2023 SCMR 1155

[Supreme Court of Pakistan] Present: Ijaz ul Ahsan and Jamal Khan Mandokhail, JJ
MUHAMMAD MUMTAZ SHAH (DECEASED) through LRs. and others--Appellants
Versus GHULAM HUSSAIN SHAH (DECEASED) through LRs. and others--Respondents

Civil Appeal No. 514 of 2015 and C.M.A. No. 11606 of 2021, decided on 2nd September, 2022.

(Against the judgment dated 03.06.2013 of Lahore High Court, Lahore passed in R.S.A. No. 869 of 1979)

Date of hearing: 2nd September, 2022.

JUDGMENT

IJAZ UL AHSAN, J.---Through this instant Appeal by leave of the Court the Appellants have challenged a judgment of the Lahore High Court, Lahore dated 03.06.2013 (the "Impugned Judgment") whereby their Regular Second Appeal was dismissed.

2. The facts giving rise to this lis are that land situated in Shahpur Town and Jalalpur Jagir was owned in equal shares by Murid Hussain and Ali Hussain. Murid Hussain passed away and his widow, Maqsudan Bibi, succeeded him as his legal heir under custom as a limited owner. Likewise, Ali Hussain died in 1946, leaving behind a son (Muhammad Hassan), who inherited the property under custom. Muhammad Hassan however, died a few days after his birth. No mutation was sanctioned in Muhammad Hassan's name and therefore, taking as if he was never born, the land of Ali Hussain was inherited by his widow Mst. Ghulam Fatima under custom as a limited owner. These widows allowed their mother, Mst. Shahzadan Bibi, to share the limited estate. Thereafter, the West Pakistan Muslim Personal Law (Shariat) Act of 1962 was passed w.e.f. 31.12.1962. As a result of the 1962 Shariat Act, the limited estate of the three ladies came to an end. Thereafter, Ghulam Hassan Shah, Altaf Hussain Shah, Nasir Ahmed Shah, Sikandar Zulqarnain Shah and Saleem Ahmed Shah (the "Contesting Respondents") filed a suit for declaration before the Senior Civil Judge, Sargodha (the "Trial Court") averring in their plaint that. according to Sharia, the inheritors of the estate of Murid Hussain and Ali Hussain were: 1) Ghulam Hussain Shah; 2) Altaf Hussain Shah; 3) Nasir Ahmed Shah; 4) Sikandar Zulqarnain Shah; 5) Saleem Ahmed Shah; 6) Mst. Maqsudan Bibi; 7) Mst. Ghulam Fatima; and 8) Mst. Shahzadan Bibi. The Contesting Respondents further claimed that since Ali Hussain had left behind a son (Muhammad Hassan), they were entitled to two-third of his share as well whereas Mst. Ghulam Fatima was entitled to the remaining one-third. During pendency of the suit before the Trial Court, the Contesting Respondents impleaded Cihulam Hussain Shah and Khadim Hussain Shah, both of whom had allegedly obtained a decree dated 18.07.1963 from the Civil Court on the basis of an oral gift in regard to one-third of the properties which had by then been incorporated in the revenue record as well. The Contesting Respondents prayed that the decree dated 18.07.1963 may be declared null and void. Furthermore, the Contesting Respondents impleaded Muhammad Mumtaz Shah, Muhammad Shah and Mst. Ghulam Sughran, legal heirs of Mst. Malookan Bibi (the "Appellants") on the ground that the Appellants had, in connivance with the revenue officers, obtained a share from the property of Muhammad Hassan as heirs of Mst. Malookan Bibi. Mst. Malookan Bibi was a consanguine sister of Murid Hussain and Ali Hussain who, as was averred by the Contesting Respondents, died before Ali Hussain passed away. The Contesting Respondents therefore prayed for a declaration that Mst. Malookan Bibi had died before Ali Hussain and that the Appellants were not entitled to a share in the inheritance of Murid Hussain and Ali Hussain. After pro and contra evidence was led by the parties, the suit of the Contesting Respondents

was dismissed by the Trial Court vide judgment dated 25.06.1977. The judgment of the Trial Court was assailed by the Contesting Respondents before the District Judge, Sargodha (the "Appellate Court") which, vide judgment dated 17.07.1979, allowed the appeal of the Contesting Respondents and decreed their suit. The Appellants thereafter assailed the judgment of the Appellate Court before the High Court, which, vide the impugned judgment, dismissed the Regular Second Appeal of the Appellants. The Appellants have now assailed the impugned judgment before this Court.

