Judgment Sheet

IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

Civil Revision No.893 of 2017

Muhammad Ismail & others Vs. Allah Wasaya & others

JUDGMENT

Dates of hearing: 29.10.2024 & 31.10.2024.

Petitioners by: Mr. Zulfiqar Ahmad, Advocate.

Respondents by: Malik Asif Iqbal, Advocate.

Shujaat Ali Khan, J: - Succinctly, on 01.12.2014, Mst. Bashiran Bibi (predecessor-in-interest the respondents No.1 to 3) and Mst. Zohran Bibi (respondent No.4) filed suit against legal heirs of their brother Abdul Aziz, seeking declaration to the effect that Gift Mutation No.708 (**suit mutation**), attested on 21.01.1987, in respect of property measuring 42-Kanals & 14-Marlas falling in *Khata* Nos.27/28, Village Kalian, Tehsil Kasur, was result of forgery and fraud, thus, was liable to be cancelled and inconsequential upon their rights. The said suit was contested by the present petitioners by filing contesting written statements *inter-alia* with the averments that as a matter of fact, the land, subject matter of the mutation, was transferred

in their names as a result of sale thus the same was not open to attack. The learned Civil Judge, Kasur **(the trial court),** out of divergent pleadings of the parties, framed following *Issues*:-

i. *Whether the plaintiff is entitled to the decree of the suit as prayed for? OPP*

ii. *Whether the plaintiff has got no cause of action to institute the present suit? OPD*

iii. *Whether the present suit is not maintainable in its present form? OPD*

iv. *Whether the present suit is false, frivolous and vexatious, hence, liable to be dismissed? OPD*

v. *Relief.*

After recording of evidence and hearing respective arguments of the parties, the learned Trial Court dismissed the suit *vide* judgment and decree, dated 01.12.2014, against which the respondents filed an appeal which was accepted by the learned Additional District Judge, Kasur **(the learned Appellate Court)**, *vide* judgment and decree, dated 17.01.2017; hence this petition.

2. Learned counsel for the petitioners submits that while reversing the findings of the learned Trial Court, the learned Appellate Court has not given any cogent reason; that since the attesting witnesses of the suit mutation were no more alive, the petitioners were not bound to produce them in terms of Articles

17 and 79 of Qanoon-e-Shahadat Order, 1984 rather they were supposed to fulfil the condition(s) stipulated under Article 82 of Qanoon-e-Shahadat Order, 1984 and when the petitioners discharged their onus under the said provision, the learned Appellate Court was not justified to accept the appeal of the respondents merely on the ground that the petitioners failed to produce the marginal witnesses of the suit mutation; that according to Order VII rule 1 CPC, a party is entitled to produce documents mentioned in the list of reliance and if any other document is to be produced, the party concerned can do so with permission of the court only but while observing that the petitioners failed to produce copy of order, dated 11.06.1985, passed by the Assistant Commissioner, Kasur, learned Appellate Court omitted to note that the petitioners filed application before the learned Trial Court with the prayer to summon record relating to the said order but the said application was dismissed by the learned Trial Court; that the appeal being continuation of the original suit, the learned Appellate Court could conveniently summon the record relating to the aforesaid order of the Assistant Commissioner or to remand the matter to the learned Trial Court for decision afresh but it failed to exercise the jurisdiction, vested in it, hence, the

impugned decision is not sustainable; that the petitioners discharged their onus by producing relevant witnesses but not a single word has been mentioned by the learned Appellate Court about their testimony; that the learned Appellate Court failed to appreciate that it was not a simple matter of fraud with the women folk rather after transfer of inheritance in the name of the donors, they alienated the property in favour of the petitioners, thus, they were supposed to challenge the same maximum within six years as mandated under Article 120 of the Limitation Act, 1908; that the learned Appellate Court has held the suit mutation as *void ab-initio* without appreciating that there is hell of difference between a *void* and *voidable* transaction; that the learned Appellate Court failed to note that since the parties were residing in the same village, it was not believe-able that the respondents were not aware about the attestation of the mutation in favour of the petitioners; that the respondents moved an application for comparison of thumb impressions of Mst. Bashiran Bibi and Mst. Zohran Bibi (donors) on the suit mutation but without deciding the said application, the learned Appellate Court proceeded to decide the main appeal; that the *Issues* framed by the learned Trial Court were not according to the pleadings of the parties, thus

