JUDGMENT

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

R.F.A. No. 64/2013
Mst. Nasreen Irteza and another
Versus
Arif-ul-Islam and others

Appellant by:	Sardar Abdul Sami, Advocate
Respondents by:	Mr. Ghulam Fareed Ch., Advocate
Date of Decision:	18.04.2017

MOHSIN AKHTAR KAYANI, J:- Through this Regular First Appeal the appellants have assailed the impugned judgment and decree dated 14.12.2012 passed by learned Civil Judge 1st Class (West) Islamabad, whereby the suit for possession through partition permanent and mandatory injunction has been decreed.

2. Brief facts of the instant case are that, appellants have filed a suit for possession through partition, permanent and mandatory injunction regarding House No.151, Street No.26, Bella Road, G-10/1, Islamabad which was allotted to Zulfiqar Ali, the father of plaintiffs and defendant No.1 and 2, who was the owner in possession and died on 17.05.2004 leaving behind the plaintiffs and defendant No.1 and 2 as legal heirs. As per the contents of the plaint, Arif-ul-Islam, the legal heir of Zulfiqar Ali, died on 27.04.2012, leaving behind the legal heirs, 1(a) to 1(d), who has been impleaded in the plaint, whereas amended plaint has been filed. The respondents claim that they are the legal heirs of late Zulfiqar Ali, their father, and they are entitled to have legal share after the death of Zulfiqar Ali, in the suit house, i.e. House No.151, Street No.26, Bella Road, G-10/1, Islamabad. After the filing of suit, the present appellants who are defendant in main suit, have filed their written statement taking a stance therein that their deceased father, Zulfiqar Ali, during his lifetime declared in unequivocal words that in event of his death the defendant Mst. Nasreen

Irteza would be allowed to occupy and live in House No.151, Street No.26, Bella Road, G-10/1, Islamabad and under no circumstances the suit property will be sold or claimed by any other legal heir till the lifetime of Mst. Nasreen Irteza. It has further been asserted in the instant RFA that by declaring such status of the suit property in the lifetime of late Zulfiqar Ali, a trust has been created regarding the suit property in favour of Mst. Nasreen Irteza.

3. Besides the above referred plea, it has been admitted on record in their written statement that late Zulfiqar Ali, has left the legal heirs Arif-ul-Islam, Mst. Nasreen Irteza, Saeed Ullah Khan, Abrar Ahmad and Mrs. Shamim Zafar. The learned trial Court after recording the evidence passed a judgment and decree which has been impugned in the instant regular first appeal.

4. Learned counsel for appellants contends that the learned trial Court has not taken care of the defense referred by them, especially the document Exh.D1/1, dated 03.12.2003 which contains the details of usage of the property after the death of late Zulfiqar Ali and the same has been called "Vasiyat" document on record. The appellants in their evidence further contend that the property in question is in possession of the appellants, even the aforesaid document is in their possession and learned trial Court has not declared the status of the property in light of Vasiyat document. The appellants further contend that the impugned judgment and decree is outcome of misconception of law facts and suffers from misreading and non-reading of the record.

5. Conversely, learned counsel for respondents contends that the plaintiffs/appellants have failed to prove their case as they have not tendered the valid evidence on record nor even fulfill the requirements of the Qanun-e-Shahadat Order, 1984 to prove the document Exh.D1/1, therefore, they are not entitled for any such relief. The respondents further contend that the document Exh.D1/1 has never been executed by their late

father Zulfiqar Ali and even the same has never been disclosed or declared in his lifetime, therefore, the entire document is just an afterthought.

