BEFORE THE COURT OF ADDITIONAL COMMISSIONER, KASHMIR AT SRINAGAR.
(Present: Mr. Qazi Sarwar, JKAS)

File No.	Date of Institution	Date of Decision
Rev-59	22-09-2023	17-09-2024
RD0050000062255		

In the case of: -

1. Mst Aisha D/o Abdul Rehman Kuchay
   R/o Hajibal Lelhjara Tehsil Kakapora District Pulwama

(Petitioner)

VERSUS

1. Abdul Sattar Kuchay S/o Rehman Kuchay
2. Noori D/o Rehman Kuchay
   Residents of Hajibal Kakapora Pulwama
3. Tehsildar Kakapora
4. Patwari Halqa Lelhara

(Respondents)

In the matter of:- Revision petition challenging the order dated 24.12.2022 passed by the court of Additional Deputy Commissioner Pulwama in file no. 29/ADC/APP, dismissing the appeal of the petitioner for want of Condonation application and order dated 26.08.2023 bearing no. 130/ADC/APP passed by the same court in the review petition in the above captioned appeal against the mutation no. 1601 dated 13.01.2001.

Present: Adv. Manzoor-Ul-Haq for petitioner.

Adv Malik Mushtaq for respondent no. 2.

ORDER

1. The instant revision petition has been transferred to this court by Ld. Divisional Commissioner, Kashmir for disposal under law. After transfer of the instant case to this court it was listed for hearing and reserved for orders after hearing the counsels for the opposite parties.
2. The instant petition has been filed by the petitioner through her counsel against the order dated 24.12.2022 (for short "impugned order") passed by Additional Deputy Commissioner Pulwama (for short "court below") in file no. 29/ADC/APP whereby the appeal has been dismissed as time barred and order dated 26.08.2023 bearing no. 130/ADC/APP (for short "impugned order") passed by the same court in the review petition in the above captioned appeal against mutation no. 1601 dated 13.01.2001.

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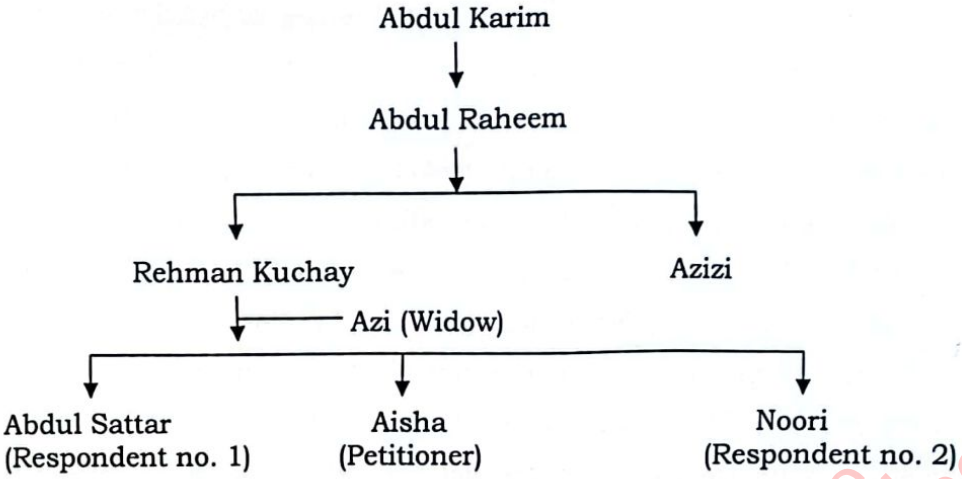
3. The brief facts of the case as stated by the counsel for the petitioner are that the estate holder Abdul Rehman Kuchay and Mst Azi widow of Rehman Kuchay died leaving behind the legal heirs mentioned in the pedigree table which is given herein below:



The revenue agencies i.e. respondent no. 3 and 4 have attested the mutation of the entire properties of the estate holder Rehman Kuchay and Mst Azi widow of Rehman Kuchay in favour of respondent no. 1 and 2. It is also stated that the petitioner challenged the mutations before the court below but the court below has not gone into the details of the memo of appeal in its true spirit and has passed the impugned order dated 02.12.2022 against which the petitioner sought intervention of the court below by way of a review whereof another impugned order dated 26.08.2023 was passed.

