

JUDGMENT SHEET

IN THE LAHORE HIGH COURT AT LAHORE.
(JUDICIAL DEPARTMENT)

Writ Petition No.15971 of 2010.

Naza and others
Vs.
Abdul Hayee (deceased) through L.Rs & others

JUDGMENT

DATES OF HEARING: 24.01.2018, 25.01.2018,
30.01.2018 & 31.01.2018.

PETITIONERS BY: M/s Malik Noor Muhammad
Awan & Sh. Naveed Shehryar
with Miss Saima Hanif and
Fatima Malik, Advocates.

RESPONDENTS No.1 to 12 BY: M/s Allah Wasaya Malik and
Zafar Iqbal Chaudhry,
Advocates.

RESPONDENTS No.13 to 15 BY: Malik Muhammad Azeem,
Additional Advocate General
Punjab.

AMIN-UD-DIN KHAN, J. Through this writ petition the judgment dated 20.08.2009 passed by the Member (Consolidation) Board of Revenue Punjab Lahore in ROR No.904 of 1996 titled “Abdul Hae etc Versus Consolidation Department etc” has been challenged, whereby the revision was accepted and it was declared that:

“The mutations No.48 and 49 are not rejected in total but remains void to the extent the changes which have already taken place and may undergo further changes through the

legal orders of competent forums. The Revision Petition No.904/1996 to that extent is accepted. The parties are free to establish their specific claims before the revenue authorities. As for as challenging the basic impugned mutation is concerned it must stop now for good.”

2. Learned counsel for the petitioners argues that mutations No.48 and 49 are in issue in this litigation. Originally the property subject matter of these mutations was recorded in the name of AALA MALKAN and ADNA MALKAN. With the abolition of AALA MALKIAT through Para 22 of Martial Law Regulation 64 of 1959 the case of petitioners that they being ADNA MALKAN in ‘Shamlat Deh’ became the owners in accordance with Notification dated 3rd of March, 1960. Through mutation No.48 AALA MALKIAT was abolished, whereas through attestation of mutation No.49 the ownership of land was created. Previously when the matter came before this Court through Writ Petition No.683 of 1962 this Court advised the petitioners or their predecessors to approach the civil court in the light of judgment passed by the Hon’ble Mr. Justice Karam Elahi Chauhan dated 11.11.1971. ADNA MALKAN filed a suit in the civil court on 21.11.1973, the suit was dismissed on 14.03.1975. An appeal was preferred, which was accepted by the learned District Judge, Mianwali vide judgment & decree dated 24.09.1975 and both the mutations were cancelled. Second Appeal was filed by AALA MALKAN bearing RSA No.700 of 1975, which was dismissed on 11.12.1975. AALA MALKAN

went to the august Supreme Court through Civil Appeals No.432, 433 and 434 of 1980, which were dismissed on 05.03.1991. The petitioners filed an application before the ADC(C) for implementation of order of learned District Judge. The application was accepted on 09.10.1995. The other side went in appeal before the Additional Commissioner (Consolidation). The appeal was dismissed vide order dated 04.06.1996, therefore, AALA MALKAN filed ROR No.904 of 1996 before the Board of Revenue, which was accepted through the impugned judgment dated 20.08.2009.

The first point raised before this Court is that the judgment was handed down by the learned Member (Consolidation) Board of Revenue after about one year of the announcement of decision. Learned counsel has referred the judgments reported as “Messrs MFMY INDUSTRIES LTD. and others versus FEDERATION OF PAKISTAN through Ministry of Commerce and others” (2015 S C M R 1550), “MUHAMMAD OVAIS and another versus FEDERATION OF PAKISTAN through Ministry of Works and Housing Pakistan, Islamabad and others” (2007 S C M R 1587) and “Syed IFTIKHAR-UD-DIN HAIDAR GARDEZI and 9 others versus CENTRAL BANK OF INDIA LTD., LAHORE and 2 others” (1996 S C M R 669) to state that when the decision was written after 30 days, same is nullity in the eye of law. States that the counsel who was appearing before the Member (Consolidation) Board of Revenue on behalf of

