

Stereo. No.H C J D 38.
Judgment Sheet
IN THE LAHORE HIGH COURT,
MULTAN BENCH, MULTAN
JUDICIAL DEPARTMENT

Civil Revision No.1461-D-2011

Mst. Naik Parveen
Versus
Jewan Khan

J U D G M E N T

Date of Hearing	25.04.2017
Petitioner By:	Mr. Muhammad Suleman Bhatti, Advocate.
Respondent By:	Mr. Muhammad Shahid Khan Sherwani, Advocate

Muhammad Ali, J.- This civil revision is directed against the judgments and decrees dated 14.10.2008 and 17.10.2011 passed by the learned trial Court and the learned appellate Court respectively, whereby suit for declaration and permanent injunction filed by the petitioner was dismissed and appeal filed to challenge the decision of trial Court was also dismissed.

2. Concisely, the facts of the case are that a suit for declaration and permanent injunction was filed by the petitioner-plaintiff contending therein; that mother of the petitioner and the respondent Mst. Waheedan was owner of the suit property fully described in the head note of the plaint; that Mst. Waheedan during her life time had verbally divided the property amongst the petitioner and the respondent being her only legal heirs; that after the death of her mother, the petitioner gave the property on lease to the respondent

and the petitioner has been receiving share of produce; that on 18.03.2004 she came to know that respondent had fraudulently got transferred the suit property belonging to Mst. Waheedan in his favour through mutation of *Tamleek* No.228 dated 28.02.1979; that Mst. Waheedan never appeared before any revenue officer nor transferred the land in favour of the respondent, therefore, mutation being result of fraud is ineffective upon her rights and liable to be set-aside.

3. The respondent contested the suit by filing written statement, according to the respondent the *Tamleek* mutation was validly executed by the deceased. From the divergent pleadings of the parties, the learned trial court framed necessary issues and proceeded to record evidence of the parties. On conclusion of trial, the suit was dismissed vide judgment and decree dated 14.10.2008. Being aggrieved, the petitioner filed appeal before the learned lower appellate Court, which came up for hearing before the learned Additional District Judge who dismissed the same vide judgment and decree dated 17.10.2011. Feeling dissatisfied this civil revision under Section 115 of the Code of Civil Procedure, 1908 (“**C.P.C**”) has been filed by the petitioner.

4. Learned counsel for the petitioner has argued that the impugned judgments and decrees passed by both the learned Courts below are against law and facts and suffer from material irregularities and illegalities; that beneficiary of the gift is bound to prove the actual transaction of gift, the respondent had not produced any evidence to prove the actual transaction of gift and failed to prove that Mst. Waheedan Bibi had gifted the property to him; that the three ingredients of gift were not proved; that original transaction of gift with all its ingredients was not pleaded in the written statement by the respondent; that no evidence was led to prove offer of gift on behalf of the donor, acceptance of offer by the

donee and delivery of possession; that evidence of the official witnesses is contradictory on material particulars; that the findings recorded by the learned Courts below are based on presumptions and are against the settled principle of law. In support of his arguments the learned counsel has placed reliance on Mst. AKULSOOM BIBI and another v. MUHAMMAD ARIF and others (2005 SCMR 135).

5. Conversely, the learned counsel for the respondent submits that there are concurrent findings of fact recorded by two Courts below in favour of the respondent; that the respondent being beneficiary of the gift fully proved the same; that Mst. Waheedan on account of love for her son gifted the property to him of her own free will being happy with the services rendered by the respondent; that the gift mutation was duly executed and there was no element of fraud in it.

6. Arguments heard. Record perused.

7. Admittedly, the suit property was owned by Mst. Waheedan, the petitioner and the respondent are her daughter and son. It is not denied in the written statement that Mst. Waheedan was illiterate *Parda Nasheen* lady. The petitioner contended in her suit that there was no special occasion for her mother to deprive the petitioner from inheritance and that the deceased was a religious and pious lady and could not have executed the gift in favour of her son to completely oust the petitioner from inheritance. The petitioner in order to discharge initial onus of proof appeared as PW-1 and stated that Mst. Waheedan got the suit property from her brothers in inheritance, she used to treat the petitioner and the respondent alike and they were given equal treatment. The deceased never alienated the property to the respondent. The petitioner also produced Muhammad Anwar as PW-2 who supported her version. The witnesses were subjected to lengthy cross-examination but nothing

detrimental to the case of the petitioner was extracted from their evidence. The initial burden of proof was discharged by the petitioner through oral and documentary evidence.

