IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Mr. Justice Qazi Faez Isa
Mr. Justice Yahya Afridi

Civil Appeal No. 177-P of 2020
AND C.M.A No. 1064-P of 2020
(On appeal from the judgment dated 07.10.2020 of the Peshawar High Court, Peshawar passed in Civil Revision No. 325-P/08)

Jehangir. ... *Appellant*

Versus

Mst. Shams Sultana and others. ... *Respondents*

For the Appellant: Mr. Mazullah Barkandi, ASC.
(Through video-link from Peshawar)
Mr. M. Tariq Khan, AOR (**absent**).

For Respondent No. 1: Mr. M. Ajmal Zeb Khan, ASC.
(Through video-link from Peshawar)

Respondent Nos. 2-3: Proforma Respondents.

Date of Hearing: 25.11.2021.

JUDGMENT

Qazi Faez Isa, J. Office has noted that this appeal has been belatedly filed with a delay of thirteen days. Civil Misc. Application No. 1057-P of 2020 states that the appeal has been filed within time and in this regard the learned Mr. Mazullah Barkandi, representing the appellant, has taken us to the impugned judgment and the endorsement on its last page which shows that the copy of the impugned judgment, dated 7 October 2020, was applied on 9 October 2020 and was prepared and made ready for collection on 2 November 2020. Therefore, the time between 9 October 2020 to 2 November 2020, that is 24 days, which was the period that the Copying Branch of the High Court took in preparing the certified copy, is to be excluded and if this is done the appeal is within time. The appeal was presented on 18 November 2020 and office objection was complied with on 19 November 2020. The learned counsel is correct. The appeal was filed within time. Therefore, we proceed to hear the appeal on merits.

2. The learned counsel for the appellant states that on the death of Khushhal Khan his estate was inherited by the appellant, his four sisters and mother. Three sisters sold some land which they had inherited to the appellant through sale mutation No. 13412, which was attested on 1 March 1975. The sale mutation was assailed by one sister, namely, Shams Sultana (respondent No. 1), by filing a suit on 24 July 2003, which was decreed. However, the appellant's appeal against the judgment and decree of the learned Civil Judge, Swabi was set aside by the District Judge, Swabi. The respondent No. 1 then filed a civil revision before the High Court, which was allowed, primarily on the ground that the sale was not established and merely because the transaction/sale mutation was thirty years old would not by itself validated it. The learned Mazullah Barkandi states that three sisters had sold their shares in the property and one of them, namely, Mst. Tasleem Bibi, had passed away and neither she in her lifetime nor her legal heirs had challenged the said sale. Mst. Amraiza, who was another seller, came forward to testify as DW-4 and supported and confirmed the sale. Mst. Marwari, the mother of the parties, testified as DW-5 and also supported the sale and it came in evidence that she was not dependent on her son, as she was receiving her deceased's husband pension, and thus not beholden to him and to have testified in his favour. He next submits that the plaintiff/respondent No. 1 was alive, and still is, yet she did not come forward to testify herself and instead her husband, namely, Zardad Khan (PW-3) testified on her behalf as her attorney. In his examination-in-chief he stated that, '*she* [the plaintiff] *was in need of money at that time, for which she had sold the property'*. During his cross-examination he also acknowledged that another sister, namely, Hussain Ara, had not sold her property and as such it was wrong to contend that the sale was fraudulent because if the brother/appellant wanted to deprive his sisters then Hussain Ara's property would not have been spared either. He further states that the attorney/husband of the plaintiff when he was being cross-examined was put that his wife, the plaintiff, was not prepared to testify and that the suit was also filed by her attorney, but even then the plaintiff/respondent No. 1 did not come forward to testify in support of her assertion that she had not sold the land, and no reason with regard to any purported inability on her part was put forward; this seriously undermined the claim that she had not sold the property to the appellant. Furthermore, it transpired that the husband of the plaintiff, who was also her attorney, was the Lumbardar of the locality and it is not believable that he would not have

known about the sale mutation dated 1 March 1975 and the suit was belatedly filed on 24 July 2003, that is, after 28 years. Concluding his submissions, the learned counsel states that the appeal filed by the appellant was rightly allowed after considering all the factors of the case, and the suit merited dismissal. However, learned Judge of the High Court set aside the decision of the Appellate Court for the reason that the sale was not established, which is surprising considering that one of three sellers had positively testified in favour of the sale, another seller had not challenged it and the third seller did not come forward to herself testify that she had not sold the land to the appellant.

3. On the other hand the learned counsel representing the respondent No. 1 relied upon the impugned judgment and states that it is well-reasoned and does not call for any interference. And, that the appellant took advantage of his position as respondent No.1's brother to manipulate the sale, which he had also failed to establish.

4. We have heard the learned counsel for the parties and with their able assistance examined the documents on record. We are surprised that the plaintiff/respondent No. 1 did not come forward to testify that she had not sold the property as reflected in the said sale mutation, particularly when her sister and mother had testified in support of the said sale. A direct challenge had also been thrown to her husband/attorney that if the plaintiff came to testify she would acknowledge the sale. When the best evidence is intentionally withheld an adverse presumption ensues that if it was produced it would be against the person withholding it as per Article 129(g) of the Qanun-e-Shahadat, 1984. The attorney of the plaintiff had also stated, in his examination-in-chief, that the land had been sold by the plaintiff because she needed the money. This statement could not be construed as a misunderstanding; his re-examination was also not sought nor the court record sought to be corrected if a mistake had been committed in recording the testimony of the witness. To satisfy ourselves, that the said admission existed on the record, we examined the original evidence file of the case where it is clearly mentioned. The sale mutation is of the year 1975 when the Qanun-e-Shahadat Order, 1984 and its Article 79 prescribing two attesting witnesses was not applicable. Instead, the Evidence Act, 1872 held the field, and section 68 thereof provided, as under:

> **68. 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 one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness 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, unless its execution by the person by whom it purports to have been executed is specifically denied.

The present case attracts the proviso to section 68 of the erstwhile Evidence Act because the sale mutation was not *specifically denied by the person by whom it purports to have been executed*, that is, by the respondent No. 1 herself.

5. The sale was admitted/not denied by the two sellers who had a two-third share in the said land and the third seller did not come forward to testify. Apparently, the plaintiff's husband was interested in the land and he had himself also filed the suit. The learned Additional District Judge, Swabi in setting aside the judgment and decree of the learned Civil Judge, Swabi was guided by correct legal principles and the judgment in appeal ought not to have been set aside in revision and that too on the mistaken ground that the sale was not established by disregarding the aforesaid facts.

6. Therefore, for the foregoing reasons, this appeal is allowed, the impugned judgment is set aside and the suit filed by the respondent No. 1 is dismissed. Since two judgments were passed in favour of the respondent No. 1, there shall be no order as to cost.

Judge

Judge

Bench-II
Islamabad:
25.11.2021
Approved for Reporting
(M. Tauseef)