IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Ijaz ul Ahsan
Mr. Justice Syed Hasan Azhar Rizvi
Mr. Justice Irfan Saadat Khan

Civil Appeal No.81-K of 2022
(Against the judgment dated 02.06.2022 passed by the High Court of Sindh, bench at Sukkur in Civil Revision No.S-42 of 2012)

Mst. Nazeeran and others ...Appellant(s)

Versus

Ali Bux and others ...Respondent(s)

For the Appellant(s) : Mr. Mukesh Kumar G. Karara, ASC

For Respondent No.1-3 : Mirza Sarfaraz Ahmed, ASC

For Respondents No.4-7 : Ex-parte

Date of Hearing : 05.12.2023

JUDGMENT

Syed Hasan Azhar Rizvi, J. This appeal under Article 185(2)(d) of the Constitution of the Islamic Republic of Pakistan, 1973 ("**the Constitution**") is directed against the judgment dated 02.06.2022 ("**impugned judgment**") of the High Court of Sindh, Bench at Sukkur whereby a Civil Revision filed by the respondents under section 115 of the Code of Civil Procedure, 1908 ("**C.P.C.**") was allowed and the judgment and decree dated 08.12.2011 and 12.12.2011 respectively passed by the first appellate court were set-aside. Resultantly, the judgment and decree dated 23.02.2011 and 25.02.2011 respectively passed by the trial court decreeing the suit of the respondents were upheld.

2. Before delving into the intricate details of the case, let us begin by providing a summary of the important facts and events that form the foundation for these legal proceedings. The respondent No.1 to 3 ("**respondents**") filed a civil suit for declaration, cancellation of documents, possession, mesne profits and permanent injunction while asserting therein that they are owners of the land, as per detail mentioned in para 1 of the plaint, ("**suit land**"); the respondents, vide a written agreement, leased out the suit land along with other lands to the Appellant No.6 (Mian Mir Muhammad) and also handed over the possession of the suit land to the appellant No.6 for a period starting from 1988 till December 1994 but the same was remained in possession of the respondent No.6 (since deceased) up to 2005. At that time, the suit land was also mortgaged with the Agricultural Development Bank Pakistan ("**Bank**"); however, the land of the respondent No.1 & 3 was redeemed in 2004, while the redemption proceeding of the land of the respondent No.2 was under process. During the aforementioned period, the appellant No.6, in collusion with the Revenue Officials, tampered with the records and the suit land, along with other lands (total area 313-9 and half acres) was mentioned to be sold out. The sale was falsely documented in the names of Abdul Nabi (Respondent No.3), Ghulam Mujtaba (Respondent No.5), Zafar (Respondent No.7), Ghulam Murtaza (Respondent No.8), Sohail (Respondent No.9), and Noor Nabi (Respondent No.10) via registered sale deed No.154 dated 06.02.2002. The respondents were ignorant of the aforementioned sale transaction dated 6.2.2002 but became aware in the year 2006 when, after the expiration of the lease period, the appellants refused to vacate the suit land and handed over its possession to the respondents. Later, during the pendency of the suit, the respondents came to know that the suit land was shown to be earlier sold by them to the appellants No.5 & 6 by way of registered sale deeds dated 14.09.1985, 25.07.1991 and 27.02.1989 ("**suit sale deeds**")leading to the sanctioning of the mutation No.88 dated 15.12.1985 and Nos.29 & 30 dated 24.05.1990 ("**suit mutation**"). Consequently, the respondents, by filing an amended plaint, also

challenged the legality and validity of the suit sale deeds and mutations being void, illegal, and nullities in the eyes of the law.