8. The burden of proof lies on the respondent being beneficiary of the gift to prove its due execution through clear and convincing evidence. The respondent in order to discharge the onus of proof, produced Rab Nawaz record keeper District Officer (Revenue), Vehari as DW-2 who produced record of mutation No.228 dated 28.02.1979. The witness admitted in his cross-examination that on the disputed mutation there are no signatures or thumb impression of the respondent and that parentage and detail of the donor and the witnesses have not been mentioned. Mukhtar Ahmed Anjum *Patwari* appeared as DW-3, he tendered *Rapt Roznamcha* No.186 dated 14.01.1979 as Exh.D-1, whereas copy of the disputed mutation was produced as Exh.D-2. Muhammad Ibrahim former *Patwari Halqa* appeared as DW-4 who made entries in Exh.D1. Ghulam Fareed Langrial appeared as DW-5 who stated that apparently Exh.D-2 was written by him. The respondent appeared as DW-1 and stated that the mutation was duly executed and there is no element of fraud. The witness further stated that his mother offered to give property to him and the offer was accepted by him and thereafter, the mutation was got entered and completed and after stating so submitted that possession was handed over to him. The respondent stated that land was transferred as his mother was happy with his services. According to him Bhag Din Lumberdar verified the mutation. In cross-examination, the witness stated that mutation was attested in a room of Tehsildar's office, he does not remember that he had signed or put thumb impression on the mutation. Further stated that his mother loved him and his sister equally, the deceased was 80/85 years of age at the time of her death. Now, according to deposition of this witness the offer and

acceptance was made prior to the entry of mutation as the witness stated that property was offered to him which he accepted and after that he went with his mother for execution and completion of mutation. This means that there was some past event when the offer and acceptance was made. The mutation in most of the cases is endorsement of a separate event when the oral gift is actually made. No detail worth the name regarding the said past event was mentioned in the written statement. No specific date, month and year is mentioned by the witness about the original transaction of the event when oral gift was made. The written statement filed by the respondent is completely silent regarding the date, time and venue of the original transaction of gift is concerned. It is requirement of law to plead date, time and place in the written statement in cases of oral gift and failure to do so is fatal as per dicta laid down in the judgment reported as ALLAH DITTA and others v. MANAK alias MUHAMMAD SIDDIQUE and others (2017 SCMR 402) and “PEER BAKSH v. Mst. KHANZADI” (2016 SCMR 1417). The written statement is also silent regarding the offer of gift, its acceptance and delivery of possession. It is only contended in the written statement that Mst. Waheedan offered to make *Tamleek* and herself went to revenue officer for execution of mutation.

9. The respondent in his examination-in-chief stated that his mother being happy with his services gave the property to him. There is no reference in the written statement about mother being happy with the services of the respondent. It is only pleaded in the written statement that respondent had served his mother. Anything stated outside the scope of pleadings could not be looked into and no decision could be based on such evidence. A party on the basis of evidence which was not pleaded could not be allowed to set-up a different case and press the same for getting a decree. Reference in this behalf is made to the cases of COMBINED INVESTMENT (PVT)

LTD v. WALI BHATI (PLD 2016 Supreme Court 730) and ESSA ENGINEERING COMPANY (PVT) LTD. v. PAKISTAN TELECOMMUNICATION COMPANY LIMITED (2014 SCMR 922).

Whenever gift mutation is challenged, burden squarely lies on its beneficiary to prove not only the mutation of gift but also the original transaction of gift, which he is required to fall back upon. Reference is made to the cases of PEER BAKSH (supra) and “FIDA HUSSAIN through legal heirs v. MUREED SAKINA” (2004 SCMR 1043). The respondent in his cross-examination admitted that his mother used to treat him and his sister equally that means there was no special occasion for the deceased to give entire property to the respondent to the exclusion of other legal heirs. There has to be strong reason to justify making of gift exclusively in favour of one legal heir. There is nothing written in the mutation to show any such reason to hamper the normal course of inheritance.

10. The marginal witnesses of the gift mutation were not produced and there is no explanation for not producing these witnesses. The respondent was required to produce these witnesses to verify and prove the transaction of *Tamleek* mutation and by not producing the marginal witnesses, the requirement of Article 79 of the Qanun-e-Shahadat Order, 1984 was not fulfilled and the document remained unproved. Reference in this behalf is made to the cases of ISLAM-UD-DIN through L.Rs and others v. Mst. NOOR JAHAN through L.Rs and others (2016 SCMR 986) and Mst. SAADIA v. Mst. GUL BIBI (2016 SCMR 662). The respondent was also under an obligation to prove that at the time of execution of *Tamleek*, independent advice was available to the donor and that she fully understood its contents. The respondent has failed to prove ingredients of gift, the ingredients had to be proved independent of the document particularly when one of the legal heir is deprived through execution of gift. The burden to prove the original transaction of gift with all its ingredients rest upon the beneficiary of such gift as

