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JUDGMENT SHEET

LAHORE HIGH COURT LAHORE

JUDICIAL DEPARTMENT

Civil Revision No.1090 of 2009

Muhammad Rasheed (deceased) through his legal heirs, etc.

Versus

Muhammad Ismail, etc.

J U D G M E N T

Date of Hearing:	23.02.2023
Petitioners by:	Mr. Bashir Ahmad Qureshi-I, Advocate.
Respondents by:	M/s. Nauman Qureshi and Muhammad Anwar Toor, Advocates.

Anwaar Hussain, J. Through this single judgment, the present as well as Civil Revision No.1089/2009 are intended to be decided.

2. Subject matter of the present Civil Revision is validity of mutation bearing No.671 dated 17.01.1981 based on an oral gift, which the petitioners claim to have been legally made, by one Jalal-ud-Din, in favour of predecessor-in-interest of petitioners No.1(a) to 1(e), namely, Muhammad Rasheed and petitioner No.2, namely, Shah Muhammad. Challenge was laid by the respondents to the above referred impugned mutation No.671 on the strength of inquiry report conducted by the Officials concerned (respondents No.1 to 5 in connected Civil Revision No.1089/2009) for ascertaining the actual date of death of the deceased Jalal-ud-Din and an order dated 11.04.1992 was passed thereon by the said Officials whereafter claim of the respondents regarding actual date of death of Jalal-ud-Din was accepted. The suit instituted by the respondents was decreed by the learned Trial Court *vide* judgment dated 08.06.2006 and the said findings were upheld by the learned Appellate Court below, in appeal preferred by the petitioners. Civil Revision No.1089/2009 is being

treated as a connected matter inasmuch as the above referred inquiry report and order(s) passed thereon were challenged by the petitioners by instituting a separate/independent declaratory suit that was concurrently dismissed in favour of the respondents and said findings have been assailed by the petitioners through connected Civil Revision referred above. Although after framing of the issues, the suits instituted by the petitioners and the respondents were separately contested and decided through separate judgments in favour of the respondents, yet both the petitions are so interwoven with each other that the decision in one case has direct implications on the decision in other and learned counsel for the parties are in agreement to that effect, therefore, with their consent present petition is treated as the main case and Civil Revision No.1089/2009 as a connected matter and both are being decided through this single judgment.

3. It is case of the petitioners that they are owners of the disputed property by virtue of the impugned mutation based on an oral gift recorded in their favour. Learned counsel for the petitioners submits that both the learned Courts below have erred in appreciating the evidentiary resume as well as factual matrix of the case inasmuch as reliance has been placed upon an inquiry report that is self-contradictory. Adds that the learned Courts below have not appreciated the fact that there is no dispute regarding possession of the petitioners over the suit property. Further asserts that the respondents being plaintiffs were to stand on their own legs and could not take benefit of weaknesses of the petitioners/defendants. Places reliance on case reported as "*Muhammad Sher and others v. Mst. Taj Meena and other*" **(PLD 1996 Peshawar 6)** in this regard. Further adds that the impugned inquiry report, which has been heavily relied upon by the learned Trial Court to decree the suit of the respondents was not a valid piece of evidence inasmuch as its scribe was not produced before the Court and in this regard places reliance on case reported as

"*Khan Muhammad Yusuf Khan Khattak v. S.M. Ayub and 2 others*" **(PLD 1973 Supreme Court 160)**. Concludes that issue wise findings were not given; that the record also substantiated the factum of death as pleaded by the petitioners; that the claim of the respondents was rejected by the revenue hierarchy, hence, the subsequent suit was not maintainable on the basis of Section 11 of the Code of Civil Procedure, 1908 ('**the CPC**') and that the death certificate relied upon by the respondents pertains to one Jalal-ud-Din Joiya, however, the deceased donor belongs to *Toor* family, therefore, the said certificate is of no help to the respondents.