3. Leave to appeal was granted by this Court vide order dated 08.05.2015 in the following terms:-

> "The controversy in the present matter of inheritance is as to whether Mst. Malukan Bibi, a consanguine sister of Ali Hussain whose estate is the subject matter of the present case, died either before or after the death of Ali Hussain. Mr. Muhammad Munir Peracha, learned counsel for the Petitioner submits that though during the pendency of the lis, the plaintiffs/respondents, who had challenged the mutation of the subject land in favour of the legal heirs of Mst. Malukan Bibi, had in a compromise deed submitted before the Court, clearly and explicitly admitted that Ali Hussain died in the year 1946 and at the time, Mst. Malukan Bibi was alive and that she lived for two years after the death of Ali Hussain and died in the year 1948, however, the Appellate Courts ignored the above admission on the ground that the compromise could not be sustained on account of minority of plaintiffs/respondents Nos.3 to 5, and whilst relying on the certified copy of the death register produced at the appellate stage by way of additional evidence, and on the testimony of the plaintiffs witnesses held that Mst. Malukan Bibi died before the death of Ali Hussain, and allowed the appeals.
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> 2. The learned counsel further submits that though it is true that at the time ofthe afore-referred compromise the plaintiffs/respondents Nos.3 to 5 were minors and that the compromise, was signed on their behalf by plaintiff/respondent No.1, who has so signed the compromise for himself also, and was also signed by plaintiff/ Respondent No.2 but it is to be noted that on one hand the plaintiff/Respondent No. 1, in his testimony claimed that Mst. Malukan Bibi died before Ali Hussain, and on the other, in the compromise he clearly stated that she survived for two years after the death of Ali Hussain and died in the year 1948 and not earlier. The learned counsel submits that the above admission, atleast, to the extent of the signatories to the compromise deed, who were major was binding and could not have been lawfully ignored by the Courts in deciding the time of death of Mst. Malukan Bibi, which has thus wrongly been decided on the basis of the testimony of plaintiff/Respondent No.1 and two other witnesses and on the basis of the death register produced belatedly before the appellate forum, wherein relevant entries suffered interpolation.
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> 3. In view of the above, leave to appeal is granted to consider as to whether theabove discussed admission was binding upon the aforesaid plaintiffs/respondents or atleast with regard to those who were major amongst them. Status quo to be maintained in the meanwhile."

4. The arguments advanced by the learned ASC for the Appellants were that the High Court had misguided itself when, instead of relying on the oral testimony of the witnesses, both the Appellate Court as well as the High Court relied on the death certificate of Mst. Malookan (Exh.P21) in finding that Mst. Malookan had died in 1941 even though Exh.P21 had only been admitted into evidence at the appellate stage. Contends that both the High Court as well as the Appellate Court had failed to take into consideration the compromise deed executed in the year 1969 between the parties. He further contends that Exh.P21 was a public document and it did not appeal to a prudent mind that the Contesting Respondents were unaware of Exh.P21 during the pendency of the suit before the Trial Court and only managed to gain knowledge of Exh.P21 when proceedings had reached the Appellate Court. Argues that even if the compromise deed

was to be excluded from evidence, there was sufficient oral evidence on record to rebut Exh.P21 and hold that Mst. Malookan Bibi died after Ali Hussain passed away. He prays that the judgments and decrees of the High Court as well as the Appellate Court may be set aside and that the judgment and decree of the Trial Court be restored.

5. The learned counsel for the Contesting Respondents on the other hand has supported the impugned judgment.

6. Towards the end of the arguments, the learned Senior ASC for the Applicants in C.M.A. No.11606/2021 sought impleadment of one Nasira Batool, who claimed descent from Haider Shah through his wife Mst. Gana Bibi. He sought impleadment of Nasira Batool and claimed a share in the estate of Ali Hussain and Murid Hussain as the legal heir of Sikandar Shah, one of the Contesting Respondents.

7. We have heard the learned counsel for the parties at length and gone through the case record with their assistance. The single point that needs to be determined is:-

i. Did the High Court and the Appellate Court fall into error when they relied upon Exh.P21? If yes, its effect? If no, its consequence?