6. Arguments heard, record perused.

7. From the perusal of record it has been observed that House No.151, Street No.26, Bella Road, G-10/1, Islamabad is owned by late Zulfiqar Ali who died on 17.05.2004 leaving behind the plaintiffs/appellants and defendants/respondents as legal heirs wherein during the pendency of the suit one of the legal heir plaintiff No.1 Arif-ul-Islam died on 27.04.2012, leaving behind Mrs. Shehzadi Parveen (widow of Arif-ul-Islam), Imran Arif, Junaid Arif (sons) and Ujala Shahid (daughter) as his legal heirs. As per the contents of the plaint, it has been observed that Arif-ul-Islam (late), Abrar Ahmad, Mrs. Shamim Zafar, Mst. Nasreen Irteza and Saeed Ullah Khan are the legal heirs of Mr. Zulfiqar Ali (late). It has further been observed from record that Mst. Nasreen Irteza, present appellant No.1, is divorced and after her divorce she is living in the said house along with her father Zulfiqar Ali (late), however, after the death of Zulfiqar Ali, Mr. Arif-ul-Islam and others filed a suit for possession of partition, permanent and mandatory injunction for the partitioning of the suit property, i.e., House No.151, Street No.26, Bella Road, G-10/1, Islamabad, the said suit was contested by Mst. Nasreen Irteza on the ground that the suit property was declared by Mr. Zulfiqar Ali (late) in his lifetime that in event of his death Mst. Nasreen Irteza would be allowed to occupy and live in the said house till her lifetime and the suit property will not be allowed to sell nor any person will claim their share in the property. The claim of Mst. Nasreen Irteza has also been acknowledged by defendant No.2, brother of present appellant and respondents, Mr. Saeed Ullah Khan, who has also submitted a conceding written statement on record.

8. From the diverse pleadings available on record, learned trial Court has framed the following issues, which are reproduced as under:-

1. *Whether the suit property is joint property? If so, what are the respective shares of the parties? OPP*

2. *Whether the plaintiffs are entitled to permanent injunction restraining the defendants from selling, mortgaging, leasing or changing nature of the suit house in any manner? OPP*
3. *Whether the plaintiffs have no cause of action? OPD*
4. *Whether the suit is not maintainable in its present form? OPD*
5. *Whether the plaintiffs have suppressed material facts from the Court. If so, its effect? OPD*
6. *Whether the plaintiffs are stopped by their words and conduct to bring this suit? OPD*
7. *Whether the plaintiffs' suit is false and frivolous and the defendants are entitled to recover special costs under Section 35-A of CPC? OPD*
8. *Relief.*

After framing of the evidence, Abrar Ahmad has put his appearance as PW-1 in the learned trial Court wherein he categorically stated that he represents the other plaintiffs and their claims are common in the present suit, he also admits before the Court that defendant No.1 and 2 are his real brother and sister. He himself claims that he is attorney of Mrs. Shamim Zafar, the plaintiff No.3 and he has produced the Special Power of Attorney Exh.P1 on record. It has further been observed that late Zulfiqar Ali, the father of plaintiffs and defendants died on 17.05.2004 and after the demise of Mr. Zulfiqar Ali, Mst. Nasreen Irteza remained in possession of the said house, i.e., House No.151, Street No.26, Bella Road, G-10/1, Islamabad, (*hereinafter called the "suit property"*). He further contends that he, after the death of Zulfiqar Ali, requested Mst. Nasreen Irteza to divide the suit property as per Shariah Laws but she has denied the rights of plaintiffs. After the refusal of Mst. Nasreen Irteza for the division of the suit property, the matter was agitated before the Civil Court. He further contends that he has also approached Capital Development Authority but the property could not be transferred in the name of legal heirs as the original allotment letter is in possession of Mst. Nasreen Irteza which was never produced before the CDA, although the CDA authorities have issued a letter to Mst. Nasreen Irteza in this regard. He further contends that the document which has been attached in this suit on behalf of Mst. Nasreen Irteza has never been

executed or signed by her father, late Zulfiqar Ali, nor even the same was in his handwriting. He further contends that Mst. Nasreen Irteza has never paid any rent although the legal heirs are entitled to receive rent of the suit property from the date of death of their father.

