

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE MUSHIR ALAM

MR. JUSTICE DOST MUHAMMAD KHAN

Civil Appeal No.774/2013

(On appeal from the judgment dated
16.5.2013 passed by the Lahore High
Court, Rawalpindi Bench in Civil Revision
No.100 of 2005)

Phul Peer Shah

....Appellant

VERSUS

Hafeez Fatima

....Respondent

For the appellant:

Syed Qalb-e-Hassan Shah, ASC
Syed Rifaqat Hussain Shah, AOR

For the respondents:

Barrister Imran Hassan Ali Ch. ASC
Mr. Ahmed Nawaz Ch. AOR

Date of hearing:

19.4.2016

JUDGMENT

Dost Muhammad Khan, J.— Through the instant appeal, the appellant, Phul Peer Shah has questioned the legality and legitimacy of the judgment dated 16.5.2013 passed by the learned Single Judge of the Lahore High Court, Rawalpindi Bench, Rawalpindi whereby, Revision Petition No.100 of 2005 filed by the respondent, Mst. Hafeez Fatima was accepted and her suit was decreed after setting aside the judgments & decrees of the Trial Court dated 1.7.2004 and that of the District Appeal Court/ADJ Chakwal dated 26.10.2004.

We have heard Syed Qalb-e-Hassan Shah, learned ASC for the appellant and Barrister Imran Hassan Ali Chaudhry, learned ASC for the respondent and have carefully gone through the record, the impugned judgments of the Trial Court and the District Appeal Court as well as the evidence on record.

2. The epitome of the controversy is that the appellant claimed, having had purchased the suit property measuring 56-K,16-M in Patwar Circle '*Choa Saiden Shah*' for sale consideration of Rs.2,60,000/- in presence of the witnesses i.e. DW-4 and DW-5 and that, the sale was given the colour of device of "***Hiba-bil-Iwaz***" to avoid of any pre-emption suit by the adjacent owners of the land.

3. Admittedly the respondent is a rustic old, illiterate widow and of reasonably advanced age. None of the witnesses of the so called sale transaction in any manner was acquainted with the lady much less related, rather they have close association and attachment with the appellant. It is alleged that the respondent lady reported the transaction to the '*Moza Patwari*', who recorded the transaction in the '*Patwari Daily Diary*' then mutation No.4021 was entered and it is further alleged that the same was attested by the Revenue Officer on 18.12.1993. In this way, the respondent lady was deprived of her entire land which was managed and cultivated by her tenants.

4. After getting knowledge of the said event, the respondent lady filed a suit on 31.10.1996 wherein she has alleged that naked fraud was committed upon her and in a fraudulent manner the land was transferred from her name without her consent, knowledge and will and without consideration and even if it is assumed to be so, then she is entitled to revoke the same. After filing written statements, contesting the suit by the appellant, the Trial Court held the trial on the wrong issues framed and then dismissed the suit. The same was the fate of the appeal filed by the respondent lady as stated above. However, the learned Judge in Chamber of the High Court set at naught both the judgments and decrees of the two courts below on the ground that the same were based on misreading and gross non-

reading of material evidence and mis and non-application of correct law to the established facts, causing serious miscarriage of justice.

5. Learned ASC for the appellant vehemently argued at considerable length that it is established principle of law that concurrent findings of two courts below be considered sacrosanct and not amenable to limited revisional jurisdiction of the High Court. He urged that no fraud was committed upon the respondent lady and because she has taken two divergent pleas, as in the first instance she has denied to have entered into any such transaction but in the same breath in paras- 16 and 17 of the plaint she opted to revoke the gift even if it is proved and this vacillating conduct of the lady speaks volumes about her conduct on account of self clashing pleas taken by her and thirdly, the appellant has established his case through overwhelming evidence by producing all the witnesses who were present at the time of initial transaction and then at the time of attestation of mutation, besides the revenue officer of the circle and the former '*patwari*' who had entered the mutation and report in the '*Daily Diary*', therefore, there was no occasion for the learned Judge in the High Court to interfere with the well reasoned judgments of the two courts below based on concurrent findings of facts, reached at after proper appraisal and re-appraisal of evidence on record. He also relied on the same case laws, which were cited before the learned Judge in the High Court during the course of arguments.

6. To the contrary, the learned ASC for the respondent lady urged with considerable vehemence that no two opinions can be formed about the established fact that the poor lady i.e. the respondent was having only one mother, who too was old enough, aged about 85 years or more. How, the receipt of transaction was

obtained from the respondent lady, more so when the description of the property i.e. 'Khasra numbers', 'Khata numbers' the area and even the '*Mozah*' in which it is situated has not been mentioned therein.

7. Again, on the basis of unfounded and fallacious plea that to ward off right of preemption or filing of any preemption suit by the owners of the adjacent property in the mutation the transaction was given the colour of ***Hiba-bil-Iwaz***. This by itself speaks volumes about the fraud because in S.2(d) of the **Punjab Preemption Act, 1991**, sale has been defined as follows: -

"d. "sale" means permanent transfer of the ownership of an immovable property in exchange for a valuable consideration and includes transfer of an immovable property by way of 'Hiba bil-Iwaz' or with 'Hiba ba shart-ul-Iwaz'."

In view of the above legal provision this plea, taken by the appellant is absolutely unsound and is fallacious as it does not stand to reason.

