

[Lahore]

*Before Shahid Bilal Hassan, J.*

Mst. NIGHAT WAHEED and others----Appellants

versus

ARIF LATIF----Respondent

R.S.A. No.33740 of 2019, decided on 21st April, 2022.

**(a) Gift ---**

**----Proof---Essential ingredients---Basic ingredients for a valid gift are, offer, acceptance and delivery of possession. [p. 546] A**

Bilal Hussain Shah and another v. Dilawar Shah PLD 2018 SC 698 and Khalid Hussain and others v. Nazir Ahmad and others 2021 SCMR 1986 ref.

**(b) Gift---**

**----Proof---Essential ingredients to prove the oral gift missing---Perusal of the plaint reveled that it did not provide description of making of offer and acceptance of the same by the plaintiff/alleged donee as well as names of witnesses, in whose presence such transaction took place, which were necessary to be pleaded and proved---Furthermore, submission of contesting written statement on behalf of the alleged donor along with the other defendants negating the making of alleged oral gift as well as execution of acknowledgment deed put a heavy burden upon the plaintiff/alleged done to prove the same by producing strong and unimpeachable evidence but he miserably failed to do so--- In addition to this, the alleged oral gift was with regards to 8-Kanals 12-Sq.Ft. of the land but the acknowledgment deed of the gift**

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*mentioned only 8-Kanals---Moreover, the possession of the disputed property was, also not with the alleged plaintiff/alleged donee---Appeal was allowed and suit filed by plaintiff/alleged donee was dismissed. [pp. 546, 547] B, E & F*

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

*---O. VI, R.7---Pleadings, departure from---Party cannot lead any evidence beyond its pleadings. [p. 546] C*

*Zulfiqar and others v. Shahdat Khan PLD 2007 SC 582; Muhammad Nawaz alias Nawaza and others v. Member Judicial Board of Revenue and others 2014 SCMR 914; Combined Investment (Pvt.) Limited v. Wali Bhai and others PLD 2016 SC 730 and Saddaruddin (since deceased) through LRs. v. Sultan Khan (since deceased) through LRs and others 2021 SCMR 642 ref.*

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

*---O. VI, R.7---Gift---Proof---Alleged witnesses to the oral gift not pleaded in the plaint---Names of two witnesses of the alleged gift deposed during evidence would be considered beyond pleadings---Even otherwise, in the present case the said two witnesses had not been produced in the witness box and it had been deposed that both of them had expired but no proof in the shape of their death certificates had been brought on record by the plaintiff/alleged donee---Even if they had appeared in the witness box, non-pleading of their names in the plaint would have come in their way and would have caused impediment in recording their depositions as witnesses---So far as the execution of acknowledgment deed (of the alleged oral gift) was concerned, its witnesses were the same two witnesses of the alleged oral gift --- When the said two witnesses had not been produced in the witness box along with the revenue officer, who allegedly recorded statement of alleged donor, a serious dent with regards to authenticity of the acknowledgment deed had been caused---Appeal was allowed and suit filed by plaintiff/alleged donee was dismissed. [p. 547] D*

**(e) Gift---**

*---Proof---When the validity and correctness of a gift transaction is challenged, it becomes mandatory and essential for the beneficiary to prove the valid execution of the same. [p. 547] G*

**(f) Gift---**

*---Proof---Oral gift allegedly made from inheritable property to the exclusion of other legal heirs---In such a case the donee is under heavy burden to prove valid execution of oral gift and subsequent*

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*acknowledgement deed, because he cannot take benefit of the shortcomings in the evidence of defendants, rather he has to stand on his own legs. [p. 548] II*

Mushtaq Ul Aarifin and others v. Mumtaz Muhammad and others 2022 SCMR 55; Mst. Parveen (deceased) through LRs. v. Muhammad Pervaiz and others 2022 SCMR 64 and Mst. Hayat Bibi and others v. Alamzeb and others 2022 SCMR 13 ref.

**(g) Civil Procedure Code (V of 1908) ---**

*---S.100---Second appeal---Concurrent findings of courts below based on misreading of evidence of the parties---When the position is such, the High Court is vested with authority to set aside such concurrent findings. [p. 548] I*

Sultan Muhammad and another v. Muhammad Qasim and others 2010 SCMR 1630 and Ghulam Muhammad and 3 others v. Ghulam Ali 2004 SCMR 1001 rel.

Khalid Ishaque, **Usman Nassir Awan**, Rahil Riaz, Wajahat Ali, Danyal Akbar, Nouman Ihsan and Faizan Ahmad for Appellants.

Aurangzeb Doha and Muhammad Ashfaq Jutt for Respondents.

Date of hearing: 4th February, 2022.

