

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Sh. Azmat Saeed
Mr. Justice Syed Mansoor Ali Shah

Civil Appeal No.404 of 2014.

(on appeal from the judgment of Peshawar High Court, Abbottabad Bench dated 22.04.2013, passed in C.R No. 235/2008.)

Bilal Hussain Shah and another

Appellants

Versus

Dilawar Shah

...Respondent

For the petitioners: Syed Hamid Ali Shah, ASC

For the respondent: Mr. Muhammad Saeed Khan

Date of Hearing: 02.05.2018

JUDGMENT

Syed Mansoor Ali Shah, J.- Leave was granted in this case vide order dated 13.03.2014 to examine whether the ratio of the judgment in the case of *Manzoor Ahmed & 4 others v. Mehrban & 5 others* (2002 SCMR 1391) relating to non-examination of attesting witnesses of a registered sale deed were applicable to the present case?

2. Brief facts giving rise to the above question are that the respondent (Dilawar Shah) filed a suit for declaration-cum-partition challenging the validity of Gift Deeds No. 1704 and 1705 dated 10.11.1996 allegedly executed in favour of appellant No. 1 (*alleged donee*) by one Syed Maqbool Shah (deceased) (*alleged donor*). Syed Maqbool Shah died in January, 2003 and was survived by his two brothers namely: Syed Lal Hussain Shah (father of appellant No.1) and Dilawar Shah, the respondent. Appellant No. 1 after the alleged

Gift Deeds transferred the property in favour of his wife i.e., Appellant No. 2, therefore, the respondent challenged both the transactions through the suit in question.

3. Learned counsel for the appellants argued that the Gift Deeds were registered documents, therefore, under *proviso* to Article 79 of the Qanun-e-Shahdat Order, 1984 ("Order") there was no requirement for the examination of the two attesting witnesses, especially when the executant had not denied the execution of the documents. He further submitted that the possession was handed over to appellant No.1 who thereafter raised construction on the said property by obtaining loan from the bank and also rented out the said property.

4. Learned counsel for the respondent on the other hand submitted that the said suit was filed in the year 2003 after the death of the donor i.e., Syed Maqbool Shah and that the execution of the Gift Deeds by the deceased has been specifically denied in the plaint. He further submitted that three ingredients of gift had to be independently proved and the appellants have failed to do so.

5. We have heard the parties at some length and have gone through the record of the case. Three questions that require examination are (1) whether two attesting witnesses were required to prove the execution of the registered Gift Deeds, in the present case? (2) whether, denial of execution of the document, under the proviso to Article 79 of the Order, has to be by the executant or can it be by any party to the suit, whose interest is affected by the document ? and (3) whether the essential requirements of gift were independently established ?

6. Respondent (plaintiff) has specifically pleaded in the plaint that appellant No.1, through his chicanery and deceit got the Gift Deeds registered and attested on behalf of Syed Maqbool Shah (*alleged donor*), hence the Deeds are illegal having no effect on the rights of the respondent. Article 79 of the Order provides as follows;

79. PROOF OF EXECUTION OF DOCUMENT REQUIRED BY LAW TO BE ATTESTED.--

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, if there be two attesting witnesses alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied." (*emphasis supplied*)

This Article deals with proof of a document that requires attestation under the law. The proviso to the Article relaxes the requirement of calling the two attesting witnesses to prove the execution of the document, if the document is duly registered in accordance with the provisions of Registration Act, 1908 and its execution is not specifically denied. In other words, the party is relieved of the duty of calling the two witnesses but not from the duty of proving the execution of the registered document¹. The effect of the proviso is that the due execution and attestation of the gift deed will have to be proved, although it may be proved by calling a person other than an attesting witness.² This relaxation is pillared on an important