the controversy between them was not decided in its true perspective; that the learned Appellate Court failed to appreciate that the suit was not properly valued for the purpose of jurisdiction and court-fee; that since serious allegations were levelled against the revenue authorities, the suit of the respondents was not proceed-able without impleading them as a party; that as the documentary evidence was produced by the respondents during the statement of their counsel, the same could not be read while deciding the *lis* between the parties; that one of the witnesses, namely, Jagmaal was died, as a result, his son was produced as a secondary evidence who verified the thumb impression of his father on the suit mutation; that the learned Appellate Court omitted to note that the decision of the Assistant Commissioner, Kasur was brought on record as Mark-A and that in fact, the respondents filed suit after seventeen years of attestation of mutation due to familial disputes. Relies on *Rustam and others v. Jehangir (deceased) through L.Rs* (**2023 SCMR 730**), *Mst. Akhtar Sultana v. Major Retd. Muzaffar Khan Malik through his legal heirs and others* (**PLD 2021 SC 715**), *Sikandar Hayat and another v. Sughran Bibi and 6 others* (**2020 SCMR 214**), *Mian Zafar Ali and another v. Mian Khursheed Ali* (**2020 SCMR 291**), *Sakhi Jan and others*

v. Shah Nawaz and another (**2020 SCMR 832**), *Muhammad Azam v. Muhammad Abdullah through L.Rs.* **(2009 SCMR 326)**, *Mst. Imtiaz Begum v. Mst. Sultan Jan and others* **(2008 SCMR 1259)**, *Mst. Rasheeda Bibi and others v. Mukhtar Ahmad and others* (**2008 SCMR 1384**), *Province of Punjab through District Collector, Jhang and another v. Allah Bakhsh and others* (**2024 CLC 1193**), *Khawaja Javed Mehmood v. Punjab Small Industries Corporation through Regional Director, Rawalpindi and 2 others* (**2024 CLC 1503**), *Shehwaar and 2 others v. Muhammad Riaz and others* (**2018 YLR 1938**), *Muhammad Asia Begum and 2 others v. Muhammad Alam and 3 others* **(2015 CLC 54)**, *Muhammad Zamin Mian and 4 others v. Shamshad and 16 others* **(2015 MLD 1384)** and *Shah Bahadar through Legal Heirs v. Sherin Bahadar and others* **(2014 YLR 1855) and PLD 1965 Dhaka 65**).

3. Learned counsel, appearing on behalf of the respondents, while defending the impugned judgment and decree, submits that it was optional for the learned Appellate Court either to accede to the request of the respondents regarding expert opinion and if the learned Appellate Court did not decide the application of the respondents, the presumption is that it was

not convinced to refer the matter to the expert for comparison of the thumb impression of Mst. Bashiran Bibi and Mst. Zohran Bibi; that since the opinion of an expert is not binding upon a Court of law, non-decision of the application of the respondents by the learned Appellate Court is not fatal; that as the petitioners were the beneficiaries of the suit mutation, they were supposed to get compared the signatures of the afore-referred females instead of raising any objection against *bona-fide* move made by the respondents for comparison of the thumb impression of the donors; that since the petitioners led evidence without raising any objection against framing of *Issues*, it does not lie in their mouth to raise objection regarding non-framing of requisite *Issue(s)* at this stage especially when they did not make any move for addition, deletion or modification of the *Issue(s)* framed by the learned trial court; that fraudulent conduct of the petitioners is evinced from the fact that though Muhammad Hussain, predecessor-in-interest of the parties, died on 19.07.1980, but the petitioners succeeded to get entered mutation of gift on 13.07.1980 and when they failed in their nefarious design, they made another attempt and got registered mutation No.704 but their said attempt also went abortive as the same was cancelled on 31.03.1986; that when the petitioners

