JUDGEMENT SHEET
IN THE PESHAWAR HIGH COURT, BANNU BENCH
[Judicial Department]

C.R. No. 96-B/2015

Noor Shah Ali Khan alias Nawarish Ali Khan deceased through legal heirs Caste Pathan resident of Bega Taja Zai Tehsil and District Lakki Marwat.

versus

Khan Momin 06 others Caste Pathan resident of Bega Taja Zai Tehsil and District Lakki Marwat.

Date of hearing: **02.02.2022**

For petitioners: Messrs. Haji Zafar Iqbal & Aslam Khan Michen Khel, Advocates.

For respondents: Messrs. Faqir Mehbub-ul-Hameed and Kazim Raza, Advocates.

JUDGEMENT

MUHAMMAD NAEEM ANWAR, J.- Petitioner has challenged the judgment and decree of learned Additional District Judge, Lakki Marwat dated 19.06.2015, whereby the appeal filed by the petitioner was dismissed, consequently the judgment and decree of the learned Civil Judge-II, Lakki Marwat dated 06.07.2013 was maintained.

02. Significant facts of the instant petition are that predecessor of respondents has filed a suit civil for declaration in the year 2011 against the petitioner/defendant for declaration to the effect that she has been entered as owner being daughter of Mir Salam in the property located in *Khata* Nos. 162, 164 to 166, 1260 etc in the revenue Estate of Moza Manji Wala Tehsil Naurang District Lakki Marwat according to *Jamabandi* for the year 1965 and property situated in *Khata* No. 34 to 40, 46 & 47 in the revenue Estate of Moza Bega Tajzai Tehsil and District Lakki Marwat according to *Jamabandi* for the year 1977-78; that petitioner/defendant

fraudulently got entered and attested gift mutation No.2385 dated 08.07.1965 and mutation No. 3961 dated 15.12.1977 in the above mentioned *Mozajaat* as such transferred her ownership in his name, therefore, both the mutations being based on fraud and collusion are ineffective upon her right and liable to be cancelled. An added prayer for perpetual and mandatory injunction to the effect that the defendant be restrained from claiming ownership the extent of shares of plaintiff as detailed in Para-A of the plaint. It was averred in the plaint that the plaintiff and defendant being real brother and sister, the plaintiff alienated her property situated in the Moza Landiwa willingly in favour of defendant through gift mutation No.41259 dated 15.02.1978; that beyond the above said property plaintiff has also got sufficient property in Moza Manjiwala and Moza Bega Tajazai; that the suit property was cultivated by the defendant who used to give due share of produce to plaintiff but since 04 years, defendant paid nothing to plaintiff and about one week prior to institution of the suit plaintiff was informed by her son namely, Momin Khan that the property of plaintiff situated in Moza Manjiwala and Moza Tajzai were transferred by the defendant through impugned mutations, thus, defendant was asked for transfer of her property in her name but proved as futile exercise hence, the suit was filed. Suit was contested through filing written statement by the petitioner/defendant on 02.03.2011 by denying the allegations of plaint. On conclusion of evidence learned trial court through judgment and decree dated 06.07.2013 decreed the suit respondent/plaintiff, being aggrieved petitioner has filed an appeal

which was dismissed on 19.05.2015, thus, the concurrent findings of both the courts below have been assailed by the defendant through the instant petition.

03. Learned counsel for petitioner contended that description of the property with reference to correct particulars of two revenue estates Manjiwala and Bega Tajazai of District Lakki Marwat were not mentioned. Similarly, the particulars of fraud were not given in the plaint which were to be proved by the plaintiff as required under Order VI Rule 4 of the Code of Civil Procedure, 1908. He added that possession of the property has been handed-over to the petitioner since the date of attestation of mutation and in such circumstances on one hand suit of plaintiffs/respondents was time-barred and on the other hand they were required to prove illegality of mutations as the suit was to be proved by the plaintiff in accordance with Article 126 of the Qanun-e-Shahdat Order, 1984. He also submitted that once the possession was transferred and supported by the entries of revenue papers strong presumption of truth is attached to the revenue papers even otherwise the mutation carries an unrebutted presumption being 30 years old documents in consonance with Article 100 of Qanun-e-Shahdat Order, 1984. In order to fortify his submissions, he placed reliance on 2011 CLC 989, 2009 SCMR 598, PLD 2019 Peshawar 202, 2008 CLC 1426 and PLD 2020 SC 338.

