ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
R.A No.77 of 2007

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

Present: Mr. Justice Nazar Akbar

Farida Gul Agha & others Applicants	**:**	**through M/s. Aziz A. Munshi & Abdullah Munshi, advocates.**
Saeeda Bano Ahmed & others Respondents		**through Mr. Usman Shaikh, advocate for Respondent No.3. Mr. Mian Khan Malik, advocate for Respondent No.6. & Respondent No.2 Tariq Ahmed in person.**
Date of hearing	**:**	**12.10.2015, 15.10.2015, 21,10.2015. 10.11.2015, 24.11.2015 & 10.12.2015.**

JUDGMENT

NAZAR AKBAR, J:- This revision has been filed by the applicants against the judgment dated **07.07.2007** passed by IVth Addl. Session Judge (East) Karachi, in appeal No.53/2005 filed by the respondents whereby the judgment & decree (dated **24.3.2005**) of dismissal of their suit No.102/2003 (Old **Suit No.139/1989**) by IXth Sr. Civil Judge East Karachi, was reversed and the suit of the respondents was decreed as prayed.

2. Briefly stated, on **6.11.1989** Mst. Hajra Begum filed a suit for declaration and injunction before this Court against the applicants who are widow and daughters of her son namely (late) Aga Khalid Ahmed and others in respect of immovable property bearing House No.37-C Tipu Sultan Road, Muhammad Ali Cooperative Housing Society Karachi, admeasuring 1084 sq.yds (hereinafter the suit property). She, through the suit, has sought declaration and injunction against the applicants and prayed for cancellation of confirmed registered gift deed dated **03.6.1986** of the suit property executed by her in favour of her son, (late) Agha Khalid Ahmed registered at Sr. No.541 page 123 to 125 volume 96 of

Book No.IV Additional with sub-Registrar T-Division Karachi. The plaint was registered in this Court as **suit No.139/1989**. In 2003 on change of pecuniary jurisdiction of High Court, it was transferred to the Court of IX Sr. Civil Judge (East), Karachi and there it was renumbered as **suit No.102/2003.**

3. The donee / beneficiary of registered gift deed Agha Khalid Ahmed has expired on **02.5.1989** and the suit was filed against his legal heirs on or about **6.11.1989** six months after his death. A tenant namely S.M Naseem, and M/s. Muhammad Ali Cooperative Housing Society Karachi were also impleaded as Defendant No.4 and 5. The sole Plaintiff died on **20.05.1990** within 06 months of filing of suit and before recording her evidence and therefore, her legal heirs were impleaded as Plaintiffs in her place.

4. The applicants / Defendants No.1 to 3 filed their written statement and the Defendant No.4 also filed his written statement. The Court framed the following issues from the pleadings of the parties.

i. Whether the Plaintiff did not make an oral gift of the property in question?

ii. Whether the signature of the Plaintiff on the declaration of gift was obtained surreptitiously?

iii. Whether the Plaintiff revoked the oral gift, if any?

iv. What relief, if any, is the Plaintiff entitled to?

In support of their plaint the respondent examined four witnesses namely Agha Iftikhar Ahmed and Tariq Z. Ahmed both sons of deceased Mst.Hajra Begum as witness No.1 & 3 and two others namely Bashir Ahmed and Kh. Mirajuddin who were tenants in the suit property during the period from 1976 to March 1978 and 1971 to 1976 respectively as witness No.2 & 4. The applicants examined, applicant No.1 Mst. Fareeda Gul as Ex.7 and Muhammad Ameen Lakhani, advocate and Farooq H. Naik, advocate as Ex.8 & 9. Defendant No.4 examined himself as Ex.11.

5. The trial court after hearing the parties, discussed all the three issues together and on the basis of evidence held that **"the deceased Plaintiff herself with her own consent gifted disputed property to her son Agha Khalid Ahmed (issue No.1) and there is no evidence which discloses that signature of deceased Plaintiff were obtained surreptitiously (issue No.2), nor she ever revoked gift of the disputed house" (issue No.3)** The suit of respondents was, therefore, dismissed.

