HCJD/C-121

JUDGMENT SHEET

IN THE SLAMABAD HIGH COURT, ISLAMABAD

R.F.A No.68 of 2014

Mst. Barkat Jan

Versus

Ch. Mohammad Yaqoob, etc.

Appellant by	**:**	**Mr. Nasir Ahmed Abbasi, AHC.**
Respondents by	**:**	**Mr. Mohammad Shakeel Abbasi, Advocate.** **Mr. Iqbal Hassan, Advocate for CDA.**
Date of Hearing	**:**	**23.02.2022**

Babar Sattar, J:- The appellant is aggrieved by judgment and decree dated 19.05.2014 pursuant to which a suit for possession through partition of House No.366, Street No.13, Model Village Chak Shahzad, Islamabad (**"Suit Property"**) and recovery of mesne profit was dismissed.

2. The Suit Property was allotted by CDA in the name of the appellant's mother to compensate her after acquisition by CDA of certain other property. The appellant's claim is that after the demise of her mother Mst. Resham Jan on 25.05.1989, she was entitled to her share of the property on the basis of inheritance along with respondent No.1 and 2 who are the appellant's brothers. Respondent No.1 on the other hand claims ownership of the Suit Property on the basis that the appellant and respondent No.2 through a registered release deed dated 18.06.2005 transferred their shares in the property to

respondent No.1 and that he has always been in possession of the Suit Property which has rented out and he is the sole owner of the Suit Property. On the basis of pleadings of the parties, the learned Civil Court framed the following issues on 23.11.2011:

ISSUES:

i. Whether the plaintiff is entitled to get possession through partition of suit plot? OPP

ii. Whether the plaintiff is entitled to recovery of mesne profit of the suit property as per his share along with mark up since the death of deceased till the final decision of the suit? OPP

iii. Whether the release deed dated 18.06.2005 is false and frivolous, null and void based on fraud and misrepresentation against the legal rights of the plaintiff? OPP

iv. Whether the plaintiff has concealed the true and material facts from the court and suit is not maintainable? OPD

v. Whether the plaintiff has no cause of action and plaint is liable to be rejected U/O VII Rule 11 CPC? OPD

vi. Whether the plaintiff is estopped by his own words and conduct? OPD

vii. Whether the plaintiff has neither properly valued the suit nor she has affixed the court fee on the plaint. Due to this plaint is liable to be rejected? OPD

viii. Whether the suit of the plaintiff is false and frivolous and defendants are entitled to get special costs under Section 35-A CPC? OPD

ix. Relief.

In relation to issues No.1, 2 and 3 the learned Civil Court found that the appellant as PW-1 had admitted to have signed certain documents for purposes of preparation of heir-ship certificate and had contended that respondents No.1 and 2 had

fraudulently prepared the impugned release deed using her thumb impression but had not produced any witnesses to support her accusations. Consequently the said issues as to whether the appellant is entitled to the possession of the Suit Property and recovery of mesne profit were decided against her and whether the release deed dated 18.06.2005 was null and void for being based on fraud and misrepresentation, was also decided against her. Further the learned Civil Court also decided issues No.4 to 8 against the appellant for not producing evidence in support of her case, in relying on the release deed while observing that a presumption of truth was attached to it.

3. Learned counsel for the appellant submitted that the appellant was an illiterate *parda nasheen* lady who had never appeared before the Registrar for registration of the release deed. That after her deposition no relevant questions were asked by the respondents to establish that she was not *parda nasheen* or an uneducated and illiterate woman. That it was admitted that she had never received any income from the suit property. That she had received no consideration in lieu of the Suit Property and respondents No.1 and 2 adduced no evidence to establish that she had received any other inherited property due to which she released her share in the Suit Property in favour of respondent No.1. That witnesses to the release deed i.e. DW-3 and DW-4 also acknowledged that the appellant was an illiterate woman. He submitted that the address of the appellant as well as her CNIC mentioned in the release deed were incorrect as the numbers mentioned in such release deed were for a CNIC issued to a resident of Islamabad. And as the