04. Contrarily, learned counsel for respondents contended that the respondents had owned properties in three revenue estates, i.e., Landaki, Bega Tajazai and Manjiwala wherefrom to the extent of

Landaki the property was not only transferred but it is also an admitted position as such that was not challenged however, to the extent of Bega Tajazai and Manjiwala respondents have never transferred their property in favour of their brothers; that plaint sans the particulars of gift, venue of alleged offer, acceptance and delivery of possession which were not only to be mentioned in the plaint but was also required to be proved. He added that entries of revenue papers were based upon illegal mutations bearing No. 3885 dated 08.07.1965 and 3961 dated 15.12.1977 but when sole witness of petitioner/defendant entered into the witness box he narrated a different story which version find no support either from record or from entries of illegal mutations; that the petitioner/defendant being beneficiary of the property were required to prove the correctness, validity and authenticity of mutations but they have failed; that during pending adjudication finger prints of disputed mutations along with admitted finger prints were sent to Forensic Expert and after receipt of report which too was not supporting the stance of defendant/petitioner, the respondent/plaintiff submitted an application that expert should be examined but their application was hotly resisted and ultimately it was dismissed on 26.03.2003; lastly, that the petitioner/defendant, as per their statement alleged that as per "*Riwaj*" of the locality the property was got mutated in their names but no such "*Riwaj*" exists in the area and if any it was required to be proved by them. In support of his submissions, he placed reliance on 2017 SCMR 1110, NLR 2008 (Rev:) 97, 2016 SCMR 862, 2016 SCMR 1417, 2017 YLR 2248, 2016 SCMR 662, 2013

SCMR 168, 2017 SCMR 402, 2012 SCMR 1373, 2016 CLC 43 and NLR 2011 (Civil) 01.

05. Arguments heard; record perused.

06. It is reflected from record that Mir Salam was predecessor in interest of both the parties, the plaintiff Mst. Nawab Khela was the daughter and Noor Shah Ali Khan alias Nawarish Ali was the son. The disputed property was devolved upon the legal heirs of Mir Salam and through disputed mutations No. 3885 of the revenue estate of Manjiwala and mutation No. 3961 of the revenue estate of Bega Tajazai it was mutated in favour of defendant/petitioner, Ex.PW-5/1 is mutation No. 3885 which reveals that Mst. Nawar Khela was identified by one Haji Nawab Khan son of Imam Shah and Sultan son of Bakhmal and record reflects that at the time of attestation of mutation she was not only married, had her husband and sons as well and this fact was admitted by Noor Shah Ali Khan alias Nawarish Ali Khan who also admitted that Mst. Nawar Khela was "*Parda*" observing lady. Defendant/petitioner produced Mst. Behram Khela the daughter of Mir Salam, the sister of Mst. Nawar Khela/plaintiff in order to prove the correctness/sanctity of mutation who deposed that only their brother Noor Shah Ali Khan alias Nawarish Ali Khan was present and nothing else when she thumb impressed the mutation. She categorically replied to a question that Haji Nawab Ali Khan son of Imam Shah and Sultan son of Bakhmal were not known to her and similarly she too was not known to them. Son of petitioner Muhammad Ghulam also appeared as DW-3 in order to depose

that Mir Mast son of Sir Mast, Ghulam Khan *Lumberdar* and Sher Nawaz Khan son of Abdullah Khan were dead as such they could not be produced however, in cross-examination, he replied to a question that neither this fact was mentioned in the written statement nor he is in possession of death certificates of referred to above alleged witnesses and that he could not produce Secretary Union Council to corroborate his stance.

