Stereo.HCJDA-38

JUDGMENT SHEET

IN THE LAHORE HIGH COURT LAHORE

JUDICIAL DEPARTMENT

R.S.A. No.25 of 2015

Shehzad Nawaz and others
v.
Mst. Raaj Begum and others

J U D G M E N T

Dates of Hearing	24.2.2023 and 02.3.2023
Appellant by	Mr. Tariq Iqbal and Muhammad Zeeshan Malik, Advocates.
Respondent Nos.1 to 3 by	Ch. Tanveer Ahmad Hanjra and Rana Muhammad Arif, Advocates.
Respondent No.4 by	Ex parte.

Rasaal Hasan Syed, J. The instant second appeal is directed against judgments and decree dated 10.3.2011 and 20.11.2014 in terms whereof the suit for declaration of respondent Nos.1 to 3 was decreed by the trial court and appeal thereagainst was dismissed by the first appellate court.

2. Plaintiffs/respondent Nos.1 to 3 along with Mst. Surraya Begum, being widow and daughters of late Noor Ahmad, instituted a suit for declaration that they were the legal heirs of the deceased and were, as such, entitled to inherit the property as per their Islamic share. They also assailed the mutation of gift No.4467 dated 09.8.1993 in favour of late Muhammad Nawaz, predecessor of appellant Nos.1 and 2 as also the subsequent mutation No.4470 dated 16.8.1993 in favour of appellant Nos.1 and 2, on the ground of being illegal, a result of impersonation and deceitful means and ineffective upon their right of inheritance. The suit was resisted by appellants/defendants, issues were framed, and

evidence was recorded whereafter the learned Civil Judge decreed the suit vide impugned judgment dated 10.3.2011. Appellants' appeal thereagainst was dismissed by the learned Addl. District Judge, Kharian vide judgment dated 20.11.2014. In the instant appeal these judgments are now under challenge.

3. Learned counsel for the appellants submitted that the findings on issue Nos.1 and 2 were based on misreading of evidence; mutation No.4470 dated 16.8.1993 was not a part of record and could not be adjudged adversely; there being no restriction on the right of the deceased to make gift in favour of one of his legal heirs i.e. his son, the respondents could not legally challenge the same and that the evidence on record proved the gift and that the attorney had acted in accordance with the authority in the power of attorney and that the evidence was not correctly appreciated which vitiated the findings. Contrarily, learned counsel for the respondents supported the findings in the judgments of courts below and vehemently stressed that the same were based on correct appreciation of evidence and that no misreading and non-reading was made and that the material on record proved beyond doubt that the respondent No.4 had no lawful authority to make any gift nor any gift could be independently proved and that the suit as also the appeal were rightly decided by the courts below.

4. Points raised pro and contra have been minutely considered and evidence on record has duly been examined. Perusal thereof reveals that respondent Nos.1 to 3 along with Surraya Begum filed a suit for declaration as legal heirs of late Noor Ahmad claiming that the alleged power of attorney bearing document No.427 dated 09.6.1992 claimed by Muhammad Anwar respondent No.4 (defendant No.3 in the suit) was never executed by the deceased and that the same was a result of fraud and impersonation on the part of

Muhammad Nawaz deceased son of Noor Ahmad and that the property devolved upon the legal heirs of the deceased Noor Ahmad i.e. respondents/plaintiffs proportionate to their Islamic shares and that the mutations subject matter of suit being fraudulent were untenable. Ruqayya Begum, respondent/plaintiff, appeared as P.W.1. Documentary evidence comprising Exh.P1 to Exh.P-5 was also tendered in evidence by the respondents/plaintiffs. In defense appellants produced Mumtaz Aziz D.W.1, as special attorney of appellants.

5. On analysis of the entire evidence, the courts below concurrently held that respondents/plaintiffs were the legal heirs of Noor Ahmad, being widow and daughters of deceased; no gift could be proved to have been made by the deceased in his lifetime; appellant Nos.1 and 2 being beneficiaries were bound to prove the execution of power of attorney and making of alleged gift in favour of Muhammad Nawaz by Noor Ahmad deceased either in England or in Pakistan but could not do so and that the alleged power of attorney did not have any power in terms of the document Exh.P-5 to make any gift on behalf of deceased Muhammad Nawaz, rather perusal thereof would reveal that it related to sale or mortgage and not to transfer by way of gift.

