

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

IInd Civil Appeal No. S – 02 of 2024

(Fakhrunisa Shahwani v. Ahsan Anwar & others)

Date of hearing : **04.11.2024**

Date of decision : **04.11.2024**

M/s Mohsin Kadir Shahwani and Amir Ali Bhutto, Advocates for appellant.

Mr. Ahmed Ali Ghumro, Advocate for respondent No.1.

Mr. Ahmed Ali Shahani, Assistant Advocate General Sindh along with Niaz Ali Ujjan, Mukhtiarkar (Revenue), Bhiria.

J U D G M E N T

Zulfiqar Ahmad Khan, J. – This Second Appeal has been filed under Section 100, CPC, against the judgment and decree dated 26.04.2024, passed by learned Additional District Judge-II, Naushahro Feroze in Civil Appeal No.135/2021, wherein the judgment and decree dated 21.10.2021, passed by learned Senior Civil Judge-II, Naushahro Feroze in F.C. Suit Old No.202/2015 (New No.183/2016), through which the suit of the appellant (plaintiff) was decreed, have been set aside, and the matter has been remanded to the trial Court.

2. The pith and substance of the lis at hand is that the appellant lady, enjoyed undisputed ownership of agricultural lands (Survey Nos. 15/A & B, 427/1 & 2, 428/1 & 2, 430/1, 2, 3, & 4, and 359) totaling 30-15 acres in Deh Khahi Qasim, Taluka Bhirya, District Naushahro Feroze as gifted to her by her father. She being a lady entrusted the land to her elder brother (respondent No.2 / defendant No.1) for cultivational hardships while offering shared produce. The appellant later discovered that respondents (defendants) No.1 and 2, in collusion with the Mukhtiarkar and Revenue officials, fraudulently transferred the subject lands through a forged gift statement, which she never made, against which illegal entry she filed an appeal under Section 161 of the West Pakistan Land Revenue Act, 1967, challenging the (fraudulent) entry No.80 in the record of rights. The Additional Deputy Commissioner-I allowed the appeal on 21.08.2013 and

canceled the said entry and ordered return of possession of land to the appellant. Meanwhile, the appellant also filed Civil Suit No.1097 of 2013 at the Principal Seat of this Court at Karachi for an injunction against unlawful dispossession, which was disposed of on 22.04.2014, with directions to the Additional Commissioner to decide the appeal within 30 days. On 13.05.2014, the Additional Commissioner-II, Sukkur, set aside the order of the Additional Deputy Commissioner, which order was challenged in revision before the Member Board of Revenue, who dismissed it on 09.10.2015. The appellant being posed with such eventuality filed a suit for Declaration, Injunction and Damages, which was decreed in her favour. Respondent No.1 and Respondent No.2 (who has since passed away and is now represented by legal heirs) appealed the said Judgment, and the appellate Court through the impugned Judgment remanded the case to the trial Court for a fresh decision while considering additional issues. The appellant has now challenged the appellate Court's Judgment in this Second Appeal.

3. Learned Counsel for the appellant has raised several grounds challenging the decision of the appellate Court. He contended that the trial Court's comparison of signatures, without the assistance of a handwriting expert, was sufficient to find out fraud in the execution of the gift statement. He further asserted that the trial Court correctly concluded that the signatures on the gift statement were forged while relying on the testimony of a witness (PW-2 Maqsood Ahmed) who denied witnessing the gift and confirmed that even his signature was fabricated. Learned Counsel also disputed the limitation having been applied, and by referencing to Hon'ble Supreme Court's rulings argued that limitation does not run against fraud, particularly in matters involving inheritance rights of a female. He also stated that all these issues were already decided by the trial Court. Additionally, he argued that the trial Court had appropriately dealt with the validity of the gift, including the issue of possession of the property, which remained in the Appellant's possession. Lastly, he prayed that the impugned judgment and decree of the appellate Court be set aside, asserting that its decision was inconsistent with established legal

