

IN THE SUPREME COURT OF AZAD JAMMU AND KASHMIR
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE KHAWAJA M. NASIM
MR. JUSTICE RAZA ALI KHAN

CIVIL PLA No. 304 OF 2023

Civil Misc. No. 204 of 2023
(Against the judgment
dated 09.02.2023, passed
by the High Court in civil
appeal No. 197 of 2020)

Yasir Mehmood s/o Muhammad Rafique Khan, caste Narma
r/o Chatter Maldyalan Tehsil and District Bag, Azad Jammu
and Kashmir.

...Petitioner

VERSUS

Parveen Aslam w/o Muhammad Rafique Khan and others.

...Respondents

Appearances:

For the petitioner: Mr. Amjad Hamed Siddiqui,
Advocate.

For Respondent No. 2: In person.

Date of hearing: 06.05.2023

JUDGMENT:

Raza Ali Khan, J:- The petition for leave to appeal has been directed against the judgment of the High Court dated 09.02.2023, whereby, the appeal filed by the petitioner, herein, has been dismissed.

2. The brief facts of the case are that the plaintiff-petitioner, herein, filed a suit for declaration and cancellation of oral gift deed dated 05.11.2014, against Parveen Akhtar and others in the Court of Civil Judge Bagh, on 22.12.2014, claiming therein that out of land survey No. 55, 298, 480, 482, 579, 605, 481, measuring 37 kanal, 16 marla situated at village Chatter Maldayalan, defendant-respondent No. 2, was owner of land measuring 18 kanal, 18 marla, including two houses. It was stated that the defendant-respondent No. 1, herein, just to deprive the plaintiffs and pro-forma defendants got fake and fictitious gift-deed from defendant No. 2 on 05.11.2014, which is liable to be set-aside. Respondent No.1, herein, also filed a cross suit for declaration-cum-perpetual injunction against the petitioners, herein, in the same Court on 15.04.2015. The learned trial Court consolidated both suits and at the conclusion of the proceedings, dismissed both the suits vide judgment and decree dated 21.01.2020. Feeling aggrieved, the petitioner, herein, preferred an appeal before the District Judge Bagh, who after hearing the arguments dismissed the appeal vide its judgment and decree dated 21.09.2020. The petitioner, herein, filed second appeal before the High Court against the judgment of the District Judge Bagh, which also met the same fate and has been dismissed through the impugned judgment dated 09.02.2023.

3. The learned counsel for the petitioner submitted that the impugned judgment of the High Court is against law, and the facts of the case. He submitted that the

impugned judgments are the result of misreading and non-reading of evidence. The learned High Court has not taken into consideration this important factor that under law, the petitioner, herein, could not gift out his whole property in favour of respondent No. 2 just by depriving the petitioner and pro-forma respondents. He argued that respondent No. 1, in connivance with respondent No. 2 portrayed the gift-deed as a sale-deed in lieu of nominal amount as a future planning in order to protect the instrument of gift-deed and just to deprive the petitioner from inherited rights but the neither the High Court nor the lower Courts took into consideration this important point. The learned advocate argued that the Courts below have also not adhered to the matter and applied their independent mind to the legal prospective derived from the Islamic Law which postulates that respondent No. 2 is clothed with power to gift out only 1/3rd of his landed property in favour of anyone, therefore, impugned judgments of the Courts below are not maintainable. He finally prayed for grant of leave.

4. On the other hand, respondent No. 2, appeared in person and stated that the learned High Court has rightly passed the judgment and stated that he has gifted the said disputed property to respondent No. 1, therefore, he prayed for dismissal of the instant petition for leave to appeal.

5. We have considered the arguments of the learned counsel for the petitioner, the stance of respondent No. 2, and gone through the record of the case. The sole point that emerged, in this case, is whether, respondent No. 2 was legally empowered to transfer his property through a gift to his wife, respondent No. 1. All the Courts below have a unanimous view that the act of the respondent No. 2 was

quite lawful, as he was the sole owner of the disputed property, hence, had the exclusive right on it. The learned counsel for the petitioner has also taken a stance that according to Islamic Law, respondent NO. 2 was only empowered to gift only 1/3rd of the entire property in favour of anyone. We do not agree with the learned counsel for the petitioner on this point as the word 'gift' should not be misunderstood with the word 'will'. The stance of the petitioner that respondent No. 2 was only empowered to transfer 1/3rd of his property is regarding the will/legacy which only operates and devolves after the death of the owner, whereas, respondent No. 2 is still alive and he appeared before the Court today and stated that he the legal owner of the land and he out of his free will, gifted the same to his wife (respondent No. 2).

