SUPREME COURT OF AZAD JAMMU AND KASHMIR
(APPELLATE JURISDICTION)

PRESENT:

Ch.Muhammad Ibrahim Zia, C.J.
Raja Saeed Akram Khan, J.

Civil appeal No.01 of 2016
Civil Misc. No.01 of 2016
(Filed on 01.01.2016)

Abdul Rashid son of Hidayat-ullah, caste Bhatti, r/o village Gotha Galari, Tehsil and District Muzaffarabad

….APPELLANT

VERSUS

1. Abdul Rashid,
2. Muhammad Imtiaz,
3. Muhammad Shafiq, sons,
4. Naila daughter of Khalil-ur-Rehman (s/o Faqir Muhammad), r/o Mohri Gojra, Tehsil and District Muzaffarabad.
5. Riffat Bibi daughter of Khalil-ur-Rehman, wife of Abdul Rasheed, r/o village Gotha Galari, Tehsil and District Muzaffarabad.
6. Yasmeen Bibi daughter of Khalil-ur-

Rehman wife of Abdul Rashid, r/o village Dalola, Post Office Garhi Habibullah, Tehsil Balakot, District Abbottabad.

7. Shamim Bibi daughter of Khalil-ur-Rehman, wife of Abdul Rasheed, r/o village Tori Battangi, Post Office Hussainabad Boi, Tehsil and District Abbottabad.
8. Nighat Bibi daughter of Khalil-ur-Rehman, wife of Muhammad Khursheed, r/o village Utrasi, Tehsil and District Muzaffarabad.
9. Kausar Bibi daughter of Khalil-ur-Rehman, wife of Muhammad Saeed, r/o village Basnara, Tehsil and District Muzaffarabad.

…. RESPONDENTS

(On appeal from the judgment and decree of the High Court dated 04.12.2015 in civil appeal No.140 of 2008)

APPLICATION FOR INTERIM RELIEF

FOR THE APPELLANT: Abdul Rashid Abbasi, Advocate.

FOR THE RESPONDENTS: Sardar Pervaiz Akhtar, Advocate.

Date of hearing: 15.02.2017

JUDGMENT:

Raja Saeed Akram Khan, J.— This direct appeal has been filed from the judgment and decree of the High Court dated 04.12.2015, whereby the appeal filed by the predecessor of the respondents, herein, has been accepted.

2. The facts necessary for disposal of this appeal are that the plaintiff-appellant, herein, filed a suit for possession of 1st and 2nd floor of a building situate at *Kacheri* Road, Muzaffarabad along with recovery of an amount of Rs.2,38,000/- against defendant-respondent No.1 and another on 13.01.2001. It was averred in the plaint that the land comprising survey No.1247, measuring 2 *sarsai,* 3 feet and 6 inch, situate at Super Market *Kacheri* Road, Muzaffarabad is in the ownership and possession of the plaintiff and

he constructed a 4 stories building over this land. The first and second floors of the building were rented out to the defendants in the year 1992. The rent of the shops amounting to Rs.2,38,000/-, is outstanding against the defendants. The plaintiff sought a decree for possession and recovery of rent amount mentioned hereinabove. On 05.09.2001, the predecessor of the respondents, herein, Khalil-ur-Rehman (deceased), also filed a counter suit for declaration-cum-perpetual injunction against the appellant, herein, regarding the same suit property. The trial Court consolidated both the suits and after necessary proceedings partly accepted the suit filed by the appellant, herein, to the extent of possession of the suit property and dismissed the counter suit filed by the predecessor of the respondents, herein, vide judgment and decrees dated 03.07.2008. Feeling dissatisfied,

the predecessor of the respondents, herein, preferred an appeal before the High Court. The learned High Court through impugned judgment and decree dated 04.12.2015, while accepting the appeal set aside the judgment and decree of the trial Court and dismissed the suit filed by the appellant while decreeing the counter suit filed by the predecessor of the respondents, herein. Hence, this appeal.

