

Judgment Sheet

IN THE HIGH COURT OF SINDH HYDERABAD CIRCUIT

R.A. No. 27 of 2014

Applicants: Mumtaz Hussain & others
through Mr. Shamsuddin Memon Advocate.

Respondent No.1: Akhtar Hussain Abbasi
through Mr. Imdad Ali R. Unar Advocate.

Respondent No.2: Nemo.

Respondents 3 to 5. Through Mr. Wali Muhammad Jamari, Assistant
A.G. Sindh.

Dates of hearing: 25-10-2021, 01-11-2021 & 08-11-2021.

ORDER

Adnan Iqbal Chaudhry, J.- Suit No. 27/1998 filed by the Applicants/Plaintiffs (Mumtaz Hussain & others) was decreed against the Respondent/Defendant No.1 (Akhtar Hussain) by judgment dated 30-09-2000 and decree dated 04-10-2000 passed by the Senior Civil Judge Sanghar. However, on Civil Appeal No. 46/2000 filed by the Respondent No.1 (Akhtar Hussain), Suit No. 27/1998 was dismissed by the Additional District Judge, Sanghar by judgment dated 23-01-2014 and decree dated 25-01-2014; hence this Revision application.

2. The undisputed facts are that the Applicants/Plaintiffs (Mumtaz Hussain & others), along with their late father, Mir Muhammad Abbasi, were co-owners of undivided agricultural land of 345-28 acres in Deh Bawarlow, Taluka Khipro, District Sanghar, which they had inherited from their mother, Mst. Sher Bano, and in which the share of Mir Muhammad Abbasi was 0-25 paisa, i.e. 86-17 acres. Mir Muhammad Abbasi is said to have gifted his share to Akhtar Hussain (Respondent/Defendant No.1), who he claimed was his son from his other wife, Mst. Zarina. Pursuant to the said gift, a mutation entry was also made in favour of Akhtar Hussain in the revenue record. Mir Muhammad Abbasi passed away in 1993. In 1994, the

Applicants/Plaintiffs filed suit for cancellation of said gift, which was later renumbered as Suit No. 27/1998.

3. Per the plaint of the suit, the Plaintiffs came to know of the gift in 1992. They moved an application to the Mukhtiarkar Khipro for cancellation of the gift. When that application did not succeed, the Plaintiffs filed the said suit. They pleaded that though Akhtar Hussain had been raised by their father Mir Muhammad Abbasi, he was not his real son, as he was already born to Mst. Zarina when she started living with Mir Muhammad Abbasi without a nikah; that Akhtar Hussain had obtained the gift from their father by exercising undue influence at a time when their father was ill and was living with Akhtar Hussain; that in any case, the gift was never complete by delivery of possession as the gifted land was under a prior mortgage with the Agricultural Development Bank, and it was in the prior possession of Sher Muhammad (Defendant No.2) as lessee for cultivation, which possession still continued with him.

4. In his written statement, Akhtar Hussain pleaded that he was the real son of Mir Muhammad Abbasi, who had entered into a nikah with Mst. Zarina in 1958, and Akhtar Hussain was born out of such wedlock in 1966; that it was in the knowledge of the Plaintiffs that Mir Muhammad Abbasi had in fact made the gift in favour of Akhtar Hussain in December 1988 by a written declaration of gift, followed by a statement recorded before the Mukhtiarkar Khipro on 04-09-1989, and then by a mutation of the khata in his name; that such gift was made by Mir Muhammad Abbasi with free will and out of natural love and affection for his son; that at the time he made the gift, Mir Muhammad Abbasi was not ill, nor did he suffer any protracted illness before his death; that despite the land being mortgaged to a bank and its physical possession with a lessee, Mir Muhammad Abbasi was in constructive possession as co-owner thereof, and the same possession was delivered by him to Akhtar Hussain.

5. The lessee of the gifted land, Sher Muhammad (Respondent/Defendant No.2) pleaded in his written statement that the

land had been leased to him for cultivation by Mir Muhammad Abbasi under a lease agreement dated 23-04-1987; that he was in possession ever since; that after the death of Mir Muhammad Abbasi the lease was renewed by the Plaintiffs; that during his lifetime Mir Muhammad Abbasi had never disclosed to him that he had gifted his share in the land to Akhtar Hussain.

