

**P L D 2004 Peshawar 95**

**Before Dost Muhammad Khan, J**

**MUHAMMAD ASLAM and others---Petitioners**

**Versus**

**MUHAMMAD ASLAM and others---Respondents**

Civil Revision No.35 of 1998, decided on 25th February, 2004.

**(a) West Pakistan Land Revenue Act (XVII of 1967)-----**

---Ss. 44, 52 & 53---North-West Frontier Province Tenancy Act (XXV of 1950), Ss.4, 4-A & 83---Specific Relief Act (I of 1877), Ss.8, 42 & 54---Civil Procedure Code (V of 1908), S.115---Suit for declaration, injunction and possession---Entries in record of rights---Correction of--Limitation---Revision petition---Plaintiff in their suit for declaration, injunction and possession had sought decree to the effect that disputed Khasra was in their ownership because it remained in possession of their predecessor-in-interest for a very long duration as occupancy tenant and that their status was then converted into ownership---Plaintiff had claimed the subsequent change in the entries made in record of rights in year 1947-48 showing predecessor-in-interest of defendant as occupancy tenants and thereafter attestation of two impugned mutations in favour of defendant was collusive result of fraud and against the facts on record and were liable to be corrected---Suit was concurrently decreed by Courts below---Validity---Predecessor-in-interest of defendants as a result of settlement carried out in the district concerned, was found to be in possession of Khasra No. in dispute as occupancy tenant---Entries in record of right having been made in year 1947-48 in consequence of settlement carried out in the area, same were validly incorporated and said change brought in record of right was not against mode prescribed by West Pakistan Land Revenue Act, 1967 and Rules to which strong presumption of correctness was attached---Said entries remained intact till the time when predecessor-in-interest of defendants was declared entitled to ownership of disputed Khasra No. because of occupancy right and mutation impugned in the suit having been attested in their favour-- Accordingly under S.4 of North West Frontier Province Tenancy Act, 1950, predecessor-in-interest of defendants was legally entitled to assume status of owner of disputed Khasra No. on the strength of their occupancy right so recorded---Mutations, in circumstances were properly attested---Suit which could be filed within three years under S.83 of North-West Frontier Province, 1950 from the date of promulgation of said Act, had been filed after about 40 years from said promulgation, and thus was barred by time---Courts below were not justified to decree suit filed by plaintiff.

Akram and others v. Zakaria Khan and others PLD 1962 Pesh. 7; Sher Ali Khan v. Nawab and others PLD 1962 Pesh. 110 and Mada v. Muhammad Sharif and 39 others 1997 SCMR 338 rel.

**(b) Civil Procedure Code (V of 1908)-----**

---O. VI, R.1---Pleadings---Party could not make a departure from its pleadings and was bound by the same---Even no evidence contrary to the pleading could be permitted to be adduced by a party to the suit.

**(c) Administration of justice---**

---Person who made inconsistent statement, was not entitled to be listened to because his credibility was drastically shaken.

**(d) Civil Procedure Code (V of 1908)----**

---S. 115---Specific Relief Act (I of 1877), Ss.8, 42 & 54---Revisional jurisdiction, exercise of---Interference by High Court in its limited powers under S.115, C. P. C, though was to be made in very exceptional and rare cases once concurrent findings were recorded by the two Courts below, but instant case reflected entirely different picture both on points of law and facts---Not only admitted facts and evidence on record -was ignored by two Courts below, but also the law applicable was not applied---Foremost duty of Courts to apply correct law to admit facts and misapplication or non-application of correct law would tender its decision nullity in the eye of law---Findings recorded by two Courts below, in circumstances had caused failure of justice and could not be maintained---High Court accepting revision petition, set aside concurrent judgments and decrees of Courts below and suit filed by plaintiff was dismissed.

Abdullah Jan Mirza assisted by Masud-ur-Rehman Awan for Petitioners.

Khalid Rehman Qureshi for Respondents No. 1 to 15.

Date of hearing: 25th February, 2004.

**JUDGMENT**

Impugned herein are the judgments and decrees dated 5-6-1997 of the learned Civil Judge-II Haripur, and that of the learned A.D.J., Haripur dated 16-12-1997, whereby the suit of the respondents/plaintiffs was decreed and confirmed.

