IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE MAZHAR ALAM KHAN MIANKHEL
MR. JUSTICE JAMAL KHAN MANDOKHAIL

AFR
CIVIL APPEAL NO.1602 OF 2014
(On appeal against the judgment dated 13.08.2014 passed by Peshawar High Court, Abbottabad Bench in C.R.No.217 of 2009)

Pervez Khan & others ... Appellant(s)

VERSUS

Ali Asghar Khan & others ... Respondent(s)

For the Appellant(s) : Mr. Zulfiqar Ali Abbasi, ASC

For Respondents No.1&2 : Mian Muhammad Ayub, ASC

For LRs of Respondent No.3 : Ex-parte

For Respondent No.4 : Nemo.

Date of Hearing : 26.10.2021

JUDGMENT

JAMAL KHAN MANDOKHAIL, J.

C.M.A.No.6672 of 2014: For the reasons mentioned in the misc. application, the delay in filing the instant civil appeal is condoned.

2. Facts in brief are that the appellants filed a suit for declaration and injunction regarding a house, described in the plaint. (the house in dispute). The contention of the appellants/plaintiffs in their suit is that the house in dispute was owned by their father, which after his death, devolved upon his legal heirs i.e. the plaintiffs, the respondents No.3 and 4. The respondents No.2 and 3 contested the suit, alleging there that the respondent

No.2 is the wife of the respondent No.3 and his father given the house in dispute to the respondent No.2 as dower through an agreement (*wasiqa*) dated 03.07.1972. It is stated that after becoming owner of the house in dispute, the respondent No.2 sold it out to the respondent No.1 through a sale agreement dated 14.03.2005. The respondent No.1 also filed a suit for specific performance of the said sale agreement, consequently, both the suits were consolidated. On conclusion of the trial, the suit of the appellants was dismissed, whereas, suit of the respondent No.1 was decreed by the trial Court vide judgment and decree dated 09.10.2007. The appeal filed by the appellants was allowed by the appellate Court vide judgment and decree dated 06.05.2009, pursuant to which, the suit of the appellants was decreed, while dismissed that of the respondent No.1. The respondents No.1, 2 and 3 filed a revision petition before the learned High Court which was allowed vide judgment dated 13.08.2014, resultantly, the judgment and decree of the Appellate Court were set aside and restored that of the trial Court, hence this appeal.

3. Heard the learned counsel for the parties and have perused the record. The admitted fact of the case is that the house in dispute initially belonged to the father of the appellants, the defendants/respondents No.3 and 4. The respondents No.2 claimed that at the time of her marriage with the respondent No.3, the house in dispute was given to her as dower by her father in law through the referred agreement dated 03.07.1972. The learned High Court and the trial Court relied upon the agreement, considering it being more than thirty years old, and decreed the suit of the respondent No.1. Article 100 of the Qanun-e-Shahadat Order 1984 describes parameters and condition for considering the evidentiary value of thirty years old document. According to

the said provisions of law, before arriving at any conclusion with regard to a presumption in respect of a document, the Court must satisfy itself about its originality, age, production from proper custody, unsuspicious character and other circumstances. The Court may make some presumption that the signature, handwriting and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested, provided that the original is before the Court, without which no such observations can be made. The presumption of genuineness with regard to 30 years old document is discretionary. therefore, the Conrt generally arrives at its conclnsion on the document, after the evidence of both sides has been given. The Court is not supposed to presnme every document and signature upon it as genuine, of a particular person, without considering the relevant factors, necessary to bring the document within the parameter of Article 100 of the Qanun-e-Shahadat Order, 1984. Reliance is placed on the judgments reported as *Jang Bahadar and others vs. Toti Khan and another*[1] and *Ch. Muhammad Shafi vs. Shamim Khanum*[2]

4. Now considering the claim of the respondent No.2. The judgments of the learned High Conrt and the trial Court did not contain any observation with regard to the production of the original agreement. As such, on the basis of a photo copy of the agreement. its age cannot he ascertained. There is also no finding or observation of both the Courts to shown their satisfaction about the proper custody of the agreement. Admittedly, the

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1 2007 SCMR 497
2 2007 SCMR 838

agreement was exhibited through DW.3, who has no relation with the document nor with the respondent No.2. The proper custody of the document in the given circumstances was not established by the respondents. Moreover, the learned High Court and the trial Court did not give any finding to show their satisfactiou with regard to the execution and signature of the father, purported to have executed and signed the agreement. Both the Courts have wrongly presumed it as genuine. Even otherwise, if a document is disputed by the opponent, the onus to prove its execution in accordance with law is upon the party, relying on it. Since the respondents were claiming to be the beneficiary of the documuent in question, which has been disputed hy the petitioners, therefore, the burden of proof of its genuiness, age, production from proper custody and its execution and signing by the executant was upon them. The respondents did not produce any evidence in this behalf, enabling the Courts below to presume that the predecessor of the plaintiffs and defendants No.3 and 4 was the executant and signatory of the agreement, therefore no presumption of correctness could be attached tn the said doenment. Both the courts have erred in law by drawing snch presumption. Reliance is also placed in the case reported as *Mst. Hajyani Bar Bibi through L.R. vs. Mrs. Rehana Afzal Ali Khan and others*[3].

5. Without prejudice to above, if a Court considers any document to be of thirty years or more old and presumes that the signature and every other part thereof, is in the handwriting of a particular person, even then, it must be taken into a consideration that whether the document so presnmed, can legally be acted upon or eau it create any right, title or interest? It is a fact that it was

[3] PLD 2014 SC 794

not the responsibility of the father in law to give his property to the respondent No.2, in lieu of a dower, rather, it was the responsibility of her husband. Under such circumstances, at the best, it could be considered as a promise or a commitment on behalf of the father in law. If it is believed that he had promised through the agreement, to give the house to the respondent No.2, admittedly, he did not act upon it in order to perform his commitment, nor the respondent No2 take any step for the performance of the agreement till date. It is a settled principle of law that mere agreement does not create a title, unless it is acted upon either by its executant or by way of a decree from a competent Court of law. It is a fact that the property has not been transferred to the respondent No.2 by the alleged executant of the agreement during his life time, therefore, after his death, his property automatically devolved upon his legal heirs. Under such circumstances, the respondent No.2 cannot be considered as owner of the house in question on the basis of the unperformed agreement. Hence, without gaining the status of an owner, the respondent Nu.2 cannot enter into any transaction in respect of the house iu question. The subsequent agreement to sell arrived at between the respondents No.1 and 2 with regard to the house in question is therefore invalid, as such, is unenforceable. The learned High Court and the trial Court have came to a wrong conclusion by considering the respondent No.2 as an owner of the house and decreeing the suit of the respondent No.1. The fiudings of both the Courts are since contrary to the facts and law, therefore, the impugned judgments and decrees are not sustainable.

Thus, in view of the above, the appeal is allowed. The judgments and decrees of the learned High Court and the trial Court dated 13.08.2014 and 09.10.2007 respectively are set aside. The judgment and decree dated

06.05.2009 passed the Appellate Court are restored, as a result thereof, the suit filed by the appellants is decreed and the suit filed by the respondent No.1 is dismissed.

Announced in open Court at Islamabad on. 13.07.**2022**

B-II
"Approved for reporting"
Sarfraz Ahmad/-