JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

C.R No.40-C/2023

Akbar Shah and others Vs. Ayub Khan and others.

Present: ***Mr. Abdul Wali Khan, Advocate for petitioners.***
Nemo for Respondents (in motion).

Date of hearing: **22.10.2024**

JUDGMENT

MUHAMMAD NAEEM ANWAR, J.-Through instant petition filed u/s 115 of the Code of Civil Procedure, 1908 (**C.P.C**), the petitioners have called in question the legality and correctness of the judgment and decree of the learned District Judge, Chitral Lower dated 03.08.2023, whereby their appeal against the judgment and decree of the learned Senior Civil Judge (Judicial), Chitral Lower dated **09.06.2021**, decreeing the suit of respondents No. 1 to 3 (Ayub Khan etc., the son and daughters of Mujeeb-Ur-Rahman), was dismissed.

2. Facts of the case, as per the plaint of **Suit No. 89/1 of 2014**, are that Mukammal Shah had five sons and two daughters, from whom, Jehan Khan and Muhammad Sharif died in his lifetime and on his death, he was survived by Muzaffar Shah, Tahir Shah, Akbar Shah (sons), Musharaf Bibi and Gul Pari (daughters). Musharaf Bibi had four sons and five daughters, from whom, the plaintiffs were the son and daughters of Mujeeb-Ur-Rahman, who have filed the suit for declaration to the effect that being the legal heirs of Mujeeb-Ur-Rahman, who was the son of Mst. Musharaf

Bibi, daughter of Mukammal Shah, are the owners in the legacy of Mukammal Shah to the extent of their legal and *shari* shares in the property, as described in ***Zamima Bay*** annexed with the plaint. Prayer for perpetual injunction was also sought to the effect that to the extent of their ownership and possession, the defendants be restrained from any kind of interference and alienation thereof. It was alleged that Mukammal Shah had contracted two marriages, from his first wife, he has two sons, Muhammad Sharif and Jehan Khan and a daughter namely Gul Pari; that allegedly all three had died during the lifetime of Mukammal Shah. Suit was resisted by defendants No. 1 to 12, the petitioners through their joint written statement on the ground of non-accrual of cause of action, *res-judicata*, barred by time and that Mukammal Shah had left no legacy because he, in his lifetime, had gifted a portion of property to his grandsons namely Ghulam Samdani and Nasar Ali, the sons of Muhammad Sharif who has predeceased his father whereas, the rest of the properties were remained in his possession, however, in the year 1965, through the gift, he had transferred the properties to defendants No. 1 to 3 and parted himself from possession of the property, thus, at the time of his death, he was no more owner of any property. The written gift deed was the part of record of Judicial Council. One of the grounds for resisting the suit was that Mst. Sultania Bibi, the daughter of Jehan Khan, who too had pre-deceased Mukammal Shah, had filed a civil suit for her legal and *shari* share by arraying the present plaintiffs as defendants in her

suit alongwith other legal heirs of Mukammal Shah; that the suit of Mst. Sultania Bibi was dismissed, against which she preferred an appeal, but her appeal was withdrawn with the request to withdraw from her suit, thus, the plaintiffs who are the legal heirs of Mujeeb-Ur-Rahman (son of Mukamil Shah) could not file a suit, being the matter has already been dilated upon by the Court of competent jurisdiction. They also added that though in appeal of Mst. Sultania Bibi, Cross Objection was filed by them to the extent of the findings of the learned trial Court in that suit to the effect that the then defendants could not prove the validity and correctness of the gift deed, however, after the dismissal of appeal and the suit as withdrawn, their Cross Objections were dismissed being infructuous. The parties recorded their evidence and learned Senior Civil Judge, Chitral Lower, after completion of evidence and hearing of the parties, through its judgment and decree dated 09.06.2021, decreed the suit of plaintiffs, against which the petitioners filed appeal but their appeal failed through impugned judgment and decree of District Judge, Chitral Lower dated 03.08.2023, hence, instant petition.

