

**IN THE HIGH COURT OF SINDH AT KARACHI**Suit No.771 of 1998**Ghulam Asghar Khan-----Plaintiff****Versus****Muhammad Arif Khan & others-----Defendants****Dates of hearing: 01.03.2016, 22.03.2016 & 31.3.2016.****Date of Judgment: 28.06.2016****Plaintiff: Through Mr. Qadir H. Sayeed,  
Advocate.****Defendants 1 & 2: Through Mr. Iftikhar Javed Qazi,  
Advocate.****D.H.A: Through Mr. Ejaz Mubarak Khattak,  
Advocate.****J U D G M E N T**

**Muhammad Junaid Ghaffar J.**- This is a Suit for declaration and permanent injunction, in which the plaintiff has sought the following relief(s):-

- a) Declaring that the Plaintiff is a 50% owner of Plot No.2/ A(B), Link Street, Pakistan Defence Officers Housing Authority Karachi, measuring 1059 sq. yds. along with all construction thereof and a further declaration that the Defendants 1 and 2 have no subsisting interest in the said property.
- b) Declaring that the order of the Defendant No.4, passed on 10<sup>th</sup> June, 1998 recalling the mutation in favour of the Plaintiff in respect of 50% share in the aforesaid property is void, contrary to the principle of natural justice and of no legal effect;
- c) Direct the Defendant No.4 to restore the mutation in favour of the Plaintiff and to cancel the mutation order dated 11.6.1998 made in the name of the Defendant No.2;
- d) Permanently restrain the Defendants their agents or assigns from denying the right, title and interest of the Plaintiff to a 50% undivided share in the aforesaid property;
- e) Grant costs of the suit; and
- f) Grant such other relief(s) as may be appropriate in the facts and circumstances of the case.

2. Briefly the facts, as stated, are that the property in question bearing No.2/A(B), Link Street, Pakistan Defence Officers Housing Authority, Karachi, ("**Suit Property**") was purchased by defendant No.1 and 6 from one Amina Y. Khan through a Sale Deed dated 21.02.1974. It is further stated that the plaintiff and defendants No.1 & 6 are real brothers and that out of natural love and affection for his elder brother (plaintiff), the defendant No.1 made an Oral Gift by way of Hiba of his 50% share in the Suit Property on or about 05.01.1984 in presence of 2 witnesses namely Muhammad Anwar S/o Chaudhry Nazar Muhammad and another brother of plaintiff and defendant No.1 namely Muhammad Ishaq Khan. It is further stated that Declaration of Oral Gift was affirmed in writing on 21.05.1986, duly signed by the donor, done and the two attesting witnesses. It is further stated that due to relationship of trust existing between the plaintiff and defendant No.1 on account of natural love and affection, the plaintiff did not bother to apply for any mutation in the record of rights in respect of Suit Property until 27.04.1998. The request of the plaintiff was granted and the property was mutated in the name of plaintiff to the extent of 50% share. Insofar as defendant No.4 is concerned, the property in question was entered in the name of plaintiff vide Letter dated 16.03.1998 and the effective date of transfer of the Said Property was recorded as per the Declaration/Confirmation of Oral Gift w.e.f. 21.05.1986. It is the case of the plaintiff that the defendant No.1 had handed over the original title documents of the property in question to the plaintiff, whereas, the constructive possession of the Said Property was also given to the plaintiff, whereas, the actual physical possession of the Said Property is with defendant No.6, who occupies the same in his capacity as a co-owner and with the implied consent of the plaintiff being a real brother. It is further stated that the plaintiff came to know that defendant No.2 (wife of defendant No.1) started claiming that the Said Property has been gifted to her by her husband and on coming to know about this information, inquiries were made from the Office of defendants No.3,4 and 5 and on or about 12.06.1998, the defendant No.3 handed over a Letter dated 10.06.1998, whereby, Mutation Order dated 16.03.1998 was recalled that on further enquiry it came to the knowledge of the plaintiff that by a Letter dated 11.06.1998, the defendant No.4 had mutated in its Record of Rights the Said Property in the name of defendant No.2 pursuant to some purported registered Declaration of Oral Gift dated 23.10.1989. It is the case of the plaintiff that once the property was gifted by defendant No.1 on 05.01.1984, he

stood divested to his entire interest in the Said Property, and therefore could not have gifted the same to defendant No.2. Being aggrieved by the recalling order in respect of mutation of the property in his name, the plaintiff filed instant Suit.

