

**IN THE SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**PRESENT:**

MR. JUSTICE MUNIB AKHTAR  
MR. JUSTICE MUHAMMAD ALI MAZHAR

**CIVIL APPEAL NO.908 OF 2015**

(Against the judgment dated 15.04.2015  
Lahore High Court, Rawalpindi Bench,  
Rawalpindi in C.R.799/2005)

Muhammad Naeem Khan & another ...Appellants

**VERSUS**

Muqadas Khan (decd) through LRs and others ...Respondents

For the Appellants: Syed Rifaqat Hussain Shah, ASC/AOR

For Respondents (1-6) Mr. Munir Piracha Sr. ASC

For Respondents: (7-19) Ex-Parte

Date of Hearing: 26.11.2021

**Judgment**

**MUHAMMAD ALI MAZHAR, J.** This Civil Appeal is directed against the judgment passed by learned Lahore High Court, Rawalpindi Bench on 15.04.2015 in Civil Revision No.799 of 2005 whereby the civil revision application filed by the appellants was dismissed.

2. The short-lived facts of the case are that the appellants filed a Suit for cancellation of Mutation Entries No.1041, 1042, 1044 & 1046 for the land measuring 1 Kanal 2 Marlas, situated at village Said Khel Nartopa. According to the appellants the aforesaid mutations entries were recorded on 19.05.1997 as a result of fraud. The respondents contested the suit, the trial court settled the issues, evidence of the parties was recorded and ultimately, the suit was dismissed. The appellants preferred Appeal which was dismissed, thereafter, the Civil Revision was filed which was also dismissed by the learned High Court.

3. Leave to appeal was granted vide order dated 11.09.2015 to examine inter alia, *“whether in the circumstances where one of the executant of a document was a parda-nasheen and illiterate lady, the burden of proof had not shifted upon the beneficiary of such transaction*

*and whether such aspect of the case was duly taken into consideration by the three fora below while passing their respective judgments against the petitioners”.*

4. The learned counsel for the appellants argued that Muqadas Khan (defendant No.1 in suit) was sole beneficiary, who was required to prove his case but the learned trial court shifted the burden on the appellants. It was further contended that the learned Courts below failed to appreciate and decide the real controversy between the parties. It was further averred that the appellant No.2 (pardanashin lady) never appeared before the Mutation sanctioning Authority and no effort was made by the trial court for the verification of her thumb impression through any Forensic Laboratory. He next argued that there was a huge difference of market value of the properties due to which exchange of land was not possible but this aspect was not considered by the courts below, therefore the impugned judgments are based on misreading and non-reading of evidence.

5. The learned counsel for the respondent No.1 to 6 argued that no plea of pardanashin lady was ever taken in any court below and even in the memo of appeal filed in this Court; hence no such plea can be agitated in the arguments without any support of pleadings. He further argued that all courts below diligently considered the evidence led by the parties and no defect was found. The suit filed for cancellation of the mutation entries was rightly dismissed and the judgment and decree of trial court were also affirmed in appeal as well as in the Revision application before the learned High Court.

6. Heard the arguments. The record reflects that all the courts below properly considered the entire evidence led by the parties in the trial court. Neither the allegation that Muqadas Khan in collusion with Halqa Patwari fraudulently obtained the signatures of appellant No.1 on a blank paper was substantiated by any convincing or cogent evidence nor it was proved that the document of mutation dated 19.05.1997 was forged. The appellants also failed to prove that they never appeared before the concerned office and authority for the mutation of the land in question. Throughout the proceedings the respondents maintained that the appellants got the mutation attested by their free will and also appeared before the Revenue Authority. The thumb impression, signatures along with identity card numbers are

