

**IN THE SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**PRESENT:**

MR. JUSTICE IJAZ UL AHSAN

MR. JUSTICE YAHYA AFRIDI

**Civil Petition No. 2144-L of 2011 and Civil Appeal No. 1-L of 2012**

*(Against the judgment dated 15.11.2011 passed by the Lahore High Court, Bahawalpur Bench, Bahawalpur in Civil Revision No. 763 of 2001)*

Khallid Hussain, etc.  
Muhammad Yasin, etc.

*(in C.P. 2144-L of 2011)*  
*(in C.A. 1-L of 2012)*

**...Petitioners/Appellants**

**Versus**

Nazir Ahmad, etc.  
Muhammad Rafique, etc.

*(in C.P. 2144-L of 2011)*  
*(in C.A. 1-L of 2012)*

**...Respondents**

For the petitioners:

Mr. M. Amer Tauseef, ASC

For the appellants:

Ms. Shaista Qaiser, ASC

For respondents:

Mr. Shahid Azeem, ASC  
Ms. Tasneem Amin, AOR  
*(in both cases)*

For Govt. of Punjab:

Mr. Akhtar Javed, Addl. A.G.

Date of hearing:

29.07.2021

**JUDGMENT**

**YAHYA AFRIDI, J.-**

**Civil Petition No. 2144-L of 2011**

This is a classic case of siblings wrangling over part of the legacy<sup>1</sup> of their father, Muhammad Din, who died on 15.01.1996. The petitioners claim that after the death of their father when they approached the revenue authorities to sanction the inheritance mutation regarding the disputed property, they

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<sup>1</sup> Immoveable property measuring 149 Kanals and 15 Marlas ('disputed property')

were informed that through a *Tamleeq Nama* dated 03.06.1989 (“**Gift Deed**”) the disputed property had been transferred to the respondents by Muhammad Din, and that Mutation No.144 dated 05.07.1989 (“**Mutation**”) had been sanctioned in the revenue record on the basis of that Gift Deed. This the petitioners claim, prompted them to file a suit for declaration, *inter alia*, that the *Tamleeq Nama* was void, and also for permanent injunction to restrain the respondents from interfering with their rights over the disputed property. The trial court dismissed the suit of the petitioners. Being aggrieved, the petitioners filed an appeal, which was allowed by the appellate court *vide* judgment dated 06.12.2001, and their suit was decreed. The respondents then challenged the decision of the appellate court in revision, which was accepted by the High Court *vide* the impugned judgment dated 15.11.2011; hence, the present petition.

2. We have heard the learned counsel for the parties at some length, and have also gone the record of the case with their able assistance.

**Maintainability of the suit**

3. What essentially prevailed with the High Court was the non-maintainability of the suit of the petitioners for declaration under section 42 of the Specific Relief Act, 1877 (“**Act of 1877**”). The High Court based this conclusion on two findings: first, as the Gift Deed was a registered document, only a suit for cancellation of the Gift Deed under section 39 of the Act of 1877 was competent; and second, a suit for simple declaration without seeking any

consequential relief, in particular possession of the disputed property, was not legally competent.

4. There is a marked yet subtle distinction between a suit for cancellation of a document under section 39 of the Act of 1877, and a suit for declaration of a document under section 42 of the Act of 1877. The crucial feature determining which remedy the aggrieved person is to adopt, is: whether the document is void or voidable. In case of a voidable document, for instance, where the document is admitted to have been executed by the executant, but is challenged for his consent having been obtained by coercion, fraud, misrepresentation or undue influence,<sup>2</sup> then the person aggrieved only has the remedy of instituting a suit for cancellation of that document under section 39 of the Act of 1877, and a suit for declaration regarding the said document under section 42 is not maintainable. On the other hand, in respect of a void document, for instance, when the execution of the document is denied as being forged or procured through deceit about the very nature of the document, then the person aggrieved has the option to institute a suit, either for cancellation of that instrument under section 39 of the Act of 1877, or for declaration of his right not to be affected by that document under section 42 of the Act of 1877; it is not necessary for him to file a suit for cancellation of the void document.<sup>3</sup>

5. When we review the plaint of the petitioners, we note that they have not only challenged the Gift Deed to be void, but

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<sup>2</sup> See the Contract Act, 1872, Ss. 19 and 19A.