principles, and that the appellant's rights are at stake. In support of his contentions, he has relied upon the cases of Mst. Ummatul Waheed and others v. Mst. Nasira Kausar and others (1985 SCMR 214), Messrs Essa Engineering Company Pvt. Ltd. and another v. Pakistan Telecommunication Company Limited and another (2014 SCMR 922), Sher Asfandyar Khan and others v. Neelofar Shah and others (2020 CLD 1260), Mst. Shabla and others v. Ms. Jahan Afroz Khilat and others (2020 SCMR 352) and Faqir Ali and others (PLD 2022 Supreme Court 85).

4. In contrast, learned Counsel for respondent No.1 asserted that the trial Court failed to address or frame crucial issues concerning the maintainability of the suit, especially given that the cause of action arose in 1984, while the suit was filed in 2015. He pointed out towards the omission of issue related to the appellant's knowledge of the gift statement, and the failure to examine whether the essential elements of a valid gift were met or not. He also pointed out towards the lack of consideration by the trial Court with regards the verification of the witness's signature by a handwriting expert. Learned Counsel argued that the matter at hand fell within the jurisdiction of the revenue authorities, who are responsible for maintaining long-standing entries, and that the Civil Court lacked jurisdiction to interfere. Citing Muhammadan law, he emphasized that a written document is not required to establish the validity of a Gift, as long all three ingredients of declaration, acceptance and delivery of possession are present, all of which, per learned Counsel fulfilled in this case, hence the gift became valid. He further contended that the appellant failed to prove fraud or provide reliable evidence regarding the Gift. Referring to decisions of the Hon'ble Supreme Court, learned Counsel asserted that the case had been correctly remanded for framing additional issues and that there was no substantial legal question to warrant a second appeal. Therefore, he maintained that the appeal lacked merit and should be dismissed. He placed reliance upon the cases reported as Maulvi Abdullah and others v. Abdul Aziz and others (1987 SCMR 1403), Muhammad Ejaz and 2 others v. Mst. Khalida Awan and another (2010 SCMR 342), Abid Hussain and others v. Muhammad

Yousaf and others (PLD 2022 Supreme Court), Aamir Afzal and another v. S. Akmal (deceased) through L.Rs. and others (2024 SCMR 1649) and an unreported judgment dated 19.09.2024 of the Hon'ble Supreme passed in **Civil Petition No.1182-L of 2018** (Akhtar Nasir Ahmed v. Province of Punjab through District Collector Gujrat & others).

5. Learned AAG Sindh, supporting the appellant's case, argued that under Section 123 of the Transfer of Property Act, 1882, a Gift Deed must be executed through a Registered Instrument, for it to be declared as a valid transaction. He emphasized that Section 17 of the Registration Act, which mandates the registration of certain documents, includes a Gift Deed also, for later's legal validity. He contended that since the Gift in question was not registered, it remains legally ineffective. He concluded that the appellant's case should be upheld and the respondents' claim be rejected due to non-registration of the deed. He has relied upon the cases reported as Naseem Ahmed Khan v. Syed Fahad Ali and others (2017 CLC 839).

6. On the first date of hearing i.e. 20.05.2024, an application (CMA No.1045 of 2024) filed by the appellant resulted in the appointment of the Nazir (then modified as Additional Registrar) of this Court as Commissioner to verify possession of the subject property. The Additional Registrar (Commissioner) submitted his report on 14.06.2024, confirming that possession of the property was with the appellant and not with the respondent, hence the ingredient of the possession, still being with the appellant, was affirmed. Respondent No.1 filed objections to the report, claiming no notice or intimation having been received. However, the request for an extension of time, filed by the Additional Registrar (Commissioner) on 30.05.2024, indicates that he made such request to notify the parties, particularly the respondents. This demonstrates that the Commissioner made required efforts seeking presence of the parties during the inspection. Furthermore, a review of the Court's file reveals that the *vakalatnama* for respondent No.1 was filed on 31.05.2024, before the

inspection date i.e. 08.06.2024, confirms that respondent No.1 was aware of the Court's orders and proceedings.

