

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE DOST MUHAMMAD KHAN
MR. JUSTICE MANZOOR AHMAD MALIK

Civil Appeal No.525 of 2013

(On appeal from the judgment dated 15.04.2013 passed by the Peshawar High Court, Abbottabad Bench in C.R. No.315 of 2005)

Ghulam Farid and another

...Appellant

VERSUS

Sher Rehman (decd.) through his LR's.

..Respondents

For the appellants: Mr. Nazakat Baig, ASC
Syed Rifaqat Hussain Shah, AOR

For the respondent: Mr. Muhammad Afzal Janjua, ASC

Date of hearing: 27.1.2016

JUDGMENT

Dost Muhammad Khan, J.— Through this appeal, the appellants have impugned the judgment and decree of the learned Single Judge of the Peshawar High Court, Bench at Abbottabad dated 15.04.2003, who reversed the judgment and decree of the District Appeal Court, Haripur dated 07.05.2005 and restored the judgment and decree of the Civil Judge, Haripur, who had dismissed the suit of the appellants.

We have heard the learned ASC for the appellants and learned ASC for the respondent and have carefully gone through the record.

2. The epitomestic history of the controversy is that, the appellants including two illiterate ladies are stated to have transferred the suit land, consisting of different "***Khataz***" and "***Khasras***" number, through disputed mutation No.44, allegedly attested on 07.06.1969. The case of the appellants is that, they were neither present nor were

having knowledge of the mutation because appellants including Ghulam Farid were living in Sindh Province and after coming back to the village, when he demanded the share of produce, the defendant refused to pay the same, rather claimed that he had already purchased the suit property through the above mutation thus, paddling up the appellants to file the suit for decree of declaration, possession and permanent injunction.

The respondent, namely Sher Rehman (deceased), now represented by LRs., filed written statement and contested the suit.

3. After holding trial, the learned Trial Judge dismissed the suit mainly on the point of limitation, however, the learned Additional District Judge, Haripur reversed the findings of the Trial Court and after setting aside the judgment & decree so passed, decreed the suit in favour of the appellants for cogent reasons, attending to each and every material aspect and also the issue of limitation.

4. The learned Single Judge in the High Court, in revisional jurisdiction set aside the judgment & decree of the learned Additional District Judge on the issue of limitation alone and further held that the attestation of mutation in another "***Mauza***", other than where the suit property situates, was not an illegality while placing reliance on the view held by this Court.

5. The learned Judge further relied on the view taken in the case of **LAL KHAN v. Muhammad Yousaf** (PLD 2011 SC 657) however, the reliance placed on this judgment is entirely misconceived one because the view held in the said case supports the case of the appellants.

6. It is a century old principle of law that mutation entry and its attestation is not a document of title and the transaction of sale

must be proved independently through cogent evidence where passing of sale consideration to the vendors is fully established. This principle shall apply more stringently without any pause and stop where such transaction is between the male beneficiary/purchaser and ***“Parda Nasheen lady”*** as in this case two of the plaintiffs were ladies.

7. The plea of appellant No.1 that, he had gone to Sindh Province for earning livelihood before the year 1961-62, was not seriously challenged by the defendant in the course of cross-examination. This plea is amply supported by the statement of Shahzada (PW-4), admitting that he was appointed as a caretaker by appellant No.1, of the suit property through a letter, which the appellant had sent to him from Sindh Province and that, the land was given on rent/tenancy basis to the defendant who had paid the share of produce to him in the first instance. He further stated that at the time of attestation of the disputed mutation, Ghulam Farid appellant was not in the village being away to Sindh Province.

8. The contention of appellant No.1 is further supported by Dilshad Khan (PW-5) who stated that he was retired from the Sindh Police after serving there for 30/40 years and; that at the time of attestation of the impugned mutation, the appellant and his mother were residing with him because plaintiff No.2, Mst. Afroz Begum was his wife. Both the statements of above PWs were not challenged by the defendant during cross-examination. The suit was filed on 21.11.2001 when appellant No.1 returned from Sindh Province to his village and defendant claimed hostile title to the suit and possession over it. On verification of the revenue record, appellant No.1 came to know about the attestation of the impugned mutation No.44 dated 07.06.1969.

