

Present: Umar Ata Bandial, Syed Mansoor Ali Shah and Muhammad Ali Mazhar, JJ

SAADAT KHAN and others---Petitioners

Versus

SHAHID-UR-REHMAN and others---Respondents

Civil Petition No.262-P of 2017, decided on 23rd September, 2021.

(Against the order of Peshawar High Court, Peshawar dated 10.4.2017, passed in C.R. No.411-P of 2014).

(a) Specific Relief Act (I of 1877)---

---S. 42---Limitation Act (IX of 1908), S. 18 & Sched. I, Art. 120---Inheritance---Female heirs---Suit instituted by a female legal heir against her brother for declaration of her ownership rights as to the property left by her deceased father in his inheritance---Limitation---Period of limitation for filing such suit; the principles relating to accrual of right to sue and the criterion for determining the actual denial of female heir's rights as to joint property stated.

As per the residuary Article 120 of Schedule-I to the Limitation Act 1908, a suit for which no period of limitation is provided elsewhere in the Schedule, the period of limitation for that suit is six years from the time when the right to sue accrues. No specific Article of Schedule-I to the Limitation Act, 1908 provides a period of limitation for a suit instituted by a person, under Section 42 of the Specific Relief Act 1877, for declaration of his ownership rights to any property against a person denying his said rights; therefore, the residuary Article 120 applies to such suit. A suit instituted by a female legal heir for declaration of her ownership rights as to the property left by her deceased father in his inheritance, against her brother who denies her rights is thus governed by the provisions of Article 120. To decide whether such a suit is barred by limitation, the six-year period of limitation provided by Article 120 is to be counted from the time when the right to sue for declaration accrues as provided therein. The question, when the right to sue for declaration has accrued in a case, depends upon the facts and circumstances of that case, as it accrues when the defendant denies (actually) or is interested to deny (threatens) the rights of the plaintiff as per Section 42 of the Specific relief Act 1877. The actual denial of rights gives rise to a compulsory cause of action and obligates the plaintiff to institute the suit for declaration of his/her rights, if he/she wants to do so, within the prescribed period of limitation; while in case of a threatened denial of rights, it is the option of the plaintiff to institute such a suit on a particular threat. On the actual denial of rights, the cause of action and the consequent right to sue matures for instituting the suit for declaration; whereas every threatened denial of rights gives rise to a fresh cause of action, and thus a fresh right to sue accrues on such a denial.

The obligations of the brothers to their sisters, as co-sharers of joint property, are further augmented when viewed in the light of the Islamic law and jurisprudence. Because of the fiduciary and protecting relation of the brothers to their sisters, they cannot claim their possession of the joint property adverse to the rights of their sisters; possession of the brothers is taken to be the possession of their sisters. Mere omission to pay a share of the profits or produce of the joint property to their sisters by the brothers in possession of the joint property does not in itself constitute a repudiation of the sisters' rights, nor does a wrong entry as to the inheritance rights in the revenue record oust the sisters from their ownership of the joint property as the devolution of the ownership of the property on legal heirs of a person takes place under the Islamic law of inheritance immediately on the death of that person without any intervention of anyone and without the sanction of the inheritance mutation in the revenue record. The position is, however, different when the brothers in possession of the joint property make a fraudulent sale or gift deed or get sanctioned some mutation, whether of sale or gift etc, in the revenue record claiming that their sisters have transferred their share in the joint property to them, or when they on the basis of a wrong inheritance mutation start selling out or otherwise disposing of the joint property claiming them to be the exclusive owners thereof. In such circumstances, the brothers by their overt act expressly repudiate the rights of their sisters in the joint property, and oust them from the ownership of the joint property. Their acts are, therefore, a clear and actual denial of the rights of the sisters, which give rise to a compulsory cause of action and obligates the sisters to institute the suit for declaration of their rights, if they want to do so, within the prescribed period of limitation.

Ghulam Ali v. Ghulam Sarwar PLD 1990 SC 1 ref.