3. Upon issuance of notices and summons, Written Statements have been filed by the defendants including defendants No.1 and defendant No.6, whereafter vide Order dated 24.05.1999, the following Issues were framed:-

- i. Whether the Plaintiff is owner of 50% share in the property bearing Plot No.s/ A (B), Link Street, D.H.A., Karachi measuring 1059 Sq. yds.?
- ii. Whether the Order dated 10.06.1998 passed by defendant No.4 (corrected vide Court's Order dated 28.2.2013, re-calling the mutation is illegal?
- iii. What should the decree be?

4. It further appears that subsequently defendants No.1 & 2 made an Application bearing CMA No.10649 of 2010 for framing of additional Issues, however, the same was disposed of by the Court vide order dated 28.02.2013, by observing that there is no need to frame any additional Issues as the Court had already framed Issue No.1, which covers the proposed additional Issues. The plaintiff led its own evidence by filing Affidavit in Evidence and produced Ex.P.W-5/1 to P.W-5/8 except Ex.P/W-5/4, which is a Declaration of Oral Gift dated 21.05.1986 of which original was not produced. The plaintiff also produced Muhammad Anwar S/o Ch, Nazar Muhammad P.W-2 as Ex/6 and Muhammad Rafiq Channa S/o Muhammad Buta as P.W-3 at Ex-7 as a Court witness under Order 16 rule 3 C.P.C, who produced the original Declaration of Confirmation of Oral Gift Deed as Ex.7/1, Letter dated 05.06.1998 as Ex.7/2, Letter dated 04.06.1998 as Ex.7/3 and Letter dated 26.12.1985 as Ex.7/4. The plaintiff also summoned Muhammad Ishaq Khan S/o Ghulam Sarwar Khan as P.W-4 at Ex-8, who is in fact a witness to the Declaration of Oral Gift dated 21.05.1986 and turned hostile and produced Ex.8/1 his Statement/Declaration dated 21.08.1998.

5. The defendants' evidence was led by defendant No1 for himself and on behalf of defendant No.2 as an Attorney and produced Ex.DW/1/1 to DW/1/7, whereas, DW/1/3, DW/1/5 and DW/1/7 were produced and objections were raised by the counsel for the plaintiff on production of DW/1/4, DW/1/5-A and DW/1/5-B, which

has been referred to the Court by the learned Commissioner regarding the evidence. Another witness namely Muzamil Hussain S/o Moazzam Hussain was also produced as DW-2 under Order XVI Rule 3 CPC and brought certain documents before the Court as Ex.DW-1/10, and O/1 to O/4, on which objections were raised by the counsel for the plaintiff, whereafter the matter has been referred to the Court for appropriate orders by the learned Commissioner.

6. Learned Counsel for the plaintiff has referred to Gift Deed dated 21.05.1986 and has contended that the same was witnessed by Muhammad Anwar and Muhammad Ishaq Khan, whereas, Muhammad Anwar in his evidence has supported the case of the plaintiff that such oral Declaration of Gift was made in his presence and thereafter the Gift Deed in question was also signed in his presence, whereas, the other witness summoned on behalf of the plaintiff i.e. Muhammad Ishaq Khan has though turned hostile by denying that any oral Gift was made in his presence, but at the same time has admitted his signatures on the Gift Deed dated 21.05.1986 and therefore his oral evidence is to be discarded in view of Articles 102 and 103 of the Qanoon-e-Shahadat Order, 1984. Learned Counsel has further contended that defendant No.4 (Military Estate Office) was approached for mutation, which was recorded vide Letter dated 16.03.1998, whereas, similarly defendant No.5 (Clifton Cantonment Board) also approved the change of ownership vide Letter dated 27.04.1998. Learned Counsel has further submitted that defendant No.4 vide its Letter dated 10.06.1998 withdrew its Letter dated 16.03.1998 without any notice or affording any opportunity to the plaintiff in respect of such withdrawal, purportedly on the basis of letter dated 11.6.1998, whereby, the property was mutated in the name of Defendant No.2, being gifted by Defendant No.1. Learned Counsel has also referred to Affidavit-in-Evidence of D.W-1, specifically Paras-5, 6, 9, 10 & 13 as well as the cross-examination to contend that the witness has admitted that the original property documents were with the plaintiff and he was never in possession of such documents. Learned Counsel has further referred to Ex.D-1/3, which is the Declaration of Confirmation of Oral Gift in favour of defendant No. 2 by defendant No.1, wherein, it has been stated that the defendant No.1 has given the property and title documents to defendant No.2, who has accepted the same and has further submitted that this could not have happened in view of the fact that original documents were never with defendant No.1. Learned Counsel has