took the plea that the transaction between the parties was not a gift rather it was a sale, it amounted to admission on their part that there was no gift, thus, the respondents were not supposed to prove anything; that while filing written statement in the suit, filed by the respondents, the petitioners tried to get declaration from the learned trial court that the transaction in their favour was a sale; that Tehsildar (PW-2) stated in his evidence that he attested the mutation on the basis of order, dated 11.06.1985, passed by the Assistant Commissioner, Kasur but the said order was never produced either before learned Trial Court or before learned Appellate Court; that if adverse inference is to be drawn against the respondents on the ground that they got exhibited documents during statement of their counsel, then the petitioners have not better case as they also produced all documentary evidence during the statement of their counsel; that sluggish attitude of the petitioners is established from the fact that though after dismissal of their application regarding summoning of record relating to order, dated 11.06.1985, passed by the Assistant Commissioner, Kasur, the suit remained pending for more than two years but they did not bother to challenge the decision of the learned trial court before any higher forum in appropriate proceedings; that even if the

application of the petitioners for summoning of a record relating to order, dated 11.06.1985, passed by the Assistant Commissioner, Kasur, was dismissed, the petitioners could discharge their onus by producing certified copy of the said order; that when Tehsildar (PW-2) admitted that he did not ensure identification of the donors through available modes, including their national identity cards, the stance of the respondents that the petitioners managed attestation of suit mutation by producing other women, stands proved; that statement of Tehsildar (PW-2) that he attested the suit mutation in the village was negated by the witnesses produced by the petitioners-defendants; that during arguments, learned counsel for the petitioners tried to show that DW-3 appeared on behalf of his late father as secondary evidence but as a matter of fact, the said witness appeared in his independent capacity; that since age of DW-3 at the time of attestation of mutation was 10/11 years, he could not be a competent witness to attest the contents of a document; that if transaction between the parties is considered as sale, as alleged by the petitioners, even then they having failed to prove the necessary ingredients of an oral sale, are not entitled to any relief; that *mala-fide* on the part of the petitioners is evident from the fact that they willfully did not

produce copy of Daily Diary Register of the *Patwari*, which was used as an edifice for the attestation of the suit mutation rather the same was brought on record by the respondents; that as per Section 18 of the of the Limitation Act, 1908, in matters where fraud is alleged, the period of limitation starts from the date of knowledge of aggrieved party, thus, the suit of the respondents could not be held barred by the law of limitation at the whims of the petitioners; that the scope of revisional jurisdiction of this Court, being narrow in nature, should be confined to any jurisdictional defect on the part of the learned Appellate Court whereas in the matter in hand though the learned counsel for the petitioners addressed the Court at length but failed to point out any material illegality justifying interference by this Court in exercise of its revisional jurisdiction; that if one of the marginal witnesses was died the petitioners were supposed to produce the available witnesses but non-production of Muhammad Siddique, one of the marginal witnesses, strengthens the plea of the respondents that the said witness was not ready to support the untenable claim of the petitioners; that Muhammad Boota was produced by the respondents but the petitioners did not bother to cross-examine by declaring him hostile just for the reason that they did not

want to get unveiled the truth; that a transaction executed prior to promulgation of the Qanoon-e-Shahadat Order, 1984 is not required to be proved under the provisions of the said Order rather the same is to be proved in terms of the Evidence Act, 1872 and that the petitioners could only be allowed to produce secondary evidence in the event they proved the death of the marginal witnesses by producing their death certificates. Relies on *Saadat Khan and others v. Shahid-ur-Rehman and others* **(PLD 2023 SC 362)**, *Muhammad Nawaz and others v. Sakina Bibi and others* **(2020 SCMR 1021)**, *Muhammad Iqbal v. Mehboob Alam* **(2015 SCMR 21)**, *Noor Muhammad and others v. Mst. Azmat-e-Bibi* **(2012 SCMR 1373)**, *G.R. Syed v. Muhammad Afzaal* **(PLD 2007 Lahore 93)** and *Baqar v. Allah Ditta and others* **(2003 SCMR 780)**.