6. First of all, we deem it necessary to analyze the relevant legal principles in order to arrive at a fair and just conclusion. Firstly, it is essential to differentiate between a "gift" and a "will." A gift, in the legal context, refers to the voluntary transfer of ownership of property from one person to another, without any consideration or expectation of something in return. According to Chapter VII, Section 122, of Transfer of Property Act, 1882, 'Gift', has been 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.”

Hiba or gift means transfer of right of property in substance by one person to another without consideration which is a condition to be fulfilled in order to make a gift valid. On the other hand, a will, also known as a testament, is a legal document that outlines the manner in which a

person's assets and property are to be distributed after his demise. It is well-established in law that any person who is the owner of land possesses the power to gift, sell, or transfer or otherwise alienate their land. This power derives from the principle of ownership and the inherent rights associated with it. Therefore, the petitioner, being the owner of the land, has the authority to gift the land to his wife, provided it is done willingly and without any external compulsion.

7. Moreover, the contention raised by the petitioner that respondent No. 2, was only authorized to transfer one-third of his property is irrelevant to the present matter as the document is gift-deed not will, therefore, the argument of the learned counsel for the petitioner is based on misconception of law. Furthermore, respondent No. 2, herein, is still alive and has explicitly stated even before this Court that he has gifted his property with his free will and without any coercion. As such, the law governing wills and legacies is not applicable in the current scenario, as same pertain to the transfer of property upon the death of the owner. The petitioner's act of gifting the land to his wife falls within the realm of property rights and voluntary transfers during his lifetime.

8. The learned counsel for the petitioner vociferously contended that the property has been gifted to respondent No. 1 with ulterior motive just to deprive the petitioner and proforma respondents, is also without substance. Law places no restriction on disposition of property by a sane Muslim owner by way of gift *inter vivos* except the disposition by the person suffering from death illness (*marz-ul-maut*). This proposition has authoritatively been dealt with by this Court in the case reported as *Reham Ali and another vs. Abdul and 3 others*¹, wherein, it has been observed as under: -

"5. It is contended by the learned counsel for the appellants that a gift deed to be valid must be

¹ [1980 CLC 1110]

genuine and bona fide and not for achieving an ulterior object like depriving the heirs of their right of inheritance. Relying on *Sardar Ahmed Khan and others v. Mst. Zamroot Jan* (1) it is contended that Baj had gifted the property mala fide with a view to depriving the plaintiffs of their right of inheritance and as such the gift deed is invalid even if the possession was properly delivered to the donees. As against this, the learned counsel for the respondent has cited *Safi Ullah v. Ghulam Jabbar and 4 others* (2) to contend that a gift made even to deprive heirs is valid provided it fulfils the other requisite conditions of a gift under Mahomedan Law. With profound respect for the views of the learned Judicial Commissioner contained in "*Sardar Ahmed Khan and others v. Mst. Zamroot Jan*" we are unable to subscribe to his views. Mahomedan Law places no restriction on disposition of property by a sane Muslim owner by way of gift inter vivos except the disposition by a person suffering from death illness (marz-ul-maut). ##TS## In fact the effect of a gift under Mahomedan Law is the deprivation of some of the heirs, whereby the donor consciously and intentionally interrupts the devolution of his property through the means of `hiba' by favoring one of the heirs or even a stranger of choice at the cost of other heirs. This is legitimately permitted under the Mahomedan Law and the mere fact that a full-fledged Muslim owner disposes of his whole or in part, property in favour of one of his heirs to the exclusion of other heirs be it with such an intention or not, the validity of gift is unassailable on this ground, provided the donor fulfils the requisite conditions. We may refer to page 137 of "*Mulla on the principles of Mahomedan Law*" by Dr. M. A. Mannan :

"A Mahomedan may dispose of the whole of his property by gift in favour even of a stranger, to the entire exclusion of his heirs."