9. During the course of cross-examination it has been admitted on record that all the plaintiffs and defendants are the legal heirs of late Zulfiqar Ali and the suit property has never been partitioned, however Mst. Nasreen Irteza has asked the question regarding the document attached with pleadings which was claimed to be executed by the late Zulfiqar Ali but the witnesses have denied the said document and nor even recognized that the document in question was ever executed by late Zulfiqar Ali. PW-1 has submitted the death certificate of Zulfiqar Ali as Exh.P1 and letter dated 17.09.2004 as Exh.P2 and closed the evidence.

10. The appellants have produced Ch. Muhammad Shabbir, Sub-assistant Estate Management-1, CDA, as DW-1, who is a Record Keeper of the CDA, categorically stated before the Court that House No.151, Street No.26, Bella Road, G-10/1, Islamabad, was allotted to late Zulfiqar Ali on 15.05.1979. He further contends that on 19.08.2004, Mr. Abrar Ahmad, the son of the allotee has submitted an affidavit before the CDA authorities that allotee has died and he has referred the details of the legal heirs in CDA record. He further contends that CDA authorities on reply to the said document have issued a letter dated 17.09.2004 to produce the details of ID cards of legal heirs, original allotment letter, certified copy of death certificate along with pay order of Rs.3,000/-, subsequently Abrar Ahmad have produced some of the aforementioned documents before the CDA authorities, however he categorically stated that original allotment letter, NOC BCS and NOC Revenue have never been produced. He further contends that CDA authorities issued a letter dated 02.10.2004 to Mst. Nasreen Irteza for the production of original allotment letter for the purposes of transfer of suit

property but these codal formalities have never been fulfilled. He further contends that another letter dated 02.11.2004 was also issued to the legal heirs to fulfill the requirements within fifteen days, but till date the requirements have not been produced. He has produced letter dated 02.11.2004 as Exh.D1 and letter dated 02.10.2004 as Exh.D2.

11. The other witness, Mst. Nasreen Irteza, has also been produced as DW-1/1 dated 21.11.2012 wherein she contends that the suit property was owned by her father and she was living in the said house along with her father since 1987. She further stated in her cross-examination that she got married on 21.12.1975 and lived in the same house along with her husband as he had no house in his ownership and later on due to some family disputes she got divorced in the year 2003. She further contends that her father died in the year 2004 in the same house and further alleged in the evidence that all the legal heirs divided the belongings of her father without her consultation and that the death certificate of her father has never been given to her. During the course of cross-examination, she admitted that we are three brothers and two sisters, as in sequence, i.e. Arif-ul-Islam (late brother), Mrs. Shamim Zafar (sister), Saeed Ullah Khan (brother) and Abrar Ahmad (brother). She further claims in her evidence that her late father allowed her to live in the said house as she has no other property or plot in her ownership and that as per the Vasiyat of her late father she should have been given a shelter and be allowed in the said house. She has produced document dated 03.12.2003 Exh.DW1 which has been objected by the other side. She admits before the Court that the house in question is in the name of her father and original allotment letter is in her possession. She also admits before the Court that CDA authorities have asked her to submit the original allotment letter for the purposes of transfer of the suit property in the name of legal heirs. She also admits before the Court that all the plaintiffs and defendants are the legal heirs of her father and she also admits in the following words that:-

"یہ درست ہے کہ متوفی کی جائیداد اس کے وارثان میں بحصیت شرعی منتقل ہوتی ہے"

However, she categorically stated before the Court that suit property of her father can only be transferred to the legal heirs after her death. She conceded before the Court regarding the status of the document which has been submitted and claimed to be as Vasiyat document, that:-

"یہ درست ہے کہ اس تحریر کے نیچے میرے والد کا نام موجود نہ ہے"

The document has been objected by the defendants, wherein it has been stated that:-

"چونکہ ڈاکومینٹ کو exhibit کیا جا چکا ہے اس کے contents کے بارے میں سوال نہ کیا جا سکتا ہے"