8. In a case of such transaction with old, illiterate/rustic village '***Parda Nasheen***' lady onus to prove the transaction being legitimate and free from all suspicions and doubts surrounding it, can only be dispelled if the lady divesting herself of a valuable property, the following mandatory conditions are complied with and fulfilled through transparent manner and through evidence of a high degree. Amongst this condition, the pre-dominantly followed are as follows: -

"(i) That the lady was fully cognizant and was aware of the nature of the transaction and its probable consequences;

- (ii) that she was having independent advice from a reliable source/person of trust to fully understand the nature of the transaction;
- (iii) that witnesses to the transaction are such, who are close relatives or fully acquainted with the lady and were having no conflict of interest with her;
- (iv) that the sale consideration was duly paid and received by the lady in the same manner; and
- (v) that the very nature of transaction is explained to her in the language she understands fully and she was apprized of the contents of the deed/receipt, as the case may be."

9. The most intriguing part of the so called transaction is that the original mutation containing the final order of attestation of the mutation by the Circle Revenue Officer was never deposited in the central office of '*Qanoongo*' nor it was received because there was no entry made in the register, maintained for that purpose in the Central Office of the District or Saddar '*Qanoon-go*'. Only '*Partt Patwar*' was produced at the trial containing no details about the nature of the transaction, payment of sale consideration, presence of the witnesses attesting the same and also no order of the Revenue Officer of the Circle, attesting the mutation was there on the same.

10. Under the law of evidence no secondary evidence can be led unless it is proved to the satisfaction of the trial Court that the original has been lost or destroyed or it was in possession of the opposite party and after serving due notice, the opposite party refused to produce the same. Without the permission of the Trial Court, this secondary evidence i.e. "*Partt Patwar*" of the mutation was brought on record, which is inadmissible and of no help whatsoever to the appellant.

11. The Trial Court committed serious illegality by placing the onus of proof on the respondent lady with regard to the transaction of gift because after clear denial by her and because the appellant was the beneficiary of the mutation/transaction, heavy burden of proof was on him and the same should have been placed on him instead of the poor lady because in a transaction of this nature a mere denial by the lady would shift the burden to the male beneficiary of the transaction. Framing of wrong issues and shifting of onus of proof to the lady landed the trial Court and the District Appeal Court in a field of illegalities and why they have drawn wrong conclusions therefrom.

12. It is century old principle of law, which is old as hills are, that mutation by itself is not sufficient to prove the transaction but it must be independently proved through cogent, reliable and convincing evidence and more stringently in the case of illiterate '*Parda Nasheen*' lady.

13. In our male dominated society where the female legal heirs are consistently deprived even of their '*Sharai*' shares in inheritance matters like sisters and mother, the principle of caution in protecting the legitimate rights of the illiterate/rustic village lady, must be applied vigorously and rigidly.

14. In the instant case, the respondent, an old lady, was having only one aged mother, who was dependent upon her and was having no male blood relative to give proper advice, protecting her rights at the time of the disputed transaction thus, she was vulnerable and fully exposed to any fraud because the appellant was a distant collateral who exploiting the ignorance of a defenceless lady, conveniently deceived her under self assumed and ill conceived design

that she would not be able to bring a law suit against him thus, managed all the things in quick succession and then with his connivance the revenue staff destroyed the original mutation because the respondent has clearly denied that she had appeared before the Revenue Officer at the time of attestation of the questioned mutation. This was the only transaction in the '*Patwar Circle*' of which the original mutation was intriguingly missing as no evidence has been brought on record that any other mutation relating to other transaction in this Circle also went missing like the present one thus, the only inference would be that it was deliberately destroyed so to cause disappearance of evidence because in case the original mutation was brought on record then, the question of identification of thumb impression through fingerprints expert would have become essential and in that case no one else but the appellant would have been the loser.

15. Even the witnesses produced, have given conflicting statements about the place and time of the transaction. Who was the scribe of the receipt obtained from the lady, is another begging question, looks askance for which the appellant has no reply, much less plausible to give.

16. This Court in the case of **Ghulam Ali vs. Mst. Ghulam Sarwar Naqvi** (PLD 1990 SC 1), after taking judicial notice of the plight of the females in a male dominated society has laid down comprehensive guidelines for all Courts and authorities to follow in such cases. So much so that even the hopelessly time barred suits were decreed and it was held that the females in our society are neither supposed nor they are given any role, much less a decisive one to play in the management and receiving the benefits from the

property in which they become co-sharers but the male members of the family dominate the entire affairs to maintain, manage or to dispose of such properties.

17. The evidence furnished by the appellant is not upto the required standard, rather it is replete with infirmities, both factual and legal and because the witnesses have given conflicting statements therefore, the impugned transaction with the respondent lady can be safely held to be the result of fraud and deception, practiced upon her exploiting her defenceless and illiterate status.

18. For the foregoing reasons, we are of the considered view that the learned Judge of the High Court was absolutely justified in setting at naught the judgments and the decrees of the two Courts below, which in our view too, were based on gross misreading and non- reading of material evidence and also on wrong application of principle of law. The required care and caution was not observed while making appraisal of evidence and legal aspects of the case therefore, the concurrent findings were clearly amenable to the revisional jurisdiction of the High Court because gross illegalities were committed in the course of trial and appeal proceedings due to the above reasons.

Accordingly, this appeal is found devoid of legal merits and is dismissed with costs throughout.

Judge

Judge

Islamabad, the
19th April, 2016
'Nisar/-

'Approved for reporting'