appellant was a resident of Rawalpindi her CNIC started with the numbers 37405 which was the series for Rawalpindi as opposed to 61101 which was the series for Islamabad. That the defense witnesses had not deposed that they witnessed the appellant placing her thumb impression on the release deed and further nobody from the office of the Registrar was produced and neither was the stamp vender produced to establish the presence of the appellant at the time issuance of the stamp paper. He submitted that the release deed was a fraudulent document and no rights could be created on the basis of such document. He submitted that the law in relation to *parda nasheen* lady was well settled as had been enumerated in detail by the august Supreme Court in ***Ghulam Ali Vs. Mst. Ghulam Sarwar Naqvi (PLD 1990 SC 1)*** and any relinquishment of property by *parda nasheen* lady was found to be against public policy unless it was established by the beneficiary that such lady understood the consequences of the consent she was given. He submitted that the presumption that attaches to a registered document is a rebuttable presumption especially when such document is purportedly executed by a *parda nasheen* or illiterate woman. That the appellant had testified before the learned Civil Court that she never appeared before the Registrar for execution of the release deed which testimony remained unshaken but was not taken into account by the learned Civil Court.

4. Learned counsel for the respondents submitted that the appellant and respondents No.1 and 2 are siblings and that the appellant's daughter was the daughter-in-law of respondent

No.1. That once respondent No.1's son died and the marriage ended the appellant initiated the instant claim against respondent No.1. That presumption of truth attached to registered document and onus for purposes of establishing that a register document is the product of fraud is on the party claiming such fraud and in the instant case the appellant had failed to adduce evidence to such effect. He submitted that respondent No.1 had proved the release deed in accordance with Article 17 and 79 of the Qanun-e-Shahadat Order, 1984. That respondent No.2 had deposed that the mother of the siblings (i.e. the appellant and respondents No.1 and 2) had declared through a *wasiat* that the appellant and respondent No.2 transferred the suit property to respondent No.1 and he had constructed a house over the suit property and it was in giving effect to such *wasiat* that the release deed was executed. He submitted that an incorrect CNIC number mentioned on the release deed was a consequence of human error and did not establish fraud. He submitted that an application for verification of the thumb impression on the release deed was made by respondent No.1 and opposed by the appellant, which established that the thumb impression on the release deed was indeed that of the appellant which is why she did not want it verified.

5. Before discussing the facts in the instant case let us first reiterate the law in relation to a *parda nasheen* or illiterate woman as it is not contested that the appellant is an illiterate woman. The law in relation to the right of inheritance of females was enumerated in detail by the august Supreme Court in

***Ghulam Ali Vs. Mst. Ghulam Sarwar Naqvi* (PLD 1990 SC 1),** wherein the time at which inheritance property devolves on legal heirs of a deceased was explained as follows:

> *As soon as an owner dies, succession to his property opens. There is no State intervention or clergy's intervention needed for the passing of the title immediately, to the heirs. Thus it is obvious, that a Muslim's estate legally and juridically vests immediately on his death in his or her heirs and their rights respectively come into separate existence forthwith. The theory of representation of the estate by an intermediary is unknown to Islamic Law of inheritance as compared to other systems. Thus there being no vesting of the estate of the deceased for an interregnum in any one like an executor or administrator, it devolves on the heirs automatically, and immediately in definite shares and fraction.*

With regard to the legality of transfer of property by a *parda nasheen* lady while keeping in view provisions of the Contract Act the following was held:

> *On questions of public policy, morality (Section 23), lack of consideration (Section 25) and undue influence (Section 16) vis-a-vis Parda Nashin ladies it has to be reiterated and recapitulated that: Firstly the relinquishment by the respondent, if any, is against public policy and morality, which concepts are to be decided on the basis of Islamic teachings and principles. The female could not opt or contract out of this protection. Hence the act of relinquishment was void and ineffective. Her ' inheritance, having accrued in her favour on her father's death remained intact at all the relevant times. Secondly the question of lack of consideration loses much of its relevance on account of the firstly above. But had it been not so, the so-called exceptions in Section 25 not being applicable in the context of Islamic rules and teachings, would not have saved the disputed relinquishment. Thirdly the relinquishment as such having been annulled, the same could not in this case operate as an ordinary alienation under the existing law for*

