

Judgment Sheet

PESHAWAR HIGH COURT, ABBOTTABAD BENCH.

JUDICIAL DEPARTMENT

CR No.244-A of 2007

JUDGMENT

Date of hearing.....25/01/2021.....

*Petitioner(s)....(Muhammad Hanif) by Mr. Ikram-ul-Qayyum,
Advocate.....*

*Respondent(s)....(Zardad Khan and others) by Haji Ghulam Basit,
Advocate*

SHAKEEL AHMAD, J:- This revision petition is directed against the judgment and decree dated 13.03.2007, passed by the learned Additional District Judge-II, Haripur, whereby, Civil Appeal No.97/13 of 2006 filed by the petitioners against the judgment and decree dated 27.02.2003 passed by Civil Judge-V, Haripur, in suit No.168/1 of 1995, was dismissed.

2. The facts of the case, in brief, are that petitioner/plaintiff instituted a suit against the respondents/defendants for declaration to the effect that petitioner/plaintiff was owner in possession of property bearing 'khasra' No.300/115, 121, 119, 'Khata' No.55/78/79 measuring 8 'Kanals' 18 'Marlas', 'Khasra'

No.114 measuring 5 'Kanal' 8 'Marlas' 'Khata' No.54/77, 'Khasra' No.120 measuring 7 'Marlas' 'Khata' No.69/94 to the extent of 1/2 share, 'Khasra' No.275 measuring 6 'Kanal' 19 'Marlas' 'Khata' No.65/90 to the extent of 1/8 share, and 'Khasra' No.111 measuring 1 Kanal 11 Marlas' 'Khata' No.64/89 to the extent of 1/4 share alongwith share in 'Shamilat' situated in 'Mauza' Qazi Maira Tehsil and District Haripur, on the basis of registered deed No.3170 attested on 27.09.1995 and gift mutation No.378 attested on 17.09.1995 in respect of the same land by defendant No.5 in favour of defendants No.1 to 4 was fraudulent, forged, fictitious, without consideration, and based on fraud was ineffective upon the rights of the plaintiff and liable to be cancelled, and entries in the name of defendants No.1 to 4 in the revenue record on the basis of said mutation were also liable to be cancelled and the name of the plaintiff was required to be entered therein on the basis of registered deed No.3170 dated 27.09.1995. The plaintiff/petitioner sought permanent injunction praying to restrain the respondents/defendants No.1 to 4 from making interference, or making construction or improvements, or alienating the disputed property on the basis of wrong entries in the revenue record. The plaintiff, in alternative, also sought possession of the suit property.

After service of summons, the respondents/defendants put their appearance before the learned trial Court, contested the suit by way of filing their written statement. From divergent pleadings of the parties, following issues were framed and parties were directed to produce evidence.

ISSUES

1. Whether the plaintiff has got a cause of action?
2. Whether the plaintiff is stopped to sue?
3. Whether the suit is time barred?
4. Whether the suit is incompetent in its present form?
5. Whether the suit is properly valued for the purposes of Court fee and jurisdiction?
6. Whether the suit is malafide and based on undue influence etc?
7. Whether Registered deed No.3170 attested on 27.09.1995 is fictitious, wrong, frivolous and without any consideration and consent of the defendant No.5, hence void and ineffective on the rights of the plaintiff?
8. Whether the suit land was gifted by mutation No.378 attested on 17.09.1995 by defendant No.5 in favour of defendants No.1 to 4 prior to the Registered sale deed No.3170 dated 27.09.95 for rendering their services and financial help. If so the relation of donor with donees and its effect?
9. Whether defendant No.5 is illiterate and ignorant villager and gift mutation No.378 dated 17.9.95 on his behalf is fraudulent, frivolous and result of collusion of defendants No.1 to 4 and revenue staff and as such ineffective and void against registered deed dated 27.9.95?
10. Whether affidavit dated 15.10.95 on behalf of defendant No.5 is wrong, fictitious, self-made and fraudulent hence ineffective on the rights of defendants No.1 to 4?
11. Whether the plaintiff is entitled to the decree as prayed for in the heading of the plaint?
12. Relief.

3. In order to prove his claim, petitioner/plaintiff produced seven witnesses including plaintiff himself, while the respondents/defendants examined three witnesses including defendant No.1 in support of their case. After a full dressed trial, the suit of the petitioner/plaintiff was dismissed by the learned Civil Judge-V, Haripur vide judgment and decree dated 27.02.2003. Not contented with the same, the petitioner approached the learned appeal Court by filing Civil Appeal No.97/13 of 2006, which was dismissed being meritless while the judgment and decree passed by the learned trial Court was maintained vide judgment and decree dated 13.03.2007. Hence, this revision petition.

