

Date of hearing: 22.2.2016.

Judgment

This revision petition is directed against the judgment and decree dated 18.05.2009, passed by learned trial Court/Civil Judge-V, Charsadda and that of learned Appellate Court/ Additional District Judge-II, Charsadda dated 19.12.2009, whereby suit of the plaintiffs (Respondents No. 1 to 7 herein) has been concurrently decreed in their favour by both the Courts below.

2. Facts in brief forming the background of the instant revision petition are that Muqadar Khan etc (Plaintiff/Respondents No. 1 to 7), filed a suit against Sher Ali and others Defendants No. 1 to 8 (Respondents No. 8 to 14 herein) and Defendants No. 9 to 15 (petitioners herein), for declaration and possession through partition to the effect that they alongwith Defendants No. 1 to 8, being owners and in possession of a land measuring 11 *Kanal 01 Marla* in Khasra Nos 815/816 and 509, situated in the revenue estate of Moza Mahzara as well as a residential house, fully described in the heading of the plaint, enjoy its usufructs, hence, inheritance Mutation No. 4705 dated 02.10.1995, on behalf of *Mst. Khan Khela* in favour of Defendants No. 9 to 15, being forged, fictitious and based on fraud, is ineffective upon their rights, is liable to be cancelled, as she had already sold out her share to the predecessors of the plaintiffs and Defendants No. 1 to 8 in the year 1961 *vide* sale-deeds; that plaintiff/respondents came to know qua the wrong entries in favour of the petitioners in the revenue record on the basis of inheritance Mutation No. 4705 of *Mst. Khan Khela*, when the petitioners brought a suit for produce before the Revenue Officer.

3. The suit was contested by the petitioners by filing written statement, raising therein variety of objections, legal as well as factual. From the divergent pleadings of the parties, the learned trial Court formulated issues. Parties adduced evidence in support of their respective stance and on conclusion of trial, the learned trial Court, after hearing both the sides, decreed the suit of the plaintiff/ respondents, against which, the defendants/petitioners preferred appeal before the learned Appellate Court, but was dismissed, hence, this revision petition.

4. Learned counsel for the petitioners argued that petitioners being the LR's of *Mst. Khan Khela* are the owners of the suit property while plaintiff/respondents have got no concern with the same; that sale-deeds relied upon by the plaintiff/respondents, are wrong, fictitious, void and based on fraud, having no adverse effect upon the rights of the petitioners; that the plaintiff/ respondents by placing reliance on the said sale-deeds, were legally bound to have proved the genuineness of the same, but they bitterly failed to do so. He next argued that the alleged sale-deeds were also void and against the law as *Mst. Khan Khela* was minor at the time of execution of the alleged sale-deed, but the two Courts below have committed serious illegality by ignoring the above aspects.

5. As against that, learned counsel for the respondent/ plaintiffs submitted that the sale-deeds being thirty years old documents, presumption of truth and correctness is attached to the same, which have been proved by the respondent/plaintiffs through the statement of Murad Ali (PW.2) son-in-law of the Deed-writer, who being well conversant with the handwriting and signature of his father-in-law, verified his handwriting and signatures over the sale-deed (Exh.PW.2/1 consisting of 15 sheets); that statement of DW, 1 also supports the claim of the *plaintiff/respondents* therefore, findings of the two Courts below, being well reasoned and based on proper appreciation of evidence and law on the subject, are not open to any interference by this Court. In support of his arguments, he placed reliance on the judgment of the Apex Court in case titled, "*Muhammad Rafiq and others vs. Muhammad Ali and others*" (2004 SCMR 704).

