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JUDGMENT SHEET
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Writ Petition No.46285/2017

Shamsa Hameed etc. **Versus** Additional District Judge etc.

JUDGMENT

Date of Hearing:	12.09.2023
Petitioner No.1 by:	Mr. Sukrat Mir Basit, Advocate. Mr. Muhammad Ramzan Gujar, Advocate. Mr. Muhammad Irfan Bharoka, Advocate.
Petitioners No.2 & 3(a) to 3(c) by:	Mr. Mubeen Uddin Qazi, Advocate. Mr. Rohail Rahman Qazi, Advocate. Ch. Tahir Mahmood, Advocate. Mr. Ahmad Sardar Khan Niazi, Advocate. Mr. Zubair Ali Butt, Advocate.
Respondents No.4(ii) and 4(iii) by:	Mr. Muhammad Ismail Thaheem, Advocate.
Respondents No.3, 4(i), 4(iv) to 4(vi) & 5 by:	Proceeded against <i>ex parte vide</i> order dated 10.12.2018.

Anwaar Hussain, J. Contest between the parties pertains to bungalow No.8-A, measuring 08 kanals, situated in Civil Lines, Jauharabad (“**the disputed property**”) that was originally owned by one Abdul Hameed Khan (“**the donor**”), who happened to be the father of petitioners No.1 and 2 and husband of deceased petitioner No.3, namely, Mst. Shahzada Begum as also father of deceased Malik Muhammad Feroze (predecessor-in-interest of respondents No.4(i) to 4(vi), who are hereinafter referred to as “**the contesting respondents**”).

FACTUAL BACKGROUND:

2. Predecessor of the contesting respondents claimed ownership of the disputed property, on the basis of an oral gift in his favour that was

rinsed through arbitration proceedings, between the donor and the *donee*, resulting into passing of an award that was subsequently made Rule of the Court and decree dated 13.02.1995 was passed, which the petitioners alleged to have been manoeuvred and is result of fraud and forgery and mere eye wash, just to deprive the petitioners from their lawful right of inheritance in the disputed property.

3. It is the case of the contesting respondents that their deceased predecessor was given the disputed property by way of an oral gift, however, there was a dispute between the donor and the *donee* as to who had to pay the expenses to be incurred for the registration of the gift deed and to settle the same, one Mehmood Iqbal (“**respondent No.3**”) was appointed as an arbitrator, *vide* arbitration agreement dated 17.01.1995. Respondent No.3 rendered award of the even date by observing that during the arbitration proceedings, the *donee* has undertaken to pay the requisite fee for execution of the conveyance deed for translating the oral gift into a registered document and, in order to make the said award Rule of the Court, an application under Section 14 of the Arbitration Act, 1940 (“**the Act**”) was filed by the *donee*, which was accepted and the award was made Rule of the Court followed by the decree dated 13.02.1995 and the disputed property was transferred in favour of the *donee*. The contesting respondents claimed that the entire transaction was transparent and made with consent of the donor whereas petitioners No.1 and 2 in particular claim that when they were denied access to the disputed property on the pretext that it is predecessor of the contesting respondents, who is the owner of the disputed property, it transpired that fraud has been committed with them by their step brother and, hence, an application under Section 12(2) of the Code of Civil Procedure, 1908 (“**the CPC**”) was filed to set aside the decree dated 13.02.1995 passed, while making the award Rule of the Court, however, the said application was dismissed by the Trial Court, *vide*

order dated 26.01.2012 that was upheld by the Revisional Court below, through order dated 13.05.2017. Hence, the present constitutional petition.

ARGUMENTS:

4. Learned counsel for the petitioners submit that petitioners No.1 and 2 are real daughters of the donor who, along with their deceased mother/petitioner No.3, had been deprived by their step brother/son, of their lawful right of inheritance in the disputed property belonging to their father/husband, on the basis of a manipulated and sham arbitration proceedings and the award dated 17.01.1995 procured thereupon and the contentions that the donor transferred the disputed property to predecessor of the contesting respondents through an oral gift are false assertions that have not been substantiated inasmuch as the necessary ingredients of the impugned oral gift were never proved in the proceedings before any competent forum, in accordance with law. Reliance has been placed on the law laid down in case reported as *Mian Ghayasuddin and others v. Mst. Hidayatun Nisa and others (2011 SCMR 803)* in support of their contentions. Add that the learned Courts below erred in holding that the claim of the petitioners was time barred as petitioners No.1 & 2, being the daughters of the donor, were extended warm welcome in the disputed property even after the death of the latter, however, when deceased Malik Muhammad Feroze denied the access, of the disputed property, to the petitioners on the strength of the decree dated 13.02.1995 passed in his favour, an application under Section 12(2), CPC was immediately filed alleging fraud committed with them. Further contend that the application of the petitioners under Section 12(2) of the CPC, has been wrongly dismissed by the learned Courts below inasmuch as record clearly depicts that the application for making the award Rule of the Court was filed on behalf of predecessor of the

contesting respondents by one Abdul Raheem, Advocate, whereas on behalf of the donor, one Abdul Rasheed, Advocate, appeared and submitted conceding written reply and the fraud, at play, becomes too obvious to be ignored by the mere fact that both these counsel belong to the same law chamber.

5. Conversely, learned counsel for the contesting respondents submit that the application, under Section 12(2), CPC, was not maintainable inasmuch as if an award was to be set aside, the legal remedy available is envisaged under Section 30 of the Act. Adds that even otherwise, the application was time barred, having been filed after a lapse of about nine (09) years of the passing of a decree, based on the award, which was not maintainable and lack of knowledge of the oral gift and/or the decree cannot be pleaded as petitioners No.1 & 2 are not strangers rather, they are the step sisters of the *donee* and were well aware of the making and registration of the impugned gift. Learned counsel also asserts that there is no question of depriving the petitioners from the inheritance of the donor inasmuch as the only witness who came forward in support of the claim of the petitioners is husband of petitioner No.2, who admitted that the donor during his lifetime transferred his other property(ies) by way of gift to petitioners No.1 & 2 as well. Further submits that the evidence, available on record, cannot be read in piecemeal, rather the conjunctive reading of the testimony of Abdul Rasheed, Advocate (RW-1) reveals that he was duly engaged by the donor and on instructions of the latter, the conceding reply, to the application under Section 14 of the Act, was submitted. Further avers that the application of the petitioners under Section 12(2), CPC was also not maintainable as the mandate of Order VI, Rule 4, CPC was not met and the particulars of fraud were not mentioned therein. Concludes that actual transaction of the oral gift was not required to be proved by the contesting respondents as the donor himself admitted the same while referring the matter to the arbitration

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and since the disputed property has been further transferred by predecessor of the contesting respondents, therefore, the matter has become a past and closed transaction.

6. In rebuttal, learned counsel for the petitioners submit that there is no bar on filing of an application under Section 12(2), CPC to lay challenge to a decree based on an award, made Rule of the Court, and the petitioners were not bound to have recourse to Section 30 read with other provisions of the Act. Reliance has been placed on case reported as *Muhammad Yasin v. Sh. Hanif Ahmed and 4 others* (**1993 SCMR 437**) in support of their contention. Further contend that the distribution of the other properties of donor by him, between petitioners No.1 & 2 and predecessor of the contesting respondents, was equitable to the extent of the agricultural land owned by the donor, however, the disputed property is a residential house, which the donor occupied till his last breath and after his demise, it was to be divided as per lawful share of all his legal heirs, including the petitioners.

7. Arguments heard. Record perused.

POINTS OF DETERMINATION:

8. Following legal and factual questions are to be adjudicated by this Court:

- i. Whether a decree based on an award, rendered under the Act, cannot be challenged by way of filing application under Section 12(2), CPC and only remedy available to an aggrieved person is to have recourse to filing of an application, under Section 30 of the Act?
- ii. Whether an oral gift of immovable property is not required to be proved on account of the fact that an arbitration between the donor and the *donee* took place subsequent to the purported gift and an award was passed in favour of the *donee*, more particularly, when

the same results into depriving the female legal heirs of the donor, from their rights in inheritance of the disputed property of the donor forming subject matter of the award?