6. Learned counsel for the Applicants/Plaintiffs supported the judgment of the trial court and submitted that the mutation entry dated 04-09-1989 in favour of Akhtar Hussain on the basis of a gift from Mir Muhammad Abbasi, was fictitious; that in any case, the land allegedly gifted was undivided land held by Mir Muhammad Abbasi with his children, the Plaintiffs, and possession of such land was never delivered to Akhtar Hussain; that physical possession of such land was always with a lessee, the Respondent/Defendant No.2; and that the very paternity of Akhtar Hussain was in question.

7. On the other hand, learned counsel for the Respondent/Defendant No.1 (Akhtar Hussain) supported the judgment of the appellate court and submitted that the gift in favour of Akhtar Hussain had been made by Mir Muhammad Abbasi by way of a statement dated 04-09-1989 recorded before the concerned Mukhtiarkar, produced as Exhibit 111, which evidence had gone unrebutted. As regards the question raised to the paternity of Akhtar Hussain, learned counsel submitted that though such question had been raised frivolously, it was not relevant to the validity of the gift.

8. Heard the learned counsel and perused the record.

9. The case set-up by both sides has already been discussed above. Since the Applicants/Plaintiffs had laid a great deal of stress on the paternity of Akhtar Hussain, which fact was decided against him by the trial court, I advert to that aspect of the matter first.

10. The trial court held that Akhtar Hussain had not been able to prove that his mother Mst. Zarina was married to Mir Muhammad Abbasi, in other words doubting the paternity of Akhtar Hussain. The sanad of the nikah between Mir Muhammad Abbasi and Mst. Zarina was produced by Akhtar Hussain as Exhibit 142. But that document was discarded by the trial court by observing that it was issued in the year 1958, whereas the requirement of registration of nikahs had come about in 1961 on the promulgation of the Muslim Family Laws Ordinance, 1961. However, the learned trial court did not notice that such sanad of nikah was never issued in the form prescribed by the Muslim Family Laws Ordinance, 1961, nor did it purport to be a registered nikah, rather it had been issued by one Shaikh Qazi Amirullah as '*Secretary Government N.W. Provinces and Odh Bahak Khandaan*'. Surely, it could not be said that prior to the Ordinance of 1961 any sanad of nikah was invalid. The said sanad of nikah was a document more than 30 years old. In disbelieving the same the learned trial court did not consider the presumption contained in Article 100 of the Qanoon-e-Shahadat Order, 1984. The trial court also did not consider Exhibit 141, a birth certificate issued by the Board of Intermediate & Secondary Education, Hyderabad, produced by Akhtar Hussain to show that the name of his father was mentioned as 'Mir Muhammad Abbasi'. Nor did the trial court take notice of Exhibit 111, the statement recorded by Mir Muhammad Abbasi before the Mukhtirakar Khipro stating that he had gifted his share in the land to his 'son' Akhtar Hussain, which acknowledgment by Mir Muhammad Abbasi raised a presumption of marriage with Mst. Zarina and of the paternity of Akhtar Hussain in terms of paras 257(b) and 334 of Muhammadan Law by D.F. Mulla. Therefore, the finding of the trial court that Mst. Zarina was not married to Mir Muhammad Abbasi, or that Akhtar Hussain was not his son, suffered from a misreading and non-reading of the evidence.

11. The question central to the suit was whether the gift by Mir Muhammad Abbasi of his share in the land to Akhtar Hussain was a valid gift or not. Though Akhtar Hussain had filed with his written statement a copy of a declaration of gift dated 26-12-1988, the same was not tendered by him in evidence. However, to establish the gift, Akhtar

Hussain rested his case on the statement of gift that had been made by Mir Muhammad Abbasi before the Mukhtiarkar Khipro on 04-09-1989. An attested copy of that statement was produced as Exhibit 111 by the Tapedar of Deh Bawarlo. That statement by Mir Muhammad Abbasi recorded that he had gifted his share of 86-17 acres in 345-28 acres land in favour of his son Akhtar Hussain and had also delivered him possession thereof. The statement of gift was signed by Mir Muhammad Abbasi as donor, by Akhtar Hussain as donee accepting the gift, and by the Mukhtiarkar Khipro and two witnesses. The Tapedar also produced an attested copy of village Form VII as Exhibit 112, which was mutation Entry No. 49 dated 04-09-1989 made in the name of Akhtar Hussain pursuant to the said gift. The statement of gift, Exhibit 111, had went un rebutted as no evidence was brought by the Plaintiffs to dislodge the presumption of its correctness. Therefore, the finding of the trial court that the gift was fictitious was only conjecture.