6. Arguments of learned counsel for the parties were heard and record of the case was perused.

7. The bone of contention between the parties is the inheritance Mutation No. 4705 dated 02.10.1997 on behalf of *Mst. Khan Khela* in favour of her offspring (petitioner/defendants). The stance of the plaintiff/respondents is that the suit property was jointly owned by their predecessor, namely, Jafar Khan and the predecessor of Defendants No. 1 to 8, namely, Muzafar Khan, to the extent of 3/4 shares while *Mst. Khan Khela* (the predecessor of the petitioners), was owner only to extent of remaining 1/4th share, which she, later on, sold out to the predecessors of the respondents, through un-registered sale-deeds dated 31.03.1961. The petitioner/defendants, in their written statement, have squarely denied the factum of any such sale on behalf *Mst. Khan Khela* (wife of Defendant No. 9/ mother of Defendants No. 10 to 15). They alleged that she had been recorded as owner in the column of ownership prior to her death and that no such sale had ever been effected by her during her life time; that after demise her inheritance Mutation No. 4705 Exh.PW.1/2, was entered and attested on 02.10.1997, in the names of her husband (Defendant No. 9) now dead, and the present petitioners.

8. In support of their claim, Muqadar Khan Plaintiff No. 1 for himself as well as attorney for the remaining plaintiffs appeared as PW.3 and produced Fazal Khaliq Lumbardar of the village as PW.4, Muhammad Alamas PW.5 while Patwari Halqa who produced the relevant revenue record was produced as PW. 1. Similarly, Haji Murad Ali son-in-law of the deed-writer, namely, Saadullah Khan, was examined as PW.2, who verified the hand writing and signatures of his deceased father-in-law/Deed-writer over the sale-deeds (Exh.PW.2/1). In rebuttal, petitioner/defendants examined Shakirullah as DW.1, who is the son of the Deed-writer. He produced

old document, therefore presumption of correctness under Article 100 of the Qanun-e-Shahadat Order, 1984, was attached to them, so there would be no need to lead further evidence in proof of the same. He while further elaborating his stance submitted that plaintiffs have produced Fazal Khaliq Lumbardar (PW.4)/the son of late Abdul Khaliq the marginal witness of the sale-deeds. No doubt, the deeds are apparently thirty years old and original of the same are also in possession of the plaintiffs and son of the marginal witness of the deeds, also appeared as a witness and verified the signature of his father as marginal witness over the deeds, but presumption of correctness to such a document, let it be thirty years old, cannot be attached, as the initial beneficiary of these deeds/documents i.e. propositus of the parties Jaffar Khan, left the same half way after getting the note of minority of *Mst. Khan Khela*, his daughter and during his remaining life he did not try to implement/act upon these documents. In this regard I am fortified by the view of the august Apex Court in the case of "*Jang Bahadar and others vs. Toti Khan and another*" (2007 SCMR 497), wherein it has been held that:-

"It is not essential for a Court to attach the presumption of execution of a document more than 30 years old in all the cases without attending to the other relevant facts and circumstances of the case before raising such presumption and not merely because any such presumption was claimed, to be attached to such document".

Same view has been reiterated by the august Apex Court in case of "*Ch. Muhammad Shaqi vs Shamim Khanum*" (2007 SCMR 838), in the following words:

"It is settled law that presumption qua thirty years old document under Article 100 of the Qanun-e-Shahadat Order, 1984, is permissive and not imperative. The Court must consider the evidence of the documents, in order to enable it to decide whether in any specific case it should or should not presume proper signature and execution. It is settled law that the Court should be very careful about raising any presumption under Article 100 in favour of old documents specially when the same are produced during the trial of suits in which under proprietary rights are set up on the basis of such documents/deeds. It is also settled law that the Court may refuse to apply the presumption where evidence in proof the document is available or where the evidence has produced and disbelieved."

11. It is the settled law of evidence under Article 117 of the Qanun-e-Shahadat Order, 1984, that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of fact which he asserts, must prove that those facts exist, but the plaintiffs failed to prove the alleged sale as well as execution and contents of the disputed sale-deeds, firstly, under Article 79 of the Qanun-e-Shahadat Order, 1984, according to which if a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, and if no such attesting witness can be found, then under Article 80 of the Order, 1984, it must be proved that the witnesses have either died, or cannot be found and that the document was executed by the person who purports to have done so, therefore, mere production of the disputed sale-deeds would not absolve the plaintiffs from proving contents of the sale-deed in terms of Articles 79 or 80 of the Qanun-e-Shahadat Order, 1984. It has been held by the Honble Supreme Court in case of "*Dawa Khan through L.Rs and others vs Muhammad Tayyab*" (2013 SCMR 1113) that;

"Admissibility of a document in evidence, by itself, will not absolve the party from proving its contents in terms of Article 79 provided under the scheme of the Order".