3. The present appellants resisted the suit by filing a contesting written statement. The appellants asserted that none of them had ever been handed over the suit land or any portion thereof on lease. Specifically, the appellant No.6 had purchased 7-20 acres of land, encompassing Survey Nos.194/1 and 194/2, for a consideration of Rs.40,000/- from the respondents No.1 & 2 through a registered sale deed dated 14.9.1985 and obtained the physical possession of the corresponding portion of the suit land. Furthermore, the respondent No.3 had sold 2-20 acres of land, located at Survey No.195/2, to the appellant No.6 for Rs.50,000/- through a sale deed dated 26.2.1989, registered on 27.2.1989. Lastly, the respondent No.2 had sold land measuring 10-381/2 acres, situated at Survey Nos.1130, 205, and 207 (half), for a consideration of Rs.80,000/- to the appellant No.5 through a registered sale deed dated 25.7.1991 and possession was duly transferred to the appellant No.5. Moreover, the respondent No.2, through an oral statement recorded before Mukhtiarkar, sold a 50% share of Survey No.207 (2-41/2 acres) in favor of the appellant No.5 for a consideration of Rs.80,000/. Notably, at no point in time did the respondents disclose that the land sold to the appellants No.5 & 6 was mortgaged with the Bank. The subsequent mutations of the revenue record for all the aforementioned transactions were duly recorded and land revenue for the transferred land was paid by the appellants from the date of their respective purchases.

4. The suit of the respondents was decreed by the trial court vide judgment and decree dated 23.02.2011 & 25.02.2011 respectively. An appeal filed by the present appellants was allowed and the above judgment and decree of the trial court were set aside by the first appellate court/Additional District Judge vide judgment & decree dated 08.12.2011 & 12.12.2011 respectively.

Being dissatisfied, the respondents filed a Civil Revision u/s 115 C.P.C before the High Court of Sindh and the same was allowed vide the impugned judgment. Consequently, the judgment/decree of the first

appellate court was reversed and that of the trial court decreeing the suit of the respondents was upheld; hence, this appeal.

5. Mr. Mukesh Kumar G. Karana ASC appearing for the appellants argued that the impugned judgment has erroneously been passed by the High Court as a trial court. Whereas the jurisdiction under section 115 C.P.C. is limited in scope and could be exercised only to rectify the apparent errors of jurisdiction. The judgment of the first appellate court impugned before the High Court did not suffer from any apparent error of jurisdiction. Furthermore, the High Court has erred in accepting and upholding oral evidence in support of copies of two lease deeds without appreciating that the lease deeds were not registered as required under section 17 of the Registration Act, 1908 **("Act of 1908")**. The lease deed dated 19.12.1988 was alleged to be for five years up to December 1994 whereas the other lease deed dated 1.11.1994 was for eleven years up to December 2005; however, both the lease deeds were not registered. Under Section 49 of the Act of 1908, the said unregistered lease deeds had no evidentiary value, much less, to discredit the suit sale deeds. Moreover, the High Court has erred in holding that the registered deeds of sale whereby part of the suit land was sold to the appellants No.5 & 6, and another transfer of sale by respondent No.2 through an oral statement recorded by the concerned Mukhtiarkar, could not be accepted unless the bar of mortgage was first removed. Nevertheless, a property that has a mortgage can be sold legally and the mortgage itself does not invalidate or make the transaction illegal. The transfer of a property subject to a prior mortgage would continue to be bound by the mortgage even after the transfer. The transfer of the mortgaged property cannot defeat the rights of a mortgagee without possession. Moreover, the mortgage with the Bank was also not registered.

6. Further added that the impugned judgment is based on presumption and conjectures. And, the judgment of the trial court which had been upheld by the High Court was also based on presumption and conjectures. The impugned judgment is unreasonably influenced by the findings of the trial court that appellant No.3 was only four years old when the sale deed dated 11.2.1989 was executed. The

