

IN THE HIGH COURT OF SINDH AT KARACHI

H.C.A NO.20/2015

Present: Munib Akhtar & Yousuf Ali Sayeed, JJ

Appellants: Syed Arif Ali & Another, through Ms. Lali Tabassum, Advocate.

Respondents: Zeenat Hanif Siddiqui & Others, through Ms. Kausar Amin, Advocate.

Date of hearing 01-03-2017

Date of Judgment

JUDGMENT

YOUSUF ALI SAYEED, J. This High Court Appeal calls in question the proceedings in Suit No. 1207 of 2007 under the Original Civil Jurisdiction of this Court (the “**Underlying Suit**”), specifically the Judgment dated 01.12.2014 (the “**Impugned Judgment**”) and Decree dated 22.12.2014, whereby an oral gift in favour of the Appellants, namely, Syed Arif Ali and Syed Rashid Ali, made by their father in relation to an immovable property bearing Plot No. 63/1, 7th Commercial Street, Phase IV, DHA, Karachi (the “**Subject Property**”) was cancelled by the learned single Judge.

2. The contesting parties are the children of the late Syed Hamid Ali (the “**Deceased**”), who expired on 20.02.2005, and the crux of their dispute *inter se* relates to whether the Subject Property belonged to the Deceased at the time of his demise or stood vested jointly in the Appellants by virtue of an oral gift made in their favour by the Deceased on 30.08.1981 (the “**Gift**”), as evinced by an Affidavit dated 23.09.1981 titled “Hiba-Zabani-Bila-Ewaz” (the “**Deed**”).

3. The Underlying Suit for Declaration, Cancellation, Partition and Permanent Injunction was filed on 15.09.2007 by the present Respondent No.1 against the Appellants and two other siblings, namely Syed Shahid Ali and Khalid Hamid (the present Respondents Nos. 2 and 3), wherein it was prayed as follows:

- “a) To declare that property bearing No.63/1, 7th Commercial Street, Phase-IV, situated at Defence Housing Authority, Karachi is the joint property of plaintiff and defendants as agreed by the legal heirs of deceased Syed Hamid Ali in WILL dated 15.01.2005.
- b) To cancel the Hiba-Zabani-Bila-Ewaz which was executed by deceased Syed Hamid Ali for the purpose of income tax and some administrative purpose which was a sham and fake document and declared null and void;
- c) To partition the property bearing No.63/1, 7th Commercial Street, Phase-IV, situated at Defence Housing Authority, Karachi with meets and bounds between the plaintiff and defendants as per the WILL dated 15.01.2005.
- d) To restrain defendant No.1, his agents, employees, relatives, workman from altering, selling, disposing off, transferring, pleading, parting the possession and interfering with peaceful possession of property bearing No.63/1, 7th Commercial street, Phase-IV, situated at Defence Housing Authority, Karachi.
- e) Cost of the suit
- f) Any other relief this Hon’ble Court deem fit and proper as per the circumstances of the case;”

4. As is apparent from the prayers, the fact that the Deceased executed the Deed in favour of the Appellants was not a matter in dispute in the Underlying Suit. Nor was it the case of the Respondent No.1 that the Deed was the product of coercion or undue influence exercised by the Appellants or any infirmity or impairment on the part of the Deceased that calls into question his capacity to make a valid Gift of the Subject Property, as envisaged. On the contrary, the contention of the Respondent No.1, in her capacity as Plaintiff, was that the Deed had been executed by the Donor for “the purpose of income tax and some administrative purpose” and the Gift was merely a façade, behind which the Donor retained dominion over, and more crucially and fundamentally, ownership of the Subject Property.

5. It was thus contended that the gift was not intended to confer or bestow any right as would vest the property in favour of the Appellants, and that the real ownership of the Subject Property remained with the Deceased. It was contended that, hence, the same remained part of his estate and was properly the subject of a testamentary instrument in the shape of a Will dated 15.01.2005 (the "**Will**") executed by the Deceased and amenable to distribution as per Shariah, as bequeathed by him.

