

Stereo.HCJDA-38
JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

C.R. No.661 of 2012

Mst. Samina Kausar and others
v.
Mst. Nasreen Bibi and others

JUDGMENT

Dates of hearing	15.11.2023
Petitioners by	Hafiz Jamil Ahmad Naqeebi, Advocate.
Respondent No.1 by	Muhammad Azam Warraich, Advocate.
Respondent Nos.2 to 6	<i>Nemo.</i>

Rasaal Hasan Syed, J. The petitioners in this civil revision have challenged the judgments and decree of the courts below whereby their suit for declaration with consequential relief was dismissed by the learned Civil Judge on 02.3.2011 which judgment was affirmed in appeal by learned Addl. District Judge vide judgment dated 31.1.2012.

2. Facts from which the instant case stems are that the petitioners instituted a suit for declaration to challenge mutation Nos. 133 and 206 dated 27.5.2005 claiming that the same were a result of connivance with the revenue staff and that late Ghulam Nabi their paternal uncle was suffering from paralysis and was mentally incapacitated because of this condition from differentiating between right and wrong and that he was bedridden on account of his illness and remained so for about 3½ years and that during his prolonged illness mutations were got attested against his consent. Suit was

resisted, issues were framed and evidence recorded. Petitioners Zareena Kausar and Samina Kausar appeared as P.W.1 and P.W.2 and also produced three other witnesses in their support as P.W.3 to P.W.5. Respondent No.1 appeared as D.W.1 and produced D.W.2 and D.W.3 to fortify her stance. She also tendered in evidence documents Ex.D-1 to Ex.D-4. On considering the evidence and submissions pro and contra the learned Civil Judge dismissed the suit while concluding that the petitioners failed to produce any medical evidence in support of the allegations of serious illness and mental incapacity allegedly suffered by the deceased Ghulam Nabi before his death nor could they establish their case by any credible evidence. In appeal the learned Addl. District Judge duly reexamined the entire evidence and affirmed the findings recorded by the Trial Court.

3. Heard.

4. From the narrative given supra it is manifest that in their suit for declaration with consequential relief the petitioners claimed that late Ghulam Nabi son of Abdul Ghani owned land measuring 21 kanals, 18 marlas in khata No.52, khatuni No. 96/97 in Mauza Nehal Garh, Tehsil and District Narowal as per register haqdaran for the year 1999-2000; that he also owned land measuring 05 kanals, 09 marlas in khata No.45, khatuni No.100 as per register haqdaran for the year 1999-2000 in Mauza Bhattian Devan, Tehsil and District Narowal which land on his death devolved upon the

petitioners and respondent Nos. 2 to 6 and respondent No.1 to the extent of 3/4th and 1/4th shares respectively. It was asserted that late Ghulam Nabi was paternal uncle of petitioners and maternal uncle of respondent Nos. 2 to 6 while respondent No.1/Mst. Nasreen Bibi was his widow. Petitioners claimed that about 3½ years before the filing of the suit Ghulam Nabi had a stroke of paralysis, who became bedridden and was unable to walk or to identify any person and was also unable to distinguish between good or bad and that respondent No.1 was living with him as his wife during the period of such illness who in connivance with the revenue staff got the suit land transferred in her own favour through mutation Nos. 133 and 206 dated 27.5.2005 by fraud and that Ghulam Nabi was on deathbed suffering from marz-ul-maut who had lost his senses and died on 02.7.2006. With these allegations the petitioners sought annulment of the mutations and claimed 3/4th share in the property. Based on the plea and assertions made in the plaint the Trial Court framed five issues out of which issues Nos.1 to 3 are relevant. These are reproduced below for facility of reference:

“ISSUES:-

1. Whether the original owner of suit property Ghulam Nabi died during Marz-Ui-Mout? OPP
2. Whether the defendant No.1 in collusion with the revenue authority fraudulently transferred the disputed property in her name through mutation Nos.133, 206 dated 27.5.2005 and same mutations are ineffective upon the rights of plaintiff? OPP
3. Whether the plaintiffs have no cause of action to institute the present suit? OPD”

5. After considering the evidence the findings recorded by the learned Civil Judge were that the petitioners/plaintiffs could not prove their case. In substance the basis of the findings of the learned Civil Judge were that the petitioners did not produce any medical evidence to prove that the deceased was suffering from the ailment alleged or he could not walk or speak or was mentally incapable of taking decisions. The learned Civil Judge took note of the fact that P.W.1 (plaintiff No.2) in her cross-examination stated that her uncle was not given any medical treatment nor did he ever ask for medical treatment while P.W.2 (plaintiff No.1) claimed such treatment of the deceased through one Dr. Parvaiz but he was never produced in the witness-box. As regards the testimony of P.W.3 Muhammad Ashraf, his testimony was disbelieved as he admitted that he never accompanied late Ghulam Nabi for medical treatment and that he did not know the name of the doctor who ever declared Ghulam Nabi as mentally incapacitated. As to the statement of P.W.5 who identified the mutations under challenge and also appeared for the petitioners, it was observed that he admitted that he identified Ghulam Nabi when he was asked by the patwari as to whether he knew Ghulam Nabi or not and that he also put his signatures on the mutations.