7. Legally speaking every second appeal, filed under Section 100, CPC, presents an opportunity for a Court to determine whether the decision of the earlier appellate Court warrants interference or not. Section 100, CPC governs second appeals and allows a party to seek redress against decisions made by the lower appellate courts. It is clear from the language of Section 100 that a second appeal can be entertained if there is a substantial question of law involved, which appears to be the case at hand.

8. In the present case, the appellant challenges the decision of the appellate Court on the grounds that the trial Court rightly concluded that the Gift Deed was forged and that there was sufficient evidence to support the appellant's claim. It is pertinent to note that learned Counsel for the appellant has consistently relied on the Hon'ble Supreme Court's case laws, which hold that limitation does not apply to fraud, particularly in cases involving inheritance rights or claims of ownership, especially for females, which is now an established position. In fact on account of such increasing incidents of land grabs of womenfolk, new offences in Pakistan Penal Code were added to curb such dishonest practices.

9. To me, trial Court's judgment was based on a careful review of the evidence, including the testimony of the key witnesses where it inter alia appropriately concluded that the signature on the Gift Statement was forged. The decision was also rooted in the principle that a fraudulent act renders any subsequent transaction, such as a Gift, voidable. The fact that the respondent failed to produce any convincing evidence of a valid Gift, especially in the face of strong testimonies and the cancellation of the fraudulent revenue entry, this further strengthened the trial Court's conclusion.

10. The appellate Court, however, raised a concern with the trial Court's failure to frame additional issues, including the appellant's knowledge of the fraudulent transaction and the validity of the Gift

statement. However, such points in my view are adequately addressed during the trial, and the trial Court's judgment did not overlook the relevant aspects of the case. The appellate Court's decision to remand the case, therefore, seems to be based more on unfounded procedural concerns rather than any substantive errors in the trial Court's findings. The remand order to frame additional issues appears to overcomplicate the matter without addressing the central issue, whether the Gift deed was executed under fraudulent circumstances or not, which issue has already been decided.

11. Moreover, the issue of jurisdiction raised by the respondents is not pertinent, as the civil court had the jurisdiction to entertain the suit for declaration of ownership and to issue restraining orders preventing the defendants from interfering with the lawful possession. The jurisdiction of the revenue authorities does not extend to matters involving fraudulent transactions or forged documents, which fall within the purview of the civil court. The argument of learned Counsel for respondent No.1 that the civil court should refrain from intervening in revenue matters unless the revenue authorities act beyond their jurisdiction is flawed in this case, as the appellant's claim pertains to the validity of a document, not a mere administrative matter, such an assertion is not well founded.

12. Under circumstances of the case at hand, one must not forget to look at Section 123 of the Transfer of Property Act, 1882, which requires Gift Deeds to be executed and registered to be legally valid, which has not been done in this case. For convenience, the contents of Section 123 are reproduced hereunder:

*“123. **Transfer how effected.** For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery. Such delivery may be made in the same way as goods sold may be delivered.”*

13. Furthermore, Section 17 of the Registration Act, 1908, stipulates that documents, including instruments of Gift of immovable property are to be registered. The failure to register this document further weakens its legal standing and reinforces the appellant's claim that the transfer was invalid. Without the mandatory registration, a Gift cannot be treated as legally binding, and the appellant the alleged "donee" remains the rightful owner of the land.

14. According to learned Counsel for respondent No.1, a written document is not required for the validity of a gift under Muhammadan Law, provided there is a declaration, acceptance and delivery of possession, all of which are allegedly present in this case. Under Islamic law, any person of sound mind may dispose of his property by way of a Gift. The essential ingredients of a gift under Section 149 of Muhammadan Law mandatorily require delivery of possession of the gift by the donor, which critical ingredient is missing the case at hand.