**JUDGMENT**

SHAHID BILAL HASSAN, J.----Brief facts, giving rise to the instant regular second appeal are as such that the respondent instituted a suit for declaration and possession against the present appellants as well as against his father Mr. C.M. Latif (defendant No.1) by maintaining that Mr. C.M. Latif was owner of bungalow No.SE-35-R-6, measuring 23-Kanals 14-Marlas and 45 Sq.Ft. known as 2-Kashmir Road, Lahore; that out of the said property the defendant No.1 transferred to the respondent/plaintiff a plot measuring 8-Kanlas and 12-Sq.ft. bearing Khasra No.1023(min) through a transaction of oral gift dated 15.07.1963; that subsequently the said oral gift was confirmed through deed of acknowledgment dated 10.03.1966. He prayed for passing a declaratory decree in his favour in this regard.

The suit was contested by the present appellants/ defendants while submitting written statement whereby defendant No.1 categorically denied the alleged fact of gift of the suit property in favour of the respondent/plaintiff. However, defendant No.1 died on 10.03.2004 during the pendency of the suit before the stage of recording of evidence.

After framing of necessary issues out of the divergent pleadings of the parties, the learned trial Court recorded evidence of the parties and vide impugned judgment and decree dated 18.09.2012 decreed the suit in favour of the respondent/ plaintiff. The present appellants being dissatisfied with the same preferred an appeal, whereas the respondent filed cross objections against the judgment passed by the learned trial Court to the extent of findings under issue No.5-I. The learned appellate Court vide impugned consolidated judgment and decree dated 14.05.2019 dismissed the appeal preferred by the present appellants and accepted the cross objections filed by the respondent. Hence, the instant regular second appeal.

2. Heard.

3. The basic ingredients for a valid gift are: offer, acceptance and delivery of possession. See Bilal Hussain Shah and another v. Dilawar Shah (PLD 2018 Supreme Court 698) and Khalid Hussain and others v. Nazir Ahmad and others (2021 SCMR 1986). In the present case paragraph No.2 of the plaint deals with the alleged gift made by the defendant No.1 in favour of the respondent/plaintiff, which reads:-

*'2. That the defendant No.1 out of the said property gifted away to the plaintiff a plot measuring 8 kanals 12 sq. ft. bearing Khasra No.1023(min) vide an oral gift dated 15-7-1963. The possession of the same was also delivered to the plaintiff there and then after the gifting of the same to the plaintiff. The property thus gifted to the plaintiff may herein be called as the property in dispute.'*

Bare reading of the above paragraph divulges that no description of making of offer and acceptance of the same by the respondent/plaintiff as well as names of witnesses, in whose presence such transaction took place are missing, which are necessary to be pleaded and proved, because a party cannot lead any evidence beyond its pleadings. Reliance is placed on judgments reported Zulfiqar and others v. Shahdat Khan (PLD 2007 SC 582), Muhammad Nawaz alias Nawaza and others v. Member Judicial Board of Revenue and others (2014 SCMR 914), Combined Investment (Pvt.) Limited v. Wali Bhai and others (PLD 2016 SC 730) and Saddaruddin (since deceased) through LRs. v. Sultan Khan (since deceased) through LRs and others (2021 SCMR 642), wherein it has been held that:-

*'..... the parties are required to lead evidence in consonance with their pleadings and that no evidence can be laid or looked into in support of a plea which has not been taken in the pleadings. A party, therefore, is required to plead facts*

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*necessary to seek relief claimed and to prove it through evidence of an unimpeachable character.'*

Therefore, the names of witnesses deposed during evidence would be considered beyond pleadings; even otherwise, the said witnesses namely Ishaque and Molvi Umar Din have not been produced in the witness box and it has been deposed that both of them have expired but no proof in the shape of their death certificates has been brought on record by the respondent. Even if they had appeared in the witness box, non-pleading of their names in the plaint would have come in their way and would have caused impediment in recording their depositions as P.Ws. D

4. So far as the execution of Ex.P1 i.e. acknowledgment deed is concerned, the witnesses of the same were also Ishaque and Molvi Umar Din, so when they have not been produced in the witness box along with the revenue officer, who allegedly recorded statement of defendant No.1/C.M. Latif, a serious dent with regards to authenticity of the document Ex.P1 has been caused, because when a person pleads a specific plea, he would have to prove the same by producing cogent, plausible and confidence inspiring evidence, which is lacking in the present case. Furthermore, submission of contesting written statement on behalf of the deceased defendant No.1/C.M.Latif along with the present appellants negating the making of alleged oral gift as well as execution of acknowledgment deed Ex.P1 put a heavy burden upon the respondent to prove the same by producing strong and unimpeachable evidence but he miserably failed to do so as has been observed above. In addition to this, the alleged oral gift was with regards to 8-Kanals 12-Sq.Ft. of the land but the Ex.P1 finds mentioned only 8-Kanals. Moreover, the possession of the disputed property was also not with the respondent. When the requirements of Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984 have not been fulfilled with regards to the document Ex.P1 and prior to this germane to transaction of oral gift, it cannot be said that the respondent has successfully proved his case. E F

