

2000 C L C 399

[Peshawar]

Before Talat Qayum Qureshi, J

Mst. GUL BIBI and another---Petitioners

versus

Mst. SAJIDA BIBI---Respondent

Civil Revision No.81 of 1997, decided on 29th October, 1999.

(a) Muhammadan Law---

---Gift---Ingredients of valid gift---Gift can be effective only if three ingredients, namely, declaration of gift, acceptance of gift and transfer of possession were proved.

(b) Muhammadan Law---

---Gift---Gift deed executed by illiterate "Pardanasheen" lady ---Validity--Where gift deed was not read over and explained to such lady, execution of such deed would not be said to have been consciously executed.

Mst. Faridun Nisa v. Munshi Mukhtar Ahmad AIR 1925 PC 204 and Muhammad Nazir v. Muhammad Sarwar 1989 MLD 293 rel.

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

---S. 115---Inheritance---Concurrent findings---Suit for partition on the basis of inheritance---Respondent/plaintiff filed such suit qua the property left by, the predecessor of parties---Suit was contested by the petitioners/defendants, who relied on "Kabeen Nama" to substantiate that one of the petitioners/defendants was the sole owner of the disputed house--Petitioners/defendants during the trial failed to prove execution of such document and attempted to oust the respondent/plaintiff from the inheritance---Trial Court decreed the suit and appeal was also dismissed by the Lower Appellate Court---Validity---Findings of both the Courts below were based on proper appreciation of evidence---Both the Courts below had properly exercised jurisdiction vesting in them and there was no material irregularity affecting their jurisdiction---No reason existed to interfere with the concurrent findings of facts of the Courts below---Revision was dismissed in circumstances.

Haji Muhammad Din v. Malik Muhammad Abdullah PLD 1994 SC 291 and Sher Muhammad Bashir Ali and others v. Sufi Ghulam Muhayyud Din 1996 SCMR 813 ref.

Haidar Zaman Khan for Petitioners.

Khalid Rehman Qureshi for Respondents

Date of hearing: 18th October, 1999.

JUDGMENT

Mst. Sajida Bibi, respondent No. 1 filed suit for partition in respect of two houses claiming that house mentioned in relief 'Alif', i.e., house constructed on Plot No.64 situated at Muhallah Sheranwala Gate, Haripur was ownership of Mst. Ashrafun Nisa. On her death the plaintiff being sole daughter inherited half share while 1/4th share was inherited by Rafique Khan husband of Mst. Ashrafun N,isa (father of respondent No.1) while remaining 1/4th share devolved upon defendants 1 to 19. Muhammad Rafique owned another house (mentioned in prayer 'Bay' of the plaint), i.e., house situated at Mauza Bail Tehsil and District Haripur and on death of Muhammad Rafique she has inherited the said house to the extent of 32/128 shares in legacy of her father. The suit of the respondent No. 1 /plaintiff was contested by defendants Nos.1 to 3. Out of pleadings of the parties, the learned trial Court framed the following issues:----

- (1) Whether the plaintiff has got a cause of action?
- (2) Whether the suit is competent in its present form?
- (3) Whether the plaintiff has got no concern with the suit property?
- (4) Whether the suit is within time?
- (5) Whether the suit is properly valued for the purpose of court-fee and jurisdiction?
- (6) Whether the suit is mala fide and defendants are entitled to special costs?
- (7) Whether the defendants have made improvements if so, to what extent and effect?
- (8) Whether the plaintiff is estopped to sue?
- (9) Whether the suit, is bad for misjoinder of parties?
- (10) Whether the suit Haveli was the ownership of Mst. Ashraf Bibi and devolved upon the parties as her inheritance?
- (11) Whether defendants 4 to 19 have gifted 32/ 128 share in the suit property in favour of plaintiff?
- (12) Whether the plaintiff is entitled to 32/128 share on the basis of gift and 71/128 shares on the basis of inheritance?
- (13) Whether the plaintiff is entitled to the decree for possession through partition as prayed for in relief Alif and Bay of the Plaintiff?
- (14) Relief.

