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JUDGMENT SHEET
IN THE LAHORE HIGH COURT AT LAHORE
JUDICIAL DEPARTMENT

C.R.No.546/2015

Chaudhry Muhammad Younas Vs.Muhammad Khursheed,etc.

JUDGMENT

Date of hearing	02.11.2018
Petitioners by	M/s. Maqbool Elahi Malik, Muhammad Umar Riaz, Muhammad Sajid Chaudhry and Shahzada Babar, Advocates for petitioner in CR No. 546 of 2015 and respondent No.10 in CR No.547 of 2015. M/s. Khalil Ahmed and Hassan Iqbal Warriach, Advocates for respondent No.10 and petitioner in CR No.547 of 2015.
Respondents No.1 to 3	M/s. Sh. Naveed Shahryar, Imtiaz Hussain Rehan, Fatima Malik and Tariq Siddique, Advocates.

***Ch. Muhammad Masood Jahangir ,J*:** Undisputedly, Ch. Maula Bakhsh was exclusive owner of House No.111-D, Model Town, Lahore, who expired on 04.07.1996 leaving behind five sons and three daughters, out of whom Mehmood Ahmed, respondent No.3, on 12.03.2001 instituted a suit for administration, declaration and permanent injunction against his other brothers and sisters to claim his share in the legacy pertaining to the subject House left by their father. Although a joint written statement (Exh.P7) on behalf of rest of the brothers and sisters was filed to contest the suit with the defence that their father had already gifted out the House to his two sons (petitioner and respondent No.10) in 1989, but during its proceedings, out of them, Muhammad Khursheed and Mst. Surriya

Begum (respondents No.1 and 2) filed independent applications and also made statements before the Court seized of the suit to resile that said written statement was filed on their behalf, who also sought leave to raise their independent defence. Although their request was accorded, but prior to its submission on 05.12.2008, the suit was dismissed for want of evidence while attracting penal consequences of Order XVII rule 3 of the Code of Civil Procedure, 1908 and the appeal as well as Civil Revision preferred by respondent No.3 also failed up to the level of this Court, however in the meantime, Muhammad Khursheed respondent No.1 on 15.12.2008 and Mst. Surriya Begum respondent No.2 on 26.01.2010 instituted two independent civil suits before the learned Trial Court to basically claim separate possession of their legal and shari shares in the demised House through partition, which were consolidated and much thereafter, Ch. Muhammad Younas, petitioner of instant Civil Revision also instituted a suit for recovery of possession, mesne profit and damages only against respondent No.1, which was not tagged with the earlier suits for the reasons that the latters had ripped till then. Although declension in this regard was assailed by the petitioners, but without any success and as a result of common protracted trial suits under these Petitions were decreed vide consolidated judgment dated 21.05.2014, which was further congealed when independent appeals of the petitioner and respondent No.10/beneficiaries of the alleged gift failed on 22.12.2014, hence Civil Revision in hand along with connected one bearing No.547 of 2015. As common questions of law and facts *inter*

se the parties are involved in these *lis* having arisen out of joint trial and consolidated judgments of the Courts below, hence for all intents and purposes, I intend to decide those jointly through this single judgment. However, the reference and source point for rendering this judgment will be Civil Revision in hand.

2. Heard and record perused.

3. M/s. Maqbool Elahi Malik, Ch. Khalil Ahmed, Muhammad Umar Riaz, Muhammad Sajid Chaudhry, Shahzada Babar and Hassan Iqbal Warriach, Advocates appearing on behalf of Civil Revisioners/beneficiaries inaugurally emphasized that mere affirmation of plaintiffs regarding denial of ownership rights of the defendants/beneficiaries did not absolve them of their obligation to produce cogent evidence in order to substantiate their assertions, who not only failed to lead tangible evidence, but also remained unsuccessful to plead and prove the alleged forgery with regard to acknowledgement of gift executed by Maula Bakhsh in their favour was not well founded. *Ex facie* Paras-4 to 7 of the plaint of respondent No.1 were very much elaborated to disclose the wrongdoings engineered by beneficiaries to usurp the shares of the other co-owners. Moreover, the moment Ch. Muhammad Khursheed/plaintiff (PW1) while appearing in the witness-box deposed that their father had never alienated the house and his brothers/beneficiaries had managed fictitious documents through forgery, onus was shifted upon the latters to prove the original transaction as well as documents executed in this regard. Reliance

can be placed upon judgment reported as "***Allah Ditta*** *and others* ***Vs. Manak alias Muhammad Siddique*** *and others* **(2017 SCMR 402).**

Before embarking any further, I would like to add that under the Mohammadan Law, a gift, in order to be valid and binding upon the parties, must fulfil the following conditions:-

(a) a declaration of gift by the donor;

(b) acceptance of gift by the donee; and

(c) delivery of possession of corpus.