6. Whilst the Respondents Nos. 2 and 3 were arrayed as defendants in the Underlying Suit, along with the Appellant, no relief was elicited against them and in their written statements they both supported the contentions of the Respondent No.1, though they did not, it appears, participate any further in the proceedings.

7. The Appellants, however, categorically denied the claim of the Respondent No.1 and asserted their absolute right of ownership to the Subject Property. In their written statement they pleaded inter alia that, as evinced by the Deed, due to love and affection their late father had gifted the Subject Property to them in the year 1981 and had put them in possession thereof. It was pleaded that in that very year their late father had made a statement on oath before the Military Estate Officer of the Cantonment, in the presence of two witnesses, and filed the Deed, and on this basis the Subject Property had been mutated in the names of the Appellants in the record of rights in substitution of the name their late father. As such, they had become the owners of the Subject Property, and at the time of demise of their late father the Subject Property was therefore not a part of his estate. It was also mentioned that the demand for payment of taxes in respect of the Subject Property continued to incorrectly be raised in the name of their late father, and upon his death the Appellants wrote a letter to the concerned authorities to raise such demands in their names.

8. Whilst impugning the admissibility of the Will, and without prejudice to this, it was pleaded by the Appellants that the same was not written in the hand of the Deceased, but was in fact the writing of the Respondent No.3, and that as on the date thereof the Deceased, being of advanced age and unsound mind, was already afflicted by illness and on his deathbed. It was denied that all the legal heirs had put their signature thereon, in as much as the Respondent No.2 had not signed and the Appellants contended that they had put their signatures in good faith on the persuasion of their sister out of a sense of obligation to the Deceased.

9. Accordingly, from the respective pleadings, the following issues were framed:

- “1. Whether the deceased father of the parties to suit executed Hiba Zabani Bila Ewaz d; 23.09.1981, in respect of property bearing No.63/1, 7th Commercial Street, Phase-IV, D.H.A Karachi in favour of defendants No.1 & 2, as a Sham document having no legal effect?
2. Whether the deceased father of the parties to suit through out his life managed/controlled the immovable property i.e. 63/1, 7th Commercial Street, Phase-IV D.H.A Karachi as owner till his death?
3. Whether physical possession of property in question was handed over to defendant No.1 & 2 by deceased Syed Hamid Ali by virtue of Hiba Zabani Bila Ewaz dt; 23.9.1981?
4. Whether the plot bearing No.63 was originally measuring about 620 sq. yards and it was bifurcated into two equal parts by the deceased father of the parties, who was the owner of this plot?
5. Whether the half of this plot bearing No.63/1 measuring about 310 Sq. yds was gifted to defendant No.1 & 2 by the deceased father due to love and affection in the year 1981?
6. Whether the rest of the half portion bearing No.63/II measuring about 310 was gifted to his daughter who is plaintiff in this case?
7. Whether any legal heir, more so the plaintiff herself raised any objection during life time of his father or not regarding the plot bearing No.63/1, in possession of the defendants No.1 & 2, if not what consequences?

8. Whether the record maintained by the Military Estates Officer Cantonment does confer this position or not?
9. Whether the Military Estates Officer is the necessary or property party, because of the reason for full and final adjudication for this suit, if so, the suit is liable to be dismissed on this ground alone.
10. Whether the gold ornaments which was kept by the deceased father with the plaintiff was distributed among the legal heirs or not if not what are the consequences?
11. What should the decree be?"

10. Whilst deciding the matter, the learned single Judge regarded Issues Nos. 1, 2, 3 and 5 as pivotal. These were considered interlinked. and it was stated that they all related and revolved around what was termed the '**legality of the gift or a condition thereof**'. As such, these issues were discussed jointly. The case set up by both sides in appeal, in their pleadings as well as arguments advanced at the bar, essentially also gravitated with the ambit of these four issues, which are therefore the points that require determination in this Appeal. Our appraisal follows accordingly.