High Court has failed to appreciate the relationship between respondents No.1 to 3 i.e. the respondents No.2 and 3 are real brothers and are sons of the respondent No.1. The entire suit land, registered in the names of respondents No.2 and 3, was transferred to them by the respondent No.1 through a gift. The statement of the gift, made by respondent No.1 before the Mukhtiarkar and the mutation record produced as Exh.91/F, established that the respondent No.1 was the actual owner of the entire suit land. Even if we assume, without considering, that the lease deeds of the years 1988 and 1994 were signed between the parties, the land owned by respondent No.3 was transferred to the appellants by respondents No.1 and 2, who were effectively maintaining and managing the suit land. Moreover, the trial court had wrongly proceeded to exercise power under Article 84 of the Qanoon-e-Shahadat Order, 1984 ("**Q.S.O**.") and held that the signatures of the Sub-Registrar on the suit sale deed did not match with each other; the trial Court should not have assumed the role of an expert. Further argued that the High Court has failed to appreciate the contradictions in the case of respondents No.1 to 3 and the burden to prove the transactions effected through registered deeds of sale, has wrongly been placed on appellants. The respondents No.1 to 3 are required to prove their case with reliable and independent evidence and may not be allowed to succeed based on the so-called weaknesses or discrepancies in the case of the appellant.

7. Mirza Sarfraz Ahmed, ASC, representing the respondents No. 1 to 3, supported the impugned judgment and argued that the first appellate court had erred both in law and facts and failed to appreciate the evidence on record. The suit land, owned by the respondents, was leased to appellant No. 6 twice, first from 1988 to 1994 and then from 1994 to 2005. The suit land had also been mortgaged to the Bank on 18.04.1984 and was subsequently redeemed by the respondents. It was neither sold to the appellants nor did the respondents execute the alleged suit sale deeds in their favor. The suit sale deeds are, in fact, false and fabricated documents manipulated by the appellants. This is evident from the fact that the respondent No. 3, purportedly one of the executants of the suit sale deeds, was only 4 years old on the date of

the alleged execution, with his age falsely stated as 20 years. Additionally, the oral statement of the respondent No. 3 regarding the sale of the suit land, supposedly recorded on 24.05.1990 when he was 17 years old, lacks supporting documentation. The trial court rightly decreed the suit, while the judgment of the first appellate court, not being based on proper appreciation of the available evidence, was appropriately set-aside by the High Court through the impugned judgment. Therefore, this appeal is liable to be dismissed accordingly.

8. We have heard the submissions of the learned Counsel for the parties and perused the material on record with their assistance.

9. The main objection of the appellants is that the trial court had wrongly placed the burden on them to prove the transactions of sale effected through registered sale deeds. Instead, the respondents were under a legal duty to initially discharge the burden by rebutting the presumption of correctness attached to a registered document and by establishing that the sale deeds in question resulted from fraud and forgery.

On the contrary, the respondents asserted that although a presumption of correctness is attached to a registered document, the moment the said document is challenged by the alleged executant or his successor-in-interest, that presumption stands rebutted. The beneficiary of the document has to prove not only its execution but also the original sale transaction as well as payment of sale consideration. The above objection of the appellants regarding the placing of the burden of proof on them has no force as in civil proceedings, an issue is to be decided by preponderance of evidence and in the case where there is a word against a word; it is the party on whom the burden must fail.

The question of the burden of proof becomes material only where the Court finds the evidence so evenly balanced that it can come to no definite conclusion. Reference may be made to the cases of *Allah Din versus Habib* (**PLD 1982 S C 465**); *Mst. Surraya Begum and others versus Mst. Susan Begum and others* (**1992 SCMR 652**); and *Muhammad Amir versus Khan Bahadur and another*(**PLD 1996 SC 267**). The record shows that both the parties have adduced their respective evidence freely, which they could and as such, the issues

involved in the present case could easily be decided by appreciating their evidence on the principle of balance of probability. Where the whole of the evidence is before the Court and it has no difficulty in arriving at a conclusion, it becomes unnecessary to enter upon a discussion of the question of placing of burden on the parties as observed by this Court in the case of *Mst. Khatun v. Malla* (**1974 SCMR 341**). Being so, the above objection of the appellants regarding the placement of the burden of proof is dismissed as misconceived.

10. The legal scheme governing various principles of the *'burden of proof*' is contained in Articles 117 to 122 of the Q.S.O. As per Article 117 *ibid*, when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. This Article is based on the rule, *ei incumbit probatio qui dicit, non qui negat*, which means that the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it because a negative is usually incapable of proof. The burden of proving a fact always lies upon the person who asserts and until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. However, the above rule is subject to the general principle that things admitted need not be proved.

