IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE JAMAL KHAN MANDOKHAIL
MR. JUSTICE MUHAMMAD ALI MAZHAR

CIVIL APPEAL NO.1012 OF 2018
(Against the judgment dated 13.06.2018 passed by the Islamabad High Court, Islamabad in C.R.No.35 of 2016)

Mst. Farzana Zia and others ...Appellants

VERSUS

Mst. Saadia Andaleeb and others ...Respondents

For the Appellants: Mr. Muhammad Ilyas Shaikh, ASC

For Respondents No.1 & 2: Agha Muhammad Ali, ASC
Syed Shajjar Abbas Hamdani, ASC

For Respondent No.3: Khalid Mehmood Khan, ASC
(Via video link from Lahore)

Date of Hearing: 06.11.2023

JUDGMENT

Muhammad Ali Mazhar, J. This Civil Appeal is directed against the Judgment dated 13.06.2018, passed by the Islamabad High Court, in Civil Revision No.35 of 2016, whereby the revision application filed by the respondent was allowed and concurrent findings recorded by the courts below were set aside.

2. The compendium of facts of the case is as follows:

> The House No.386, Street No.64, Sector I-8/3, Islamabad was owned by Zia-ul-Haque Zia, who died on 03.12.2007 and left behind his surviving legal heirs Khadija Begum, widow (who died on 10.04.2012), Ihtisham-ul-Haq (son), Farzana Zia (daughter) and Fakhra Zia, (daughter who died on 15.01.2015), survived by her husband Hafiz Nazir Ahmed and daughter Aqsa Nazir. On 24.06.2013, Farzana Zia (appellant No.1) instituted a civil suit before the Civil judge, Islamabad with the prayer that the Release Deed dated 30.05.2009 be declared null and void which was secured through fraud and misrepresentation and without consideration. After death of Khadija Begum, the respondent

No.2, (Ihtisham) asked appellant No.1 to vacate the property in question when she came to know that by means of release deed dated 30.05.2009, the property in question was transferred to Ihtisham on 18.06.2013. In the civil suit, though Fakhra, (other sister) was impleaded as defendant but on 23.09.2013, she was transposed as plaintiff No.2 in the suit on her application who also pleaded cheating and fraud against her brother. The suit was decreed which was challenged by Ihtisham (respondent No.2) *vide* appeal No.79/2015 but it was found time barred and dismissed on 27.10.2015. The same judgment and decree were also challenged in Civil Appeal No.116/2015 by Saadia (respondent No.1) before the Court of the learned Additional District Judge, Islamabad but *vide* judgment and decree dated 21.01.2016, her appeal was also dismissed. The concurrent judgments and decrees were challenged in the Islamabad High Court which passed the impugned judgment in its revisional jurisdiction.

3. The learned counsel for the appellants argued that the impugned judgment of the learned High Court is based on misreading and non-reading of evidence. It was further averred that the High Court has reversed the concurrent judgments and decrees and substituted its own findings while exercising powers under Section 115 of the Code of Civil Procedure, 1908 ("C.P.C.") which was beyond the jurisdiction of the revisional court. He further argued that the execution of the release deed was denied by the appellants which were otherwise without any consideration. He further argued that both the marginal witnesses, in their examination-in-chief, neither expressed anything about the contents of the release deed nor stated that the contents were read over and translated to the executants, or that after understanding the contents they signed it in good faith, and on the basis of misrepresentation of their brother. Similarly, DW-3 admitted that the predecessor in interest of appellants No. 2 and 3 never appeared before *Tehsildar* to acknowledge the execution of the deed. He further admitted that no payment was made to the executants of the release deed in his presence. The learned counsel further contended that nothing was placed on record to show that any payment was made or any share was given to the sisters against the relinquishment of their inherited shares. He further averred that the High Court fell into an error of law in holding that the release deed, being a registered document, carries a presumption of truth, while ignoring the crucial evidence and reversing the concurrent findings recorded by the courts below on the presumption that the appellants are educated ladies which is not sufficient to hold that they had consciously, and after understanding the contents, signed the release

deed, and ignored that the executants signed the documents in good faith and based on the confidence reposed to them that the signature and thumb impression was required to get the property transferred in the name of all legal heirs as legal heirs.