3. Mr. Abdul Rashid Abbasi, Advocate, the learned counsel for the appellant argued that the impugned judgment is against law and the facts of the case which is not sustainable in the eye of law. He contended that the learned High Court has failed to take into consideration the relevant provisions of Registration Act, 1908 while passing the impugned judgment. He added that the gift-deed dated 19.06.1988, is a registered document and in support of the same the

appellant also brought on record the documentary as well as oral evidence, but the learned High Court failed to appreciate the evidence in a legal manner. He further added that the learned High Court while passing the impugned judgment has also not considered the settled principle of law that strong, convincing and un-impeachable evidence is required to refute a registered document. He maintained that the learned High Court mainly passed the impugned judgment on the strength of the statement of one Abdul Qadir, a witness of the appellant, herein, without taking into account that the said witness is only a witness of identification of the donor and nothing more. He contended that the appellant before the High Court, Khalil-ur-Rehman, was died during the pendency of appeal and he was not substituted by any of legal heirs. In this way, the appeal by a dead

person could not be continued, but the learned High Court has ignored this important aspect of the case. He also raised the objection that the value of the subject matter in which the decree had been passed in favour of the appellant was Rs.8,00,000/- and an appeal in the matter could not be heard by a single Judge in the High Court. In this way, the impugned judgment passed by the single Judge of the High Court is without jurisdiction. He lastly submitted that the impugned judgment not only based on misreading and non-reading of evidence but also on misinterpretation of law which is liable to be set aside.

4. On the other hand, Sardar Pervaiz Akhtar, Advocate, the learned counsel for the respondents strongly opposed the arguments advanced by the learned counsel for the appellant. He submitted that the alleged gift-

deed on the basis of which the appellant sought possession of the disputed property is based on fraud. The appellant is son-in-law of Khalil-ur-Rehman (deceased), who advised the deceased to raise construction over the suit land and offered to bear the expenses incurred on construction. The deceased accepted the offer for the reason that he had no sufficient means to raise the construction. Both; the appellant and the deceased agreed on the point that the appellant will meet all the expenses to be incurred on the construction of 4 shops over the suit land and will be entitled to keep the possession of two shops, whereas, rest of 2 shops will go to the deceased. As per mutual understanding, the appellant handed over the possession of two shops to the deceased but afterward, the appellant with mala-fide intention proposed the deceased to execute an affidavit in his

favour in order to meet some legal problems. The deceased accepted the proposal, but instead of getting an affidavit, the appellant got executed a gift-deed in his favour, by way of fraud. The deceased plaintiff by producing the cogent evidence proved this fact; therefore, the learned High Court has rightly decreed the suit in his favour. He further added that it does not appeal to the prudent mind that in presence of sons and daughters, the deceased transferred the whole commercial property in favour of his son-in-law without any plausible reason. He contended that the appellant obtained the alleged fake gift-deed by practicing fraud; moreover the necessary ingredients of a valid gift-deed have also not been fulfilled.

5. While replying to the objection raised by the learned counsel for the appellant that during the pendency of appeal before the High

Court the appellant, therein, had expired and appeal could not be continued as proceedings by or against a dead person are not maintainable without substituting him by the legal heirs, he submitted that the appellant has not raised this objection before the High Court, therefore, he cannot be allowed to raise the same for the first time before this Court. Moreover, after amendment in Order XXII rule 3, CPC in case of death of the plaintiff, the suit or appeal will not abate even if no application for impleading the legal heirs has been moved within limitation. He further submitted that in such situation the proceedings will be continued and the judgment and decree passed in the suit or appeal will be valid. He lastly submitted that the appellant has prepared a fake gift-deed on behalf of the deceased, Khalil-ur-Rehman, who never alienated the suit property to the appellant;

therefore, the learned single judge of the High Court has rightly set aside the gift-deed while passing the impugned judgment and has not committed any illegality which may call for any interference by this Court.

6. We have heard the arguments of the learned counsel for the parties and gone through the record along with the impugned judgment. At first we deem it proper to deal with the objection of the learned counsel for the appellant that during the proceedings of the appeal the appellant, therein, had died, therefore, without substituting him by his legal representatives the proceedings could not be continued. The record shows that in support of this contention no proof in shape of death certificate etc., has been brought on record Moreover, this point has also not been brought into the notice of the High Court by the either party. In such situation, when it was not in the

notice of the High Court that the appellant has been died during the pendency of appeal then in view of the amendment made in rule 3 of Order XXII, CPC, the High Court was competent to pass the judgment and decree and the same would be deemed as valid and binding on the parties. In this regard reference may be made to a case reported as *Muhammad Sadiq v. Muhammad Sakhi through Fateh Muhammad* [PLD 1989 SC 755], wherein, same proposition was under consideration and the apex Court of Pakistan has held that:-

> "By going through the judgment of the High Court, there is nothing to show that an objection was raised on behalf of the petitioner that the legal heirs of the deceased plaintiff despite the fact that they had the knowledge that the appeal of their deceased predecessor plaintiff was pending in the High Court, they did

not care to apply for their impleadment as his legal heirs in the proceedings and on that score the preceedings before the High Court were rendered void and of no legal effect. The petitioner was bound to establish this fact. For that purpose he was to apply before the High Court. The High Court was to issue notice to the heirs. The heirs were to rebut the stand of the petitioner and after hearing both the sides, the High Court was to give decision one way or the other. In the absence of such thing available on the record the question of bar of limitation agitated by the learned counsel before us will not arise. The moreso as this question was not raised even before the High Court. The High Court, therefore, proceeded with the hearing of the appeal on merit, and notwithstanding the death of the plaintiff/appellant the judgment made and pronounced will have the

> same force and effect as if it had been made or pronounced before the death of the plaintiff/appellant took place.

