IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE EJAZ AFZAL KHAN
MR. JUSTICE QAZI FAEZ ISA

CIVIL APPEAL NO. 94-P OF 2012 AND CIVIL APPEAL NO. 1445 OF 2013
(On appeal from the judgment dated 27.06.2012 of the Peshawar High Court, Mingora Bench (Dar-ul-Qaza), Swat passed in Civil Revision Nos. 470 and 604 of 2003).

Islam-ud-Din (deceased) through L.Rs and others. *(in CA. 94-P/12)*
Rehman-ud-Din and others. *(in CA. 1445/13)*
… ***Appellants***

VERSUS

Mst. Noor Jahan (deceased) through L.Rs and others. *(in both cases)*
… ***Respondents***

For the Appellants: Mr. Gulzarin Kiani, Sr. ASC.
(In both cases)

For the Respondents: Mr. Zahoor-ul-Haq Chishti, ASC.
(In CA. 94-P/12)

For the Respondents: Sher Muhammad Khan, ASC.
(In CA. 1445/13)

Date of Hearing: 11th January 2016.

JUDGMENT

QAZI FAEZ ISA, J. These appeals assail the judgment dated 27th June 2012 of the learned Single Judge of the Peshawar High Court, Mingora Bench (*Dar-ul-Qaza*) at Swat, whereby Civil Revision No. 470 of 2003 filed by Mst. Noor Jahan ("**the respondent**") was allowed and the suit filed by the respondent was decreed as prayed for, whereas, Civil Revision No. 604 of 2003 filed by the Islam-ud-Din and others ("**the appellants**") was dismissed.

2. Leave to appeal was granted in Civil Petition No. 414-P of 2012 vide order dated 28th November 2013 to examine, "*whether the question of validity of gift in favour of the petitioners/appellants allegedly made by the deceased Haji Saharney Khan was rightly*

examined by the revisional Court in its true perspective or otherwise". However, Civil Appeal No. 94-P of 2012 was filed as of right.

3. Haji Sahraney ("**the deceased**") died in the year 1990-1991. The deceased owned a house, four shops, godowns with rooms and corridors (hereinafter "**the said properties**") in addition to agricultural lands which the respondent contended remained in his ownership till his death. The appellants however relied upon a document in the Pashto language dated 26th June 1989 (hereinafter "**the said document**") whereby the said properties were stated to have been "*given*" to his three sons (Islam-ud-din, Rehman-ud-din and Shahab-ud-din) by the deceased. The appellants also relied upon the three mutation entries in respect of the agricultural lands all of which were made on 8th June 1989 and attested on 22nd June 1989. The respondent filed Suit No. 43-L of 1999 on 22nd February 1999 against the appellants praying that she is entitled to a 1/12th share being her share as per *shariah* in the estate of the deceased, who was her late father. The said suit was partially decreed vide judgment dated 24th February 2001 by the *Illaqa Qazi*, District Swat in terms that the respondent was found only entitled to her share in agricultural lands but not in the said properties as the said properties had been gifted by the deceased to the three sons as per the said document. Both sides filed appeals against the said judgment, Appeal Nos. 76/13 and 86/13 of 2001 respectively. The Appeals were dismissed vide common judgment dated 10th April 2003. The judgment of the Appellate Court was in turn assailed by both sides in revision petitions, which were disposed of vide judgment dated 27th June 2012; Civil Revision No. 470 of 2003 which was filed by the respondent was allowed and the suit of the respondent was decreed as prayed for, whereas Civil Revision No. 604 of 2003 which was filed by the appellants was dismissed.