4. Conversely, learned counsel for the respondents submits that the deceased Muhammad Rasheed [predecessor-in-interest of petitioners No.1(a) to 1(e)] and Shah Muhammad (petitioner No.2), both sons of Noor Muhammad (deceased) were not real maternal grandsons of the donor, Jalal-ud-Din. Adds that even otherwise, there was no logic as to why a person will deprive his own children in order to give benefit to the maternal grandchildren. Further contends that in case of oral *Hiba*, the beneficiary is obligated to refer to the time, place and name of witnesses in whose presence the offer of gift is made by the donor and the same is accepted by the donee, which is conspicuously missing in the written statement filed by the petitioners' side. Further avers that apart from the above discrepancies, in relation to the impugned gift, neither attesting witnesses of the impugned mutation were produced nor secondary evidence was led. Concludes that not only fraud was alleged by the respondents but the fact that the donor was on his death bed due to serious illness few months prior to the date when the impugned mutation was recorded was also asserted in the plaint and also proved by leading oral evidence.

5. Arguments heard. Record perused.

6. The basic issue relates to actual/correct date of death of the donor, namely, Jalal-ud-Din who admittedly was predecessor-in-interest of the respondents. The petitioners/ defendants claim that the donor was their maternal grandfather and validly made the gift. It is also assertion of the petitioners that the respondents assailed the impugned mutation on the revenue side and their claim was rejected and hence, subsequent suit on the same subject is hit by doctrine of *res-judicata* and the suit was badly time barred, while it is case of the respondents that the donor was already dead on the date of recording of the impugned mutation, after suffering from serious illness, and the correct date of death has been clearly established through the inquiry conducted by the Officials, status of which is subject matter of the connected Civil Revision No.1089/2009.

7. The fundamental questions that call for determination by this Court on which learned counsel for the petitioners has laid a lot of stress is to opine whether the suit instituted by the respondents was time barred and whether the decision on the revenue side operates as *res-judicata* in the suit instituted by the respondents before the Civil Court. Both these questions have been dealt with by the learned Courts below. It is settled principle of law that fraud vitiates the most solemn proceedings and thus period of limitation would not be an embargo upon a justifiable claim directed against fraud, more particularly if same involves right of a person to inheritance of the property. Therefore, the learned Courts below have rightly held the suit of the respondents to be within time.

8. As regards applicability of principle of *res-judicata* on the suit instituted by the respondents, it is imperative to note that any decision, on the revenue side, does not operate as bar on a subsequent civil suit, more particularly, when question of fraud is involved in respect of which the jurisdiction of the Revenue Authorities is barred, for the reasons that the proceedings before the Revenue Officers and/or the

Revenue Courts are summarily conducted without recording of evidence. Section 11 of the CPC that is based on doctrine of *res-judicata* clearly stipulates that no subsequent suit shall be entertained in which the matter is directly and substantially the same in a former suit between the same parties and decided by a Court of competent jurisdiction. Therefore, Section 11 of the CPC is applicable only where earlier as well as the subsequent proceedings are before the Courts, which are competent to decide both the matters. Reliance is placed on case reported as "*Rehmatullah v. Ali Muhammad and another*" (**1983 SCMR 1064)**. In the instant case, earlier proceedings were on the revenue side that, as observed earlier, are summary in nature, conducted without recording of evidence. Therefore, one of the necessary conditions for the applicability of principle of *res-judicata* that former suit should have been decided by the Court competent to try the subsequent suit is an aspect that is missing in the instant case as the Revenue Court and Civil Court are not vested with the similar jurisdiction rather their jurisdiction is mutually exclusive to each other in certain matters. Jurisdiction of Civil Court is barred in terms of Section 172 of Land Revenue Act, 1967 (**"the Act"**) only with respect to matters exclusively vested in the jurisdiction of Revenue Courts under the said provision and civil suit is always maintainable under Section 53 of the Act to establish right or title in respect of immovable property where the Revenue Court lacks jurisdiction. Moreover, this Court in judgment reported as "*Arshad Ali and 6 others v. Muhammad Tufail through L.Rs. and others*" (**2013 CLC 632**) has held as under:

> "6.….It is true that any order made by Revenue Authorities under the West Pakistan Land Revenue Act, 1967 do not bar any party to establish his right or title in respect of immovable property by invoking jurisdiction of civil court. There is also no cavil to the proposition that order passed by the Revenue Authorities does not operate as *res judicata* under Section 11 C.P.C……."