In another case reported as *Muhammad Riaz v. Razia Nishat and other* [1994 MLD 2270], while dealing with the proposition it has been held that:-

> "In view of the amended provisions in Order XXII, C.P.C., if no intimation is given about the death of parties to the suit, the Court can proceed with the suit and any order or judgment made in such circumstances shall be valid and binding on the parties, as if death had not taken place."

Similarly, in a case reported as *Allah Wasaya & 5 others v. Irshad Ahmad and 4 others* [1992 SCMR 2184], it has been held that:-

> "Under Order XXII, Rule 3 the plaintiffs, no doubt, have to apply to bring on record the legal

> representatives of the deceased/defendant but their failure to do so is no longer fatal to the suit as under the amended provision even if the proceedings are continued against a dead person a decree can be passed against him notwithstanding his death during the pendency of the suit. Consequently the non-impleadment of his legal representatives could not legally hamper the progress of the suit."

Keeping in view the circumstances of the present case and the case law referred to hereinabove, the objection raised by the learned counsel for the appellant being devoid of any force is hereby repelled.

7. So far as, the other objection raised by the learned counsel for the appellant that as per value of the subject matter, i.e. Rs.8,00,000/- (eight lac), the learned single judge of the High Court could not hear the

appeal, is concerned, it seems to be misconceived as no such provision is existing on any statute book which may imposed a bar upon the learned single Judge of the High Court to hear an appeal involving an amount of subject matter of Rs.8,00,000/-. The argument of the learned counsel for the appellant might have been based on un-amended Rule 14 of the Azad Jammu and Kashmir High Court Procedure Rules, 1984. The relevant portion of un-amended Rule is reproduced as under:-

> "14. **Jurisdiction of a Single Judge:** Except as otherwise provided by these rules or by any other law for the time being in force, the following cases shall ordinarily be heard and disposed of by a Judge sitting alone, namely;
>
> (1) (a) A civil first appeal from a decree or an order of a subordinate Court when the value for the purpose of jurisdiction does not exceed fifteen thousand rupees; and

(b) A second appeal under Section 100 of the Code;

(c) any other civil appeal under any law for the time being in force where the value of the subject matter does not exceed fifteen thousand rupees.

(2) ……..

(3) ……

(4) …….

(5) …….

(6) …….”

The un-amended provision reproduced hereinabove, shows that the learned single Judge in the High Court can hear an appeal in the civil cases when the value for the purpose of jurisdiction or where the value of the subject matter does not exceed fifteen thousand rupees. However, later on, the word “when the value for the purpose of jurisdiction does not exceed fifteen thousand rupees” and “where the value of the subject matter does not exceed fifteen thousand rupees” incorporated in clause (a) and (c) of the Rule

14 (1) of the High Court Procedure Rules, have been deleted vide notification No.6502/06/H.C/99, dated 31.07.1999. Meaning thereby, that after amendment in Rule 14 of the High Court Procedure Rules, 1984, the learned single Judge can hear and dispose of competently any appeal irrespective of its value for the purpose of jurisdiction or the value of the subject matter, as the case may be. Thus, the objection regarding the jurisdiction of the single Judge of the High Court being misconceived is hereby repelled.

6. While attending the merits of the case we have minutely examined the record with utmost care. The claim of the appellant is that he is owner of the suit property on the basis of gift-deed executed in his favour by Khalil-ur-Rehman (deceased) and entitled to get the possession of the suit property. On the other hand, the deceased denied the claim of the

appellant while taking the stance that it was agreed between them that the appellant will raise construction of shops over the suit land and thereafter the property will be divided in equal shares between them. He also taken the stance that he never executed any gift-deed in favour of the appellant rather the appellant had asked him to execute an affidavit in his favour to meet some legal formalities, but instead of an affidavit he got executed the gift-deed by way of fraud. To discover the truth, we have scanned the evidence brought on record by the parties. The appellant in support of his version produced as many as 3 witnesses and also got recorded his statement as a witness. In the shape of documentary evidence the appellant placed on record the gift-deed, Exh.PA, copy of agreement-deed, Exh.PB, copy of mutation, Exh.PC, copies of *Jamabandi* and *khasragirdawri*, Exh.PD and PE,

and site-map, Exh.PF. One of the witnesses of the appellant, Khan Muhammad (petition-writer), has not got recorded his statement in such manners which may strengthen the version of the appellant. He stated that regarding the contents of the gift-deed, no condition was agreed between the parties in his presence. He also deposed that the note regarding the acceptance by the donor is missing. The relevant portion of his statement reads as under:-

