

JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
(JUDICIAL DEPARTMENT)

Civil Revision No.181-P of 2012
Dil Aram & another vs. Sherzada & others

JUDGMENT

Date of hearing: - **17.12.2020.**

Mr. Abdul Sattar Khan, Advocate for the petitioners.
M/S Muhammad Taif Khan, Syed Saud Shah, Asad Iqbal Akhunzada &
Yousaf Ali., Advocates for the respondents No.1 to 6.
Syed Rehman, Advocate for the respondents No.7 & 8.

MUHAMMAD NAEEM ANWAR, J.- This single judgment shall also decide **Civil Revision No.224-P/2012** titled "Anwar Khan versus Sherzada and 07 others" as both the petitions against the same judgment and decree of learned additional District Judge-IV, Mardan dated 30/01/2012, by which the respondents' appeal was allowed and suit filed by them was decreed.

02. Compendious details of the matter in hand are that Mst. Hussan Bibi , predecessor in interest of respondents brought the /is before civil Court challenging the entries of revenue papers of property bearing Khasra No. 1178/2, 1181, 1166/2, 1167, 1166/1, 1172, 1173, 1174, 1184, 1169, 1170, 1168, 1171 of the estate of Khazana Dheri of Tehsil & District Mardan, which was incorporated on the strength of mutation No. 207 in favour of petitioner No. 01, mutation No. 209, in favour of petitioner No.02 of this petition and mutation No. 222 in favour of petitioner of CR NO. 224, all were attested on 24/2/1998, being the wrong, against the law, without consideration, fraudulent, collusive, unjust and

without her consent, thus inoperative upon her rights, with added prayer for restraining them from further alienation. Suit was resisted by petitioners through their separate written statements on different legal as well as factual objections. Learned trial court after framing of issues, recording of evidence and hearing the parties dismissed her suit. Being aggrieved, she preferred an appeal which was allowed and her suit was decreed by the learned appellate court on 30.01.2012, hence these petitions.

03. Learned counsel for the petitioners contended that on 24/02/1998 not only the disputed mutations i.e. 207,209 and 222 but also mutation No. 208, 203 & 223 were attested, which were not challenged and this fact was admitted by the respondents, so not only the plaintiff was estopped to sue but her suit was also barred by time, being instituted on 24/04/2007, much latter than the period prescribed for seeking declaration. He vociferated that despite being alive, she opted not to appear in person which cast doubt that had she appeared would have admitted the sale in petitioners' favour. The other sisters of respondent appeared and have admitted not only alienation of property in petitioners' favour but also the receipt of sale consideration. He went on to say that witnesses produced by petitioners have categorically deposed that plaintiff had acknowledged the receipt of sale consideration and transfer of property in favour of vendees in their presence. While referring to the statement of petitioners, he argued that the petitioners have requested to the learned court for sending the

disputed mutations to FSL for forensic examination of vendor's thumb impression with admitted thumb impression but neither the prayer was acceded nor rejected, thus, the administration of justice requires that on acceptance of these revisions, the matter may be remanded for expert opinion through FSL of disputed mutations. To substantiate his conventions, he relied on the case law reported as PLD 2007 SC 433, 2006 YLR 1513, 1995 CLC 695, PLD 1979 SC 890, PLD 1992 SC 811, 1979 SCMR 625, 2012 MLD 1545 and 2008 SCMR 1425.

04. Contrarily, learned counsel for respondents contended that only the disputed mutations were purportedly attested on the instance of plaintiff in favour of petitioners and the other mutations referred to by the learned counsel for petitioners, the plaintiff was not the vendor so she was neither aggrieved of those mutations nor was supposed to challenge them. He went on to say that only in one mutation No.209, Mst. Hussan Pari, the sister of plaintiff is the vendor whereas other alleged mutations only Mst. Hussan Bibi is the vendor. However, when Mst. Hussan Bibi is a *Parda Nasheen* illiterate and rustic villager and when her son and husband were alive but none of them was made witness and the one who happened to be the witness did not know the plaintiff who deposed that in his presence neither the mutation was thumb impressed nor the sale consideration changed hands, then how come the veracity of witness be authenticated. He added that entire commission proceedings were manipulated, fabricated just

to deprive the plaintiff from her valuable property and that too for no sale consideration. Insofar as the expert opinion for thumb impression or FSL, he added that not only the petitioners' application was dismissed but appeal and revision were also dismissed, and those orders being not assailed have attained finality. He supported the impugned judgment and decree by submitting that the same was the result of correct appreciation of evidence.