15. In addition to the above ingredients, every transaction must be proved through two witnesses in accordance with the Qanun-e-Shahadat Order, 1984. Therefore, a person claiming title based on such an oral Gift must substantiate the claim with cogent and reliable evidence. The individuals claiming to be witnesses to the transaction must explain the time, date and place of the gift, as well as the circumstances surrounding why the gift was not reduced to writing. Failure to provide such details would render the transaction unproven. In the case at hand the respondent No.1 could not satisfy holding possession of the suit land except under the pre-gift cultivation arrangements, and the signatories to the alleged change of land revenue record denied having signed the paper and denied that their signatures were genuine, leaving me to the conclusion that claim of the Respondent No.1 is not sustainable.

16. Admittedly, no registered instrument is available to support the claim of the respondent No.1 except for the Gift statement dated 30.01.1989, which was made before the Mukhtiarkar. This document though bears the signature of the appellant (which are denied by the

appellant who states that these are forged signatures) but lacks her thumb impression, which is quite unusual. It also contains the signature of one witness, Maqsood Ahmed, who is the real brother of the appellant and respondent No.2, but it does not include even his thumb impression. The thumb impression of the second witness, Muhammad Chuttal (since expired), is present on the document. However, both the appellant and witness Maqsood Ahmed have denied their signatures on the document, which raises questions about its authenticity and validity. I had the opportunity to examine the original register of land and noted that nearly for all such transactions, thumb impressions of the parties were affixed. Hence in my view the trial Court rightly reached to the conclusion that the alleged gift is a sham transaction. Furthermore, out of the two witnesses, one has passed away and the second has denied signing the document. This failure to properly establish the essential elements of the gift and the absence of credible witnesses severely undermines the Respondents' claim. As a result, the transaction cannot be legally upheld, and the trial Court's decision to reject the respondents' claim is justifiable in my humble view.

17. The trial Court while discussing the evidence of the appellant has also observed as under, which statement I choose to reproduce:

“20. The perusal of evidence of Mst. Fakhrunisa clearly shows that she has categorically denied that she had ever gifted her property to defendant No.01. In cross examination contention of plaintiff that basically property pertains to her father and later gifted to her was reiterated but nothing substantial came on record that she has voluntarily offered her entire property to brother, which he had accepted and such gift was made in his favour. In evidence of plaintiff no any justification was put before her that why she has gifted her entire suit property.”

18. With regards Gifts, in the case of Faqir Ali and others v. Sakina Bibi and others (PLD 2022 Supreme Court 85), the Hon'ble Supreme Court has observed as under:

“8. Although stricto sensu, it is not necessary for a donor to furnish reasons for making a gift yet no gift in the ordinary course of human conduct can be made without reason or

justification be it natural love and affection for one or more of his children who may have taken care of the donee in his old age and thus furnished a valid basis and justification for the donor to reward such effort on the part of the donee by way of making a gift in his/her favour. In the case of Barkat Ali v. Muhammad Ismail (2002 SCMR 1938) this Court has already taken notice of the fact that in the wake of frivolous gifts generally made to deprive female members of the family from benefit of inheritance available to them under Sharia as well as the law, the Courts are not divested of the powers to scrutinize the reasons and justification for a gift so that no injustice is done to a legal heir who otherwise stands to inherit from the estate of a deceased predecessor or relative and that the course of inheritance is not bypassed or artificially blocked. In the present case, no reason is available on the basis of which the alleged gift appears to have been made. The only reason furnished by Faqir Ali, DW.8 and Munir Ali, DW. 10 in their statements before the trial Court was that their father Muhammad Ali had transferred the suit land to gain divine favour of God by pleasing Him and the exact words used were "Allah Waasty" It is therefore clear and obvious to us that natural love and affection was not the consideration of the gift and instead as alleged by the aforementioned two witnesses the intention behind the transaction was to please God, the Almighty. Even if that claim is accepted as true, it is ex facie hard to understand how depriving his real daughters of their rightful share in the inheritance/estate of the donor could be interpreted as an act which would please God, the Almighty Who has specifically ordained that the daughters are entitled to a specified share by way of inheritance in the estate of their father on his demise. It therefore appears that the gifts were only a device to deprive the daughters from inheritance and the gift mutations were sanctioned to bypass the law of inheritance and to disinherit the daughters. In this background, the High Court in our opinion was correct in coming to the conclusion that the gift was based on a fraudulent intent. It is settled law that fraud vitiates even the most solemn transactions and any transaction that is based upon fraud is void and notwithstanding the bar of limitation. Courts would not act as helpless by stands and allow a fraud to perpetuate."