also mentioned in mutation documents. Nothing alleged that the thumb impression of Mst.Shamim was obtained through fraud or under duress or coercion or that she failed to understand the very nature of document or deal. The learned counsel for the appellants argued that the learned trial court failed to verify the thumb impression of Mst.Shamim from any Forensic Science Laboratory but the fact remains that Mst. Shamim failed to appear for recording her evidence which was the best evidence to lead with regard to veracity and genuineness of her own thumb impression but no effort was made to produce her. On the other hand, if the appellants were of the view that her thumb impression should have been verified by some forensic lab then it was the responsibility of the appellants to apply and move proper application in the trial court at the relevant time which they failed to do. Where a party keeps hold of the witnesses, the presumption would be that if such witnesses were produced, their testimony must have against him, therefore adverse inference of withholding evidence goes against the party who failed to call the concerned person engaged in the transaction who was in a better position to give firsthand and straight narrative of the matter in controversy. According to Article 129 of the Qanun-e-Shahadat Order 1984, the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Illustration (g) attached to this Article is quite relevant to the facts and circumstances of the case in hand in which the court may draw adverse inference or presumption that evidence which could be and is not produced would, if produced, be unfavorable to the person who withholds it. No misreading or non-reading of evidence or any other defect or error was pointed out in the impugned judgments which may warrant interference by this court.

7. We have cautiously scanned the record and found out that the appellants have not taken any plea in the plaint, memo of appeal or Revision Application filed in the High Court that Mst.Shamim was a pardanashin or illiterate lady nor has any such plea been taken in the instant Civil Appeal, except that the mutation was recorded fraudulently. Neither she appeared in the trial court for recording her evidence nor claimed any exemption from her personal appearance in

the court being a pardanashin lady but when we confronted the learned counsel for the appellants as to why she failed to appear in court for evidence, he simply replied that she is pardanashin lady hence she did not record her evidence in court. According to Order 6 Rule 1 C.P.C, the term "pleadings" include the plaint and the written statement, whereas Order 6 Rule 2 C.P.C accentuates, that every pleading shall contain a statement in concise form of the material facts on which the party pleading relies for his claim or defence. It is also a well settled exposition of law that no party can lead evidence beyond the pleadings. Though no plea of "Pardanashin lady" was raised in the memo of appeal in this Court also but the leave to appeal was granted on the point which has direct nexus with the ideology and genus of pardanashin or illiterate lady, hence we would like to take up this issue as well.

8. The denotation and import of phrase "Pardanashin lady" depicts a woman who heeded stringent and unyielding canons and ethics of seclusion and privacy and according to the customs may object to show up in a public office or have no communication except behind the screen with any male person save as near relatives. In our Holy Quran also, the believing women are commanded to draw their cloaks close round them (when they go abroad) and lower their gaze and guard their chastity and not to reveal their adornments except what normally appears. Allah is ever Forgiving and Merciful. **(Ref: Surah Al-Ahzab, Verse No.59 and Surah An-Noor, Verse No.31)**. If any such plea is taken then it is a time-honored parameter that in case of a document executed by a pardanashin lady, the burden of proof is on the party who depends on such a deed to persuade and convince the Court that it has been read over and explicated to her and she had not only understood it but also received independent and disinterested advice in the matter. The aforesaid parameter and benchmark is equally applicable to an illiterate and ignorant woman who may not be a pardanashin lady. If authenticity or trueness of a transaction entered into by a pardanashin lady is disputed or claimed to have been secured on the basis of fraud or misrepresentation, then onus would lie on the beneficiary of the transaction to prove his good faith and the court has to consider whether it was done with freewill or under duress and has to assess further for an affirmative proof whether the

said document was read over to the pardanashin or illiterate lady in her native language for her proper understanding.

9. The obvious underlying principle is to protect and save a weak and helpless woman from danger and risk of an unfair deal, thenceforth, it is to be ensured by the court in tandem, whether the alleged deal or transaction was effected by her free will or through coercion/duress or emotional blackmailing or whether it was simply aimed to deprive her right or interest in the property or divest her due share in the inheritance by male members of her family. The survey and analysis of some judicial precedents rendered by our courts and pronouncement of courts from Indian jurisdiction have in fact woven a cloak of protection for pardanashin ladies, who because of their ignorance, inexperience of business matters and social conditions are not able to understand the nature of business transactions. The Privy Council defined a Pardanashin lady as a woman of rank living in seclusion but the law regarding pardanashin ladies equally applies to illiterate and ignorant women. The question is whether a lady is pardanashin or not is always a question of fact which should be specifically pleaded and proved by some cogent evidence and is not to be used as weapon or shield to defend the lawsuit under the garb of this plea at original or appellate stage. The status and eminence of Pardanashin lady have been discussed in detail in the following dictums:-