<sup>3</sup> See *Muhammad Akbar v. Muhammad Yusuf* (PLD 1964 SC 329 (5-MB)); *Hamida Begum v. Murad Begum* (PLD 1975 SC 624 (4-MB)); *Abdul Hamid v. Sadeque Ali* (PLD 1969 Dacca 357 (DB)); *Muppudathi Pillai v. Krishnaswami Pillai* (AIR 1960 Mad 1 (FB))

have also sought consequential injunctive relief. Thus, the finding of the High Court on the maintainability of the suit is factually unfounded, and legally incorrect. As far as not seeking possession of the disputed property is concerned, the record is clear that no reliable evidence was adduced by the respondents to prove their exclusive possession thereof. No independent evidence, worthy of credence, was produced by the respondents to prove the factum of transfer of possession of the disputed property to them under the Gift Deed. In fact, there is a clear finding of the trial court that the possession of the disputed property remained under the control of Muhammad Din till his death, and further that the same was being cultivated by the tenants, as later correctly confirmed by the appellate court. Even otherwise, the petitioners claim themselves to be the co-owners of the disputed property with the respondents, having inherited the same from their father. The possession of one co-owner is considered, in law, to be the possession for and on behalf of all the co-owners.<sup>4</sup> Thus, the suit of the petitioners in its form and content was maintainable and competent under the law.

#### **Onus of proof**

6. There is no cavil to the proposition that the onus to prove the claim is ordinarily on the person moving the court to seek his relief, as he is the one who is to fail if no evidence at all is given on either side.<sup>5</sup> However, when the contesting party takes up a defence and desires the court to pronounce judgment as to his legal right dependent on the existence of facts which he asserts,

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<sup>4</sup> See *Aswar Muhammad v. Sharif Din* (1983 SCMR 626); *Jan Muhammad v. Abdur Rashid* (1993 SCMR 1463); *Shahro v. Fatima* (PLD 1998 SC 1512)

<sup>5</sup> See the Qanun-e-Shahadat 1984, Article 118.

then the onus to prove those facts lies on him.<sup>6</sup> It is after the parties have produced their respective evidence that, the court is to consider and evaluate the evidence, in civil cases, on the touchstone of preponderance of evidence. It is on whose side the scale of evidence tilts would emerge as the victor, and be awarded the positive verdict.

**Factum of execution and registration of Gift Deed**

7. In the present case, the petitioners challenged the Gift Deed to be void, and in rebuttal the respondents put up a defence that the same was duly executed and validly registered, and thereby had a presumption of truth attached thereto. However, we have noted that the respondents were unable to prove the factum of due execution and valid registration of the Gift Deed. No attesting witness of the Gift Deed has been examined to prove execution. As to registration, though a feeble effort was made by the learned counsel in referring to the testimony of Mansoor Ahsan, Record Keeper, D.C. Office, Bahawalnagar (DW-6), who according to him brought the record of registration of the Gift Deed. We are afraid, the said contention of the learned counsel for the respondents is belied by the record. The said witness was not the custodian of record relating to registration of instruments in Bahawalnagar District. It is noted that Mansoor Ahsan (DW-6) was in fact the witness who brought the revenue record relating to the sanctioning of the Mutation, and not that of registration of the Gift Deed. Similarly, Muhammad Ramzan, retired Tehsildar (PW-7), who testified sanctioning the Mutation, could not legally be competent

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<sup>6</sup> Ibid, Article 117.

to prove the factum of registration of the Gift Deed under the Registration Act, 1908 ("**Registration Act**"). In fact, the competent officer of the Sub-Registrar Office of the District Bahawalnagar, where the Gift Deed was claimed to have been registered, would have been the competent and relevant witness to prove the factum of registration of the Gift Deed. The failure on the part of the respondents to produce the said witness would surely go against them.

8. We are cognizant of the principle that the factum of registration of a document is essentially a notice to the public regarding its existence and validity, and having been registered by the Sub-Registrar in the performance of his official act there is a presumption of truth attached thereto under the law<sup>7</sup>. But the moment the said document is challenged by the alleged executant or his successor-in-interest, that presumption stands rebutted, and the beneficiary thereof has to prove not only the execution thereof, but also the original transaction embodied therein. As the inquiry made under the Registration Act with regard to the execution of the document by the alleged executant is not a judicial inquiry by a Court, but is confined to the purposes of registration, and that too, as a departmental duty.<sup>8</sup>

#### **Conditions of a valid gift**

9. Section 129 of the Transfer of Property Act, 1882, has expressly excluded the transactions of gifts made under the Islamic Law from its application. Under the Islamic Law, the conditions of

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<sup>7</sup> See The Qanun-e-Shahdat, 1984, Article 129(e).