further referred to Ex.8/1, which is a Statement/Declaration given by Muhammad Ishaq Khan P.W-4 and has contended that the Statement/Declaration Ex.8/1 has no legal value in view of the fact that said witness has admitted his signatures on Ex.5/4. Learned Counsel has also relied upon the Evidence of P.W-2 Muhammad Anwar, who according to the Learned Counsel in his evidence has stated that Ex.5/4 bears his signatures as Witness No.2, whereas, he was also present at the time of Oral Gift of the Suit Property in 1984, along with other witness, Muhammad Ishaq Khan and has signed as a witness on Ex.5/4. Learned Counsel has further contended that insofar as the question of possession is concerned since defendant No.6, who also owns 50% of the property and is a real brother of the plaintiff and defendant No.1 was residing in the same property, the possession to the extent of plaintiff's share was a constructive possession by permitting defendant No.6 to reside in the same.

7. On the other hand Learned Counsel for defendants No.1 & 2 has contended that an Application bearing CMA No.10649/2010 under Order 14 Rule 5 C.P.C was filed on behalf of both the defendants for framing of additional Issues, which has been disposed of vide Order dated 28.02.2013, by observing that since Issue No.1 covers the entire controversy, there is no need to frame any additional Issue and has contended that while deciding Issue No.1, the Court may consider and examine the request of defendants No.1 & 2 for framing of additional Issues. Learned Counsel has further referred to Ex.5/4 and specially Para-3 to contend that though it has been stated in the said Gift Deed that possession was handed over, however, in reality no such possession was ever handed over by defendant No.1 to the plaintiff, which even otherwise has admitted that plaintiff never resided in the Suit Property. Learned Counsel has also referred to the cross-examination of P.W-2 Muhammad Anwar and has contended that the said witness has also stated that it was not in his knowledge that whether the plaintiff ever resided in the Suit Property. He has further contended that P.W-4 Muhammad Ishaq Khan, who was summoned as a witness on behalf of the plaintiff has denied that any Gift was ever made in his presence. Per Learned Counsel even otherwise the circumstances, prevailing between the plaintiff and defendants No.1 & 2 do not suggest that any Gift to the exclusion of his wife and kids could have been made by defendant No.1, whereas, the plaintiff has never suggested in its plaint that the property in question was purchased in the name of defendant No.1 to the extent of 50% share

