IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Mr. Justice Yahya Afridi
Mr. Justice Sayyed Mazahar Ali Akbar Naqvi

Civil Appeal No. 2121 of 2017
(Against the judgment dated 19.10.2017 passed by the Lahore High Court, Rawalpindi Bench, Rawalpindi in Civil Revision No. 77-D of 2011)

Rehmat Noor

... *Appellant*

Versus

Zulqarnain

... *Respondent*

For the Appellant:	Sh. Zamir Hussain, Sr. ASC Syed Rifaqat Hussain Shah, AOR
For the Respondents:	Raja Nadeem Haider, ASC *(through video-link, Lahore)*
Date of Hearing:	22.06.2023

ORDER

Yahya Afridi, J.- Rehmat Noor through the instant appeal seeks to retain the property measuring 75 Kanals and 17 Marlas situated in Mauza Madan, Tehsil Sohawa, District Jhelum **("disputed gift property")** claiming that her late brother Abdul Ghafoor had validly gifted the same to her during his lifetime, and that she had accepted the same, as was validated by the trial court and affirmed by the appellate court, thus though, such findings of fact were for *alien* considerations set at naught by the Revisional Court *vide* the impugned judgment dated 19.10.2017.

2. We have heard the learned counsel for the parties and have gone through the record with their able assistance.

3. The learned counsel for the petitioner, when confronted with the finding of the revisional Court regarding the lack of evidence produced by the appellant to prove the three essential ingredients of a valid gift,

contended that in the present case there was 'material', as proof of the valid gift, which was considered by the trial and the appellate courts in adjudging the gift to be lawfully valid. When further asked, what 'material' according to the learned counsel was available on the record, which could prove the essentials of a valid gift, he contended that it was the relationship of the appellant with her deceased brother, and the fact that he was residing with the appellant and not with the respondent-son. He further added that this caring attitude of the petitioner towards her deceased brother was a peculiar circumstance, which should be considered, while appreciating the mutation recorded in the revenue record (Ex.P1), wherein the deceased brother, being the *donor*, is recorded to have approached the revenue staff to record the disputed gift property. In support of his contentions, the learned counsel sought reliance on **Haji Ghulam Rasool v. The Chief Administrator of Auqaf, West Pakistan (PLD 1971 SC 376), Mst. Manzoor Mai v. Abdul Aziz (1992 CLC 235), Said Wali v. Yaqoot Khan and another (PLD 1983 SC 440) and Fazle Ghafoor v. Chairman, Tribunal Land Disputes, Dir, Swat At Chitral at Mardan (1993 S C M R 1073)**

4. Generally, the Courts in our jurisdiction follow a liberal approach towards evidence produced to prove the essential ingredients for a lawful gift, when it relates to one being gifted to a woman or minor child and that too by a close relative.[1] However, in the present case, apart from the admission of the objecting-nephew (respondent-plaintiff) regarding the possession of the disputed gifted property with the Rehmat Noor (*donee*), there is no reliable evidence to prove the actual transaction of an offer made by late Abdul Ghafoor (*donor*) and the same being accepted by Rehmat Noor (*donee*), so as to constitute a valid gift being made. In fact, the evidence so produced by the Appellant-*donee* is essentially relating to the steps taken

[1] For example, a gift to the minor children does not require the actual transfer of possession from the donor but not by a grandfather, if the father of the minors is alive then the exception will not operate **(Ghulam Hassan v. Sarfraz Khan, PLD 1956 SC 309)**. The same rule applies to a gift from the husband to the wife **(Alif Khan vs. Mst. Mumtaz Begum and Another 1998 SCMR 2124)**. Further reference may be made to MZ Abbasi and SA Cheema, ***Family Laws in* Pakistan (Oxford University Press 2018)** .

after the alleged oral gift was made, and in particular, the recording of the said gift in the revenue record. When the basic foundation of a fact is lacking, no legal superstructure could be built thereon. Though the effort was made to prove the entry of the gift being recorded in the revenue record, but proving the same could never substitute evidence to prove the essential ingredients of the original transaction of gift made by late Abdul Ghafoor *(donor)* to Rehmat Noor (*donee*). Moreover it would be pertinent to note that the case law referred to by the learned counsel for the appellant is clearly distinguishable from the facts and circumstances of the present case.