3. Mr. Abdul Wali Khan, Advocate representing the petitioners contended that since there was no codified law extended to the ex-state of Chitral and the people used to keep their documents in Judicial Council, the record of the same was produced before the learned trial Court pertaining to **Ex DW 1/3**, the deed executed on 01.07.1965, through which, Mukammal Shah has alienated his entire property by mentioning therein in

categoric term that earlier, he had gifted a portion of property to the sons of Muhammad Sharif, who has predeceased him. He added that the respectable and notables of the area were the witnesses of the deed but since none of them were alive at the time of recording of evidence, as such, they could not be produced. According to him, though the original whereof was not in possession of the petitioners but the since it was documented and the record thereof was kept in the record of Judicial Council the legality whereof could not be questioned and since, the suit of Mst. Sultania Bibi, the daughter of Jehan Khan (son of Mukammal Shah), was dismissed by the learned trial Court with the same plea of her entitlement in the legacy of Mukammal Shah, thus, the plaintiffs being the legal heirs of Mujeeb-Ur-Rahman (the son of Mst. Musharaf Bibi who was daughter of Mukammal Shah) and were parties to the suit, were estopped to question the validity and correctness of the gift deed, through which, the petitioners had become the owners of the property; and that dismissal of the suit of Mst. Sultania Bibi is a constructive *res-judicata* against the plaintiffs/respondents. He also added that in **Suit No. 115/1 of 2009**, titled ***"Mst. Sultania Bibi and 2 others Vs. Zahir Shah and others"***, the plaintiffs of the instant **Suit No. 89/1 of 2014** were defendants No. 16 & 18 and in the said suit, issue No. 6 was in respect of the alienation of the property by Mukammal Shah, in his lifetime, in the year 1953 & 1965 and though this issue was decided against the then defendants (now petitioners) but since the suit of the then plaintiffs was dismissed,

thus, they have no option but to file Cross Objections when it was appealed; that the dismissal of appeal alongwith dismissal of the suit as withdrawn has resulted into dismissal of their cross objections, being infructuous, but this fact too was not an impediment for the petitioners because suit of Mst. Sultania Bibi and others alongwith their prayers, was dismissed in toto and the said judgment is still holding the field. Lastly, he contended that Zafar Ali Shah son of Mir Bahadar Khan (being the son of Mst. Sultania Bibi), appeared in the said suit as PW-1 and in his cross-examination has admitted the factum of alienation of property in favor of defendants No. 1 to 3 of the suit of Mst. Sultania Bibi in the year 1965, thus, after the admission of the son of Mst. Sultania Bibi, nothing was required to be proved by the petitioners and as such in view of his statement, there was every likelihood of acceptance of cross objections in the appeal of Mst. Sultania Bibi and others, the plaintiffs of earlier suit bearing No. 115/1. He also raised the question about maintainability of the suit pertaining to the proof of gift deed in view of the cross-examination of PW-1, who, as per his contention, has admitted the factum of the record of Judicial Council and once the execution of the deed has been proved from the record of Judicial Council then acceptance, offer and delivery of possession alongwith the permission to produce secondary evidence were of no value, thus, the judgments and decrees of both the learned Courts below are against the law.

4. Arguments heard and record perused.

5. The pedigree-table of Mukamil Shah available at page No. 93 demonstrates the factual aspects of the legal heirs of Mukammal Shah and those, to whom, the properties were allegedly transferred by him, in his lifetime. The points for determination for this Court in the instant petition are:

i. **Whether the dismissal as withdrawn of the earlier suit of Mst. Sultania Bibi, the daughter of Jehan Khan, who predeceased Mukammal Shah, was an impediment for bringing the *lis* by the plaintiffs/respondents, seeking declaration to the extent of their legal and *shari* shares from the estate of Mukammil Shah?**

ii. **As to whether the petitioners/ defendants could prove the execution of deed (Ex.DW1/3), when the original whereof, has not been produced before the Court and no permission from the Court was sought for placing it on record, being the copy from the original deed allegedly executed on 01.07.1965?**