from the funds provided by the plaintiff. Learned Counsel has further contended that the Gift Deed made in favour of defendant No.2 by defendant No.1 is a registered document, whereas, the plaintiff has made an effort to get mutation in his name on the basis of an unregistered Gift Deed in the year 1998 and therefore, the defendants No.3,4 & 5 have correctly recalled the mutation order made in the name of the plaintiff, which was otherwise a mistake by defendants No.3,4 & 5, inasmuch as no transfer on the basis Gift Deed is to be recorded by them until the same is registered in accordance with law. Learned Counsel has also submitted that Muhammad Ishaq Khan P.W-4 has also given a Declaration on Oath to the effect that no Gift was made in his presence in favour of the plaintiff by defendant No.1, nor any such Gift Deed or document was signed in his presence. Learned Counsel has further contended that defendant No.2 after execution of Gift Deed in the year 1989 by defendant No.1 is in physical possession of the property in question along with co-owner/defendant No.6 and both are paying the taxes and other charges in respect of the Suit Property, which further establishes that plaintiff has no concern with the property in question. Learned Counsel has further contended that insofar as defendant No.4 is concerned they only record mutation on the basis of Gift Deed once the Donor is present before them, whereas, the same is being done only on the basis of registered Gift, and therefore the mutation recorded in the name of plaintiff is a fraud, hence correctly recalled by defendants No.4 & 5. Per learned counsel insofar as the plaintiff's case is concerned, all three ingredients for a valid Gift i.e. offer, acceptance and handing over of possession to the plaintiff is missing in this case and therefore the plaintiff's Suit is liable to be dismissed. In support of his contention he has relied upon the cases reported as *Privy Council (Canada and Dominion Sugar Company, Limited and Canadian National (West Indies) Steamships, Limited, AIR 1962 CALCUTTA 325 (United Bank of India Ltd. v. Nederlandsche Standard Bank), 2003 MLD 1531 (Mst. Nusrat Zohra v. Mst. Azra Bibi and 2 others), PLD 1990 Azad J & K 34 (Mst. Resham Bibi and 3 others v. Walayat Hussain alias Abdul Karim), 1992 CLC 235 (Mst. Manzoor Mai v. Abdul Aziz) PLD 2003 Azad J & K 25 (Khurshid Ahmed and 7 others v. Zeenat Begum and another), 2003 CLC 485 (Ch. Muhammad Boota v. Mst. Bano Begum), 2003 SCMR 286 (Muhammad Bakhsh v. Ellahi Bukhsh and others), 2001 MLD 186 (Ashiq Hussain and 2 others v. Zaffar Iqbal Hameed Khan), PLD 1956 Supreme Court (Pak.) 309 (Ghulam Hassan and others v. Sarafarz Khan and others), 2003 SCMR 41 (Muhammad Yaqoob through Legal Heirs v. Feroze Khan and others), 2001 SCMR 34 (Azim Khan v. Malik Mobeen*

*Khan and others) and 1968 SCMR 859 (Amir Muhammad Khan v. Dost Muhammad and 4 others), PLD 2005 Supreme Court 343 (Fida Hussain and others v. Abdul Aziz), PLD 1997 Lahore 633 (Siraj Din v. Mst. Jamilan and another), 2010 SCMR 342 (Muhammad Ejaz and 2 others v. Mst. Khalida Awan and another) and 2001 SCMR 1700 (Muhammad Akhtar v. Mst. Manna and 3 others).*

8. Insofar as Counsel for DHA (defendant No.3) is concerned, he has contended that it is a dispute between plaintiff and defendant No.1 and they would abide by the orders of this Court, which may be passed in the instant matter, whereas, defendant No. 4 & 5 have not contested the matter.

9. I have heard all the learned Counsel and perused the record. My issue wise findings on the basis of discussion hereinafter are as under:

Issue No.1:	Affirmative
Issue No.2:	Affirmative
Issue No.3:	Suit Decreed

**Issue No.1**

10. The facts as involved in this matter have already been stated hereinabove in that; the plaintiff claims ownership to the extent of 50% in the Suit Property on the basis of an Oral Gift dated 05.01.1984 and Declaration in respect of such Oral Gift dated 21.05.1986. The plaintiff's case precisely is that defendant No.1, out of his love and affection had gifted the Suit Property to the extent of his 50% share, whereas, the same was mutated in his name by Defendant No. 3 & 4, and without any Notice, has been withdrawn / recalled vide letter dated 10.6.1998. Contrary to this the contesting defendants case is that no such Gift Deed was ever signed or executed nor any oral Gift was ever made to the plaintiff, rather defendant No.1 has gifted his share in the property to defendant No.2 (his wife) in the year 1989 on the basis of a registered Gift Deed. It is further case of defendant No.1 that mutation recorded in the name of plaintiff was illegal as according to the rules governing the procedure of defendants No.3,4 & 5, it is necessary that Donor must be present before them for mutation and transfer and same could only be affected, if the Gift Deed is registered and not otherwise. Similar stance has been taken by defendant No.6 by supporting the case of defendants No. 1&2, however, no evidence has been led by him. Therefore, the question before the Court is that

whether any Oral Gift was ever made by defendant No.1 and if so that whether such declaration was recorded in writing or not.

11. In the instant matter the main Issue which has been framed by the Court is only to the extent that whether the plaintiff is owner of 50% share in the Suit Property, whereas, no specific Issue has been settled regarding validity of the Gift being claimed by the plaintiff. However, it is clear that such ownership is being claimed in the Suit Property on the basis of Gift Declaration i.e. Ex.5/4. Therefore, the answer to Issue No.1 can only be given once the Court comes to the conclusion that whether the Gift as claimed by the plaintiff is valid or not.

