HIGH COURT OF AZAD JAMMU & KASHMIR

Civil Appeal No.64/2018.
Date of institution.21.03.2018.
Date of decision.15.12.2023.

Gulshana Begum W/o Muhammad Ameer Tahir D/o Abdul Raheem Baig presently residing Nagdar Kanari Tehsil Authmuqam District Neelum, Azad Kashmir.

....Appellant

VERSUS

1. Abdul Rasheed.
2. Hameed sons of Abdul Raheem Baig caste Baig R/o Lala Tehsil Authmuqam District Neelum.
3. Collector District Neelum Tehsil Authmuqam District Neelum.
4. Assistant Collector Tehsil Authmuqam District Neelum.
5. Tehsildar Revenue Tehsil Authmuqam District Neelum.
6. Patwari Halqa Lala Tehsil Authmuqam District Neelum.

....Respondents

CIVIL APPEAL

Before:- Justice Sardar Liaqat Hussain, J.

PRESENT:
Amjid Hameed Siddique, Advocate, for appellant.
Aftab Ahmed Awan, Advocate, for respondents No.1 and 2.
Nemo for official respondents.

JUDGMENT:

The captioned 2nd appeal has been filed against the judgment and decree of the learned District Judge, Neelum, dated 29.01.2018, whereby, the learned 1st Appellate Court concurred with the findings recorded by the Senior Civil Judge, Authmuqam, dated 23.08.2017 and dismissed the appeal.

Shortly stated facts of the captioned appeal are that plaintiff/ appellant, herein, filed a suit for declaration, possession and perpetual injunction about the land khewat No.34/31 situated at village Lala Tehsil Authmuqam, which was transferred to plaintiff and defendants No.1 and 2 after the death of their father, however, in the legacy instead of the name of plaintiff, Gulshana Begum, in mutation No.123, her name was entered as Roshan Jan. It was further alleged that defendants by committing fraud produced one Afsar Jan and secretly registered mutation No.259 on 15.05.1978. It was stated that with the connivance of revenue officers in Jamabandi of year 1969-70 her name was entered as Afsar Jan, whereas, in death certificate of her father, her name mentioned as Roshan Jan, however, her real name was Gulshana Begum was not entered. It was submitted that plaintiff never gifted the land to defendants No.1 and 2 and submitted for decree as prayed for. Defendant No.1 filed cognovit on 22.01.2016. Defendants also filed written statement, however, defendant No.2 absented from the Court, hence, was proceeded ex-parte vide order dated 30.08.2016. The learned trial Court heard the learned counsel for the plaintiff and at the conclusion of the proceedings, dismissed the suit vide judgment and decree dated

23.08.2017. On appeal, the learned 1st Appellate Court concurred with the findings recorded by the trial Court and dismissed the appeal vide its judgment and decree dated 19.01.2018, hence, this second appeal.

Learned counsel for the appellant filed written arguments which are made part of file, hence, need not to be reproduced for the sake of brevity.

Learned counsel for the respondents defended the impugned judgment and decrees on all counts and prayed for dismissal of appeal.

I have considered the written arguments filed by the learned counsel for the appellant and heard the learned counsel for the respondents and gone through the record of the case with due care and caution.

Before having juxtaposed analysis of both the impugned judgments and parting with the decision, it is worth mentioning that as per celebrated principle of law Courts of law in civil cases have to record findings in favour of the party in whose favour the material has been brought on record rather than other party, creates preponderance of probability and the cumulative analysis and appreciation of evidence creates preponderance of probability in favour of a litigant party which could be made based for adjudication and

definitely in such like circumstances, a party to lis who proved his stance with upper edge to other side quo evidence on record deserve decree in his favour as a fruit of his proof. Reliance can be placed on a case reported as 2012 SCR 115.

The claim of the appellant is that she is daughter of Abdur Raheem (deceased) and after the death of her father his legacy was transferred to his legal heirs, which are plaintiff, and defendants No.1 and 2. It was claimed that in mutation No.123 her name was wrongly entered as Roshan Jan instead of her real name as Gulshana Begum, however, in mutation No.195 her name was rightly entered. It was further claimed that defendants fraudulently by producing a lady namely Afsar Jan, transferred her whole share through gift deed dated 15.05.1978 and mutation No.259 also got attested. On filing of suit, defendants have filed written statement, however, later on, defendant No.1 filed cognovit. Learned trial Court framed issues and directed the parties to produce evidence, however, defendant No.2 absented from Court, hence, was proceeded ex-parte. At the conclusion, trial Court dismissed the suit vide judgment and decree dated 23.08.2017. Feeling dissatisfied from the said judgment and decree, appellant, herein filed an appeal before the learned District Judge Neelum, who also concurred with the findings

recorded by the trial Court and dismissed the appeal vide judgment and decree dated 29.01.2018. To prove her claim appellant/plaintiff produced oral as well as documentary evidence. The oral evidence produced by plaintiff fully supported her version. A perusal of record depicts that in mutation No.123 Roshan Jan was mentioned. In mutation No.195 Gulshana was written, however, in mutation No.259 donor name of gift deed was written as Afsan Jan. The trial Court has neither considered the evidence nor the cognovit filed by defendant No.1 and disposed of issues No.1 to 5 simultaneously which are “whether plaintiff has cause of action?, whether plaintiff’s correct name is Gulshana Begum?”. In para No.6 of written statement, it was stated that:

"بووقت تحریر و تصدیق ہبہ نامہ مدعیہ کا نام ریکارڈ مال میں اور عرف عام میں بھی افسر جان ہی درج تھا اور مدعیہ نے از خود نقولات ریکارڈ مال حاصل کرتے ہوئے ہبہ نامہ تحریر و تکمیل و تصدیق کروایا"۔

In para No.8 further mentioned that:

"ہبہ نامہ مدعیہ نے از خود اپنی رضا مندری اور خوشی سے مدعاعلیہم کے مدعیہ کی پہلی شادی جہیز و مقدمہ تنسیخ نکاہ عدالت فیملی کورٹ سے شریعت کورٹ اور پھر کفالت اور درسری شادی اور جہیز پر اٹھنے والے لاکھوں روپے اخراجات کے بدلہ میں ہبہ کی ہے"

How it is possible that in one mutation the name of plaintiff is Roshan Jan, in second mutation Gulshana and in third her name is mentioned as Afsar Jan, whereas, defendants admitted that plaintiff is their real sister who transferred her share through gift deed, therefore, there is dispute with regard to sister. Defendant No.1 also filed cognovit and admitted the claim of plaintiff as correct. Even witnesses of plaintiff also supported her version. Mateh Ullah witness of plaintiff, deposed that:

"مدعیه کا شروع سے ہی نام گلشانه بیگم ہے ۔ مدعیه عبدالرحیم کی واحد دختر ہے اس کے علاوه روشن جان نامی کوئی اولاد نه ہے"۔

Mohammad Shafi deposed that:

مدعیه گلشانه بیگم کا نام کبھی بھی روشن جان نه رکھا گیا ہے"۔

In my view, the trial Court has failed to reach the actual controversy and wrongly decided issues No.1 and 5 against the plaintiff because plaintiff has cause of action and from shaking of evidence, it is clear that plaintiff's real name is Gulshana Begum, who is real sister of defendants as they admitted in the written statement. Even the 1st Appellate Court has also failed to appreciate the matter in a legal fashion.

The other claim of plaintiff that gift deed dated 29.10.1977 is fake and fictitious one. The Courts below

disposed of the matter by resolving that plaintiff has neither produced copy of gift deed nor sought relief for summoning of such document. As the gift deed is under custody of defendants and in my view, it was duty of the Court to summon the document from the defendants just to reach the actual controversy. Record also shows that plaintiff has not transferred her land through gift deed, however, the gift deed was given by one unknown lady namely Afsar Jan who was legally not authorized to register such deed, hence, the plaintiff proved his stance. Even otherwise, defendant No.1 filed cognovit and admitted all the claim of plaintiff. Whereas, defendant No.2 instead to defend the stance taken by plaintiff absented from the Court.

In the present case admittedly the execution of gift deed cannot be said to have been executed with free consent and without any duress or influence when it came on record that such deed was executed by producing one Afsar Jan. No evidence has been brought on record by defendants which depicts that the alleged gift deed was not executed by plaintiff. Moreover, no documentary proof with regard to marginal witnesses of deed has been brought on record, rather the defendants in fact want to deprive their sister from the legacy of their parents on the basis of alleged gift deed

executed in their favour, whom by no stretch of imagination could deprive their real sister from the share due without any justifiable reasons which one badly lacking in this case which otherwise does not appeal to logic and reason. Even the stance taken by the plaintiff remained un-rebutted as no evidence otherwise has been brought on record by the defendants.

It can also be held that the Courts below also decided issue No.2 regarding limitation against the plaintiff, however, limitation would run from the date of knowledge, hence, the suit is well within time, even the efflux of time does not extinguish the right of inheritance and limitation does not run against a void transaction. Reliance can be placed on a case reported as 2016 SCMR 1417.

The share of daughter in inheritance prescribed by Shariah is half of her brothers, therefore, revenue officer who had proceeded to record the statement should have satisfied himself that she is a real sister and she understood the consequences of her action, however, no effort was made.

I might observe that this case is sad example of brothers depriving their sister of their inheritance by contrived means. The Courts exercise extreme caution when faced with ‘gifts’ which deprived the female member of a

family. Gifts generally made to deprive females in the family from the course of inheritance prevalent at present times, the Courts are not divested of the powers to scrutinize the reasons and justification for a gift so that no injustice is done to the rightful owners and no course of inheritance is bypassed. The respondents had completely failed to establish the gift in their favour. It was established that the person presented before Registrar, whose statement was recorded was actually not the plaintiff. The brothers deprived their sister of their share in the property left by their father and brothers perpetuated this injustice since long which was not corrected by both the Courts below while disposing the matter on technical basis without deep diving in the matter. Pursuant of the above discussion 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 the evidence of plaintiff and when the position is as such, this Court is vested with authority to undo the concurrent findings as has been held in cases reported as 2010 SCMR 1630, and 2004 SCMR 1001.

The crux of the above discussion is that while accepting this appeal, the judgment and decrees of both the Courts below dated 23.08.2017 and 29.01.2018, are hereby

set aside. Consequently, the suit of plaintiff is decreed in the terms that gift deed dated 29.10.1977 as well as mutation No.259 dated 15.05.1978 are hereby annulled and plaintiff is entitled to get 1/5th of legacy of her father to the extent of her share half of her brothers and revenue authorities are also directed to enter the real name of plaintiff in the revenue record as Gulshana Begum.

Muzaffarabad:
15.12.2023. **JUDGE**

Approved for reporting

JUDGE