4. The learned counsel for respondents No.1 & 2 supported the impugned judgment and argued that the concurrent findings recorded by the Civil Court and Appellate Court were against the law and facts of the case. It was further contended that the appellants prayed in the suit for separate possession through partition and challenged the Release Deed and its subsequent transfer in the name of respondent No.1. It was further contended that all legal formalities were fulfilled before the execution of the Release Deed. He further averred that neither the concerned Revenue Authority nor the Joint Sub Registrar was made party to the civil suit. It was further avowed that all the executants signed the release deed consciously with their free will and without any compulsion or coercion and there was no element of fraud or misrepresentation. It was further contended that both ladies were educated and were aware to the contents of the release deed, hence the learned High Court rightly set aside the concurrent findings of the courts below which was based on misreading or non-reading of the evidence led in the Trial Court.

5. The learned counsel for the respondent No.3 argued that the transfer in the name of respondent No.2 was made on production of the release deed. However, he did not deny the averments of the public notice published in the newspaper which demonstrates that an application was moved to the Federal Government Employees Housing Foundation, Islamabad, for transfer of the aforesaid property in the name of all legal heirs and not solely in the name of respondent No.2.

6. Heard the arguments. In consequence of the impugned judgment, the concurrent finding recorded by the courts below were set aside in the revisional jurisdiction by the learned High Court, therefore it is imperative to assess the evidence led by the parties in the Trial Court with its reckonable and probable outcome. The appellant No.1/plaintiff appeared as PW-1, who *inter alia* deposed that her deceased father was owner of the house in question and, besides this; he was also owner of a 03 *kanal* property in Mauza Noon out of which 1-1/2 kanal was transferred in the name of his brother respondent

No.2/defendant No.1 in his life time. After the death of the father, all the affairs were handled by the brother. She clearly deposed that respondent No.2 took the remaining legal heirs to the district court for the purpose of transfer of property in the name of all legal heirs and for this purpose, he secured signatures and thumb impression on certain stamp papers through fraud and misrepresentation. However, on 10-06-2013, the defendant No.1 called upon the plaintiffs/appellants to vacate the house. On inquiry it revealed that the property has been transferred solely in the name of the respondent No.2/defendant No.1 based on the release deed. She further deposed that neither she had any knowledge of the release deed nor she surrendered her share in favour of anyone nor received any consideration in lieu of the alleged release deed. The plaintiff No.2 (Fakhara Zia), who expired on 15.01.2015, also appeared as PW- 2 and deposed similarly. Thereafter, her legal heirs were impleaded in the Trial Court as plaintiff No.2A & 2B. While respondent No.2/defendant No.1 appeared as DW-1 and *inter alia* deposed that appellant No.1 is well-educated and is employed as a teacher in a school, and is also the author of many books, the suit house was transferred in the name of his wife Sadia Andleeb (respondent No.1). The defendants in the trial court also produced marginal witnesses of the release deed namely Mr. Nadeem Qaiser and Muhammad Eshsan, who appeared in the witness box as DW-1 & DW-4 respectively.

7. Without further ado, the aforesaid property was devolved upon all the legal heirs. The respondent No.2, being the elder brother, took the other legal heirs in the guise of making transfer of the property in the name of all legal heirs. At page 168 of the Paper Book, a copy of a public notice published in the newspaper is available which demonstrates that it was published by the Assistant Director, Federal Government Employees Housing Foundation, Islamabad, for public information that the legal heirs of the deceased Zia-ul-Haque Zia has moved an application for transfer of the aforesaid property in their name. This public notice showed that the application was made for a joint transfer and not in the sole name of respondent No.2, which fortifies the plea of the appellants. It was further asserted by respondent No.2 that he gave an extra amount of Rs. 3,75,000/- after selling a plot owned by his father and gave the share of the plaintiffs amounting to Rs. 75,000/- from the plot situated in Rawalpindi. If