> *two amongst other reasons: One, the so-called relinquishment of accrued inheritance, is neither recognized in Islamic law of transfers nor is it treated as a "transfer under the Transfer of Property Act. If at all the nearest form being of 'gift', none of its essential conditions are satisfied in a relinquishment", so-called. If it is intended to be a gift, the latter's essentials would have to be gone through on principle and also as legal necessity. It cannot be by way of 'relinquishment' simpliciter. Another form of alienation in this context would be by way of family settlement/arrangement; which it might be argued is permissible in Islam.*
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> *Two, even if all the conditions for a valid transfer under the existing set and systems of laws, after the due accrual of inheritance are satisfied, the protection afforded by Section 16 of the Contract Act against undue influence, to Parda Nashin ladies and others similarly placed parties and entrenched in the case-law as also available under the Islamic Law would require so many conditions to be satisfied, Admittedly in such like cases the burden of proof is upon the alienee. The presumption exists regarding undue influence on prima facie satisfaction regarding inter se position of the parties and the state and status of the alienor.*

The question of application of the law as settled in relation to *parda nasheen* ladies being applicable to illiterate ladies came before the august Supreme Court in ***Janat Bibi Vs. Sikandar Ali (PLD 1990 SC 642)*** as well and the following was held:

> *14. It is well settled that the question whether a lady is a pardah nashin lady is a question of fact (See Bank of Khulna Ltd. v. Jyoti Prokash Mitra and others AIR 1,940 Privy Council 147). It is also well settled that the burden of proof in respect of a document purported to have been executed by a pardah nashin woman affecting her right or interest in the immovable property is on the person claiming the right or interest under the document. It is for him to establish affirmatively that it was substantiality understood by the lady and it was really her free and intelligent act. If she is illiterate, it must have been read over to her. Here we may*

quote the observation of Sir George Lowndes in (Valluri) Ramanamma v. Marina Virana AIR 1931 Privy Council 100:-

> *"The law as to disposition of property by pardah nashin ladies has been discussed by the Board on many occasions. It is for the person claiming the benefit of any such disposition to establish affirmatively that it was substantially understood by. the lady and was really her free and intelligent act. If she is illiterate, it must have been read over to her; if the terms are intricate they must have been adequately explained, and her degree of intelligence will be a material factor; but independent legal advice is not in itself essential: See per Lord Sumner in Faridunnisa v. Mukhtar Ahmad AIR 1925 PC 204."*

6. More recently the legal protection to be afforded to an illiterate woman came before the august Supreme Court in ***Mian Allah Ditta Vs. Mst. Sakeena Bibi*** ***(2013 SCMR 868)*** in which while reiterating the law in ***Jannat Bibi*** and relying on the law laid down in ***Chainta Dasya Vs. Bhalku Das*** ***(AIR 1990 Cal. 591)*** it was clarified that the protection to be afforded to a *parda nasheen* lady was founded on the principle that there was an obligation under law to afford them additional protection so as to prevent anyone from abusing their rights and that the same principle was applicable to an illiterate and uneducated lady who likewise fell within the same vulnerable class. In holding so the august Supreme Court reiterated the dicta in ***Chainta Dasya Vs. Bhalku Das*** ***(AIR 1990 Cal. 591)*** which held the following:

> *"The rule of law so far as pardahnashin women is concerned is well known and has been clearly laid down in many decisions of the Privy Council. It is true that most of these decisions relate to the case of pardahnashin ladies. We have*