9. Having held hereinabove that the suit of the respondent was well in time and principle of *res-judicata* is not applicable, it is imperative to examine merits of the case. Scanning of the record reveals that one of the respondents, namely, Muhammad Ismail appeared as PW-5 and produced as many as four witnesses including Imam Masjid (PW-2), namely, Abdul Rehman, who categorically supported the version of the respondents/plaintiffs that Jalal-ud-Din expired on 01.11.1980 prior to the execution of the impugned oral gift. The inquiry report, which was brought on record as Exh.P-1 also reflects that the date of death as claimed by the petitioners, who are beneficiaries of an oral transaction, was recorded in the relevant record, by the petitioners after a gap of more than 10-years challenging already existing entry related to death recorded by the respondents and hence, the same raises serious doubt about veracity of the claim of the petitioners. The controversy has been aptly dealt with by the learned Trial Court while rendering findings on material issues No.9 and 10, in the following terms:

> "6. ……ISSUES No.9 to 10
> These issues are material and very important upon which the entire fate of the suit hinges. Onus to prove these issues has been placed on plaintiffs. EX.P.1 is the detailed inquiry report of the Revenue authorities with regard to determination of date of death of deceased Jalal Din. It appears from a bare perusal of this inquiry report that death entry recorded in the record of Union Council was found to be 1-11-80 and not 6-6-81 as alleged by defendants. ***It was also found in the inquiry report that death entry of deceased Jalal din recorded on 1-11-80 was prior in time whereas the death entry of deceased Jalal din claimed by the defendants as 6-6-81 was subsequent in time.*** PW.1 is the record keeper in the office of Assistant Director, Local Government, Lahore who produced the inquiry report. ***PW.2 is the Imam Masjid of the village Mosque where deceased Jalal Din used to live. In his examination in chief he has stated that he conducted Namaz-e-Janaza of deceased Jalal din.*** In his cross-examination he has stated that deceased Jalal Din died at the age of 80/85 years."
>
> ***(Emphasis provided)***

Moreover, no *malafide* on part of the Officials concerned could be pointed out by learned counsel for the petitioners to question the authenticity of the inquiry report (Exh.P-1). Furthermore, the learned Appellate Court below while appraising the evidence on record has also put forth cogent reasons to uphold the findings of the learned Trial Court.

10. Similarly, even if the argument is accepted that the inquiry report has no evidentiary value in the light of *dicta* laid down in case of *Khan Muhammad Yusuf Khan Khattak supra* as statement of its scribe has not been recorded in the suit instituted by the respondents, matter can be examined from another angle without placing any reliance on the said inquiry report and taking benefit from the same. It is by now well-settled that a mutation by itself does not create any title unless it can be substantiated to be backed by a valid transaction more particularly if the transaction is in the nature of *Hiba* depriving legal heirs of the donor. In the instant case, such detail is conspicuous by its absence inasmuch as neither the time of offer and acceptance of the gift has been mentioned in the written statement nor any witness has been produced in support of the said contentions. A pointed question was put thrice to learned counsel for the petitioners as to who were the marginal witnesses of the impugned mutation or witnesses of any oral offer or acceptance of the gift, on the strength of which the petitioners were claiming the title of the suit property, admittedly owned by predecessor-in-interest of the respondents prior to sanctioning of the impugned mutation, the answer could not be given, which fact alone defies the claim of the petitioners. This aspect has been also examined by the learned Trial Court with cogent reasons, in the light of *dicta* laid down in number of reported judgments. Relevant part from the impugned judgment is reproduced hereunder:

> "6. …***In 2003 YLR 3184 it was held that particulars of gift namely the date of offer, acceptance and transfer of***

> ***possession should be mentioned in the pleadings. In 1994 MLD 467 it was held that onus to prove the transaction of gift lies on the donee who claims to be beneficiary thereof.*** In the said precedent case the date of death of donor was also in dispute. ***In PLD 1986 Lahore 194 it was held that in a transaction of gift if revenue officer who attested the mutation or any other witness testifying the form of transaction of gift is not produced it is fatal…*** ……***Neither in the written statement nor in the evidence, defendants have particularized the date of offer, acceptance and transfer of possession to them by deceased. It is not understandable as to why the deceased Jalal Din could gift his land in favour of defendants by depriving his own legal heirs***. It appears that at the time of making of alleged gift he was not made aware of the contents thereof and he was also illiterate person. From ***a bare perusal of statement of PW.1 it appears that at the time of making of transaction of alleged gift Ishaque the real maternal uncle of defendants was cultivating the land of deceased Jalal Din as his tenant and taking undue advantage of this fact they must have procured the transaction of gift in their favour***."
>
> ***(Emphasis provided)***