present petitioners filed his affidavit to this effect, therefore, the first prayer was that after setting aside the order passed by the Member (Consolidation) Board of Revenue the matter be remanded back to the Member (Consolidation) Board of Revenue. Further learned counsel has argued that when there is a judgment passed by the learned District Judge dated 24.09.1975 the Member (Consolidation) Board of Revenue cannot declare that the impugned mutations cannot be fully cancelled/set-aside. Learned counsel has further referred the order passed in Writ Petition No.17270 of 1993 by the Hon'ble Mr. Justice Munir A. Sheikh. Refers Para 3 of the judgment whereby as per learned counsel for the petitioners the impugned mutations were totally declared to be nonexistent. Prays for acceptance of the Writ Petition and declaration of the judgment/order passed by the Member (Consolidation) Board of Revenue dated 20.08.2009 without jurisdiction.

3. On the other hand, learned Additional Advocate General Punjab as well as learned counsel for private respondents have vehemently opposed the arguments advanced by the learned counsel for the petitioners. Argue that there is no solid evidence with regard to the fact that order/judgment was written by the Member (Consolidation) Board of Revenue after about one year of the announcement of decision and further that there is no illegality or infirmity in the order impugned nor the same is without jurisdiction, therefore, if there was any delay in

writing of the judgment, that is irrelevant when there is no jurisdictional defect and even this Court while exercising jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 cannot go into the factual controversy, unless the order is without jurisdiction, it is the discretion of court to ignore this point of argument. While referring the final Para of the impugned judgment states that even the petitioners approached the civil court in the light of judgment passed by this Court in Writ Petition No.683 of 1962 and this discretionary jurisdiction is not available with the petitioners to challenge the order passed by the Member (Consolidation) Board of Revenue. Further argues that the Member (Consolidation) Board of Revenue has decided the matter exactly in accordance with the judgment handed down by the Hon'ble Mr. Justice Karam Elahi Chauhan. Finally learned Additional Advocate General Punjab supports the judgment passed by the learned Member (Consolidation) Board of Revenue dated 20.08.2009.

4. I have heard the lengthy arguments of learned counsel for the parties and gone through the record as well as the case law with the able assistance of learned counsel for the parties and the judgment impugned through this writ petition as well as the voluminous record appended with this petition.

5. The matter in issue started with the promulgation of Martial Law Regulation 64 of 1959. Para 22 is relevant, which is reproduced as under:-

“22. Intermediary interest.--- Ala-Milkiat and similar other interests subsisting immediately before the commencement of this Regulation, shall on such commencement, stand abolished, and no compensation shall be claimed by, or paid, person affected by the abolition.”

To implement Para 22 referred above the Board of Revenue issued various notifications. Notification No.ASP-2/59/2241-LC West Pakistan Land Commission, Lahore dated the **20th June, 1959** is relevant, which is reproduced as under:

“From

Malik Khuda Bakhsh, T.K.(I), P.C.S.
Secretary, West Pakistan Land Commission,
Lahore.

To

All Deputy Land Commissioners (Deputy Commissioners, Settlement Officers; and Political Agents) in West Pakistan, except Kalat Division and Collector, Karachi.

Subject: Intermediary interests- Abolition of Ala Malkiat; ESQUIRE, C.S.P., CHIEF LAND COMMISSIONER, WEST PAKISTAN LAHORE.

Sir,

I am directed to invite your attention to paragraph 22 of the Martial Law Regulation No.64, under which Ala Malkiat and similar other interests subsisting immediately before the commencement of the Regulation, shall on such commencement, stand abolished without any compensation, and to the replies received from you to letter No.551/59/1266-LR I, dated the 17th March, 1959 from the Secretary, Board of Revenue. The matter was considered by the West Pakistan Land Commission in its meeting held on the 9th June, 1959, and it was decided that:-

- (a) Adna Maliks should be made full proprietors of land held by them as such;

