

ORDER

QAZI FAEZ ISA, J. This appeal assails the judgment of a learned Judge of the Peshawar High Court who set aside two concurrent judgments of the Subordinate Courts, respectively of the learned Civil Judge-XII Mardan dated 10th May, 2007 and of the learned Additional District Judge-IV Mardan dated 27th October, 2009, and consequently, decreed the suit filed by the respondents.

2. The sisters of the appellants had filed a suit challenging a gift purportedly made by their mother, the late Mst. Pari, on the basis of which mutations Nos. 507 and 507/1 dated 27th February, 1993 were made in the revenue records.

3. The learned counsel for the appellants states that the learned Judges of the Trial and Appellate Courts had correctly dismissed the suit filed by the respondents and the High Court should not have exercised its revisional jurisdiction in respect of two concurrent findings of fact. He further states that Mst. Pari was identified by Muhammad Zaman (DW -2) to Said Rehman (DW -3), the Halqa Patwari, who had recorded her statement whereby she had gifted her property to the appellants and that Muhammad Zaman was also a witness of the gift. The evidence of Said Rehman (DW -2) and Muhammad Zaman (DW -3), the learned counsel submits, had conclusively established that Mst. Pari had gifted her property to her sons, the appellants herein, therefore the High Court should not have set aside two concurrent judgments which were based on reliable evidence.

4. Mr. Khalid Khan, the learned counsel representing the respondents, states that it is not denied that the parties are siblings, therefore, upon the death of their mother the sisters too were entitled to inherit from the estate left behind by Mst. Pari. However, the respondents' brothers (the appellants herein) took the plea that they had been gifted the property and in this regard got the statement of an imposter, pretending to be Mst. Pari, recorded and this imposter purportedly gifted to them her property. This statement is said to have been recorded shortly before the death of Mst. Pari. The learned judges of the Subordinate Courts had wrongly assumed that the purported gift was proved which error was corrected by the learned Judge of the High Court, the learned counsel submits. The Subordinate Courts, the learned counsel states, overlooked the principles of burden of proof and the manner of discharging it as provided in Qanun-e-Shahadat, 1984, President's Order No.10 of 1984 ("Qanun-e-Shahadat"). The appellants in their written statement did not disclose before whom the gift was made. Wali Muhammad (DW -1) testified that the gift by his mother was made in front of Muhammad Zaman (DW -2) and Ghulam Muhammad, but Ghulam Muhammad was not produced as a witness nor any reason given for not producing him, the learned counsel submits. Furthermore, Muhammad Zaman (DW -2) was an interested witness as he was the son-in-law of the appellant No. 2 and his testimony even otherwise did not inspire confidence. The learned counsel, by referring to the testimony of Said Rehman (DW -3) submits that the original document on which the statement of Mst. Pari is stated to have been recorded was not produced nor the originals of other relevant documents and Said Rehman made no effort to verify that the lady whose statement he wrote out was actually Mst. Pari. The learned counsel in support of his contentions refers to the following part of the testimony of Said Rehman:

"It is correct that the original roznamcha and mutation are not before me at the moment. And the said record produced and already on file do not contain my original signature and also do not contain the original thumb impression of Mst. Pari as well as the signature of Muhammad Zaman and Ghulam Muhammad. Mst. Pari observed parda from me and I had recorded the statement at the identification of Muhammad Zaman marginal witness of the roznamcha. It is correct that through misrepresentation another lady might have been produced to me instead of Mst. Pari. Volunteer that Muhammad Zaman

had stated that the lady whose thumb impression was obtained was Mst. Pari. Possession had not changed hands in my presence."

The learned counsel submits that since Mst. Pari was not known to Said Rehm an and as she observed parda therefore it was essential to establish that the lady whose statement he wrote out was in fact Mst. Pari. However , Mst. Pari was not identified by her close relatives, let alone those who had no interest in the matter . Said Rehm an ought to have been alerted when none of the children of Mst. Pari were present. The learned counsel in conclusion submits Mst. Pari's estate automatically devolved upon her legal heirs but the appellants fraudulently deprived their sisters of shares in their mother's estate by fraudulent means and on the basis of such fraud the said mutations were made, which are of no legal effect.

5. We have heard the learned counsel for the parties and with their assistance examined the record. The learned counsel for the appellants is undoubtedly correct that two concurrent judgments in favour of the appellants were set aside by the High Court. We therefore need to consider whether the suit merited dismissal or whether the High Court had correctly exercised its revisional jurisdiction under section 115 of the Code of Civil Procedure in decreeing the suit.

6. It was the appellants' case that their mother gifted them her entire property . As per the appellants' case their mother at the time of the gift was about 70 years of age, who after making the gift proceeded to perform Hajj and had died whilst performing it. The appellants' sisters cried foul and after unsuccessfully challenging the mutations before the revenue authorities filed a suit assailing the purported gift and the mutations made in the revenue records on the basis of the said gift. The appellants opposed the suit and stated that they had been gifted the property by Mst. Pari, therefore, when Mst. Pari died she was no longer the owner of the property and as such it could not devolve on the legal heirs of Mst. Pari.

7. The document whereon the statement of Mst. Pari was allegedly recorded and on which she is stated to have affixed her thumb impression was not produced; and instead a simple photo copy of such document was produced, which neither constituted primary nor secondary evidence. The gift therefore was never established. This in itself was a sufficient reason to decree the suit but there were additional factors too which would also have led to it being decreed.

