

P L D 1986 Lahore 194

Before Manzoor Hussain Sial and Riaz Ahmad, JJ

Mst. GHULAM SUGHRAN AND OTHERS-Appellants

versus

Sahibzada IJAZ HUSSAIN AND OTHERS-Respondents

Regular First Appeal No. 11 of 1968/BWP, decided on 24th March, 1986.

(a) Muhammadan Law-.

-- Gift-Essentials.

There are three essentials of gifts under the Muhammadan Law

(i) A declaration of gift by the donor.

(ii) An express or implied acceptance of the gift by the donee, and

(iii) Delivery of possession of the gifted property by the donor to the donee.

It is, therefore, necessary to keep them in view while examining the validity of the transactions of gift.

(b) West Pakistan Land Revenue Act (XVII of 1967)-

-- S. 52-Record-of-rights-Presumption of correctness-Presumption of correctness though is attached to entries in record-of rights but such presumption was rebuttable.

Wali Muhammad and others v. Muhammad Bakhsh and others A I R 1930 P C 91 ref.

(c) Muhammadan Law-

-- Gift-Non-production of Revenue Officer who attested mutation or any other witness testifying factum of transaction-Effect.

The non-production of the Revenue Officer who attested the mutation or any other witness testifying the factum of transaction would certainly diminish the evidentiary value of the entries in the revenue' record, in face of the documentary evidence led by the plaintiffs to prove that the donor had been dealing with the property even after the pur ported gift transaction. The mutation proceedings are neither judicial proceedings nor intended or designed to create tale. and at best can be used as evidence in support of the transaction. Neither the delivery of possession by the donor, nor the donee entering into possession of the disputed property under the gift or with permission of the donor ; was proved from the evidence on record. It being a condition prece dent, casts serious doubt to the validity of the gift.

Muhammad Bakhsh v. Zia Ullah and others 1983 S C M R 988 ref.

(d) West Pakistan Land Revenue Rules, 1968-

-- R. 39-Land Administration Manual, para. 383-Muhammadan Law-Gift-Mutation - Duty of Revenue Officer-Entries in record-of-rights-Evidentiary value-Party relying as admission recorded in order of Revenue Officer sanctioning mutation about identity of maker or contents of statement attributed to him has to prove same like any other fact in issue Presumption-Duty of Court.

The Revenue Officer shall note briefly the presence of the parties interested, the persons examined and the facts to which they deposed. The entries in the record-of-rights are no doubt admissible in evidence but their evidentiary value depends on the circumstances of each case, A party who relies on an admission recorded in the order of the Revenue Officer, sanctioning mutation, about the identity of the maker or the contents of the statement attributed to him, has to prove, same like any other fact in issue. The onus lies on the person who wants to establish the genuineness of the transfer. The Court can only presume about the regularity of the official acts performed by the Revenue Officer and not that the same were performed correctly as well. Presumption can only be raised as to regularity in the form and procedure adopted in performance of official and judicial acts, but it cannot be raised about the correctness of decision taken by the Revenue Officer.

Hakim Khan Aurangzeb and others 1979 S C M R 625; Muhammad Aslam v.. Khuda Dad 1982 S C M R 511 ; Shamshad Ali and others v. Syed Hassan Shah and others P L D 1964 S C 143 ; Abdul Ghani and others v. Mst. Taleh Bibi and another P L D 1962 (W.P.) Lah. 531 ; Abdul Ahad and others v. Roshan Din and others P L D 1979 S C 890 and Haji Ghulam Rasool and others v. The Chief Administrator of Auqaf, West Pakistan P L D 1971 S C 376 distinguished,

(e) West Pakistan Land Revenue Act (XVII of 1967)-

-- S. 42-Record-of-rights-Entries in Jamabandis are relevant and admissible in evidence-Evidentiary value, however, depends upon circumstances of each case, for, entries in record-of-rights do not create title.

(f) Muhammadan Law-

-- Gift-Donor through mutation gifted land to donee-Donor himself appeared before Revenue Officer and made a declaration that he had transferred said land by way of gift to donee-Land, at relevant time, was Ghair Mumken Khandar and in occupation of tenants-Donor himself visited said land and disclosed that he had gifted land to donee and directed tenants to attorn donee Revenue record showing that after attestation of mutation, donee was recorded as owner of property-No evidence was led to show that donor had no intention to make gift of property in favour of donee-Land being 'Ghair Mumkin Khandar' in occupation of tenants, could validly he gifted, by a declaration of donor -Donor, in order to transfer gifted property to donee, held, had done what possibly he could do in circumstances-Gift, there fore, was complete in all respects.

(g) Muhammadan Law-

-- Gift-Agricultural land-Mutation was not entered at instance of donor nor was attested by Revenue Officer in presence of donor or donee-Neither Revenue Officer nor person who got mutation registered allegedly on behalf of donor appeared before Court to testify transaction-Evidence on record showed that donor had been visiting land even after attestation of mutation in favour of donee-Subsequent entries in revenue record showed that donor remained co-owner of his share of said property with donee-Lessee of land deposing that donor remained in possession of land through out his life and he paid lease money to him for his share in land Statement of such lessee inspiring confidence-Other witnesses also corroborating statement of lessee but were not cross-examined regarding factum of gift having been made by donor in favour of donee in respect of said property-Fact that there was no reliable evidence on record showing that donor made a declaration alienating land and same was accepted by donee before Revenue Officer raised serious doubt about

genuineness of transaction-Mere entries in revenue record, could not prove transaction and created no title in favour of donee-No valid gift, held, was made by donor in respect of property in favour of donee in circumstances.

