SUPREME COURT OF AZAD JAMMU AND KASHMIR
[Appellate Jurisdiction]

PRESENT:
Raja Saeed Akram Khan, C.J.
Raza Ali Khan, J.

Civil Appeal No. 249 of 2018
(PLA Filed on 29.6.2018)

Tahir Ayub s/o Muhammad Ayub Khan, caste Banis Rajput r/o Chowki Mong, Tehsil and District Kotli.

.... APPELLANT

VERSUS

1. Naeem Ayub,
2. Zahid Ayub, sons,
3. Mst. Najma Masood,
4. Nargas Sajid Ali,
5. Tahira Mehmood Khan, daughters of Muhammad Ayub Khan,
6. Husnain Javaid s/o Muhammad Javaid r/o Chowki Mong Tehsil Kotli.

..... RESPONDENTS

7. Iqbal Begum,
8. Hasnain Javaid,
9. Aneesha Bibi, daughters of Javaid Iqbal,
10. Farhat Zaffar,
11. Rukhsana Khalid, daughters of Muhammad Ayub Khan r/o Chowki Mong Tehsil and District Kotli.

.... PROFORMA RESPONDENTS

(On appeal from the judgment of the High Court dated 4.5.2018 in Civil Appeal No. 70 of 2013)

FOR THE APPELLANT: Mr. Muhammad Yaqoob Khan Mughal, Advocate.

FOR THE RESPONDENTS: Sardar M.R. Khan and Saqib Javed, Advocates.

Date of hearing: 1.7.2021.

JUDGMENT:

Raza Ali Khan, J.— The captioned appeal by leave of the Court arises out of the judgment dated 4.5.2018 passed by the High Court of Azad Jammu & Kashmir in civil appeal No. 70 of 2013.

2. The brief facts forming the background of the captioned appeal are that appellant, herein, filed a suit for declaration-cum-specific performance and perpetual injunction before the Court of District Judge Kotli, on 06.03.2012. The case was transferred to Additional District Judge Kotli for hearing and disposal under law. It was claimed that the appellant's father Muhammad Ayyub (deceased) alienated the land measuring 10 *marla* comprising Survey No. 1087

to him through a registered gift-deed on 02.01.1992. He further claimed that Muhammad Ayyub (deceased) executed an agreement in shape of gift-deed on 06.11.2001 in his favour, whereby, he transferred the land measuring 35 *kanal*, 12 *marla* bearing *Khewat* No. 10, *Khasra* Nos. 1087, 1319, 1321, 1331, and 1348, *Khewat* No. 11 Survey Nos. 1127, 1083, 1048, 925 and 777, *Khewat* No. 13, *Survey* Nos. 1207, 1084, 1078, 1077, 1024, 1017, 1009 and 907, *Khewat* No. 55, *Survey* Nos. 1257 and 1253 and *Khewat* No. 245, Survey No. 2534 min situated in village Chowki Mong, Tehsil & District Kotli. He claimed that he is the owner and possessor of the land in dispute on the basis of the said agreement/ gift-deed. He further claimed that Muhammad Ayyub (deceased) borrowed a sum of Rs. 20,00,000/- for his personal needs from him, so, he alienated the afore-mentioned land through agreement out of his free will and consent. He challenged the validity of registered gift-deed dated 09.09.2011, whereby, his father,

Muhammad Ayyub (deceased) transferred his total share of land to respondents No. 2 to 9. It was contended that Muhammad Ayub (deceased) was a psycho patient who executed gift-deed dated 09.09.2011 under the pressure and coercion of the respondents, herein. The learned trial Court after necessary proceedings rejected the suit for having no cause of action. Against the said judgment and decree, the appellant, herein, filed an appeal before the High Court. The learned High Court after hearing the parties has dismissed the appeal vide impugned judgment dated 04.05.2018.