Here it is worth mentioning that the contention of learned counsel for the petitioners that caste of deceased Jalal-ud-Din has been wrongly mentioned in the death certificate relied upon by the respondents and hence, the said death certificate being unreliable is also of no help inasmuch as the said ground was never taken in the written statement and/or in the grounds of appeal before the learned Appellate Court below. Even otherwise, the above referred discussion makes the said death certificate irrelevant since the petitioners failed to prove the necessary ingredients of the oral gift depriving the respondents who are admittedly legal heirs of deceased Jalal-ud-Din (the donor).

11. Adverting to the facts of the connected Civil Revision No.1089/2009, it is noted that challenge was laid to order dated 11.04.1992 statedly passed by the Revenue Officials on the strength of the inquiry conducted and it was concluded that deceased Jalal-ud-din

died on 01.11.1980 and not on 06.06.1981 on the ground that the petitioners moved the application for correction of the register pertaining to deaths maintained by the Local Government/Officials concerned after lapse of more than a decade and the date was unilaterally changed from 01.11.1980 to 06.06.1981 without even summoning respondent No.1, namely, Muhammad Ismail who admittedly is the real son of deceased Jalal-ud-Din and was alive at the relevant point of time. Both the learned Courts below scanned the evidence on record and concluded that there are major contradictions in statement of the witnesses of the petitioners who could not categorically extend support to the version of the petitioners regarding the date of death of deceased Jalal-ud-Din and hence, the suit instituted by the petitioners was dismissed. This Court agrees with the reasoning put forth by the learned Courts below, particularly, with the ground that the application for correction of the date was moved by the petitioners after a considerable delay of more than a decade, once challenge was laid by the respondents to the impugned mutation and said ground alone is sufficient to disbelieve the stance of the petitioners. In this regard, it is also imperative to note that deceased Muhammad Rasheed/plaintiff No.1 appeared as PW-3 and when cross-examined, stated as under:

> ”جب کوئی شخص فوت ہو جائے تو اس کی وفات کا اندراج اسکے پسران کرواتے ہیں۔ جلال کی وفات کا اندراج اسکے پسران نے کروادیا تھا۔ بلکہ یونین کونسل میں اندراج کروایا تھا۔ مجھے اس اندراج کے بارے علم نہ ہوا تھا مجھے اس وقت علم ہوا جب شفع کا دعویٰ 1991 میں دائر ہوا تھا۔“
>
> ***(Emphasis provided)***

While appraising the evidence in general and above quoted part of statement of PW-3 in particular, the learned Trial Court held as under:

> “7…..Issues No.1 & 2
>
> ……..The death certificate on which claim of plaintiffs is based shows the date of death of deceased to be 6-6-81 which was found to be bogus and fictitious entry manipulated by plaintiff in connivance with the concerned Secretary U.C. ***It is an admitted fact that at the time when death entry of deceased 6-6-81 was got recorded, the death***

> ***entry of deceased as 1-11-80 was already got recorded.*** In these circumstances it can safely be concluded that plaintiffs have miserably failed to prove these issues. These issues are decided in the negative."
>
> ***(Emphasis provided)***

12. In view of the above discussion, this Court is of the opinion that the concurrent findings of the learned Courts below in present as well as in connected Civil Revision No.1089/2009 are supported by cogent reasons and rendered after proper appraisal of factual as well as evidentiary resume of the cases and by correct application of law, which does not merit interference in revisional jurisdiction by this Court as no misreading, non-reading, procedural impropriety or jurisdictional defect could be pointed out by the petitioners. As a natural corollary, both the Civil Revisions fail and are hereby **dismissed**. No order as to costs.

(ANWAAR HUSSAIN)
JUDGE

Approved for reporting.

Judge

Maqsood