(h) Muhammadan Law-

--- Gift -Residential property-Nothing else on record was available to prove gift of property having been made by donor in favour of donee except statement of an interested witness and a notice published in a local weekly paper-Statement of witness was found to be factually incorrect and remained uncorroborated-Original of notice published in weekly not brought on record-Evidence on record showed that donor remained in possession of property during his lifetime-Execution of notice, by donor having not been proved and its contents being also partially incorrect. possibility that it was published at the instance of someone else, than the alleged donor could not be ruled out-No valid gift, held, was made by donor in favour of donee in circumstances.

(i) Limitation Act (IX of 1908)-

- Art. 144-Adverse possession-Owner remained in possession of property and enjoyed profits accruing therefrom-Question of adverse possession by his successor or someone else, held, would not arise.

(J) Civil Procedure Code (V of 1908)-

-- S. 11-Res judicata-Previous suit admittedly was withdrawn and not dismissed on merits-Dissmissal of previous suit, held; could not operate as res judicata in circumstances.

(k) Civil Procedure Code (V of 1908)-

-- S. 11-Res judicata-Subject-matter of previous suit being different, principle of, res judicata, held, could not be pressed into service for fresh suit.

(l) Civil Procedure Code (V of 1908)-

-- O. I, r. 3-Dispute as to property-Non-impleading as party of a person who got such property in exchange and against whom no relief was claimed -Non-impleading of such person, held, would not render decree ineffective as against property in dispute.

M. M. Bhatti and M. M. A. Pirzada for Appellants.

A. A. Bhatti for Respondents Nos. 1 and 6.

Muhammad Ghani Khan for Respondent No. 2.

Mian Allah Nawaz for Respondents Nos. 3 to 5.

S. M. Aslam Khan for Respondent No. 7.

Dates of hearing : 27th, 28th, 29th and 30th October and 2nd, 4th and 5th November, 1985.

JUDGMENT

MANZOOR HUSSAIN SIAL. J.-By this judgment we proposed to dispose of this appeal and connected appeal No. 27 of 1908/BWP preferred in this Court, to assail the validity of judgment and decree dated 11th June, 1968 passed by Ch. Fazal Karim, Administrative Civil Judge, Bahawalpur.

2. To understand the precise nature of the dispute and the position of the parties, it would be useful to give hereunder the pedigree-table of the family, from its founder Sahibzada Maroof Khan.

Sahibzada
Maroof Khan

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Mohd. Yar Ahmadyar Sikandar
Khan Khan Khan

Zahoor Ghulam Murad Fakhri Faiz
Elabi Sughran Begum Jehan Elahi
Phapho Nawab Bibi

Surraya
Begum

|

Wafa Begum Mohd. Sahibyar
Yusuf I

Wajeeda
Begum

Farhat Khurshid
Begum Begum

Azeemyar Muhammad
Maroof
Nasim Shamim
Akhtar Akhtar

Shehryar Ashiq Khurshid Rashida
Hussain Begum Begum

Sadaryar

Zubaida Shehzad
Begum Begum

3. Sahibzada Muhammad Yar (hereinafter called the 'donor'). at one time was owner in possession of substantial urban and rural immovable property, situate in Districts Bahawalpur and Rahimyarkhan. The dispute. however, in this case, relates only to his following properties :-

- (1) Land measuring 91 Kanals 14 Marlas with garden situate in Mauza Dera Izzat, Tehsil and District Bahawalpur.
- (2) Residential bungalow situate in Mauza Dera Izzat, Tehsil and District Bahawalpur.
- (3) Land measuring 34 Kanals 2 Marlas situate in Mauza Aghapur, Tehsil and District Bahawalpur.
- (4) House bearing No. B-11-99, situate inside Multani Gate, Bahawalpur.
- (5) Land measuring 851 Kanals 4 Marlas situate in Mauza Katchi Jamal Bhinda, Tehsil Khanpur, District Rahimyarkhan.
- (6) Land measuring about 2 Bighas situate in Mauza Khanpur, District Rahimyarkhan.

In the year 1944 he alienated by way of "Tamleek" the properties mentioned at S. Nos. 1, 2, 4, 5 and 6 in favour of his brother Ahmadyar Khan. Similarly on 27th April, 1947 he transferred property mentioned at S. No. 3 in favour of Ashiq Hussain son of Ahmadyar Khan. On 18th February, 1947 Ahmadyar Khan donee died and thereafter the donor also passed away on 15th November, 1953. The properties mentioned at S. Nos. 1 and 2 devolved upon Ashiq Hussain and mutation of-inheritance No. 238 was attested in his favour. Ashiq Hussain on 28th July, 1956 further transferred the afore-mentioned properties in favour of his wife (Mst. Wajeeda Begum) vide mutation No. 166 in lieu of her dower. Similarly on 7th September, 1956 vide mutation No. 446 he transferred property mentioned at S. No. 5 in her favour. Mst. Wajeeda Begum, sold property mentioned at S. No. 4 in favour of Khuda Bakhsh and exchanged property situate in Mauza Khanpur District Rahimyarkhan with one Abdul Hamid who in turn gave it to his brother Muhammad Siddiq.