5. What is also strange to note is that the trial court, while framing eight issues has only passed finding on Issue No. 1, and this crucial legal lapse was not attended to by the Appellate Court. Issue No. 1, as framed, read:

> "Whether the mutation No 320 dated 09.06.2001 with regard to suit property is against law, against facts based on fraud and ineffective over the right of the plaintiff?"

The finding of the trial Court on Issue No. 1, which was not disturbed by the Appellate Court, was in terms that:

> "Onus to prove this issue was on plaintiff; plaintiff himself appeared as PW1 and deposed on oath that Abdul Ghafoor was his father who died on 1.11.2001. .....He denied that suit property is in possession of Rehmat Noor. He did not know where mutation was mutated. ..... In documentary evidence plaintiff produced attested copy of mutation No. 310 of village Madan as Ex.P1, copy of death certificate of Abdul Ghafoor as Ex.P2, copy of register of record of rights for the year 1998-99 of village Rai-pur as Ex.P3, copy of birth certification of Zulqarnain as Ex.P4 and copy of mutation No. 1335 as Ex.P5.
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> 5. In rebuttal Rehmat Noor appeared as DW1 and deposed on oath that Abdul Ghafoor was her brother..... Majeed Khan appeared as DW2 and deposed on oath that he was witness to disputed mutation. At that time when Abdul Ghafoor mutated land was in full senses. That plaintiff did not attend Janaza of deceased. Plaintiff never went to Karachi. Rehmat Noor looked after Abdul Ghafoor. Fazal Dad appeared as DW3 and deposed on oath that Rehmat Noor looked after Abdul Ghafoor and also bore expenses of his funeral. ..... Abdul Ghafoor mutated land with his free will. Abdul Ghafoor was taken care by her sister. He denied that mutation was mutated through fraud. In documentary evidence defendant produced copy of mutation No. 310 as Ex.D1, copy of register of record of rights for the year 2002-2003 as Ex.D2.
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> 6. It is admitted by plaintiff that he used to meet his father secretly and his aunt did not let him meet his father..... It is also obvious that relationship between plaintiff and his father were not normal; therefore Abdul Ghafoor deceased was residing separately with his sister who looked

> after him and as a reward for her services to her real brother, Abdul Ghafoor deceased gifted land to his real sister for her services and due to affectionate relationship which accepted by defendant and possession was also handed over to defendant and the ingredient of valid gift in accordance with law have been fulfilled. As far as plea of fraud taken by plaintiff is concerned, plaintiff has failed to prove that defendant made any action of concealment of any fact or of false signature. Plaintiff has also failed to prove any deceit or intention to deceive, or mere secrecy or any actual or possible injury due to such deceit. Ex.P1 mutation of gift by Abdul Ghafoor to the defendant is a public document to which presumption of correctness is attached. ..... The perusal of Ex.P2 shows that defendant is in possession of suit property. In these circumstances plaintiff is miserably failed to prove issue No. 1 hence this issue is decided against plaintiff."