iii. **As to whether the petitioners have proved the transfer of property in favour of Muzaffar Shah, Tahir Shah, Akbar Shah and further the alienation by Mukammil Shah allegedly in favour of Nasir Ali and Ghulam Samdani, the sons of Muhammad Sharif, who had predeceased Mukammil Shah? and**

iv. **What would be the effect the statement of Zafar Ali Shah, the son/ special attorney of Mst. Sultania Bibi, who has allegedly admitted the factum of transfer of property by Muhammad Sharif to his sons?**

6. Admittedly, Mst. Musharaf Bibi was the daughter of Mukammil Shah, who was survived by Mujeeb-Ur-Rahman along with three other sons and a daughter namely Mst. Jehan Bibi. Undisputedly, the respondents/ plaintiffs Ayub Khan, Mst. Shamim Nahar and Mst. Wahida Naz are the son and daughters of Mujeeb-Ur-Rahman. No doubt, Mst. Musharaf Bibi was alive at the time of the death of Mukammil Shah, who was the owner of the property. The petitioners alleged that Mukammil Shah had alienated his property at two different occasions; first in favour of Nasir Ali and Ghulam Samdani through an oral gift and later, in

favour of three sons Muzaffar Shah, Tahir Shah and Akbar Shah through deed executed on 01.07.1965 (**Ex DW1/3**). Record reflects that neither the original deed was produced nor witnesses thereof were produced before the Court at the during trial being dead. The significance of execution of the deed could not be denied subject to its proof because in such an eventuality, no property could be devolved upon any of the legal heirs Mukamil Shah otherwise the plaintiffs and the other legal heirs are the owners to the extent of their legal and *shari* shares. The document, which was produced before the Court, was the copy from original allegedly prepared from the contents thereof and was placed on file from the record of Judicial Council but this factum could not absolve the petitioners/ defendants from the proof of the document when this fact was alleged by them. No witness regarding alienation of the property in favour of Nasir Ali and Ghulam Samdani (the legal heirs of Muhammad Sharif, who has predeceased his father Mukamil Shah) has ever been produced before the Court and similar was the case of **Ex.DW1/3**.

7. Adverting to another legal aspect of execution of the deed in terms of Article 90 of Evidence Act, 1872, allegedly executed prior to promulgation of Qanun-e-Shahadat Order of 1984. No doubt, it was a thirty years old document but when it was relied upon by the petitioners/ defendants and refuted by the respondents/ plaintiffs then they (petitioners) were required to prove not only execution of the deed but the basic essential ingredients of gift allegedly made in favour of Muzaffar Shah,

Tahir Shah and Akbar Shah alongwith the details of alienation of the property in favor Nasir Ali and Ghulam Samdani. Mere age of the document as of thirty years old is not sufficient to hold that it was executed and was deemed to be proved. The petitioners have alleged the alienation in two series and they were required to prove it but not even an iota of evidence is available on record to substantiate their contention except the production of documents which too has not been produced in original before the court. The law has provided a remedy for proving a document through secondary evidence which is an exception to general rule and only meant for the purpose to cater a genuine need and hardship. It cannot be allowed in routine or without complying with the requirements mentioned under section 65 of the Evidence Act of 1872 or Article 76 and 77 of Qanun-e-Shahadat Order, 1984. The contents of documents can only be proved through secondary evidence if the conditions mentioned under Article 76 are available, which should be satisfied first. This Article provides an alternate mode and method of proving the document which for various reasons could not be produced. When primary evidence is not available or produced, then law permits secondary evidence which remedy is designed for the protection of person who despite best efforts unable from the circumstances beyond his control to produce the primary evidence. Where a person is unable to bring the original document despite all reasonable efforts, the court is competent to admit secondary evidence but at the same time, this should also to be kept in mind that this benefit is not intended for