6. The respondents preferred an appeal **No.53/2005** against dismissal of the suit filed by their mother Mst. Hajra Begum. In appeal, IVth A.D.J (East) Karachi, without examining the findings of trial court, set aside the judgment and decreed of dismissal of suit and decreed it as prayed. The applicants against the findings of ADJ in appeal No.53/2005 have preferred the instant revision.

7. This court during the proceeding of this Revision application by order dated **23.12.2010** deleted Defendant No.4 from the array of respondents on the ground that the controversy does not relate to the rights of S.M Naseem and his presence would only distract the proceeding of the Court.

8. I have heard learned counsel for the parties and thoroughly examined evidence and the record and proceedings of the lower courts.

9. Learned counsel for the applicant has contended that the Ist appellate court reversed the findings of the trial court without appreciating the issues between the parties in the correct perspective of their pleadings. There is hardly any comment of the appellate court on the issue of revocation of gift by the deceased donor Mst. Hajra Begum. He contended that admittedly the suit was filed for revocation of a gift after the death of donee / beneficiary of gift and therefore, all the contentions / averments regarding revocation of gift stand nullified in view of **para-167** of the Muhammadan Law, which clearly stipulates that gift cannot be

revoked when the donor was within the prohibited degree with the donee and the donee has died. Mr. Abdullah Munshi, learned counsel for applicants has pointed out that suit was filed on or about **06.11.1989** when admittedly the donee has already expired on **2.5.1989** as stated in para-1 of the plaint. In para-21 of the plaint, it has been alleged by Mst. Hajra Begum that on **30.4.1989** she revoked the said gift by informing the deceased Agha Khalid Ahmed at her home in presence of witnesses but the plaint has not disclosed names of the so called witnesses nor anything has come on record that on the said date she has revoked the gift. Rather it has come on the record that on **30.4.1989** she was hospitalized since she was suffering from multiple health problems. He has further argued that the registration of gift by itself is a proof of the fact that possession has been delivered and the contents of the registered documents unless proved to be false are binding on the executant as well as his/her legal heirs. The Plaintiff who was donor has also died without coming in the witness box to confirm any of the averment of the plaint including the so called fraud or misrepresentation by the deceased donee Agha Khalid Ahmed and therefore, entire evidence on the averment of any fraud played by the deceased donee in obtaining the registered gift is merely hearsay evidence which has not been corroborated or established by any independent source.

10. The registered gift deed, he further contended, has been witnessed by another son of the deceased donor Mst.Hajra Begum namely Mr. Tariq Z. Ahmed. It has come on record that Tariq has appeared before the Registrar of Properties on the date and time of execution and registration of oral gift deed. The signature of witnesses and the donee on the registered gift deed has been admitted by both the witnesses namely Mr. Tariq Z. Ahmed himself and his brother Agha Iftikhar Ahmed. Both, in cross-examination have admitted signatures of Tariq as witness on **Ex.IL** and also confirmed that it bears signature of Mst. Hajra Begum.

The oral gift deed was also witnessed by one Saddarul Hasan, who is admittedly a stenographer of Mr.Tariq Z. Ahmed and his signatures have also been admitted by Tariq on the said gift deed. The statement of interested witness of a registered document that he has signed this document without knowledge of its contents can only be considered an after-thought since he would be beneficiary himself if the gift is declared null and void. The donee and one of the witness are sons and their mother is the donor and if the donor was illiterate woman and she was under the influence of donee at least the son who is witness to execution of such document was an intelligent man running his own business cannot say that he has gone to the office of Registrar of the Properties simply in good faith since his brother has asked him to execute documents for the purpose of obtaining loan.

11. Three different counsel of the respondents / legal heirs of donor while defending the impugned appellate judgment have stressed on the point that gift has not been completed since possession of the suit property was not handed over. None of them argued anything with reference to the issues framed by the trial court and the evidence led by the parties on the three issues. Each one of them, one by one, has read the evidence of three tenants i.e evidence of witness No.2 and witness No.4 namely Bashir Ahmed and Khawaja Mirajuddin and Defendant No.4. The learned counsel for the respondents have contended that the deceased Mst.Hajra Begum has not divested herself from the property and she has been receiving rent from the tenants including Defendant No.4 Shaikh Muhammad Naseem, who was tenant from 1981 onwards. Mr. Ghulam Nabi Shaikh, learned counsel for Tariq Ahmed, Respondent No.2 has also contended that deceased Hajira Begum has revoked the gift on **30.4.1989** in presence of witnesses and she has subsequently even published revocation in newspaper. He has further contended that even after

