

2009 S C M R 598

[Supreme Court of Pakistan]

Present: Muhammad Akhtar Shabbir and Mian Hamid Farooq, JJ

TAJ MUHAMMAD KHAN through L.Rs. and another--Petitioners

Versus

Mst. MUNAWAR JAN and 2 others----Respondents

Civil Petitions Nos.109 and 110 of 2009, decided on 2nd February, 2009.

(On appeal from the judgment of the Peshawar High Court, Abbottabad Bench dated 18-12-2008 passed in Civil Revisions Nos.415 and 416 of 2006).

(a) Specific Relief Act (I of 1877)---

---S. 42---West Pakistan Land Revenue Act (XVII of 1967), S.42---Qanun-e-Shahadat (10 of 1984), Arts. 17 & 79 ---Civil Procedure Code (V of 1908), O.VI, R.4---Suit for declaration---Transfer of land by deceased through mutations of gift and sale in favor of his two daughters excluding his third daughter from inheritance---Plaintiff's plea was that such mutations were the result of fraud and misrepresentation; and that deceased had never appeared before Revenue Officer for their attestation---Proof---Both witnesses of sale mutation were landowners in Deh---One witness of gift mutation was a Lambardar, while other was a resident of Deh---All such witnesses had deposed in Court that they had identified deceased at the time of attestation of such mutations in open assembly of 300/400 people of Deh---Such mutations had been challenged after 7/8 years of attestation thereof and four years of death of deceased---Plaintiff had neither mentioned in plaint ingredients of fraud nor led any evidence to prove as to how defendant committed fraud with her---Plaintiff had failed to discharge initial onus to prove misrepresentation and fraud---Defendant had proved gift deed by producing its scribe and attesting witnesses---Ex-Girdawar Kanungo had deposed to have verified entries of both mutations---Suit was dismissed for want of proof in circumstances.

Muhammad Akram and another v. Altaf Ahmad PLD 2003 SC 688; Arshad Khan v. Mst. Resham Jan 2005 SCMR 1859; Nasrullah Khan v. Rasul Bibi 2001 SCMR 1156 and Mst. Nusrat Zohra v. Mst. Azhara Bibi PLD 2006 SC 15 ref.

Siddik Mahomed Shah v. Mt. Saran and others AIR 1930 PC 57; Government of West Pakistan v. Haji Muhammad PLD 1976 SC 469; Abdul Karim v. Muhammad Akram 1995 CLC 130; Tom Boevey Barrett v. African Products Ltd. AIR 1928 PC 261; Ghulam Shabbir v. Nur Begum PLD 1977 SC 75; Banwari Lal and others v. Shaikh Shukurullah and others AIR 1940 Patna 204 and Mst. Sahib Noor v. Haji Ahmad 1988 SCMR 1703 rel.

(b) West Pakistan Land Revenue Act (XVII of 1967)---

---S. 4(9)---"Estate"---Meaning---Estate would mean not only a particular village, but also that village included as a unit for purpose of assessment of land revenue.

(c) West Pakistan Land Revenue Act (XVII of 1967)---

---S. 42(7) & (8)---Mutation, attestation of---Identification of vendor or donor---Scope---Any Lambardar or Member of Union Council concerned but not necessarily of that village/Mauza could identify vendor or donor---Principles.

(d) Civil Procedure Code (V of 1908)---

---O. VI, R.4---Plea of fraud and misrepresentation etc., raised in plaint without mentioning ingredients thereof---Effect---No amount of evidence could be looked into upon such plea---Illustration.

Siddik Mahomed Shah v. Mt. Saran and others AIR 1930 PC 57; Government of West Pakistan v. Haji Muhammad PLD 1976 SC 469; Abdul Karim v. Muhammad Akram 1995 CLC 130; Tom Boevey Barrett v. African Products Ltd. AIR 1928 PC 261; Ghulam Shabbir v. Nur Begum PLD 1977 SC 75; Banwari Lal and others v. Shaikh Shukrullah and others AIR 1940 Patna 204 and Mst. Sahib Noor v. Haji Ahmad 1988 SCMR 1703 rel.