4. Mat. Ghulam Sughran widow, Mst. Wafa Begum daughter, Mst. Shamim Akhtar and Mst. Naseem Akhtar grand-daughters of the donor (hereinafter referred to as plaintiffs) as heirs of the donor on 18th October, 190, instituted a suit for joint possession of 24/48 share of the afore mentioned properties against Ashiq Hussain and others. The plaintiffs maintained that the donor alienated the afore aid properties in favour of Ahmadyar Khan and Ashiq Hussain (hereinafter referred to as donees) ostensibly by way of "Tamleek" but in fact were sham transactions. The donor during the entire span of his. he did not divest himself of his right of ownership in tote properties and utilised the produce and profits derived, therefrom for his own benefit. At one time Sahibzada Ashiq Hussain admitted before "Brothers" that he was holding donor's property as 'Ameen' and executed document (Exh. P/3) in that behalf but afterwards changed his mind and sold House No. B-II-99, Multani Gate, Bahawalpur, in favour of Khuda Bakhsh defendant.

5. The suit was contested by defendants Nos. 1 to 6. Out of them Ashiq Hussain, Wajeeda Begum his wife and Mst. Zahoor Elahi his mother filed joint written statement while Shehryar, Sadaryar sons and Mst. Khurshid Begum widow of Sahibyar defendants filed separate written state ment. Khuda Bakhsh defendant was proceeded ex parte. It is noteworthy. that Mst. Khurshid Begum defendant is sister of Ashiq Hussain defendant No. 1. The averments made in the plaint were controverted and several objections were raised in the written statements filed by the defendants. It was inter alia pleaded that the donor had bona fide alienated the proper ties in dispute in favour of the donees. He had completely divested himself- of the right of ownership in the properties and banded over possession thereof to the donees. It was also pleaded that the suit was barred by time and the donees became owners of the properties being in adverse possession thereof.

To determine the dispute between the parties the learned trial Court framed following issues:-

- (1) Did not Sahibzada Muhammad Yar deceased predecessor-in-inter est of the plaintiffs in fact gift away the property Nos. 1, 2, 4, 5 and 6 described in the heading of the plaint in favour of Sabibzada Ahmad Yar ? OPP.

(2) Did not Sahibzada Muhammad Yar deceased gift away the property described at No. 3 of the plaint in favour of Ashiq Hussain defendant No. 1?

(3) Did Muhammad Yar deceased remain in possession of the property in dispute as owner during his lifetime ?

(4) Is the suit within time ? OPP.

(5) Are plaintiffs Nos. 3 and 4 major, if so, what is its effect? OPD.

(6) If gift is not proved have the defendants remained in adverse possession of the property in dispute for a period of more than twelve years ?

(7) Is the suit barred by res judicata? OPD.

(8) Is Muhammad Siddique necessary party to the suit being a transferee of property described at No. 6 from defendant No. 2 ? OPD.

(9) Is the suit with respect to property described at Nos. 5 and 6 competent in this Court ? OPP.

(10) Is the suit correctly valued for purposes of court-fees and jurisdiction ?

(11) Is Ashiq Hussain not a necessary party to the suit ? OPD.

(12) Is Msr. Wajeeda Begum defendant No. 2 transferee of the property Nos. 1, 2, 3, 5 and 6 in lieu of dower from defendant No. 1, if so, what is its effect ?

(13) Relief.

6. The learned trial Judge after evaluating evidence on the record, found that the donor made no valid gift in respect of properties mentioned at S. Nos. 1, 2, 4 and 6 but held otherwise in regard to properties mentioned at S/Nos. 3 and 5 and decided issues Nos. 1, 2, 3 and 6 accordingly. As for the rest of the issues, he held that neither the suit was barred by limitation nor it was hit by principle of res judicata, the suit in respect of properties mentioned at S. Nos. 5 and 6 maintainable in his Court ; Ashiq Hussain was held necessary party to the suit, while the presence of Muhammad Siddiq was considered not necessary for the decision of the suit. Mst. Wajeeda Begum being transferee of the property in dispute from Ashiq Hussain would succeed or fail with him; the suit was held correctly valued for the purposes of court-fee and jurisdiction.

On the basis of the afore-mentioned findings he decreed the suit for joint possession in part to the extent of 24/48 shares in the properties described at S./Nos., 1, 2, 4 and 6 and dismissed the suit regarding the rest of the properties.

7. The plaintiffs on the one hand, and defendants Nos. 1, 2 and 6, on the other, preferred these cross appeals against the impugned judgment and decree of the learned trial Court.

8. Messrs Muhammad Ghani, Advocate and Asghar Ali Bhatti, Advocate, learned counsel for Ashiq Hussain and other defendants did not seriously contest issues Nos. 5, 9, 10, 11 and 12 and vehemently assailed the

findings of the learned trial Court on other issues. They attacked the impugned judgment and decree only on four-fold grounds :-

The first and principal question raised before us was that the learned trial Judge was wrong to hold that gift made by the donor in respect of properties Nos. 1, 2, 4 and 6 was invalid. It was contended that from evidence on the record it was established that the donor alienated the properties in dispute by way of 'Tamleek' to the donees. They were put in possession of the properties and even otherwise matured their title by adverse possession. The donor in some cases himself appeared before the Revenue Officer, made a declaration and parted with possession of the properties.