- (b) Adna Maliks should not pay any compensation to the Ala Maliks or the Commission;
- (c) With effect from Rabi 1959, the Adna Maliks should stop paying anything in cash or kind to the Ala Maliks;
- (d) Where a person is entered as Ala Malik and as well as Adna Malik, or where land is held only by an Ala Malik and there is no Adna Malik under him, the Ala Malik should be considered as a full proprietor and the entries in the revenue records should be corrected accordingly;
- (e) No Ala Malik will be entitled to any compensation on account of the extinguishment of his rights as laid down in Paragraph 22 of the martial Law Regulation;

2. I am to request you that necessary action may be taken in accordance with the above decisions of the Commission.

Your obedient servant,

ASSISTANT SECRETARY,
For Secretary Land Commission

The concluding Para of the judgment dated 11.11.1971 passed in Writ Petition No.683 of 1962 by the Hon'ble Mr. Justice Karam Elahi Chauhan is as under:-

“From what has been written above, it will be evident that this case involves dispute/questions of fact which require leading of evidence oral and documentary and going through the volumes of revenue records extending over decades. It is obvious that such a question cannot be gone into by this Court, specially, when the persons against whom the rights are being claimed have neither, been impleaded in the writ petition nor other vice their names have been disclosed in any other form. In cases of the kind in hand, in my opinion, the petitioners' have a remedy of approach of the civil Court by making out a proper case for the relief desired by them. In this writ petition, no copies of any revenue record have been filed and the case of the petitioners' rests solely on their oral averment case on in the writ petition. In these circumstances, the writ petition shall have to be dismissed leaving the petitioners

their rights by an appropriate jurisdiction in accordance with law which I hereby do. There shall be no order as to costs.”

6. I have also gone through the judgment of this Court reported as “GHULAM HAIDER versus GHULAM RAZA SHAH AND 12 others” (PLD 1979 Lahore 481) whereby this judgment was handed down by the Hon’ble Mr. Justice Aftab Hussain while deciding Regular Second Appeal No.764 of 1967. Paragraphs Nos.28 to 36 of this judgment being relevant are reproduced as under:-

“28. Even if this provision had not been there the conclusion would not have been different. The division of the proprietary rights and consequent rights of superior proprietor and inferior proprietors have been dealt with in Punjab Settlement Manual by Sir James M. Douic (15th Edn.) in paras, 143, 167, 168, 169 and 171. The origin of the rights may differ from district to district but the rights of both types of proprietors are almost uniform. The rights of both categories of proprietors in Muzaffargarh District particularly with reference to waste as explained by Mr. O’Brien are dealt with in para. 169 of the Settlement Manual. The relevant portion of this quotation is as follows:-

“The superior proprietors claim to be owners of all unappropriated land. The malikan adna are full proprietors of the land in their possession subject to the payment of the share of the old proprietors, and not liable to eviction on failure to pay it, and are entitled to introduce tenants without reference to the superior proprietors.....Their rights (rights of superior proprietors) are restricted.....to disposing of the unappropriated waste in the village.....The unappropriated waste belongs to the superior proprietors.....”

In para. 171 it is stated that the title of the superior landlord has been most fully preserved in Mianwali and in the Sanawan Tehsil of Muzaffargarh. Reference is made to Mr. Tucker’s Settlement Report of Dera Ismail Khan.

29. A copy of this report has been shown to me by the learned counsel for the respondents. It is not however necessary to reproduce any portion from this unauthenticated copy since the same principles have been evolved by a Division Bench of Lahore High Court in *Malik Gulzar Haider v. Haider* a case of Tehsil Bhakkar. The rules laid down by Mr. Tucker have been summed up as follows:-

“(1) The ala makiyat is not ordinarily to be partitioned, though such partition may be allowed for sufficient reasons. In case of partition, the rights of the adna maliks in the common lands of the whole village will be continued as before. For instance, an adna malik will continue to graze his cattle and to beak up waste in all the pattis into which a Mauzah may be divided.

(2) The ala maliks will have the first right to cultivate waste, and after them the adnas. Failing these the ala maliks may give lands to outsiders to cultivate.