On the accomplishment of these ingredients, a valid gift comes into existence. A written instrument in any case would not create a gift but was mere piece of paper to record a past transaction and in such eventuality it was *sine qua non* for its gainer to independently prove the aforenoted three components of the gift besides the execution of the document as well.

4. During the proceedings of earlier suit instituted by Mehmood Ahmed regarding the identical controversy, the beneficiaries in their written statements without mentioning any date or month and specific names of the witnesses of the transaction simply disclosed that their father with his free will in presence of witnesses had made a declaration of gift in 1989 in lieu whereof, the possession was also handed over to them, but absolutely there was no disclosure to the extent that any instrument was constructed as well to acknowledge the transaction. The beneficiaries again in the instant suits failed to give essential details regarding any writing executed for the confirmation of oral gift. Anyhow, in evidence only photocopies of different documents (Mark-A, B and Exh.DW3/5) were brought on

suit file to prove that oral transaction of gift was ultimately admitted by its executant/donor, but neither the original one thereof were brought into picture nor any effort was made to prove the same through secondary evidence. It was again stunning that beneficiaries did not examine any of its marginal witnesses, scribe and stamp vendor.

The contention of learned counsel for the beneficiaries that out of attesting signatories, one had already departed, whereas the other having become crippled could not be summoned, but at the same time, they were compelled to concede that even no attempt was made for the identification of their signatures through some persons familiar therewith. The learned counsel also failed to justify why the stamp vendor as well as scribe was withheld. The other setback was that out of two beneficiaries, only one was examined, whereas other despite his availability did not appear to face the test of cross-examination. It was also shocking that no one in corroboration was produced to prove the factum that offer of gift was ever made, which was accepted before him, what to talk of the change of possession in lieu of alleged transaction, so it was a case of no evidence on behalf of petitioners to prove their original transaction as well as construction of subsequent documents to acknowledge it. The stress of learned counsel that in earlier suit rest of the siblings of the donor had conceded the stance of the petitioners, as such their admission was binding upon them was fallacious. It is well established that pleadings cannot be treated as evidence until and unless its maker is called upon to testify it on oath. It is to be recalled

that the plaintiffs of the *lis* in hand during the proceedings of earlier suit resiled to have filed any such written statement while leveling serious allegations upon the beneficiaries that they had fictitiously invented it. In these circumstances, the mere fact that a conceding written statement was filed, cannot be taken as proof of the disputed gift.

At this stage, Mr. Umar Riaz accented that instrument of gift (Ex:DW3/5) was received in evidence without any objection, as such it stood proved, was not correct. The pivotal question in the litigation was its genuineness or otherwise. Articles 78 and 79 of the Qanun-e-Shahadat Order, 1984 are the relevant provisions, which provide procedure for proof of such like instrument. Even if it was brought on record without objection, but it could not be treated as evidence of the original having been signed and written by the persons, who purported to have written or signed it, unless the writing and their signatures were proved in terms of aforenoted provisions. The identical controversy has already been clinched by the apex Court in a case reported as ***Khan Muhammad Yousaf Khattak Vs. S.M. Ayub*** *and others* **(PLD 1973 S.C. 160).**

5. The next emphasis of learned counsel for the beneficiaries that gift was duly recorded in the relevant record of Model Town Housing Society and after its transfer to their clients in the life of the donor, neither there left any requirement to prove it nor the other siblings of the donor had any *locus standi* to dispute the same, is not well founded. Although Record Keeper (DW3) of the Society was examined by the beneficiaries, who tendered copies of some

documents as per availability thereof in Office File, but admittedly none of these was either scribed or signed in any capacity by him. Anyhow, the testimony of this star witness was of no help to the petitioners and for ready reference some relevant extract from his cross-examination in verbatim is reproduced as under:-

اللہ بخش نے اپنے دو بیٹوں مولا بخش اور محمد شریف کو رقبہ تین تین کنال ہبہ کیا تھا۔ جس کا نوٹنگ پارٹ میں ذکر نہ ہے۔۔۔ نوٹنگ پیرہ میں ایسا اللہ بخش کی طرف سے کوئی بیان نہ ہے۔ جس میں دو بیٹوں کے نام ہبہ کرنے کا ذکر کیا گیا ہو۔۔۔ درست ہے کہ نوٹنگ پارٹ پر نہ کوئی مولا بخش کا کوئی بیان ہے اور نہ ہی کوئی دستخط۔

During the cross-examination, the specific question as follows:

کیا نوٹنگ پارٹ پر اس بات کا ذکر ہے کہ "آج مولا بخش صاحب حاضر آئے اور ایک درخواست دائر کی"

was extended to him by learned counsel for the plaintiffs and he replied:-

نوٹنگ پیرہ میں ایسا ذکر نہ ہے۔

So, nothing was made available on the record during the trial to prove that Maula Bakhsh had ever appeared before the Society to make a request for transfer of suit property through gift in favour of his two sons/petitioners. The entire proceedings for transfer of the House were allegedly conducted by the Secretary of the Society, but despite availability, he was also not examined and Courts below were perfect to draw an adverse inference under Article 129 illustration (g) of the Qanun-e-Shahadat Order, 1984, that had he been examined, he would have not acknowledged the proceedings of transfer available in the relevant file and the alleged transfer of said house to beneficiaries without any legal back was of no legal effect. Under the law, a property could only be transferred either through mutation, registered instrument or by orders of Court of

law, whereas its transfer was made by the Society without securing identification of the donor or recording his statement, hence Courts below were perfect to disbelieve those proceedings.