12. The plaintiff in support of its case and to prove validity and existence of the Gift in question has called upon himself as a witness (PW-1) and two attesting witnesses to the Declaration of oral Gift namely Muhammad Anwar (PW-2) and Muhammad Ishaq Khan (PW-4). Additionally Muhammad Rafique Cheema (PW-3) was also summoned as a witness under Order 16 Rule 3 CPC, who has produced and exhibited the Originals of Declaration of Confirmation of Oral Gift (Exh-7/1), Letter dated 5.6.1998 addressed by defendant No.1 to MEO (Exh-7/2), letter dated 4.6.1998 addressed by defendant No.1 to MEO (Exh-7/3) and letter dated 26.12.1985 again addressed by defendant No.1 to MEO (Exh-7/4). Insofar as the witness Muhammad Anwar (PW-2) is concerned, he appeared in the witness box and the said witness has categorically stated as follows:-

“I see Document marked as PW5/4 to the Affidavit in Evidence of the Plaintiff which bears my signatures as witness No.2. I was also present at the time of Oral Gift of Suit Property which was made in 1984. The other witnesses at the time of oral Gift of the suit property was Mr. Muhammad Ishaq Khan who also witnessed the Documents PW5/4.”

His statement remained persistent despite being subjected to extensive Cross examination, and the Counsel for defendants No.1 & 2 has not been able to shake his evidence. In the cross examination his evidence remained confidence inspiring. The only objection which has been raised by the Counsel for defendants No.1 & 2 is to the effect that since the Said witness is an employee of the plaintiff, therefore, he has given evidence in his support. I am afraid that such contention is misconceived as the witness has entered in the Witness Box, and the defendant's Counsel had full opportunity to cross examine him, whereas, his evidence has not been shaken. The witness has



categorically stated while being cross-examined that *“it is incorrect to suggest that I am deposing on behalf of the plaintiff under pressure and that if I would have not given the present evidence, I would have been rendered jobless at this stage of my life”*, Therefore, the evidence of this witness cannot be discarded merely for the fact that he is an employee of the plaintiff. He has come before the Court and has given his evidence to the effect that not only the oral gift was made in his presence but the Declaration of Gift was also signed in his presence by defendant No.1.

13. The plaintiff has also summoned a clerk from the litigation branch of Military Estate Office [MEO] as (PW-3) in terms of Order 16 Rule 3 CPC, (Exh-7), who has produced the original of declaration confirmation of oral gift (Exh7/1). Therefore, the objection raised on behalf of Counsel for defendant No.1&2 for production of a copy of the same as Ex-5/4 on behalf of the plaintiff, is overruled as both the Exhibits are of the same document. This witness has also produced letter (Exh-7/4) dated 26.12.1985 addressed by defendant No.1 to MEO, whereby, defendant No.1 has informed MEO that he has gifted his share in the Suit property to the plaintiff, relevant portion whereof reads as under:

This is to inform you that I have gifted 50% share of above said property in favour of my elder brother Mr. Ghulam Asghar Khan S/o Ghulam Sarwar Khan out of my love and affection orally long back and wish to get the same (oral gifted) registered with the District Registrar.

It is therefore, requested that No objection Certificate may please be issued enabling me to execute the gift deed photo copy of transfer letter attached for ready reference.

Thanking You,

Yours faithfully,

Sd/-

This letter has been acknowledged in the office of MEO on 28.12.1985 duly signed and stamped by them. The defendant's Counsel has not made any effort to challenge existence of such letter nor has the said witness been cross examined in this regard. What inference then one can draw from perusal of this letter? Nothing, but existence of a Gift in favour of the plaintiff. If not then what this letter is doing in the office of MEO since, 26.12.1985. There is no explanation from defendant's side nor has it been controverted in any manner.

