Judgment Sheet

IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

W.P. No. 31166 of 2017.

Mst. Rehmat Bibi (through L.Rs.) etc.
Versus
Additional District Judge, Gujranwala etc.

JUDGMENT

Date of hearing: 15.03.2024.

Petitioners by: Mr. Irfan Ghaus Ghuman, Advocate.

Respondents by: Mr. Takeel Ahmed Gujjar, Advocate for respondent No.3.

Shujaat Ali Khan, J: - Unnecessary details apart, Muhammad Aslam (respondent No.3) filed a suit for possession through pre-emption against Mst. Rehmat Bibi (predecessor-in-interest of petitioners No.1 to 4), which was partially decreed by the learned Civil Judge, Gujranwala through judgment & decree, dated 30.09.2000, in view of the compromise between the parties. The petitioners, being legal heirs of late Mst. Rehmat Bibi, filed application under section 12(2) CPC challenging *vires* of judgment & decree, dated 30.09.2000, on

the basis of fraud and misrepresentation, which was dismissed by the learned Civil Judge, Gujranwala (learned Trial Court) through order, dated 28.01.2016, against which they filed revision petition but without any positive result as the same was dismissed by the learned Additional District Judge, Gujranwala (learned Appellate Court) *vide* order, dated 24.03.2017; hence this petition.

2. Learned counsel for the petitioners submits that while deciding the matter both the courts below failed to consider that Mst. Rehmat Bibi (mother of the petitioners) died on 20.05.2000 whereas respondent No.3 filed suit on 25.05.2000, thus, no decree could be passed in the said suit even on the basis of acclaimed statement of mother of the petitioners in respect of compromise and that both the courts below omitted to consider the contents of the Death Certificate (Exh.A/1) pertaining to death of mother of the petitioners which was supported by entries in the Register of Deaths, maintained by the Secretary Union Council concerned for the period from 17.06.1995 to 30.12.2014, hence, impugned decisions of the courts below are not sustainable.

3. On the other hand, learned counsel representing respondent No.3, while defending the impugned decisions of

the courts below, states that *mala-fide* on the part of the petitioners is evident from the fact that initially they filed an application for summoning of Secretary Union Council, Kali Suba, as witness but subsequently opted to withdraw the same seemingly for the reason that the said official was not ready to support their stance; that Roshan Din (RW-2), real maternal cousin of the petitioners, clarified that Mst. Rehmat Bibi died on 19.12.2003, thus, the documents, being relied upon by the petitioners, carry no authenticity; that according to Register of Revenue Returns (Exh.R/5) maintained by the Nazir, Civil Courts, Gujranwala, cheque bearing No.87/3093, worth Rs.35,000/- was issued in the name of Mst. Rehmat Bibi which was received by her, on 22.11.2000, upon verification by his counsel, thus, stance of the petitioners that she died on 20.05.2000 being contrary to the record cannot be given any weightage; that the petitioners being aware of the falsity of their claim never made any move for comparison of thumb impression of Mst. Rehmat Bibi from Fingerprint Expert through the learned Trial Court and that concurrent findings of facts recorded by the courts below cannot be upset by this Court in exercise of its constitutional jurisdiction vested under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973.

4. I have heard learned counsel for the parties at considerable length and have also gone through the documents, annexed with this petition.

5. The moot question involved in this petition is as to whether Mst. Rehmat Bibi died on 20.05.2000 or 19.12.2003. To believe that Mst. Rehmat Bibi died on 19.12.2003 both the courts below have relied upon the Death Certificate issued by the Secretary Union Council, Kali Suba and entries in Register relating to deaths in the Union Council prepared by the said official coupled with statement of RW-2.

