

[Supreme Court of Pakistan]

Present: Mushir Alam and Syed Mansoor Ali Shah, JJ

MUHAMMAD IRFAN---Appellant

Versus

Mst. GUL AFROZ JAN (DECEASED) through LRs and others---Respondents

Civil Appeal No. 1044 of 2015, decided on 12th March, 2018.

(On appeal from Judgment dated 10.06.2015 passed by the Peshawar High Court, Bannu Bench in C.R.
No. 169-B of 2014)

Specific Relief Act (I of 1877)---

---Ss. 42 & 54---Suit for declaration and perpetual injunction---Common land/pathway---Proprietary rights through exclusive usage---Question as to whether a pathway or a galli, in an Abadi Deh was a common land for the use of the village community or whether, exclusive usage of the pathway or galli over the years by respondents (certain residents of Abadi Deh) granted them possessory and, as a result, proprietary rights over the said pathway; held, that subject pathway was described as an Abadi Dehor "inhabited site of a village" as per the Record of Rights---Said pathway according to the Khaka Tasweri was connected to other pathways or gallis in the village and ran along the mosque and other houses and ended as a cul de sac at the house of the respondents---In the absence of any proof of exclusive possession of the pathway by the respondents, mere usage of a common pathway by the respondents did not amount to possession---Pathways formed part of the commons and were to be used by everyone in the village, unless of course, the residents (or respondents in the present case) had through any means denied access of the pathway over the years to other residents of the village, thereby establishing exclusivity of possession---Khaka Tasweeri showed that the pathway was connected to other pathways in the village and was a communal pathway just like the other pathways in the village, therefore, the argument that the respondents enjoyed exclusive possession of the pathway was not supported by any tangible evidence---Furthermore a special attorney of respondent had made a statement before the court that the said pathway was built up by the relevant Municipal Authority, which also underlined the public character of the pathway and affirmed that it was part of the commons/shamilat---Suit filed by respondents was rightly dismissed by the lower Appellate Court---Appeal was allowed accordingly.

Zulfiqar Khalid Maluka, Advocate Supreme Court for Appellant.

Kh. Azhar Rasheed, Advocate Supreme Court for Respondents Nos.1 - 3.

Syed Rifaqat Hussain Shah, Advocate Supreme Court/Advocate-on-Record for Respondent No.4.

Date of hearing: 12th March, 2018.

JUDGMENT

SYED MANSOOR ALI SHAH, J.---The question before us is whether a pathway or a galli, in an Abadi Deh is a common land for the use of the village community or whether, exclusive usage of the pathway or galli over the years by some residents of Abadi Deh grants them possessory and, as a result, proprietary rights over the said pathway?

2. This question arises out of a suit for declaration and perpetual injunction filed by the respondents against the appellants. The declaration and injunction sought is that the pathway or pukta galli (16 feet wide) (referred to by the respondents as Kocha Khaas) situated in Khasra No.5974, in Abadi Deh of Deh Teri,

Tehsil Banda Daud Shah, District Karak, has been used exclusively by the respondents, as a pathway leading to their house, for over two decades, therefore, they are in exclusive possession of the said pathway and, therefore, also maintain proprietary interest in the said pathway. As a consequence, the appellant, cannot open a gate onto the said pathway from their house, a property that abuts the said pathway. Respondents seek a declaration and an injunction to this effect.

3. The trial court decreed the suit in favour of the respondents on 21-2-2014 which was overturned in appeal by the Additional District Judge on 28-6-2014 and was then set aside by the Peshawar High Court through the impugned judgment dated 10-6-2015 holding that the respondents enjoy exclusive possession of the pathway.

4. Learned counsel for the appellant argued that the said pathway is public passage for common usage of the residents of the Abadi Deh, therefore, the appellant is entitled to use the same by opening a gate of his house into the said passage. He submits that there is no evidence on the record to establish that the said land is owned or is in possession of the respondents. He referred to the cross-examination of PW-2 (special attorney of the respondent/plaintiff) wherein he affirmed that the said passage was improved and built up by the local TMA.

5. Learned counsel for the respondent on the other hand submitted that the title in an Abadi Deh follows the possession and for the last 20 years, respondents have been using the said pathway and therefore the said passage belongs to the respondents and the appellant cannot be allowed access to the said pathway by opening the second gate of his house onto the said pathway. He placed reliance on *Zarin Gul v. Malik Jan* (1995 SCMR 92), *Raees Khan v. Samar Ali Shah* (1997 CLC 349) and *Muhammad Sadiq v. Amir Muhammad* (2006 SCMR 702) in support of his contention.

6. We have examined the record. The pathway falls in Khasra No.5974 of Mauza Teri, Tehsil Banda Daud Shah, District Karak, which is described as an Abadi Deh or "inhabited site of a village" as per the Record of Rights i.e., Register Haqdar-e-Zameen 2007-2008 of Mauza of Deh Teri (see Ex.PW-1/1). The said pathway according to the Khaka Tasweri (see Ex.PW-1/2) is connected to other pathways or gallis in the village and runs along the mosque and other houses (including the house of the appellant) and ends as a cul de sac at the house of the respondents.

7. The principle that title in an Abadi Deh follows possession is well recognized, however, does this principle extend to common pathways in a village or Abadi Deh? Common land or Shamilat in an Abadi Deh includes pathways, lanes, streets, playgrounds, etc used for communal use of the residents of the village. "The whole of the abadi of every village is by presumption shamilat. That is not a proposition for which we need quote any authority, for it is well established. That part of the abadi which is in the exclusive possession of any co-sharer in the shamilat has to remain in his possession but any part not in exclusive possession of any co-sharer is subject to use by all. If at any time, a piece of land in the abadi has been left for use as a land it cannot be appropriated by any particular co-sharer."¹

8. In the absence of any proof of exclusive possession of the pathway by the respondents, mere usage of a common pathway by the respondents does not amount to possession. Pathways form part of the commons and are to be used by everyone in the village, unless of course, the residents (or respondents in this case) had through any means denied access of the pathway over the years to other residents of the village, thereby establishing exclusivity of possession. Khaka Tasweeri shows that the pathway is connected to other pathways in the village and is a communal pathway just like the other pathways in the village. Therefore, the argument that the respondents enjoy exclusive possession of the pathway is not supported by any tangible evidence. It is also on the record as per statement of PW-2 (special attorney of respondent) that the

said pathway was built up by the TMA, which also underlines the public character of the pathway and affirms that it is part of the commons/shamilat. Case law relied upon by learned counsel for the respondents does not advance his cause.

9. Even otherwise, the opening of the second gate by the appellant into the pathway does not in any manner block or restrict the usage of the passage by the respondents. The passing reference to the right to privacy due to long usage is also incorrect as the said pathway merges into other thoroughfares in the village and maintains a communal and public character.

10. As a sequel of above discussion, we allow this appeal and set aside the judgment of the Peshawar High Court dated 10.06.2015 and uphold the judgment of the lower appellate court dated 28.06.2014.

11. Foregoing are the reasons for our short order dated 12.3.2018.

MWA/M-11/SC Appeal allowed.