07. It appears from record that when the disputed thumb impression on mutation and admitted thumb impression of Mst. Nawar Khela were sent for Forensic Expert, it was reported "*the impression now mark-Q on the aforesaid mutation is too faint and bears no identifiable data for examination/comparison purposes hence no definite opinion can be given on it.*" In such an eventuality when the alleged witnesses were not before the Court, thumb impression was not compared as correct, the alleged donor was not identified by her husband and sons, the ingredients of alleged gift were neither mentioned in the written statement nor elaborated in the evidence of petitioner/defendant, fact of offer of alleged gift, its acceptance, transfer of possession were not proved and the alleged "*Riwaj*" has not been supported by any one. During the course of arguments, learned counsel for petitioner Hajai Zafar Iqbal was questioned about the transfer of the property of two revenue estates as to whether the entire property was mutated or any share therefrom, he stated at the bar that the entire property of revenue estate of Manjiwala and Bega Tajazai has been transferred through disputed mutations. In the case titled ***"Muhammad***

Asghar and others Vs. Hakam Bibi through L. Rs and others" ***(2015 CLC 719(Lahore))*** it was held that:

> "In this regard it is important to note that no time, date or place with regard to the offer of gift, its acceptance or delivery of possession is mentioned in the written statement or in the testimony of the said witness. Even in Rapt Roznamcha Waqiati (Exh.D-1) there is no mention about any date of offer of gift its acceptance or delivery of possession by the donor to the donee."

Reliance is also placed on judgment of Hon'ble Supreme Court in case titled "***Khushi Muhammad Vs Liaquat Ali***" **(PLJ 2003 SC 28)** and "***Mst. Kalsoom Bibi and another Vs Muhammad Arif and others***" **(2005 SCMR 135)** which reads as under:

> "It is a matter of record that the deed as such is challenged on grounds of conspiracy, fakeness and forgery amounting to fraud. In these circumstances, the beneficiary under the document is bound not only to prove the execution of document but also to prove the, actual factum of gift by falling back on the three ingredients of proposal, acceptance and delivery of possession. These have to be proved independent of the document. This Court has quite recently held in case of Ghulam Haider 2003 SCMR 1829 that essentials of a valid gift were required to be proved independent of the deed even if it was registered, in case it is challenged on grounds of forgery etc. Keeping in view the principle so enunciated, we are clear in our mind that the defendants have not produced an iota of evidence to prove the original factum of gift; the proposal, the acceptance and the delivery of possession. We have already discussed that the possession under the gift has not been delivered at all. The gift can be declared void on this score alone arid as well.
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> In the instant case it is a gift which tantamount to disinheriting the closest of the legal heirs or, even if genuine, it otherwise practically disinherits the legal heirs. In such given circumstances, when, through a gift, deprivation of legal heirs is involved, either intended or unintended, the burden to prove original transaction of gift with all its ingredients strongly rests, upon the beneficiaries of such gift. This Court, in similar circumstances, had nullified a transaction of gift in case of Muhammad Ashraf 1989 SCMR 1390, where the question arose as to why in the presence of legal heirs, particularly the children, the donor would have gifted out the entire land to a nephew. Quite recently in case of Barkat Ali 2002 SCMR 1938, this Court once again reiterated such principle holding that in cases of gifts, resulting into disinheriting of the legal heirs, the burden to prove original transaction of gift squarely rests upon the donees Such burden has not been touched at all, much less proved.

The petitioner has miserably failed to prove the gift of property in his favour by predecessor in interest of respondents.