2. Brief facts of the case are that respondents brought a suit against the petitioners seeking decree of declaration to the effect that Khasra No.252 was their ownership because it remained in possession of their predecessor-in-interest for a very longer duration as occupancy tenant and their status was then converted into ownership and that the subsequent change in the entries made in the record of rights 1947-1948 showing the predecessor-in-interest of the petitioners as occupancy tenant' and thereafter the attestation of two impugned mutations in their favour was collusive, the result of fraud and against the facts on record, A therefore, was illegal, ineffective upon their rights and that all these entries so made are liable to be corrected. Consequential relief by way of injunction was also sought and additionally prayer for possession was also made.

Arguments heard, record perused.

3. After contest by the petitioners and after holding trial, the suit was decreed and appeal of the petitioners also failed.

4. It was vehemently contended for the petitioners that both the learned Courts below have acted beyond their jurisdiction and important issues of law were either not decided properly or the same were not attended fairly and the evidence on record both documentary and oral was not taken into consideration, therefore, they have reached at patently wrong conclusion resulting into miscarriage of justice. It was also emphatically argued that the predecessor-in-interest of the petitioners as a result of the settlement carried out in the area was recorded occupancy tenant in the year 1947-1948 which status they maintained till the promulgation of the N.-W.F.P. Tenancy Act 1950 and as a result of that by operation of law and after due verification and examination of Revenue Record mutations impugned in the suit were duly attested in their favour. This aspect according to the learned counsel was not considered by both the Courts because and in view of the clear bar contained in section 83 the suit brought by the respondents was hopelessly time barred and that even if the residuary Article of Limitation Act i.e. 120 is (sic) was time-barred and that the civil Courts were having no jurisdiction because the respondents were required to have themselves declared from the competent forum as occupancy tenants over suit Khasra No.252.

5. For the respondents/plaintiffs it was contended that both the mutations attested appears to be fictitious and that the essential requirement i.e. payment of compensation was not fulfilled/paid, therefore, mutations are nullity in the eyes of law. It was also strongly argued that change of entries in the Revenue Record and that too the long-standing entries must be done in the laid down manner and not in the way as has been done in this case.

6. There is not dispute on the legal proposition that entries in the Revenue Record can only be changed in the mode prescribed by the Land Revenue Act and Rules. In the instant case as a result of settlement carried out in the district concerned the predecessor-in-interest of the petitioners was found to be in possession of suit Khasra No.252 as occupancy tenant while in the ownership column earlier the predecessor in-interest of the respondents/plaintiffs was recorded. As these entries of 1947-1948 were made in consequence of the settlement carried out in the area, therefore, were validly incorporated and the change brought was not against the mode prescribed by the Land Revenue Act and Rules to which strong presumption of correctness is attached. Again these entries remained in tact till the time when the predecessor-in-interest of the petitioners was declared entitled to the ownership of the land (Khasra No.252) because of occupancy rights and mutations impugned in the suit were accordingly attested in their favour.

7. According to section 4 of the Tenancy Act 1950 (N.-W.F.P.) the predecessor-in-interest of the petitioners was legally entitled to assure the status of owner on the strength of their occupancy rights so recorded, therefore, mutations were properly attested, the question that no compensation has been paid to the land owner was neither the case of the plaintiffs in the plaint nor before the Appellate Court and this plea was also not taken in the evidence recorded in the trial Court. Similarly no cross revision has been filed to that effect because the findings recorded by the two Courts are on other premises.

The instant suit was instituted on 10-4-1989 whereas entries in favour of the predecessor-in-interest of the petitioners showing him as occupancy tenant were made in the Jamabandi in the year 1947-1948 after the settlement of land was carried out in the District and thereafter Mutation No.306 was attested on 16-8-1952 on the strength of provision of section 4 of the N.-W.F.P. Tenancy Act, 1950 converting the occupancy rights of the predecessor in interest of the petitioners to that of full owner which is within the stipulated period laid down by the law itself.

To understand the legal effect of the said provision of section 4 of the ibid Act is reproduced below:-

S.4. Compensation to be paid to the landlord.

Any occupancy tenant who at the commencement of this Act;

- (a) occupies any land as such paying no rent thereof beyond the amount or the land revenue thereof and the rates and cesses for the time being chargeable thereon shall become full owner of such land without payment of any compensation.
- (b) Not relevant.