(3) Though the ala maliks have paid no jhuri hitherto, they will pay it in future for any lands they may clear. There will, however, be this difference between them and the adna maliks that it will be optional with the ala maliks to take jhuri from an adna malik, in which case he will remain an occupancy tenant only. The individual ala malik on the other hand, will be entitled, if he chooses, to pay jhuri at a fair rate, and to thus become an adna malik. In such a case the other ala maliks will not be able to refuse to take jhuri.

(4) The question as to the taking of jhuri, or as to its amount, will for the future be determined by the ala maliks as a body, and the decision come to be recorded by the Patwari.

(5) The lambardar will be entrusted with the power of allotting common waste for cultivation. Any persons feeling aggrieved at the way in which he exercises such power, must put in a complaint at once, otherwise persons clearing jungle, with the lambardar's permission, will acquire occupancy rights, and pay rent at the customary village rate to the superior proprietary body.

(6) The right to profits from the produce of common waste lands, other than grazing, has been continued to the superior proprietors subject to the right of the adna maliks and cultivators to take first what they want for their own requirements. The ala maliks have been given the option of taking a third

of whatever munj grass there may be, leaving the rest to the cultivating body generally or of leaving the whole to the adna maliks till 1st January after which the ala maliks are at liberty to sell the remainder. In neither case are the adna maliks at liberty to sell any munj grass that they may have out, or dispose of it to outsiders.

(7) All classes of cultivators are entitled to firewood from the common lands. Non-cultivators such as traders and artisans, will in future pay 8 annas a year for the privilege of taking grass and wood and munj from the common lands. Payment under this head will go to meet the grazing jama assessed on such lands, and will not be a pre-requisite of the ala maliks.

(8) In some cases partial partition of the waste may be effected. In such cases, the existing waste can be divided among the superior proprietary shares without touching the cultivated lands, and it can be provided that the malikana due on the partitioned lands, when these are brought under the cultivation, will be paid into the common fund. In this way the right to the malikana will continue to be held undivided as before, but each ala malik will be able to make his own arrangement for taking jhuri, etc. for the lands that may have fallen to his portion. A portion of this sort, though it effectively protects the interests of the shares claiming partition, is not generally what the ala maliks care for. The great idea of every ala malik is to get patti of his own, with adna maliks over whom he can rule, and a share of the lambardari.”

30. After considering the nature of this tenure in detail it was concluded by the Division Bench (page102) that:-

(1) Ala malkiat means the right to give waste land for cultivation to others.

(2) Persons among the body of the ala maliks can bring a portion of the waste under cultivation and become the adna malik themselves. This proprietorship is subject to the right of ala malik to the payment of jhuri and malikana.

(3) Where the waste is not common land and the title of the maliks of the village to it and not only to ala malkiat in it is recognized by Government, the waste is the property of

the ala maliks, which they may use in any way they like, and

(4) If the unappropriated waste is common land (Shamilat-i-deh) it is not the exclusive property of any body but the nature and extent of such rights will depend upon the terms of the Wajibularz which incorporates the agreement in respect of this land between the Government, the ala maliks, the adna maliks and the other representatives of the village.

31. On the facts of that case it was held that according to the conditions of the Wajibularz the ala maliks have the first right to bring the Shamilat land under cultivation. Though it was held that ala maliks could not be deemed to be the exclusive owner but a decree for ejectment of the defendants, adna malikan, was passed. This case was, as stated above taken to the Supreme Court by the defendant but the appeal was not pressed and was dismissed as such.

32. The other case decided by a Division Bench of Lahore High Court is K. B. Muhammad Abdul Rahim Khan v. Hussaina (1) This case dealt with the land in villages Hetu and Tinda Thal of District Mianwali. On the basis of wajibularz of the village, the ala maliks were held entitled to partition of the shamilat deh and were held to be sole owners of it, which means that they had full proprietary interest in it to the exclusion of the adna maliks and tirniguzars. It was observed that the wajibularz determines the rights inter alia of the two types of proprietors.

33. The view that ala maliks have the right to partition of waste land is thus uniform. Similarly position of the wajibularz as a charter of rights of right holders in an estate is undisputed.