She also admits before the Court that document Exh.D1/1 was written by her son, Umar Zain, on the dictation of her father and the document was corrected at two different places by her father and the date was written in the handwriting of her father and signed by him, however she admits that the content was in writing of her son. She also admits that at the time of execution of document, her father and her two sons namely Umar Zain and Jibran were also present and that her father was quite well and had no other decease though since he was in his old age, he was not able to write because of trembling hand. She admits before the Court that she is not aware as to when her father has expressed the intention to her brother Abrar Ahmad, however she categorically stated that:-

"ابرار سے ابا نے کہا تھا کہ میں پورا گھر نصرین کو ہبہ کرنا چاہتا ہوں، مکان مذکورہ کا کچھ حصہ میرے والد نے میرے بچوں کے نام ہبہ کیا۔"

But at the same breath she categorically stated that:-

"یہ درست ہے کہ میرے والد نے میرا نام مکان متعدوایہ بطور ہبہ کبھی منتقل نہ کروایا ہے"

She admits before the Court that she never filed any suit regarding the said written document before any Court, however she admits that:-

"یہ درست ہے کہ اس تحریر کی رو سے میں اس مکان کی مالک نہ ہوں"

However, an important question has been asked from DW-1/1, which has been reproduced as under:-

"سوال: کیا یہ درست ہے کہ آپ اس تحریر کی رو سے اس مکان میں بطور وارث حصہ دار ہیں؟

جواب: اس تحریر کی رو سے بھی اور ہر طرح سے میں اس مکان کے وارثان میں ہوں۔ یہ درست ہے کہ میرے بھائی بہن بھی مکان مذکورہ میں بطور وارث حصہ دار ہیں۔ یہ درست ہے کہ میرے بہن بھائی اپنے حصے کے مطابق جائیداد مذکورہ منتقل کرانے کے حقدار ہیں میرے مرنے کے بعد"

She also admits before the Court that she does not remember that her father ever produced the written Vasiyat document in CDA office, however she admits before the Court that she has produced document Exh.D1/1 and she claims that the same is the Vasiyat of her father. Mst. Nasreen Irteza appellant has also produced her son Zain-ur-Rehman as DW-2 before the Court and admitted that he is an attorney of his uncle (Maamu)/defendant No.2 and same is referred as Exh.D2/2, however he reiterated the same claim as of her mother before the Court, though he admits before the Court that:-

"یہ درست ہے کہ میرے نانا کی وفات کے بعد ان کے تمام بیٹے بیٹیاں مکان مذکورہ کے وارث اور حصہ دار ہیں۔"

He also admits before the Court that:-

"یہ درست ہے کہ مدعا علیہ نمبر 2 نے آج تک اپنا حصہ میری والدہ کے نام ٹرانسفر نہ کیا ہے۔ یہ درست ہے کہ مری والدہ اس مکان مذکورہ کی مالک نہ ہیں۔"

FINDINGS ON ISSUES NO.1, 2 AND 5:

12. From the perusal of above referred qualified admissions on record it has been observed that the main contested issues on record are Issues No.1, 2 and 5, wherein the learned trial Court while relying upon the testimony has rightly declared that the suit property belongs to late Zulfiqar Ali and all the plaintiffs and defendants i.e., the present appellants and respondents, are legal heirs of late Zulfiqar Ali and there is no dispute to the status of appellants and respondents being legal heirs of late Zulfiqar Ali. It has also been referred in the impugned judgment and decree that the suit property has never been partitioned. However, the learned trial Court while discussing the status of Exh.D1/1, the Vasiyat document, it has been observed by the learned trial Court that the name of deceased is missing on Exh.D2/1 and the same has not been proved in accordance with law.