Although, by the above mentioned acts of the brothers, the right accrues to the sisters to sue for declaration of their rights, but if they by means of fraud are kept from the knowledge of those overt acts, the time limit of six years provided in Article 120 for instituting the suit for declaration against brothers or any person claiming through them otherwise than in good faith and for a valuable consideration, is to be computed from the time when the fraud of the brothers first became known to the sisters, by virtue of the provisions of Section 18 of the Limitation Act. The "fraud" contemplated by Section 18 means suppression of those acts or transactions that give rise to the cause of action from coming into the knowledge of the plaintiff. A deliberate concealment of facts intended to prevent discovery of the right to sue is also a "fraud" within the meaning of the term used in Section 18, but an open act of a party cannot be said to be a fraudulent act of concealment and is therefore not covered by this Section. The benefit of Section 18 is, however, not available against any person who though claims through the defrauding party but is a transferee in good faith and for a valuable consideration. That is why the Supreme Court treats differently the two types of cases: (i) where the joint property is still in possession of the defrauding brothers or their legal heirs; and (ii) where the joint property has been alienated further to third persons - the transferees in good faith and for a valuable consideration.

(b) Specific Relief Act (I of 1877)---

---S. 42---Co-sharers---Suit instituted by one co-sharer for declaration of his/her ownership rights---Accrual of right to sue---Criterion for determining the actual denial of a co-sharer's rights as to joint property stated.

Due to the special characteristics of their relationship, the criterion for determining the actual denial of a co-sharer's rights as to joint property by the other co-sharer is different from the one that is applied between strangers. Co-sharers have a relationship of trust and support for each other. Possession of joint property with one co-sharer is considered to be for and on behalf of all the co-sharers. A co-sharer who is not in actual possession is considered to be in constructive possession of the joint property. Each co-sharer protects the joint property against trespassers for the benefit of all the co-sharers. Even if one co-sharer acquires possession of some portion of the joint property in consequence of legal proceedings initiated by him against a trespasser, he is deemed to be in possession of that portion of the joint property, on behalf of all the co-sharers. Against such backdrop, the actual denial of a co-sharer's rights as to joint property by the other co-sharer is not to be readily inferred. Actual denial of a co-sharer's rights by the other co-sharer may occur when the latter does something explicit in denial of the former's rights. A mere oral negation, even made several times, of each other's rights by the co-sharers on different disputes as to the use and sharing of the profits of the joint property, but without doing any overt act to oust a co-sharer from the ownership of the joint property, cannot be treated as an actual denial of the rights and thus does not necessitate to sue for declaration of ownership rights.

Manzoor Khan Khalil, Advocate Supreme Court and Haji Muhammad Zahir Shah, Advocate-on-Record for Petitioners.

Nemo for Respondents.

Date of hearing: 23rd September, 2021.

JUDGMENT

SYED MANSOOR ALI SHAH, J.---The petitioners seek leave to appeal against a judgment of the Peshawar High Court, dated 10.04.2017 ("impugned judgment"), whereby the High Court has upheld, in revision, the judgment of the appellate court non-suiting the petitioners on the issue of limitation. Although there are concurrent findings of the two courts below, on the issue of limitation against the petitioners but as the matter involves the enforcement of an alleged right of inheritance of some females, the predecessors of the petitioners, we are inclined to re-examine the issue of limitation, in the interest of justice, to satisfy ourselves as to the correctness of the said concurrent findings.

2. Facts forming the background of the case are that one Isa Khan son of Hameedullah was the owner of the suit property, i.e., the then agriculture land measuring 19-Kanal 17-Marla. He died and his inheritance mutation No. 327 was sanctioned on 23 March 1935 in favour of his son Abdur Rehman. In the year 1960- 61, some portion of the suit property was acquired by the Small Industries Corporation of West Pakistan, and the said Abdur Rehman received the compensation therefor. Later on, Abdur Rehman also died and respondents Nos. 1

to 5 being his sons and daughters, and respondent No.6 being his widow, inherited the remaining suit property. Respondents Nos. 1 to 6 sold out almost all of the remaining suit property to respondents Nos. 12 to 74 and others, who are now recorded as owners-in-possession of the suit property in very small shares measuring in Marla and Sarsai, in the revenue record (Exh-P 1).