11. From what has been recorded in the Impugned Judgment, it is manifest that certain excerpts from the cross-examination of the Appellants (as reproduced in the Impugned Judgment) were treated as admissions on their part and weighed heavily with the learned single Judge in his determination that the Deceased never divested himself from ownership and dominion of the Subject Property and continued claiming ownership thereof, and that the Gift was never a complete, legal and bona fide one and was only for administrative purposes, as claimed by the Respondent No.1. Whilst the import, significance and effect of these excerpts will be duly considered hereinafter, for reference the same are reproduced verbatim, with underlining and emphasis in bold as added by the learned single Judge:

"It is correct that our late father had gifted the property through this affidavit Ex.D/1 in favour of defendant No.1 & 2. **It is correct that the physical**

possession of property was not delivered to defendant No.1 and 2 and the property was rented out to Dr. Abdul Rasheed since 1994.

It is correct that our late father expired on 20.02.2005. **It is correct that till the death of our father, the property was not mutated in favour of defendant No.1 & 2.** It is correct that the mutation was made on 12.10.2007.

It is correct that the tax bills produced by me are all in the name of our late father. It is correct that our father during his life time, used to collect the rent of the suit premises him self.

12. Similarly, certain other excerpts from the cross-examination of the Appellants were treated by the learned single Judge as admissions as to the legality of the Will and its contents. These are as follows (the emphasis supplied being, as before, that of the learned single Judge):

“I see the WILL where it is stated that the gift was executed due to some administrative problems. Voluntarily stated that we had not filed the suit for declaration as the property has been mutated in our favour. It is correct that the mutation was made in the year 2007 and before that we had not challenged the statement made in the will that the gift was made due to administration problems.

The will was signed during the life time of our father. I had signed the Will because of the loan taken by me from my father. Voluntarily stated that I had not gone through the contents of the Will at the time of signing the Will.

“It is correct that the property 4/C/1 was sold out in compliance of the ‘WILL’ Ex.P/7.”

“It is correct that the ornaments referred to in the WILL were also distributed amongst the legal heirs.”

It is correct that the saving certificate referred to in Ex.P/7 were also encashed and the amount was distributed.

13. Thus, in considering Issues Nos. 1, 2, 3 and 5, it appears that from a reading of the evidence the learned single Judge considered the following points to have been established:

- (a) That the Deed executed in favour of the Appellants by the Deceased, the latter did not divest himself from ownership of the Subject Property or dominion thereof.
- (b) The Deceased continued receiving the rent from the tenancy of the Subject Property in the capacity of owner and never asked the tenants thereof to take or consider the Appellants as the owners.
- (c) that the ownership of the Deceased over the Subject Property was not challenged or questioned by the appellants during his lifetime or even subsequently.
- (d) That the title to the Subject Property was transferred in the name of the Appellants on 12.10.2007, two years after the death of the Deceased.

14. Based on this reading of the evidence and an appraisal of various relevant provisions of Muhammadan Law, the learned single Judge concluded in terms of Para 23 of the Impugned Judgment that the Defendants Nos. 1 and 2 had failed to establish that the Gift in their favour was (i) bona fide, (ii) that the Deceased had divested himself from all rights of ownership and dominion over the Subject Property, and (iii) that there had been delivery of possession (physically or even by conduct and attitude of the Deceased). It was held that mere non-objection would not serve to make the Gift complete unless and until the required formalities to constitute a valid gift were established/proved, and that, the Deed would not of itself serve to deprive other legal heirs (i.e. the Respondents) from their rights of ownership in the Subject Property. Accordingly, the learned single Judge went on to decree the Underlying Suit as prayed, hence this appeal.

15. Learned counsel for the Appellants has contended that the Impugned Judgment is patently the product of a misreading of evidence and misapplication of law. It was contended that the learned single Judge erred in failing to appreciate that the Respondents had not brought any documentary evidence on record to establish that the Gift, as evinced by the Deed and transferred in favour of the Appellants, was not a complete and genuine transaction.