9. It was contended that the burden of proof lay on the plaintiffs to prove that the donor did not part with possession of the disputed properties. The donor during his lifetime did not revoke the gift. It was not possible for his heirs to avoid the consequences of gift made by their predecessor. It was further submitted that the entries in the record-of-rights carried presumption of truth and could not have been summarily brushed aside. He cited in support of his submissions *Hakim Khan v. Aurangzeb* and another (1979SCMR625), *Muhammad Aslam v. Khuda Dad* (1982SCMR 511), *Shamshad Ali and others v. Syed Hassan Shah and others* (P L D 1964 S C 143), *Abdul Ghani and others v. Mst. Taleh Bibi and another* (P L D 1962 (W.P.) Lah. 531), *Abdul Ahad and others v. Roshan Din and others* (P L D 1979 S C 890) and *Haji Ghulam Rasool and others v. The Chief Administrator of Auqaf, West Pakistan* (P L D 1971 S C 376).

The second point urged by learned counsel was that the suit was barred by time.

The third point agitated before us was that the suit was barred by principle of *res judicata* as against plaintiffs Nos. 3 and 4, whose predecessor in-interest had challenged the alienation of properties in dispute through suit which had been dismissed.

The last point argued before us was that Muhammad Siddiq was necessary party to the suit and no effective decree could be passed, in respect of property No. 6, in his absence.

10. Mian Allah Nawaz, Advocate appeared on behalf of respondents No. 3 to 5. They did not support the case of respondents Nos. 1, 2 and 6 contrary to their stand in the pleadings. They rather supported the case of plaintiffs. Learned counsel representing them contended that possession of the disputed properties did not pass to the donees. The mere entries in revenue record could not adversely affect, the interest of co-heirs nor could discharge burden which heavily lay on respondents Nos. 1, 2 and 6 to prove that valid transactions of gift in respect of the disputed properties had taken place in their favour. It was contended that the initial stand taken up by respondents Nos. 3 to 5 in the written statement would not bind them because admission made under mistaken belief of the real facts would neither operate estoppel nor acquiescence against them. He relied on *Ahmad Khan v. Rasool Shah and others* (P L D 1975 S C 311) and *K. Kochunni alias Muppil Nayar v. K. Kuttanunni alias Flare Nayar and others* (P L D 1947 P C 344) in support of his submission.

11. Sardar Muhammad Aslam Khan, Advocate representing respondent No. 7 contended that the disputed house situate in Multani Gate, Bahawalpur was never transferred to him and was in fact alienated in favour of his sons, who having been not impleaded as defendants in the suit, no effective decree could be passed against them.

12. Mr. M. M. Bhatti, Advocate, learned counsel for the plaintiffs controverted the submissions made by learned counsel for the opposite side. It was submitted by him that the donees did not obtain possession of the disputed property with permission of the donor. It was submitted that except for the land situate in Mauza Aghapur there was nothing on the record to show that the tenants, had ever attorned the donees. Neither the Revenue Officer who attested the mutations nor any one else, was examined to prove the factum of gift or

delivery of possession of the property in dispute. He relied on *Shamshad Ali Shah and others v. Syed Hassan Shah and others* in this behalf. It was contended that the entries in the revenue record are not foundations of title but only items of evidence. In support of his submission he relied on *list. Bibi Alukhtar v. Mst. Amreezan and another* (P L D 1968 Pesh. 169), *Muhammad Bakhsh v. Zia Ullah and others* (1983 S C M R 988), *Muhammad and others v. Sardul* (P L D 1964 (W: P.) Lah. 431) and *Wali Muhammad and others v. Muhammad Bakhsh and others* (A I R 1934 P C 91). It was argued that where the transfer of property is evidenced by mutation the burden lies on the person who wants to establish genuineness of transfer or in whose favour mutation stands sanctioned, to prove the factum of transaction. It was next submitted that the transaction of mutation pertaining to land situate in Mauza Katchi Jamal Bhinda, Tehsil Khanpur, District Rahimyar Khan was neither entered nor attested in presence of donor and the donees. Neither the Halqa Patwari who entered the mutation nor the Revenue Officer who attested the mutation was produced to prove the validity of the transaction. The mutation was attested in violation of the requirements of rule 39 of the Land Revenue Rules read with paragraph 383 of the Land Administration Manual. It was submitted that it is in evidence that during the last days of his life, the donor was residing with Mst. Wajeeda Begum his daughter, who is wife of Ashiq Hussain donee; the possibility that influence was exercised on him which dominated his will cannot be ruled out in the circumstances of the case. He relied on *Nawab and others v. Allah Rakhha and others* (1977 S C M R 193) in this behalf. It was next argued that a co-sharer and a co-heir cannot acquire title by adverse possession unless hostile possession is established through evidence on record. In this regard learned counsel referred to *Mst. Omai and others v. Hakeem Khan and others* (1970 S C M R 499), *Abdur Rauf Khan and another v. Firm Babu Munir Ghulam Siddique Peshawar and others* (1970 S C M R 594), *Muhammad Hakim v. Sher Alam* (1973 S C M R 284), *Bacha Mian v. Sebura Khatoon and others* (P L D 1959 Dacca 655), *Noor Ahmad v. Mst. Hubab Jan and others* (P L D 1974 S C 78) and *Ayaz v. Makai and another* (P L D 1952 Pesh. 70).