respondent No.2 paid the inheritance share of his sisters in some other property, it does not allow or absolve the respondent No.2 from paying her share in other properties of the deceased father. The screening of evidence makes obvious that the respondent No.2 was in a dominant position and all title documents were in his possession. So far as the veracity or authenticity of the release deed is concerned, both marginal witnesses contradicted the version of the respondent No.2. The DW-3 deposed that he did not know that the release deed was made, while DW-4 admitted that the signatures were not made in his presence. Both the marginal witnesses deposed during the cross examination that they were told that the release deed is meant for distribution amongst siblings and that the property is being distributed. No family settlement was produced on record to show the distribution of shares amongst the legal heirs for the estate of their predecessor. It is also pertinent to point out that Item No. 55 of Schedule 1 and Section 29(a) of the Stamp Act 1899 Act are germane to the deed of release. The learned counsel for the respondent No.1 & 2 also relied on the same provisions to emphasize that the indenture of the release is required to be registered compulsorily and for the purposes of stamp duty, the assessment should be made on the basis of the amount of the claim or value of the property. Neither anything on record shows that any consideration was paid to the sisters against the suit property nor any individual specific share of each releasor was carved out or specified in the release deed which was allegedly relinquished by them in favour of respondent No.2. No stamp duty was assessed or paid on the part of the relinquished share or the value of the property. No logical conclusion can be drawn as to why both sisters, who had their own children and husbands, executed a release deed out of love and affection in favour of their brother and deprived their own children with whom they had no love and affection which is somewhat outlandish and irrational. If everything was done with free will and consent or there was a conscious abandonment of rights, then the best marginal witnesses to the deed would be the husbands of both sisters, but this was avoided by respondent No.2, which also transpires that the sisters had no independent advice to understand the nature of the document to safeguard their interest but they signed it in good faith on the understanding that the property is being transferred in the name of all legal heirs. The record reflects that neither the joint sub-registrar was summoned by the defendant nor

Fakhra Zia ever appeared before the *Tehsildar*/sub-registrar for any such purpose which fact was admitted by the respondent No.2 in his cross examination. The learned Trial Court, after proper assessment and comprehension of the entire evidence, reached the conclusion that the preparation of the release deed, its execution, signatures of the plaintiffs over the same, and the appearance of the plaintiffs before the joint sub-registrar was doubtful and the release deed and subsequent transfer was declared *void ab-initio* and ineffective.

8. Indeed, the substratum of the indenture of the Release Deed or the Relinquishment Deed encompasses the conveyance of right, title, or interest in the immovable property by the legal heirs in the joint property by which, often, a co-owner, renounced his rights in favour of another legal heir with consideration or even without consideration or on account of some family settlement discernible from the record, but the parties to a relinquishment deed must be the co-owners/co-sharers. The deed of release or relinquishment should be cautiously put in order which must encapsulate, the date when the right to the property was given up; purpose of giving up the right; consideration, if any; consent of the party giving up the right in the property, etc. with the aspiration to put an end to any unresolved or unsettled issue or differences between the parties to prevent future litigation. According to the Black's Law Dictionary, Sixth Edition, 1990 (Pages 1289-1290), the indenture of Release is defined as under:-

> "To discharge a claim one has against another, as for example in a tort case the plaintiff may discharge the liability of the defendant in return for a cash settlement. To lease again or grant new lease. See *Accord* and *satisfaction*.
>
> A writing or an oral statement manifesting an intention to discharge another from an existing or asserted duty. The relinquishment, concession, or giving up of a right, claim, or privilege, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced. Abandonment of claim to party against whom it exists, and is a surrender of a cause of action and may be gratuitous or for consideration. Melo v. National Fuse & Powder Co., D.C.Colo., 267 F.Supp. 611, 612. Giving up or abandoning of claim or right to person against whom claim exists or against whom right is to be exercised. Adder v. Holman & Moody, Inc., 288 N.C. 484, 219 S.E.2d 190, 195.

> A deed operating by way of release; but more specifically, in those states where deeds of trust are in use instead of common-law mortgages, as a means of pledging real property as security for the payment of a debt, a "deed of release" is a conveyance in fee, executed by the trustee or trustees, to the grantor in the deed of trust, which conveys back to him the legal title to the estate, and which is to be given on satisfactory proof that he has paid the secured debt in full or otherwise complied with the terms of the deed of trust".