Mere statement of the plaintiffs regarding death of witness of the disputed sale-deeds would not absolve and exonerate them of their legal obligation to prove the contents of the same. Guidance in this regard can be derived from the judgment of the Honble Supreme Court in case of "*Anwar Ahmad vs. Mst. Nafis Bano through Legal Heirs*" (2005 SCMR 152). The plaintiffs are alleging sale of the disputed property in favour of their father by *Mst. Khan Khela* (late) through the disputed sale-deeds. Admittedly, *Mst. Khan Khela* was an illiterate lady. It is well settled law of the land that transactions with old infirm, illiterate persons, women under the influence of elders of the family and pardha observing ladies, burden of proof would lie on the person claiming benefit and title from the transactions. As stated earlier, the plaintiffs being beneficiaries of the suit sale have to discharge their burden but they failed.

12. The learned counsel for the plaintiff/respondents also laid a great stress on the question of possession of the suit property with the plaintiffs, but in view of this Court, that would also not support the stance of the plaintiffs as the suit property was owned by *Mst. Khan Khela*, who was residing there with her husband Dilawar Khan (Defendant No. 9). Since, father of *Mst. Khan Khela*, namely, Jaffar Khan was co-sharer in the suit property and was also in possession of the same along with the suit house. As explained above, the two sets of defendants get their share direct from the legacy of *Mst. Amtu Jan* whereas the plaintiffs get their share from their father Jaffar Khan, who inherited it from *Mst. Amtu Jan*. After getting married to Defendant No. 9, she used to reside with him in his house, but being co-owner in the house and co-sharer in the landed property, she remained in constructive possession till her life time and after her death, the present petitioners fell into her steps, therefore, have attained the same status. So being co-owners and co-sharers, are owners in every inch of the joint property unless partitioned. The Respondents No. 1 to 7, who are the beneficiaries of the un-registered sale-deeds, have failed to prove their stance through cogent and tangible evidence. They also failed to rebut the long standing entries in the revenue record (Record of rights) in favour of the defendant/petitioners through cogent and convincing evidence. In light of mandate of Article 49 of the Qanun-e-Shahadat Order, 1984, such long standing entries in the revenue record, especially in the Register of Record of Rights, do carry presumption of truth and cannot be controverted by mere oral evidence unless proved otherwise by sufficient and convincing evidence.

13. The two Courts below have squarely ignored the above discussed facts and circumstances of the case reflecting from the available record and evidence, therefore, the findings of the Courts below being patently illegal, result of bare misreading and non-reading of material evidence and based on conjectural presumptions and erroneous assumption, warrant interference by this Court.

14. Though, the High Court, normally does not interfere in the concurrent findings of facts recorded by two Courts below, but when there is gross misreading and non-reading of evidence and patent violation of the law, the Revisional Court/High Court, is under legal obligation to rectify the error by interference in such illegal findings. Reliance in this regard can also be placed on the cases of "*Nazim ud Din and others vs Sheikh Zia ul Qamar and others*" (2016

SCMR 24), "*Mushtari Khan vs. Jehangir Khan*" (PLJ 2006 SC 877) and "*Ghulam Muhammad and 3 others vs. Ghulam Ali*" (2004 SCMR 1001)). Thus by following the command of law declared by the Apex Court and statutory provisions of Section 115, CPC, instant revision petition is allowed, impugned judgments and decrees of the two Courts below are set aside and consequently, suit of the plaintiff/respondents is dismissed. Parties are left to bear their own costs.

(R.A.) Petition allowed