

In the Supreme Court of Pakistan
(Appellate Jurisdiction)

Present:

Mr. Justice Anwar Zaheer Jamali, HCJ.
Mr. Justice Amir Hani Muslim
Mr. Justice Iqbal Hameedur Rahman

Civil Appeal No. 194-P of 2010

(on appeal from the judgment of Peshawar High Court,
Peshawar, dated 24.11.2008 passed in C.R No.1575/2004)

Mst. Saadia

...Appellant

VERSUS

Mst. Gul Bibi

...Respondent

For the appellant: Mr. Abdul Sattar Khan, ASC.
Mr. M. Ajmal Khan, AOR.

For the respondent: Mr. Muhammad Shoaib Khan, ASC.
Mr. Muhammad Zahoor Qureshi, AOR.

Date of hearing: 15.12.2015

JUDGMENT

Anwar Zaheer Jamali, C.J. – In respect of a house as detailed in the heading of the plaint in Suit No.32/1, bearing No.923, situated at Mohallah Shah Faisal Kochi Bazar, Chowk Nasir Khan, Peshawar City (hereinafter referred to as “suit house”), on 21.1.2002, respondent through her brother and special attorney had instituted a suit for declaration and permanent injunction against the appellant with the following prayer:-

(i) دعویٰ استقرار حق بدین طور کہ مدعیہ مکان املاک شماری نمبر 923 محدودہ بحدودات شرقاً مندرالباب راستہ کوچہ بستہ، غرباً مکان ملکیتی محمد جمیل شمالاً مکان محمد اسماعیل جنوباً سرائے گوہر علیشاہ حال مکان ناصر و عبدالرؤف واقع محلہ شاہ فیصل کوچی بازار چوک ناصر خان پشاور شہر کی بروئے ہبہ نامہ محررہ

2/8/1995 مالکہ وقابضہ ہے اور مدعا علیہا کا مکان متدعوئیہ سے کوئی تعلق اور واسطہ نہیں ہے اسلئے مدعا علیہا کسی طور بھی خود کو مکان متدعوئیہ کی مالکہ وقابضہ ظاہر کرنے کی مجاز نہ ہے۔
(ب) دعوئی بمراد صدور حکم امتناعی دوائی برخلاف مدعا علیہا بدیں طور کہ وہ خود کو مکان متدعوئیہ کی مالکہ وقابضہ ظاہر کرنے اور اس پر قبضہ مدعیہ میں دخل مداخلت کرنے سے باز و ممنوع رہے۔

2. The claim of respondent in respect of the suit house was based on two gift deeds dated 21.7.1986 and 02.8.1995, Ex.PW-1/1 and PW-1/2 respectively. As per the earlier gift of 1986, purportedly Mst. Fehmida Begum wife of Abdul Majeed Khan, who owned the suit property through registered deed dated 17.1.1977, had gifted the suit house to her brother Mirza Rab Nawaz, who was husband of the respondent, while by second gift deed dated 02.8.1995, said Mirza Rab Nawaz had purportedly gifted the suit house in favour of his wife, the respondent.

3. In her written statement, the appellant categorically denied such claim of respondent and disputed the genuineness of both the purported gift deeds produced and relied upon by the respondent to establish her title over the suit house. She also disclosed other relevant facts about the legal heirs/brothers of Mst. Fehmida Begum, and her own relationship with the respondent, being her only paternal niece (daughter of her deceased husband's brother). The appellant further disputed the maintainability of the suit on various legal grounds, as shown in the plaint.

4. Upon divergent pleadings of the parties, as noted above, the trial Court of learned Civil Judge, Peshawar, framed six issues, out of which issue No.5 was the crucial issue for determination, which related

to the genuineness or otherwise of the two purported gift deeds Ex-PW1/1 and PW1/2, relied by the respondent to claim her exclusive title over the suit house.

5. At the stage of evidence, the respondent had examined five witnesses including herself while the appellant had examined only her mother in law and attorney. Besides, another witness was examined by the Court as CW-1/1, who was the handwriting expert, to whom Ex-PW1/1 and some other documents purportedly bearing signatures/thumb impression of Mst. Fehmida Begum were sent for comparison of her signature/thumb mark over Ex-PW1/1.

6. The Civil Judge, Peshawar at the conclusion of proceedings in the suit, vide judgment dated 30.7.2004 decreed the suit in favour of respondent. This judgment was challenged by the appellant through an appeal under section 96, CPC filed before the Court of 2nd Additional District Judge, Peshawar on 29.9.2004, which was dismissed by the first appellate Court vide its judgment dated 18.11.2004.