3. Mr. Muhammad Yaqoob Khan Mughal, the learned Advocate appearing for the appellant while reiterating the grounds taken in the memo of appeal has argued that the land in dispute was validly alienated in favour of the appellant and to this effect a document was duly handed down and witnessed by the witnesses, therefore, the fact of execution of document can only be proved through evidence. He argued that

the trial Court although framed issue to this effect but the appellant, herein, was not afforded an opportunity to adduce evidence to prove this fact. The learned Advocate further argued that the findings recorded by both the Courts below to the effect that the agreement-to-sell is not registered, therefore, the plaintiff-petitioner has no cause of action, is not in accordance with law because in case of agreement-to-sell its registration is not mandatory. He further argued that according to Islamic law as well as the law of the State, a father being the land owner, can transfer his land in total or in part in favour of any of his legal heir and if, in this regard, someone has any objection then the claimant is provided an opportunity to adduce evidence in support of his claim, but in the case in hand the trial Court has not bothered to do so. The learned Advocate further argued that in the instant case the defendants No.1 and 8 to 10 admitted the claim of plaintiff-appellant by filing cognovit, therefore, it was enjoined upon the

Courts below to pass a decree in favour of plaintiff-appellant to the extent of the shares of these defendants, but this aspect of the case was also not considered by the Courts below while delivering the impugned judgments. He maintained that the validity and correctness of the gift-deed dated 9.9.2011 has also been assailed by the appellant, herein, therefore, it can be declared against the dictum of Sharia simply for the reason that a legal heir cannot be deprived of the right to property by executing such like document. It was further argued by the learned Advocate for the appellant that under law and also in light of the judgment of Superior Courts, whenever a document is relied upon or challenged by a party then without recording evidence the same cannot be held valid or invalid. The learned Advocate lastly argued that as per contents of the plaint the suit of the appellant, herein, was maintainable, hence, the same should be decided on merits. The judgements and decrees passed by the

Courts below are self-contradictory, hence, the same are liable to be set aside.

4. Conversely, Mr. Saqib Javed, the learned Advocate appearing for the respondents argued that impugned judgments and decrees have been passed quite in accordance with law, facts and the record, hence, the same is liable to be maintained. He further argued the trial Court has rightly concluded that the appellant had no cause of action to file the suit. He further argued that the suit filed by the appellant, herein, was based on contradictory stances and only meant for depriving the respondents of their property duly transferred to them through registered gift-deed. He maintained that the appellant on one hand claimed oral gift of the land to the tune of 2 kanal in his favour on the basis of an agreement as gift-deed and on the other hand he claimed the rest of the property on the basis of an unregistered photocopy of an agreement-to-sell. He maintained that the appellant has challenged the registered gift-deed while relying

on oral claim, whereas it is settled principle of law that documentary evidence has preference over oral evidence and similarly, a registered document has preference over unregistered document. He argued with vehemence that both the Courts below after detailed deliberation dismissed the suit of the appellant, herein, while recording comprehensive reasons and it is well settled principle of law that when a Court reaches at the conclusion that no effective decree is likely to be passed in a suit, the same must be buried at earliest stage for protecting the parties from agony of litigation.

5. We have heard the learned Advocates representing the parties and have gone through the record of the case made available along with the impugned judgment of the High Court as well as that of the trial Court. The case of the appellant, herein, before the trial Court was that his father Muhammad Ayub (deceased-respondent) transferred 10 marla land in his favour on the basis of registered gift-deed dated

2.1.1992 and 2 kanal land on the basis of oral gift-deed from survey No. 1087. He further claimed that land measuring 35 kanal 12 marla was further alienated in his favour by his father vide agreement in form of gift-deed dated 6.11.2001 out of Khasra Nos. 1087, 1319, 1321, 1331, 1348, 1127, 1083, 1048, 925, 777, 1207, 1984, 1078, 1077, 1024, 1017, 1009, 907, 1257, 1253, and 2534 min, situated in village Chowki Mong Tehsil and District Kotli and since then the said land is in ownership and possession of the appellant. He also claimed that his father had borrowed a sum of Rs.20,00,000/- from him for his personal needs and in lieu of the said amount he transferred the said land in his favour by his consent and free will. The appellant, herein, also challenged the legality and validity of the gift-deed dated 9.9.2011 executed by his father Muhammad Ayub Khan (Late) in favour of respondents/defendants No. 2 to 9.