11. In terms of Article 118 of Q.S.O., the initial burden to prove its claim is always on the plaintiff and if he discharges that burden and makes out a case that entitles him to relief, the burden shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff of the same. Where, however, evidence has been led by the contesting parties, abstract considerations of burden are out of place and truth or otherwise must always be adjudged on the evidence led by the parties. As per Article 119 of Q.S.O, the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. This Article amplifies the general rule in Article 117 of Q.S.O that the burden of proof lies on the person who asserts the affirmative of the issue. It lays down that if a person wishes

the court to believe in the existence of a particular fact, the burden of proving that fact is on him unless the burden of proving it is cast by any law on any particular person. Article 121 of Q.S.O is an application of the rule in Article 119 of Q.S.O. Article 122 of Q.S.O is an exception to the general rule laid down in Article 117 of Q.S.O that the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue. Article 122 of Q.S.O is not intended to relieve any person of that duty or burden but states that when a fact to be proved is peculiarly within the knowledge of a party, it is for him to prove it.

12. Given the above legal position, it may be resolved that the phrase *'burden of proof'* has two meanings - one the burden of proof as a matter of law and pleading, that is '*legal burden'* and the other, the burden of establishing a case, that is '*evidential burden'*, the former is fixed as a question of law on the basis of the pleadings and is unchanged during the entire trial, whereas the latter is not constant but shifts as soon as a party adduces sufficient evidence to raise a presumption in his favour. Reference may be made to the case of *Raja Khurram Ali Khan and 2 others versus Tayyaba Bibi and another* (**PLD 2020 SC 146**).

Thus, the legal burden would always remain on the plaintiffs and the evidential burden would shift to the defendants if they (plaintiffs) discharged their initial burden. The evidence required to shift the evidential burden need not necessarily be direct evidence i.e. oral or documentary evidence or admissions made by the opposite party, it may comprise of circumstantial evidence or presumptions of law or fact. The question as to whether the burden of proof has been discharged by a party to the *lis* or not, would depend upon the facts and circumstances of the case. If the facts are admitted or, if otherwise, sufficient materials have been brought on record to enable a Court to arrive at a definite conclusion, it is idle to contend that the party on whom the burden of proof lies would still be liable to produce direct evidence.

13. The standard of evidence required to discharge the initial burden depends on the facts and circumstances of each case. It cannot be said that it will be consistent in all situations. Sometimes, a simple denial is adequate to shift the burden to the opposite party, while at other times, material evidence is necessary for the same purpose. Therefore, the standard of evidence is not uniform when challenging a registered document as compared to challenging an unregistered document. It has been observed that in disputes relating to registered documents, a common misconception may arise when an executant attempts to dispute the validity of the document through mere denial. It is essential to emphasize that the act of registration is not a perfunctory formality but rather a deliberate and legally binding process. When a document is registered, it becomes an official record available to the public. This adds credibility to the authenticity and legal purpose of the transaction.

On the other hand, unregistered documents lack the same level of legal endorsement. While they may carry evidentiary weight, their value is inherently lessor as compared to the registered document. The absence of registration renders unregistered documents vulnerable to challenges regarding their authenticity and enforceability. Moreover, a document duly registered by the Registration Authority in accordance with the law becomes a legal document that carries a presumption as to the genuineness and correctness under Articles 85(5) and 129(e) of the Q.S.O. and which cannot be dispelled by an oral assertion that is insufficient to rebut the said presumption. The High Court overlooked the above position of law and erroneously held in the impugned judgment that "*the moment the document [suit registered documents] 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*."