9. Under the law and principle of justice, when mutation is never held to be a document of title and when a negligible presumption is attached to it, provided it is proved fairly and its entry and attestation is conducted in the laid down manner, the mere incorporation of it into the "***Jama Bandi***" and its repetition periodically, would not confer title on the purchaser unless the transaction of sale is independently established, through cogent and convincing evidence. In the case of transaction with illiterate village lady this principle assumes the status of rule of law as in that case the onus of the beneficiary of it becomes manifold. To discharge the burden of proof he has to satisfy the court of law that the entire transaction was completed in a transparent manner and all the required precautions were faithfully and honestly observed before the attestation of mutation, dispelling every suspicion that it was tainted with fraud and misrepresentation.

10. In the present case, it is admitted fact that none of the vendors have thumb impressed the disputed mutation as has been stated by Malik Muhammad Taj, *Halqa Patwari* (PW-1) and Shakeel Ahmad, *Qanoon-go* (PW-2). Even the daily diary, maintained by the '*Patwari*' was not produced as it was destroyed after 12 years however, the defendant did not obtain a certified copy of the same, while u/s. 42 of the **West Pakistan Land Revenue Act, 1967** it is essentially provided to the informer.

11. Neither the two attesting witnesses to the mutation, namely, (i) Muhammad Asif Khan and (ii) Malik Mir Haider Zaman, Lambardar, nor the then *Halqa Patwari* who made entries in the daily diary, were produced to substantiate the claim of the defendant/purchaser. Even the Revenue Officer, who attested the mutation, was not produced.

12. To avoid the commission of fraud, misrepresentation or foul play, the provision of sub-s.(8) of S.42 of the Act, has made it mandatory that an inquiry under sub-s.(6) of the said provision shall be made and the mutation, the subject matter, should be attested in the common assembly in the estate to which the mutation relates. In this case, admittedly the mutation was attested entirely in a different **"Mouza"** situated 3/4 miles away from the **"Mouza"** where the property situates. The maxim, **"Expressio Unis Est Exclusio Alterius"** commanding that when law requires that a thing be done in particular manner then, it should be done in that manner as anything done in conflict of the command of law shall be unlawful being prohibited.

13. As discussed in the earlier para of this judgment that transaction of sale shall be independently established through convincing, reliable and cogent evidence, which is absolutely missing in this case. In whose presence, where, on what date and time the transaction of sale took place and how the sale consideration was paid to the vendors including the two illiterate and rustic village ladies, are all such begging questions, which have not been answered in any manner.

14. The inflexible, hard and fast rule is, that when any transaction is made by anyone where **"Parda Nasheen"** lady's vital interest is involved then, the following conditions are to be invariably and essentially fulfilled 14(i)-25(o) 27(n)-6()-7(u)] Tacen

- (iii) *in the case of “Parda Nasheen” rustic village ladies, at the time of transaction such ladies were fully made to understand the nature of the transaction and the consequences, emanating therefrom and;*
- (iv) *that at the time of transaction, the ladies were having access to independent advice of their nearer and dearer, who have no hostile interest to them.”*

None of these conditions was in any manner fulfilled or complied with.

15. The plea that in those days, getting thumb impression or signatures of the vendors was not mandatory, is absolutely fallacious because the **West Pakistan Land Revenue Act, 1967** was enacted two years earlier to the transaction where-under, the presence of the vendors before the Revenue Officer at the time of attestation of mutation and after getting their consent, explaining the nature of the transaction to them and thereafter getting their thumb impressions, was mandatory.

After careful scrutiny we find that the evidence furnished by the respondent/defendant is absolutely silent, as to what was the reason when the vendors to the transaction did not appear nor they thumb impressed the mutation, thus, the attestation of mutation by the Revenue Officer and that too, in another “**Mouza**” much away from the property, was surely against the mandatory provision of law. This fact by itself speaks volumes of *mala fide*, misrepresentation and fraud, having been committed in the course of attestation of mutation.

16. As discussed above, not a single word has been stated by the attorney of the defendant or his witnesses that on what date, place and time the transaction of sale took place, thus, when the basic transaction, on the basis of which the mutation was entered and attested, has not been established then, the impugned mutation

absolutely loses even the little worth attached to it, nor it can be held to be a valid document, duly executed. Mere incorporation of such invalid mutation in the periodical record and its subsequent repetition, is of no legal benefit to the respondent/defendant because the same was invalid for having no sanction of law. The circumstances surrounding it, have rendered it the most suspect document.