14. Insofar as the second attesting witness i.e. P.W-4 Muhammad Ishaq Khan is concerned, though he has been summoned as a witness of the plaintiff but has turned hostile to the extent that he has filed a Statement/Declaration through an affidavit on oath by stating that no Oral Gift was made in his presence by Muhammad Arif Khan in favour of Mr. Ghulam Asghar Khan (plaintiff). He has further stated that Muhammad Arif Khan did not signed any written Declaration of Gift in my presence but when the said witness was confronted with Ex.5/4, which is a Declaration of Gift given in favour of plaintiff, the witness has said that *I see Ex.5/4 and say that it bears my signatures as a witness*. After giving such answer, the witness wanted to give a voluntarily statement on the contents of the said document, however, the same was objected to by the Counsel for the plaintiff on the ground that oral evidence could not be given to contradict the contents of a written document under Article 102 and 103 of the Qanun-e-Shahadat Order, 1984 and such objection has been referred to the Court by the learned Commissioner for appropriate order.

Article 102 of the Qanun-e-Shahadat Order, 1984, provides that when the terms of a contract, or of grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the documents itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein before contained. This Article provides that no oral evidence could be led to contradict the contents of a document as the same is inadmissible in law, meaning thereby that documentary evidence is to be given preference over the oral evidence. It further provides that no evidence can be given in proof of terms of disposition of property except the documents itself. In the instant matter the witness has admitted his signatures on the Declaration of Oral Gift (which is a document of disposition of property) and therefore, the said witness cannot give any oral evidence to negate the contents of the documents in question. Though this witness has made an attempt through a Declaration purportedly on Oath by denying the existence of Ex.5/4, but when confronted he has not denied his signatures on Ex.5/4. In the circumstances, the Court has to discard his oral statement as well as the purported Declaration given through an affidavit on Oath to the effect that no such Oral Gift was made as in presence of a

documentary evidence Ex.5/4, on which he has admitted his signatures, as the same cannot be entertained in view of Article 102 of Qanun-e-Shahadat Order, 1984.

It is also important to note that this witness who was produced on behalf of the plaintiff as (PW-4) and turned hostile was also cross examined by the learned Counsel for defendants No.1&2. Interestingly in his cross examination he has said that:

“At the time of signing Exhibit 5/4 (4 is missing in the typed version of Commissioner’s evidence, but is mentioned in the original hand written version), as a witness **no other person was present except the plaintiff.....**” (Emphasis supplied)

From a bare reading of the above, it appears that PW-4 is not denying the existence of Exh-5/4 at least. What he is saying is no one else was present except the plaintiff. Now he can only say so if he was there at the time of signing of such declaration of Oral Gift. It must be kept in mind that he has not denied his signature on Exh-5/4. He claims to be an educated person and can understand what is written where he is putting his signatures as a witness. In the circumstances no evidentiary value can be accorded to his Declaration (Exh-8/1) and to his statement that whatever is written therein is true and correct to the best of faith, belief and knowledge.

Though Exh-5/4 is not in fact a Gift Deed but a declaration of oral gift evidencing the factum of Gift, whereas, it cannot in its strict sense be equated with a gift deed, which has altogether different dimensions and parameters. A gift deed in law is a document, which is compulsorily required to be attested by two witnesses. May be the declaration of Oral Gift is not. Nonetheless the plaintiff has called both the attesting witnesses in evidence. This is what the plaintiff could have done to prove that an oral Gift was made by defendant No.1. In absence of it (Gift Declaration) being registered, the plaintiff’s best evidence was to examine the two marginal witnesses which he has done. This leads credence and his bonafides in establishing what he has averred in his plaint. In terms of Article 79 of Qanun-e-Shahadat Order, 1984, if a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses have been called for the purposes of proving its execution, if there be two attesting witnesses alive. Therefore, insofar as Ex.5/4, is concerned, which is a crucial document in question, it appears to have been validly executed as the only means to prove any such document is to call the Executants as well as the witnesses to substantiate the existence of

any such document as required in terms of Article 79 of Qanun-e-Shahadat Order, 1984. The plaintiff has come forward along with two witnesses, whose evidence has not been shaken; therefore, there is no reason for the Court to discard the existence of Ex.5/4. This leads to the conclusion that property in question to the extent of 50% share was gifted by defendant No.1 to the plaintiff and such gift has been proved through Ex.5/4.