> *not been referred to any case in which the principle has been extended to the case of other women who do not come within that class; but that does not seem to be any reason why a rule which is applicable to pardahnashin ladies on the ground of their ignorance and illiteracy should be restricted to that class only and should not apply to the case of a poor woman who is equally ignorant and illiterate and is not pardahnashin simply because she does not belong to that class. If this view of the matter were adopted the effect clearly would be to confer an unfair advantage upon rich women as compared with poor women. The object of the rule of law is to protect the weak and helpless, and it should not, in my judgment, be restricted to a particular class of the community."*

7. What is not disputed in the present case is that the mother of the appellant was the owner of the suit property which after the death of her mother devolved upon the appellant and respondents No.1 and 2. It is the appellant's contention that she became aware of the transfer deed after filing of the instant suit due to which she filed an amended plaint and sought a declaration that the release deed is liable to be declared null and void for being a product of fraud and misrepresentation. The suit property still stands in the name of the mother of the appellant and respondents No.1 and 2. It is respondents No.1 and 2 that rely on the release deed to claim that while a share in the suit property devolved on the appellant after the demise of their mother, such share was transferred and relinquished in favour of respondent No.1 through the release deed. As a beneficiary of the release deed it was, therefore, for respondent No.1 to establish the legality and validity of the document under which he is claiming ownership over the suit property.

8. Let us now review the testimony adduced before the learned Civil Court. The appellant appeared as PW-1 in support of her claim and submitted that respondent No.1 had been in possession of the house and had been receiving the rent in lieu of the house approximate to the amount of Rs.16,000/- to 20,000/- per month. That she never consented to execution of the release deed and had only signed certain documents which were handed to her by respondent No.1 by representing that they were for purposes of affecting transfer of the property in the name of the successor-in-interest of their mother Resham Jan within CDA record. She stated that she never appeared before the Registrar to execute the release deed. In cross-examination she contended that the suit property was allocated to the appellant's mother in lieu of the property of appellant's father which was acquired by CDA. She testified that house on the Suit Property was constructed by her mother and not by respondent No.1. Respondent No.1 appeared before the learned Civil Court as DW-1 and testified that he was in exclusive possession of the Suit Property which he rented out and no one other than him had received any share from its rent. He further testified that he had not paid any consideration to the appellant or respondent No.2 for execution of the release deed and that he had incurred the expense to transfer the Suit Property in the name of her mother Resham Jan and had also incurred expense for construction of the house on the Suit Property. In cross-examination he admitted that the appellant does not reside at the address mentioned in the release deed and that the appellant's CNIC was also issued in Rawalpindi but clarified that

there was no *mala fide* involved in mentioning on address in Islamabad for her in the release deed. Respondent No.2 appeared as DW-2. In cross-examination he acknowledged that the suit property was allocated to his mother in lieu of property acquired by CDA that it was due to their mother's *wasiat* that he and the appellant executed the release deed in favour of respondent No.1 but that there were no witnesses of such oral will or *wasiat*. As a defence witness he was unable to name the scribe of the release deed. Sheikh Mohammad Zulfiqar appeared as DW-3 who was a witness to the release deed and testified that the appellant appeared before the Registrar at the time of execution of the release deed. He admitted that he was a close friend of respondent No.1 that he was not aware of who procured the stamp paper for the release deed or who was the scribe who prepared the release deed. He also acknowledged that he did not execute the release deed in the presence of the Registrar and that no one executed the release deed in the presence of the Registrar. While he denied that the appellant was a *parda nasheen* lady, he acknowledged that she was an illiterate and uneducated person and somebody who could not sign her own name (i.e. angootha chaap). He also acknowledged that address of the appellant mentioned on the release deed was a fictitious address. Mr. Saparas Hussain appeared as DW-4 being a witness to the release deed. He testified that the Registrar checked the CNIC of the appellant, respondents No.1 and 2 and the witnesses i.e. DW-2, DW-3 and DW-4 at the time of execution of the release deed. He acknowledged that he was a close friend of respondents No.1

and 2 and was unaware of where the stamp paper was procured from or who was the scribe who prepared the release deed. He also acknowledged that the appellant was a *parda nasheen* lady and also an illiterate woman and could not sign her name.