6. From the perusal of the record, it reveals that respondents No. 1, 8, 9, and 10 admitted the claim of the appellant-plaintiff by filing cognovit, whereas the remaining respondents/defendants have refuted the claim of the plaintiff-appellant by filing written statement, wherein they stated that the plaintiff has no cause of action, hence, suit filed by him is not maintainable. They also stated that the plaintiff has filed the instant suit on the basis of fake and forged documents, however, they admitted the claim of the plaintiff to the extent of the land transferred to him through gift-deed dated 2.1.1992. The trial Court after necessary proceedings dismissed the suit of the plaintiff-appellant, herein, on the ground that the plaintiff-appellant has no cause of action, hence, his suit is not maintainable. The learned High Court also concurred with the findings recorded by the trial Court and

dismissed the appeal filed by the appellant, herein.

7. Deeper insight and detailed consideration of the case in hand makes many points notable, if we analyse the document dated 6.11.2001;

a) The gift-deed dated 6.11.2001 is an unregistered gift-deed executed in favour of the appellant. If we go through the legal analysis and legal study of "gift-deed" in the light of Islamic Jurisprudence and enacted law;

i) Islamic Jurisprudence recognizes "gift" as "Hibba". In a wider sense; it defines "Hibba" as any kind of transfer of ownership without any consideration out of free will. *Al-Hadaya* defines "Hibba" as an unconditional transfer of ownership in any existing property made immediately without any consideration during donor's life time.

ii) According to DF Mullah, “Hibba” is a transfer of property, made immediately and without any exchange by one person to another and accepted by or on behalf of the later.

iii) According to Section 122 of Transfer of Property Act, 1182, “Gift” is defined as under:-

> “Gift” defined.—“Gift” is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

The bare reading of the above-mentioned definition and section 122 of Transfer of Property Act, leave no doubt that any deed which involves any sort of consideration in lieu of the transfer, does not fall under the definition of a “gift”.

8. It would be advantageous to reproduce the document dated 6.11.2001, which is as under:-

" "

707-86-010217

11 1348, 11331, 1321, 1319, 1087 10

1207, 1084, 1078. 13 1127, 1083, 1048, 925, 777

245 1257, 1253 55 1077, 1024, 1017, 1009, 907

2534

10 1087

2 1992

20

6.11.2001

"

In the light of the afore-stated definitions of "gift", this document does not fall under the definition of a "gift". Therefore, this document fails to attain the status of a "gift-deed". Another point to be discussed here is that declaration of a gift must be expressly made in clear words that the donor is conceding his ownership to the property completely. A gift

made in ambiguous words is null and void. As far as the case in hand is concerned, the document relied upon by the appellant who claims it to be a gift-deed, is vogue, ambiguous and not made in an expressed manner.

9. Another legal point to be taken into consideration by this Court is that a gift-deed takes effect from the date when the gifted property is delivered to the donee and not from the date when declaration is made by the donor. Delivery of possession has an over-riding affect in Islamic Law. The importance is to such an extent that without the delivery of actual possession to the donee, the gift is void even if it has been made through a registered deed. In the instant case, the father (deceased-respondent) of the appellant never delivered the actual possession to the appellant till his death. Even no mutation was made in the name of appellant. Since, no delivery of possession was made, this document would be considered ineffective and incomplete in the eye of law. Islamic Law also

does not presume transfer of ownership rights from donor to the donee without the actual delivery of possession of the property. We are fortified in our view from the case reported as *Devji Shivji vs. Karsandas Ramji and another* (A.I.R 1954 Patana 280), wherein it has been held as under:-

> "(10) The next question is whether the deed is valid and operative according to law. Though the learned Subordinate Judge has observed that
>
> > "when the idea of the deed of gift was given up, the plaintiff executed a genuine deed of gift in respect of the goodwill of the firm Devji Shivji and Sons in favour of his son-in-law",
> >
> > This document cannot be regarded as a deed of gift. It is a deed of transfer, and the consideration of Rs.1000/- was paid for it. Whatever might have been the original motive behind the deed, it purports to be a deed of transfer, and it must be treated as an effective deed of transfer."