12. The case set-up by the Applicants/Plaintiffs in the plaint was that the gift had been procured by Akhtar Hussain by exercising undue influence over their father, Mir Muhammad Abbasi, who was severely ill at the time and was under the care of Akhtar Hussain. However, the only evidence brought by the Plaintiffs to show the illness of Mir Muhammad Abbasi was a medical certificate dated 06-07-1995 (Exhibit 125), issued after his death, which stated that on 04-11-1993 he had been admitted to the hospital with the diagnosis of chronic abdomen and intestinal obstruction, and that he was discharged on 17-11-1993. In his examination-in-chief, Mushtaq Hussain (Plaintiff No.2) also stated that: *"My father was ill since 1992"*. On the other hand, the gift had been made much before that in 1989, and much before Mir Muhammad Abbasi passed away in 1993. Thus, there was nothing to show that at the time Mir Muhammad Abbasi made the gift he was suffering from any illness, and such that his consent could have been influenced unduly. Rather, the evidence was that that Mir Muhammad Abbasi remained estranged with the Plaintiffs.

13. This brings us to the question whether the gift in favour of Akhtar Hussain was complete by delivery of possession. Admittedly, the mortgage of the land by Mir Muhammad Abbasi to the Agricultural Development Bank was without delivery of possession. Akhtar Hussain had also produced a letter dated 24-02-1994 (Exhibit 140) issued by the bank to show that he had subsequently repaid the loan. The trial court took the view that since the land was leased by Mir Muhammad Abbasi to the Defendant No.2 for cultivation in 1987 (Exhibit 130), i.e. prior in time to the gift, the possession of the land was never delivered to Akhtar Hussain to complete the gift.

14. It was an admitted position that the gift by Mir Muhammad Abbasi was of his 0-25 paisa share in 345-28 acres of land, which worked out to be 86-17 acres, and which was undivided land held by him jointly with the Plaintiffs. The gift of an undivided share (*mushaa*) in property which is capable of division is dealt by para 149 of Muhammadan Law by D.F. Mulla, which stipulates that such a gift is irregular, not void, and it may be perfected by the subsequent partition and delivery to the donee. However, para 149 also provides certain exceptions which are as follows :

“Exceptions.— A gift of an undivided share (*mushaa*), though it be a share in property capable of division, is valid from the moment of the gift, even if the share is not divided off and delivered to the donee, in the following cases:

- (1) where the gift is made by one co-heir to another;
- (2) where the gift is of a share in a zemindari or taluka;
- (3) where the gift is of a share in freehold property in a large commercial town;
- (4) where the gift is of shares in a land company.”

15. It is manifest that the gift of share in undivided land made by Mir Muhammad Abbasi to Akhtar Hussain fell within Exceptions (1) and (2) listed above, in that, the said donor and donee being father and son were heirs of each other, and the underlying land was a zemindari. In more or less similar circumstances it was held by the Supreme Court in the case of *Haji Muhammad Ali v. Muhammad Akram* (PLD 2007 SC 319) that in view of the Exceptions contained in para 149 of Muhammadan Law, the non-delivery of physical possession of the share in undivided land did not

invalidate the gift. Since the Defendant No.2 was in possession as lessee of co-owners of undivided land, and he did not claim the same adversely to them, the fact that the gifted land was not partitioned and continued with him for cultivation as undivided land, that did not invalidate the gift in favour of Akhtar Hussain.

16. Having seen that the evidence before the trial court had established a valid gift made by Mir Muhammad Abbasi in favour of his son, Akhtar Hussain (Respondent No.1), the judgment passed by the trial court to cancel such gift was a result of misreading and non-reading of the evidence. Its setting-aside by the appellate court does not call for any interference. Resultantly, this revision application is dismissed.

JUDGE

A.