Similarly section 4-A also being relevant is reproduced below:-

S.4-A. Determination of occupancy tenancies in cases where rent in kind is paid.-

- (1) Any occupancy tenant who at the commencement of this Act, occupies land as such and pays rent by division of the produce shall become full owner of the portion of the land in proportion to his share of the produce, which he retains for himself, without payment of any compensation to the landlord.
- (2) any occupancy tenant acquiring land in accordance with the provision of sub-section (1) shall acquire it free from any encumbrance created in respect of that land by the landlord.
- (3) Subject to the provisions of sub-sections (1) and (2) the landlord shall take possession of the remaining portion of the land at the expiry of the current agricultural year, free from any encumbrance lease created by the tenant and occupancy rights therein shall be extinguished.
- (4) Not relevant.

The combined reading of the above provisions of law would leave nothing behind to be debated upon that the predecessor-in-interest of the petitioners at the time of promulgation of the Act of 1950 duly recorded occupancy tenant was entitled to acquire the property as owner on the strength of the same. Mutation was duly attested to that effect in the prescribed manner. The question that compensation was not paid to the land owner was not agitated by the respondents-plaintiffs at any time before the trial Court in the plaint, in the evidence or during

the arguments nor the same was taken before the appeal Court. It is settled principle of law that party can not make a departure from its pleading and is bound by it. Even no evidence contrary to the pleading can be permitted to be adduced by a party to the suit. Again no evidence has been adduced of any nature by the respondents-plaintiffs to prove that no compensation was determined or paid, therefore, in the absence of any such evidence this plea at this belated stage can not be entertained.

8. According to section 83 of the N.W.F.P. Tenancy Act, 1950, period of limitation has been laid down which is 3 years commencing from the date of promulgation of the said Act. In this view of the matter, therefore, the respondents-plaintiffs were essentially required to have applied to the competent forum within 3 years seeking declaration of their occupancy rights over suit Khasra No-252 but they did not opt to comply with this mandatory provision of law hence it is held that the suit of the respondents plaintiffs was hopelessly time barred. Reliance in this regard is placed on the view taken by this Court in the case of Akram and others v. Zakaria Khan and others (PLD 1962 Peshawar page 7). Similar view was taken by this Court in the case of Sher Ali Khan v. Nawab and others (PLD 1962 Peshawar page-110) and the said view was approved by the Hon'ble Supreme Court in the case of Mada son of Fateh Ali v. Muhammad Sharif and 39 others (1997 SCMR 338).

9. Looked yet from another angle, the respondents-plaintiffs have taken inconsistent pleas at different occasions and stages. In the plaint they have claimed ownership of the suit land (Khasra No.252) on the strength of the occupancy rights but later on they took a different stance and alleged that their predecessor-in-interest was recorded in the column of ownership much before the promulgation of the Act of 1950 and in that capacity and status they were entitled to the decree. These two pleas taken are self clashing and irreconcilable one. Both the learned Courts below have failed to take notice of such inconsistency. It is a bed rock principle of law that person who makes inconsistent statement is not entitled to be listened to because his credibility is drastically shaken.

So far as the other Khasra No.250 is concerned, both in the plaint and in the evidence plaintiff while appearing as PW-3 has squarely admitted that 1/4 share in the suit Khasra No. was validly transferred in favour of the petitioners and mutation to that effect was admitted to be correct.

9. True that interference, by this Court in its limited powers under section 115 C.P.C., is to be made in very exceptional and rare cases once concurrent findings are recorded by the two Courts below but the case in hand reflects entirely a different picture both on points of law and facts. Not only the above admitted facts and evidence on record was ignored but also the law applicable was not applied. It is the foremost duty of Courts to apply the correct law to admitted facts and mis or non-application of correct law would render its decision nullity in the eye of law. This being the case the findings recorded by the two Courts below, therefore, have caused failure of justice and can not be maintained. Accordingly this revision petition is accepted, both the impugned judgments and decrees are set aside and suit of the respondents/plaintiffs is dismissed with no order as to costs with clarification that in Khasra No.250 the petitioners are owners to the extent of 1/4<sup>th</sup> share.