' The three essential conditions for the validity of the gift under the Mahomedan Law are-

- (1) that there should be a manifest declaration of intent of gift by the donor ;
- (II) there should be an acceptance of gift expressed or implied by the donee or by somebody on donee's behalf ; and

(iii) delivery of the possession of the subject of the gift by the donor to donee either actually or constructively as the subject is susceptible.

' In the case before us all these conditions have been fulfilled and according to us the law laid down in "Safi Ullah v. Ghulam Jabbar and 4 others (P L D 1955 Lah. 191)" by Kaikaas and Akhlaque Hussain, JJ, (1) P L D 1950 Pesh. 45 (2) P L D 1955 Lab. 191 is the correct exposition of law on this point. We, therefore, hold this plea of the learned counsel of the appellant as untenable.

Another precedent on the point is also available which is reported as *Safi-Ullah vs. Ghulam Jabbar and four others*², wherein, the samelike proposition was emerged and the Lahore High Court observed as under: -

“The only restraint upon a Muslim in the matter of alienating his property imposed by the Muslim Law relates to wills and gifts on death-bed. In other cases the power of alienation of a Muslim qua his property is, apart from the conditions laid down by the law for completing a transfer, unfettered. A misapprehension appears to have arisen in the last century in the Court of the Judicial Commissioner of Oudh and nearly a century afterwards in the Peshawar Judicial Commissioner's Court on account of certain observations of old Muslim jurists that the making of such gift is sinful. But every transaction which is sinful or impious is not ipso facto a nullity and the Holy Quran does not confer the authority upon temporal powers to punish every act which may savour of sin or impiety. Great stress was laid by the learned counsel for the appellant on the verses of the Holy Quran in Sura Al-Nisa, relating to the law of inheritance. After the shares of the children, parents, wives, brothers and sisters have been laid down in the 11th and 12th verses, the thirteenth verse opens with the words "A' 3ja- dw". This and the following verse, as translated by the late Allama Yusuf Ali, run thus :-

"(13) Those are limits Set by God : those who. Obey God and His Apostle will be admitted to Gardens with rivers flowing beneath, to abide therein

² [PLD 1955 Lahore 191]

(forever) and that will be the Supreme achievement.

But those who disobey God and His Apostle and transgress His limits will be admitted to fire, to abide therein and they shall have a humiliating punishment."

The appellant's learned counsel has strenuously contended that these verses show that God has commanded the observance of the "limits set by God" and their transgression cannot be permitted-"especially" as the learned counsel put it, "in a Muslim country by an Islamic Court". The argument can shortly be disposed of by pointing out that the "limits set by God" in these verses relate to intestate succession alone and not to gifts inter vivos. It may be impious for a Muslim to deprive some or all of his children of his property by alienating it in his lifetime-and it would be obviously so in all good sense if done without just cause-; but there is nothing anywhere in the Holy Quran to forbid such gifts when, made by a person not suffering from *maraz-ul-maut*."

8. In such state of affairs, after careful consideration of the evidence, legal principles, and in the light of above discussion, arguments presented by the petitioner, we are of the view that respondent No. 2, as the legal owner of the land, exercised his exclusive right to gift his own land to his wife voluntarily. Therefore, the transaction is completely valid and legal and the same has been rightly decided by the Courts below and the judgment of the Courts below suffer no illegality or infirmity, therefore, the same are hereby upheld.

9. Even otherwise, the concurrent findings of facts recorded by the Courts below are not disturbed by this Court unless and until any gross misreading, non-reading in the evidence or illegality is apparent on the face of it. The petitioner has failed to point out any legal question of public importance for the grant of leave. Leave cannot be granted in routine merely to make false hopes in the mind of the parties.

In view of the above, this petition for leave to appeal along-with application for interim relief, having no backing in it, is hereby dismissed.

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JUDGE

JUDGE

Muzaffarabad,
07.06.2023
(Approved for reporting)