Firstly, taking up the authenticity of Death Certificate issued by the Secretary Union Council, Kali Suba, I have observed that proper course to prove contents of said document was to summon the Secretary, Union Council concerned. Though, the petitioners filled application to summon the Secretary Union Council, in the shape of additional evidence, but subsequently opted to withdraw the same. Consequences of reliance upon a death certificate without producing the Nazim or the Secretary Union Council concerned has been highlighted in the case reported as *Muhammad Younas and another v. Ghazanfar Abbas and 12 others* (**2017 YLR 2229**) by *inter-alia* observing as under: -

> *"8.*****The copy of death certificate (Ex.D/3) on its face value is to be taken out of consideration for the reasons that neither the Secretary, Union Council nor the Nazim, who put their signatures on the same, were brought into the witness-box to prove the contents of the said document. The production of document on record and its proof are two independent aspects and the latter aspect is vital, which makes a fact to be proved....."*

If the reliance of the courts below on the death certificate of Rehmat Bibi, without examining the Secretary Union Council concerned, is seen in the light of the above-quoted judgment, it stands crystal clear that both the courts below misdirected themselves while relying upon the document, under discussion.

6. Another important limb of the matter in hand is that though after withdrawal of the application, filed by the petitioners seeking permission to produce the Secretary Union Council concerned in the shape of additional evidence, the learned Trial Court was vested with the power to summon the said official as Court Witness to unveil the truth but non-exercise of such jurisdiction vested in the Civil Court resulted into grave miscarriage of justice. The Apex Court of the country in the case reported as *Commissioner of Income-Tax, Companies Zone-II, Karachi v. Messrs Sindh Engineering (Pvt.) Limited, Karachi* (**2002 SCMR 527**) while taking note of the non-exercise of powers vested in a forum has *inter-alia* held as under:-

> *"10.*****Undoubtedly when a Tribunal declines to exercise jurisdiction for one or the other pretext then the basic question of law emerges for consideration whether the decision under challenge is legally justified or not. Here we are not confronted with the situation of counting the shares of the Government or private persons in the respondents organization but our problem is whether jurisdiction has been Justifiably exercised by the Tribunal and High Court or not. There is no cavil with the proposition that non-exercise or mis-exercise of jurisdiction by a forum/Tribunal is relatable to the question of law. However, the forum/Tribunal seized with a proposition is free to form its opinion independently by exercising jurisdiction in a prescribed or settled manner. As it has been pointed out hereinabove that Income Tax Appellate Tribunal had not independently assigned any reason in holding that respondent organization was a public company because it has based its finding on some earlier decision referred to hereinabove and we were not aware that what reasons prevailed upon learned Tribunal while deciding those cases. Thus in such-like situation it was obligatory upon the Tribunal either to have disclosed the facts as well as reasons of earlier case on which reliance was placed or the respondent's case should have been examined independently. As such, we are of the opinion that the Income Tax Appellate Tribunal did not exercise its jurisdiction in accordance with law. Therefore, question of non-exercising of jurisdiction properly by the Tribunal, being a question of law, was liable to be answered by the High Court in its appellate jurisdiction under section 136(2) of the Ordinance but it failed to do so."*

If the conduct of the learned Trial Court as well as that of learned Appellate Court is seen in the light of the afore-referred judgment of the Hon'ble Supreme Court there leaves no ambiguity that both the *fora* failed to exercise the jurisdiction vested in them.

7. It is important to observe over here that learned counsel representing respondent No.3 took exception against non-production of the Secretary Union Council by the petitioners to prove the contents of the Death Certificate (Exh.A/1). To appreciate the plea of respondent No.3, I have gone through the contents of the reply, submitted by respondent No.3, to the application filed by the petitioners seeking permission to produce Secretary Union Council concerned in the shape of additional evidence. Relevant portion from the said reply is reproduced herein under: -

عذرات ابتدائی

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3---- قبل ازیں سیکرٹری یونین کونسل مع رجسٹر حاضر عدالت ہوا تھا تو کونسل سائل نے اس کی شہادت نہ کرائی تھی اسلئے درخواست سائل نہ صرف ناقابل رفت ہے بلکہ قابل اخراج ہے۔