**1. Ghulam Ali and others versus Mst. Ghulam Sarwar Naqvi (PLD 1990 SC 1).** This court held that no doubt in our urban society woman is not only asserting her rights but also is believed in some quarters as able to protect herself and her rights. In other social sectors she still is highly dependent upon the good-will of men around her and in the rural areas due to the reasons, which would be presently noted, the conditions under which she is living in this 20th Century, can in the present context, be compared with those prevailing before the advent of Islam. It was further held that the position of woman and her disabilities regarding protection of her own rights was recognized consistently, without reference to Islamic injunctions, purely as interpretation of the provisions of Contract Act (Section 16 and others), even by the Privy Council when dealing with the contracts by and acts of Parida Nasheen ladies.

**2. Janat Bibi versus Sikandar Ali and others. (PLD 1990 Supreme Court 642).** It was held that the question whether a lady is a pardahnashin lady is a question of fact (See Bank of Khulna Ltd. v. Jyoti Prokash Mitra and others AIR 1940 Privy Council 147). It is also well settled that the burden of proof in respect of a document purported to have been executed by a pardahnashin woman affecting her right or interest in the immovable property is on the person claiming the right or interest under the document. If she is illiterate, it must have been read over to her. This court also quoted the observation of Sir George

Lowndes rendered in the case of (Valluri) Ramanamma v. Marina Virana AIR 1931 Privy Council 100 that "the law as to disposition of property by pardanashin ladies has been discussed by the Board on many occasions. It is for the person claiming the benefit of any such disposition to establish affirmatively that it was substantially understood by the lady and was really her free and intelligent act. If she is illiterate, it must have been read over to her; if the terms are intricate they must have been adequately explained, and her degree of intelligence will be a material factor; but independent legal advice is not in itself essential.

**3. Syed Mansoor Ahmad v. Mst. Maqbool Begum and others. (1990 SCMR 1259).** The court held that a document adversely affecting the interest of a woman in favour of a person standing in relationship of active confidence requires strict proof of execution and availability of independent advice to such executant.

**4. Muhammad Yaqoob v. Mst. Sardaran Bibi and others. (PLD 2020 Supreme Court 338).** It was held that illiterate village women are to be treated at par with Pardanasheen ladies and where a transaction involves anything against their apparent interest, it must be established that independent, impartial and objective advice was available to them and the nature, scope, implication and ramifications of the transaction they were entering into was fully explained to them and they understood the same.

**5. Rangbi Bewa v. Md. Abed Ali & others. (Supreme Court of Bangladesh) (1987 7 BLD 319).** It was held that the court when called upon to deal with a deed executed by a pardanashin lady must satisfy itself upon the evidence first, that the deed was actually executed by her or by some person duly authorized by her with a full understanding of what she was about to do; secondly that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and thirdly that she had independent disinterested advice in the matter.

**6. Phul Peer Shah versus Hafeeza Fatima (2016 SCMR 1225).** It was held that in a case of such transaction with old, illiterate/rustic village 'Parda Nasheen' lady onus to prove the transaction being legitimate and free from all suspicions and doubts surrounding it, can only be dispelled if the lady divesting herself of a valuable property, the following mandatory conditions are complied with and fulfilled through transparent manner and through evidence of a high degree. Amongst this condition, the pre-dominantly followed are:- (i) that the lady was fully cognizant and was aware of the nature of the transaction and its probable consequences; (ii) that she was having independent advice from a reliable source/person of trust to fully understand the nature of the transaction; (iii) that witnesses to the transaction are such, who are close relatives or fully acquainted with the lady and were having no conflict of interest with her; (iv) that the sale consideration was duly paid and received by the lady in the same manner and (v) that the very nature of transaction is explained to her in the language she understands fully and she was apprised of the contents of the deed/receipt, as the case may be.