Learned counsel also controverted the objection that the suit was barred by limitation or that it was hit by principle of *res judicata*.

13. It may be noticed that issues Nos. 1, 2 and 3 inter alia, relate to the transactions of gift, and transfer of possession of the disputed properties under the gift. They are relevant to the first point raised by learned counsel for Ashiq Hussain and others, we, therefore, propose to deal with these issues together. The rest of the issues pressed by learned counsel for Ashiq Hussain and other; relating to other questions, will however, be dealt with separately.

Issues Nos. 1, 2 and 3:

14. It is significant to note that properties mentioned at S/Nos. 1, 3 and 5 were gifted through mutation whereas properties Nos. 2, 4 and 6 were gifted through other documents. It appears appropriate to take up first, the properties, gift whereof was evidenced by mutations. Before, dealing with the transactions of & qua different properties, it is needless to point out that there are three essentials of gifts under the Mohemdan Law :-

- (i) A declaration of gift by the donor ;
- (ii) An express or implied acceptance of the gift by the donee, and
- (iii) Delivery of possession of the gifted property by the donor to the donee.

It is, therefore, necessary to keep them in view while examining the validity of the transactions of gift.

15. As described in para, 3 above, property No. 1 comprises 91. Kanals 14 Marla; of agricultural land with garden thereon. situate in Mauza Dern Izzat, Tehsil & District Bahawalpur. It was purportedly gifted by

Muhammad Yar Khan through mutation No. 162 (Exh. P. 6) to his brother Ahmad Yar Khan. The mutation was entered on 22-7-1944 at the instance of the donor. On 24-7-1944 the donor himself appeared before the Revenue Officer, and was identified by the latter. The donor admitted the factum of gift and change of possession. Tote matter was, however, adjourned to 25-9-1944 on which date neither the donor nor the donee appeared before the Revenue officer, nevertheless the mutation was attested.

At the trial, neither the Revenue Officer nor any one else who was present on the day, the mutation was attested appeared to testify the factum of transaction. It is in evidence that the donor and the donee were co sharers in the land out of which the land in dispute was gifted to the donee. The entries in, the mutation register, later on were reflected in record-of-rights. Learned counsel referred to mutation of inheritance No. 238 (Exh. p./9) attested in favour of Ashiq Hussain on the demise of the donee and mutation No. 266 dated 28-7-1956 (Exh. P. 11) whereby Ashiq Hussain transferred the property in dispute in favour of his wife in lieu of dower. Reference was also made to the statement of Ghulam Rasul (D. W. 5) Lambardar of the village who had been receiving land revenue from Ashiq Hussain. The precise contention raised in this behalf, was that the donor had parted with possession of the disputed property and the entries in the record-of-rights showing the donee and his successors in possession thereof, carried presumption of truth which could not be ignored.

16. The plaintiffs on the contrary relied on document Exh. P./2 which is a receipt issued by the donor in the year 1947 for sale of garden fruit to Muhammad Nawaz (P. W. 3) and Shah Muhammad (P. W. 4) lessees. The contention raised by the plaintiffs was that the donor remained in possession of property and derived benefits therefrom, even after, the alleged transaction of gift. They further relied on the oral depositions of Muhammad Nawaz and Shah Muhammad P. Ws. to prove that the receipt was executed by the donor himself. The learned trial Judge relied on the evidence led by the plaintiffs and held that the donor had no 'bona fide intention to divest himself of the ownership of disputed properties as he remained in possession, thereof, even after the purported gift and utilised produce and profits therefrom.' It is no doubt true that presumption of correctness is attached to the entries in the record-of-rights but the presumption is rebuttable. In *Wali Muhammad and others v. Muhammad Bakhsh and others* their Lordships of the Privy Council held :-

"The entries relied on by the appellants were not the foundation of their title but were mere items of evidence adduced by them to prove the sale. The only question as regards the entries is their evidentiary value on the fact in issue, viz., the sale."

The non-production of the Revenue Officer who attested the mutation or any other witness testifying the factum of transaction would certainly diminish the evidentiary value of the entries in the revenue record, in face of the documentary evidence led by the plaintiffs to prove that the donor had been dealing with the property even after the purported gift transaction. It goes without saying, that the mutation proceedings are neither judicial proceedings nor intended or designed to create title, and at best can be used as evidence in support of the transaction. In the instant case, neither the delivery of possession by the donor, nor the donee entered into possession of the disputed property under the gift or with permission of the donor ; is proved from the evidence on record. It being a condition precedent, casts serious doubt to the validity of the gift.

17. In *Muhammad Bakhsh v. Zia Ullah and others* the Supreme Court has elaborately dealt with this question and ruled as follows :-

"Such a transaction must satisfy the legal requirements and it is only when its conformity to law is established that title to property is created, legal rights and liabilities come into existence. If the very substratum of the entries of the revenue record is found to be defective, deficient, or wanting, the entries of the revenue record cannot create title in property or give rise to rights and liabilities as is claimed by the appellants."