15. Insofar as the objection of the learned Counsel for defendants No.1 & 2 that since Ex.5/4 is not a registered document, therefore, it is to be discarded is concerned, the same appears to be misconceived as it is not necessary that in each and every situation, the Gift be registered as under Muhammadan Law there is no such requirement. Reference in this regard may be made to the cases of ***Mst. Umar Bibi and 3 others Vs. Bashir Ahmed & 3 Others*** (1977 SCMR 154) and ***Maulvi Abdullah and others Vs. Abdul Aziz & Others*** (1987 SCMR 1403). Whereas, even otherwise the Oral Gift was recorded into a Declaration subsequently and as discussed hereinabove through evidence, its existence has been justified. Insofar as the question of physical possession is concerned, it also appears to be an admitted position that the plaintiff as well as defendant Nos.1 and 6 are real brothers, whereas, defendant No.6 is residing in the Suit Premises. In such a situation it is possible that the defendant No.6 was allowed to reside in the Suit Premises with the consent of plaintiff, whereas, defendant No.1 has not called defendant No.6 to rebut the contention of the plaintiff in this regard, who has though denied such assertion of the plaintiff through his written statement. However, he has failed to enter the witness box and lead his evidence to support defendant No.1. Therefore, insofar as plaintiff's possession is concerned the same appears to be a constructive possession of the property in question and since his real brother was already residing in the premises, it was not necessary to take over the physical possession or in other words, if no such physical possession was handed over to him it would not invalidate the Gift in question on this ground.

16. There is another aspect of the matter and it is in respect of the execution of a registered Gift Deed in favour of defendant No.2 by defendant No.1. On perusal of ExhDW-1/3, it appears that the said Gift Deed has been registered on the basis of a certified copy of the original title documents of the property in question, whereas, it has been mentioned in the Gift Deed that original title documents have

been handed over to defendant No.2. It is an admitted position that the original title documents were never with defendant No.1 and for that matter with defendant No.6. I am astonished to note that a registered Gift Deed has been executed in favour of defendant No.2 without there being the title documents in favour of the donor i.e. defendant No.1 and such defect creates serious doubts in respect of the validity of the said registered Gift. For all legal purposes no document for alienation of the property in question could have been executed by defendant No.1 without obtaining NOC from the Bank, as admittedly the same was mortgaged. Notwithstanding the claim of plaintiff in the said property, it was in the knowledge of defendant No.1 that it was mortgaged, and therefore, in absence of original documents and a proper NOC from the Bank, the registration of alleged Gift Deed in favour of defendant No. 2 by defendant No.1 is highly improper and against the law . If this practice continues, and be allowed and permitted then every now and then, people would execute Gift Deed on the basis of certified copies of the title documents and create third party interest without having title documents with them. In the circumstances, it appears that the alleged Gift Deed has not been registered with due care and is doubtful.

17. From further perusal of the record as well the Evidence file, it appears that the entire Suit Property was mortgaged with Habib Bank Limited (**HBL**) for obtaining loan in respect of several companies owned by the plaintiff. Such fact is deducible from Ex.5/9, which is a Memorandum of Deposit of Title Deeds in respect of the Suit Property. Though no specific date has been mentioned on this document, however, it appears to have been executed in June, 1983 by defendant No.1 and defendant No.6 including Muhammad Ishaq Khan P.W-2. Therefore, insofar as original title documents are concerned they must have been handed over by defendants No.1 & 6 to the plaintiff and or to the Bank for obtaining loan, as stated hereinabove. The defendant No.1 as (DW-1) in his cross examination has stated that:

...and say that when I executed DW-1/3 the title documents of the property were with the Plaintiff who had mortgaged the same. It is correct that I had not delivered the title documents of the property to my wife/defendant No.2 as the same were with the Plaintiff who had to get the same released from the bank. I did not inform the bank about the gift to my wife/defendant No.2. I knew that the title documents were not with me at the time of gift..... I did not pay any monies to the bank for releasing the title documents of the property." .....