3. It was in the year 2004 that the petitioners instituted a suit on 19 November 2004 praying for a declaration that inheritance mutation No. 327 sanctioned on 23 March 1935 in favour of Abdur Rehman, the predecessor of respondents Nos.1 to 6, and the subsequent inheritance mutation in favour of respondents Nos. 1 to 6 and the further transfers made on the basis of those inheritance mutations, in favour of respondents Nos. 12 to 74 were void and ineffective against their rights. They asserted that Isa Khan had left one son, Abdur Rehman, and two daughters, Mst. Mehro and Mst. Afsro, as his legal heirs but Abdur Rehman fraudulently got sanctioned inheritance mutation No. 327 in his favour excluding his sisters from the inheritance of their father; that the said Mst. Mehro and Mst. Afsro daughters of Isa Khan had died, and they and respondents Nos. 7 to 11, who did not join them as plaintiffs in the suit, were their legal heirs; that being legal heirs of Mst. Mehro and Mst. Afsro, they and respondents Nos. 7 to 11 were owners of the suit property to the extent of their share; and that they had, time and again, asked the respondents to accept their entitlement and get corrected the revenue record to the extent of their share in the suit property, but they first evaded the matter and then flatly refused to do so, hence the need to institute the suit arose.

4. Respondents Nos. 1 to 6 contested the suit and claimed that the inheritance mutation No. 327 was correctly sanctioned in favour of their predecessor, Abdur Rehman, in the year 1935 as per the then prevailing law; that since 1935 their predecessor, and after his death they, had been in possession of the suit property as the exclusive owner to the knowledge of the petitioners; and that the fact of acquisition of a portion of the suit property by the Small Industries Corporation and receiving of the compensation by their predecessor for that acquisition was in knowledge of the petitioners, therefore, their suit was time-barred.

5. The trial court decreed the suit by its judgment dated 28.01.2012, and on the issue of limitation held that the limitation does not apply where a person seeks to enforce his right of inheritance in the estate of his deceased predecessor. Respondents Nos. 1 to 6 appealed in District Court. The appellate court noticed that Mst Mehro and Mst. Afsro, the predecessor of the petitioners, had not challenged the inheritance mutation in their lifetime, despite knowledge of receiving the compensation by Abdur Rehman, the predecessor of respondents Nos. 1 to 6, in the year 1960-61, for the acquisition of some land out of the suit property by the Small Industries Estate and the sale of a major portion of the suit property by respondents Nos. 1 to 6. Keeping in view these facts and while relying upon two unreported judgments and one reported judgment (*Abdul Haq v. Surraya Begum* 2002 SCMR 1330) of this Court, the appellate court decided the issues as to cause of action, estoppel and limitation against the petitioners and reversing the judgment and decree passed by the trial court, dismissed the suit. The petitioners then agitated their grievance against the judgment of the appellate court in the High Court by filing a revision petition.

6. The High Court also took up the issues as to cause of action, estoppel and limitation, examined the evidence available on record relating thereto, and upheld the decision of the appellate court on these issues. The High Court relied upon the judgments of this Court reported as *Kala Khan v. Rab Nawaz* 2004 SCMR 517, *Lal Khan v. Muhammad Yousaf* PLD 2011 SC 657, *Muhammad Rustam v. Makhan Jan* 2013 SCMR 299, *Mst Grana v. Sahib Kamala* PLD 2014 SC 167 and *Ghulam Abbas v. Muhammad Shafi* 2016 SCMR 1403.

7. The petitioners have impugned the concurrent findings of the appellate court and the High Court on the question of limitation. Their learned counsel has submitted that the trial court correctly applied the principle that the limitation does not apply in cases of inheritance, while the appellate court and the High Court erred in non-suiting the petitioners on the ground of limitation. He has relied upon judgments of this Court reported as *Ghulam Ali v. Ghulam Sarwar* PLD 1990 SC 1, *Namdara v. Sahibzada* 1998 SCMR 996, *Shahro v. Fatima* PLD 1998 SC 1512, *Muhammad Iqbal v. Allah Bachaya* 2005 SCMR 1447 and *Peer Baksh v. Mst. Khanzadi* 2016 SCMR 1417.