Apparently the mutation in question did not meet the requirements of the relevant rule 39 of the Land Revenue Rules, read with para. 383 of the Land Administration Manual, which envisage that the Revenue Officer shall note briefly the presence of the parties interested, the persons examined and the facts to which they deposed.

The entries in the record-of-rights are no doubt admissible in evidence but their evidentiary value depends on the circumstances of each case. It is well established, that a party who relies on an admission recorded in the order of the Revenue Officer, sanctioning mutation, about the identity of the maker or the contents of the statement attributed to him, has to prove, like any other fact in issue. The onus lies on the person who wants to establish the genuineness of the transfer. The Court can only presume about the regularity of the official acts performed by the Revenue Officer and not that the same were performed correctly as well. Presumption can only be raised as to regularity in the form and procedure adopted in performance of official and judicial acts, but it cannot be raised about the correctness of decision taken by the Revenue Officer.

It is noteworthy that the lessees themselves went to the donor and not to Ashiq Hussain for lease of the garden, which shows that the donor was himself dealing with the garden and the land. Moreso, when as per testimony of Muhammad Nawaz P. W. 3 even the receipt was written by the donor himself. The lessees (P. W. 3 and P. W. 4) being independent witnesses were rightly relied by the learned trial Judge to hold that the donor had no intention to divest himself of the ownership of the property in dispute in his life.

It is perfectly clear to us that the finding of the learned trial Judge in this behalf is in accordance with the evidence on record.

18. The authorities cited by learned counsel for Ashiq Hussain and others, in this behalf are distinguishable.

In Hakim Khan's case, the donor was guardian of minor donees and Lambardar of the village. the transaction of gift made in favour of minor donees was held not invalid due to lack of the delivery of possession. It was further held that entries in Jamabandies carry statutory presumption of truth. There can be no cavil with the proposition that entries in Jamabandies carry presumption of correctness, but certainly are not conclusive evidence of facts purportedly recorded therein.

Similarly in Muhammad Aslam's case, it was held that entries in Khasra Girdawari, are presumed to be correct, but do not have the same degree and statutory force as for entries in the annual Revenue Record. As pointed out above the presumption of correctness is to the form and procedure followed by revenue official and not to the actual position. The onus to prove lies on the person who claims the entries to be genuine.

Shamshad Ali Shah's case, is also not helpful to the contesting defendants, because, in that case, there was a registered gift deed and a recital in the deed about the delivery of possession, which was considered not sufficient proof of the delivery of possession of the disputed property.

In Abdul Ghani and others' case, one Allah Bakhsh died in the year 1936 leaving behind his mother, Mst. Taleh Bibi, his daughter Mst. Naziran Bibi, Mst. Kaki and Mst. Mehr Bibi sisters. The land owned by Allah Bakhsh was mutated in favour of Mst. Naziran Bibi in the year 1937 and remained in her possession. The mutation was not assailed by any other relative of the deceased. However, in the year 1953, Abdul Ghani and other heirs of Mst Kaki sister of Allah Bakhsh deceased, instituted a suit for declaration that they were owners of the land in dispute as Mst. Taleh Bibi had relinquished her claim in their favour. the suit was dismissed having been filed after lapse of 12. years from the date of mutation and Mst. Naziran Bibi having become full owner by reason of adverse possession. Mst. Taleh Bibi supported the case of the plaintiffs but it was held that since she had voluntarily agreed to the mutation of the whole land in favour of Mst. Naziran

Bibi, she was estopped by her conduct to change her stand. It was further held that plaintiffs who claimed through Mst. Taleh Bibi had no better position to dispute the title of Asst. Naziran Bibi.

It may be noted that in the instant case Muhammad Yar donor has been held to be in possession of the disputed property except property No. 3, during his lifetime. The question of donees having been in adverse possession of the disputed property during his lifetime could not arise. Even if it is assumed, that the donee or his successors remained in possession of the disputed property after the death of the donor. the suit having been brought by the plaintiffs within 12 years from the date of his death was within time. Ashiq Hussain or his successors did not: acquire title in respect of the disputed property by prescription.

In Abdul Ahad's case, one Ghulam Din died, and dispute of inheritance arose among his heirs. Roshan Din and others instituted suit that they were owners in possession of the suit land as heirs of Ghulam Din propositus. The suit was contested and plaintiffs' claim that they were heirs of Ghulam Din was denied by the defendants. The Supreme Court observed that Ghulam Din in his lifetime had produced a pedigree-table before the Revenue Officer and mutation based on that pedigree-table was sanctioned; which was reflected in subsequent Jamabandies. It was held that the mutation containing the pedigree-table to show relationship between the heirs was relevant and could not be brushed aside as presumption of correctness is attached to the entries in the Jamabandies.

It is true that the entries in the Jamabandies are relevant and admissible in evidence. Their evidentiary value, however, depends upon the circumstances of each case, because, the entries in record-of-rights do not create title.