7. These concurrent findings of the two Courts below were then challenged by the appellant in Revision Petition No.1575/2004, filed before the Peshawar High Court, Peshawar on 15.12.2004, which was finally heard and dismissed vide impugned judgment dated 24.11.2008. Against these concurrent findings of the three Courts below, when Civil Petition for leave to appeal was filed by the appellant, leave was granted in terms of the order dated 06.4.2010, which reads as under:-

“A suit for declaration and perpetual injunction was filed by Mst. Gul Bibi (respondent) against Mst. Saadia (the petitioner). Respondent/plaintiff on the basis of un-registered Hiba claimed to be owner in possession of the suit property. Also pleaded that petitioner (real niece of the real owner of the house) had no right or interest in view of Hiba. Contesting written statement was filed by the petitioner. Issues were framed. Evidence was recorded by the learned trial Judge. The suit was decreed and appeal of the petitioner-defendant was dismissed. Her Civil Revision also failed before the High Court. Hence the present petition for leave to appeal.

2. Learned ASC for the petitioner raised the following questions:-

- (i) As to whether the two Hiba namas could be legally relied upon without due registration in accordance with Section 17 of the Registration Act. And as to whether un-registered Hiba-namas were admissible under Section 49 of the Registration Act *ibid*;
- (ii) Whether the learned Courts below should have legally examined the above questions even if petitioner had failed to properly raise the same in her written statement or in the memo of appeal; and
- (iii) As to whether the respondent/plaintiff succeeded in proving execution of Hiba namas and making of Hiba thereof in terms of law;

3. The above questions require consideration, leave is granted.”

8. We have heard the arguments of learned ASC for the appellant. He has briefly stated relevant facts of the case forming background of this litigation, particularly with reference to the legal heirs of Mst. Fehmida Begum, wife of Abdul Majeed, the original owner of suit house vide registered deed dated 17.1.1977, who died issueless, having five brothers, Mirza Mushtaq, Mirza Nisar, Mirza Abdul Latif, Mirza Nazir Ahmed and Rab Nawaz. Learned ASC submitted that out of

them, three had died issueless, while it was only Mirza Nisar, the fourth brother, who had one daughter Mst. Saadia, the present appellant, who was minor at the time of death of Mst. Fehmida Begum. But in order to deprive her of her legitimate claim in the suit house, being the only descendant from the brothers of Mst. Fehmida Begum, two fraudulent, fabricated and forged gift deeds were prepared/managed. He argued with vehemence that surprisingly both these deeds were attested by four witnesses each, but except one, no other marginal witness of the gift deeds Ex-PW1/1 was examined nor it had been registered to give some credibility or authenticity as to the time of execution of such gift deeds, which could otherwise be easily fabricated and prepared at any time after the demise of original owner Mst. Fehmida. As regards the possession of suit house, he argued that possession of the suit house all along remained jointly with the family of Mst. Fehmida Begum till her death and thereafter with her brothers, including the father of the appellant, when she was a minor, therefore, question of delivery of possession also remained unproved. He further argued that judgments of all the three Courts below suffer from misreading and non-reading of evidence, so much so, that even the original Hibanamas Ex-PW1/1 and PW1/2 were not proceeded before the Court to prove their authenticity, whereas the witnesses were confronted with their photostat copies, which were not admissible in evidence, irrespective of the fact whether any objection to this effect was raised or not.

9. Conversely, the learned ASC for the respondent strongly supported the concurrent findings of the three Courts below on the plea that there was no instance of any misreading or non-reading of evidence and the two documents i.e. Exhibit PW1/1 and PW2/2, being not objected to, were also proved in accordance with law. He further argued that there was ample evidence available on record to show that Mirza Nisar, father of the appellant, maintained strained relations with Mst. Fehmida, the original owner of suit house, therefore, she had gifted the suit house exclusively in the name of her other brother, Rab Nawaz vide Gift Deed dated 21.7.1986. However, when the learned ASC was confronted with the contents of the two Gift Deeds i.e. Exhibit PW1/1 and PW2/2, he did not dispute that both these documents were unregistered and the respondent has no plausible explanation for seeking their attestation from four witnesses for each, out of whom only one relating to Ex-PW1/1 Hakeem Alauddin was examined, but even he did not confirm the signature or thumb impression of Mst. Fehmida over the alleged Gift Deed. He further conceded to the position that no document regarding the death of other attesting witnesses of these documents were placed on record to support the oral assertion of respondent that they all had died before the stage of evidence in the suit.