completion of gift by delivery of possession of the property it can be revoked through the court in terms of **sub-para (4) of para 167** of Mohammadan Law. He relied on the evidence of PW-1 and PW-3 to show that the gift was revoked by Mst. Hajira Begum, on **30.4.1989** and even Agha Khalid Ahmed has agreed to execute a deed of revocation but he died on **2.5.1989**. Therefore, exception contained in **clause(c)** of **sub-para(2) of para 167 of Muhammadan Law** about the effect of death of donee was not applicable since the donee has died after the revocation of gift deed. Lastly it has been contended by them that each and every document signed by Hajira Begum was not signed by her with due knowledge of the contents of the said documents and therefore, even agreement of lease between (late) Agha Khalid Ahmed and Defendant No.4, S.M Naseem, the tenant, was also by playing fraud and misrepresentation. Learned counsel for the respondents vehemently argued that the plea of benami ownership of Mst. Hajira Begum also confirms that the gift was fraudulently obtained.

12. I have carefully examined the submission made on several dates by the three counsel for the respondents in reply to the arguments of Mr. Abdullah Munshi, advocate for the appellants. First, I would like to discuss the implications of **para-167** Mohammadan Law on the registered gift in the given facts of the suit filed by the deceased Hajira Begum and thereafter examine the merit of impugned order. The provisions of **para-167** of Muhammadan Law, from the principles of Muhamadan Law by D.F Mullah are as under:-

> **167. Revocation of gifts**—(1) A gift may be revoked by the donor at any time before delivery of possession. The reason is that before delivery there is no completed gift at all.
>
> (2) Subject to the provision of sub-section (4), a gift may be revoked even after delivery of possession **except in the following cases**:
>
> (a) when the gift is made by a husband to his wife or by wife to her husband;

(b) when the donee is related to the donor within the prohibited degrees;

(c) when the donee is dead;

(d) when the thing given has passed out of the donee's possession by sale, gift or otherwise;

(e) when the thing given is lost or destroyed;

(f) when the thing given has increased in value, whatever, be the cause of the increase;

(g) when the thing given is so changed that it cannot be identified, as when wheat is converted into flour by grinding.

(h) When the donor has received something in exchange (iwaz) for the gift [see section 168 and 169]

(3) A gift may be revoked by the donor, but not by his heirs after his death. It is the donor's law that will apply to a revocation and not of the donee.

(4) Once possession is delivered, nothing short of a decree of the Court is sufficient to revoke the gift. **Neither a declaration of revocation by the donor nor even the institution of a suit for resuming the gift is sufficient to revoke the gift**. Until a decree is passed, the donee is entitled to use and dispose of the subject of the gift.

Admittedly, on **6.11.1989** when the plaint was filed for cancellation of gift deed by the donor, the donee was already dead as stated in para-1 of the plaint. He had died on **02.5.1989.** It is also admitted position that donor being mother of donee, she was related to the donee within the prohibited degree. Therefore, merely by suggesting a date of oral revocation of gift by donor in the plaint just two days earlier to the death of donee she cannot revoke the Gift after the death of donee even through the Court. Not only the plaintiff was barred by **sub-para 2(b) and (c)** of **para-167 ibid** to sue the Donee after his death, even on the death of Plaintiff (DONOR) by virtue of **sub-para (3)** of para-167 ibid the suit has been abated since "**a gift may be revoked by the donor but not by his heirs after his death "**i.e death**"** of Donor. Therefore on **20.5.1990** when of Donor (Plaintiff) expired even before service of summon on the applicants, the legal heirs of the donee, the cause of action for cancellation of Gift-Deed has abated.

13. **On merit** of the impugned judgment, at the very outset, I must say the order impugned before this Court is entirely on a different premise from the premise on which the learned trial court has examined the pleadings and decided the issues on the basis of evidence led by the parties in support of their respective pleadings. This is an admitted position that from the pleadings of the parties the trial court has framed three main issues which were also reproduced by the learned first appellate Court in para-4 of the impugned judgment. However, the learned appellate Court, without declaring that the findings of the trial court were not in accordance with evidence adduced by the parties or otherwise not sustainable in law, reversed the findings of dismissal of suit by trial court and decreed the suit as prayed.