13. From the perusal of record, the most important document which comes on record is the document of Vasiyat claimed by the appellants referred as Exh.D1/1, handwritten in English language and the same was not typed, however it has been observed from the contents of the document in question that Mr. Zulfiqar Ali son of Habib Ullah Khan, resident of House No.151, Street 26, G-10/1, Islamabad, claims to be the owner of the said house and it has been written in the said document by late Zulfiqar Ali that after his death her daughter Nasreen Zulfiqar be allowed to occupy and live in the rooms of the house along with necessities of life till her death. In order to understand the concept of will "وصیت" some of the basic principles which have been settled under authoritative judgments of the Apex Court and High Courts are reproduced as under:-

> ***2000 YLR 2937 (Muhammad Asghar etc. vs. Muhammad Din, etc.)***
> *"Will---Validity---Will under Muslim law could not be made validly in favour of an heir unless and until other heirs consented to same both at time of making the will and also after death of testator."*
>
> ***2002 YLR 2895 (Muhammad Shaoib etc. vs. Razia Bibi, etc.)***
> *"Will---Pre-conditions---Bequest to an heir is not valid unless the other heirs consent to the bequest after the death of the testator—Airy single heir may consent so as to bind his own share---Muslim cannot by Will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts---Bequest in excess of the one third cannot take effect unless the heirs consent thereto after the death of the testator."*
>
> ***1995 SCMR 1489 (Abdur Razzaq etc. vs. Shah Jehan, etc.)***
> *"Will---Essentials---Will takes effect after the death of the testator---Will made in favour of an heir is not valid unless consented to by the other heirs of the deceased testator."*
>
> ***1999 SCMR 971 (Zakirullah Khan, etc. vs. Faizullah Khan, etc.)***
> *"Will---No evidence was available to show that the will had been executed by common ancestor with express or implied consent of other heirs---Mere silence of such other heirs for some period would not raise an inference that they had*

> *consented to the will made out whereby their share in the inheritance was substantially reduced."*

Hence in view of above principles, Exh.D1/1 "وصیت" is of no legal effect, especially when appellants have not produced the consent of other legal heirs on record as respondents have lawful share in the property in question and no consent was obtained from them amounts to refusal of status of Exh.D1/1 as of "وصیت".

14. We have gone through the contents of the said document and it has been observed that there is no signature available on record, however a date has been referred at bottom of the said document but the same was not signed although there is some mark referred above the date, i.e., 03.12.2003. It is settled proposition of law that document which creates some rights and disputed by the parties during the course of any proceedings has to be proved in terms of the Qanun-e-Shahadat Order, 1984 which requires at least two attesting witnesses to be produced before the Court, reliance in this regard is placed upon ***PLD 2011 SC 241 (Hafiz Tassaduq Hussain vs. Muhammad Din, etc.)*** wherein it is held that:-

> *".....the agreement in this case was received in evidence without any objection, therefore, it cannot b excluded from consideration, suffice it to say that the submission is wholly misconceived, the said agreement was never tendered in evidence or exhibited, rather was only marked "A". Besides the said rule shall not be applicable to the case which comes within the mischief of Article 79, on account of its language as explained above that such document shall not be used in evidence, therefore, it is the command of the law to exclude it from evidence, until it is admitted to have been executed by the side against whom it is sought to be used and enforced. Moreover, a litigant cannot be precluded to tender a document in evidence through the examination/statement of one attesting witness and at that point of time the opposite side cannot anticipate if the other attesting witnesses shall not be produced, enabling it to raise the objection about the proof there and then, therefore on this account the non raising of the objection at the time when it is tendered in the statement of one of the marginal witnesses or even through the scribe who may come*

> *forward to prove his writing does not make the document admissible."*

It is imperative upon the person claiming benefit to discharge the onus in this regard. Reliance in this regard is placed upon ***2010 SCMR 1351 (Khan Muhammad vs. Muhammad Din)*** wherein it is held that:-

> *"Duty and obligation of beneficiary of document to prove the same in accordance with the provisions of Qanun-e-Shahadat, 1984. Initial burden to prove execution of document is on the party which is relying on the document---Once such onus is discharged, burden to prove factum of fraud or undue influence or genuineness of documents shifts to party which alleges fraud."*