34. The Wajibularz in the present case is proved as Exh.P.3. It is the charter of rights. It appears from para.2 of this document that the land of the village was governed by Sind Sagar Doab Act, 1902 under which the Government had entered into an agreement with the ala maliks in their capacity as exclusive owners of the shamilat and had agreed to give to them land equivalent to 1/4th of the shamilat taken from them (ala maliks). It was further

provided that during the currency of this agreement, no other proprietary interest could intervene in the shamilat. In para. 3 it was stated that the preferential right to sink well in the shamilat would be that of the ala maliks and any right of adna maliks were subject to this preferential right and in case the adna maliks were not in a position to sink the well, the ala maliks had a right to give the land to others on proper conditions. But in case of reclamation of barani area, no right or interest of ownership or of tenancy on the basis of breaking the waste would accrue to any person.

35. This document is of the same pattern as the wajibularz in the case decided in K. B. Muhammad Abdul Rahim Khan v. Hussaina and supports the principles laid down in Mr. Tucker's report. Another document is Exh.D.2, a judgment between ala maliks and the adna maliks of village Daggar Yar Shah dated 10-06-1933 delivered by Mr. P. R. B. May, District Judge, Mianwali. The ala maliks were held in that case also to have proprietary rights in the shamilat area. As a result of this finding the suit of the adna maliks who had claimed a right in the shamilat of village and a right to claim its partition, was dismissed by the said learned District Judge. This judgment was confirmed by the High Court in Civil Case No.1863 of 1933 on 26-4-1935 (copy Exh.D.3). From the facts as stated above as well as law it is clear that:

(1) Ala maliks bringing any of the area of shamilat under cultivation will also become the adna maliks of that area with the result that their right of proprietorship becomes all exclusive.

(2) In case of reclamation of barani area, no right of adna milkiyat can be claimed by the person breaking the waste, and.

(3) The ala maliks have a right to partition of the waste without any interference from the adna maliks.

36. The abolition of ala milkiyat only removes the superior proprietary interest. It does not take away the adna milkiyat right or right to exclusive possession of even uncultivated waste which once vested in the owners as ala maliks. The effect of para.22 of Martial Law Regulation 64 in case of such land is that the danger of the ala maliks ever losing the land to adna maliks evaporates and

notwithstanding any right given in the wajibularz to persons reclaiming the waste by breaking the land, the ala maliks will become exclusive owners of that property. The argument of the learned counsel about resumability of the land by the Government is, therefore, without merit.

7. The copies of suit and judgment of learned trial court are not available on record. The appellate judgment is available. No doubt the suit was decreed at appellate stage as the prayer was with regard to the specific land by the specific persons and in civil litigation the impugned mutations were declared null and void totally, whereas through the judgment reported as “GHULAM HAIDER versus GHULAM RAZA SHAH AND 12 others” (PLD 1979 Lahore 481) the ratio of this judgment as well as of the judgment handed down by the Hon’ble Mr. Justice Karam Elahi Chauhan passed in Writ Petition No.683 of 1962 dated 11.11.1971 that if a person establishes his right through a decree of civil court of ADNA MALIK, to that extent the impugned mutations are not sustainable and in the way of rights created through a decree of civil court the impugned mutations will not be a hurdle. If the intention of judgment was to declare the impugned mutations null and void in toto, then there was no need to ask the claimant of status of ADNA MALIK for getting a decree for declaration of their status as ADNA MALIK from the civil court. Against the above said judgment no judgment of august Supreme Court or of this court has been produced whereby the impugned

mutations were declared null and void in toto except passing remarks passed by the Hon'ble Mr. Justice Munir A. Sheikh in Para 3 of the judgment while dismissing Writ Petition No17270 of 1993 in limine vide order dated 22.2.1994, passing remarks on the basis of assertion of learned counsel for the writ petitioner that mutations No.48 and 49 have been declared as void by the august Supreme Court, no point was decided by the learned Judge of this Court, therefore, the value of said judgment of learned single Judge of this Court is not more than passing remarks about mutations No.48 and 49. Even the same learned Judge thereafter decided Writ Petition No.11126 of 1994 vide order dated 12.02.1995. Para 5 of the judgment is reproduced as under:-