8. As the High Court for applying and the counsel for the petitioners for opposing the application of, the bar of limitation to the present case have relied upon the judgments of this Court, we have deeply considered the ratio

of the said judgments as well as other relevant judgments¹ to understand as if there is any conflict of opinions recorded therein. We have found no such conflict, which we shall explain hereunder.

9. We may say at the very outset that in view of the provisions of the residuary Article 120 of Schedule-I to the Limitation Act 1908, there can hardly be any suit to which the bar of limitation does not apply. As per the said Article a suit for which no period of limitation is provided elsewhere in the Schedule, the period of limitation for that suit is six years from the time when the right to sue accrues. No specific Article of Schedule-I to the Limitation Act provides a period of limitation for a suit instituted by a person, under Section 42 of the Specific Relief Act 1877, for declaration of his ownership rights to any property against a person denying his said rights; therefore, the residuary Article 120 applies to such suit. A suit instituted by a female legal heir for declaration of her ownership rights as to the property left by her deceased father in his inheritance, against her brother who denies her rights is thus governed by the provisions of Article 120. To decide whether such a suit is barred by limitation, the six-year period of limitation provided by Article 120 is to be counted from the time when the right to sue for declaration accrues as provided therein. The question, when the right to sue for declaration has accrued in a case, depends upon the facts and circumstances of that case, as it accrues when the defendant denies (actually) or is interested to deny (threatens) the rights of the plaintiff as per Section 42 of the Specific Relief Act, 1877. The actual denial of rights gives rise to a compulsory cause of action and obligates the plaintiff to institute the suit for declaration of his rights, if he wants to do so, within the prescribed period of limitation; while in case of a threatened denial of rights, it is the option of the plaintiff to institute such a suit on a particular threat. On the actual denial of rights, the cause of action and the consequent right to sue matures for instituting the suit for declaration; whereas every threatened denial of rights gives rise to a fresh cause of action, and thus a fresh right to sue accrues on such a denial. This Court has, therefore, decided the question of limitation in the cases relied upon by the High Court and referred to by the counsel for the petitioners, in the peculiar facts and circumstances of each case.

10. Because of the special characteristics of their relationship, the criterion for determining the actual denial of a co-sharer's rights as to joint property by the other co-sharer is different from the one that is applied between strangers. Co-sharers have a relationship of trust and support for each other. Possession of joint property with one co-sharer is considered to be for and on behalf of all the co-sharers. A co-sharer who is not in actual possession is considered to be in constructive possession of the joint property. Each co-sharer protects the joint property against trespassers for the benefit of all the co-sharers. Even if one co-sharer acquires possession of some portion of the joint property in consequence of legal proceedings initiated by him against a trespasser, he is deemed to be in possession of that portion of the joint property, on behalf of all the co-sharers. Against this backdrop, the actual denial of a co-sharer's rights as to joint property by the other co-sharer is not to be readily inferred. Actual denial of a co-sharer's rights by the other co-sharer may occur when the latter does something explicit in denial of the former's rights. A mere oral negation, even made several times, of each other's rights by the co-sharers on different disputes as to the use and sharing of the profits of the joint property, but without doing any overt act to oust a co-sharer from the ownership of the joint property, cannot be treated as an actual denial of the rights and thus does not necessitate to sue for declaration of ownership rights.

11. The obligations of the brothers to their sisters, as co-sharers of joint property, are further augmented when viewed in the light of the Islamic law and jurisprudence as expounded by this Court in Ghulam Ali. Because of the fiduciary and protecting relation of the brothers to their sisters, they cannot claim their possession of the joint property adverse to the rights of their sisters; possession of the brothers is taken to be the possession of their sisters. Mere omission to pay a share of the profits or produce of the joint property to their sisters by the brothers in possession of the joint property does not in itself constitute a repudiation of the sisters' rights, nor does a wrong entry as to the inheritance rights in the revenue record oust the sisters from their ownership of the joint property as the devolution of the ownership of the property on legal heirs of a person takes place under the Islamic law of inheritance immediately on the death of that person without any intervention of anyone and without the sanction of the inheritance mutation in the revenue record. The position is, however, different when the brothers in possession of the joint property make a fraudulent sale or gift deed or get sanctioned some mutation, whether of sale or gift etc, in the revenue record claiming that their sisters have transferred their share