The additional setback of the controversy would be that the alleged donor had five sons and two daughters or their siblings, if any out of them had already departed, but no reason was ever furnished either in the memo of gift or record of the Society that for what evil deeds rest of the sons as well as daughters were deprived of the said benefit. See ***Sadar Abbas Vs. Province of Punjab*** *and others* (**2015 CLC 822)** and ***Barkat Ali through Legal Heirs*** *and others* ***Vs. Muhammad Ismail through Legal Heirs*** *and others* **(2002 SCMR 1938).** The apropos of entire discussion is that beneficiaries failed to discharge onus of issue No.5 duly shifted upon them and this Court being sanguine to unanimous findings returned by the Courts below feels no hesitation to confirm it.

6. The next argument of learned counsel for the beneficiaries that suits were badly time barred having been filed after many years of the departure of Maula Bakhsh is also not forceful. In the present case, perspicuous stance of the plaintiffs was that the impugned memos of gift were fictitious, forged as well as fabricated and on having been proved as such beyond any shadow of doubt, the same could not be perpetuated, but those can be assailed at any point of time. Reliance in this respect can be placed on the case law reported as ***Abdul Rahim*** *and another* ***Vs. Mrs. Jannatay Bibi*** *and 13 others* **(2000 SCMR 346)** and ***Khair Din Vs. Mst. Salaman*** *and others* **(PLD 2002 SC 677).**

7. The next submission of learned counsel for the beneficiaries that after dismissal of earlier suit instituted by Mehmood Ahmed respondent No.3, a fresh suit could not be instituted on behalf of the defendants of afore-noted lis and both the Courts below failed to apply principle of *res judicata* is again not tenable.

Admittedly, during trial of suits in hand, application under Section 11 of the Code, 1908 seeking rejection of plaint being barred by law was filed by the petitioners, but was declined and maintained upto the level of this Court, hence interlocutory order having attained finality could not be re-agitated. Reliance in this respect is placed on the judgment reported as ***Gulistan Textile Mills Ltd.*** *and another* ***Vs. Soneri Bank Ltd****. and another* **(PLD 2018 SC 322).** Moreover, in cases reported as ***Ghulam Muhammad, etc Vs. Muhammad Hussain, etc*** **(2006 CLJ 633)** and ***Muhammad Zubair*** *and others* ***Vs. Muhammad Sharif*** **(2005 SCMR 1217)** the Superior Courts have already concluded that right of inheritance could not be defeated by law of limitation or principle of *res judicata* as no law or judgment could override law of Sharia being a superior law, hence the arguments in this regard being meritless are repelled.

8. Learned counsel for the beneficiaries while relying upon judgments reported as ***Yasmeen Qureshi Vs.Tariq Qureshi*** *and 2 others* **(PLD 2006 Lahore 311)**, ***Mehbub Alim Vs. Razia Begum*** *and others* **(PLD 1949 Lahore 263)**, ***Syed Mehdi Hussain Shah Vs. Mst. Sahadoo Bibi*** *and others* **(PLD 1962 SC 291)**, ***Muhammad Sharif*** *and 2 others* ***Vs. Mst. Aisha Bibi*** **(1994 MLD 677)**, ***Chanar Gul*** *and 4 others* ***Vs. Province of Sindh through Secretary, Sindh Secretariat*** *and 3*

others **(2017 YLR Note 434)**, ***Murad Bakhsh*** *and 4 others* ***Vs. Mst. Syeda Ashraf Jhan*** *and 4 others* **(2017 CLC 646)**, ***Chandu Lal Agarwala*** *and others* ***Vs. Khalil ur Rehman*** *and others* **(PLD 1949 Privy Council 239)**, ***Muhammad Akbar*** *and others* ***Vs. Mst. Sahib Khatoon*** *and others* **(1991 SCMR 1196)** *and* ***Rashid Ahmed*** *and others* ***Vs. Allah Ditta*** *and others* **(2014 YLR 1748)** put their best to persuade that concurrent findings of two Courts below were liable to be interfered with, but minute perusal of the referred case law reveals that these being distinguishable from the facts and circumstances of the instant case cannot be made basis to reverse unanimous impugned judgments, which having been based upon well appreciation of evidence and application of law on the subject are approved and confirmed.

9. Consequently, these Civil Revisions being devoid of any force and merit are **dismissed** with cost throughout.

(Ch. Muhammad Masood Jahangir)
Judge

Approved for reporting.

Judge

Syed Zameer