The above findings on this crucial issue appear to have validated the gift on the basis of the callous conduct of the respondent-son, and that the mutation recording the execution of gift **(ExP-1)** was a public document, and thus, had a presumption of truth attached thereto. These findings are contrary to the law. There is no cavil with the proposition that a mutation is always sanctioned through summary proceedings and to keep the record updated and for collection of revenue such entries are made in the relevant Register under Section 42 of the Land Revenue Act, 1967. It has no presumption of correctness prior to its incorporation in the record of rights. It is also settled law that entries in mutation are admissible in evidence but the same are required to be proved independently by the persons relying upon it through affirmative evidence. An oral transaction reflected therein does not necessarily establish title in favour of the beneficiary. A mutation cannot by itself be considered a document of title.[2] We also note that the respondent failed to prove the instrument of gift mutation in line with the requirement of Qanun-e-Shahadat, 1984. She examined only one witness of subject gift mutation. This Court in **Hafiz Tassaduq Hussain v Muhammad Din** (PLD 2011 SC 241) has aptly discussed the issue in hand and opined that:

> 8. The command of the Article 79 is vividly discernible which elucidates that in order to prove an instrument which by law is required to be attested, it has to be proved by two attesting witnesses, if they are alive and otherwise are not incapacitated and are subject to the process of the Court and capable of giving evidence. The powerful expression "shall not be used as evidence" until the requisite number of attesting witnesses have been examined to prove its execution is couched in the negative, which depicts the clear and unquestionable intention of the legislature, barring and placing a complete prohibition for using in evidence any such document, which is either not attested as mandated by the law and/or if the required number of attesting

[2] **Muhammad Yaqoob v. Mst. Sardaran Bibi and others, PLD 2020 SC 338**

> witnesses are not produced to prove it. As the consequence of the failure in this behalf are provided by the Article itself, therefore, it is a mandatory provision of law and should be given due effect by the Courts in letter and spirit. The provisions of this Article are most uncompromising, so long as there is an attesting witness alive capable of giving evidence and subject to the process of the Court, no document which is required by law to be attested can be used in evidence until such witness has been called, the omission to call the requisite number of attesting witnesses is fatal to the admissibility of the document. See Sheikh Karimullah v. Gudar Koeri and others (AIR 1925 Allahabad 56). The purpose and object of the attestation of a document by a certain number of witnesses and its proof through them is also meant to eliminate the possibility of fraud and purported attempt to create and fabricate false evidence for the proof thereof and for this the legislature in its wisdom has established a class of documents which are specified, inter alia, in Article 17 of the Order, 1984. (See Ram Samujh Singh v. Mst. Mainath Kuer and others (AIR 1925 Oudh 737). The resume of the above discussion leads us to an irresistible conclusion that for the validity of the instruments falling within Article 17 the attestation as required therein is absolute and imperative. And for the purpose of proof of such a document, the attesting witnesses have to be compulsorily examined as per the requirement of Article 79, otherwise, it shall not be considered and taken as proved and used in evidence. This is in line with the principle that where the law requires an act to be done in a particular manner, it has to be done in that way and not otherwise.

In the present case, we have noted that neither the concerned Revenue Officer or the Halqa Patwari were produced nor any effort was made for them to be produced through a court order. Original Record of the mutation and *Rapt Roznamcha* was also not produced in the court to establish the genuineness of the mutation. These deficiencies are enough to discredit the impugned mutation.[3]

6. Given the above, we find that the High Court in its revisional jurisdiction had correctly held that the very transaction of gift had to be proved by the present appellant, and proving a mutation can never vest title in a party over immovable property. At best, it may be considered as evidence in support of the material evidence produced by a party to prove the transaction of gift. In the instant case, there is no evidence produced by the appellant to substantiate her claim of receiving a valid gift of the disputed gift property from her deceased brother.

7. Accordingly, for the reasons stated above, we find that the High Court has exercised its jurisdiction in accordance with law, and no illegality or irregularity has been pointed out warranting interference of this Court. In

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[3] **Mst. Rabia Gula v. Muhammad Janan 2022 SCMR 1009; Ghulam Farid v. Sher Rehman 2016 SCMR 862**

view of the above, we find the present appeal to be bereft of merit. Therefore, this appeal is dismissed but with no order as to costs.

Sd/—J
Sd/—J

Announced in Open Court on 24-7.2023 at Islamabad

Sd/-J

Islamabad
Approved for reporting
Arif