14. The case of the respondents rested on the ground of fraud and forgery allegedly committed by the appellants. Fraud vitiates all actions and no Court can uphold a right on fraud. It is very easy to assert fraud but it is difficult to prove the same. Reference in this

regard may be made to the case of *Ghulam Ghous v. Muhammad Yasin and another* (**2009 SCMR 70**). No law provides a special quantum of evidence for the establishment of fraud. While it is true that the Courts should be careful in coming to a finding of fraud and should normally satisfy themselves that the finding is based on reliable evidence, it cannot be said that any special number of witnesses or any special nature of evidence is needed to establish fraud. It is for the Court which is to decide this question to be satisfied that the evidence adduced before it is such that it can believe it. Reference in this regard may be made to the case of *Mst. Bhano and another versus Mian A.M. Saeed and others* (**1969 SCMR 299**). Nonetheless, when a party alleges fraud it becomes its duty to prove the same and generalized allegations or for that matter, mere bald assertions without evidence cannot shift the initial burden.

That being so, we have no hesitation in our mind to hold that a mere denial by the executant of a registered sale deed is insufficient to shift the burden onto the beneficiary of the registered document. He (executant) must establish his assertion of fraud or forgery, etc. by producing some evidence other than his denial to shift the burden onto the beneficiary to prove the valid execution of the registered document. This legal principle reflects the recognition of the high evidentiary value attached to registered documents as compared to unregistered documents.

15. Similarly, in this case, the respondents, to discharge the initial burden, took the version that the respondent No. 3, (Hamza Ali) one of the executants of the suit sale deed (Exh.91/C), was only 04 years old at the time of its execution whereas his date was fraudulently mentioned thereon as 20 years. This assertion of the respondents was duly supported by his School Leaving Certificate (Exh.47/G) available on record. The appellant did not produce any documentary evidence regarding age of the respondent No.3 to rebut the above stance of the minority pleaded by the respondents. The stance of the appellants that the entire suit land, registered in the names of respondents No.2 and 3, was transferred to them by the respondent No.1 (father of the respondents No.2 & 3) through a gift; he (respondent No.1) being the

actual/real owner could transfer the same on behalf of the respondent No.3 has no force in the eyes of law.

Under section 11 of the Contract Act 1872, a contract made by a minor is of no legal effect. Moreover, it is a well-established principle of Muslim Law that a *de facto* guardian of a minor has no power to transfer any right to or interest in the immovable property of the minor. Such a transfer is not merely voidable but is void: **See** Principles of Muhammadan Law by Mulla, 17th Edition at p.299. No rights and liabilities could be attached to or arise out of a void contract. Even the principle of estoppel is also inapplicable in the case of a minor. Reference in this Court regard may be made to the cases reported as *Ahmad Khan versus Rasul Shah and others* (**PLD 1975 Supreme Court 311**); *MehrManzoor Hussain and others versus Muhammad Nawaz and another* (**2010 SCMR 1042**); *Abdul Ghani and others versus Mst. Yasmeen Khan and others* (**2011 SCMR 837**); and *Yar Muhammad Khan and others versus Sajjad Abbas and others* (**2021 SCMR 1401**). Thus, a void contract is entirely void, as if a part of it has no effect, the other part cannot stand by itself and be operative.

16. The trial court while deciding the Issues No.1 & 3 observed that the signatures of the Sub-Registrar as well as the respondent No.2 (Koural) on the suit sale deeds did not tally with each other and drew an adverse presumption that some other person had signed the suit sale deeds as Sub-Registrar by copying his signature, and decided the said issues in favour of the respondents and against the present appellants. Before us, the learned counsel for the appellants argued that the trial court had wrongly proceeded to exercise power under Article 84 of the Q.S.O. and held that the signatures of the Sub-Registrar on the suit sale deed did not match with each other; the trial Court should not have assumed the role of an expert. Instead, the matter should be referred to a handwriting expert.

We have also examined the suit sale deeds available on record and found the trial court fully justified for making the above observation and the same was rightly affirmed and upheld by the High Court vide the impugned judgment. Even otherwise, the Court, in

certain eventualities, enjoins plenary powers to itself compare the signature along with other relevant material to effectively resolve the main controversy as observed by this Court in the cases of *Zar Wali Shah versus Yousaf Ali Shah and 9 others* (**1992 SCMR 1778**); *Ahmed Hassan Khan versus Naveed Abbas and another* (**1998 SCMR 346**); and *Messrs Waqas Enterprises and others versus Allied Bank of Pakistan and 2 others* (**1999 SCMR 85**). Thus, the visual comparison conducted by the trial court is in consonance with the law declared by this Court in the above cases.