8. Order XLI, Rule 27 of the C.P.C. deals with the production of additional documents in the Appellate Court. It is reproduced below for ease of reference:-

"27. PRODUCTION OF ADDITIONAL EVIDENCE IN APPELLATE COURT

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if -

(a) the Court from whose decree the appeal is preferred has refused to admitevidence which ought to have been admitted, or

(b) the Appellate Court requires any document to be produced or any witness tobe examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

Order XLI, Rule 27 states that generally, no evidence is to be produced at the Appellate stage. But there are two exceptions to the general rule i.e., additional evidence may be produced at the appellate stage if: a) the court from whence the appeal is preferred has refused to admit evidence which it ought to have admitted; or b) the Appellate Court requires any document in order for it to pronounce a judgment. For the purposes of the instant appeal, the second exception is of importance because the Appellate Court has, vide its order dated 12.03.1979, allowed the application moved by the Contesting Respondents for additional evidence on the ground that by admitting the relevant entry in the death register, all ambiguity insofar as the date of the death of Mst. Malookan Bibi would cease to exist. Complying with the requirements under Order XLI, Rule 27(2), the Appellate Court passed an order explaining why it allowed evidence in the Appellate stage of the proceedings. The order of the Appellate Court was assailed by the Appellants and the said order was upheld all the way to this Court. For all intents and purposes, the issue of production of additional documents has attained finality and the legality of the order dated 12.03.1979 cannot be brought into question at this stage of the proceedings especially when the said order has been upheld all the way to this Court.

9. Since the legality of allowing the application for additional evidence can no longer be agitated at this stage, it may be prudent to go over Exh.P21 which was admitted in evidence

after the application for additional evidence was allowed. On perusal of Exh.P21, we notice that the date of death (Column No.2) is 28.12.1941 (i.e. on a Sunday) and that her death was entered into the register (Column No.12) on 29.12.1941 (i.e. on a Monday). The said register was maintained by the "Qasba Shahpur Shehr" on behalf of the Municipal Committee of Shahpur. It may be stated that in the year 1941, the Municipal Corporation of Shahpur was regulated by the Punjab Municipal Act of 1911 (the "Municipal Act of 1911"). Section 50-B of Chapter 3-A (Functions of the Municipalities) is relevant for the purposes of the instant appeal. It is reproduced below for ease of reference:-

"50-B. POWERS AND AUTHORITIES OF MUNICIPALITIES.

(1) Without prejudice to the generality of the provisions of subsection (1) of section 50-A, the State Government may, by notification endow the Municipalities with such powers and authorities as may be necessary to enable them to function as institutions of self-government, subject to such conditions as may be specified therein, with respect to:

(i) .....;

(ii) the performance of functions and implementation of the schemes which maybe entrusted to them including the following, namely:-

(1) .....;

(2) .....;

(3) .....;

(4) .....;

(5) .....;

(6) .....;

(7) .....;

(8) .....;

(9) .....;

(10) .....;

(11) .....;

(12) .....;

(13) .....;

(14 .....;

(15) .....;

(16) vital statistics including registration of births and deaths;

(17) .....;

(18) .....;

(2) Nothing contained in the provisions of this section shall be construed to divest the Municipalities of various powers and functions vested in them under various provisions of this Act, rules and bye-laws made thereunder."

Having gone over the Municipal Act of 1911, the next question would be whether Exh.P21 satisfies the requirements under the erstwhile Evidence Act of 1872 (the "Evidence Act") for the purposes of being considered a public document.

10. Section 74 of the Evidence Act as it stood in 1941 compared to 15.01.1979 (i.e. the date the application for additional evidence was moved by the Contesting Respondents) are substantively different. In the year 1941, section 74 was as follows: -

"74 PUBLIC DOCUMENTS

The following documents are public documents:(1)

documents forming the acts or records of the acts

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive whether of British India, or of any other part of Her Majesty's dominion or of the Commonwealth, or of a foreign country.

(2) public records kept in British India of private documents."

Subsequently, subsections (3), (4) and (5) were inserted into section 74 of the Evidence Act by virtue of the Law Reforms Ordinance of 1972. After the insertion of the three sections, section 74 of the Evidence Act read as follows:-

"74 PUBLIC DOCUMENTS

The following documents are public documents:(1)

documents forming the acts or records of the acts

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive whether of British India, or of any other part of Her Majesty's dominion or of the Commonwealth, or of a foreign country.

(2) public records kept in British India of private documents.