“After hearing learned counsel for the petitioner and Syed Jamshed Ali Shah, Advocate learned counsel for respondent No.2 at limine stage, I do not find myself in agreement with learned counsel for the petitioner that in the said suit mutations 48 and 49 as a whole in general were declared to be inoperative and void. The petitioner was declared to be the owner of land measuring 206 kanals 15 marlas and qua this land and the petitioner rights of ownership in it that mutation No.48 and 49 were declared to be ineffective and nothing more. He could not claim that the consolidation in the village qua the other land as a whole should be stayed treating the said mutations as a whole inoperative. The petitioner has been granted ownership rights in the land measuring 206 kanals 15 marlas through mutation No.84 sanctioned on 10.02.1976 therefore he cannot claim any land in excess thereof.”

8. In the above circumstances, it is clear that the property of which there was no ADNA MALIK was to be given

to the AALA MALIK and they became the full owner. It will also be important to note here that in accordance with Para 18 of the Land Reforms Regulation, 1972 as well as Para 15 of Martial Law Regulation No. 77, the excess land after retaining permissible holding was to be resumed by the Land Commission and was to be allotted in accordance with the scheme of Land Reforms to the persons entitled for the same and actually after resumption the land was allotted to the persons entitled under the Land Reforms, some property was given to the Pakistan Railways and some to the Canal Department. If both these mutations are declared null and void in toto, all the legal proceedings and legal transfers of land to the persons entitled under the Martial Law Regulation of resumed land as well as Railways and Canal Departments will be reversed, which is not permissible under the law. The declaration of impugned mutations as null and void in toto is not the requirement of any previous judgment passed by this court or the intention of any notification issued by the Government. Some property was of non-Muslim owners, after their migration to India, the property vested to the Custodian and Settlement Department allotted the land under their own schemes.

9. The resume of above discussion is that mutations No.48 and 49 will be void to the extent of decree passed by the civil court in individual suit as held by the Hon'ble Mr. Justice Karam Elahi Chauhan in the judgment passed in Writ Petition

No.683 of 1962. The Additional Deputy Commissioner decided the matter in accordance with the said judgment. Against the decision of A.D.C., Writ Petition No.11126 of 1994 was filed, which was dismissed in limine on 12.02.1995 by the Hon'ble Mr. Justice Munir A. Shiekh and it was held that mutations No.48 and 49 as a whole are not void. The Additional Commissioner (Consolidation) declared mutations No.48 and 49 as void in toto passing his findings that learned District Judge has declared as such. The same findings were absolutely against the facts as well as law. The property in dispute in the lis routed through the civil court, subject matter of appeal decided by the learned District Judge mentioned supra, was 206 kanals 15 marlas, whereas the property subject matter of the mutations No.48 and 49 was 28000 kanals and only 2000 kanals was of ADNA MALIKAN. It will not be out of place to mention here that none of the parties have disputed the notification issued by the Land Commission as I have referred notification dated 20.06.1959. In accordance with Clause (d) of the said notification when AALA MALIK is in possession and as a whole the ADNA MALIK who is to be treated as full owner, therefore, where AALA MALIK made the land of shamilat-i-deh cultivable and they qualify the definition of ADNA MALIK, they were to be declared as full owner and mutations impugned through this writ petition have rightly been declared as not come in the way of ADNA MALIK when they established their right in the light

of judgment passed by this court and through a decree of civil court.

10. I am clear in my mind that when a party comes to this court through a constitution petition filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 the party must show the order impugned through the petition or action taken by the respondents to be without jurisdiction or contrary to any legislative provision of law or at least against the notified policy of the Government. None of the above said eventualities could be proved by the learned counsel for the petitioners in case in hand. In these circumstances, I see no infirmity or illegality in the judgment passed by the Member (Consolidation) Board of Revenue Punjab Lahore, which is in accordance with the previous judgment passed by this court. Therefore, very writ petition is not maintainable, same stands dismissed. No order as to costs.

(Amin-ud-Din Khan)
Judge

Qurban*

Announced in Open Court on_____

Judge

Approved for Reporting

Judge