17. In the case of ***“Parda Nasheen”*** ladies, under the rules it is a consistent practice that before the attestation of mutation by the Revenue Officer, a Local Commission is invariably appointed, accompanied by two attesting witnesses, preferably the close relatives of the ladies, to identify them before the Local Commission and also to become attesting witnesses to the statements, given to the Commission to dispel any apprehension of fraud or misrepresentation because ***“Parda Nasheen”*** ladies, keeping in view the traditions and culture of the society, do not appear in the common assembly. The Local Commission and the two witnesses must establish that the ladies gave statements with their free will, full understanding about the nature of the transaction and also admitting of having received the sale consideration for the land sold and that, at the relevant time, they were having free and full advice of the close relatives. The departure, made by the Revenue Officer in this case, from the well prescribed procedure, strongly suggests that foul play was committed and everything was arranged in a concerted manner. It was for this reason that, the two attesting witnesses to the mutation were also not produced as they were not supporting the transaction. The fact that the mutation was attested in the absence of all the three vendors, as none of them have thumb impressed the same, is a blatant violation of the mandatory provision of sub-s.(7) of s.42 of the ***Land Revenue Act***.

18. Albiet, the mutation in the present form cannot be held to be a document, duly executed, even then, the evidence of the two attesting witnesses was very much necessary, as required under Article 17 read with Article 79 of the ***Qanoon-e-Shahadat Order, 1984***. This was so essential in the peculiar facts and circumstances of the case, where the entire onus of proof did lay on the defendant/respondent.

The contention that the mutation is a 30 years old document, therefore, under Article 100 of the ***Order, 1984*** it was admissible in evidence, is equally misconceived one. There is a sky high difference between admissibility of document and its evidentiary value. Moreover, when registered document is subject to proof and production of two attesting witnesses becomes essential when its execution is denied by the executants, as required by the *proviso* to Article 79 of the ***Order, 1984*** then, presumption attached to 30 years old document under Article 100 of the ***Oder, 1984***, cannot be placed on better pedestal than a registered document, which under the ***Registration Act, 1908*** is considered to be a notice to the public at large and carries much more sanctity under the law and when this mutation is not thumb impressed by the executants then, it is not protected under the provision of Article 100 of the ***Order, 1984***, nor the relevant presumption is attached to it.

19. The learned Single Judge and the Trial Court have conveniently ignored all the above facts, which are vital and fundamental in nature, while giving the verdict on the issue of limitation.

In the first instance it may be pointed out, without any fear of denial, that fraud vitiates every solemn transaction and Court of law

shall, in no eventuality, endorse and perpetuate a fraud once it is proved to have been committed. Any transaction, which is the result of misrepresentation, is not protected on the ground of period of limitation. It is a settled principle of law that whenever such transaction is pressed into service or is pleaded, the Court of Law has to refuse to give effect to the same, much less to execute the same or endorse and acknowledge it. In the present case, appellant No.1 has given ample explanation that on return from Sindh province, he came to know about the fraudulent transaction i.e. the attestation of mutation and without any delay all of them including the two ladies instituted the suit within a month from the date of knowledge, therefore, the learned High Court fell into grave error by knocking out the appellants/plaintiffs on the misconceived notion with regard to the period of limitation. The findings recorded and the conclusion drawn in this regard, are absolutely untenable in law.

20. Before concluding this judgment, it is deemed essential to point out that the High Court has a very limited revisional jurisdiction, the parameters of which have been well defined by S.115, CPC. In the case of **PATHANA v. Mst. WASAI** (PLD 1965 SC 134) this Court has held that where a sentence is capable of two equal interpretations, even then the one preferred by the District Appeal Court cannot be said to have misdirected himself by adopting one of them, rather a due weight shall be given to the same. On re-appraisal of evidence, the High Court in its limited revisional jurisdiction cannot substitute its own opinion for that of the District Appeal Court even if it is possible, unless and until the interpretation adopted by the District Appeal Court has caused serious and grave miscarriage of justice. In the present case, there was no occasion for the High Court to indulge in such exercise and that too in a limited and confined revisional jurisdiction.

21. For the reasons stated above, this appeal is allowed, the impugned judgment dated 15.04.2013 of the learned Single Judge of the Peshawar High Court, Abbottabad Bench, Abbottabad is set aside, while the judgment and decree of the learned Additional District Judge, Haripur dated 7.5.2005 is restored and the suit of the plaintiffs/appellants is decreed as prayed for, with no order as to costs.

Judge

Judge

Islamabad, the
27th January, 2016
Nisar /*

'Approved For Reporting'