4. Aggrieved of the impugned orders the same have been assailed on the grounds that the impugned orders have destroyed the object of concept of sufficient cause and Section 17 of the Limitation Act. It is also submitted that the object of the condonation of delay has been explained in catena of judgments and also in Shanti Devi vs Ramlal (1988 SLJ 297) it has been held that court can allow the delay condonation even in absence of the separate application seeking condonation of delay. It is further submitted that Naib Tehsildar was not competent to pass order on the mutation and that too in ex-parte. It is further submitted that the appeal, even if it was not accompanied by a separate application for condonation of delay, was liable to be heard on merits even though the petitioner has mentioned the circumstances causing delay in para 3 of petition/memo of appeal. In the end the

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counsel for the petitioner has prayed to set aside the impugned orders along with mutation no. 1601 dated 13.01.2001.

5. The respondents were put to notice pursuant to which respondent no. 2 appeared before this court through her counsel. However, respondent no. 1 despite being duly served failed to appear before this court as a result of which respondent no. 1 was proceeded ex-parte. The counsel for the respondent no. 2 has filed objections wherein it has been submitted that the petitioner has preferred a time barred application before the court below and as per mandate of Section 11 of Land Revenue Act, the period of limitation is 60 days and the court below while dealing with a time barred appeal as per the mandate of the Order 41 Rule 3-A is required to decide the application for condonation of delay and the appellate authority was left with no option but to dismiss the appeal keeping in view the mandate of Section 3 of the Limitation Act. It is also submitted that the court below has committed no illegality while dismissing the review application as the petitioner has miserably failed to show the error on the face of the record which the appellate authority has failed to correct or the discovery of new fact or evidence which were not within the knowledge of the petitioner.

6. The counsel for respondent no. 2 filed written arguments wherein the grounds taken in the objections so filed against the revision petition, have been reiterated.

6. Heard and perused the records.

7. The court below vide impugned order dated 24.12.2022 has rejected the appeal of the petitioner preferred against mutation no. 1601 dated 23.01.2001 with the observation that the appellant therein has not filed the application seeking condonation of delay along with appeal which the appellant could have. A review petition against the said order has been also dismissed by the court below vide order dated 26.08.2023 which is also impugned here in.

8. The contention of the counsel for the petitioner is that the object of the condonation of delay has been explained in catena of judgments and also in Shanti Devi vs Ramlal (1988 SLJ 297) it has been held that court can allow the delay condonation even in absence of the separate application seeking condonation of delay. In fact, it has been held by the superior courts in a number of judgments that there is no need to file any formal application, if there are sufficient materials on record disclosing sufficient cause for the delay. It has been held by the Hon'ble Supreme

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Court of India in Civil Appeal No. 9198 of 2019 titled **Sesh Nath Singh & Anr. Versus Baidyabati Sheoraphuli Co-operative Bank Ltd and Anr**, that *"At the cost of repetition it is reiterated that delay can be condoned irrespective of whether there is any formal application, if there are sufficient materials on record disclosing sufficient cause for the delay"*. The court below has rejected the appeal on this sole ground and has failed to appreciate the law laid on this point.

9. I have gone through the order on the part-i-sarkar of mutation no. 1601 available on the portal of Land Records Information System wherefrom it transpires that that the petitioner herein is not shown in the pedigree table drawn on the mutation sheet. Even the order on the mutation reads that Mst Azizi widow of Rehman Kuchay has no legal heirs other than respondent no. 1 and 2. Therefore, the mutation no. 1601 has been attested at the back of the petitioner herein. The issue of limitation loses significance in the instance case in view of the mutation having been attested at the back of the petitioner (appellant before the court below). The Hon'ble High Court of J&K in **Suraj Prakash vs Hon'ble Member Special Tribunal, OWP NO. 949 of 1994** has held:

   "Time barred appeal against a mutation attested in absence of the appellant – appeal filed without an application for condonation of delay-such mutation held a nullity and non-est in the eye of law-appeal held maintainable."