19. As far as the point of comparing the signatures exercised by the trial Court itself is concerned, the Hon'ble Supreme Court in the case of Mst. Nazeeran and others v. Ali Bux and others (2024 SCMR 1271), has dilated upon the issue in the following manner:

"16. The trial court while deciding the Issues Nos.1 and 3 observed that the signatures of the Sub-Registrar as well as the respondent No.2 (Koural) on the suit sale deeds did not tally

with each other and drew an adverse presumption that some other person had signed the suit sale deeds as Sub-Registrar by copying his signature, and decided the said issues in favour of the respondents and against the present appellants. Before us, the learned counsel for the appellants argued that the trial court had wrongly proceeded to exercise power under Article 84 of the Q.S.O. and held that the signatures of the Sub-Registrar on the suit sale deed did not match with each other; the trial Court should not have assumed the role of an expert. Instead, the matter should be referred to a handwriting expert.

We have also examined the suit sale deeds available on record and found the trial court fully justified for making the above observation and the same was rightly affirmed and upheld by the High Court vide the impugned judgment. Even otherwise, the Court, in certain eventualities, enjoins plenary powers to itself compare the signature along with other relevant material to effectively resolve the main controversy as observed by this Court in the cases of Zar Wali Shah v. Yousaf Ali Shah and 9 others (1992 SCMR 1778); Ahmed Hassan Khan v. Naveed Abbas and another (1998 SCMR 346) and Messrs Waqas Enterprises and others v. Allied Bank of Pakistan and 2 others (1999 SCMR 85). Thus, the visual comparison conducted by the trial court is in consonance with the law declared by this Court in the above cases.”

20. Article 84 of the Qanoon-e-Shahadat Order, 1984 is a provision that addresses the “comparison of signatures”. It empowers a court to compare a disputed signature with any signature that is admitted to be genuine, without the need for an expert’s opinion. For convenience, the relevant provision is reproduced below:

84. Comparison of signature, writing or seal with others admitted or proved.—(1) *In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.*

(2) *The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.*

(3) *This Article applies also, with any necessary modifications, to finger-impressions.*

21. In this scenario, the trial Court was within its authority to directly compare the disputed signature with an admitted genuine signature. However, in this case, such admitted signature is absent, as both the appellant and the witness, Maqsood Ahmed, have denied its authenticity. While the process of comparison falls squarely within the judge's discretion under Article 84, it is not necessary to bring in an expert unless the judge deems expert analysis necessary. Here in this case, the appellate Court has required an expert's opinion despite the trial Court having properly compared the signatures and found them to be dissimilar, which is an error in law. The trial Court, having exercised its authority under Article 84, is not obligated to seek expert testimony unless the judge finds it essential to the determination of authenticity.

22. As to the contention of learned Counsel for respondent No.1 regarding limitation, the observation of Hon'ble Supreme Court made in the case of Shabla and others v. Ms. Jahan Afroz Khilat and others (2020 SCMR 352) are necessary to reproduce, which are as follows:

“..... Limitation never run against fraud, more so in the matters involving inheritance rights of a female; a view consistently taken by this Court in cases reported as Fazal Ellahi deceased through legal heirs v. Mst. Zainab Bi (2019 SCMR 1930), Khan Muhammad through L.Rs and others v. Mst. Khatoon Bibi and others (2017 SCMR 1476), Mahmood Khan v. Syed Khalid Hussain Shah (2015 SCMR 869), Mst. Gohar Khanum v. Mst. Jamila Jan (2014 SCMR 801), Rehmat Ullah and others v. Saleh Khan and others (2007 SCMR 729), Arshad Khan v. Resham Jan and others (2005 SCMR 1859) and Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi (PLD 1990 SC 1).”

