

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Qazi Faez Isa
Mr. Justice Yahya Afridi

Civil Petition No. 4349 of 2018 and
CMA No.10079 of 2018

(On appeal against the judgment dated 13.09.2018
passed by the Lahore High Court, Lahore,
in C. R. No. 1724/2016)

Mst. Parveen (decd.) through her L.Rs. ... *Petitioners*

Versus

Muhammad Pervaiz and others. ... *Respondents*

For the Petitioners: Mr. Munawar Iqbal Duggal, ASC
Syed Rifaqat Hussain Shah, AOR

For the Respondents: Mr. Tariq Aziz, ASC/AOR

Date of Hearing: 04.11.2021

JUDGMENT

Qazi Faez Isa, J. A suit was filed by two sisters against their two brothers (respondent Nos. 1 and 2) assailing the gift mutation No. 318, attested on 22 November 1992, whereby their father, Nizam Din, is supposed to have gifted his property to his two sons (**'the sisters'** and **'the brothers'** respectively) in equal shares. The suit was dismissed. The sisters succeeded in their appeal and the suit was decreed, but the brothers filed a civil revision before the Lahore High Court and were successful in setting aside the judgment of the Appellate Court and restoring that of the Trial Court, which had dismissed the suit.

2. Notices were issued and the learned Mr. Tariq Aziz represents the brothers and has raised a preliminary objection to the maintainability of this petition on the ground that, since the High Court had overturned the judgment in appeal, therefore, the petitioners should have filed an appeal under Article 185(2)(d) of the Constitution of the Islamic Republic of Pakistan (**'the Constitution'**) and further that the petitioners filed a petition for leave to appeal to overcome the belated filing. 30 days is prescribed in Order XII

Rule (1) of the Supreme Court Rules, 1980 (**'the Rules'**) for filing an appeal and 60 days for the filing of a petition for leave to appeal under Order XIII Rule (1) of the Rules. The learned counsel states that where an appeal has to be filed a petition cannot be filed to overcome the disability of belated filing and relies upon the judgment of this Court in the case of *Gul Jan v Naik Muhammad*¹.

3. The learned counsel for the brothers availed of his right to reply and submits that this Court has stipulated the method of determining '*the amount or value of the subject-matter of the dispute in the Court of first instance*' in the cases of *Muhammad Inayat v Fateh Muhammad*², *Zafar Iqbal Hameed Khan v Ashiq Hussain*³, *Taza Gul v Fazal Subhan*⁴, *Muhammad Nawaz v Sardara*⁵ and *Mahmood Hussain Larik v Muslim Commercial Bank Ltd.*⁶ Reference has also been made to his own '*Certificate of Value*' filed with CMA No. 10116/2021; the learned counsel is both the respondent's Advocate-on-Record and Advocate Supreme Court in this case. The said certificate states that the matter in dispute, '*is not less than fifty thousand rupees*'.

4. Responding to the question of the maintainability the learned counsel for the petitioners states that the petitioners filed a petition for leave to appeal (**'petition'**) because the suit filed by the sister stated that for purpose of court fee it was valued at two hundred rupees (paragraph 12 of the plaint); exception to such valuation did not result in the framing of an issue on this point nor did any court negate the said valuation mentioned in the plaint. He submits that an appeal cannot be filed when '*the amount or value of the subject-matter of the dispute in the Court of first instance*' is less than fifty thousand, therefore, the petitioners had no option but to file a petition. He further states that since the cancellation of a gift mutation was sought and a gift has no monetary value, and the instant gift mutation also did not mention a value therein, therefore, the suit could be valued as deemed appropriate by the plaintiffs and they had elected to value it at two hundred rupees.