14. Learned appellate court failed to appreciate that first burden of proof is always on the Plaintiff and unless it is discharged by evidence consistent with the pleadings, the Defendant cannot be required to prove anything from his pleadings. The case of the respondent/Plaintiff was set out in the plaint from para-16 onwards that the Plaintiff an illiterate lady was under the influence of her son (late) Agha Khalid Ahmed, who used to obtain her signature on various documents and the said (late) Agha Khalid Ahmed in the month of June 1986 took her to the office of sub-Registrar of properties on the pretext for signing certain documents which were required to be sent out of Pakistan and such documents were pertaining to the partnership business (**para 16 and 17** of plaint). On **28.4.1989,** it was averred in plaint, Defendant No.4 informed the deceased Hajira Begum that on **17.4.1989** he had entered into an agreement of lease with Agha Khalid Ahmed w.e.f **01.4.1989** as he had shown him a registered gift deed. The agreement of lease which was brought to him by deceased Agha Khalid Ahmed already had signature of Plaintiff as witness therefore, he was under the impression that she was party to the said lease agreement. The deceased Plaintiff was shocked and informed Defendant

No.4 that she has not executed any gift in favour of Agha Khalid Ahmed and the said Defendant No.4 has supplied copy of the lease agreement to Hajira Begum and explained her in Urdu the terms and conditions (**para 18, 19 & 20** of plaint) and the Plaintiff on **29.4.1989** called (late) Agha Khalid Ahmed to her house to confront him with said facts and on his arrival, Plaintiff on **30.4.1989** revoked the oral gift in presence of witnesses and Agha Khalid Ahmed begged forgiveness and consented to get the revocation registered but he died on **2.5.1989** and in **June 1989** Plaintiff herself obtained certified copies of registered gift deed. The Plaintiff was neither aware of the contents of documents nor the contents were read over to her. She has never intended to divest the suit property to Agha Khalid Ahmed and therefore, despite revocation it was not valid lawful gift (**para 20 to 24** of plaint). In view of the aforesaid averments the Plaintiff sought declaration and cancellation of registered gift deed.

15. The applicants/Defendants in written statement have denied fraud and misrepresentation in obtaining gift. In para-7, the reason of gift was mentioned that the Plaintiff herself to avoid complication after her death wanted to transfer the suit property by way of gift. The applicants/Defendants categorically stated that the Defendant No.4 as tenant had attorned to late Agha Khalid Ahmed and after his death, he had been paying rent to his widow. The Plaintiff, Hajira Begum was suffering from serious health issue and the suit has been filed by her under the influence of brothers and sister of deceased Agha Khalid Ahmed and the story of revocation of gift by Hajira Begum is not true.

16. The first burden of proof was on the plaintiff to prove the contents of plaint. They examined only two Plaintiff (**PW-1 & 3**) and relied on the evidence of Defendant No.4. The evidence of other PWs namely Bashir and Marijuddin (**PW-2** and **PW-4**) was entirely out of context since they were tenant in the suit property prior to the date of dispute about gift. The

entire story of the plaint was demolished by Defendant No.4 who was impleaded in the hope that he would be treated as independent and credible witness. The contents of written statement of Defendant No.4 appears to be in favour of Plaintiffs. He has straightaway admitted contents of para-18 and 19 of plaint but he could not withstand the test of cross-examination. Unfortunately, this witness has damaged the case of Plaintiffs/legal heirs of donor more than anybody else. It has come on record from the evidence of lawyers that written statement filed by Defendant No.4 was neither drafted nor presented in Court by Mr. Farooq H. Naik, advocate. He was lawyer of Plaintiff and his name has also been shown on the written statement of Defendant No.4 as an advocate who identified him before the Commissioner for taking oath. Mr. Farooq Naik, advocate on oath has denied filing of written statement of Defendant No.4. It would lead to believe that Defendant No.4 did not know who drafted it and therefore his knowledge of the contents of his written statement was doubtful. In cross he stated that **Mr. Mian Khan Malik**, advocate was his counsel but his power on behalf of Defendant No.4 is not available on record. **Mr. Mian Khan Malik**, advocate even before this court is representing one of the Plaintiffs/respondents. In this background he was advised to produce his written statement in evidence as **Ex.11-A** and admit its contents and Mr. Ainuddin Khan, advocate was hired to represent him only for recording his examination-in-chief. He was neither aggrieved by dismissal of suit nor his counsel attend the case. Be that as it may, his evidence was crucial. He has confirmed the stance taken by the applicants/Defendants that he had entered into an agreement of lease with the donee Agha Khalid Ahmed and he has been tendering rent to the applicants as legal heir of deceased donee Agha Khalid Ahmed till April 1991. The story narrated in para-18 and 19 of the plaint about the disclosure of execution of gift deed by Defendant No.4 to the Plaintiff was also belied by him when in his cross-examination he failed to be