4. After hearing learned counsel for the parties and scanning the documents, appended with this petition, in particular, the written statement, filed on behalf of the petitioners-defendants, I have noted that though they raised specific objection against maintainability of the suit *vis-à-vis* limitation but while casting *Issues*, the learned Trial Court did not frame specific *Issue* on the said point. Though learned counsel for the respondents has tried to fill in the said lacuna by

submitting that when the parties adduced evidence without any objection against framing of *Issue(s)* and both the courts below discussed the said limb, no interference is permissible in these proceedings on the ground that no specific *Issue* was framed in respect of limitation. In this regard, I am of the view that Order XIV CPC casts heavy duty upon the court to firstly determine points of dispute between the parties and then to move for recording their evidence. It is of common knowledge that the parties are supposed to lead evidence to support or oppose a fact put before them in the shape of formal *Issues* but in absence of material *Issue* on a particular point, it cannot be believed that the party concerned was aware about the exact nature of the dispute regarding which he had to lead evidence. Reliance in this regard is placed on Haji Farman Ullah v. Latif-Ur-Rehman (**2015 SCMR 1708**) wherein the Apex Court of the country while dealing with the repercussions of non-framing of a material Issue in line with the pleadings of the parties, has *inter-alia* held as under:-

> *"4.*****It may be pertinent to mention here that the purpose of framing issues in a civil litigation is that the parties must know the crucial and critical factual and legal aspects of the case which they are required in law to prove or disprove through evidence in order to succeed in the matter on facts and also the points of law.*

> *5.***** It is postulated in the C.P.C. that in normal course for the determination of a civil lis, after the plaint has been filed, the written statement must be called for, issues should be framed on the basis of the pleadings of the parties and the parties must be enabled to lead evidence according to the onus placed upon them and it is only thereafter while hearing the argument in terms of Order XX, Rule 1 that judgment should be pronounced by the courts (note however this part of the judgment may not be construed to apply where plaint can be rejected under the law or summary dismissal of suit is permissible under any special law or C.P.C.). All these aspects are conspicuously missing in the present case. Resultantly we allow this appeal and set aside the judgments of the courts below. The suit of the appellant is revived and the matter is remanded to the trial court for decision in accordance with law after requiring the written statement from the respondent."*

If the omission on the part of the learned Trial Court as well as learned Appellate Court in respect of non-framing of *Issue,* concerning limitation, is considered in the light of the above quoted judgment of the Hon'ble Supreme Court, there leaves no ambiguity that the said flaw, having important bearing upon the outcome of the *lis* between the parties, cannot be let unnoticed.

5. A perusal of the appeal, filed by the respondents shows that they *inter-alia* took the ground that *Issues* were not properly framed. Reference in this regard can be made to the following grounds, taken by them in their appeal:-

(iii) یہ کہ فاضل عدالت ماتحت نے رسپانڈنٹس کی کمزور اور تضادات پر مبنی شہادت کو خود تسلیم کیا ہوا ہے۔ رسپانڈنٹس کی Material شہادت نہ ہونے کی بناء پر فاضل عدالت نے زائد المیعادی کا سہارا لے کر فیصلہ بحق رسپانڈنٹس کر دیا ہے حالانکہ "limitation" پر کوئی تنقیح وضع نہ تھی۔ اپیلانٹس نے زائد المیعاد ہونے کی وجہ لاعلمی وادائیگی حصّہ پیداوار دیگر اندھیرے میں رکھنے کا بیان دیا تھا۔ جس کے متعلق فاضل عدالت نے بے بنیاد وجوہات یعنی حصّہ کم تھا۔ قبضہ کیوں نہ لیا۔ تحریر کر کے یہ موقف تسلیم نہ کیا ہے حالانکہ DW4 جو کہ عبدالعزیز کا مزارعہ ہے اُس نے کہا ہے کہ حصّہ 7/8 حصہ عبدالعزیز کو دیتا تھا علاوہ ازیں فراڈ و زبانی انتقال میں کوئی میعاد نہ ہے اور میعاد علم سے شروع ہوتی ہے فاضل عدالت ماتحت کی "findings" سراسر تصوراتی ہیں جو کہ ہرگز قابل پذیرائی نہ ہیں۔