9. To differentiate between a release deed, a gift deed, and a sale deed, the pivotal factor is the actual character of the transaction and the explicit category of the rights created by the instrument. The precept that comes into sight is that by executing a release deed, one of the co-sharers/legal heirs separates himself or herself from the joint or inherited property. The repercussions of "*spes successionis*", which is a Latin maxim, denotes the rule of succeeding in a person's property after his death which can be resolved and settled down through execution of a fair and equitable family settlement, succession certificate, letter of administration or by accepting consideration in lieu of a share and executing the deed of release/relinquishment to the extent of such share which would in future operate as an estoppel against the expectant heir to lodge any future claim on account of the doctrine of *spes successionis*. In the case at hand, though the respondent No.2 asserted that he paid share in the other properties, nothing was produced on record to show whether any share in relation to the property in question was ever paid or settled vice versa or in lieu of share paid in some other property by dint of some family arrangement or settlement, the share in the property in question was relinquished. The learned High Court in paragraph 23 of the impugned judgment held that *"Now, as regards the question as to proof of transaction, the release deed in question has features akin to a gift*". While in paragraph 24 of the impugned judgment it was held that "*The three executants of the release deed relinquished their shares in the suit house in Ihtisham's favour without any monetary consideration. They divested themselves of all proprietary interest in the suit house. In effect, the three executants of the release deed gifted their shares in the suit house in Ihtisham's favour".* Whereas in paragraph 26, the learned High Court while pointing out the essential ingredients of a valid gift, held that *"In the instant case, the satisfaction of the first condition has been disputed by the plaintiffs. Where there is no declaration of a gift,*

the question of its acceptance will not arise. It is not disputed that Ihtisham continued to remain in possession of the suit house after the execution of the release deed. Ihtisham appeared as DW-1 and deposed that the plaintiffs were well educated ladies and were aware of the contents of the release deed. Therefore, the pivotal question that needs to be determined is whether the plaintiffs were aware of the contents of the release deed and voluntarily signed the same mindful of the consequences".

10. At this juncture, the ramifications of Section 25 of the Contract Act, 1872, are also quite relevant which is, for the ease of convenience, reproduced as under: -

> "Agreement without consideration void, unless it is in writing and registered, or is a promise to compensate for something done, or is a promise to pay a debt barred by limitation law
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> 25. An agreement made without consideration is void, unless–
>
> (1) it is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other; or unless
>
> (2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do, or unless
>
> (3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits. In any of these cases, such an agreement is a contract.
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> Explanation 1: - Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.
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> Explanation 2: - An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given".

11. It is a well-settled elucidation of law that the deed of release or relinquishment and the indenture of gift both have distinctive paraphernalia, characteristics, and corollaries and cannot deemed to be interchangeable or substitutable. The Transfer of Property Act, 1882, has no application to the gift envisioned and encapsulated under the Muslim Law and for this reason, Section 123 and 129 of the Transfer of Property Act can neither surpass nor outweigh or

preponderate the matters of gifts contemplated under the Muslim Law. However, the donor should be of sound mind and understand the legal implications of making the gift, free from any coercion, duress, or undue influence. Under the Muslim Law, the constituents of a valid gift are tender, acceptance, and possession of property. A Muslim can devolve his property under Muslim Law by means of *inter vivos* (gift) or through testamentary dispositions (will). Islamic law does not make any distinction between movable or immovable property regarding the conception of gift, rather any property may be gifted by any person having ownership and dominion over the property intended to be gifted on fulfilling requisite formalities. In the case at hand, if the deed of release could not be established as a valid document but, on the contrary, it is proved to have been secured through fraud or misrepresentation, then in such eventuality, how could the same document be construed as a valid gift when other elementary constituents are missing? It was not sufficient to dislodge the claim that since the plaintiff No.1 was an educated lady, therefore, she was conscious to the substance and nature of the document. Quite the reverse, the fundamental question which required to be decided was vis-à-vis the plea of conscious abandonment on account of natural love and affection in terms of Section 25 of the Contract Act, 1872, good faith, and trust reposed by the sisters on their brother who represented and assured both of his sisters and mother that the documents are required for the transfer of property in the name of all legal heirs and, right after the death of the mother, called upon the sisters to vacate the house. On account of misrepresentation and deception, the share of the sisters was siphoned off/divested from the estate of their deceased father which devolved upon them according to Muslim Law of inheritance. We are cognizant that each case rests on its own veracities and particulars. The semblance, if any, between one case and another is not sufficient to be treated alike in all set of circumstances; even a solo diverged attribute may alter the nature of the entire case. Thus, in all fairness, the transaction cannot be considered as a valid gift due to such missing components. So far as the release deed is concerned, had it been executed with some consideration or on account of some family settlement in which the sisters had given up their shares in lieu of a greater share in some other joint or inherited property or properties or any other arrangement which might have been jotted down in writing for settling

the share of inheritance amongst the legal heirs, presented and proved in the Trial Court, then obviously, respondent No.2 must have a good case and good defence, but on the other hand, the evidence available on record reflects in a different way and corroborates that the release deed was secured in bitter violation and contravention of Section 25 of the Contract Act, 1872, and rightly declared invalid by the Trial and Appellate Courts.