6. Notwithstanding that in a second appeal concurrent findings of fact could not ordinarily be challenged unless any serious misreading of evidence was pointed out or serious questions of law were raised, yet for satisfaction the entire evidence was minutely examined. Scrutiny thereof shows that appellants' claim was that the property of Noor Ahmad was allegedly gifted by him to his son Muhammad Nawaz, predecessor of appellant Nos.1 and 2 vide mutation No.4467 dated 9.8.1993 whereafter Muhammad Nawaz transferred the land in favour of his real sons appellant Nos.1 and 2 vide

mutation No.4470 dated 16.8.1993. The original power of attorney was not produced in evidence by the appellants. Muhammad Anwar the alleged attorney and defendant No.3 in the suit (respondent No.4 herein) also did not appear in the witness-box nor the appellants appeared in the witness-box. Rather they opted to produce Mumtaz Aziz D.W.1, their special attorney. It was only the respondents/plaintiffs who tendered in evidence certified copy of the power of attorney Exh.P-5 for making reference of document to seek annulment thereof by the order of the court. In the instant case no witness of Exh.P-5 was produced to prove its execution nor Muhammad Anwar the alleged attorney entered appearance as witness. The case of the respondents was that no power of attorney was ever executed by Noor Ahmad and even if the power of attorney is taken in account yet Muhammad Anwar did not have any authority to either make a gift of property of Noor Ahmad or to transfer it by way of gift and that no gift was ever made by late Noor Ahmad.

7. To prove gift, it was incumbent to allege and prove three mandatory ingredients. The declaration of gift, acceptance of gift and transfer of possession of the property. It was also necessary to specifically mention the time, place and names of persons in whose presence these prerequisites were performed. Neither these ingredients were mentioned in the written statement nor proved in evidence. D.W.1 did not claim making of gift in his presence nor any other evidence could be produced to prove that these three ingredients were fulfilled in their presence either in England or in his native country by Noor Ahmad deceased. It was, therefore, a case in which no affirmative admissible evidence could be produced by the appellants to prove making of any gift either in Pakistan or abroad by Noor Ahmad in favour of his son Muhammad Nawaz. The recitals of Exh.P-5 do not record any context of

transfer of the property by way of gift in favour of Muhammad Nawaz predecessor of appellant Nos.1 to 3 nor does the instrument in its operative part contain any covenant or clause delegating any authority to make gift for the transfer of property by way of gift. Rather the document speaks of transfer of the property by sale or mortgage. The courts below therefore, rightly concluded that Muhammad Anwar had no power to transfer the property of Noor Ahmad, by way of gift, as was claimed vide disputed mutation No.4467 dated 09.8.1993 which mutation was obviously without lawful authority and legally untenable in view of the rule in *"Mst. Bandi v. Province of Punjab and others"* **(2005 SCMR 1368)** and *"Mst. Shumal Begum v. Mst. Gulzar Begum and 3 others"* **(1994 SCMR 818)**. The special attorney of appellant D.W.1 also admitted that in his presence no gift was made and that Noor Ahmad had been cultivating the land himself as also through others during his lifetime.

8. In *"Faqir Ali and others v. Sakina Bibi and others"* **(PLD 2022 SC 85)** it was observed to the effect that for a gift to be valid and binding three necessary conditions must be met, namely, declaration of gift by owner, acceptance by donee and delivery of possession of corpus and that a valid gift could also be effected orally if these three prerequisites were established through valid and cogent evidence and that written instrument was not a requirement under Mohammadan Law nor was it compulsorily registerable under the Registration Act, 1908 and that registration of the document shall be of no help if the three mandatory conditions remained unsatisfied. It was further observed to the effect that beneficiary of such document was bound not only to prove its execution but was also obligated to prove the gift itself by producing cogent and reliable evidence establishing the aforementioned three necessary conditions of a valid gift.

9. In the instant case the appellants were unable to produce any tangible evidence to prove the making of gift by the deceased in his lifetime nor Muhammad Anwar defendant No.3 could prove any valid authority to transfer the property on the basis of gift, particularly when no such power was vested by delegation in writing in the document. In *"Ijaz Bashir Qureshi v. Shams-Un-Nisa Qureshi and others"* **(2021 SCMR 1298)** while considering various aspects of the claim by way of gift by an attorney it was observed by the Supreme Court Of Pakistan as follows:

> "7. Now comes the question whether in a power of attorney if it is mentioned that the agent can transfer the property through gift, these powers are given to the agent to transfer the property himself or herself through gift, in our view the gift can be made by the owner/principal only. The agent cannot himself or herself transfer the immovable property of principal through gift on the basis of any power of attorney even if the power of attorney contains the powers to transfer the property through gift. These powers can only be used for completion of codal formalities of the gift which must be by the owner/principal himself/herself. The attorney cannot transfer the property of principal himself/herself to anyone through gift and if that transfer is by the attorney himself/herself, that is invalid transfer."

