

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Bench:

Mr. Justice Jamal Khan Mandokhail
Mr. Justice Syed Hasan Azhar Rizvi

Civil Appeal No. 415 of 2018

(On appeal from the order of the Lahore High Court, Multan Bench, Multan dated 22.03.2017 passed in Civil Revision No. 737-D of 2013)

Zaffar Afzal & others

.....**Appellant(s)**

Versus

Ashiq Hussain

....**Respondent(s)**

For the Appellant(s): Mr. Zulfiqar Khalid Maluka, ASC

For the Respondent: Mr. Javed Akhtar Wains, ASC

Date of hearing: 12.04.2023

JUDGMENT

Jamal Khan Mandokhail, J.- Brief facts of the case are that one Fateh Muhammad was a paternal uncle of the parties. He was hard of hearing, non-verbal and uneducated. He was living with the respondent and died issueless. Fateh Muhammad owned a property ("**property in question**") which was transferred in the name of the respondent *vide* sale mutation No. 588 dated 30 June 2003 ("**the disputed mutation**"). The appellants, being Fateh Muhammad's niece and nephews and also the brothers of the respondent, filed a suit for declaration and cancellation of the disputed mutation on the pretext that it was a result of fraud. The respondent contested the suit alleging therein that he had lawfully purchased the property in question from Fateh Muhammad through an oral sale agreement in consideration of Rs.2,000,000/- (Rupees Twenty Lac) paid in cash. The Civil Judge, Lodhran ("**Trial Court**") *vide* judgment and decree dated 16.07.2013, decreed the suit in favour of the appellants. The respondent filed an appeal before the Additional District Judge, Lodhran ("**Appellate Court**"),

which was allowed *vide* judgment and decree dated 05.10.2013, and the suit filed by the appellants was dismissed. The appellants filed a Civil Revision before the Lahore High Court, Multan Bench, Multan, which was dismissed through the impugned order, maintaining the judgment and decree of the Appellate Court. Feeling aggrieved, the appellants filed a petition which was converted into an appeal through an order dated 13.03.2018 and is reproduced below:

"In the instant case the matter in issue is an oral sale by a deaf and dumb person. It is contended by the learned counsel for the petitioners that the petitioners/plaintiffs challenged the sale claiming that it was a result of fraud and that there isn't sufficient evidence on record to establish the consent of the deceased seller for the transaction. It is added that the consideration was rupees two million and the availability of the said amount and its payment and subsequent safe keeping is also not established on record through cogent and reliable evidence. The learned counsel for the respondent controverts the contentions raised on behalf of the petitioners and states that all these questions have been answered in favour of the respondent by the appellate Court as well as the revisional Court.

2. Leave to appeal is granted, inter alia, to consider the contentions of the learned counsel for the parties. Let the appeal be listed down for hearing in the year 2018. Both parties shall be at liberty to file additional documents if necessary."

2. The learned counsel for the appellants states that Fateh Muhammad was hard of hearing and non-verbal, therefore, was not capable of entering into any agreement or transaction by himself. He adds that even otherwise, the respondent is claiming an oral sale transaction, but has not been able to prove the same, therefore, the disputed mutation was a result of fraud. He states

that the disputed property is the leftover property of Fateh Muhammad which devolves upon the parties being his legal heirs.

3. The learned counsel for the respondent, though opposed the contentions of the learned counsel for the appellants, admitted that Fateh Muhammad was a person with disabilities and was uneducated, however, stated that he was capable enough to understand the terms and conditions of the agreement, therefore, the transaction in respect of the property was with his free will and consent. He stated that before attestation of the mutation, the revenue authorities in order to satisfy themselves called an expert to translate the expressions and signs of communication of Fateh Muhammad. The said expert also appeared before the Trial Court and confirmed his statement given before the revenue authorities. He added that the Appellate Court as well as the High Court after proper appreciation of evidence and the material available on the record have come to a correct conclusion.

4. Arguments heard and have perused the record. One of the points for consideration is whether Fateh Muhammad was capable to protect his rights and interests while entering into a sale agreement in respect of the property in question. Each person hard of hearing and non-verbal is unique in their own way. Most of them are healthy and are not considered as intellectually disabled. However, disabilities of some of them may have a debilitating effect on their mental status which may impair their skills of perception, comprehension, judgment, thought, response, behaviour, capacity to recognize reality, etc. to cope with the ordinary demands of life and the capacity to protect their rights and interests. Any person adjudged or if not so adjudged, appear to be of unsound mind, mentally infirm, or intellectually disabled, is incapable of protecting and safeguarding their rights and interests themselves. Under such circumstances, transaction in respect of rights and interests of such persons must be through next friend or guardian as the case may be, as provided by Order XXXII, Rule 15 of the Code of Civil Procedure ("**CPC**"). Similarly, any transaction in respect of rights and interests of a person(s) who is hard of hearing