consistent with contents of his own written statement. He, contrary to para 18 & 19 of plaint which were admitted by him in his written statement, stated in cross examination that "**there used to be quarrel between Khalid and Mst. Hajira usually. On one day Mst. Hajira Begum (the Plaintiff) on my inquiry about her quarrel with Khalid told that she had not executed gift deed in favour of Khalid and on that fact he had quarrel with her**". He further stated in cross that **"when he signed rent agreement in favour of Khalid no other person had signed the document in my presence Khalid had already signed the rent deed when it was sent to me".** He again contradicted the contents of **para-18 and 19** of plaint when he stated that "**the lease agreement which Agha Khalid Ahmed brought for his** (DefendantNO.4) **signature already contained her signature as a witness and as such he gathered the impression that she is a party to the said lease agreement.**

17. The issue of revocation of gift by Mst. Hajira Begum on **30.4.1989** was also not proved when it was admitted by the two sons of deceased Hajira Begum that in the last week of April 1989 she was in hospital though both the witnesses (**PW-1 & 3**) were conscious of the dates given in the plaint. One of them (**PW-1**) Agha Iftikhar Ahmed in his cross-examined admitted the date of discharge of Plaintiff as **02.5.1989** in unambiguous terms, when he categorically stated in cross-examiantion that "**my mother was admitted in hospital for a short period in April, 1989. It is not a fact that our mother was admitted in the hospital on 26.4.1989**. however, to the suggestion of discharge from the hospital he confirmed in cross that "**our mother was brought from hospital on 2.5.1989 on the death of Khalid"** then he again said **"our sister Musarat Afroz and her husband had taken our mother from hospital to their house on 2.5.1989 when Khalid died**". This witness consciously did not give the date of admission of his mother in hospital but his other brother **(PW-3)** Tariq in his cross-examination conceded that **"my mother was**

admitted in OMI Hospital but I do not remember the date. I had first said that my mother was admitted on 26.4.1989 but I immediately corrected myself after understanding the question. I do not remember if my mother was discharged from OMI hospital on 2.5.1989. To another question he said "**I am conversant to some extent with the writing of Khalid. I see photocopy of writing on five leaves. I produce it as Ex.3-B.** The perusal of **Ex.3-B** shows that on **26.4.1989** Hajira Begum was admitted to room private-3 of OMI hospital. Therefore, there was an unimpeachable evidence on record that from **26.4.1989** to **02.5.1989** Mst. Hajira Begum was in the hospital and that is why learned trial court on the basis of this evidence came to the conclusion that the story of revocation of gift on **30.4.1989** (issue No.3) was not proved by the Plaintiffs. The learned first appellate court had ignored not only the issue No.3 but also the evidence which has disproved the plaint.

18. The perusal of the impugned order clearly indicates that evidence of the parties has not been discussed by the appellate court and the suit was decreed in appeal on the issue of status of Plaintiff as **benami** owner, and the concept of delivery of possession of corpus of gift under Muhammadan Law and its effect. From para-9 at typed page-**8** to the first two lines on typed page-**16**, the learned appellate court has examined the proposition about benami transaction only on the ground that it was also suggested by the applicants/defendants in their written statement without realizing that it was not pressed by applicants/defendant as an issue nor the trial court has given its findings on the basis of such averment in the written statement. The second proposition in the impugned order of appellate court was on the point of Muslim gift and its validity. This proposition, too, was neither advanced by the Plaintiff before the trial court nor such issue was framed by trial court. The very fact that the respondent/Plaintiff has stressed on revocation of gift on **30.4.1989** was in