It is also interesting to note that neither defendant No.1 nor defendant No.6 have ever made any effort and/or attempt to procure and retrieve the original title documents either from the bank with whom they had mortgaged the property or from the plaintiff, which according to them has redeemed the same and has created his interest in the property. It is not denied by the defendants that the property was mortgaged with the Bank for obtaining loan for Plaintiff's Companies; therefore, since the property in question was mortgaged by them it was incumbent upon them to seek redemption of their property documents. Neither any such effort was made by them nor have they come forward with any evidence to this effect. One fails to understand as to why no such effort was made by them as no ownership could be claimed or justified without having possession of the original title documents for such a long period of time. This inaction on the part of defendant No.1 and specially defendant No.6, who has though no interest involved in the controversy, creates credence to the contention of the plaintiff that property in question was gifted by defendant No.1, whereas, he is also in possession of the original title documents after its redemption from the Bank. It also leads to an inference that perhaps, while mortgaging the property documents in favour of the plaintiff's companies, Defendant No.1 & 6 had no issue with the plaintiff, whereas, such mortgage by defendant No.1 amounts to an offer, and loan being obtained on the basis of such mortgage is acceptance by the plaintiff, and to complete the transaction between themselves, as brothers, Gift has been made in favour of plaintiff. It is also noteworthy that since the date of mortgage till date, the defendant No.1 or for that matter, defendant No.6 has not demanded the original title documents from the plaintiff. Why? I am afraid no explanation of whatsoever nature is on record in this regard. If the mortgage was created without any consideration or interest, then why the documents were never demanded by them, when the stance of defendant No.1 throughout is that he did not had any cordial relations with plaintiff. This creates serious doubts about the stance of defendant No.1 in these proceedings. In the circumstances Issue No.1 is answered in the affirmative in favour of the plaintiff and against defendant No.1 & 2.

**Issue No.2:**

18. Insofar as this issue is concerned, it appears that neither Defendant No. 4 (Military Estate Office) nor defendant No.5 (Cantonment Board) has filed any written statement nor have led any

evidence in this matter. Whereas, Defendant No.3 (DHA) has filed its written statement by making submission to the effect that they are a formal party and the main dispute is between private parties. The conduct of defendant No.4 is not appreciable as they have unilaterally withdrawn the earlier mutation dated 16.3.1998 recorded in favour of plaintiff by their letter dated 10.6.1998. No reasons of whatsoever nature have been stated in the withdrawal letter nor has the plaintiff been provided any opportunity of hearing to make his submission and reply. This conduct alone is sufficient enough to set aside letter dated 10.6.1998. Nonetheless on perusal of record it appears that perhaps defendant No.1 had approached them through letter dated 5.6.1998 by making submission that he had earlier approached them for mutation of his share in the Suit property on 18.12.1989 on the basis of a registered Gift Deed in favour of defendant No.2 but for one reason or the other, the same was not mutated. Thereafter, defendant No.4 has cancelled mutation in favour of plaintiff on 10.6.1998 and has mutated the property in favour of defendant No.4 on 11.6.1998. Neither any justification has been given for taking such action by defendant No.4 nor have they led any evidence in this regard. In fact the defendants No. 1 & 2 have also failed to lead any evidence in respect of this issue. However, the learned Counsel for defendant No.1 & 2 had also made his submission that even otherwise Defendants No. 3 to 5 could not have mutated the property in the name of plaintiff in absence of a registered Gift Deed. In my view such contention is not correct, being misconceived and is hereby repelled. As discussed above under the Muhammadan Law, a person can dispose of his property by way of gift in his lifetime and for such purposes a Registration under the Act is not compulsory. All that is required is the fulfilment of prerequisites of a valid gift under the Muslim Personal Law, declaration by the donor, acceptance by donee and delivery of possession. Therefore, DHA, MEO or for that matter any other department or local authority cannot demand a compulsory registration of an otherwise valid Gift. Reliance in this regard may be placed on a Division Bench judgment in the case of ***Abdul Sattar Dadabhoy and another Vs. The Honorary Secretary, Pakistan Employees Co-operative Housing Society and another (PLD 1998 Kara 291)***, which deals with this situation and has also, provided enough guidelines as to how such properties are to be mutated.

Since I have already decided issue No. 1 in favour of plaintiff this issue is also answered in affirmative by holding that defendant No. 4

was not justified in withdrawing the mutation already recorded in favour of plaintiff vide letter dated 16.3.1998. Therefore this issue is answered accordingly.

**Issue No.3:**

19. In view of hereinabove discussion the Suit is decreed to the extent of prayer clause(s) (a), (b) and (c). Office is directed to prepare decree accordingly.

Dated: \_\_.06.2016

Judge