(iv) یہ کہ فاضل عدالت ماتحت نے مطابق دعویٰ و جواب دعویٰ درست طور پر تنقیحات اخذ نہ کی ہیں۔ اپیلانٹس کا موقف تھا کہ مطابق ریکارڈ محکمہ مال انتقال ہبہ 708 غلط ہے۔ اپیلانٹس نے کوئی ہبہ بحق عبدالعزیز نہ کیا ہے جبکہ رسپانڈنٹس کا موقف تھا کہ انتقالات زبانی دراصل بیع کے ہیں ہبہ کے نہ ہیں۔ اپیلانٹس کو 2½ لاکھ روپیہ قیمت ادا کی گئی تھی۔ ایسی صورت میں فاضل عدالت ماتحت کو تنقیح بدیں صورت اخذ کرنا چاہیئے تھی کہ "Wheather mutation no.708 is not Hiba but infact it is sale" اور اسکا بار ثبوت رسپانڈنٹس پر ڈالنا چاہیئے تھا۔ مگر فاضل عدالت ماتحت نے جواب دعویٰ پڑھے بغیر رسمی تنقیحات اخذ کر کے غیر قانونی اقدام کیا ہے جس سے اپیلانٹس کی حق تلفی کی گئی ہے۔

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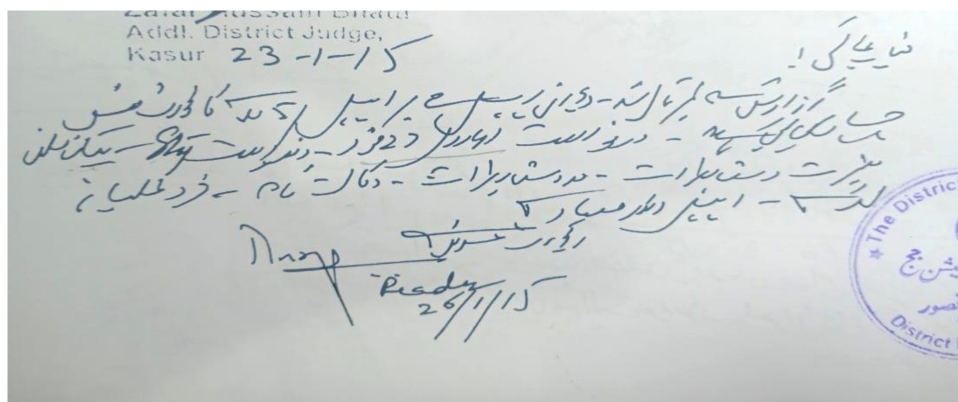
In presence of such unequivocal stance of the respondents that the *Issues* were not properly framed, the insistence of the learned counsel for the respondents that since the controversy between the parties was decided by the learned Appellate Court in line with the pleadings thus framing of *Issues* at this stage is irrelevant, is not justified. The appeal being the continuation of the original suit, the learned Appellate Court enjoys the same powers as that of the trial court and if the respondents themselves agitated that the *Issues* were not properly framed the learned Appellate Court was supposed to take the said point seriously but a perusal of the impugned judgment & decree rendered by learned Appellate Court shows that the said point has even not been touched.

6. While addressing the Court, learned counsel for the respondents, repeatedly argued that since the petitioners themselves admitted that no gift was executed in their favour rather it was a sale, it amounted to admission on their part that no gift was made in their favour. Perhaps, learned counsel for the respondents has raised the plea, under discussion, in oblivion of the fact that the learned Trial Court did not frame specific *Issue* in that regard and without giving the opportunity to the parties to establish their rival claims it cannot be believed

that the learned Appellate Court decided the controversy between the parties in line with the facts of the case and the law applicable thereto.

7. During the course of arguments, learned counsel for the petitioners presented attested copy of the order sheet of the learned Appellate Court. A perusal of the same shows that alongwith the appeal the respondents filed application for comparison of the thumb impressions of Mst. Bashiran Bibi and Mst. Zohran Bibi (donors) on the suit mutation, factum whereof was duly incorporated in the corresponding interim order, dated 26.01.2015 which, for facility of reference, is imaged below:-


Addl. District Judge,
Kasur 23-1-15

26/1/15

Admittedly, afore-referred miscellaneous application was not decided by the learned Appellate Court before decision in the main appeal. It is well established by now that prior to deciding the main *lis*, a court or forum is bound to decide the miscellaneous application(s). If any case-law is required, reference can be made to the cases reported as ***Muhammad***

Umer v. Muhammad Qasim and another (**1991 SCMR 1232**) and *Amina Begum and others v. Mehar Ghulam Dastgir* (**PLD 1978 SC 220**). If inaction on the part of the learned Appellate Court towards non-decision of the miscellaneous application is seen in the light of the afore-referred judgments of the Hon'ble Supreme Court, it becomes crystal clear that the same cannot be condoned merely on the ground that the matter has been decided in view of the pleadings of the parties.