Khalid Rehman Khan Qureshi, Advocate Supreme Court and Ch. Akhtar Ali, Advocate-on-Record for Petitioners.

Nemo for Respondents.

Date of hearing: 2nd February, 2009.

JUDGMENT

MUHAMMAD AKHTAR SHABBIR, J.--- This judgment will dispose of Civil Petitions Nos.109 and 110 of 2009 as the same have arisen out of common impugned judgment and involve identical questions of law and facts.

2. The facts giving rise to the present petitions are to the effect that late Amir Bostan Khan, owner of immovable property, fully described in the plaint, transferred the Haveli through gift, mutation No.1666 dated 9-7-1986 and a portion of agricultural land through sale Mutation No.1749 dated 14-2-1987, in favour of his two daughters namely, Mst. Ashraf Jan and Mst. Munawar Jan. On his death, his third daughter, Mst. Zaiwar Jan and his nephew, Taj Muhammad Khan filed two separate civil suits challenging the validity, legality, correctness of the said mutations, claiming that they being Sharai sharers of late Amir Bostan Khan, were entitled to inherit their share out of this ancestral property left by their predecessor and the gift and sale mutations purportedly executed by late Amir Bostan Khan in favour of his two

daughters/respondents Nos.1 and 2 were false, fake, fraudulent, factitious and ineffective qua their rights. The suits were contested by the defendants/respondents. On the divergent pleadings of the parties, the learned trial Court framed various issues, recorded evidence of the parties, pro and contra, and vide two separate judgments dated 30-4-2005 decreed the suits. Feeling aggrieved, the defendants/ respondents preferred two separate appeals which came up for hearing before an Additional District Judge, Haripur, who vide his two separate judgments, dated 4-10-2004 and 26-9-2006, respectively, accepted the same, set aside the findings of the trial Court and dismissed the suits. The petitioners in both the petitions, assailed the validity of the said judgments of the appellate Court through Civil Revisions Nos.415 and 416 of 2008 which were dismissed by a learned single Judge of the Peshawar High Court, Peshawar, vide the common impugned judgment.

3. Learned counsel for the petitioners contended that the suits filed by the petitioners had been validly decreed by the trial Court and the appellate Court while setting aside the said judgment had not assigned sufficient reasons; that the appellate Court and the High Court have not adverted to the provisions of section 42 of the West Pakistan Land Revenue Act, 1967 (hereinafter referred to as the Act); that Amir Bostan Khan was an old and sick person and was not identified by the Lambardar of the Deh and the mutations have not been attested in open assembly of the residents of the estate, where the property in dispute is situated; that the onus to prove the validity of the mutations (Exh.D.W.1/1 and D.W.1/2) was on the beneficiaries thereof/ respondents and they have miserably failed to prove the same in accordance with the provisions of Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984 (hereinafter referred to as the Order) and that the petitioners being daughter and nephew of the deceased, are entitled for inheritance of his property. He placed reliance on Muhammad Akram and another v. Altaf Ahmad PLD 2003 SC 688, Arshad Khan v. Mst. Resham Jan 2005 SCMR 1859, Nasrullah Khan v. Rasul Bibi 2001 SCMR 1156 and Mst. Nusrat Zohra v. Mst. Azhara Bibi PLD 2006 SC 15.

4. We have heard the arguments of the learned counsel for the petitioners, perused the record with his kind assistance. As to the argument of the learned counsel for the petitioners that the Revenue Officers while attesting the mutations, have not fulfilled the requirements prescribed in section 42 of the Act and at the time of sanctioning the mutations, Amir Bostan Khan, the donor/vendor had not been identified by the Lambardar of the village and the mutations were not sanctioned in the concerned estate. From perusal of the mutations in dispute, it reveals that the same had been attested in open assembly and at the time of sanctioning of gift mutation, Amir Bostan Khan, the owner of the property had been identified by two persons i.e. Pir Altaf Hussain, Chairman Zakat and Ushr Committee and Inayat Ullah Khan, both land owners in the Deh. Subsection (7) of section 42 of the Act enshrines as under:--

"Except in case of inheritance or where the acquisition of the right is by a registered deed or by or under an order or decree of a Court, the Revenue Officer shall make the order under subsection (6) in the presence of the person whose right has been acquired, after such person has been identified by two respectable persons, preferably from Lambardars or members of Union Committee, Town Committee or Union Council concerned, whose signatures or thumb-impressions shall be obtained by the Revenue Officer on the register of mutations."