6. The crux of findings was that the petitioners having taken specific stance about the alleged illness of the deceased

Ghulam Nabi which according to them continued for 3 $\frac{1}{4}$ years, they were under heavy onus to prove the plea and they also were under heavy onus to establish fraud but had failed to do so. The non-production of medical evidence was also sufficient to disbelieve their version. The learned Addl. District Judge in appeal reexamined the entire evidence and observed that the petitioners failed to produce any medical certificate or medical evidence or so much as a prescription of competent medical practitioner. There was no evidence on record to prove that the deceased Ghulam Nabi had ever received medical treatment before his death. Dr. Parvaiz was claimed to be medical attendant of Ghulam Nabi was never produced nor any application was made for summoning the said doctor in evidence and, therefore, the petitioners had failed to discharge the onus to prove their case. As against the evidence of petitioners, respondent No. 1 appeared in the witness-box as D.W.1 who deposed that the oral gift was made 14 months prior to the death of Ghulam Nabi and that the witness Asghar Ali Bhatti, Naib Nazim Union Council, had accompanied D.W.1 to the *patwarkhana* of the mauza. He was also *pattidar* of the same village/mauza and identified the deceased. He appeared as witness for the petitioners/plaintiffs as P.W.5 and attempted to extend corroborative support to the petitioners but he could not deny that he had identified Ghulam Nabi before the patwari and tehsildar and that he had signed the register of mutation and

that he always used to sign after reading the contents of writing and all these facts proved that Ghulam Nabi did appear before the patwari and tehsildar of the mauza for attestation of mutations and that there was no evidence of fraud and collusion. With these amongst other reasons the learned Addl. District Judge dismissed the appeal.

7. Learned counsel for the petitioners could not point out any misreading or non-reading of evidence by the courts below whereby the suit of the petitioners was concurrently dismissed. On review of the entire evidence it is discernable that the petitioners' stance for seeking indulgence against the mutations was based on the plea that due to attack of paralysis the deceased Ghulam Nabi suffered from serious ailment including mental unsoundness, inability to recognize anyone, inability to walk or speak or talk, inability to identify anyone, inability to decide between right or wrong and inability to perform his day-to-day affairs. And that he was in the state of marz-ul-maut during which period the mutations were got attested. In the first instance the petitioners did not allege in the plaint that the deceased ever remained under medical treatment of a doctor or that they had ever provided medical treatment to him for such alleged illness. By attributing unsoundness of mind, the petitioners in fact were alleging insanity. Question in this case was as to whether the petitioners had been able to establish the plea of mental unsoundness or disability as claimed. In Muhammad Munir

and others v. Umer Hayat and others (2023 SCMR 1339) it was observed to the effect that the evidence of layman, especially relatives like son, daughter, wife, etc. may be relevant but being biased and exaggerated it cannot be conclusive. In law where the treatment is claimed to be by a qualified medical practitioner the appearance of such expert in the witness-box is necessary and non-production of such person without any plausible explanation would amount to a serious evidentiary flaw. In the instant case the plaint was silent as to the medical treatment of the deceased by any particular doctor or specialist for the illness claimed. P.W.1 who was one of the plaintiffs in the case stated that their paternal uncle late Ghulam Nabi was not given any medical treatment by them nor did he ask for it. P.W.2 claimed medical treatment by one Dr. Parvaiz as well as by many other doctors from time to time but none of them was produced in evidence. In view of the assertions as to the nature of the disease, the deceased was allegedly suffering from it was incumbent on the petitioners to have produced some medical evidence of a specialist or the person who was allegedly treating the deceased in his lifetime. Notwithstanding the same, no effort was made nor any application was filed for production of Dr. Parvaiz or any other doctor under whose treatment the deceased, according to petitioners, had allegedly remained. The non-production of such evidence was a pivotal flaw in the case of the

petitioners which fact was rightly taken note of by the courts below to disbelieve their stance. As to the claim that on account of paralysis the deceased Ghulam Nabi had lost his senses and was unable to recognize or to perform his quotidian functions and that he was passing through the state of marz-ul-maut; paralysis asserted could not automatically entail the inference of mental incapacitation or incomprehension which had to be specifically proved qua the disputed document in view of the rule supra.

8. The plea of the petitioners of the deceased suffering from marz-ul-maut itself also could not be proved by any medical evidence or other evidence worthy of consideration. Reference in this respect can be made to the case of Mst. Chanan Bibi and 4 others v. Muhammad Shafi and 3 others (PLD 1977 SC 28) where it was observed that:

"...The law applicable to the case is not in controversy. If the gift by Rajwali was made under, what the Privy Council described in Arabi Ghulam Arif v. Saiboo 34 I A 167 as "pressure of the sense of the imminence of death" then the gift would be hit by doctrine of marz-ul-maut. The same criterion was accepted by this Court in the case of Shamshad Ali Shah noticed earlier. Both these precedent cases set out the following factors which the Court should consider to sustain the conclusion that the impugned transaction was made under such pressure:

- (i) Was the donor suffering at the time of the gift from a disease which was the immediate cause of his death?
- (ii) Was the disease of such a nature or character as to induce in the person suffering the belief that death would be caused thereby, or, to engender in him the apprehension of death?
- (iii) Was The illness such as to incapacitate him from the pursuit of his ordinary avocations-a circumstance which might create in the mind of the sufferer an apprehension of death?
- (iv) Had the illness continued for such a length of time as to remove or lessen the apprehension of immediate fatality or to accustom the sufferer to the malady?"