<sup>8</sup> Muhammad Cherag v. Dullay Khan PLD 1954 Dacca 134, approvingly referred to in Mansoor Ahmad v. Maqbool Begum 1990 SCMR 1259 (6-MB).

a valid gift, are: (1) a declaration of gift by the donor; (2) acceptance of gift expressly or impliedly by or on behalf of the donee, and (3) delivery of possession of the subject-matter by the donor to the donee. If these three conditions are fulfilled, the gift is complete. Registration of the gift deed would not be of much legal usefulness, if any of the said conditions is missing.<sup>9</sup> The respondents being the beneficiary of the Gift Deed were, therefore, under the law bound to prove the factum of the actual transaction of the gift, leading to the Gift Deed, by proving the fulfilment of the said three conditions of a valid gift through cogent evidence. To be fair to the respondents, we asked the worthy counsel for the respondents to point out any evidence proving the said three conditions of the actual transaction of gift. Despite all his best effort, he was unable to point to any positively reliable evidence. In fact, no independent witness was produced to prove that the "donor", deceased Muhammad Din, had made declaration of gift of the disputed property, in his presence, to his two sons, the purported "donees". The only evidence in this regard is the oral testimony of one of the "donees" which, in the present case, does not cross the threshold of veracity and sufficiency required in such a contested transaction. Similarly, the factum of transfer of possession was also not very clear. The *Khasra Gardawari* (Ex D-3) produced by the respondents was not of the relevant period. Even otherwise, no independent evidence worthy of credence was produced by the respondents to prove the factum of transfer of possession of the disputed property to them, by the deceased Muhammad Din,

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<sup>9</sup> See *Maulvi Abdullah v. Abdul Aziz* (1987 SCMR 1403); *Muhammad Ejaz v. Khalida Awan* (2010 SCMR 342)

under the alleged gift. In fact, the evidence produced in the case shows that, the disputed property was in possession of a tenant, and remained in the control of Mohammad Din till his death. In such circumstances, the necessary ingredients of a valid gift have not been proved by the respondents. Thus, when the foundation of the transaction being that of the gift was not proved, then the superstructure built thereon in the shape of the registration of the Gift Deed or the entry in the revenue record recording the Gift Deed *vide* the Mutation would not be of any legal consequence.

#### **Equitable distribution**

10. Much was argued about the two lots of 100 *kanal* land, which are in the name of the petitioners, to suggest equitable distribution by Mohammad Din to his children. We have scanned the evidence and noted that the said two lots were neither owned by Muhammad Din, their father, nor is there any evidence to support that the amount for the same was paid to the Government by him for the benefit of the petitioners. This being so, the contention of the respondents of there being fairness and equity amongst the siblings regarding the legacy of Muhammad Din, does not hold good.

#### **Limitation**

11. As far as limitation is concerned, the cause of action to the petitioners to challenge the Gift Deed arose at the time of the death of Muhammad Din, when their interests were created in his legacy, and not prior thereto. Accordingly, the suit of the



petitioners was filed within the statutory period; hence, was competent.

12. For the foregoing reasons, the impugned judgment of the High Court passed in its revisional jurisdiction erred in properly appreciating the crucial factual aspect of the case and the evidence available on the record, and in correctly applying the relevant law on the subject. Hence, it warrants correction by interference of this Court, to prevent miscarriage of justice.

13. This petition is, therefore, converted into appeal and allowed. Consequently, the impugned judgment passed by the High Court is set aside, and the judgment passed by the learned appellate court is upheld and maintained.

**Civil Appeal No. 1-L of 2012**

14. As this appeal is filed against the same judgment, therefore, it is also allowed.

15. These are the reasons of our short order dated 29.07.2021, which reads as under:

*"For reasons to be recorded later Civil Appeal No. 1-L of 2012 is allowed. Civil Petition No. 2144-L of 2011 is converted into appeal and allowed."*

Judge

Judge

Lahore  
29.07.2021  
Approved for reporting.  
Arif