fact an admission that the gift has been completed or at least they were conscious of the fact that it had been completed by overt acts of donor and such overt acts of donor were documented in the Ex.1/M, Ex.1/N and Ex.1/O etc. That is why the respondent/Plaintiff from **November 1989** when suit was filed to **March 2005** when their suit was dismissed did not request the court to frame an issue about the non-delivery of possession of corpus of gift. The respondents/Plaintiff have not even prayed for declaration that the gift was incomplete and therefore, not enforceable against the Plaintiff. Even in the memo of appeal No.53/2005, the respondents has not raised the issue that the trial court has not framed proper issue or failed to frame an issue of delivery of possession of suit property by the deceased Hajira Begum to the deceased Agha Khalid Ahmed.

19. Learned appellate court in a very cursory manner without referring to the several documents which were admitted by the Plaintiffs and referred by the learned trial court in its judgment hastily concluded that the possession of the gift was not established, therefore, the gift was not complete and it was invalid. This findings of the appellate court, too, was contrary to the evidence and without any comment on the reasoning of the trial court in dismissal of suit. The trial court has thoroughly referred to the evidence of the parties on the point of delivery of possession of the suit premises to the donee son by the donor mother. In this context trial court has discussed and examined Ex.I/L, Ex.I/M, Ex.I/N, Ex.I/O, Ex.I/P-3, Ex.I/Q, Ex.I/R, and Ex.I/S. In the cross-examination of the two Plaintiffs who were the only witnesses namely **Iftikhar** and **Tariq** (PW-1 & 3) when confronted with these documents they admitted each one of them. The learned appellate court referred only halfheartedly to **Ex.I/L** and **I/M** and ignored all the other documentary evidence which over whelming proved that (PW-3) Tariq, who was also the Plaintiff after the

death of Mst. Hajira Begum, was consciously participating and party to the documents whereby the ownership right in the suit property were passed on by Mst. Hajira Begum to the deceased Agha Khalid Ahmed. It cannot be believed that Tariq Ahmed who signed all the relevant documents as witness to the execution of the same by his mother was not aware of contents thereof right from 1981 to June 1986. Agha Tariq Ahmed himself has admitted in cross-examination to a suggestion that he knew that he has signed a gift deed as witness and the learned trial court has taken note of it in the judgment when the trial court has observed that during cross-examination he has explained Agha Khalid Ahmed informed orally that the documents on which signature of PW-3 were obtained pertains to declaration of gift of the disputed property. The relevant evidence from cross of PW-3 is reproduced bellow:-

> Cross examination to Mr. Mushtaq Memon,
> advocate for the Defendants No.1 to 3
>
> I am conversant to some extent with the signatures of my mother I see signature of my mother on documents Ex.I-L, I-M and I-O. These signatures are of my mother. So also on Ex. I-P-3 and Ex. I-S. It is not a fact that I had gone through all the documents brought to me by Khalid Ahmed on which he had taken my signatures. Khalid Ahmed had informed orally that the documents on which he was taking my signatures pertained to declaration of gift of the disputed property.

20. The Ex.I/M, Ex.I/N and Ex/I/O are respectively first oral gift dated **8.1.1980,** General Power of attorney by Khalid (donee) to his mother Hajira Begum (donor) dated **19.1.1980** and an agreement dated **19.1.1980** between the donee and donor and all these documents were witnessed by the Plaintiff No.1(b) namely **Tariq Z. Ahmed** and perusal of these document confirms that donee had allowed his mother (donor) to live and occupy the suit property in her life time. The relevant contents of admitted Ex.1/N and Ex.I/O are reproduced below:-

Ex.1/N General Power of Attorney at page 229

> That my attorney shall look after and manage my affairs with respect to my immovable property bearing No.37/C, Muhammad Ali Cooperative Housing Society, Karachi.

That my attorney shall have the sole discretion to let out my immoveable property to whomsoever and whenever at any time **till her lifetime**.

Ex.1/O Agreement at page 233

NOW THIS AGREEMENT WITNESSEST:

1. That the party of the second part has granted permission to the party of the first part to occupy and stay in the said-property till her life time.