8. This Court is cognizant of the fact that it is optional for the Court either to accede to the request of a party for expert opinion in a matter or not but the said discretion cannot be used to permit a forum to decide the main case without taking decision on the miscellaneous application. Further, the justification given by the learned counsel for the respondents for non-decision of the application, filed by his clients for comparison of thumb impressions of the donors, does not appeal to reason inasmuch as the intention of the Court to permit or decline a party to get compared signatures/thumb impressions of a person on a document can be gathered from its order but inaction on its part to decide a miscellaneous application prior to decision in the main case, cannot be used to

believe that the said forum was not willing to refer the matter for expert opinion.

9. Another important facet of the matter in hand is that the learned Appellate Court has decided the matter against the petitioners on the ground that order, dated 11.06.1985, was not produced before the court. Firstly, a perusal of the suit mutation shows that the factum of said order has duly been incorporated in column No.12 thereof and if there was any ambiguity, the learned Appellate Court could summon the record from the relevant forum as it was equipped with such powers as that of the learned Trial Court. Secondly, during the course of arguments, learned counsel for the petitioners took specific plea that the order, under discussion, was brought on record by the petitioners as Mark-A and the said contention of the learned counsel for the petitioners was not specifically repelled by the learned counsel for the respondents meaning thereby that there was no material omission on the part of the petitioners justifying acceptance of the appeal filed by the respondents. Moreover, no adverse opinion could be formed against the petitioners on account of non-production of order, dated 11.06.1985, passed by the Assistant Commissioner, Kasur, for the reason that the application, filed by them, before the learned

Trial Court seeking permission to summon record relating to said order of the Assistant Commissioner, was rejected by the said forum. In this backdrop, one thing is clear that the controversy between the parties has not been decided by the learned Appellate Court in its true perspective.

10. Now coming to the case-law, referred by the learned counsel for the respondents, I am of the view that the same is inapplicable to peculiar facts and circumstances of the present case inasmuch as in the matter of *Saadat Khan and others* (supra) the question mainly revolved around the share of the female legal heirs in the legacy left by their predecessor-in-interest whereas in the case in hand, the case of the petitioners is that the donors transferred the land in their favour after getting their due share from inheritance. Likewise, in the case of *Muhammad Nawaz and others* (supra) the question in pith and substance before the Hon'ble Supreme Court was regarding transfer of the land by the father in favour of his sons while excluding the daughters whereas in the case in hand, upon death of Muhammad Hussain, predecessor-in-interest of parties, his inheritance was opened and the donors got their due share, thus the said case is also distinguishable. Insofar as cases of *Muhammad Iqbal*, *G.R. Syed* and *Noor Muhammad and others*

(supra) are concerned, suffice it to note that since the matter is not being decided by this Court finally rather the same is being remanded, the said decisions are irrelevant at this stage rather the respondents would be at liberty to refer them during post-remand proceedings before the learned Appellate Court. As far as case of *Baqar* (supra) is concerned, it is observed that since the petitioners have claimed that in fact it was a sale between the parties which was couched in the nature of a gift, the said case is of no help to the respondents.

11. For what has been discussed above, instead of dilating upon the other limbs of the matter lest it may prejudice the case of either party, I deem it appropriate to remand the matter to the learned Appellate Court. Resultantly, this petition is **allowed** and the judgment and decree, dated 17.01.2017, passed by the learned Appellate Court is **set aside**. Consequently, the appeal, filed by the respondents, would be deemed to be pending before learned Appellate Court and the same shall be decided afresh after framing proper *Issue(s)*, in particular, on the point of limitation. For the purpose, learned Appellate Court would be at liberty either to record evidence by itself or refer the matter to learned Trial Court after framing requisite Issue.

12. Before parting with this judgment, it is observed that learned Appellate Court would be at liberty to record statement of anybody or to summon record as additional evidence, for just decision of the matter.

Judge

APPROVED FOR REPORTING

Judge

Jamil*