and non-verbal, communicates through signs and expressions and is not intellectually disabled, must be in the presence of witnesses who can understand, interpret, and express their views. The witnesses to the transaction should preferably be close relatives or anyone who is fully acquainted with such persons. The witnesses to the transaction should be apprised of the consideration of such transaction. It must be ensured that the persons who deal, assist and witness the transaction have no conflict of interest in the matter. Thus, the authorities before alienating the rights and interests of persons with disabilities must satisfy themselves with regard to the fulfilment of the requirements for a transaction explained herein so that it is free from any influence, misrepresentation or fraud, the amount of consideration is equal to the value of the property and was indeed paid. The reason for such an exercise is to take maximum measures in order to protect and safeguard the rights and interests of such persons.

5. There is no proof on the record to show that Fateh Muhammad was capable to understand the terms and conditions of the agreement, in order to protect his rights. It has not been explained as to whether Fateh Muhammad was actually desirous to sell the property in question. Even otherwise, it has not been established whether he being a person hard of hearing and non-verbal, properly understood the offer made to him, whether he accepted the offer and if so, on what terms and conditions. There is no evidence to prove how and when the transaction took place and who witnessed it. The petitioners were the best persons to interpret Fateh Muhammad's views and communicate the offer made to him, but no effort was made by the respondent to associate them or even any other close relative of his at the time of negotiation, execution and completion of the alleged transaction. Moreover, the respondent alleged that an amount of Rs.2,000,000/- was fixed as sale price of the property in question, but it has not been proved that the price was in accordance with the market rate at that time. It is alleged that the amount has been paid in cash, but there is no witness in whose presence the alleged amount was paid, nor has it

been mentioned as to when and where it was paid. The respondent has also failed to prove whether the possession of the property in question was delivered to him as a result of the alleged sale. Under such circumstances, the alleged sale transaction stands disproved.

6. Without prejudice to the above, the respondent is mainly relying upon the mutation in question. It is a well-settled principle of law that mutation does not confer title, however, it may be considered as a piece of evidence if it is affected in accordance with law. It is stated that before entering the mutation in question, the revenue authorities called Ch. Faqir Muhammad, a teacher at a high school for children with hearing and speaking disabilities, to interpret his signs and expressions to them. Though he interpreted Fateh Muhammad's signs and expressions, he did not mention anything with regard to the alleged oral sale agreement. The only other witnesses to the mutation in question were Muhammad Iqbal and Shaukat Hayat, out of them only Muhammad Iqbal appeared (as DW2). In his statement he stated that the payment of the amount was made before the execution of the mutation, but in his cross-examination admitted the fact that he was not present at the time of the alleged sale transaction. As far as the second witness of the mutation is concerned, it has come on the record that he had died, but no effort was made to prove his signatures through some other source or from a person who was acquainted with them. The record suggests that before alienating the property rights of Fateh Muhammad in the revenue record, the revenue authorities did not satisfy themselves to the extent whether the transaction was free from any influence, misrepresentation or fraud; whether the amount of consideration was equal to the prevailing market value; and if it was indeed paid. They also failed to ascertain whether the witnesses to the mutation in question had a conflicting interest in the property. Under such circumstances, the mutation in question, on the basis of such oral sale agreement, is contrary to law.

7. The Appellate Court has held that the suit was barred by time for the reason that the property in question was already partitioned by the revenue authorities by means of an *ex parte*

order dated 02 April 2007, which was within the knowledge of the appellants. The appellants have denied their knowledge with regard to the partitioning proceedings. The record reflects that there is no evidence to show that the respondents (present appellants) were served or even any step was taken for the service of notice by the revenue authorities for the purpose of partitioning their joint properties, including the property in question. The appellants recorded their statements before the Trial Court, but no question regarding the factum of partitioning of the property and their knowledge in respect of the order dated 02 April 2007 was put to them by the respondent. Under such circumstances, the respondent has failed to prove the knowledge of the appellant in respect of the partitioning proceedings and the *ex parte* order dated 02 April 2007. The findings of the Appellate Court and the High Court with regard to the knowledge of the appellants about the partitioning proceedings is contrary to the record, therefore, both the courts have reached a wrong conclusion. Consequently, the judgments and decrees of the High Court dated 22.03.2017 and that of the Appellate Court dated 05.10.2013, respectively, are set aside. The judgment and decree of the Trial Court dated 16.07.2013 are upheld.

Foregoing are the reasons for our short order dated 12.04.2023, which is reproduced herein below:

"For the reasons to be recorded later, this appeal is allowed."

Judge

Judge

Islamabad,
12th April 2023
K.Anees/Ammar, LC
APPROVED FOR REPORTING