**7. Irshad Hussain v. Ijaz Hussain and 9 others (1994 PLD SC 326).** This court held that whether a lady is a Pardanashin is a question of fact. The burden of proof that any document purported to have been executed by a Pardanashin lady affecting her right in an immovable property was substantially understood by the lady and was her voluntary, intelligent, free and conscious act, is upon

the person chiming any right under such deed. This rule has been extended to illiterate ignorant lady whether she is Pardanashin or not. This rule of wisdom and caution thrown round the Pardanashin, illiterate and ignorant women is to protect them from exploitation, duress, fraud and misrepresentation. But where the lady involved is an educated lady not observing Parda capable of understanding transactions and has executed the deed on full and proper understanding of its implications, the principle governing Pardanashin, ignorant and illiterate women will hardly be attracted.

**8. Mst. Farid-un-nisa. v. Munshi Mukhtar Ahmad and another (A.I.R. 1925 Privy Council 204)**. The court held that the case of an illiterate pardanashin lady, denuding herself of a large proportion of her property without professional or independent advice, is one on which there is much authority. The real point is that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act, of the person who makes it. They must satisfy the Court that the deed has been explained to and understood by the party thus under disability, either before execution, or after it under circumstances which establish adoption of it with full knowledge and comprehension.

**9. Mst. Kharbuja Kuer. v. Jangbahadur Rai and others (AIR 1963 SC 1203)**. The court held that the rule evolved for the protection of pardahnashin ladies shall not be confused with other doctrines, such as fraud, duress and actual undue influence, which apply to all persons whether they be pardanashin ladies or not. In the first place, the lady was a pardanashin lady, and the law throws round her a special cloak of protection. It demands that the burden of proof shall in such a case rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by but was explained to, and was really understood by the grantor.

10. The aforesaid verdicts laid down the glorious rules of wisdom, thoughtfulness and attentiveness for protecting the pardanashin or illiterate lady from exploitation, duress, fraud, emotional blackmailing and misrepresentation in the male dominant society which has a conceptual label to characterize the unequal power relations between men as a group and women as a group.

11. The function of the court is to do substantial justice between the parties after providing ample opportunity of hearing which is one of the significant components and virtues of the fair trial. The well-known Latin maxim *Ubi jus, ibi remedium*, means where there is a right, there is a remedy which is a universal and incontrovertible rule. In order to handle the issue of exemption of pardanashin lady from personal appearance in Courts, the Civil Procedure Code, endows with specific provision with logical solution and forward-thinking to deal with the issue in an appropriate manner which is perhaps not applied

objectively by the Civil Courts despite availability of a well-defined remedy and immemorial solution for alleviation and assuagement of such particular class of women. At this juncture we would like to refer to Section 132 of Civil Procedure Code which is for ease of convenience reproduced as under:

**132. Exemption of certain women from personal appearance.**

(1) Women who, according to the customs and manners of the country, ought not to be compelled to appear in public shall be exempt from personal appearance in Court.

(2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any case in which the arrest of women is not prohibited by this Code.

[N.B. **Section 133 CP.C** represents the exemption of other persons who are exempted by the Provincial Government by Notification. Where any person is exempted, he will also be examined by commission on payment of cost of that commission].

12. The customs and manners advocated under Section 132 C.P.C, characterizes the customs and manners predominating presently and not the customs and manners which were prevalent in antiquity which have now become obsolete. The personal appearance refers to in-person attendance in the Court and if such plea is taken the Court should not compel a pardanashin lady to appear in court for recording her evidence. The rules framed in the Civil Procedure Code are for the advancement of justice and should not as far as possible, be allowed to operate so as to defeat the ends of justice. In the same backdrop, certain powers are vested in court to handle the disability and incapacity of person who is exempted or could not appear in the court for the purposes of recording evidence or is not represented through an attorney. In such a case, the court may issue commission to examine the witness. For the ease of reference, the relevant provisions i.e. Section 75 and Order 26 Rule 1 C.P.C are recapitulated as under:-

**75. Power of Court to issue commissions.** Subject to such conditions and limitations as may be prescribed, the Court may issue a commission –

- (a) to examine any person ;
- (b) to make a local investigation;
- (c) to examine or adjust accounts ; or
- (d) to make a partition



**Order XXVI Rule 1, C.P.C.**

**1. Cases in which Court may issue commission to examine witness.** Any court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it.