a person who intentionally or with some ulterior motives or sinister objects refused to produce the document in court which is in his possession, power and control. The court is competent to determine whether sufficient ground has been made out or not for the admission of secondary evidence which discretion is to be exercised keeping in view the parameters and dynamics laid down in Article 76 and the facts and circumstances of each case as secondary evidence is given to prove the existence, condition, or contents of document and nothing more beyond that. The petitioners were required to bring their case within the parameters of exceptions provided under section 65 of the Evidence Act of 1872, but nothing is available on record to bring the case of the petitioners in the exceptions pertaining to the loss of the documents through any means. They have never placed it before the Court that where was the original document, thus, mere production of **Ex.DW1/3** before the court especially when the validity thereof was questioned by the respondents/ plaintiffs, the benefit of section 90 of the Evidence Act of 1872 or that of article 100 of the Qanun-e-Shahadat Order, 1984 could not be extended in favor of the petitioners. Reference may be made to the principle enunciated in the case of "***Ch. Muhammad Shafi vs. Shamim Khanum***" (**2007 SCMR 838**), wherein the Hon'ble Supreme Court has held that:

> **"It is settled law that 'presumption qua thirty years old document under Article 100 of Qanun-e-Shahadat Order, 1984 is permissive and not imperative. The Court must consider the evidence of the documents, in order to enable it to decide whether in any specific case it should or should not presume proper signature and execution. It is settled law that the Court should be very careful**

about raising any presumption under Article 100 in favour of old documents specially when the same are produced during the trial of suits in which under proprietary rights are set up on the basis of such documents/deeds. It is also settled law that the Court may refuse to apply the presumption where evidence in proof the document is available, or where the evidence has produced and disbelieved".

Reference can also be on made to ***Muhammad Naseem Fatima's*** case (**PLD 2005 Supreme Court 455**).

8. Mst. Sultania Bibi was the daughter of Jehan Khan who has predeceased his father Mukamil Shah, thus, the natural course of devolution of the property in favour of Mst. Sultania Bibi from Mukamil Shah was neither *shari* nor legal and could only be connected if section 4 of the Muslim Family Law Ordinance, 1961 is given effect. The contention of learned counsel for the petitioners that the earlier suit of Mst. Sultania Bibi was in respect of the legacy of Mukamil Shah was not correct as she (Mst. Sultania Bibi) was seeking recovery of possession of the property through partition devolved upon her and other plaintiffs from Jehan Khan (her father, the son of Mukamil Shah). I have gone through from the attested copies of Civil Suit No.115/1 where the intended title of the plaintiffs of suit No.115/1 was from Jehan Khan. Zafar Ali Shah was questioned about the death of Jehan Khan in the lifetime of Mukamil Shah and he admitted this fact. No doubt, in the suit of Mst. Sultania Bibi, there was an issue regarding alienation of the property by Mukamil Shah allegedly through two episodes i.e., 1953 & 1965 but this was not the contention of Mst. Sultania Bibi rather it was the defendants of suit No.115/1 who have resisted the suit of Mst. Sultania Bibi etc.

with the contention that Mukamil Shah had alienated his entire proprietorship through gift, however, it is significant to mention here that the defendants No.1 to 5, now the petitioners, have miserably failed in proving their stance, consequently this issue was decided against them. The dismissal of the suit of Mst. Sultania Bibi etc. was questioned by them but on 31.10.2013, the request of the plaintiffs for withdrawal of the suit with permission to file afresh was allowed and their suit was dismissed as withdrawn and through said order, the cross objections to the extent of issue No.6 were also dismissed being infructuous. The contention of the petitioners that the respondents/ plaintiffs were estopped from filing of the fresh suit in view of the dismissal of the earlier suit of Mst. Sultania Bibi being the preclusion against them is misconceived. No doubt, the son and daughters of Mujeeb-Ur-Rahman were the parties in the said suit but neither the suit was in respect of the legacy of Mukamil Shah, nor they have ever appeared before the Court. More-so, they were defendants but neither their rights were in question nor they were resisting the suit of Mst. Sultania Bibi, thus, neither the present controversy of the respondents/ plaintiffs was the subject matter of suit No.115/1, nor it was resolved in any manner. Neither the estoppel could be alleged against the plaintiffs nor *res judicata* could be pressed into service but since the present petitioners being defendants No.1 to 5 of suit No.115/1 have taken a clear stance but failed in proving the same, thus, this aspect has properly been adjudicated upon by the Court of competent