2. Mst. Sajida Bibi, the plaintiff in support of her suit examined Muhammad Nasir Iqbal, her general attorney as P.W.1. whereas in rebuttal the petitioners/defendants Nos. 1 to 3 produced Ehsan Shah (D.W.1), Qazi Shujauddtn (n W 2), Sheikh Anwarul Haq, Advocate (D.W.3), Mst. Gul Bibi (D.W.4) and Maulvi Manzoorur Rehman (D.W.5).

After hearing the arguments of the learned counsel for the parties the learned Civil Judge, Haripur passed a preliminary decree for partition of 103/128 share in favor", of plaintiff against the defendants. Being aggrieved of the judgment/decree passed by learned Civil Judge on 5-9-1996, the petitioners filed appeal (No.99/13) in the Court of learned Additional District Judge, Haripur. The learned Additional District Judge upheld the judgment/decree in respect of relief ' Alif' whereas findings in respect of house situated at Mauza Bail were modified to the extent that the respondent/plaintiff was held entitled to 7/32 share in the said house. With the above modification, the appeal was dismissed vide judgment/decree dated 9-4-1997. The petitioners have now challenged judgment/decree of both the Courts below through revision petition in hand.

3. Mr. Haidar Zaman Khan, Advocate, the learned counsel representing the petitioners argued that both the 'Courts below have misread the evidence and drawn conclusions which are hypothetical: Plot No.64 measuring 1512 C.ft. situated in Haripur City was purchased by Muhammad Rafique Khan in the name of Mst. Ashrafun Nisa his first wife. He raised construction on this plot. The said house was---later on gifted to Muhammad Rafique by Mst. Ashrafun Nisa vide gift deed dated 30-10-1978 EXh.D.W.1/1. This gift deed, as per learned counsel for the petitioners was proved beyond any doubt by producing its scribe, namely, Ahsan Shah, (D. W.1) and marginal witness, namely, Maulvi Manzoorur Rehman (D.W.5) but both the lower Courts have discarded the evidence;---

4. The other house situated at village Bail (more particularly described in prayer 'Bay' of the plaint) was exclusive ownership of Muhammad Rafique Khan who transferred the same in the name of his second wife Mst. Gul Bibi petitioner No.1 in lieu of her dower at the time of her marriage under Kabeen Nama dated. 2-10-1979 and Nikah Nama, dated 3-10-1979. These deeds were also proved beyond any doubt by producing their scribe and marginal witnesses to whom no suggestions were put that these documents were false and forged but even then the learned Courts below discarded this evidence.

5. Controverting the arguments of the learned counsel for the petitioners. Mr. Khalid Rehman Qureshi, Advocate, the learned counsel representing respondent No.1 argued that the Courts below- have properly appreciated the evidence available on record. The petitioners failed to prove the gift deed whereby house situated in Haripur City was allegedly transferred by Mst. Ashrafun Nisa in favour of Muhammad Rafique. Similarly, neither the Kabeen Nama nor the Nikah Nama was properly proved by the petitioner, therefore, the judgments arid decrees passed by Courts below are based on proper appreciation of evidence and need no interference by, this Court.

6. I have heard the arguments of the learned counsel for the parties and perused the record of the case carefully.

7. So far as house situated at Muhailah Sheran Wala Gate, Haripur (more particularly described ill relief 'A' of the plaint) is concerned the same was admittedly purchased by Mst. Ashrafun Nisa through sale-deed No.257 dated 26-6-1962 registered in the Office of Sub-Registrar Haripur. The contention of the petitioners is that the said house was in the year 1978, gifted by Mst. Ashrafun Nisa in favour of her husband Muhammad Rafi.que. Gift deed dated 30-10-1978 has been placed on record as EXh.E.W.I/1. This deed is unregistered. The onus to prove that the abovementioned house was gifted in

favour of Muhammad Rafique was on the petitioners/defendants 1 to 3. In order to prove the gift deed dated 30-10-1978 (Exh.D.W.1/1) the petitioner/defendants examined Ahsan Shah as D.W.1. This witness is scribe of the deed. In his cross-examination he admitted:

"It is correct that I do not know the executant Muhammad Rafique Khan and marginal witnesses personally. I do not remember whether the executant was in Parda or not. At serial No.3443 some other entry is made and it is not in respect of gift deed."