13. The privilege of exemption in court appearance to a pardanashin lady as provided under Section 132 of C.P.C is to be read with Section 75 and Order 26 Rule 1 C.P.C wherein the Court may appoint commission to record the evidence of pardanashin lady. In unison, under Order X, Rule 1-A C.P.C., the Court may adopt any lawful procedure not inconsistent with the provisions of this Code to (i) conduct preliminary proceedings and issue orders for expediting processing of the case; (ii) issue, with the consent of parties, commission to examine witnesses, admit documents and take other steps for the purposes of trial; (iii) adopt, with the consent of parties, any alternative method of dispute resolution including mediation, conciliation or any such other means.

14. If a woman falls within the exemption clause as cited under Section 132 C.P.C, the court has to issue commission as the matter of course or right, provided such plea was taken in the pleadings and the court is obligated to determine first whether the exemption claimed is permissible within the grounds and purview of Section 132 CPC or not, which is meant for particular class of women, so that the privilege/exemption should not be misused but allowed only in genuine cases. However, once it is proved that applicant is a pardanashin lady, she cannot be compelled to appear in the court and in such eventuality, the court may appoint the commission to record evidence in the interest of justice at any convenient place; even samples of thumb impression can be drawn on commission to verify with the documents in issue through any forensic lab if deemed fit by the Court for deciding the lis in just manner. In the families where ladies observe strict parda, it is considered by them most objectionable to appear in public even with their faces covered and to respect such sentiments and values, the legislature has provided a remedy under Section 132 C.P.C. We have also noticed that by dint of Code of Civil

Procedure (Amendment) Act 2020, (Gazette of Pakistan Extraordinary, Part I, No.F.9(5)/2020-Legis, dated 21.2.2020), extended to territory of Islamabad, certain new provisions have been incorporated for ensuring expeditious disposal of civil cases. According to newly inserted Section 26C in C.P.C, the court is obligated to direct the recording of evidence through Commission immediately upon framing of issues and filing of the list of witnesses and according to Sub-section 10 of Section 26C, the Commission shall record the evidence and proceedings thereof in written and audio and video recording which is quite a unique and distinctive feature in our judicial system that will obviously help and assist the courts to consider intrinsic and deep-seated value of evidence more cautiously for just and proper decision of the lawsuits. A mandatory provision has also entrenched and embedded in Sub-section 12 of Section 26C that the High Court shall frame rules for the purposes of recording of evidence through Commission.

15. In this advanced era of computer age, the information technology is progressing and growing manifold with rapidity. Even under Article 164 of Qanun-e-Shahadat Order 1984, in such cases as the Court may consider appropriate, the Court may allow to produce any evidence that may have become available because of modern devices or techniques. This Article further articulates that even conviction can be recorded provided that conviction on the basis of modern devices or techniques may be lawful. In order to warrant the uninterrupted discharge of judicial functions, even in the Covid 19 pandemic, many Courts in our country made provisions by means of modern technologies to conduct hearings by video link and in same pattern, the evidence after proper identification can also be recorded through video link if the facility is available in the court premises or alternately via video call to ascertain whether the pardanashin lady endorsed her signature or thump impression by free will or she was compelled to do this under duress, coercion, fraud, emotional blackmailing or misguidance or to deprive her right or interest in the property or divesting her share in the inheritance. The law must not become stagnant or archaic while society moves forward. It must be accessible, intelligible and must change with the times responding to the realism of modern day life which requires transfiguration of new ways and means and invention of up to date mechanisms for the purpose of providing access to justice with the aim to cut down the volume of

litigation and pendency of cases. If any plea of pardanashin is properly taken then the court may on its own motion appoint the Commission for recording the evidence to adjudicate whether the deal or transaction of any property entered into in her name was by her free will or through duress, fraud or emotional blackmailing of male members of family with the sole intention to deprive her right and interest.

16. As we have already held that no plea of pardanashin or illiterate lady was taken by the appellants before any forum, albeit, the above discussion was only made to address the leave granting order. On merits, we do not find any justification to interfere with the impugned judgment. The appeal is dismissed with no orders as to cost.

Judge

Judge

ISLAMABAD  
26<sup>th</sup> November, 2021  
Khalid  
Approved for reporting