The first is essentially a question of fact and the best evidence could be that of a medical attendant who treated the deceased at the relevant time. It is noteworthy that in various cases cited at the Bar some doctor or Hakim had appeared to testify to the condition of the patient at or about the time the impugned instrument was executed. Evidence of laymen particularly of relatives may be relevant. But it cannot be conclusive particularly when it is partisan and exaggerated. In the instant case, it was admitted by Ghulam Fatima plaintiff that though Rajwali remained under the treatment of a Hakim at Bhera but he was not examined. I consider this as a serious drawback in the plaintiff's case. The burden of proof of issue relating, marz-ul-maut lay heavily on the plaintiff, and the oral evidence did not inspire the confidence of the trial Judge...

...Thus it is wrong to suggest that stroke of paralysis is immediately dangerous to life and that merely because Rajwali was suffering from paralysis it must be inferred that he was under pressure of the sense of the imminence of death."

Reference may also be made to Safi Ullah v. Ghulam Jabbar and four others (PLD 1955 Lah. 191) wherein the gift was challenged on the ground that the deceased suffered from prolonged illness and was bedridden before his death and that he executed the gift on 24.3.1948 and died on 28.8.1948; it was observed to the effect that mere long drawn illnesses like paralysis or gout per se were insufficient to sustain plea of marz-ul-maut.

9. Curiously, the petitioners claimed that late Ghulam Nabi had been suffering from paralysis for more than three years and that during this period as per P.W.1 he was not provided any medical treatment but as per P.W.2 he had been treated by one Dr. Parvaiz who was not produced as a witness nor did the petitioners produce any medical evidence like medical certificate or doctor's prescriptions to prove that the man was suffering from unsoundness of mind. Crucial

point for determination in the instant case was the plea of insanity or unsoundness of mind at the time of attestation of mutations and best evidence to prove it could be of medical attendant/expert who treated the petitioners' predecessor at the relevant time but he was not examined nor any plausible explanation was furnished as to why he was not produced in evidence. Burden of proving the alleged unsoundness of mind was in the first instance on the petitioners who had failed to discharge it by producing any credible evidence.

10. As against this respondent No.1 appeared as D.W.1 and deposed on oath that the suit land was transferred in her favour through impugned mutations, she was in possession thereof and that the transaction was made 14 months before the death of Ghulam Nabi and that he was not suffering from any ailment which could affect his mental state or rendered him incapacitated from dealing with his day-to-day affairs and that the deceased was living with her till his death. She was supported by D.W.2 and D.W.3 who used to visit late Ghulam Nabi and deposed that the deceased had acknowledged before them about the attestation of mutation and of gifting the property and that he was physically and mentally capable to deal with his day-to-day affairs and that the respondent No.1 was in possession of the property. The significant factor is that the respondent No.1 was married to the deceased, the couple remained issueless but lived happily together. P.W.2 herself admitted that the deceased and

respondent No.1 had good relations and both were living together. Knowing well that he was issueless and that his wife served him throughout by giving good and dutiful company, being issueless, it would be not unusual that difficulty which the widow could potentially suffer or undergo if she was not protected with sufficient resources in case of his demise and, being so, the motive appeared to be justified and obvious. It is not a case of gifting of the entire property to a daughter by ignoring the sons or to a son by ignoring the daughters. Rather it was the case where the couple who was issueless and the property was being transferred by the husband to the wife in lifetime to provide protective coverage.

11. Another factor pertinent in the case was that petitioner Nos.1 and 2 claimed to be paternal nieces of deceased while respondent Nos.2 to 6 claimed to be maternal nieces who were not joined as plaintiffs, despite having same claim/interest in the inheritance of deceased who neither filed any suit nor supported the petitioners in the present case and rather opted to stay away from the proceedings. Petitioners could not give any plausible justification for their not joining in the case with them and only claimed that for some unavoidable reason they could not be joined. Obvious inference shall be that they did not support the petitioners as they knew that their maternal uncle had validly transferred the property to his issueless wife. The mutations were

attested on 27.5.2005, Ghulam Nabi remained alive for 14 months after attestation but he never challenged the mutations and, therefore, the petitioners could not challenge the validity of the gift made by the deceased who had acquiesced to the transaction by his conduct and action. As such the petitioners have no locus standi or cause of action to file the suit.

12. For the reasons supra, the findings of the courts below do not suffer from any error of law or misreading of the record. No ground is made out for interference. In result, instant revision petition is without substance which is accordingly **dismissed**.

(RASAAL HASAN SYED)
JUDGE

ANNOUNCED IN OPEN COURT ON **28.11.2023**

JUDGE

APPROVED FOR REPORTING

JUDGE

*Rabbani**