Maulvi Manzoorur Rehman was examined as D.W.5 as he was marginal witness of the said deed. This witness in cross-examination admitted.

"It, is also correct that signatures of Mst. Ashrafun Nisa over alleged gift deed was got signed by Muhammad Rafique in his house and not in the Court.--It is also correct that gift deed is signed as well as thumb-impressed by me as marginal witness. This deed was scribed at Haripur Court premises and signatures .of Mst. Ashrafun Nisa was got in his house. "

The perusal of the abovementioned statement shows that the petitioners, failed to prove the gift deed dated 30-10-1978. (Exh.D.W.I/1). There are material contradictions between the statements of D.W.1 and D.W.5. Neither the signatures of Mst. Ashrafun Nisa were taken on the deed in presence of D.W.I nor D.W.5, who claims to be the elders of the parties have stated that he witnessed Mst. Ashrafun Nisa signing the gift deed. On the contrary he stated that- Muhammad Rafique her husband got the said deed signed in his house. She was neither present at the time of scribing the deed nor any one has seen-her executing/signing the- said deed. There is also contradiction about the place where the same was scribed. The petitioners have failed to prove as to whether the deed was scribed in the Court premises or in the village. No independent evidence has been produced by, the petitioners from which it could be inferred that the gift deed dated 30-10-1978 Exh.D.W.1/1 was executed by Mst. Ashrafun Nisa in favour of Muhammad Rafique.

8. It is an accepted principle of law that a gift can be effective only if three ingredients are proved, namely, declaration of gift, acceptance of gift and transfer of possession. In the present case oral evidence is full of contradictions, as such intelligently could not be relied upon. The instrument of gift' deed was not registered. Minute study of gift deed Exh. E. W . 1 /1 would show that Muhammad Rafique, the donee has not accepted the same. The possession admittedly remained with Mst. Ashrafun Nisa till her death. I am of the view that petitioners have made a futile effort to deprive the actual legal heirs of Muhammad Rafique of their inheritance of the property which was owned by him.

9. Mst. Ashrafun Nisa was illiterate Pardanasheen 'lady. The gift deed Exh.D.W.1/1 was not read over and explained to her. It was not confirmed that the said deed was consciously executed. In a case Mst. Faridun Nisa v. Munshi Mukhtar Ahmad AIR 1925 PC 204 it was observed that the rule that the disposition made must be substantial understood anti must rule by the mental act and distinguished from execution which is physical act of a person who makes it should be extended to ignorant and illiterate woman as well. Similarly, in case titled "Muhammad Nazir v Muhammad Sarwar 1989 MLD 293, sale agreement was discarded for the reason that the scribe could not himself identify illiterate Pardanasheen lady who executed the document nor was he satisfied

about her identification from independent source and that her sons were joined in the bargain the burden of proof that any document purported to have been executed by a Pardanashin lady affecting her right in an immovable property was substantially understood by the lady and was her voluntary, intelligent, free and conscious act is upon the person claiming any right under such deed. This rule has been extended to illiterate ignorant lady whether she is Pardanashin or not. This rule of wisdom and caution thrown round the Paradanashin, illiterate and ignorant women is to protect them from exploitation, duress, fraud and misrepresentation. In the case in hand it -is clear that Mst. Ashrafun Nisa did not execute the deed in presence of any of the witnesses. She was neither present at the time of scribing the deed nor any one has seen her executing/signing the same. It was, 'therefore, rightly upheld by the learned trial Court and concurred by the learned Additional District Judge, Haripur that Mst. Ashrafun Nisa was the owner of the house mentioned in prayer ' Alif' of the plaint and Mst. Sajida Bibi respondent No. 1 is entitled to 103/128 share.