12. In the case of Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi **(PLD 1990 SC 1),** this Court held that it might be very rare that a male co-heir would relinquish his right for a female heir. Experience, shows that it has always been the reverse. The flow of love cannot be so unnatural. Therefore, the rules devised by the Privy Council for the, *Parda Nasheen* ladies as contracting patties and the one referred to above emanating from the public policy, would lead to another principle that there will be a presumption otherwise that it was not on account of natural love but on account of social constraints which would be presently referred to, that 'relinquishment' has taken place. It was further held by this Court that in the present case it appears to be jugglery that the petitioners claimed that the relinquishment by the respondent was in consideration of what they claim to have done in her two marriages as also for her maintenance. And in addition, what again could be only a jest, that they spent some money on a criminal case which they had to right on account of respondent being divorced by her first husband. All these claims are against the teachings of Holy Quran and the sayings of the Holy Prophet (P.B.U.H,), wherein emphasis has been laid again and again on the best possible concern for and treatment of female relations. The Holy Prophet (P.B.U.H) was eager to explain again and again the rights of daughters and the way their fulfilment takes one to the heights of piety. While in the case of Muhammad Shamim through Legal heirs v. Mst. Nisar Fatima through Legal Heirs and others **(2010 SCMR 18)**, this Court held that "It may also be observed that a rightful owner of the property cannot be deprived of his/her share unless precluded to claim the same due to conscious abandonment or relinquishment. As has been noted above, the respondents/plaintiffs in the instant case were admittedly daughters of late Tufail Muhammad, they were under the law entitled to succeed and inherit the leftover of the deceased and had stepped into the shoes of their father on his death and became shareholders to

the extent of their shares. Any of the brothers, who were also co-sharer in the property could not deprive them of their due share by alienating the property falling in their share and belonging to them". In the case of Sadar Din v. Mst. Khatoon and others **(2004 SCMR 1102)**, this Court found that the judgment of the Lahore High Court was not open to any exception. It was held that the agreement in question through which Siraj Din had allegedly relinquished his share in the said property did not deserve any credit because the said agreement of relinquishment was without any consideration because no evidence could be led that his brother had relinquished his share in the said shop in favour of the said Siraj Din and the document (Exh. D.1) was thus found to be nullity in the eye of law on account of Section 25 of the Contract Act, 1872. Again in the case of Mirza Abid Baig v. Zahid Sabir (Deceased) through LRs and others **(2020 SCMR 601),** this Court held that "We cannot be unmindful of the fact that often times male members of a family deprive their female relatives of their legal entitlement to inheritance and in doing so shariah and law is violated. Vulnerable women are also sometimes compelled to relinquish their entitlement to inheritance in favour of their male relations".

13. We are sanguine that the High Court has the powers to reevaluate the concurrent findings of fact arrived at by the lower courts in appropriate cases but cannot upset such crystalized findings if the same are based on relevant evidence or without any misreading or non-reading of evidence. The first appellate court also expansively re-evaluated and re-examined the entire evidence on record. If the facts have been justly tried by two courts and the same conclusion has been reached by both the courts concurrently then it would not be judicious to revisit it for drawing some other conclusion or interpretation of evidence in a second appeal under Section 100 or under revisional jurisdiction under Section 115, C.P.C., because any such attempt would also be against the doctrine of finality. We do not find that the concurrent findings of fact arrived at by the appellate court as well as the trial court were either perverse or without justification or based on ignorance of evidence. The High Court cannot substitute its own findings unless it is found that the conclusions drawn by the lower courts were flawed or deviant to the erroneous proposition of law or caused serious miscarriage of justice and must also avoid independent

re-assessment of the evidence to supplant its own conclusion. Consistent with the aforesaid backdrop, we feel no hesitation to hold that the judgments of the trial court and appellate courts are more in consonance with the evidence led by the parties and should not be reversed.

14. In the wake of the above discussion, this Civil Appeal is allowed. As a consequence, thereof, the impugned judgment of the learned High Court is set aside and the concurrent judgments and decrees passed by the learned Trial Court and Appellate Court are restored.

Judge

Judge

Announced in open Court

On 18.3.2024 at Islamabad Judge_____
Khalid
Approved for reporting