In Ghulam Rasool's case, it was held that Mujawars of Hazrat Data Ganj Bakhsh Sahib who had by their conduct allowed the disputed properties to be shown in the relevant record to belong to holy shrine unaltered for nearly 79 years cannot be allowed to say that they did so under some erroneous impression or that their admission does not represent the true state of facts. It was further held that entries in the mutation register are by themselves not conclusive evidence of the facts, which they purport to record, but they are, nevertheless not unimportant pieces of evidence about facts. In the instant case, however, the question of estoppel cannot be pressed into service because the right to sue in favour of the plaintiffs accrued only after the death of the donor and they instituted the suit within the period prescribed under the law. As afore said the entries in the mutation register, are no doubt admissible in evidence but not conclusive evidence of facts which they record.

19. Learned counsel for the parties cited sufficient case-law on the subject including some precedents of Indian jurisdiction, but it is not necessary to refer them in this judgment because in our view, the same are irrelevant or nothing turn on them.

20. We now revert to Property No. 3, which comprises 34 Kanals 2 Marlas of land situate in Mauza Aghapur, Tehsil and District Bahawalpur. The donor through mutation No. 29 on 27-4-1947 gifted this land to Ashiq Hussain defendant. The donor himself appeared before the Revenue Officer and made a declaration that he had transferred, this land by way of gift to Ashiq Hussain. At the relevant time, it was 'Ghair Mumkin Khandar' and in occupation of tenants. Rahim Bakhsh (D. W. 10) deposed that the donor himself visited the land and disclosed that he had gifted the land to Ashiq Hussain and directed to attorn him. Allah Bachaya another witness also deposed that the donor in his presence instructed his father Muhammad Bakhsh to attorn Ashiq Hussain. The revenue record produced by the parties shows that after the attestation of mutation Ashiq Hussain had been recorded as owner of the property in dispute. The plaintiffs led no evidence to show that the donor had no intention to make gift of the property in question in favour of Ashiq Hussain. The land in dispute being 'Ghair Mumkin Khandar' in occupation of tenants could validly be gifted, by a declaration of the donor. In order to transfer this property to the donee, the donor had done what possibly he could do.

In our estimation, the gift, in regard to this property was complete in all respects. The finding of the learned trial Judge in this behalf is) correct and, therefore, maintained.

21. We come now to Property No. 5. It comprises agricultural land measuring 851 Kanals and 5 Marlas situate in Mauza Katchi Jamal Bhinda, Tehsil Khanpur, District Rahimyarkhan. The donor vide mutation No. 270 dated 7-8-1944 purportedly gifted away this property to the donee. It may be pointed out that this mutation was neither entered by Patwari at the instance of donor, nor was attested by Revenue Officer in presence of the donor or the donee. It appears that on 26-4-1944 one Munshi Allah Dawaya got this mutation entered by making statement to the effect ; that the donor by way of 'Tamleek' alienated his entire land in favour of the donee. On 1-5-1944 he appeared before the Revenue Officer and stated that the donor was resident of Bahawalpur and got issued interrogatories and unusually the interrogatories were handed over to him. On 7-8-1944 he re-appeared before the Revenue Officer and mutation to the extent of 7/16 shares in the land in dispute was attested in favour of the donee.

At the trial neither the Revenue Officer nor Allah Dawaya appeared to testify the transaction. It is in evidence that the donor had been visiting the disputed land even after the attestation of the aforesaid mutation in favour of the donee. The subsequent entries in the revenue record, however, show that the land in dispute remained in possession of the owners, the donor remained co-owner to the extent of 1/16 share with the donee. This land remained on lease at one time with Ghulam Raza (P. W. 1) as admitted by Ghulam Sarwar (D. W. 4) in his cross-examination. Ghulam Raza (P. W. 1) deposed that the donor remained in possession of the disputed property throughout his life and he paid lease money to him and Ashiq Hussain up to 1950. The statement of Ghulam Raza (P. W. 1) inspires confidence and was wrongly discarded by the trial Judge. Allah Rakhia (P. W. 5) and Jamal Muhammad (P. W. 6) corroborated his testimony. These witnesses were not cross-examined regarding the factum of gift having been made by the donor in favour of the donee in respect of the disputed property. The fact that there is no reliable evidence on the record showing that the donor made a declaration alienating the land in dispute and the same was accepted by the donee before the Revenue Officer, raises serious doubt about the genuineness of the transaction, particularly when Ashiq Hussain failed even to produce Munshi Allah Dawaya at the trial to testify the validity of gift. The fact that once the name of the donee was got recorded to the column of ownership, it had to be carried as such, in the subsequent Jamabandies. The mere entries in the revenue record, in our view, did not prove the transaction and created no title in favour of the donee. The learned trial Judge misconstrued evidence on record to hold that the transaction of gift in respect of this land was complete. We, therefore, set aside his finding and hold that there was no valid gift made by the donor in respect of this property in favour of the donee.

22. We now take up properties Nos. 2, 4 and 6

"(i) Property No. 2 is a bungalow in the garden situate in Mauza Dera Izzat, Tehsil and District Bahawalpur.

(ii) Property No. 4 is a house situate in Multani Gate, Bahawalpur, and

(iii) Property No. 6 is land measuring about 2 bighas situate in Mauza Khanpur."