10. Now coming to the mutation no. 1601. As discussed supra it is the inheritance of Mst Azizi W/o Rehman Kuchay which has devolved on respondent no. 1 and 2 (son and daughter of Mst Azizi respectively) to the exclusion of the petitioner (other daughter of Mst Azizi) by virtue of the mutation no. 1601 dated 13.01.2001. The order on the mutation has been passed in ex-parte and at the back of the petitioner. The petitioner has not even been shown as legal heir of deceased Mst Azizi. An order passed without summoning a party has been held nullity and non-est by the superior courts in plethora of judgments. The judgment of Hon'ble High Court of J&K in Suraj Prakash vs Hon'ble Member Special Tribunal, OWP NO. 949 of 1994 is referred to in para 9 of this order.

11. The counsel for the respondent no. 2 in his objections as well as written arguments has taken the plea that mutation no. 1601 is off shoot of mutation no. 746 dated 09.04.1976 through which the inheritance of Rehman Kuchay has devolved on his legal heirs including his widow namely Mst Azizi who is mother of

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the parties. After the demise of Mst Azizi her property should have been devolved on the petitioner also being her legal heir which has not been done in the instant case. Mutation no. 1601 being off-shoot of mutation no. 746 dated 09.04.1976 will make no difference as far as devolution of the inheritance of Mst Azizi on the petitioner is concerned.

14. Another aspect of the case is that the impugned mutation has been attested by the Naib Tehsildar who is not competent to attest mutations pertaining to Khana Nisheen Daughter in terms of para 29 of Standing Order 23-A, where a proviso has been kept which reads:

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

(ii) that mutations

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

In the case titled **"Rasheeda Akhtar V/S State" (SLJ 2005) passed by Hon'ble High Court of J&K,** it has been held:

Thus under the paragraph mutation concerning Khana-Nisheen daughter is to be attested by the Assistant Collector Ist Class or any other Class of Revenue Officers of higher rank. A Naib Tehsildar is, therefore, not competent to attest mutations in such cases.....since the petitioner was claiming as khana-nisheen daughter, under the paragraph 29 read with paragraph 64 of the Standing Order 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.

Naib Tehsildar was not having jurisdiction to pass mutation in favour of Khana-Nishen daughter and therefore, the mutating officer has transgressed his jurisdiction.

The Hon'ble J&K High Court Citations 2004 SLJ 303 in the case **titled "Bodh Raj & others v/s Rano Devi (Case No. Review (C) No, 12-A/2003 in CSA No. 19/1994)** wherein it has been held:

Civil Procedure Code —— An order made by a court which has no jurisdiction to make it, a nullity and non-est, question of its validity can be raised even at the execution

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stage –An order which has been passed by a court which lacks jurisdiction does not assume finality even if it is not challenged.

14. Thus viewed, the court below has erred in passing the impugned orders and therefore, both the orders along with the order on the mutation no. 1601 dated 13.01.2001 warrants setting aside.

15. For the foregoing reasons the revision petition is accepted and the case is submitted to the Ld. Financial Commissioner, Revenue J&K with the recommendation that the impugned orders along with the order on the mutation no. 1601 dated 13.01.2001 may be set aside and Tehsildar concerned be directed to attest fresh mutation after de-novo enquiry in favour of all the legal heirs of the deceased estate holder after affording them an opportunity of being heard. The parties are directed to appear before the Ld. Financial Commissioner, Revenue J&K on 11-10-2024.

Announced

17-09-2024

Additional Commissioner (S)
Kashmir

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