عذرات واقعاتی

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2۔ یہ کہ ضمن نمبر 2 غلط اور بے بنیاد ہے۔ سیکرٹری یونین کونسل بمعہ رجسٹر حاضر عدالت ہوا تھا۔ شہادت قلمبند کروانے کیلئے تو کونسل سائل نے اس کی شہادت قلمبند نہ کروائی اور نہ ہی رجسٹر چیک کروایا جس کی وجہ سے اب سائل کو کوئی حق حاصل نہ ہے کہ وہ رجسٹر کی نقولات پیش کرے۔ کیونکہ وہ پہلے ہی دستاویزی وزبانی شہادت ختم کر چکا ہے۔

When confronted with the above portion from the reply of respondent No.3, learned counsel representing him failed to give even half a reason that as to why his client opposed the application of the petitioners for summoning Secretary Union

Council especially when according to his own showing, statement of said witness had important bearing upon the final outcome of the case. This fact alone is sufficient to establish that both the parties did not come forward with true narration of facts. Similarly, neither the learned Trial Court nor learned Appellate Court exercised the jurisdiction vested in them to arrive at a just conclusion.

8. It is relevant to note that though respondent No.3 filed an application seeking permission to file list of witnesses but did not mention the name of Secretary Union Council concerned in the said list. Had respondent No.3 was so fair to unveil the truth, there was nobody impeding his way to incorporate the name of said official in his application notwithstanding the fact as to whether he was summoned by the petitioners or not. The said omission on the part of respondent No.3 places him equal to the petitioners for non-disclosure of the real facts, in particular the date of death of late Mst. Rehmat Bibi, hence, it is not open for respondent No.3 to blame the petitioners only for suppression of material facts.

9. Insofar as entries of Register relating to deaths in the vicinity, prepared by the Secretary Union Council, Kali Suba, is concerned, suffice it to note a cursory glance over the said

document leads to indubitable conclusion that certain entries therein have been left blank just to accommodate any unscrupulous person and possibility of making any entry relating to death of Mst. Rehmat Bibi, at some subsequent stage, cannot be ruled out. Moreover, against most of the entries National Identity Card Number of the informer about death of anybody, except that of Chowkidar, has been mentioned but against entry relating to death of Mst. Rehmat Bibi though few digits of CNIC of Muhammad Rashid (son of Mst. Rehmat Bibi), who reported her death to the Secretary Union Council, were incorporated but instead of completing the same, they were crossed. The said fact *prima-facie* raises doubts about the genuineness of entries in the Death Register and the same could only be removed by producing the relevant official viz. the Secretary Union Council concerned but failure of both sides to produce the said official and inaction on the part of the courts below to exercise jurisdiction vested in them left the controversy between the parties undecided.

10. Now coming to the reliance of the courts below on the statement of Roshan Din (RW-2), I have observed that there is no cavil with the fact that he is close relative of the petitioners but credibility of said witness stood compromised in view of his

admission that his daughter is married to son of respondent No.3 and likewise daughter of respondent No.3 is married to his son, thus, it was not safe for the courts below to rely upon the statement of said witness especially when said statement was not corroborated by any document and he fell within the category of interested witness. The Apex Court of the country in the matter of *Mst. Saadia v. Mst. Gul Bibi* **(2016 SCMR 662**) while noting down the ramifications of withholding of related witnesses and reliance on the statements of interested witnesses, has *inter-alia* held as under:-

> *"11. Beside, the evidence of these three witnesses the evidence of other two witnesses i.e. PW-4 Gul Bibi/respondent and PW-5 Shah Nadir further reveal that they were interested witnesses installed for the purpose of justifying the execution and genuineness of the two documents i.e. Ex-PW1/1 and PW1/2. However, they also failed as their evidence was not confidence inspiring enough to prove the execution of these two documents. Similarly the evidence of Hand Writing Expert was of no avail as all the documents sent to him; firstly, came from the possession of the respondent; secondly, the comparison of Photostat copies with the originals was not warranted by law; and lastly such exercise was not a conclusive proof about the genuineness of Ex-PW1/1. We, therefore, find much force in the arguments of the learned ASC for the appellant that concurrent findings of the three Courts below suffered from misreading and non-reading of evidence, which resulted in miscarriage of justice to the appellant, thus open to interference."*