There is nothing on the record to prove the gift of the aforesaid properties having been made by the donor in favour of the donee except the statement of Ghulam Haider Shah (D. W. 12) and a notice published in the weekly 'Kianat' Bahawalpur, at the instance of the donor. Ghulam Haider Shah (D. W. 12) deposed that the donor gifted away his entire property in favour of the donee in his presence and possession of the properties was also delivered to the donee. This statement ostensibly has little evidentiary value as it is factually incorrect. The donor admitted did not gift away his entire property in favour of Ahmadyar Khan done as he had gifted part of the property in favour of Ashiq Hussain. Beside, no one else corroborated his statement. He

admitted that he was 'Pir' of Ashiq Hussain's sister. He being an interested witness, his testimony is not reliable.

The original of the notice published in the newspaper was not brought on the record. Wali Ullah Ohad (D. W. 7), Editor weekly 'Kianat' Bahawalpur deposed that notice was published, in the newspaper on its receipt in the office. In the absence of original notice, it is difficult to hold that the notice was signed by the donor or that it was published at his instance. Wali Ullah Ohad did not state that the donor had visited his office and signed notice in his presence which was later on published, in the weekly newspaper. Ashiq Hussain no doubt has stated that the donor himself had gone to the office of weekly newspaper, and got the notice published but admitted in cross-examination that notice was not written in his presence. His testimony also lacks corroboration, on this point. As the execution of the notice, by the donor could not be proved and its contents being partially incorrect, the possibility that it was published at the instance of some one else, than the donor cannot be ruled out.

23. Moreover, the copies of judgments Exh. P/13 and Exh. P/14 show that Ashiq Hussain earlier filed a suit for possession of house situate in Mohallah Maroof Khan and relied on an unregistered gift deed dated 24-7-1944 allegedly executed by the donor in respect of the disputed properties. The suit was however, dismissed being based on unregistered document relating to transaction of gift made in favour of the donee. Ashiq Hussain did not produce that material document, in absence whereof, it is not proved, that the donor made declaration with bona fide intention to divest himself of his ownership of the properties in dispute.

24. In our opinion the alleged transaction of gift in respect of the aforesaid properties made by the donor in favour of the donee is not established. This view finds supports from evidence on record that the donor remained in possession of property No. 2 during his lifetime. Ghula Raza and Jamal Muhammad P. Ws. and Muhammad Siddiq, Ghula Rasool and Ghulam Haider D. Ws. admitted that they had seen the donor living in the bungalow situate in Mauza Dera Izzat. We are, therefore, inclined to uphold the findings of the learned trial Judge in respect of the aforesaid properties, that there was no valid gift made by the donor in favour of the donee.

Issues Nos. 4 and 6:

25. As has been found from evidence on record that the donor remained in possession of the properties in dispute except Property No. 3 and enjoyed profits accruing therefrom during his lifetime, the question that Ashiq Hussain or his successors remained in adverse possession thereof does not arise. Ashiq Hussain and others even otherwise failed to prove that they had been in adverse possession of the properties in dispute continuously for 12 years and their possession was hostile to the knowledge of the plaintiffs. The donor admittedly died in November, 1953, and the plaintiffs instituted the suit on 18th October, 1965, the suit was, therefore, filed within time. In case of Property No. 5 even after the demise of the donor a portion of the same was mutated in favour of the heirs of the donor; Ashiq Hussain being co-sharer and co-heir would be deemed to have held the land in dispute on behalf of other heirs. The findings of the learned trial Judge on these issues are in accordance with evidence on the record and thus maintained.

Issue No. 7:

26. As for the question, that plaintiffs' suit was barred by principle of res judicata, it is pointed out that previous suit filed by Sahib Yar Khan and Muhammad Yusuf, sons of donor, was for specific performance of agreement (Exh. P/3) wherein Ashiq Hussain declared himself to be 'Amin' of the properties of donor. The suit was later on withdrawn on 9-9-1961 by Muhammad Yusuf, the predecessor-in-interest of plaintiffs Nos. 3 and 4. Mst. Sughran Bibi and Mst. Wafa Begum plaintiffs were not parties to the suit, they could, therefore, validly maintain the suit, for enforcement of their rights as heirs of the donor. Admittedly the previous suit

was withdrawn and not dismissed on merits. The dismissal of the previous, suit, therefore, could not operate as res judicata. Moreover, in the earlier suit neither the alienation of the property by way of gift was challenged nor possession of the properties in dispute as heirs of the donor was claimed. The subject-matter of the previous suit being different the principle of res judicato cannot be pressed into service.

Issue No. 8:

27. Admittedly Muhammad Siddiq obtained 8 Kanals of land in Mauza Khanpur. District Rahimyarkhan from Mst Wajeeda Begum in exchange with other land. He was not impleaded party to the suit as no relief was claimed against him. In the event the plaintiff's suit is decreed, they may claim the land in dispute or may opt to retain the land obtained by the successors of the donee in exchange.

28. In our view, non-impleading Muhammad Siddiq as defendant in the suit would not render the decree ineffective as against the property in dispute. The finding of the learned trial Court being in accord with law in this behalf is also maintained.

29. In the result, the plaintiffs' appeal in respect of Property No. 5 is allowed and they are granted decree for joint possession of 24/48 share of the Properties Nos. 1, 2, 4, 5 and 6, as described in para. 3 above, but their appeal in respect of Property No. 3 is dismissed.

30. The counter appeal (R. F. A. No. 27-68/BWP) for the reasons recorded hereinbefore is dismissed.

The parties are, however, left to bear their own costs.

M.B.A. Order accordingly.