4. The learned counsel for the appellants Mr. Gulzarin Kiani stated that the impugned judgment of the High Court was not sustainable in law, as the said document constituted a valid gift which was proved in accordance with law and it had not been specifically assailed by the respondent in her plaint. It was also contended that the said properties which had been gifted were in long standing possession of the sons. As regards

the mutations the learned counsel stated that the deceased had divested himself of the said agricultural lands in his lifetime. The learned counsel prayed that the impugned judgment be set aside and the suit of the respondents be dismissed with costs. Reliance was also placed upon the cases of Bashir Ahmad v. Taja Begum (PLD 2010 Supreme Court 906), Gul Rehman v. Gul Nawaz Khan (2009 SCMR 589), Iftikhar-ud-Din Haidar Gardezi v. Central Bank of India Ltd., Lahore (1996 SCMR 669) and Sailajananda Pandey v. Lakhichand Sao (AIR (38) 1951 Patna 502).

5. Mr. Zahoor ul Haq Chisti, the learned counsel for the appellants Ahmed Saeed and Muhammad Rasheed both sons of Sarof Khan, stated that they had in good faith purchased from the three sons of the deceased 4 kanals and 11 marlas of land vide Mutation No. 500 dated 3rd June 1997, which was attested on 12th June 1997 by the revenue authorities, and the three sons had admitted the sale, therefore, their ownership rights thereto should not be disturbed, particularly as they were purchasers for value and had no notice of any other person's or persons' interest therein. It was further contended that the revenue record had only disclosed the three sons as owners of the said land that was sold / bought.

6. On the other hand, the learned counsel for the respondents supported the impugned judgment of the High Court, which according to him did not suffer from any legal or factual defect. He stated that in the written statement filed by the appellants who were the other heirs of the deceased reference was made to the partitioning of the property by the deceased in his lifetime but this was never proved / established by them. The case of Muhammad Ejaz v. Khalida Awan (2010 SCMR 342) was cited with regard to the necessary ingredients of gifts and that if a gift deed purports to make a transfer of immovable property *in praesenti* it needs to be registered whereas the necessary ingredients of gifts were not present in this case and the said document was also not registered. He further contended that neither the mutations in respect of the agricultural lands nor the said document (purported gift) was established in accordance with law, since the requisite witnesses to prove the same were not produced. It was alleged that the

mutations and the purported gift were devices to deprive the respondent and the other daughters of the deceased from their rightful inheritance. That since the appellants had taken shelter behind the said document of which the respondent had no knowledge therefore not challenging the same was of no consequence, and it was for the appellants who relied thereon to prove the same, which they failed to do. He said that no reliance can be placed on the written statement to the extent of the other daughters of the deceased since the same was on the basis of a general power of attorney the original whereof was not produced.

7. We have heard the arguments of the learned counsel for the parties and have gone through the record. The issue under dispute is the validity of the mutations and the purported gift as per the said document. We shall first take up the matter of the three mutations Nos. 36, 59 and 107 all of which are dated 8th June 1989 and shown to be attested by the revenue authorities on 22nd June 1989. The attesting witnesses of all the three mutations are Muhammad Rashid son of Maula and Akbar Jan son of Mehr Jan, however, only one witness (Muhammad Rashid) was produced and no any reason was given for the non-production of Akbar Jan. Article 79 of the Qanun-e-Shahadat Order, 1984 stipulates that a document "*shall not be used in evidence until two attesting witnesses at least have been called for the purpose of proving its execution*". Moreover, even though the Patwari Halqa was produced by the respondent as PW-4 he was not questioned about the validity of the said mutations. The Tehsildar who attested the mutations was also not produced, and no explanation for his non-production was forthcoming from the appellants. On all the three mutations against the name of the deceased a thumb impression is affixed, but no effort was made to confirm the authenticity thereof. Incidentally, there is no signature of the deceased on the mutations whereas the said document is purportedly signed by the deceased (without affixing his thumb impression) even though the said document and the mutations were made at about the same time; this inconsistency remained inexplicable**.**