held in the case of Mst. AKULSOOM BIBI and another v. MUHAMMAD ARIF and others (2005 SCMR 135). The three basic ingredients of gift are to be fulfilled in their logical order and one cannot overlap the other, if any one of the ingredient is missing, the gift is not proved. Reference in this behalf is made to the cases of “Mst. NAGINA BEGUM v. Mst. TEHZEEM AKHTAR and others” (2009 SCMR 623) and “MUHAMMAD IDREES v. Mst. ZEENAT BIBI” (2005 SCMR 1690). The mutation is not a title document and efflux of time does not extinguish any right of inheritance because on the death of an owner of the property, all the co-sharers immediately and automatically become co-sharers in the property. It appears from the record that an effort has been made to deprive the petitioner a female family member from inheritance of the deceased. The Courts while analysing the evidence have to keep in view the fact that mutation of gift which had the effect of depriving female lawful heir had to be jealously scrutinized so that the normal course of inheritance is not frustrated as held in the case of “BARKAT ALI through legal heirs and others V. MUHAMMAD ISMAIL and others” (2002 SCMR 1938).

11. Both the learned Courts below in oblivion of what has been discussed above proceeded to dismiss the suit without considering the fact that the beneficiary of the gift had failed to prove the gift independently. The impugned judgments lay much emphasis on the fact that possession of the property was with the respondent and on the basis of the same held that gift was validly made, in doing so the other important aspects of the case were ignored. The petitioner categorically stated that share in produce was given to her and when the respondent stopped giving her the share, the Revenue Record was checked and the disputed mutation came to her knowledge few months before filing of the suit. The petitioner considered herself as co-owner in the property which was looked

after by her brother. The findings of the Courts below are based on presumptions and are also result of misreading and non-reading of evidence. The learned appellate Court in an illegal manner held that there was sufficient explanation for not producing marginal witnesses as they had expired, admittedly no death certificates of the witnesses were produced and there is no reference in the statement of the respondent about death of these witnesses. The oral assertion of the counsel at the appellate stage that these witnesses have passed away was not enough. Production of death certificates in the circumstances was necessary to prove that witnesses were dead. Reference in this behalf is made to the case of MUHAMMAD SIDDIQUE v. GHULAM RASOOL and others (2011 CLC 661).

12. Although, no issue on question of limitation was framed yet the learned appellate Court non-suited the petitioner holding that suit was filed with considerable delay. The findings on this question are not in accordance with law and are in conflict with the law laid down in case law Mst. SUBAN v. ALLAH DITTA and others (2007 SCMR 635), the operative part of the judgment reads as under:

“11. It is a proposition too well-established by now that as soon as someone who owns some property, dies, the succession to his property opens and the property gets automatically and immediately vested in the heirs and the said vesting was not dependent upon any intervention or any act on the part of the Revenue Authorities or any other State agencies. It is also an established proposition that a mutation did not confer on anyone any right in any property as the Revenue Record was maintained only for realization of land revenue and did not, by itself confer any title on anyone. It may also be added that efflux of time did not extinguish any rights inheritance because on the death of an owner of property; all the co-inheritors, immediately and automatically, became co-sharers in the property and as has been mentioned above, limitation against them would start running not from the time of the death of their predecessor-in-interest nor even from the date of mutation, if there be any, but from the date when the right of any such co-sharers/co-inheritors in such land was denied by someone.”

The suit relating to inheritance of a female heir in the circumstances was not barred by time.

13. The concurrent findings recorded by the two Courts below are found to be against the settled principles of law and are result of misreading and non-reading of evidence, hence liable to be set-aside in exercise of revisional jurisdiction. Ordinarily, the jurisdiction under Section 115 C.P.C is not exercised to upset concurrent findings of fact but where the Courts had acted in exercise of its jurisdiction illegally or with material irregularity, jurisdiction has to be exercised to upset the concurrent findings. Reference is made to the case of NAZIM-UD-DIN and others v. Sheikh ZIA-UL-QAMAR and others (2016 SCMR 24).

For what has been discussed above, this civil revision is **allowed**, the impugned judgments and decrees dated 14.10.2008 and 17.10.2011 passed by the learned trial Court and the first appellate Court are set-aside and the suit filed by the petitioner is decreed. There is no order as to costs.

(MUHAMMAD ALI)

JUDGE

Approved for reporting.

JUDGE