¹ PLD 2012 Supreme Court 421

² 2003 SCMR 875

³ 2005 SCMR 1371

⁴ 2006 SCMR 504

⁵ 2008 SCMR 1593

⁶ 2009 SCMR 857

5. With the assistance of the learned counsel we have examined the plaint, which sought the cancellation of the said gift mutation, and in paragraph 12 of the plaint it is stated that the suit is valued at two hundred rupees for the purposes of court fee. There is no specific mention of valuation in terms of the Suits Valuation Act, 1887. We have also seen the said gift mutation and it does not mention any amount or value. Therefore, the plaintiffs were entitled to value the suit as they deemed appropriate and they valued it at two hundred rupees for purposes of court fee and three courts accepted this. In such circumstances a petition under Article 185(3) of the Constitution had to be filed; Article 185(2)(d) of the Constitution, which is in respect of appeals, was not applicable. Since the petitioners had not couched an appeal as a petition, the ratio of the judgment in the case of *Gul Jan* is not applicable. All the other cited judgments are in respect of how to determine the *amount* or *value* mentioned in Article 185(2)(d), and none of them are in respect of a gift or a gift mutation. Therefore, since this petition for leave to appeal is maintainable we proceed to decide it, but before doing so during the course of hearing we have noted an anomalous position in the Rules. This anomaly creates problems and complications and which earlier had necessitated a five-member Bench of this Court to decide one aspect of it in the case of *Gul Jan v Naik Muhammad*; where it was held that a petition must not be filed when an appeal lies to circumvent the 30 days prescribed period for filing of an appeal by resorting to filing a petition which may be filed within 60 days.

6. The Rules prescribe double the period for the filing of a petition to that for filing an appeal which is surprising because an appeal is filed as of right. The Rules have been made pursuant to Article 191 of the Constitution, which provides that, '*Subject to the Constitution and law, the Supreme Court may make rules regulating the practice and procedure of the Court*'. Therefore, to attend to the noted discrepancy it may be appropriate to amend the Rules. One simple way of doing this, without adversely affecting the accrued rights of any party, could be by amending Order XII Rule 1 of the Rules by substituting the stated period of 30 days mentioned therein for filing an appeal and bring it at par with the period in which a petition may be filed, that is, 60 days.

7. Notice was given to the respondents after recording in order dated 19 January 2021, the contentions put forward by the petitioners' learned counsel, reproduced hereunder:

The learned counsel for the petitioners states that the father of the petitioners, Nizam Din died on 18 May 2007 leaving behind one widow, two daughters and two sons. The petitioners filed a suit on 3 July 2007 challenging the gift mutation No. 318 attested on 22 November 1992 statedly made by Nizam Din in favour of his sons and claimed their right in inheritance in the 120 *kanals* of land of Nizam Din as per their shares in accordance with *shariah*. The suit was dismissed, the appeal filed by the petitioners against the same was allowed, but the High Court allowed the revision by setting aside the judgment of the appellate court and dismissed the suit.

2. The learned counsel states that out of two donees only Muhammad Pervez testified to support the gift and the other donee, namely Muhammad Aslam (who was then alive), did not testify nor execute a power of attorney in favour of his brother Muhammad Pervez to give evidence on his behalf. It is next contended that there were three witnesses to the said gift namely, Rana Muhammad Azeem, Nazir Ahmad and Khursheed Ahmad of which the latter two had died but Rana Muhammad Azeem who was alive was not produced as a witness. He points out that the suit was filed by two sisters and their mother was arrayed as a defendant but she had disowned the joint written statement filed by her sons and did not independently contest the suit nor came forward to testify. The learned counsel submits that the learned appellate court had in the circumstances of the case rightly decreed the suit, however, the High Court exercising revisional jurisdiction set aside the judgment and decree of the appellate court by shifting the burden of proving the gift on to the petitioners and held that the petitioners' contention that their father was physically and mentally incapacitated at the said time of making gift was not

established. Since this is a family matter let in the first instance notice be issued to the respondents.

8. The learned counsel for the petitioners, in addition to what was noted in the aforesaid order, submits that the *gift* was not valid because the mutation, through which the said property is stated to have been gifted, did not record that the donees of the gift, that is the brothers, had accepted it. The gift mutation also did not state that possession of the land was delivered to the donees pursuant to the gift nor that they were already in possession, submits the learned counsel. He also by referring to section 42(7) of the Punjab Land Revenue Act, 1967 (**'the Act'**) submits that Nizam Din, the purported donor, was not identified by the category of persons mentioned in the said legal provision, and that it was incumbent to produce such persons as witnesses.