11. It is very strange to note that the courts below based their findings on the testimony of Roshan Din (RW-2) despite knowing the fact that he had an axe to grind against the interest

of the petitioners on account of his close relationship with respondent No.3 and his statement was not corroborated by any documentary evidence. It is well-settled by now that documentary evidence outweighs the oral evidence. Reliance in this regard can be placed on the case of *Tassaduq Hussain Shah and others v. Allah Ditta Shah and others* **(2023 SCMR 1635)** wherein the Apex Court of the country, while comparing the *inter-se* worth and value of documentary and oral evidence, has *inter-alia* concluded as under:-

> *"12.*****There is nothing on the record to show that the stance of Allah Ditta was challenged through evidence in rebuttal. It is settled law that documentary evidence takes precedence over oral evidence……"*

If the veracity of the statement of Roshan Din (RW-2) is considered on the touchstone of the afore-referred judgment of the Hon'ble Supreme Court it stands clarified that it was not safe for the courts below to hinge upon the testimony of said witness when the same was not corroborated by the relevant documentary evidence.

12. Learned counsel appearing on behalf of respondent No.3 put much emphasis on the fact that as Mst. Rehmat Bibi received cheque in the sum of Rs.35,000/- from the Nazir, Civil Courts, Gujranwala for withdrawal of the amount deposited by respondent No.3 during pendency of his suit for possession

through pre-emption as *Zar-e-Soim* the plea of the petitioners that she died on 20.5.2000 does not hold any substance. The said assertion of learned counsel for respondent No.3 cannot be given much importance for the reason that though respondent No.3 mentioned the name of Civil Nazir at Sr.No.3 in para 5 of his application seeking permission to place on record list of witnesses but did not produce the said official in the witness box despite the fact that some of the persons, referred in above para of application, under discussion, were produced. Though learned counsel for respondent No.3 has blamed the petitioners for non-production of Secretary, Union Council concerned but has not come forward with any plausible explanation as to why Civil Nazir was not produced in evidence despite the fact that his name was duly mentioned in the application filed by respondent No.3 seeking permission to place on record List of Witnesses. The august Supreme Court in the case of *Mst. Zarsheda v. Nobat Khan* (**PLD 2022 SC 21)** while dealing with the repercussions of withholding of an important witness by a party during the course of evidence has *inter-alia* held as under:-

> *"9.*****Adverse inference for non-production of evidence is one of the strongest presumptions known to law and the law allows it against the party who withholds the evidence……"*

In case, the conduct of the parties in the present matter is seen in the light of the afore-quoted judgment of the Hon'ble Supreme Court, it stands proved that if the courts below were justified to form opinion against the petitioners for non-production of the Secretary Union Council concerned they were supposed to justify the conduct of respondent No.3 for non-examining of the Civil Nazir especially when his statement had important bearing to ascertain as to whether the lady, who received cheque from him, was Rehmat Bibi or not but omission of such import limb on the part of the courts below affirms that controversy between the parties was not decided in an impartial manner.

13. In order to appreciate the contention of learned counsel for respondent No.3 that Mst. Rehmat Bibi received cheque from the Civil Nazir, Gujranwala, on 22.11.2000, I have summoned original Register of Revenue Returns maintained by the Civil Nazir, Gujranwala, according to which afore-referred cheque was received by one Mst. Rehmat Bibi upon her identification by her counsel, namely, Tayyab Tahir Advocate (RW-4). Reliance upon the identification of Mst. Rehmat Bibi by said witness was unjustified for the reason that during cross-examination said witness showed his inability to clarify that as

to when Rehmat Bibi came to him and who accompanied her at the relevant time. He further showed his lack of knowledge about the person who facilitated compromise between the parties. Moreover, lack of knowledge of said witness about the name of the Judge, who recorded the statement of Rehmat Bibi, acknowledging compromise, raises serious doubts about the authenticity of his statement. In this scenario, reliance of the courts below upon the statement of said witness connotes to lack of legal acumen on their part.