Subsection (8) of the said section further envisages as under:

"an inquiry or an order under subsection (6) shall be made in the common assembly in the estate to which the mutation, which is the subject matter of the inquiry, relates."

Minute scrutiny of the documents reveals that gift mutation No.1666 was sanctioned in presence of Pir Altaf Hussain, Chairman Zakat and Ushr Committee and Inayat Ullah Khan, both land owners in the concerned Deh while mutation No.1749 had been sanctioned in presence of Malik Abdul Sattar, Lambardar village Nehang and Muhammad Yousaf son of 'Mahmood Khan, a resident of the concerned Deh. He appeared in the Court as D.W.2 and admitted that the mutation was attested in the open assembly where about 300/400 people of the village were present. The requirement for attestation of mutations as per the provisions of section 42 of the Act is only the presence of the two respectable persons, preferably of those mentioned in subsection (7) of section 42 of the Act. The mutations were sanctioned in open assembly in the estate. The word "estate" means "any area" : ---

(i) for which a separate record of rights has been made; or

(ii) which has been separately assessed to land revenue; or

(iii) which the Board of Revenue may, by general rule or special order, declare to be an estate."

The definition of the word 'estate' as given in the Act would mean an area for which a separate record of rights has been prepared, or which has been treated as a separate unit for purpose of assessment of land revenue, or which the Government has by general rule or special order declare to be 'estate'. The word 'estate' would mean not only a particular village but that village also which is included as a unit for the purpose of assessment of the land revenue. The learned counsel for the petitioners has not been able to rebut whether the place Mauza Nehang, where mutations were attested, was not part of the said estate.

5. Learned counsel for the petitioners made stress that the two mutations in dispute were the result of fraud and misrepresentation and donor/vendor, Amir Bostan Khan did not appear before the Revenue Officer for attestation of the mutations. The answer would be that at the time of sanctioning of mutation of gift Nos.1666, Amir Bostan Khan was identified by two respectables of the area, out of whom one was Chairman Ushr and Zakat Committee and the other was a resident of the concerned Deh while at the time of sanctioning of mutation of sale No.1749, he was identified by Malik Abdul Sattar, Lambardar of village Nehang and Muhammad Yousaf, a resident of the concerned Deh. The signatures of the witnesses and Amir Bostan Khan are appearing on the mutations which shows that Amir Bostan Khan himself appeared before the revenue officer. The provisions of section 42 subsections (7) and (8) require the presence and identification of the person whose right has been acquired, by two respectable persons, preferably from Lambardars or members of Union Committee, Town Committee or Union Council concerned, whose signatures or thumb impressions shall be obtained by the Revenue Officer on the Register of mutations. It means that at the time of sanctioning of mutation, any Lambardar or any member of the concerned Local Council can identify the vendor or the donor, but not necessarily Lambardar or member of

the Union Council of that Village or Mauza. Keeping in view, the above criteria, we have no hesitation to observe that the mutations had been sanctioned in accordance with the required procedure provided in section 42 of the Act. The case referred to by the learned counsel, supra are not attracted to the present case. The mutations had been attested on 9-7-1986 and 14-2-1987, respectively. Amir Bostan Khan died in 1990 and the suits were filed on 21-4-1994 i.e. after about 4 years of the death of Amir Bostan Khan, who lived about three/four years after the sanctioning of the mutations in favour of the his two daughters, who had served him in the old age. Amir Bostan Khan did not challenge the said mutations during his life time, for the reason that he himself had transferred his property through gift and sale mutations in favour of his two daughters. During his life time, the petitioners also did not challenge these mutations. The learned counsel for the petitioners admitted that except the property in dispute, the mutation of inheritance of his remaining property had been attested on 11-4-1990, while the property in dispute was not transferred in favour of the petitioners as legal heirs of late Amir Bostan Khan, and the transfer of the said property through the said two mutations had come into their knowledge. It is noteworthy that the suits were filed after about 7/8 years of the attestation of mutations Nos.1666 and 1749 and after four years of the death of Amir Bostan Khan.