4. The learned counsel representing the petitioner argued that findings of both the Courts below are based on misreading and non-reading of evidence and that their conclusion are not supported by the evidence on record. He next argued that the impugned mutation through which the suit property was transferred in the name of the respondents No.1 to 4 is forged and fictitious. He further argued that requirement of gift of immovable property under the Muhammadan Law are declaration by donor, acceptance by the donee and delivery of possession by the donor to the donee, which is lacking in the instant case, therefore, the gift

mutation is liable to be set aside. He added that the respondents No.1 to 4 are not related to the respondent No.5, and went on to say that a gift without consideration is void. He lastly argued that neither the marginal witnesses of the mutation in question were produced nor it was attested in the concerned village, therefore, the same is not sustainable in the eye of law.

5. As against that learned counsel representing the respondents No.1 to 4 contended that the mutation in question attested in favour of the respondents No.1 to 4, is prior in time. He next argued that Muhammadan Law does not prohibit an adult sane Muslim from alienating the property by way of gift even to a stranger. He further contended that petitioner being a stranger cannot challenge the validity of gift mutation. He added that donor has unlimited power to gift away his property even without consideration. The learned counsel for the respondents by summing up his arguments contended that the entries got recorded in revenue record effected by the donor (now deceased) is sufficient proof of delivery of possession. He lastly contended that attestation of mutation in the village is not a mandatory requirement under the Land Revenue Act and concluded his arguments by contending that a Muslim may alienate the whole of his property by gift

even in favour of a stranger, to entire exclusion of his heirs and only restraint is the rule which invalidates a gift, is death bed gift and prayed for dismissal of the revision petition.

6. I have carefully considered the submissions of the learned counsel for the parties and perused the record with their valuable assistance.

7. It transpired from the record that the suit land measuring 13½ Kanal at Mauza Qazi Maira, Tehsil & District Haripur originally belonged to Faqeer Muhammad/respondent No.5. It was pleaded by the petitioner that through the registered deed No.3170 attested on 29.09.1995 Ex.PW 2/1, the respondent No.5 has sold out his said landed property to him. He thus claimed right, title, interest etc in respect of the suit land. He was aggrieved of the gift mutation No.378 attested on 17.09.1995 in favour of the respondents No.1 to 4 by the respondent No.5 through which the suit land was mutated in the names of the respondents No.1 to 4. The respondent No.5 denied the claim of the petitioner and supported the stance of the respondents No.1 to 4 by way of filing his written statement through his counsel. The learned trial Court on the basis of findings recorded on issues No.7, 8 and 9 found that plea of gift, taken up by the respondents No.1 to 4 was established

and held that the petitioner failed to establish genuineness of registered sale deed in his favour and proceeded to decide issues No.7, 9 and 10 against the petitioner and issue No.8 in favour of the respondents No.1 to 4. Having arrived at this finding, the suit was dismissed. There was an appeal bearing No.97/13 of 2006 before the learned Additional District Judge, Haripur. Having considered the submissions of the learned counsel for the parties, the learned appeal Court agreed with the findings recorded by the learned trial Court and dismissed the appeal on 13.07.2007.

8. I found that the petitioner claimed his ownership over the suit property on the basis of registered sale deed Ex.PW 2/1. On the other hand, the respondents No.1 to 4 assert that the suit property was gifted to them through suit mutation executed by the respondent No.5. These two documents, are supposed to be proved by both the parties through cogent, reliable and confidence inspiring evidence as required under the law. No doubt presumption of truth is attached to the registered sale deed, so the respondents were under obligation not only to shatter genuineness of the said deed but also to prove genuineness of gift mutation attested in their favour.

9. The record disclosed that the respondent No.5 contested the suit by way of filing his written statement through his counsel, wherein he denied execution of registered sale deed and contended that it was a forged and fictitious document and admitted the genuineness of gift mutation attested in favour of the respondents No.1 to 4 by him. He stated in his written statement that he throughout lived with the respondents No.1 to 4 and was looked after by them. He categorically admitted claim of the respondents No.1 to 4 and denied claim of the petitioner. It is pertinent to mention here that the petitioner also placed reliance on the affidavit Ex.PW 4/2 allegedly executed by the respondent No.5 in his favour, admitting therein execution of registered sale deed, however, this document could not be proved as he failed to produce the executant of Ex.PW 4/2 even he was not cited as a witness in his list of witnesses, though it was borne from the record that at the time of recording evidence he was alive. Another interesting aspect of the case is that the petitioner while appearing as PW-5 deposed that he entered into oral sale agreement at Hazara Colony at Rawalpindi in presence of one Aurangzeb and his brother namely Mumtaz but neither the said Aurangzeb nor Mumtaz were produced as witnesses in support of

his contention. The stamp paper was purchased on 05.09.1995 while the deed was scribed on 27.09.1995, It was admitted by him that before the execution of registered deed, no sale consideration was paid. He also stated that at the time of purchase of stamp paper, neither he nor his witnesses were present and the respondent No.5 had come from Rawalpindi. He further admitted that all the three dates i.e. purchase of stamp paper, scribing of sale deed and execution/attestation of sale deed, were fixed due to on and off visit of the respondent No.5 from Rawalpindi. The relevant portion of his cross-examination is reproduced as under:-