jurisdiction against them and their cross objections in view of the dismissal of the suit as withdrawn had become infructuous. Hence, they could not allege said fact in the suit of the respondents/ plaintiffs as there was no decree and that too in respect of the document **Ex. DW/1/3**, alleged by the petitioners.

9. More particularly since the petitioners were permitted to assert their contentions and they have also sought dismissal of the suit on the plea that erstwhile predecessor Mukamil Shah at the time of his death was no more owner of the property being transferred by him in the years 1953 & 1965. Though, the alleged former alienation in favor of Nasir Ali and Ghulam Samdani, the sons of his predeceased son was not documented but it was allegedly mentioned in **Ex.DW1/3**. The execution of the gift deed, alienation of the property, the factum of gift and completion of essential ingredients were the basic steps, which were required to be proved by the petitioners/ defendants. Undeniably, the scribe of the deed and marginal witnesses were not produced before the Court being dead. Likewise, the factum of the gift as alleged by the petitioners with specification of its ingredients has not been proved by them.

10. Turning to the 3rd legal and factual aspect, as discussed above, except pleadings and submissions of Mr. Abdul Wali Khan, Advocates neither any documentary evidence nor any oral evidence on the part of the petitioners is available on record to fortify their stance. When and at which particular place, the

declaration of the gift i.e., offer and acceptance was taken place, has not been proved by the petitioners/ defendants. Reliance is placed on the case of ***"Muhammad Asghar and others Vs. Hakam Bibi through L. Rs and others" (2015 CLC 719(Lahore))*** wherein it was held that:

> **"In this regard it is important to note that no time, date or place with regard to the offer of gift, its acceptance or delivery of possession is mentioned in the written statement or in the testimony of the said witness. Even in Rapt Roznamcha Waqiati (Exh.D-1) there is no mention about any date of offer of gift its acceptance or delivery of possession by the donor to the donee."**

Similarly, in the case titled "***Mst. Kalsoom Bibi and another Vs Muhammad Arif and others***" **(2005 SCMR 135)**, it was held by the apex Court that:

> **"It is a matter of record that the deed as such is challenged on grounds of conspiracy, fakeness and forgery amounting to fraud. In these circumstances, the beneficiary under the document is bound not only to prove the execution of document but also to prove the, actual factum of gift by falling back on the three ingredients of proposal, acceptance and delivery of possession. These have to be proved independent of the document. This Court has quite recently held in case of Ghulam Haider 2003 SCMR 1829 that essentials of a valid gift were required to be proved independent of the deed even if it was registered, in case it is challenged on grounds of forgery etc. Keeping in view the principle so enunciated, we are clear in our mind that the defendants have not produced an iota of evidence to prove the original factum of gift; the proposal, the acceptance and the delivery of possession. We have already discussed that the possession under the gift has not been delivered at all. The gift can be declared void on this score alone arid as well.**
>
> **In the instant case it is a gift which tantamount to disinheriting the closest of the legal heirs or, even if genuine, it otherwise practically disinherits the legal heirs. In such given circumstances, when, through a gift, deprivation of legal heirs is**

involved, either intended or unintended, the burden to prove original transaction of gift with all its ingredients strongly rests, upon the beneficiaries of such gift. This Court, in similar circumstances, had nullified a transaction of gift in case of Muhammad Ashraf 1989 SCMR 1390, where the question arose as to why in the presence of legal heirs, particularly the children, the donor would have gifted out the entire land to a nephew. Quite recently in case of Barkat Ali 2002 SCMR 1938, this Court once again reiterated such principle holding that in cases of gifts, resulting into disinheriting of the legal heirs, the burden to prove original transaction of gift squarely rests upon the donees Such burden has not been touched at all, much less proved."