05. Arguments heard and record perused.

06. It appears from record that all three sale mutations were challenged by an illiterate and *Parda Nasheen* Lady by contending that those were without consideration, without her consent and that she never appeared before any revenue officer / official; that in accordance with the law of the land, the beneficiaries were required to prove firstly, the independently the factum of sale, secondly, the payment of sale consideration, thirdly, the presence of vendor before local commission and putting of her thumb impression and fourthly, her due identification so that the vendor may not be misidentified, thus her near and dear i.e. husband and son were alive, were not the identifier of vendor, and the one who identified her did not know her rather has never met her ever. Payment of sale consideration was not proved, none of witness deposed that in his presence sale consideration was paid. Column No.13 of mutations reveal that these were attested for Rs.

50,000/-, 70,000/- + 7000/-, thus the petitioners had to prove the payment of sale consideration.

The Hon'ble Supreme Court in case titled "**Sardar Ali versus Wazir Khan**" (2005 SCMR 1583) has held: -

"It is true that P.W.3 is scribe of the document but he had failed to furnish trustworthy evidence to establish that the transaction in respect of sale of land took place between the parties in pursuance whereof the petitioner paid Rs. 1,00,000 out of total sale consideration of Rs.1,25,000. Since the document (Exh.P.1) has not been proved on record according to law, therefore, no exception can be taken to the impugned judgment which is based on correct appreciation of evidence available on record".

Similarly, the Apex Court in case titled "**Ghulam Mustafa versus Muhammad Yahya**" (2013 SCMR 684) has held that: -

"this is an admitted fact that only one marginal witness to the agreement to sell was produced and he also did not support the claim of the appellant regarding payment of sale consideration in his presence as was mentioned in the agreement therefore, the assertion of the respondent that her signature on the agreement were obtained deceitfully would be sufficiently supported by the evidence on the record. The genuineness of the agreement and the transaction of sale was not proved as per requirement of Article 17 read with Article 15 of Qanun-e-Shahadat Order, .1984 and this is settled law that relief of specific performance cannot be granted unless the execution of sale agreement as per requirement of law and payment of sale consideration in part or full is proved".

07. Before discussing the legal aspect of sale mutations, a look of basic definition of sale as provided in Section 54 of the Transfer of Property Act 1882, which is reproduced as under.

" 54. Sale defined. 'Sale' is a transfer of ownership in exchange for a price paid or promised or part paid and part promised. Sale how made. Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of

a reversion or other intangible thing, can be made only by a registered instrument. In the case of tangible immovable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property. Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs in possession of the property. Contract for sale-A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property”

08. The above quoted section of law in explicit term defined that it is a contract, so it was petitioners to prove that when, where and under what circumstance the contract of sale was entered between the parties. Apart from above, mutation No.222 (Ex.DW1/1) mutation No.207 (Ex.DW1/6) and mutation No.209 were entered through *Roznamcha Waqiyati* but copies of the same were not placed on file. Sub-Section (1) and (2) to (8) of Section 42 of the Land Revenue Act, 1967, are reproduced as under: -

“42. Making of that part of periodical records which relates to land-owners. - (1) [Subject to other provisions of this Chapter, a person acquiring by inheritance, purchase, mortgage, gift, or otherwise, any right in an estate as a land-owner, or a tenant for a fixed term exceeding one year, shall, within three months from the date of such acquisition, report his acquisition of right to the Patwari of the estate, who shall.

- (a) record such report in the *Roznamcha* to be maintained in the prescribed manner;
- (b) furnish a copy of the report so recorded, free of cost to the person making the report; and
- (c) send a copy of the report, within a week of its receipt by him, to the [respective Local Council] within which the estate is situated.