17. The stance of the respondents that the suit land which was given to the appellant on the lease was already mortgaged with the Bank in the year 1982-83 and was redeemed by them in the year 2004 is duly supported by the documentary evidence i.e. Exhs.47/B to 47/F and 47/H and Exhs.47/L. Moreover, Abrar Hussain (PW-4), Manager Bank also supported the version of the respondents by deposing that the above documents were issued from his Bank, bore his signatures as well as those of the previous Manager, and had the seal of the Bank. The respondent No.3 has also produced the entries from the revenue record from Exhs.47/B to 47/E and 47/H, which also reinforced their version by showing that the suit property was mortgaged with the Bank in the year 1982-83. The afore-noted documentary evidence clearly established that the fact of the prior mortgage of the suit land was duly incorporated in the relevant revenue record. We are mindful of the fact that no bar existed on the sale purchase of a mortgaged property except that mortgage was always considered a charge over the property sold which was previously mortgaged. However, non-mentioning the fact of previous mortgage in the suit sale deeds raises serious doubts about the credibility and validity of the suit sale deeds.

Foregoing in view, it can safely be said that the respondents had discharged the initial burden placed upon them. Consequently, the presumption of correctness attached to the suit registered documents stood rebutted. The burden shifted to the appellants, who, as beneficiaries, were bound to prove not only the execution of the suit sale deeds but also the original transactions mentioned therein

including the payment of sale consideration to the respondents by producing cogent and reliable evidence.

18. A sale deed relates to financial obligations and is required to be attested by two witnesses by virtue of sub-Article 2(a) of Article 17 of the Q.S.O. The general rule indeed is that the documents required by law to be attested shall not be used as evidence until two attesting witnesses, who are if alive, amenable to the jurisdiction of the Court and capable of giving evidence are produced before the Court under Article 79 of the Q.S.O. for the purpose of proving its execution. The record shows that the appellants did not produce any attesting witness, scribe, or stamp vendor before the Court to support their stance even though they did not advance any reason for their non-production. The appellant also did not produce any documentary evidence to prove the factum of payment of the alleged sale consideration to the respondents. Although, Muhammad Aslam, the Sub-Registrar concerned appeared before the trial court as a witness (DW-4) but candidly stated that he could not comment on the genuineness or falseness of the sale deeds in question, as the entire record of their office was burnt on 11.12.2001. Therefore, the Sub-Registrar, who was a material official witness, did not support the version of the appellants. Besides, the appellant did not produce any other independent witness within whose presence the suit sale deeds were executed or payment of sale consideration was made by the appellants to the respondents. In the presence of all these circumstances, the appellants could not be said to have proved the existence of the transaction or the execution of the alleged sale as well as the alleged payment of the sale consideration.

19. The trial court, after thoroughly considering the evidence presented by the parties and observing the inconsistencies and irregularities in the registered suit sale deeds, rightly decreed the suit in favor of the respondents by canceling the suit sale deeds. Unfortunately, the first appellate court ignored the above aspects, accepted the appeal, and erroneously reversed the judgment/decree of the trial court.

The appellate court based its decision on the mistaken premise that the case of the respondents relied solely on oral evidence and

concluded that oral evidence could not be given preference over documentary evidence. However, the High Court correctly exercised its jurisdiction under Section 115 of the C.P.C. and set-aside the judgment/decree of the first appellant court while upholding that of the trial court. And, in its thorough analysis of the relevant legal principles and available facts, the High Court has arrived at a sound and reasoned conclusion that is both legally sound and just.

20. For what has been discussed above, there is no merit in this appeal, which is dismissed. These are the reasons of our short order of even date.

JUDGE

JUDGE

JUDGE

Islamabad, the
5th December, 2023
Not approved for reporting
*Ghulam Raza/**