¹ See for ref: AIR 1934 Lahore 282

² The Law of Evidence, *Jethmalani & Chopra*, 1st Edition, 2013. P. 952 (also see AIR 1940 Mys 234)

assumption that the execution of the document is not denied. Article 79 is document specific and deals with the proof of documents that require attestation under the law. Therefore, denial of execution is also document specific. The part *“unless its execution by the person by whom it purports to have been executed is specifically denied”* deals with the denial of the execution of the document and simply elaborates that the denial is to the effect that it has not been executed by the person who purports to have executed it. The words *by the person by whom it purports to have been executed* go with the word “execution” and not with the words ‘specifically denied.’ What has to be specifically denied is the execution. In other words, the facts constituting denial must show that the purported executant of the document never executed it. The specific denial is by the opposite party, i.e., the party against whom the document is sought to be proved, irrespective of whether he is or is not the executant of the document³. The words “specifically denied” evidently mean specifically denied by the party against whom the document is sought to be used and not by the executant alone. The denial, therefore, has to come from the party who is entitled to dispute or is interested in disputing its execution⁴. Thus, the denial of the execution of the document is not limited to the executant alone but is open to any party to the suit that is affected by the said document. For a similar view in our jurisdiction, see Mst. Saleema Bibi v. Mst. Ramzan Bibi

³ Chief Justice M. Monir’s Law of Evidence, 17th edition. Universal Law Publishing. Vol 2. P. 1349.

⁴ AIR 1959 Mys 148.

(2007 YLR 910) and Ghulam Bheek & others v. Mst Salamat Bibi & others (2001 CLC 1078).⁵

7. In this case the plaint states that the Gift Deeds have not been executed by Syed Maqbool Shah, as they have been fraudulently procured and executed on his behalf by appellant No.1. Admittedly two attesting witnesses to the Gift Deeds were not produced. The argument of the learned counsel for the appellants that the proviso to Article 79 of the Order applies to the present case, because the Gift Deeds are registered documents and there is no specific denial to the execution of the document by the executant, does not hold ground for the above reasons. The execution of the document, therefore, required the evidence of two attesting witnesses.

8. Secondly, the executant in this case died in January, 2003 before the filing of the suit in February, 2003. In case of death of the executant prior to the suit and in the face of the denial of the execution by the respondent (plaintiff), the requirement of two attesting witnesses cannot be dispensed with. Reliance is placed on Muhammad Iqbal Khan v. Mst. Farhat Nisa (PLD 2017 Lahore 727), Abdul Hameed v. Shamasuddin (PLD 2008 SC 140) and Abdul Ghafoor v. Mukhtar Ahmad Khan (2006 SCMR 1144).

9. Three ingredients of gift include: (i) declaration / offer by the donor (ii) acceptance of gift by the donee and (iii) delivery of possession under the gift. See Mst. Rasheeda Bibi v. Mukhtar Ahmad (2008 SCMR 1384) and Mst. Nagina Begum v. Mst.

⁵ Also see: AIR 1949 Nag 149, AIR 1932 All 320, AIR 1959 Mysore 148 and AIR 1989 Kerala 163.

Tahzim Akhtar (2009 SCMR 623). The declaration of gift and delivery of possession has to be established through independent evidence. See Islam-ud-Din v. Mst. Noor Jahan (2016 SCMR 986), Mst. Shafqat Parveen v. Muhammad Iftikhar Amjad (2012 SCMR 1602) and the case of Mst. Nagina Begum (*supra*). In the instant case, the first ingredient of gift, i.e., *Declaration of gift*, evidenced by the two Gift Deeds, falls to the ground, as the said Gift Deeds were not proved due to the absence of the two attesting witnesses. The second ingredient, i.e., *Delivery of possession*, means that the donor must deliver and divest the property in favour of the donee and establish the same through independent evidence. It is an admitted position that the donor till his death in 2003 was in possession of the property alongwith appellant No.1. There is no evidence on the record to establish that appellant No.1 took possession of the property, to the total exclusion of the donor. The exclusivity of delivery or the factum of complete divestiture in favour of appellant No.1 is not established. This factual position has been, concurrently, upheld by the courts below.

10. For the above reasons, we find no illegality of approach or infirmity in the appreciation of evidence or in the application of the law by the courts below. This appeal is, therefore, dismissed.

Judge

Islamabad,
02nd May, 2018.
Approved for reporting.

Judge

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