10. Regarding the other house situated at Mauza Bail Tehsil and District Haripur (more particularly described in prayer 'Bay' of the plaint) the plea of the petitioners that the same was given to petitioner No. 1 Mst. Gul Bibi in lieu of her dower equally has no force. The petitioners have failed to prove that the said house was given to petitioner No. 1 in lieu of her dower. In order to substantiate their plea the petitioners have placed on record Kabeen Nama Exh.D.W.2/1 and Nikah Nama Exh.D.W.2/2. Neither measurement of the land underneath the house nor the boundaries of the house have been mentioned in Exh.D.W.2/1 as well as Nikahnama Exh.D.W.2/2. Kabeen Nama has also not been registered. In order to prove Kabeen Nama the petitioners examined petition writer Qari Shujahuddin Alamgeer D.W.2 who in the examination-in-chief stated,

"I see the original Kabeen Nama. Its copy is Exh.D.W.2/1. It was read over to the executant after its scribing, who admitted it to be correct and signed the same in my presence. Similarly marginal witnesses also signed the original deed."

In the cross-examination he stated,

"I do not know executant Muhammad Rafique and Mst. Gill Bibi. Defendant No. 1 was not personally present. Volunteered that Maulvi Manzoorur Rehman the proxy of defendant No. 1 was present who signed in my register. There was no Nikah form produced by the parties. The house mentioned in Exh.D.W.2/1 is situated in village Bail Garhan. "

Maulvi Manzoorur Rehman who is allegedly marginal witness of Kabeen Nama Exh.D.W.2/1 was examined as D.W.5 who stated in the cross-examination,

"It is correct that marginal witnesses of Kabeen Nama, i.e. Doctor Sultan Mehmood and Ehsan Hashmi signed the documents in their respective houses and not in the Court."

The material contradictions in the statements of D.W.2 Petition Writer Qari Shujahuddin and D.W.5 Maulvi Manzoorur Rehman create doubt about the genuineness of the Kabeen Nama Exh.D.W.2/1. It appears that Qari Manzoorur Rehman . (D.W.5) is a master mind behind gift deed EXh.D.W.1/1 and Kabeen Nama Exh.D.W.2/1 as well as Nikah Nama Exh.D.W.2/2. It is on record that this witness was Imam in Mosque of

village Bail but he was turned out of the Mosque by the villagers. In our society Imam of Mosque of the village is highly respectable person and he is never turned out of the mosque unless the villagers find that the Imam is a characterless person. The evidence given by such a person cannot be safely relied upon. The petitioners have failed to prove the execution of Kabeen Nama in favour of petitioner No. 1. They have attempted to oust Mst. Sajida Bibi from the inheritance of Muhammad Rafique by fabricating document which they could not prove due to test of cross-examination. The finding of the learned trial Court that Muhammad Rafique was the owner of house mentioned in prayer 'Bay' of the plaint is, therefore, correct. The learned Additional District Judge, Haripur has rightly held Mst. Sajida Bibi entitled to 7/32 share in the house situated at Mauza Bail Tehsil and District, Haripur.

11. The findings of both the Courts below based on proper appreciation of evidence. The Courts below have properly exercised jurisdiction vested in them. I find no material irregularity affecting their jurisdiction in the case. I, therefore, do not find any reason to interfere with the concurrent finding of facts of the courts below. Wisdom has been sought from Haji Muhammad Din v. Malik Muhammad Abdullah PLD 1994 SC 291 and Sher Muhammad Bashir Ali and others v. Sufi Ghulam Muhayyud Din 1996.SCMR 813.

12. For the foregoing reasons I dismiss the revision petition with no orders as to costs.

Q.M.H./M.A.K./475/P

Revision dismissed.