9. The learned counsel for the respondents relies on the impugned judgment and on the judgment of the Trial Court and states that the same are in accordance with law and do not call for any interference by this Court. He further submits that the petitioners had alleged that the parties' father, Nizam Din, was mentally incapacitated to make the gift and was physically unable to go to the Revenue office to record the gift, but had failed to establish these facts nor did they produce medical evidence in support of their contention. Therefore, their challenge to the gift must fail.

10. We have heard the learned counsel for the parties and with their able assistance examined the record of the case. On the death of a Muslim his/her property devolves upon his/her legal heirs. However, if any heir seeks to exclude the other legal heirs, as in the instant case by relying on a purported gift the beneficiary of such gift must prove it. The *gift* in this case is stated to have been witnessed by three persons, namely, Rana Muhammad Azeem, Nazir Ahmad and Khursheed Ahmad, and even if it be accepted that two of the said witnesses had died by the time the evidence was recorded, the third witness, namely, Rana Muhammad Azeem, was alive but he was not brought to testify as a witness in support of the *gift*. Therefore, an adverse presumption may be drawn that if he did come to testify he would not have supported the *gift*. As if this was not enough, only one of the two donees, namely, Muhammad Pervaiz, testified in support of the gift and the other donee, namely, Muhammad Aslam, did not do so nor

did he execute a power of attorney in favour of his brother Muhammad Pervaiz, authorizing him to give evidence on his behalf. The purported donor of the gift, Nizam Din, was also not identified as required by section 42(7) of the Act, therefore, it cannot be said that the person who was presented before the Revenue authorities was Nizam Din. The purported gift also suffers from the defect of non-acceptance by donees and the further defect of not mentioning that the possession of the land allegedly gifted was handed over to the donees. As regards the contention of the learned counsel for the respondents that, the petitioners having alleged that their father was mentally incapacitated to make the gift and physically unable to attend the Revenue office but having failed to establish this the gift stood proved, is incorrect. Firstly, no issue was cast on this point and thus it was not decided and, secondly, even if it be assumed that Nizam Din was mentally capable to make the gift and physically fit to go to the Revenue office it does not follow that he had in fact done so. The beneficiaries of the gift had to establish the making of the gift by their father, and also that they had accepted it and that they had received possession of the land, but none of these facts were established.

11. Therefore, there was no reason in fact or in law for the learned Judge of the Trial Court to have dismissed the suit. The mistake was rightly corrected by the Appellate Court, but the learned Judge of the High Court intervened to set at naught the judgment of the Appellate Court, primarily on the ground that the petitioners had failed to establish the mental incapacity and physical inability of Nizam Din which, as noted above, was not a determinative factor. The impugned judgment is not sustainable and is accordingly set aside and the judgment of the Appellate Court is restored. Resultantly, *gift mutation* No. 318 in favour of the brothers, which was attested on 22 November 1992, is set aside and declared to be of no legal effect. Consequently, the estate of the deceased Nizam Din shall be distributed amongst his legal heirs in accordance with the applicable Muslim laws of inheritance. Since Nizam Din passed away in the year 2007, that is 14 years ago, the concerned Revenue authority is directed to incorporate the names of the legal heirs of the late Nizam Din in the revenue record and if the respondent Nos. 1 and 2 had sold/transferred any portion of the land to any third party the petitioners shares shall be adjusted from their brothers available shares.

12. We may once again state that, we are dismayed to observe the all too frequent practice in Pakistan of male heirs resorting to fraud and other tactics to deprive female heirs from their inheritance. While this deprivation causes suffering to those deprived, it also unnecessarily taxes the judicial system of the country, resulting in a needless waste of resources. Each and every day that a male heir deprives a female heir is also an abomination because it contravenes what has been ordained by Almighty Allah.

13. Therefore, for the reasons mentioned above, this petition is converted into an appeal and allowed in the aforesaid terms with costs throughout.

14. The Registrar to bring paragraphs 2 to 6 of this judgment to the kind attention of the Hon'ble Chief Justice who may be pleased to place it for consideration in the next Full-Court meeting.

15. Copy of this judgment be sent to the concerned revenue authority to ensure compliance with regard to the inheritance of the estate of Nizam Din as stated above.

Judge

Judge

Bench-I
Islamabad
04.11.2021
(Farrukh)

Approved for Reporting