In the light of above mentioned points and pondering over all the aspects of the record made available, it becomes crystal clear that the document dated 6.11.2001, which is claimed as a gift-deed by the plaintiff-appellant, does not, in any way, fall under the definition of a "gift".

10. The plaintiff-appellant in his suit has prayed for a decree of specific performance on the basis of agreement dated 6.11.2001 and also sought cancellation of the gift-deed dated 9.9.2011 on the basis of the same document. Firstly, the perusal of the agreement dated 6.11.2001 reveals that it is not an agreement-to-sell, whereupon a suit for specific performance of contract could be filed. As far as argument of the counsel for the appellant for the cancellation of the gift-deed dated 9.9.2011 on the basis of document dated 6.11.2001 is concerned, it is evident from the record that the document dated 6.11.2001 is an unregistered document, whereas, the gift-deed dated 9.9.2011 is a registered document. It is a settled principle of law that a registered document has preference over an unregistered document. Therefore, the document dated 6.11.2001 has lost its evidentiary value in presence of the registered document dated 9.9.2011. The Courts below have rightly resolved this point.

11. So far as the argument of the counsel for the appellant that the suit of the plaintiff-appellant was maintainable but the trial Court arbitrarily dismissed the same on the ground that the plaintiff has no cause of action, has no substance. The plaintiff-appellant in support of his claim relied upon a copy of document dated 6.11.2011, which is an unregistered document and also does not fulfill the requirements of "gift" as has been declared herein above, hence, on the basis of this document neither a decree of specific performance of contract can be sought nor validity of a registered document can be challenged. In our considered view, if on examining the plaint, the Court comes to the conclusion that the suit does not disclose cause of action, the same can be rejected. Our this view finds support from the case reported as *Ammer Abbas Sial vs. Province of Punjab* (2020 CLC 792), wherein at page 796 this Court has held as under:-

> "Suffice it to say that Order VII, rule 11 of the Code, 1908 confers wide

> powers on the Court to reject the plant at any stage of its proceedings. Indeed, if on examination of the plaint, the Court comes to the conclusion that suit is barred by some provisions of law or it does not disclose cause of action, then it is not only proper, rather statutory duty of the Court to reject the plaint and definitely there are reasons for it; firstly that a still born suit should be buried in its inception so that no further time is wasted on fruitless litigation and secondly that rejection of plaint of the suit would give the plaintiff a chance to retrace his steps at the earliest possible moment. There is no cavil to the proposition that the Court is even empowered to reject the plaint *suo motu* without there being an application filed by the defendant so that incompetent suit shall be taken off the file. It is again well established that Appellate Court is vested with all the powers conferred upon Trial Court and appeal otherwise is continuation of original proceedings."

Thus, the impugned judgment of learned High Court as well as that of the Additional District Judge Kotli appears to have been passed with a judicial mind. The appellant has failed to point out any illegality or legal infirmity in the impugned judgments, therefore, intervention in the same by this Court is not required.

The upshot of the above discussion is that finding no force in this appeal, it is hereby dismissed. No order as to costs.

JUDGE CHIEF JUSTICE.

Muzaffarabad.
14.7.2021.

Tahir Ayub vs. Naeem Ayub & others.

ORDER:

Judgment has been signed. It shall be announced by the Registrar after notice to the learned counsel for the parties.

CHIEF JUSTICE JUDGE

Muzaffarabad
14.7.2021.