- (2) If the person acquiring the right is a minor or is otherwise unable to report, his guardian or other person having charge of his property shall make the report to the Patwari.
- (3) The Patwari shall enter in his register of mutations every report made to him under sub-section (1) or sub section (2) and shall also make an entry in the Roznamcha and in the register of mutations respecting the acquisition of any such right as aforesaid which he has reason to believe to have taken place and of which report should have been made to him under either of those sub-sections and has not been so made.
- (4) The report made to the Patwari under sub-section (1) or sub-section (2) or recorded by him under sub-section (3) shall be displayed in such manner as may be prescribed.
- (5) If the Patwari fails to record or to display a report made to him under sub-section(1) or sub-section (2), the person making the report may make the report, in writing, to the Revenue Officer concerned and 1[the Nazim of the Village Council or Nazim of the Neighborhood Council as a case may be]in which the estate is situated by registered post acknowledgement due and the Revenue Officer shall there-upon cause such report to be entered in the register of mutations.
- (6) A Revenue Officer shall, from time to time, inquire into the correctness of all entries in the register of mutations and into all such acquisitions as aforesaid coming to his knowledge of which, under the foregoing sub-section report should have been made to the Patwari and entries made in that register, and shall in each case make such order as he thinks fit with respect to any entry in the periodical record of the right acquired.
- (7) Except in cases of inheritance or where the acquisition of the right is by registered deed or by or under an order or decree of a Court, the Revenue Officer shall make the order under sub-section (6) in the presence of the person whose right has been acquired, after such person has been identified by two respectable persons, preferably from Lambardars or members of the Union Committee, Town

Committee or Union Council concerned whose signatures or thumb-impressions shall be obtained by the Revenue Officer on the register of mutations.

- (8) An inquiry or an order under sub-section (6) shall be made in the common assembly in the estate to which the mutation, which is the subject matter of the inquiry, relates”.

09. Statement of Patwari Halqa was recorded as PW-1, who was cross examined at length, then statement of ADK was recorded as PW-2 but from them no such record was placed on file in order to determine that in whose instance *Roznamcha* was entered. More importantly one of the marginal witness was examined as CW-1, who demonstrated the true picture, by deposing that vendor Mst. Hussan Bibi is his first cousin, neither in his presence sale consideration was paid nor his statement was recorded, similarly he deposed that in his presence no mutation was thumb impressed by vendor. Petitioners have not cross examined the same, as such by not cross examining, examination in chief and cross examination on behalf of plaintiff, would be considered as an admission of petitioners. Beneficiary of mutation is required to prove it as held by the apex Court in case titled “*Aurangzeb through L.Rs and others vs. Muhammad Jaffar and another*” (2007 SCMR 236) that: -

“It is a settled law qua the transaction of sale or gift, that it is the duty of the beneficiary and a heavy onus lay on the beneficiary to prove by convincing evidence j satisfying the judicial conscience of the Court that the transaction shown to be a gift was executed by the donor in favour of the donee”

10. In case titled "*Mst. Hafiza Bibi vs. Ali Hussain and others*"

(1994 SCMR 1194), it was held that: -

"4. It has come in evidence that the appellant is a married woman. She had come to the house of her brothers, though step, at the time of 'Chehlum' of their father and stayed there for about two months and was treated very nicely. At the time of alleged alienation, her husband was not there. The alienate stood in fiduciary relationship. In the absence of independent advice, in view of the long established law from *Mst. Farid-un-Nisa v. Munshi Mukhtar Ahmed and another*, (1925 PC 204), and lastly declared by this Court in *Ghulam Ali and others v. Mst. Ghulam Sarwar Naqvi* (PLD 1990 SC 1) the transaction cannot be sustained. Therefore, the appeal is allowed, and the judgment and the decree of the learned trial Court restored. In the circumstances the parties are left to bear their own costs".

11. Furthermore, before trial court, petitioners have submitted application for summoning of DOR, Rehmat Ullah Wazir Revenue Officer, Shamsheer Patwari, Girdawar Circle but their application was turned down by the learned trial court, against which their appeal was failed. They have also filed an application for expert opinion regarding the thumb impression of Mst. Hussan Bibi that too was dismissed. That have also submitted an application for amendment in written statement, which was dismissed against which they came up to this court and their civil revision was also dismissed vide judgment rendered in **CR No. 364 of 2011 dated 25/03/2011**. Second Civil Revision for producing of witnesses and re-summoning of witnesses through **CR No. 540 of 2011** was dismissed by this Court on **07/10/2011**. Therefore, there is no force in the arguments of the learned counsel that on the request

of petitioners, the expert opinion was not sought by the lower court. Even otherwise the evidence of expert opinion is only to corroborate the stance of party and such evidence itself does not entitle a party for relief, if not supported by primary evidence which is lacking in this case.

12. Therefore, for all that has been discussed above, these petitions are dismissed being without substance with cost.

ANNOUNCED.
17.12.2020.

J U D G E

Himayat, CS