"مظہر کے سامنے ھبہ نامہ کی عبارت کی نسبت مابین فریقین کوئی شرط طے نہ ہوئی تھی۔ یہ درست ھیکہ موہوب علیہ کی جانب سے ھبہ نامہ کی قبولیت کا کوئی نوٹ درج نہ ہے۔ البتہ دستخط موجود ہے۔ یہ بات درست ھیکہ گواہ حاشیہ ایک درج کیا ہے دوسرے کی جگہ خالی ہے۔"

The other witness, Syed Karim Haider Shah (petition-writer), is the witness of agreement-deed, Exh.PB, which pertains to an amount of Rs.39,000/-. The language of this document speaks that the same has no nexus with the suit property; therefore, the statement of this

witness is not helpful to the case of the appellant. The third witness produced by the appellant is a witness of agreement-deed who also identified the donor at the time of execution of the gift-deed and affixed his signature upon the gift-deed as 'Exh.PA'/2. This witness in an unambiguous manner supports the version of the respondents. The relevant portion of his statement reads as under:-

"یہ درست ھیکہ خلیل الرحمان اور عبدالرشید کے مابین یہ طے ہوا تھا کہ اراضی جائے متدعویہ چونکہ خلیل الرحمان کی ہے عبدالرشید اس میں دکانات تعمیر کرے پھر دونوں فریقین بحصہ برابر دکانات مالک ہونگے۔ اس وقت بھی نصف دکانات عبدالرشید کے تصرف میں ہیں اور بقیہ نصف پر خلیل الرحمان کے پسران قابض و متصرف ہیں۔ مظہر کو یہ علم نہ تھااور نہ ہے کہ Exh.PA میں کیا لکھا ہوا ہے اور نہ ہی بوقت شناخت مظہر کو یہ بات بتائی گئی تھی۔"

The appellant himself has admitted that his father-in-law Khalil-ur-Rehman (deceased), offered him for construction of shops in the cost of the expenditure met by him (appellant) and thereafter, the property will be divided in

equal shares. The relevant portion of the statement reads as under:-

"سال 1984 سے قبل مظہر کو سسر م نے کہا تھا کہ تم تھڑے پر بیٹھے رہتے ہو۔
خرچہ تم کرو دکان اور تعمیر کر کے نصف نصف رکھ لیں گے۔"

It is also pertinent to mention here that the delivery of possession is one of the assential ingredients for constitution of a valid gift and without fulfilling the same the gift cannot be termed as a valid gift. In the case in hand, the appellant himself admitted that from the very first day of the construction of shops, the half of the portion of shops is in possession of the respondents. The relevant portion of his statement reads as under:-

"یہ بات درست ھیکہ کہ جب سے مظہر نے دکانات جدید تعمیر کی ہیں اسوقت سے
نصف حصہ پر مدعا علیہم اور مظہر نصف حصہ پر قابض چلے آرہے ہیں۔"

Even otherwise, it does not appeal to the prudent mind that the deceased in presence of his sons, daughters and wife gifted away his whole valuable property to a third person

without any valid reason. It appears from the contents of the alleged gift-deed that no reason whatsoever has been assigned as to why the donor gifted away the whole commercial property to the donee in presence of his legal heirs. In this regard, the learned High Court has rightly recorded the findings while relying upon the case law reported as *Khurshid Ahmed and 7 others v. Zeenat Begum Widow and another* [PLJ 2003 AJ&K 59]. The witnesses produced by the respondents fully support the stance taken by the respondents. In the civil cases the celebrated principle of law is to record findings in favour of a party in whose favour the material brought on record creates preponderance of probability. In the instant case, the juxtapose study of the oral as well as the documentary evidence available on record, postulates that the preponderance of the

evidence brought on record by the parties lean in favour of the respondents; thus, in our considered view the learned High Court has not committed any illegality while accepting the appeal filed by the respondents.

In view of the above, finding no force this appeal stands dismissed with no order as to costs. The application for interim relief is also disposed of accordingly.

Muzaffarabad, **JUDGE** **CHIEF JUSTICE**
__.03.2017

Date of announcement: 14.03.2017