5. It is observed that when the validity and correctness of a gift transaction is challenged, it becomes mandatory and essential for the beneficiary to prove the valid execution of the same, but when the evidence produced by the parties is gone through, it appears that the respondent has failed to prove the making of valid oral gift and subsequent acknowledgment deed Ex.P1, rather it has surfaced that fraud has been committed, as the respondent has failed to bring on record any reliable evidence. Even, evidence led to show and prove how, when and where offer was made and the same was accepted, where-after possession was delivered, was not trustworthy and confidence inspiring and even the respondent could not mention the names of witnesses in the plaint, as has been highlighted above, which was essential and necessary G

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to be pleaded and proved; reliance is placed on Mst. Kulsoom Bibi and another v. Muhammad Arif and others (2005 SCMR 135), Peer Bakhsh through LRs and others v. Mst. Khanzadi and others (2016 SCMR 1417), Mst. Mughlani Bibi and others v. Muhammad Mansha and others (2012 CLC 1651 Lahore) and Allah Wassaya v. Mst. Halima Mai and 12 others 2016 MLD 1535 Lahore (Multan Bench).

6. The matter in hand pertains to inheritable property because admittedly the property in question was owned by C.M. Latif, father of the parties and the respondent was under heavy burden to prove valid execution of oral gift and subsequent acknowledgement deed (Ex.P1) because he cannot take benefits from the shortcomings in the evidence of appellants rather he has to stand on his own legs. In a judgment reported as Mushtaq Ul Aarifin and others v. Mumtaz Muhammad and others (2022 SCMR 55), the apex Court of the country has invariably held that:-

*‘As far as the contention of learned counsel for the respondents-plaintiffs that the appellants-defendants have not succeeded in proving their claim is concerned, it is a well settled principle of law that the plaintiffs cannot get benefit from the weaknesses of the defendants alone, rather they have to prove their case on their own strength. The initial burden of proof was upon the respondents-plaintiffs which they did not discharge, but the learned High Court has burdened the appellants-defendants for proving their stance which is not a correct approach.’*

Moreover, in judgment reported as Mst. Parveen (deceased) through LRs. v. Muhammad Pervaiz and others (2022 SCMR 64), the Hon'ble Supreme Court of Pakistan has invariably held that:

*‘----- On the death of a Muslim his/her property devolves upon his/her legal heirs. However, if any heir seeks to exclude the other legal heirs, as in the instant case by relying on a purported gift the beneficiary of such gift must prove it.’*

The same view was also affirmed in Mst. Hayat Bibi and others v. Alamzeb and others (2022 SCMR 13).

7. Pursuant to the discussion above it is observed that the learned Courts below have failed to adjudicate upon the matter in hand by appreciating law on the subject; thus, the Courts below have misread evidence of the parties and when the position is as such, this Court is vested with authority to set aside concurrent findings as has been held in Sultan Muhammad and another v. Muhammad Qasim and others (2010 SCMR 1630) and Ghulam Muhammad and 3 others v. Ghulam Ali (2004 SCMR 1001).

8. The crux of the discussion is that the appeal in hand is allowed, impugned judgments and decrees are set aside, consequent whereof the suit instituted by the respondent/ plaintiff for declaration and possession stands dismissed. No order as to the costs.

MWA/N-21/L

Appeal allowed.

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2023 C L C 549

[Peshawar (Mingora Bench)]

*Before Muhammad Naeem Anwar, J*

GUL REHMAN and others----Petitioners

versus

KHAN BAHADAR and others----Respondents

Civil Revision No.739 of 2007, decided on 28th March, 2022.

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

***---Ss.42 & 54---Qanun-e-Shahadat (10 of 1984), Art.100---Civil Procedure Code (V of 1908), S.115---Suit for declaration and injunction---Thirty years old document---Presumption---Judgment at variance---Suit filed by petitioners / plaintiffs was based upon more than thirty years old deed of possession, original of which was not produced during trial---Lower Appellate Court reversed findings of Trial Court and dismissed the suit---Validity---Mere 30 years age of document did not provide any justification for its proof unless document was proved in accordance with Qanun-e-Shahadat, 1984---When document was questioned, sole ground of age of document as 30 years could not be taken as gospel truth as genuineness of document was disputed---Duty of Trial Court to determine question of its genuineness and correctness, because age of document alone did not amount to a proof but the correct contents of such document---If genuineness of document was susceptible to suspicion, Court could refuse to raise presumption and ask for proof of its contents---High Court declined to interfere in judgment and decree passed by Lower Appellate Court as petitioners / plaintiffs could not point out any illegality, irregularity or jurisdictional defect in findings of Lower Appellate Court---Revision was dismissed in circumstances. [pp. 554, 556] A & B***