23. To address the case laws cited by learned Counsel for respondent No.1, it is necessary to carefully evaluate each one in the context of the current dispute. The case of Maulvi Abdullah (*supra*) involved a Gift under Muslim law, specifically Hiba-bil-iwaz, which is a Gift made for consideration. The judgment clarified that the provisions of Chapter VII of the Transfer of Property Act, 1882, which require a Gift of immovable property to be made by a registered document, do not apply to Gifts made under Muslim law, particularly Hiba-bil-iwaz. However, the present case

involves a unilateral Gift, which requires the fulfillment of three conditions: declaration, acceptance and possession. The absence of possession in the current case, coupled with the failure to substantiate the Gift through evidence and reliable witnesses, renders the reliance on Maulvi Abdullah's case inapplicable.

24. The case of Muhammad Ejaz (*supra*) upheld that a valid gift can be made orally under Muslim law, provided the essential ingredients, declaration, acceptance and possession, are fulfilled. It also reaffirmed that a written document or registration is not necessary for an oral Gift under Muslim law. However, in the present case, the lack of proof and the absence of possession of the property at the time of the Gift suggest that the case of Muhammad Ejaz is also not directly applicable here.

25. The case of Abid Hussain (*supra*) reinforces that the Transfer of Property Act does not apply to Gifts made under Muslim law, and Hiba can be effected orally without the necessity of a written or registered instrument. While this principle may be applicable to the present case, it is the failure to prove possession and the lack of credible evidence that distinguishes this case. The mere fact that Muslim law allows oral Gifts does not obviate the necessity of fulfilling all formal requirements, particularly possession, to establish a valid gift.

26. The case of Amir Afzal (*supra*) dealt with the issue of fraud and held that allegations of fraud must be pleaded with specificity, including dates, items and other details. While the principles regarding fraud and specificity are important, they are not directly applicable in the present case, which primarily concerns the validity of a Gift. The focus here is on the failure to substantiate the Gift with possession and proper witnesses, not on an allegation of fraud.

27. The case of Akhtar Nasir Ahmed (*supra*) involved a claim that was barred by the law of limitation due to a delay of 27 years in filing the suit. However, the present case presents a different set of circumstances. The lady in this case, in good faith, had given the land to her brother for cultivational purposes, trusting him and was unaware of the forged Gift

statement. Upon discovering the forgery, she acted swiftly by approaching the revenue authorities and subsequently the Civil Court. Therefore, the facts of Akhtar Nasir Ahmed's case are not directly relevant to the issue at hand, as the delay in the present case resulted from the lady's lack of knowledge of the forgery, rather than any negligence or indifference on her part.

28. The case laws cited by learned Counsel for respondent No.1 are either based on different principles or involve facts that do not directly apply to the present case. The central issue here is the specific legal requirement for a valid Gift under Muslim law, particularly the requirement of possession, which is absent in this case. The failure to provide sufficient evidence or reliable witnesses further distinguishes the present case from those cited.

29. In light of the above discussion, the decision of the trial Court is found to be correct and legally sound. The trial Court properly considered the evidence, applied the law and concluded that the gift was fraudulent. The appellate Court's remand order, which sought to revisit procedural matters without addressing any substantial legal error, is not only warranted but would also be an abuse of the process of law. Therefore, the second appeal is **allowed**, and the decision of the trial Court is upheld.

Above are the reasons of my short order dated 04.11.2024.

J U D G E

Abdul Basit