ANALYSIS AND OPINION OF THE COURT

9. The answer to the first question requires analysis of the interplay of Section 12(2), CPC and the provisions of the Act including Section 30 thereof. The applicability of CPC, on the arbitration proceedings, under the Act came under discussion before the Supreme Court of Pakistan in case reported as *Combined Enterprises v. Water and Power Development Authority (PLD 1988 SC 39)*, more particularly, in relation to the setting aside of the award and after analysing Sections 31, 32, 33 and 41 of the Act, at page 52 of the judgment, it was observed as under:

“Therefore, the reference and the award could only be interfered with in the manner laid down by sections 31, 32 and 33 and to that extent the provisions of the Code of Civil Procedure are expressly excluded and no Court other than that mentioned therein could deal with the matter.”

It was further observed by the Supreme Court that CPC is applicable only subject to the provision of Section 23(2) read with Section 32 of the Act. The matter also came under examination in case reported as *Government of Sindh and another v. Ch. Fazal Muhammad and another (PLD 1991 SC 197)* in which the aggrieved person therein had the opportunity to take all the objections to the award, which they had filed earlier and were rejected and therefore, they were not allowed to press the same objections under Section 12(2), CPC to challenge the validity of judgment and decree passed on the basis of the award impugned therein. It is imperative to observe that in both *Combined Enterprises supra* as well as *Government of Sindh supra*, the question whether an award made Rule of the Court on the basis of which a decree has been passed can be challenged by an application under Section 12(2), CPC, was not under discussion.

10. Moreover, the provisions of CPC in terms of Section 41 of the Act, are applicable to the arbitration proceedings to the extent that the same are not specifically excluded by the Act. Therefore, this Court is of the opinion that if an award is obtained by collusion of the parties and/or the arbitrator appointed by them, the decree based upon such an award, having been made Rule of the Court, more particularly defeating the rights of third parties, could be impeached in proceedings under Section 12(2), CPC instead of filing of an application under Section 30 of the Act read with other provisions since there is no provision under the Act enabling such third parties (like the petitioners) to lay the challenge. This Court is fortified by the law laid down by the Supreme Court in case of Muhammad Yasin supra, which appears to be the leading judgment on this point wherein it has been held that Sections 30 and 33 of the Act refer to only the awards and not the decree passed on the basis of the award and there is no provision for challenging such decree(s) on the ground that it has been obtained by misrepresentation and fraud. It had been held that applicability of Section 12(2), CPC has not been excluded and it was concluded that in the facts and circumstances of the case, application under both the provisions i.e., Section 30 of the Act and Section 12(2), CPC, was maintainable. This view has been followed by this Court in cases reported as Abdul Basit and another v. Muhammad Ashraf Dar and another (2000 CLC 920) and Mian Moazzam-Ud-Din and others v. Haji Sadiq Jilani and others (2002 MLD 185). Similar view has been taken by the Sindh High Court in case reported as Ch. Fazal Muhammad v. Pakistan Through Secretary Ministry of Defence (2007 CLC 148). In another pronouncement of the Supreme Court of Pakistan reported as Mst. Fateh Bevi and others v. Additional District Judge, Khushab and others (2008 SCMR 1262), a judgment of the lower Court allowing an application under Section 12(2), CPC against a judgment and decree passed on the basis of an award was upheld by the Supreme Court.

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11. A *contra* view of this Court is also reported as Sardar Muhammad v. Mst. Hasmat Bibi alias Hasmatee and 3 others (2004 YLR 626) where it was held that an award can only be challenged under Sections 30 read with 33 of the Act and not under Section 12(2), CPC. However, a careful perusal of the said case, with respect, reveals that the judgment errs in law inasmuch as the same relies on the case of Government of Sindh supra, in respect of the proposition involved, whereas the latter case does not relate to the same point. In case of Government of Sindh supra, the Supreme Court has drawn a distinction between a challenge to the award itself and a challenge to a decree passed pursuant to the award. In case of Government of Sindh supra, the challenge was to the award and the Court held that the award could only be challenged under Section 30 read with Section 33 of the Act. It does not say that an award made Rule of the Court and forming basis of a decree passed pursuant to the same cannot be challenged under Section 12(2), CPC. Therefore, this Court is of the opinion that any decree based on an award that is made Rule of the Court, under the Act, can be challenged by way of filing application under Section 12(2) of the CPC, if the fraud is alleged.