(3) documents forming part of the records of Judicial proceedings;

(4) documents required to be maintained by a public servant under any law; and

(5) registered documents the execution whereof is not disputed."(Underlining is ours)

In essence, the death register maintained under the Punjab Municipal Act of 1911 became a public document only after the Law Reforms Ordinance of 1972. Since the document had become a public document after the amendments in 1972, Exh.P21 would have all the presumptions that would be attached to such a public documents under the Evidence Act. Section 79 of the Evidence Act deals with presumptions as to the genuineness of certified copies. It is reproduced below for ease of reference:-

"79. PRESUMPTION AS TO GENUINENESS OF CERTIFIED COPIES

The Court shall presume every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer of the Central Government

or a Provincial Government, or by any officer in an Acceding State or non-Acceding State who is duly authorised thereto by the Central Government to be genuine;

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper."

(Underlining is ours)

At the time the document was produced in 1979, Exh.P21 had become thirty-eight years old. In order to satisfy itself, the Appellate Court summoned and perused the original death, register maintained by the Municipal Committee Shahpur before allowing the certified copy of the said entry to be placed on record. In 1979, the said original register had a presumption attached to it under section 90 of the Evidence Act. Section 90 is reproduced below for ease of reference:-

"90. PRESUMPTION AS TO DOCUMENTS THIRTY YEARS OLD

Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation.- Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section 81."

The said entry in the register was never challenged by the Appellants before any forum. The Appellants can argue that they were only made aware of the entry in the death register during the pendency of the case before the Appellate Court. However, onus still lay on them to rebut Exh.P21 through cogent and reliable evidence. It is trite that once a document has been proved in accordance with law, the genuineness of its contents can be presumed and the rule the "document speaks for itself" (acta probant sese ipsa) can be deployed. Even otherwise, the rationale behind the presumptions attached to written documents stem out of both principle as well as policy. The presumptions are a matter of principle because written documents are, by their very nature, to be accorded a higher degree of credibility as opposed to oral evidence. A matter of policy because it would bring uncertainty and chaos if written documents (and valuable rights, if any, attached to them) were allowed to be set aside on the basis of oral evidence. That is why, as a general rule, documentary evidence cannot be overridden merely by oral evidence. However, this is still a rebuttable presumption and a party seeking to rebut such a presumption must do so by bringing on record cogent and reliable evidence to the contrary. The Appellants in this case failed to rebut the presumptions attached to Exh.P21 by bringing on record cogent and reliable evidence to the contrary despite being granted multiple opportunities to do so when Exh.P21 was remanded by the Appellate Court to the Trial Court for admission as part of evidence.

11. While Esxh.P-21 had duly been admitted and exhibited by the Contesting Respondents in evidence, the compromise deed executed between the parties, which the Appellants relied on to show that Mst. Malukan Bibi had died after Ali Hussain, was placed on record as "Mark-

A". It was never exhibited at any stage of the proceedings before the Trial Court or the Appellate Court even though the compromise deed had been available to both the parties since 1969. The Appellate Court had not relied on or given weight to the compromise deed on the ground that the said compromise deed was inadmissible under section 23 of the Evidence Act. Section 23 of the Evidence Act is reproduced below for ease of reference:

"23 ADMISSIONS IN CIVIL CASES WHEN RELEVANT

In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given

Explanation - Nothing in this section shall be taken to exempt barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126."

In the present case, the Contesting Respondents tried to buy their peace by entering into a compromise with the Appellants. However, the Contesting Respondents subsequently resiled from the compromise and did not tender the compromise deed into evidence and only left it as "Mark A". That, however, did not prohibit the Appellants from exhibiting the said compromise deed in their evidence or even confronting the Contesting Respondents' witnesses with the compromise deed in their cross-examinations. The Appellants failed to bring the compromise deed on record even though the compromise deed had been executed in 1969 which, as we have noted, was before the Contesting Respondents had started producing their evidence. Therefore, we find that all the Courts below had rightly excluded the compromise deed from consideration. The Appellate Court as well as the High Court have, as a result, not fallen into error when they (and we may say correctly) excluded the compromise deed and relied on Exh.P21 in decreeing the suit of the Contesting Respondents.

12. In light of what has been discussed above, we find that the impugned judgment arrives at the correct conclusions by assigning valid reasons after appraising the entire evidence available on record. The Learned ASC for the Appellants was unable to point out any ground which could persuade us come to a conclusion different from the one reached by the High Court. No mis-reading or non-reading of evidence was pointed out by the Learned ASC in the impugned judgment. The impugned judgment passed by the Lahore High Court, Lahore is accordingly upheld. Consequently, this appeal and C.M.A. No.11606/2021 are dismissed.

Appeal dismissed.