8. We now proceed to attend to the said document. The said document simply states that the said properties have been given (دے دیئے) by the deceased to his three sons. The said document was purportedly signed by the deceased in the presence of Laiber Khan, Muhammad Ameen Khan and Haji Kimyagar, however, only Laiber Khan was produced as a witness. Consequently, this document too fails to meet the test prescribed in Article 79 of the Qanun-e-Shahadat Order, 1984 and remained unproved. We may also observe that the said document cannot be categorized as a gift as the necessary ingredients of gift were not established, including the acceptance of the alleged gift of the said properties, as also held in the cited case of Muhammad Ejaz (above). The said document also cannot be categorized as 'conveyance' or even as an 'agreement'. There is yet another aspect of the matter, which was that after the purported execution of the said document the same was not acted upon by the sons, in that the said properties were not mutated / transferred in their names on the basis thereof.

9. Mr. Gulzarin Kiani, the learned counsel for the siblings, contended that the High Court in exercise of its revisional jurisdiction could not have set aside the findings of the two courts below and if at all it should have remanded the matter. In this regard the learned counsel had cited a few cases (above). In the case of Sailajananda Pandey, which was referred to in the case of Gul Rehman, the matter was remanded because "*further investigation of some necessary facts*" was required where after "*many different principles*" of law were to be dilated upon. However, there is no need of any *further investigation* in the present case nor the need to consider *many different* [legal] *principles* as a consequence thereof. In Iftikhar-ud-Din Haidar Gardezi's case it was held that judgments in revisional jurisdiction could only be assailed in terms of section 115 of the Code of Civil Procedure ("**the Code**"). We entirely agree. However, in the present case the trial and appellate courts had exercised jurisdiction vesting in them *illegally or with material irregularity*, as they disregarded Article 79 of the Qanun-e-Shahadat Order and misread or did not read the evidence as noted above. Since the parties had already lead evidence and the material facts had clearly emerged the High Court had correctly exercised its revisional jurisdiction under the Code. It was held in Nabi Baksh v Fazal

Hussain (2008 SCMR 1454) that concurrent findings of the courts below can be set aside by the High Court in its revisional jurisdiction if the same, "*were based on misreading or non-reading of the material available on record*".

10. The learned Judge of the High Court was correct to disregard the three mutations and the said document and the learned counsel for the appellants was unable to show any legal infirmity in the impugned judgment which may have persuaded us to take a different view.

11. We can also not lose sight of the fact that soon after executing the mutations and the said document the deceased departed to meet His Maker. A daughter / sister to claim her rightful inheritance was compelled to go to court and suffered long years of agony. However, before the sister / respondent could get, what was rightfully hers, she too departed from this world. The heirs of Mst. Noor Jahan then joined these proceedings. A quarter of a century has elapsed since the death of Haji Sahraney. Such a state of affairs, to say the least, is most unfortunate.

12. As regards the appellants Ahmed Saeed and Muhammad Rasheed, they appear to have bought in good faith 4 kanals and 11 marlas of land vide Mutation No. 500 dated 3rd June 1997, which was attested on 12th June 1997 by the revenue authorities, from the said three sons of the deceased who were shown in the property records to be the owners of the same and who had admitted selling the said land to them. They acted in good faith and were purchasers for value without having notice of any other person's or persons' interest in the said land. Such purchasers are protected by law (section 41 of the Transfer of Property Act, 1882). Therefore, it would not be proper to disturb their ownership rights to the said land. Consequently, the impugned judgment is modified to their extent and the 4 kanals and 11 marlas of land which they bought pursuant to Mutation No. 500 dated 3rd June 1997 is allowed to stand in their names, which shall be equally reduced from the respective shares of the said three sons (Islam-ud-din, Rehman-ud-din and Shahab-ud-din) or their respective heirs in the estate of the deceased.

13. With the aforesaid modification (as mentioned in paragraph 12) to the extent of the appellants Ahmed Saeed and Muhammad Rasheed, these appeals are dismissed.

JUDGE

JUDGE

Announced in Open Court
At Islamabad

On 2nd March 2016

By Justice Qazi Faez Isa

Approved for Reporting
(Zulfiqar)