9. What emerges from the aforementioned evidence adduced before the learned Civil Court is that DW-3 and DW-4 both acknowledged that the appellant is an illiterate woman incapable of signing her name and consequently relied on her thumb impression for execution of the release deed. And that DW-4 admitted that the appellant is a *parda nasheen* lady. The assertion that the appellant is a *parda nasheen* lady has not been challenged by DW-1 or DW-2 through their pleadings or testimonies. In view of the evidence adduced, it is therefore safe to conclude that the appellant is a *parda nasheen* woman who is illiterate. The second crucial fact that emerges from the evidence is that the CNIC as well as the address of the appellant as mentioned on the release deed being incorrect has been admitted by all the defence witnesses. DW-3 acknowledged during cross-examination that no one executed the release deed in the presence of the Registrar but DW-4 on the contrary contended that the Tehsildar verified the CNIC of everyone at the time of execution of the release deed. In view of the testimony of DW-3 it appears that none of the signatory or witnesses of the release deed executed the same in the presence of the Registrar. The testimony of DW-4 to the extent of his assertion that CNIC of all those who executed or singed the release deed were verified by the Tehsildar lacks credibility as it has been admitted by respondent No.1 as DW-1 himself

that the CNIC of the appellant as mentioned on the release deed is incorrect. In view of the above, there is no consistent evidence on whether the executants of the release deed and its witnesses signed such documents in the presence of the Registrar. It is also evident that no one from the office of the Registrar verified the CNICs of the executants of the release deed or else it would have become apparent that the CNIC of the appellant as mentioned on the release deed does not match her actual CNIC No.37405-0232125-6, and while this correct CNIC number is mentioned on Page-1 of the release deed (which is not signed by any of the executants or by attesting witnesses) while Page-2 of the release deed, which has the signatures of the executants as well as attesting witnesses mentioned her CNIC number as 61101-0232125-6. If the CNIC of the executants were verified by the Registrar's office, it would have realized that the CNIC mentioned on both pages of the release deed are different and that the CNIC mentioned on the execution page does not match the actual CNIC of the appellant. This lack of verification of the CNIC raises a more fundamental question. If the appellant is a *parda nasheen* lady, as emerges from the evidence discussed above, and her CNIC was also not verified by the Registrar's office, which if done would have led the Registrar not to register the release deed with an incorrect CNIC, what was the basis used by the Registrar's office to identify the appellant. Other than the use of CNIC to identify a *parda nasheen* lady there was no other way to identify her as such. And this in itself creates a big question mark as to whether the appellant ever appeared before the Registrar for

purposes of execution of the release deed, which the appellant has denied, or whether another *parda nasheen* lady was produced before the Registrar pretending to be the appellant.

10. In view of the law laid down in ***Ghulam Ali,*** after the death of the appellant's mother, the Suit Property devolved on all three legal heirs i.e. appellant and respondents No.1 and 2 and consequently her interest in the suit property became vested. She denies having gifted the suit property to respondent No.1 through the release deed and alleges that such release deed is a product of fraud and misrepresentation. Respondents argue that the release deed is a consequence of their mother's *wasiat* and was executed by the appellant of her own free will. No evidence of such *wasiat* was however produced by the respondents No.1 and 2. Respondent No.1 contended in his written statement that the suit property was allocated in his mother's name due to his efforts and expenses for such purpose were incurred by him. Such position is controverted by respondent No.2 as DW-2 who acknowledged that the suit property was allocated by CDA in lieu of family property acquired by CDA. Respondent No.1 as DW-1 asserted in his written statement and testimony that the appellant was given her share in the family property through an independent settlement. Respondents No.1 and 2 however failed to adduce any evidence of such family settlement or details of the property that were transferred in the name of the appellant. In this regard to the testimonies of DW-1 and DW-2 are contradictory. DW-2 has asserted that release deed was executed out of natural love and affection due to a *wasiat* of their mother to

transfer such property to respondent No.1. DW-2 has, however, maintained that appellant was given a fair share in other family properties due to which she executed the release deed in relation to the suit property. All of these contradictions pointed above raise a fundamental question about the execution of the release deed by the appellant which is sufficient to rebut any presumption of legality that attaches to a release deed as a registered document. If the CNIC of the appellant as mentioned in the release deed was incorrect there was no other means available to the Registrar to verify the identity given that she was a *parda nasheen* lady. And in the event that her identity was correctly verified by checking her CNIC the Registrar could not have registered the release deed which mentions a fictitious CNIC attributed to the appellant.