14. Since both sides did not come up with true narration of fact, coupled with the fact that intricate question relating to the death of Rehmat Bibi was involved in the matter, both the courts below were supposed to follow the principle of sifting grain from the chaff to arrive at a just conclusion about date of death of Mst. Rehmat Bibi which had important bearing on the outcome of the case but both the courts below, instead of unveiling the truth, proceeded to rely upon the documents contents whereof were not proved as per law. It is well established by now that contents of a document, in particular a public document, can be proved by producing its custodian in due course.

15. Another important facet of the instant matter is that on the one hand stance of respondent No.3 is that Mst. Rehmat Bibi died on 19.12.2003 but on the other he produced copy of Register (Exh.R/10) relating to deaths prepared by the Secretary Union Council, on the basis of information furnished by relative of the deceased(s) or Chowkidar of the village, wherein date of death of Mst. Rehmat Bibi has been mentioned as 20.05.2000. In such situation, both the courts below were bound to take pain to unearth the real date of death of Mst. Rehmat Bibi as it was the sole decisive factor for decision of *lis* between the parties.

16. While scanning the decisions of the courts below, I have observed that they have given much importance to the statement of Mr. Manzoor Hussain, Advocate (RW-3) despite the fact that the said witness during cross-examination showed his inability to state that who was accompanying Mst. Rehmat Bibi when she approached him to hire his legal services. The said fact leads to irresistible conclusion that late Mst. Rehmat Bibi had no independent advice from any male member from her family either at the time of engaging Mr. Manzoor Hussain, Advocate (RW-3) as her counsel, or at the time of making statement before learned Trial Court acknowledging compromising with respondent No.3. The Hon’ble Supreme

Court of Pakistan in the case reported as *Ch. Muneer Hussain v. Mst. Wazeeran Mai alias Mst. Wazir Mai* (**PLD 2005 SC 658**) while taking serious note of the casual approach of the courts while adjudging the execution of any document by a female, without independent advice from a male family member, has *inter-alia* observed as under:-

> *"It has not been established through evidence that the above-said documents were executed by her or that they were executed by her voluntarily out of her own free-will and that at the time of execution of said documents she had an independent advice of her close male relatives and that the contents of the said documents were read over to her and nature of the transaction was explained to her. The bare perusal of the said documents shows that in this regard, the needful was not done. The onus was on the appellant and he miserably failed to discharge the same. The learned counsel for the appellant has not been able to point out any non-reading of evidence or illegality, in the impugned judgment. We are of the view, that the High Court has drawn correct conclusions from facts found and we are not inclined to interfere merely because the learned counsel for the appellant is of the view that another inference is also possible. The respondent is being continuously victimized and is out of possession of her landed property measuring about 50 acres, inherited by her from her father, for the last 26 years and is suffering because the appellant thought that since she is a helpless female, he can grab her property."*

17. While relying upon the testimony of Mr. Manzoor Hussain (RW-3) both the courts below omitted to note that the said witness showed his lack of knowledge about the person, who presented Wakalatnama before the court on his behalf. Moreover, the said witness admitted that he was not aware as to

whether written statement was filed in the suit and as to whether it was part of judicial file or not. Furthermore, the said witness stated that he did not remember who facilitated recording of statements of parties before the Court as a result of compromise. The said witness further admitted that he was not aware about the fact that the woman, who appeared to make statement in lieu of compromise, possessed her National Identity Card, having picture of Mst. Rehmat Bibi. The conduct of the said witness became doubtful when during later part of his cross-examination, the said witness, with a view to improve case of the respondents, stated that the written statement was not filed due to compromise between the parties without divulging that as to how he came to know about any future compromise between the parties especially when respondent No.3 was hotly pursuing his suit and the learned Trial Court had been adjourning the case for filing of Written Statement. In ordinary circumstances, the statement of a member of the Bar vouching a fact is given due credence but when such statement does not clinch the real controversy between the parties rather seems to be partial, same cannot be given precedence over the documentary evidence. Reference in this regard can be made to the case of *Mst. Safia Begum v. Muhammad Ajmal* (**2007 YLR 3030**) wherein it has *inter-alia* been held as under:-

