

**ORDER SHEET.**  
**IN THE ISLAMABAD HIGH COURT, ISLAMABAD.**  
**JUDICIAL DEPARTMENT**

Writ Petition No. 876/2020  
Nusrat Imtiaz  
Versus  
Civil Judge, etc.

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
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07.09.2020	Malik Mumtaz Ahmed, learned ASC for petitioner, Mr. Abdul Rehman Hur Bajwa, learned ASC for respondents 2 to 4.
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Through the instant writ petition, petitioner impugns the order dated 08.02.2020 passed by the learned Civil Judge 1<sup>st</sup> Class Islamabad-West, whereby her application for placing on record conversation (*audio recording*) of her husband with respondent No.3, has been dismissed.

2. Facts, relevant for the disposal of instant writ petition are that the petitioner filed suit for declaration and permanent injunction regarding House No.17, Street No.4, Sector F-8/3, Islamabad, on the basis of an oral gift dated 25.05.2018. The gist of the petitioner's claim is that she and respondent No.3 are real daughter and son of respondent No.2, who gifted the above said house to her while the second House bearing No.69, situated in Sector F-10/4 was gifted to her brother/respondent No.3; that all the formalities were got completed by her and only transfer in her name from the C.D.A is left and that her mother under the influence of her son and paternal grandson (respondents 3&4), is causing hurdles for formal transfer of the suit property in her name.

3. The respondents 2 to 4 contested the suit by filing written statement, wherein they denied the claim of oral gift besides the transfer of possession of the suit property. The learned trial Court after framing necessary issues recorded evidence of the petitioner. In the meanwhile, petitioner filed an application for production of audio recording through USB which was contested by the respondents. The learned trial Court vide order dated 08.02.2020 dismissed the said application, hence the instant writ petition.

4. Learned counsel for the petitioner contends that the case is at the stage of recording of evidence; that the purported conversation would be essential for just decision of the case, wherein respondent No.3 admitted oral gift in favour of the petitioner and that the respondents will have opportunity to rebut the same, therefore, the impugned order is liable to be set aside.

5. Learned counsel for respondents 2 to 4 contends that neither the suit property was gifted to the petitioner nor its possession was handed over to her and that the application was an attempt to create evidence under the orders of the court, therefore, same was rightly turned down by the learned trial Court. Reliance is placed on case laws reported as "*Syeda Irshad Fatima Rizvi V. Bashir Ahmad and others*" (PLD 2020 Islamabad 184) and "*Ishtiaq Ahmed Mirza and 2 others V. Federation of Pakistan and others*" (PLD 2019 SC 675).

6. Heard, record examined.

7. It is settled principle that the burden to prove a gift lies on the person who claims ownership of the suit property on the basis of said gift. It is therefore, duty of the petitioner/plaintiff to advance her case through the evidence of unimpeachable character. Likewise, it is also to be noted that the court cannot be used to create or defeat evidence in favour of any party.

8. In the present case, it gleans out of the record that the instant suit was filed on 18.10.2018 while petitioner got recorded her statement as PW-3 on 06.11.2019, while the audio conversation, sought to be produced is dated 30.12.2018. It means that the said conversation had been with the petitioner soon after about two months of the filing of the suit but she did not make any effort to bring the same on record at the earliest and opted to file the application even after recording of her statement on 06.11.2019. It is noteworthy that her statement is also silent regarding the stated conversation. Therefore, in such an eventuality, it appears that the petitioner has deliberately withheld the same. Even otherwise, the factum to prove a gift is totally an independent cause which requires to be proved through a particular/significant evidence.

9. The Hon'ble Apex Court in recent judgment in the case of *Isthiaq Ahmad Mirza and 2 others V. Federation of Pakistan and others* (PLD 2019 SC 675) has graciously laid down parameters for production of audio tape or

video recording in evidence. It has graciously been held, *inter alia*, that an audio tape or video sought to be produced in evidence must be an actual record of the conversation as and when it was made; the person recording an audio tape or video may be a person whose part of routine duties was recording of an audio tape or video and he should not be a person who had recorded the audio tape or video for the purpose of laying a trap to procure evidence; the person recording the conversation had to be produced and that the person recording the conversation must produce the audio tape himself.

10. The request of the applicant does not fulfill the prerequisites highlighted above. Moreover, it is also matter of record that the purported conversation was available with the petitioner soon after about two months of the filing of the suit but the same was not made part of the pleadings at the initial stage and even did not mention in the list of documents in terms of Order VII Rule 14(1) CPC, therefore, cannot be allowed to be made part of record at this belated stage in the light of above observations.

11. In view of above, the order impugned does not call for any interference. Consequently, the instant writ petition is dismissed being devoid of merits.

12. Before parting, it is deemed necessary to mention that the observations made hereinabove are meant and restricted only to resolve the controversy contained in the instant

writ petition and shall have no impact upon merits of the case.

(FIAZ AHMAD ANJUM JANDRAN)  
JUDGE

Imran