6. The petitioners had challenged the mutations taking a specific stance that the transactions were based on fraud, misrepresentation. Order VI, rule 4, of the Code of Civil Procedure provides that "in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items necessary) shall be stated in the pleading." The plaintiffs/petitioners in paragraph No.6 of the plaint had specifically taken the plea of fraud, misrepresentation, fabrication but have neither mentioned the ingredients of fraud nor led any evidence to prove as to how the defendants/respondents committed fraud with them. They have produced only two witnesses namely Malik Sher Afzal Patwari P.W.1, who brought the revenue record to prove the issuance of the copies of the record of rights. The other P.W, Riaz Khan son of Taj Muhammad Khan, plaintiff, appeared as P.W.2, who has also not given the details and ingredients of the fraud allegedly committed by the respondents and as provided in Rule 4 of Order VI, of C.P.C., if a plea has not been taken in the plaint, no amount of evidence can be looked into upon such pleadings not specifically taken up in the plaint. Reference in this context can be placed on the cases of Siddik Mahmood Shah v. Mst. Saran and others, AIR 1930 PC 57. In Government of West Pakistan v. Haji Muhammad, PLD 1976 SC 469, it was held that a plea of fact not pleaded, no case can be founded thereon. In another case Abdul Karim v. Muhammad Akram, 1995 CLC 130, a legal proposition has been laid down that he who alleges a fact has to prove the same and the ingredients of fraud have to be narrated and stated by the person alleging the same. Further reference can be made to the case of Tom Boevey Barrett v. African Products, Ltd. AIR 1928 PC 261, wherein it was held that the fraud must be definitely alleged and its particulars unequivocally stated. In another case titled Ghulam Shabbir v. Nur Begum PLD 1977 SC 75, A Full Bench of this Court headed by Mr. Justice Muhammad Yaqub Ali, the then Chief Justice, laid down that in pleadings general allegations, however, strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud, meaning thereby vague allegations in the plaint are not enough. In Banwari Lal and others v. Shaikh Shukrullah and others, AIR 1940 Patna 204, it was observed that a litigant to prefer the charge of fraud should place specific details thereof. The same view was adopted in case of Mst. Sahib Noor v. Haji Ahmad 1988 SCMR 1703, observing that where charges of fraud are intended to be made

full particulars thereof ought to be given in the pleadings, either as originally framed or as amended for that purpose. In Muhammad Umar v. Muqarab Khan and another 1968 SCMR 983, where in the plaint neither the particulars of fraud had been mentioned nor evidence led in support thereof, the suit was dismissed and this Court refused leave to appeal. The onus to prove fraud and misrepresentation was on the plaintiffs/petitioners who have miserably failed to discharge the same by producing sufficient convincing evidence. While, on the other hand, the defendants/respondents had produced oral as well as documentary evidence, mutations, gift and sale deeds and to prove these documents, they also produced Inayat Ullah Khan D.W.4, who was one of the attesting witnesses of the gift deed. Aurangzeb D.W.2, a petition writer, also appeared in the Court, who was also the scribe of the gift deed (Exh.D.W.1/1). The defendants/respondents have proved the gift deed by producing two attesting witnesses. To prove the sale Mutation No.1749 (Exh.D.W.1/2), Malik Abdul Sattar Lambardar Nehang D.W.2 and Muhammad Yousaf D.W.5, have been produced, they being respectables of the area, were present at the time of attestation of mutation of sale. Rustam Khan, Ex-Girdawar Kanungo who has verified the entries of the mutations also appeared as D.W.3. The defendants successfully proved their assertion and transfer of land in dispute in their favour by production of oral as well as documentary evidence. The first appellate Court and the revisional' Court (High Court) concurrently observed to the effect that the petitioners have failed to prove their case. In view of the above, we do not find any illegality, infirmity, jurisdictional defect, misreading or non-reading of evidence by the Courts below which could persuade us to interfere with the impugned judgment.

7. For the foregoing reasons, this petition being devoid of any force is dismissed and leave to appeal refused.

S.A.K./T-3/SC

Leave refused.