08. Furthermore, Mere 30 years age of a document would not provide any justification for its proof unless the document is proved in accordance with Article 79 of Qanoon-e-Shahadat Order, 1984, when it was questioned. The sole ground that the age of the document is 30 years would not be taken as gospel truth, when the genuineness of the document is disputed, it the duty of the Court to determine the question of its genuineness and correctness because age of the document alone would not amount to be a proof about the correct contents of such document. If genuineness of a document was susceptible to suspicion the Court could refuse to raise presumption and could ask for the proof of its contents. Wisdom is drawn from the principle enunciated in the case of "***Ch. Muhammad Shafi vs. Shamim Khanum***" **(2007 SCMR 838)**. The Hon'ble Supreme court has held that:

> "It is settled law that 'presumption qua thirty years old document under Article 100 of Qanun-e-Shahadat Order, 1984 is permissive and not imperative. The Court must consider the evidence of the documents, in order to enable it to decide whether in any specific case it should or should not presume proper signature and execution. It is settled law that the Court should be very careful about raising any presumption under Article 100 in favour of old documents specially when the same are produced during the trial of suits in which under proprietary rights are set up on the basis of such documents/deeds. It is also settled law that the Court may refuse to apply the presumption where evidence in proof the document is available, or where the evidence has produced and disbelieved".

Reference can also be on ***Muhammad Naseem Fatima's*** case (**PLD 2005 Supreme Court 455**).

09. True, a woman can transfer her share to any one and transfer made by her cannot be questioned unless she herself disputes, in the instant matter, it was Mst. Nawar Khela who came to the court, filed the suit but unfortunately before entering into the wetness box breathed her last. Though the petitioner has taken the plea that particulars of fraud were not mentioned in the plaint but when the plaintiff has challenged that she has not alienated her property through mutations in question and after her death her legal heirs appeared in witness box and corroborated their stance than in such an eventuality the beneficiaries were required to prove the correctness of mutations. It is settled law that pleadings must contain only factum *probanda* and not factum *probantia*. The material facts on which the party relies for his claim are called factum *probanda* and they must be stated in the pleadings. And the facts or facts by means of which factum *probanda* (material facts) are proved and which are in the nature of factum *probantia* (particulars or evidence) need not be set out in the pleadings. They are not facts in issue, but only relevant facts required to be proved at the trial in order to establish the fact in issue. In the instant case the plaintiff has alleged what was required to be mentioned in pleadings thus the objection of petitioners is of no significance.

10. In so far as the contention of learned counsel for petitioner that the instant matter shall be dealt with in consonance with Article 126 of Qanun-e-Shahdat Order, 1984 in juxta position with

Article 100 of the Qanun-e-Shahdat Order, 1984, but as stated in the last paragraph, the onus to prove gift, its particulars, authenticity of a document, identification of the donor at the time of her statement before witnesses, absence of her close inmates, husband, sons has left nothing for its determination and to reach to an inescapable conclusion that the plaintiff/respondent/plaintiff has proved her case. I am of the view that in fact the petitioner has tried to grab the proprietorship of plaintiff and in doing so he succeeded as well but when challenged remained unsuccessful to prove it.

11. Turning to the last submission of the learned counsel for petitioner to remit the case for examination of expert pursuant to the report submitted by him. Yes, it is an established law that opinion of an expert can only be affirmed or discarded if he enters into the witness box but once the expert opined that the characteristic mark of alleged thumb impression of Mst. Nawar Khela on mutations are too faint to be compared and when the application of plaintiff for summoning the expert was resisted by the petitioners themselves neither there is any force in the submission of petitioner nor the examination of expert could provide any premium to the case of petitioner because the opinion of expert is the weakest type of evidence and can only be considered if lends support from other convincing and corroborative evidence which is lacking in the case especially to substantiate the petitioners contentions. In such circumstances the case of petitioner does not fall within the parameters of Order XLI rule 23 & 24 of the Code of Civil Procedure, 1908.

12. Apart from the above, impugned are the concurrent findings of fact recorded against the petitioners which do not call for any interference by this Court in exercise of its revisional jurisdiction in absence of any illegality or any other error of jurisdiction. **Rel: (2006 SCMR 1304), (2007 SCMR 926), (PLD 2003 SC 155) and (2014 SCMR 1469).** Thus, in view of the above discussion, the instant petition being without any merit is hereby dismissed.

Announced.
02.02.2022.

JUDGE

Imranullah PS
(S.B) Hon'ble Mr. Justice Muhammad Naeem Anwar.

09/2022

SCANNED
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Khalid Mahmood