> *"4. The agreement has not been proved through production of two marginal witnesses as required under Article 17 of Qanun-e-Shahadat Order 1984. Haji Inayat Ullah is the sole witness in support of agreement, who is father of the plaintiff. Ghulam Nabi son of Chiragh Din is step-brother of Mst. Safia Bibi. He did not enter in the witness box. Muhammad Younis Mughal, P.W.3 is not the attesting witness. He only authored the document and read over its contents to the parties and candidly admitted that Mst. Safia Bibi was not personally known to him. He required her to bring male member of family which shows his mind of non availability of independent advice to appellant. He cannot be treated at par with the petition writer, who maintains a register with page marking and entries are carried with serial No. and date. An Advocate is not obliged to keep record. He had not produced his register for examination in Court. His statement, thus, is of no evidentiary value. Reference can be had to Altaf Hussain Shah v. Nazar Hussain Shah (2001 YLR 1967) and Qasim Ali v. Khadim Hussain (PLD 2005 Lah. 654)"*

If the authenticity of statement of Mr. Manzoor Hussain, Advocate (RW-3) is adjudged in the light of the afore-referred judgment there leaves no ambiguity that it was not safe for the courts below to rely upon the same while determining the fact that as to whether Mst. Rehmat Bibi was alive at the time of filing of suit by respondent No.3 and she appeared before the court owning compromised between the parties.

18. Now taking up the question relating to the credibility of the statement of Mr. Tayyab Tahir, Advocate (RW-4), I have noted that according to Manzoor Hussain (RW-3) statements of the parties relating to compromise were facilitated by RW-4. While replying to a question as to name of the Presiding Officer

who recorded the statements of the parties, RW-4 showed his inability to tell the name of the Presiding Officer, who recorded statement of the parties relating to compromise. Moreover, the said witness also stated that he did not remember as to whether there was picture of Mst. Rehmat Bibi on the National Identity Card presented at the time of making statement before the learned Trial Court or not. In this scenario, reliance of the courts below on the statements of RW-3 & RW-4 to believe that at the time of compromise Mst. Rehmat Bibi was alive, is not justified.

19. It is not out of place to mention over here that none of the parties came forwarded with true picture and in such scenario responsibility of the courts to arrive at a just conclusion increased manifold. Further, not only death of Mst. Rehmat Bibi was reported to the Secretary Union Council, Kali Suba, by Muhammad Rasheed (petitioner No.2) but also mutation of inheritance bearing No.991 was attested on 31.12.2009 on the basis of his statement but the said person did not enter the witness box despite the fact that according to his own statement (referred in Mutation No.991 *Supra*) Mst. Rehmat Bibi died about six years prior to attestation of said mutation which approximately comes to year 2003. In the given circumstances,

both the courts below failed to clinch the issue between the parties in its true perspective.

20. While going through the evidence of the parties, I have observed that Muhammad Naseer (AW-1) and Noor Muhammad (AW-2) disclosed the name of the person who led the funeral prayer of Mst. Rehmat Bibi but non-summoning of said person by the learned Trial Court, to reach a just conclusion, shows that both the court failed to exercise the jurisdiction vested in them. Had the statement of said person been recorded, it was very easy for learned Trial Court to arrive at just decision.

21. In ordinary circumstances, documentary evidence outweighs the oral evidence but it is exceptional case wherein documentary evidence cannot be relied upon without due corroboration to believe that Mst. Rehmat Bibi was alive at the time of making statement before learned Trial Court owning compromise between the parties as entries in documents, referred *supra,* contradicted each other. In this backdrop, I think it appropriate to remit the matter back to learned Trial Court for decision afresh.

22. For what has been discussed above, instant petition is **accepted** and impugned decisions, rendered by the courts

below, are **set-aside**. As a result, the application filed by the petitioners, under section 12(2) CPC, would be deemed to be pending which shall be decided by the learned Trial Court **afresh**. During post remand proceedings learned Trial Court would be at liberty to summon anybody whose statement, in its opinion, would further the ends of justice.

23. The Office is directed to return the original Register of Revenue Returns, requisitioned from the Nazir Civil Courts, Gujranwala, forthwith.

Judge

Announced in open Court today i.e. 02.04.2024.

Approved for Reporting.

Judge

G.R.*