffer from any jurisdictional error. The observations made in this order or in the order impugned shall, however, not prejudice the rights of any of the parties in the proceedings before the Tehsildar.

In the totality of the circumstances this petition is dismissed. Order accordingly.