12. Adverting to the second question formulated hereinabove, this Court considers incumbent upon it to keep in sight the unique factual matrix of the case while answering the said question. The essence of the petitioners' case is that a decree was obtained in favour of the predecessor of the contesting respondents on the basis of an award that was made Rule of the Court pursuant to the arbitration proceedings, having the effect of preventing the petitioners from claiming their lawful share of inheritance in the disputed property left by their predecessor-in-interest inasmuch as a bogus reference to arbitration was made by the predecessor of the contesting respondents so that a purported oral gift in his favour can be documented by obtaining a decree of the Court on the basis of the award, and then the *donee* deceived the Trial Court by

representing that the award was outcome of the genuine arbitration proceedings, though in fact it was not and the entire exercise was to deprive the petitioners, who were step sisters of the predecessor of the contesting respondents, from their share of inheritance in disputed property.

13. Before proceeding further, it will be advantageous to examine the impugned award, recital(s) whereof highlights the dispute and reads as under:

”فیصلہ ثالثی“

منکہ ملک محمود اقبال ولد عبدالغفور خان قوم مندیاں ٹوانہ ساکن ہڈاں تحصیل و ضلع خوشاب ام جو کہ مجھے ملک محمد فیر و زولد ملک عبدالحمید خان قوم مندیاں ٹوانہ کند جوہر آباد تحصیل خوشاب فریق اول ملک عبدالحمید خان ولد ملک عبدالرحمن خان قوم مندیاں ٹوانہ کند ہڈاں تحصیل و ضلع خوشاب فریق دوم نے واحد ثالث بفرض تصفیہ برے اقرار نامہ تقری ثالث 1.95 مقرر کیا تھا۔ تنازعہ کی نوعیت ذیل ہے کہ ملکتی جائیداد پلاٹ کو ٹھی نمبری A-8 سول لائے جوہر آباد تحصیل و ضلع خوشاب ملکتی مقبوضہ فریق دوم تھی۔ جو فریق دوم نے حق فریق اول زبانی ہبہ کر دی تھی۔ اور حسب ہبہ سے کچھ جائیداد حدا کا قبضہ برپا نہیں کیا تھا۔ اور فریق اول نے حاصل کر لیا ہوا تھا۔ لیکن بوقت تصدیق ہبہ نامہ بغرض قطعی منتقلی مابین فریقین تنازعہ پیدا ہو گیا۔ اور فریق اول کا موقف ہے کہ فریق دوم نے ہی جملہ اخراجات برداشت کرنے کی ذمہ داری قبول کی تھی۔ لیکن فریق دوم ایسے کسی بیان کردہ معاہدہ سے انکاری ہے۔ اور بیانی ہے کہ فریق اول ہی بطور موہوب الیہ اخراجات برداشت کرنے کا ذمہ دار ہے مجھے سپرد کیا گیا۔ ریفرنیس چونکہ صرف اخراجات کی حد تک ہے۔ کیونکہ فریق دوم درستی ہبہ اور تبدیلی قبضہ سے انکاری نہ ہے۔ چنانچہ میں نے فریقین کو ساعت کرتے وقت اس امر کر ضروری سمجھا۔ کہ اخراجات کی نوعیت کا تعین کیا جاوے۔ ویسے بھی فریق اول فریق دوم کا حقیقت پسرا ہے۔ موقع پر تحقیق، تصدیق سے قبضہ منتقل شدہ ہے۔ اور کو ٹھی نمبر A-8 پر فریق اول ہی مالک قابل ہے۔ مابین فریقین ہبہ نامہ تنازعہ نہ ہے۔ اور فریق دوم اب بھی اقبالی ہے۔ اور فریق اول نے خود ہی بوقت ساعت اخراجات منتقلی کی ادائیگی کی ذمہ داری قبول کر لی ہے۔ اور اس طرح ہر دو فریق نے تنازعہ کو ختم کر دیا ہے۔

(Emphasis provided)

Perusal of the impugned award reveals that while the reference was admittedly to resolve the issue as to who was obligated to incur the necessary expenses for effecting registration of oral gift, the arbitrator

(respondent No.3) held as under:

”لہذا من مقر کافیلہ ثالثی حسب ذیل ہے۔ کہ کوئی نمبر A-8 واقع سول لائے جو ہر آباد ضلع خوشاب کا مالک قابض برپنائے ہبہ فریق اول ہے۔ اور فریق دوم کامنز کرہ بالاجاید اوسے کوئی تعلق واسطہ نہ رہا ہے۔

فیصلہ ثالثی بحق فریق اول صادر کیا جاتا ہے۔ فیصلہ سنایا گیا۔

17.1.95

ملک محمود اقبال ولد عبدالغفور خان قوم مندیاں ٹوانہ کندھڑاں تحریک خوشاب

”ملک محمود اقبال“

(Emphasis provided)

It is *prima facie* evident that even if arbitration proceedings are accepted to be genuine, respondent No.3 rendered the award beyond the scope of reference as dispute was statedly not regarding ownership of the disputed property. In fact, the matter became infructuous as the award itself envisages that the *donee* ended the dispute by agreeing that he will bear the expenses for registration of the oral gift but respondent No.3 opted to proceed and declare predecessor of the contesting respondents to be the owner of the disputed property.

14. The contents of the impugned award when put in *juxta* position with the factual background of the matter, analyzed hereinabove, propels this Court to conclude that entire stance of predecessor of the contesting respondents belies logic inasmuch as if the donor, being the real father had divested himself from the disputed property, in favour of his son, by way of an oral gift, would only refuse to incur the meagre expense to give effect to the said gift and then readily agrees to refer the matter to the arbitration, in span of one day, and during the arbitration proceedings, the *donee* (predecessor of the contesting respondents) concedes to pay the expenses whereafter instead of just getting straightaway registration of the gift deed in his favour, the *donee* again resorted to the legal

proceedings, against the donor (his father), by filing an application under Section 14 of the Act, for making the said award as Rule of the Court and the donor again readily filed a conceding written reply, through a counsel, without even appearing before the Court, in person.

15. The entire chain of events, as also the award itself, are *prima facie* against the normal human conduct that a father would gift his valuable immovable property to his son to the exclusion of his other children but entangle himself in litigation to the extent as to who would incur the meagre expenses for registration of the gift. Seems fictional, to say the least that the unfathomable love of father/donor for his son/*donee* would whittle away and subside when it comes to bearing expenses of registration of the oral gift. *Prima facie*, it appears that through manoeuvring, undue influence, concealment of facts and misrepresentation, an invalid award, emanating from sham arbitration proceedings, was made Rule of the Court followed by the impugned decree drawn thereof. The order making the award Rule of the Court, being a result of fraud and otherwise without lawful authority, was liable to be annulled on this ground.

16. Moreover, the fact that the agreement to refer the matter to the arbitrator and the award passed thereon, all were made on the same day, in itself, is sufficient to show the fraud and misrepresentation on part of predecessor of the contesting respondents who was the original beneficiary of the oral gift of the disputed property that deprived the other female legal heirs of the donor (i.e., the petitioners). Moreso when the donor himself never appeared before the Court to give his assent to make the award Rule of the Court. It again seems not normal that the gift would be orally made but there would be a formal arbitration agreement in writing followed by the arbitration proceedings for resolving as to who has to bear the registration expenses, which reflects ingenuity at its best. Furthermore, scanning of the evidentiary resume of the case reveals that

the lawyers, who appeared on behalf of the beneficiary of the oral gift (predecessor of the contesting respondents), as also on behalf of the donor belong to the same chamber and the counsel appearing for the donor acknowledged that the donor was not personally known to him. The statement of RW-1, who represented the donor and submitted conceding written reply on behalf of the donor, stated as under:

”یہ درست ہے کہ مسی منکہ عبدالحید خان اور ملک محمود اقبال کو ذاتی طور پر نہ جانتا ہوں میں نے اصل درخواست 14/17 ایکٹ شائی دیکھ لی ہے۔ یہ درست ہے کہ درخواست مورخہ 16.01.95 کی تیار شدہ ہے جسکی تصدیق بر حلف پر تاریخ 16.01.95 موجود ہے۔ یہ درست ہے فقرہ نمبر 2 درخواست میں شائی فیصلہ کی تاریخ تحریر شدہ نہ ہے۔ اور آج بھی شائی فیصلہ مورخہ کے آگے خالی جگہ موجود ہے۔ جواب درخواست جسکی نقل Exh.R2 ہے میری قلمی نہ ہے۔ یہ شیر کلر ک ملک عبدالرحیم صاحب کی قلمی ہے۔ اس مثل میں ملک عبدالرحیم صاحب کو نسل سائل ہے۔ یہ غلط ہے کہ جواب درخواست پر دستخط و نشان اگوٹھامیرے رو بروند لگا تھا۔ جواب درخواست پر ملک محمود اقبال کے کوائف غلط ہے کہ ملک عبدالرحیم صاحب کے قلمی ہیں۔ میں ملک عبدالرحیم صاحب کے دستخط شناخت کرتا ہوں۔ یہ غلط ہے کہ سائل کے وکالت نامہ پر دستخط انکے نہ ہیں میں یہ بتانے سے قاصر ہوں کہ کیا وکالت نامہ منجانب سائل پر ثبت شدہ دستخط ملک عبدالرحیم صاحب ایڈو و کیٹ انکے مروجہ دستخطوں سے قطعاً مطابقت نہ رکھتے ہیں۔ یہ غلط ہے کہ درخواست پر دستخط کو نسل سائل اور وکالت نامہ پر دستخط سائل مسکی ایک دوسرے سے مطابقت نہ رکھتے ہیں۔ یہ غلط ہے کہ جواب درخواست شیر کلر ک نے میری dictation پر تحریر نہ کیا تھا۔ میں نے درخواست پڑھ کر جواب درخواست لکھوایا تھا۔ مجھے یاد نہ ہے کہ میں نے درخواست پڑھتے وقت اس بات کی نشان دھی کی تھی کہ نہیں کہ درخواست کے فقرہ نمبر 2 میں فیصلہ شائی کی تاریخ موجود نہ ہے۔ میں 1988 سے 1998 تک ملک عبدالرحیم صاحب کے جو نیز کے حیثیت سے کام کیا۔ یہ درست ہے کہ انکی طرف سے دائرہ کردار Consent Decree کے مقدمات میں میں مسؤول علیہم کی طرف سے وکیل ہوتا تھا۔ وکالت نامہ کے کوائف بھی شیر کلر ک مذکور کی قلمی ہیں۔“

(*Emphasis supplied*)

It is also pertinent to observe that the conceding written reply submitted on behalf of the donor also contains the name and signature of respondent No.3 (the arbitrator), without any plausible justification or legal requirement. These facts raise serious doubts as to the veracity of the entire arbitration proceedings culminating into passing of decree, based on the award rendered thereupon.

17. Instead of appreciating the above referred discrepancies, irregularities and illegalities in relation to the arbitration proceedings as well as the award, the learned Courts below, in general and the Revisional Court in particular, have proceeded to dismiss the application of the petitioner on the basis of comparison of disputed signatures of the donor with his admitted signatures, in terms of Article 84 of *Qanun-e-Shahadat* Order, 1984 ("the QSO") and the fact that only husband of petitioner No.2 appeared as witness who could not substantiate lack of knowledge of the petitioners regarding the making of the impugned oral gift and subsequent proceedings as also failure of the petitioners to prove any disability of the donor to make the gift, with his free consent, on account of advanced age or any illness.

18. As regards comparison of the signatures of the donor by the Court, certainly, there is no legal bar to prevent the Court from comparing signatures or handwriting itself, rather, Article 84 of the QSO empowers the Courts to carry out such exercise, however, the naked-eye comparison without the aid of an expert in this regard, involves fallibility and may not be the conclusive proof thereof, hence, any conclusion drawn thereof is susceptible to error and has been given undue weightage in the present case.

19. As far as absence of evidence on part of the petitioners' side to establish lack of knowledge of the oral gift for the purposes of limitation for filing application under Section 12(2), CPC is concerned, suffice to observe that admittedly, petitioners No.1 & 2 were married step sisters of predecessor of the contesting respondents and residing in their marital abode. Therefore, possibility cannot be ruled out that they were prevented from the knowledge of making of the impugned oral gift and subsequent proceedings, hence, their stance that they came to know about the making of the oral gift only when they were denied access to the

disputed property has force that has been erroneously ignored by the Courts below. Moreover, this is fair justification and has not been refuted by contesting respondents by leading any *contra* evidence. Therefore, the application of the petitioners was not barred by time.