Even, it has not been proved on record by the petitioners that the erstwhile predecessor Mukamil Shah has divested himself from the possession of the property, thus, they have failed to prove the alleged gift.

11. Moreover, it is settled law that mere pleadings unless corroborated by qualitative evidence could not be based for the decision of the *lis* nor the evidence without pleadings could provide any benefit. Moreover, mere pleadings of a party cannot be treated as substitute for proof. It is also settled law that no litigant can be allowed to build and prove his case beyond the scope of his pleadings. Reliance in this respect is placed on the judgments reported as ***Muhammad Iqbal vs. Mehboob Alam*** (**2015 SCMR 21**) "***Inayat Ali Shah v. Anwar Hussain***" (***1995 MLD 1714***), "***Pir Wali Khan v. Niaz Badshah***" (***2013 MLD 1106***), "***Mir Laiq Khan v. Sarfraz Jehan***" (***2013 MLD 1449***), "***Mst. Ghazala Yasmeen v. Sarfraz Khan Durrani***" (***2013 CLC 1406***) and "***Messrs Choudhary Brothers Ltd., Sialkot v. Jaranwala Central Co-operative Bank Ltd., Jaranwala***" (***1968***

SCMR 804). In the case of ***Muhammad Yaqoob vs. Mst. Sardaran Bibi and others*** (**PLD 2020 SC 338**) wherein it was held:

> ***"It is settled law that a party is not allowed to improve its case beyond what was originally set up in the pleadings".***

12. Adverting to the last submission of learned counsel for the petitioners that since the attorney of Mst. Sultania Bibi has admitted the factum of sale by Mukamil Shah in favor of sons of his predeceased sons and his three during his lifetime, suffice it to say that Mst. Sultania Bibi etc., were seeking a relief for recovery of possession through partition, which was devolved upon them from their father and not from her grandfather Mukamil Shah and in the very suit, it was the contention of the petitioners (defendants No.1 to 5) that Mukamil Shah had transferred the property through gift in his lifetime, for which, a question was put to Zafar Ali Shah, thus, the answer of Muzaffar Shah in the case of Mst. Sultania Bibi etc. is not binding upon the plaintiffs/ respondents nor any admission which was not the plea of the mother of Zafar Ali Shah will bound down the respondents/ plaintiffs in their suit who were claiming the legacy from Mukamil Shah. Had it been the claim of the plaintiffs in the earlier round of litigation of the suit then ultimately the plea of estoppel could be attracted against them as the plaintiffs under the principle of estoppel, however, in earlier round of litigation, the present plaintiffs were the defendants who never appeared before the court and were proceeded ex-parte then on their part, there was no admission to

erect a barrier for them and even otherwise, the principle of estoppel is always used as a shield and not as a sword. This plea could be taken only by Mst. Sultania Bibi, thus, the statement of Zafar Ali Shah in the earlier round of litigation is neither binding upon the respondents/ plaintiffs nor it could disentitle them from their legal and *shari* shares in the property of their predecessor in interest.

13. Viewing the submissions of learned counsel for the petitioners in juxtaposition with the provisions of order XLI rule 31 C.P.C and order XX rule 5 C.P.C, the materials available on record in support of the contention of the petitioners/ defendants, I have reached to an irresistible conclusion that the learned courts below have put the controversy to rest through well-reasoned judgments, which are not open to any interference. Learned counsel for the petitioners has not been able to point out any illegality, irregularity or jurisdictional defect in the impugned judgments and decrees of the learned Courts, hence, the instant petition, being devoid of merits, is hereby dismissed in ***limine***.

Announced.
22.10.2024

JUDGE

Sabz Ali/* (S.B) HON'BLE MR. JUSTICE MUHAMMAD NAEEM ANWAR

Office 29/10/2024