10. We have carefully considered the arguments advanced by the learned ASCs for the parties and perused the material placed on

record including the original R&Ps of Suit No.3271 of 2002. According to the admitted facts of the case Mst. Fehmida was the exclusive owner of the suit house through registered Sale Deed dated 17.1.1977. She had five brothers, Mirza Mushtaq, Mirza Nisar, Abdul Latif, Nazeer Ahmed and Rab Nawaz, and she died issueless. Although, no exact date of her death has come on record, but one thing is clear that before the institution of declaratory suit by the respondent in the year 2002, the two purported Gift Deeds in her favour had not seen the light of the day in any manner/government record. In addition to it, as per admission of the respondent in her statement before Court, except Mirza Nisar all other brothers of late Mst. Fehmida used to live in the suit house till her death somewhere in the year 1989-90. Moreover, PW/2 Muhammad Yunus, who is stated to be the marginal witness of Exhibit PW1/2, had also clearly affirmed the fact that the purported gift in favour of the respondent allegedly made by her husband, Rab Nawaz, was not signed by him in presence of any person. Further scrutiny of evidence adduced by Respondent reveals that admittedly appellant was the only surviving legal heir of Mst. Fehmida from her five brothers, she was minor at the time of her death and when she became major and agitated her claim over the suit house, respondent came out with the story of two Gift Deeds to legitimize her exclusive claim over the suit house. A man may lie but circumstances do not. In our opinion, the pleadings of the parties and the evidence brought on record from both the sides reveal that judgments of all the three Courts below suffer

from patent misreading and non-reading of evidence inasmuch as the Courts failed to appreciate the true effect of non-production of original gift deeds alongwith the plaint as per the requirement of Order VII, Rule 14, CPC, even at evidence stage, and non-examination of attesting witnesses of the two Gift Deeds. More so, when the evidence of PW/1, PW/2 and PW/3, was also of no help to the case of Respondent to prove the authenticity or genuineness of the documents Exhibit PW1/1 and PW2/2, who respectively deposed as under:-

PW-1 Hakeem Allauddin:

"Mst. Fehmeeda Khatoon was ill and was lying on bed. After three-four days of my visit Rabnawaz brought a written document duly thumb impressed and signed by Mst. Fehmeeda Khatoon and thereafter I alongwith the other marginal witnesses signed the same. Rabnawaz had got the signed document individually at different time from the marginal witnesses."

PW-2 Muhammad Younas:

"Rabnawaz has not signed the said document before me but the signature marked-A is his signature as I am well acquainted with his signature."

PW-3 Muhammad Sherin:

"It is correct that Rabnawaz has not signed the deed in my presence. Volunteered that he had already signed the same."

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.

12. At the cost of repetition, we may observe that the claim of respondent over the suit house is based on and subject to the validity of both documents Exhibit PW-1/1 dated 21.7.1986 and PW-1/2 dated 02.8.1995, thus, the execution of these two documents was to be proved independently. In other words even if the execution of first document Exhibit PW-1/1 was presumed as valid and genuine, still the validity and genuineness of the other document Ex.PW-1/2 was to be proved independently, but the respondent did not even bother to produce this original document in Court.

13. Had it been a case of genuine gift in favour of respondent then there was no justification for the respondent to withhold production of these documents for such a long period before filing the suit against the appellant when all the attesting witnesses as per her claim except PW/1, have expired. In this regard, mere oral assertion of the Respondent about the death of attesting witnesses of the two

documents had not absolved her of the legal burden to prove their death with some documentary evidence or atleast by examining some other independent witnesses in this regard. It also smacks of some foul play that instead of following usual practice of having two attesting witnesses of documents Ex-PW1/1 and PW1/2, these documents contained attestation by four witnesses at a time and for this reason too possibility of manipulation/substitution/subsequent addition of other two witnesses cannot be ruled out.

14. Indeed, if a document in the form of memorandum of gift has been executed between the parties (donor and donee) as an acknowledgment of past transaction of oral gift, its non-registration will not have much bearing as regards its authenticity or validity, but the other important thing is the proof of fulfillment of three conditions of a valid gift *"offer", "acceptance" and "delivery of possession"*. Reverting to the facts of the present case, we find that neither PW-1 Hakeem Alauddin, who was the only witness of first gift document Ex-PW1/1, had said anything about the fulfillment of these three conditions of gift between the parties in his presence, nor the other two witnesses, PW-2 Muhammad Younas and PW-3 Muhammad Sherin of second gift document Ex-PW1/2 have deposed, whether the performance of these ingredients of gift, oral or otherwise, had taken place in their presence. Even the evidence of PW-4 Mst. Gul Bibi in this context is hearsay as regards the first document of gift and shaky to the extent that in her

deposition, she has admitted that atleast three other brothers of Mst. Fehmida Begum, Mirza Mushtaq, Mirza Abdul Latif and Mirza Nazir Ahmed, continued to live in the said house till their death. To sum up, virtually not a single witness from the side of respondent validly proved the performance of these three prerequisites for a valid transaction of gift in respect of the suit house.

15. The upshot of the above discussion is that this appeal is allowed in terms of the short order already passed in this case.

Chief Justice

Judge

Peshawar,
the 18th December, 2015.
Approved for reporting.

Judge

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