20. Similarly, the advanced age of the donor is not denied. Admittedly, the donor died, approximately, within one year after making of the impugned gift at the age of 90 years. Therefore, once the challenge was laid to the decree based on the award, made Rule of the Court, through application under Section 12(2) of the CPC, predecessor of the contesting respondents, being beneficiary of the oral gift, was obligated to prove the said transaction as the oral gift was extremely suspectful as examined hereinabove, having purportedly been made by the donor, on whose mental and physical health, serious questions had been raised on account of advanced age. In this regard, Section 16 of the Contract Act, 1872 ("the Act 1872") becomes relevant and its sub-section (3) throws burden of proof on the beneficiary that a contract (oral gift in the instant case) was not induced by the undue influence when two factors are found against him. Firstly, if the beneficiary is in a position to dominate the will of another (the donor in instant case) and secondly, if the transaction appears, on the face of it, to be unconscionable. Section 16 of the Act 1872 reads as under:

"16. "Undue influence" defined. (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another-

(a) where he holds a real or apparent authority over the other or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Evidence Act, 1872.”

(Emphasis supplied)

The impugned oral gift, by all standards was unconscionable as it is inexplicable as to why the donor would want to deprive his daughters from his inheritance in the disputed property (residential house) when, admittedly, he had equitably distributed his other property(ies). It is trite law that the beneficiaries of a gift, more importantly oral in nature, have to establish it by giving particulars of the gift, including when and where the gift was made, which predecessor of the contesting respondents have not provided and the said failure is fatal to the case of the contesting respondents.

21. At this juncture, it is imperative to observe that Islamic philosophy aims to end injustice and oppression of the weak and vulnerable segment of the society by conferring equal status upon the women and ordaining not to abuse and exploit the vulnerables. Glorious Quran recognizes the right of women to inherit which has a close nexus with enjoying a complete legal personality by the females. The Constitution of the Islamic Republic of Pakistan, 1973 also extends protection of rights of the women, *inter alia*, through Article 25 read with Article 37 thereof that talk about equality and special protection, respectively. In case reported as *Khair Din vs. Mst. Salaman and others* (**PLD 2002 SC 677**), the Supreme Court of Pakistan held that no benefit could be derived by those

claiming rights against the female legal heirs, based on fraudulent transactions. It has been further held that an heir is considered to be in constructive possession of the property on behalf of all the heirs inspite of his exclusive possession. Moreover, the oral gifts like one, in the present case, forming subject matter of an arbitration proceedings, and the subsequent award and decree based on it, are contracts that have been held to be against the public policy, by the Supreme Court of Pakistan and hence, not enforceable. Case reported as Farhan Aslam and others v. Mst. Nuzba Shaheen and another (2021 SCMR 179) is referred in this regard.

22. The above analysis propels this Court to opine that factum of an arbitration proceedings having been conducted, between the donor and the *donee*, subsequent to the making of impugned oral gift and passing of the award in favour of the *donee* that was made Rule of the Court, *ipso facto* does not absolve the *donee* to prove the genuineness of the impugned oral gift, more particularly, when the same results into depriving the female legal heirs of the donor, from their rights in inheritance of the disputed property belonging to the donor. This Court is of the considered opinion that it does not make any difference if such contracts are camouflaged and given legal cover through initiation of arbitration proceedings and passing of the award thereafter, when it transpires that such arbitration proceedings initiated and the award passed thereof were mere eye wash and therefore, the *donee* was obligated to prove the transaction, which in the instant case, predecessor of the contesting respondents failed to do.

23. In view of the above discussion, this Court is of the view that both the Courts below have erred in rendering the impugned findings. This constitutional petition has force and merits acceptance, and hence, **allowed**, with costs throughout, and the impugned orders are set aside. As

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a natural corollary, the application of the petitioners under Section 12(2), CPC is accepted and the decree dated 13.02.1995 passed on the basis of award dated 17.01.1995, made Rule of the Court, is set aside.

(ANWAAR HUSSAIN)
JUDGE

Announced in Open Court on 17.11.2023.

Judge

Approved for reporting

Judge

Akram