8. Chapter IX of the Qanun-e-Shahadat is titled "Of the Burden of Proof" and attends to the burden of proof, on whom the burden of proof lies and other evidentiary matters pertaining thereto. The burden of proof to establish the gift lay on the appellants (Articles 117 and 118, Qanun-e-Shahadat), but they failed to discharge such burden. The appellants had alleged that the gift was made in the presence of Ghulam Muhammad, but he did not testify . Both sides maintained that Mst. Pari was an old, illiterate, parda observing lady. The paper on which her purported statement was recorded by Said Rehman (DST -3) bears a thumb impression. The appellants had to establish that Mst. Pari had impressed her thumb impression on it but made no effort to prove it, which they could have done by having it forensically examined and having it compared with some document on which she had admittedly impressed her thumb, such as her identity card and or her passport. The appellants' case was that after gifting them her property Mst. Pari proceeded to perform Hajj therefore she must have been issued a passport, which is only issued to those possessing an identity card.

9. Muhammad Zaman (DW -2) testified that he had identified Mst. Pari to Said Rehman (who had recorded her statement) and that she had gifted the property , however , Muhammad Zaman was an interested witness, did not live with Mst. Pari and was not her close family member . Apparently a parda observing lady was produced before Said Rehman, who Muhammad Zaman stated was Mst. Pari, and Said Rehman unquestioningly accepted her to be Mst. Pari, without making any effort to verify her identity . He did not seek

proof of identity , let alone her national identify card/passport. Said Rehman also did not take simple precautions, such as enquiring from the lady about her family members and the reason why her children were not present. Neither in the statement recorded by Said Rehman nor from his testimony does it transpire that Said Rehman went to the house where Mst. Pari actually resided; the statement also does not mention her address nor the location where the statement was recorded.

10. The learned Civil Judge-XII, Mardan, without appreciating that Mst. Pari was not alive and that the burden to prove the gift lay on the defendants (the appellants herein), observed, "There is nothing available on file which could prove that Mst. Pari has denied the disputed mutations which means that mutations are attested in according to well [sic] of Mst. Pari" (pages 5-6 of the judgment). On the basis of this reasoning and without appreciating that the appellants had to prove the alleged gift the learned Civil Judge assumed that Mst. Pari had gifted her property to the defendants and that the mutations subsequently made on the basis thereof were valid. The Appellate Court perpetuated the error and assumed that Mst. Pari had gifted her property without this having been established through evidence. The Subordinate Courts failed to appreciate that the burden of proving the gift lay on the appellants who had completely failed to discharge it. Under such circumstances the High Court had rightly exercised its revisional jurisdiction to correct the material irregularity committed by the Subordinate Courts. Since the gift was not proved mutation Nos. 507 and 507/1 dated 27th February , 1998 could not be sustained.

11. That since an elderly parda observing illiterate lady intended to divest her entire property in favour of only two of her children, every precaution should have been taken to ensure that the parda clad person who was produced before the revenue officer was actually Mst. Pari. Subsection (7) of section 42 of the Land Revenue Act, 1967 requires that the person from whom the property is being acquired is to be identified by, "two respectable persons, preferably from Lambardars or members of the Union Committee, Town Committee or Union Council concerned, whose signatures or thumb-impressions shall be obtained by the Revenue Officer". This was not done. The register of mutations was not produced, nor verified copies therefrom exhibited. Only Muhammad Zaman, who was an interested witness, identified Mst. Pari and also testified to the making of the said gift. The procedure stipulated in the law was not followed, let alone the extra circumspection required in dealing with a parda observing lady, and one who was also illiterate and quite old.

12. The share in inheritance prescribed by shariah of daughters to that of sons is half therefore the revenue officer who had proceeded to record the statement of an illiterate lady of advanced years should have satisfied himself that she understood the consequences of her actions, which was to completely exclude her daughters from their inheritance, and further that she was doing so of her own freewill. However , no effort was made by Said Rehman to determine whether the lady whose statement he was to record understood her proposed action which favoured her sons and deprived her daughters; he also did not ensure that she was acting of her freewill and was not in any manner compelled to do so.

13. We may observe that this case is yet another sad example of brothers depriving their sisters of their inheritance by contrived means. There was no reason why a mother would want to exclude her daughters of their inheritance, and all the more so, when the share of each son was twice that of each daughter . The courts exercise extreme caution when faced with 'gifts' which deprive the female members of a family . This Court has held, that, gifts generally made to deprive females in the family from the course of inheritance prevalent at present times, the Courts are not divested of the powers to scrutinize the reasons and justification for a gift so that no injustice is done to the rightful owners and no course of inheritance is bypassed. The appellants

had completely failed to establish the gift in their favour . It was not established that the person presented before the revenue officer, whose statement he recorded, was actually Mst. Pari. Only one person (Muhammad Zaman) who was not an immediate family member , identified the lady in parda and this person was an interested person. It was not established that Mst. Pari understood, what she was doing and the consequences of her actions nor that she did not do so under compulsion, undue influence or advantage. The brothers deprived their sisters of their share in the property left by their mother and the brothers perpetuated this injustice for about two decades which was finally corrected by the learned Judge of the High Court whose judgment we affirm. The result therefore is that we dismiss this appeal with costs throughout.

MWA/W -3/SC Appeal dismissed.

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