11. The second question that arises is in relation to the appellant's consent for the transaction referred to in the release deed. The appellant being an uneducated woman testified that she did affix her thumb impression on certain documents for purposes of preparation of *warasat nama* and transfer of suit property in the CDA record on being asked by respondent No.1 but never executed a release deed. The release deed itself states that it is a consequence of natural love and affection on part of the appellant. The appellant denies such consideration as a motivation for alienating her inherited property along with the execution of the release deed. Respondent No.1 is a beneficiary of the release deed purportedly executed by the appellant without receiving any consideration. Consequently, the onus was on respondent No.1 to establish that not only did the

appellant execute such a release deed but while doing so she fully comprehended the consequences of her action amounting to relinquishment of her rights in inherited property in favour of her brother i.e. respondent No.1. The law in relation to establishment of understanding of the transaction as well as of voluntary consent in the context of requirements of Contract Act has been mentioned in the case law reproduced above. In the instant case no evidence has been led by respondent No.1, who is the beneficiary of the release deed, to establish that the appellant comprehended the consequences of executing the release deed (even if she did), and did so willingly at the time of execution of release deed out of love and affection. The appellant on the other hand has denied the execution of the release deed and any intent on her part to relinquish her interest in the suit property in favour of her brother i.e. respondent No.1.

12. Perusal of the impugned judgment reflects that neither the contradictions in evidence as discussed above were appreciated by the learned Civil Court nor the law in relation to grant of consent by a *parda nasheen* and uneducated woman in a transaction that results in relinquishment of her property rights was taken into account. The law in relation to *parda nasheen* and uneducated women has developed in view of the rampant practice in this part of the world by male heirs of the family to deny female heirs their right in inherited property. Courts have thus enumerated a cautionary principle to be applied to determine that the consent purportedly given by a *parda nasheen* or illiterate lady reflected her state of mind after

comprehending what she was consenting to, in order to protect the rights of such women who belong to a vulnerable segment of the society. The impugned judgment and decree are, therefore, neither supported by the law laid down in relation to the manner in which the rights of *parda nasheen* and uneducated women are to be protected nor the evidence adduced on the basis of which a conclusion was drawn by the learned Civil Court with regard to execution of the release deed by the appellant.

13. The impugned judgment and decree suffer from infirmities and are set aside. The suit of the appellant to the extent of possession through partition of Suit Property is decreed and the release deed No.3146 dated 18.06.2005 is declared to be null and void for being an agreement not duly and willfully consented to by the appellant. It is declared that the appellant is the owner of the suit property to the extent of her *sharai* share in the said property since the demise of her mother on 25.05.1989 and is and has remained entitled to her proportionate share from the rental yield of such property since such time. For determination of the mesne profit from the Suit Property and her proportionate share therein, the matter is remanded back to the learned Civil Court to frame an issue as to the rental yield of the suit property and allow the parties to adduce evidence before declaring the proportionate share due to the appellant since 25.05.1989. The appeal is accordingly ***allowed*** in the above terms together with cost of litigation in the amount of Rs.25,000/- payable by the respondents to the appellant within a period of thirty days. The learned counsel for

the respondents will file a compliance certificate with the Deputy Registrar (Judicial) of this Court certifying that the order as to cost has been complied with.

(BABAR SATTAR)
JUDGE

Announced in open Court on 29.04.2022.

JUDGE

Approved for reporting.

M.A. Raza