کیونکہ فقیر محمد جوں جوں آتا رہا یہ کام کرتا رہا۔

It was also admitted by him that the registered deed was written at 9.00 a.m. and at that time his both witnesses Chanzeb (PW-6) and Muhammad Ayub (PW-7) were present. Whereas Muhammad Ayub (PW-7) deposed that the bargain was stuck before him and he for the first time appeared before the registrar. It clearly suggests that the entire transaction was completed on 27.09.1995, however, the record reveals that the stamp paper was purchased on 05.09.1995 as per statement of stamp vendor PW-2 and it was scribed on 10.09.1995, its entry in the relevant register can easily

be maneuvered in the back date. It is not appealable to a prudent mind that the respondent No.5 came from Rawalpindi and purchased stamp paper on 05.09.1995 and the petitioner was not available to him to scribe and execute the deed, particularly, for want of payment of sale consideration. It is an admitted fact that the gift mutation executed in favour of the respondents No.1 to 4 by the respondent No.5 is prior in time and the second transaction, if any, made by the respondent No.5 as alleged, was illegal and void as he was no more owner of the suit property after alienating it in favour of the respondents No.1 to 4. Thus, it was rightly held by the Courts below that the petitioner failed to prove genuineness of registered sale deed.

10. Before advertng to the genuineness of the gift mutation attested in favour of the respondents No.1 to 4 by the respondent No.5 and submissions of the learned counsel for the petitioner, it would be appropriate to resort to the definition of gift provided by Section 138 of Muhammadan Law written by D.F. Mullah, which reads as under:

“A hiba or gift is a transfer of property made immediately, and without any exchange, by one person to another accepted by or on behalf of the later.”

Pre-requisites of a valid gift under Muhammadan Law as pointed out by Mullah are declaration, offer by owner, acceptance of gift by donee and delivery of possession. It is reflected from the record that the suit mutation was sanctioned in the presence of tehsildar in a public meeting and on inquiry by the tehsildar, respondent No.5 accepted that he was making gift with his own free will. Moreover, when he submitted his written statement, he admitted that possession of the suit land was delivered to the respondents No.1 to 4. Hence, the basic three ingredients of a valid gift, were fulfilled. In this behalf reference may be made to the case reported as '**Mst. Jabeda Khatoon V. Moheed Ali**' (AIR 1973 Gauhati 105), wherein it was held that when the donee has been possessing the land and got his name mutated in the revenue record in respect of the land, it is implied that there is acceptance on behalf of the donee and coupled with possession of the property which was delivered to the donee by the donor. In this context reference may also be made to the case reported as '**Mst. Nagina Begum V Mst. Tahzim Akhtar and others**' (2009 SCMR 632). It is also an admitted fact that during life time the above named donor never objected to the mutation in question rather he admitted its execution as stated above. No doubt, a

gift mutation executed by a sick person dependant at the mercy of his attendants under compelling circumstances, is illegal and is not binding, but it is equally true that in the present case nothing exists on the file to indicate that respondent No.5 was sick and infirm at the time of execution of the gift mutation and the same had been obtained by the respondents No.1 to 4 through fraud, coercion or undue pressure or undue influence was exercised on him to constitute the said gift. Mere assertion of the petitioner that a fraud has been practiced upon the respondent No.5 to get the gift mutation attested without a positive attempt on his part to substantiate the same, is of no consequence. Needless to mention that it is very easy to assert fraud but it is difficult to prove the same. In this respect, I am fortified in my view from the dictum laid down in the case reported as '**Ghulam Ghaus V. Muhammad Yasin and another**' (2009 SCMR 70). A Muslim donor enjoys vast unfettered power to alienate his property by way of gift during his lifetime, subject to one condition (as discussed above) that he should be in proper state of health and gift is made of his own without any coercion or inducement.

11. Last but not least, merely non-existent of blood relation, as argued by the learned counsel for the

petitioner, would not be sufficient to declare a gift invalid. In this context reliance can be placed on the judgment reported as '**Tahir Pervez V. Muhammad Sadiq and others**' (2005 CLC 346).

12. The points urged before me by the learned counsel for the petitioner in my opinion, are not substantial reasons or material enough to earn interference in the concurrent findings of fact rendered by the learned lower fora on the basis of due and proper evaluation and appreciation of evidence. The learned Courts below thoroughly discussed, dealt with and analyzed the evidence of the parties and then formed their well-reasoned opinion on the litigated questions of fact against the petitioner. The well-reasoned conclusions of the learned subordinate Courts cannot be superceded by this Court even if another view was deducible from evidence on a third opinion of fact was inferable from the record. The oral as well as documentary evidence was logically and consistently deciphered and reasoned out for the impugned opinions. There exists no ground for interference in the conclusion drawn from cumulative and comprehensive consideration of the case evidence by the learned Courts below.

13. No illegality, irregularity or jurisdictional defect in the concurrent findings of the learned Courts below, which resulted into impugned judgments and decrees could either be pointed out or observed. This being the position, there is no merit in this revision petition and the same is dismissed. However, I leave the parties to bear their own costs.

Announced:
Dt.25.01.2021.

M.Saleem/PS



J U D G E

(SB) Mr. Justice Shakeel Ahmad