10. Admittedly Muhammad Nawaz was the son of Noor Ahmad while the respondents/plaintiffs were the widow and daughters of deceased Noor Ahmad. No reason whatsoever was advanced to show as to why the deceased would like to deprive his real daughters and widow of their share and would give preference to the son by excluding the legal heirs in departure with Islamic injunctions. In *"Barkat Ali through Legal Heirs and others v. Muhammad Ismail through Legal Heirs and others"* **(2002 SCMR 1938)** it was observed as follows:

> "5…Though it is not necessary for a donor to furnish the reasons for making a gift yet no gift in the ordinary course of human conduct is made without reason or justification unless the donor is divested of all the power of reasoning and logic and unless he is a person of unsound mind. In the wake of frivolous gifts generally made to deprive females in the family from the course of inheritance prevalent at present times, the Courts are not divested of the powers to scrutinize the reasons and justification for a gift so that no injustice is done to the rightful owners and no course of inheritance is bypassed"

11. In the Faqir Ali's case supra it was observed to the effect that the only reason furnished by the alleged beneficiaries and their witness in their statements before the trial Court was that their father had transferred the suit land to gain divine favour of God by pleasing Him and the exact words used were "Allah Waasty"; that from this it was clear that natural love and affection was not the consideration of the gift; that even if the claim was accepted as true it was ex-facie hard to understand how depriving real daughters of their rightful share in the inheritance/estate of the donor could be interpreted as an act which would please Allah Who had specifically ordained that the daughters were entitled to a specified share by way of inheritance in the estate of their father; that it therefore appeared that the gifts were only a device to deprive the daughters from inheritance and the gift mutations were sanctioned to bypass the law of inheritance; and that gift being based on a fraudulent intent which vitiates even the most solemn transactions notwithstanding the bar of limitation Courts would not act as helpless bystanders and allow a fraud to perpetuate. Reference can also be made to the rule in *"Mst. Parveen (deceased) through LR.s and others v. Muhammad Pervaiz and others"* **(2022 SCMR 64)** wherein it was held as follows:

> "12. We may once again state that, that we are dismayed to observe the all too frequent practice in Pakistan of male heirs resorting to fraud and other tactics to deprive female heirs from their inheritance. While this deprivation causes suffering to those deprived, it also unnecessarily taxes the judicial system of the country, resulting in a needless waste of resources. Each and every day that a male heir deprives a female heir is also an abomination because it contravenes what has been ordained by Almighty Allah"

12. Considering the rule supra, evidence on record and the reasoning recorded by the courts below, it is observed that the findings under challenge are unexceptionable whereby it was concluded that no gift by Noor Ahmad in favour of Muhammad Nawaz during his lifetime could be proved and that respondent No.4, the alleged attorney, could not prove the execution of power of attorney by the deceased or existence of any authority therein of making gift of property of Noor Ahmad, the mutation No.4467 dated 09.8.1993 of gift (in favour of Muhammad Nawaz predecessor of appellants) as also the subsequent mutation No.4470 dated 16.8.1993 (in favour of appellant Nos. 1 and 2) were illegal, a result of fraud, ab initio void, ineffective in law and that the property devolved upon the legal heirs of deceased Noor Ahmad on the opening of succession in accordance with their Islamic shares.

13. As regards the objection of limitation the respondents claimed knowledge of the mutation of gift a few months before the filing of suit and after obtaining certified copies of the documents, promptly filed the suit which was rightly held to be within time. In Faqir Ali's case supra the gift mutation was attested in the year 1985 onwards and the suit for cancellation was instituted in year 2004. It was observed to by the Supreme Court Of Pakistan to the effect that gift mutation having been challenged on grounds of fraud and collusion, the contention that suit was barred by time did not

have any force, as where fraud and collusion are alleged and established question of limitation cannot help the beneficiary thereof.

14. In the instant case as noted supra D.W.1 could not deny that Noor Ahmad used to cultivate the land himself as also through others during his lifetime which proved beyond doubt that possession was not transferred and that the deceased continued to enjoy the status of owner till his death whereafter the property devolved upon his legal heirs in accordance with the Islamic Law. As per statement of P.W.1, the plaintiffs/respondents came to know about the fraudulent gift when they approached the patwari for getting copy of fard to sell their share and that the copy was supplied in November 2004 whereafter they filed the suit in January 2005. There is no evidence in rebuttal to prove that either deceased had knowledge of the transaction or his legal heirs had any such clue and, therefore, the suit from the date of knowledge was rightly adjudged to be within time in view of the rule given in precedent supra.

15. For the reasons hereinabove this appeal is devoid of substance which is, accordingly, **dismissed**.

(RASAAL HASAN SYED)
JUDGE

ANNOUNCED IN OPEN COURT ON **10.3.2023**.

JUDGE

APPROVED FOR REPORTING

JUDGE

Rabbani