2. That the party of the second part shall not disturb, interfere, dispossesses OR FOR THAT MATTER, shall not transfer the lease HOLD rights in the said-property till the life time of the party of the first part.

The Plaintiffs (deceased Hajira Begum), therefore, by virtue of Ex.1/M coupled with Ex.I/N and Ex.I/O had already transferred the suit property by way of GIFT by handing over possession and original title document to the donee, thus the requirement of **para-152** of Muhammadan Law was fully complied. There was no need of any further act / action on the part of the donor and donee. However, the requirement of registration of documents of gift was necessary for the purpose of subsequent transfer of the suit property in the record of various governmental / semi government department and therefore, it was merely a formality and even this formality has also been established from the record that no fraud was committed. In view of these documents and the relationship between the donor and the donee was such that the actual physical dispossession of the donor from the suit property in this particular case was not required rather it was sufficiently complied by execution of aforesaid documents. In Muhammadan Law to meet a situation like this I may at the cost of repetition again refer to the provision of **Para-167** of the Muhammadan Law which operative as bar for cancellation / revocation of a gift:-

(b) when the donee is related to the donor within the prohibited degrees;

(c) when the donee is dead;

Beside the evidence for dismissal of suit on merit, the ingredients of the above two prohibitions for the revocation of gift were very much available in the facts of the case in hand. In the first place on **6.11.1989**, plaint should have be rejected as it was seeking cancellation of a gift after the death of donee and even if it was not rejected, the cause of action has died/buried with the Plaintiff (DONOR) by operation to **sub-clause-3** of **para-167** ibid which clearly stipulates that "a **gift** may be revoked by donor but **not by his legal heirs after his/her (donor) death.** Therefore, the suit for cancellation / revocation of gift filed by Hajira Begum had abated on her death on **20.5.1990** by virtue of **sub-para 3 of para-167** of Muhammadan Law on **20.5.1990**. All the proceeding after the death of donee were coram non judice.

21. I have examined the judgment of the trial court as well as the judgment of the appellate court, with regret, I must say that all the labour done by the trial court in minutely examining each and every documents produced in evidence and the conduct of the parties while dismissing the suit has been brushed aside by the appellate court without even condemning it on any ground whatsoever. The appellate authority is not supposed to write a fresh judgment of its own without commenting and explaining the circumstances for forming an opinion contrary to the opinion / reasoning of the trial court in the order impugned before the appellate court. The appellate court, unless finds the judgment of trial court suffering from improper treatment of evidence such as wrongly placing the burden of proof on the parties in deciding the issues between them or finding it in conflict with some law on the subject etc. etc., cannot reverse the findings of trial court. It is settled law that the appellate authority has a right to reverse finding / conclusions of the trial court while exercising power under **section 96** of the CPC but this power is subject to the condition that First Appellate Court has to meet the reasoning of the trial court in the first instance and thereafter reappraise the evidence on record while reversing the findings of the trial court. If

uany authority is required on this proposition one may refer to the case of Ch. Muhammad Shafi ..Vs.. Shamim Khanum reported in **2007 SCMR 838.** I am afraid **Mr. Abdul Razzaque**, learned IV Additional Sessions Judge East Karachi, was unaware of his responsibility as appellate court. The first and the only impression one may gather on reading the appellate order after the judgment of trial court is that the appellate court has not only refused to examine/reappraise the evidence but it has also not even read the order impugned before it. Unfortunately in its endeavor to write a fresh judgment, the appellate court failed to follow the basic principle of law contained in **Section 117** of the **Qanon-e-Shahdat Order, 1984** that whoever approaches the court of law to give judgment as to his legal right or liability dependent on the existence of facts which he asserts in the plaint must prove that those facts exist. Otherwise the appellate court should have also given his reasoning for not agreeing with the findings of the trial court. The appellate court without setting aside the findings on the three main issues decided by the trial court set aside only the conclusion drawn by the trial court.

22. In view of the above facts and discussion the Revision application is allowed. The impugned judgment & decree of the First Appellate Court in Civil Appeal No.53/2005 is set aside and the judgment and decree of the trial court is restored.

JUDGE

Karachi
Dated:26.02.2016

SM