in the joint property to them, or when they on the basis of a wrong inheritance mutation start selling out or otherwise disposing of the joint property claiming them to be the exclusive owners thereof. In such circumstances, the brothers by their overt act expressly repudiate the rights of their sisters in the joint property, and oust them from the ownership of the joint property. Their acts are, therefore, a clear and actual denial of the rights of the sisters, which give rise to a compulsory cause of action and obligates the sisters to institute the suit for declaration of their rights, if they want to do so, within the prescribed period of limitation.

12. Although, by the said acts of the brothers, the right accrues to the sisters to sue for declaration of their rights, but if they by means of fraud are kept from the knowledge of those overt acts, the time limit of six years provided in Article 120 for instituting the suit for declaration against brothers or any person claiming through them otherwise than in good faith and for a valuable consideration, is to be computed from the time when the fraud of the brothers first became known to the sisters, by virtue of the provisions of Section 18 of the Limitation Act. The "fraud" contemplated by Section 18 means suppression of those acts or transactions that give rise to the cause of action from coming into the knowledge of the plaintiff. A deliberate concealment of facts intended to prevent discovery of the right to sue is also a "fraud" within the meaning of the term used in this Section, but an open act of a party cannot be said to be a fraudulent act of concealment and is therefore not covered by this Section. The benefit of Section 18 is, however, not available against any person who though claims through the defrauding party but is a transferee in good faith and for a valuable consideration. That is why this Court has treated differently the two types of cases: (i) where the joint property is still in possession of the defrauding brothers or their legal heirs; and (ii) where the joint property has been alienated further to third persons - the transferees in good faith and for a valuable consideration.

13. We have gone through the facts of the present case in light of the above principles regarding the calculation of the period of limitation. We find that the acts of acquisition of a part of the suit property by the Small Industries Estate and receiving of the compensation therefor by Abdur Rehman, the predecessor of respondents Nos. 1 to 6, in the year 1960-61 were open acts and were also in the knowledge of Mst. Mehro and Mst. Afsro, the predecessor of the petitioners. This fact has been admitted by petitioner No. 1, Saadat Khan, when he appeared in the witness box as PW-5. He further said that they had demanded their share in the compensation amount from Abdur Rehman but he had refused to pay. The act of receiving compensation for the acquired portion of the suit property by Abdur Rehman was equal to selling that portion of the suit property by claiming him to be the exclusive owner thereof. It was his express overt act whereby he repudiated the rights of his sisters, Mst. Mehro and Mst. Afsro, in the suit property and ousted them from the ownership thereof. By the said act of Abdur Rehman, the right accrued to his sisters to sue for declaration of their rights, and the six-year limitation period provided in Article 120 started to run from the date of knowledge of Mst. Mehro and Mst. Afsro, of that act of Abdur Rehman and expired in the year 1967-68. For when once limitation time had begun to run, no subsequent disability or inability to sue could stop it as per Section 9 of the Limitation Act. Similar was the effect of the acts of selling out the remaining portion of the suit property by respondents Nos. 1 to 6 to respondents Nos. 12 to 74 and others. The limitation period having thus expired in the lifetime of Mst. Mehro and Mst. Afsro, it cannot start over again for their successors, the present petitioners, in view of the definition of the term "plaintiff" provided in Section 2(8) of the Limitation Act, which provides that "plaintiff" includes any person from or through whom a plaintiff derives his right to sue. Because of the said definition of "plaintiff", it was the knowledge of Mst. Mehro and Mst. Afsro that had triggered the period of limitation to run not only against them but also against their successors, i.e., the petitioners who derive their right to sue from them. The appellate court and the High Court have, thus, correctly decided the issue of limitation against the petitioners.

14. For all what has been discussed above, the present petition for leave to appeal is found meritless; it is, therefore, dismissed and leave declined.

MWA/S-10/SC Petition dismissed.