Similarly, reliance is also placed upon ***2015 SCMR 1 (Amjad Ikram vs. Mst. Asiya Kausar, etc.)*** wherein it is held that:-

> *"It is an equally settled principle of law that it is the duty and obligation of the beneficiary of a transaction or a document to prove the same. Reference in this behalf may be made from the judgments of this Court, reported as Akhtar Ali v. The University of the Punjab (1979 SCMR 549), Haji Muhammad Khan and others v. Islamic Republic of Pakistan and 2 others (1992 SCMR 2439) and Khan Muhammad v. Muhammad Din through LRs (2010 SCMR 1351)."*

Borrowing the same contention, reliance is further placed upon ***PLD 2007 Lah 254 (Mst. Sakina Bibi etc vs. Muhammad Anwar alias Mujahid etc.)*** wherein it is held that:-

> *"Arts. 117 & 118---Will---Burden of proof---Initial onus would lie on beneficiary of Will to prove its valid execution---Wrong placement of such initial onus on opposite party would not relieve beneficiary of Will to finally prove a valid Will in his favour."*

Sec.72 of the Qanun-e-Shahadat Order, 1984 provides the proof of contents of document through a primary or secondary evidence, however when a document has been submitted in terms of Article 73 of the Qanun-e-Shahadat Order, 1984, it is necessary that in terms of Article 79, if a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject

to the process of the Court and capable of giving evidence, reliance in this consideration is placed upon ***2013 YLR 2839 (Mst. Khalida Bibi vs. Muhammad Shafi, etc.)*** wherein it is held that:-

> *"The powerful expression "shall not be used as evidence" until the requisite number of attesting witnesses have been examined to prove its execution is couched in the negative, which depicts the clear and unquestionable intention of the legislature, barring and placing a complete prohibition for using in evidence any such document, which is either not attested as mandated by the law and/or if the required number of attesting witnesses are not produced to prove it. As the consequence of the failure in this behalf are provided by the Article itself, therefore, it is a mandatory provision of law and should be given due effect by the Courts in letter and spirit. The provisions of this Article are most uncompromising, so long as there is an attesting witness alive capable of giving evidence and subject to the process of the Court, no document which is required by law to be attested can be used in evidence until such witness has been called, the omission to call the requisite number of attesting witnesses is fatal to the admissibility of the document."*

15. The above stated statutory provisions of the Qanun-e-Shahadat Order, 1984 to prove any document are mandatory in their nature and a document could not be proved without calling the witnesses. In order to understand the entire legal proposition it is necessary to call the author, subscriber, witnesses of the execution and the contents of the document in question, i.e. "وصیت" to verify and prove the document, however in present case Mst. Nasreen Irteza has not produced the witnesses in accordance with the Qanun-e-Shahadat Order, 1984 requirements, she has only produced DW2, her own son, as her witness but the same is incorrect approach as it requires at least two witnesses therefore, any document which is in dispute if not proved in accordance with requirements of Article 17 read with 79 of the Qanun-e-Shahadat Order, 1984, the same stands excluded. Reliance is placed upon PLD 2011 SC 241, PLD 2007 Lah 254 and 2013 YLR 2839 which have been referred above.

16. From the pleadings and the evidence available on record we are of the confirmed view that late Zulfiqar Ali is the owner of suit property and plaintiffs as well as defendants, i.e., appellants and respondents No.1 and 2 are the legal heirs of late Zulfiqar Ali and there is no dispute among their status of being legal heirs of late Zulfiqar Ali, therefore, the learned trial Court has rightly passed the preliminary decree as the stance and plea taken by the appellants have not been proved on record rather they failed to discharge their onus regarding their plea of Vasiyat "وصیت". Hence, the instant regular first appeal is devoid of merit and same is hereby dismissed.

(ATHAR MINALLAH)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Khalid Z.

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