16. Learned counsel for the Appellants further contended that the Impugned Judgment is based purely on the oral testimony of the Respondents and ignored the inherent contradictions therein, and, vitally, also overlooked the fact that such oral testimony was contrary to and belied by the documentary evidence placed on record by the Appellants, and the same ought to be excluded to that extent accordingly. She submitted that the completion of all requisite formalities in relation to the Gift, including the aspect of possession, was unequivocally declared by the Deceased in terms of the Deed and submitted that such a written acknowledgment of a gift was conclusive. Reliance was placed in this regard on the case reported as Muhammad Sharif & 2 Others v. Mst. Aisha Bibi 1994 MLD 677.

17. It was submitted that the learned single judge had presumed that the Subject Property was not transferred in the name of the Appellants during the lifetime of the Deceased and also failed to appreciate that such transfer was duly effected in the year 1981 and no steps were taken by the Deceased during his lifetime to revoke or otherwise assail or seek to set aside the Gift. She submitted that under such circumstances and in the face of such a transfer the question of non-delivery of possession could not validly arise. Reliance was placed on the case reported as Qutab Din & 4 Others v. Mst. Rahim Bibi 1989 SCMR 727.

18. It was further submitted that the learned single judge also failed to appreciate that the so-called Will was never properly exhibited in evidence in as much as only a copy thereof was produced, which was duly objected to at the material time. Without prejudice to this, it was submitted that in any case the same was not written in the hand of the Deceased but was written by the Respondent No. 3, who stood to materially benefit from the terms thereof.

19. Conversely learned counsel for the Respondents resoundingly endorsed the correctness of the Impugned Judgment and submitted that the same was unobjectionable and has been passed in view of what she contended was the reality of the arrangement inter se the Deceased and the Appellants. She further contended that such reality was confirmed by the fact that the Appellants executed a power of attorney in favour of the Deceased and that the Deceased was a signatory to the tenancy agreement along with the Appellants. Learned counsel also submitted that possession of the Subject Property was never with the Appellants and whilst referring to the evidence pointed to certain so-called admissions in that regard, as considered by the learned single Judge.

20. We have considered the record and the submissions made by the learned counsel for the parties. From a plain reading of the Impugned Judgment it is apparent that the learned single Judge took the aforementioned statement made by the Appellants under cross-examination that mutation had occurred in the year 2007 to mean that the title to the Subject Property was first transferred in the name of the Appellants on 12.10.2007, two years after the death of the Deceased, and this finding appears to have coloured the view taken as to the Deceased exercising dominion over and thus asserting ownership of the Subject Property subsequent to the Gift as well as the status of the Appellants as regards the Subject Property.

21. However, when the documents exhibited in evidence and the depositions of witnesses are viewed holistically in juxtaposition with the findings contained in the Impugned Judgment, certain salient facts that remained unconsidered at first instance emerge from the material placed on record, which have a direct bearing on the matter. These are as follows:

(a) The Deed was sworn by the Deceased before an Oath Commissioner and was submitted by him before the Military Estates Officer for the purpose of seeking the transfer of the Subject Property in favour of the Appellants, with the result that a Transfer Order dated 26.09.1981, bearing Reference No. K-15/PDSO/2198/15, was issued by the Military Estates Officer in respect of the Subject Property in their favour. The mutation referred to by the Appellant No.2 under cross-examination as having taken place in 2007 was the ultimate entry in the records of the Pakistan Defense Officers Housing Authority (“**DHA**”), which was predicated on the prior transfer in the records of the Military Estates Officer and proceeded on the basis thereof. Thus the crucial event marking the change of ownership in the official record was the Transfer Order of 1981 and not the final entry in the DHA records in 2007. Of course, from a legal perspective the real question always was the validity of the Gift. The strongest evidence of the Gift, apart from the Declaration itself, was the Transfer Order of 1981, contemporaneous as it was to the gift itself. With respect, the learned single Judge erred materially in failing to appreciate this aspect of the matter, which was of fundamental importance.

- (b) Whilst the receipts on account of house tax, conservancy and water charges remained in the name of the Deceased, the paid bills for the period prior to his demise were apparently in the possession of the Appellants as some of these were produced in original by the Appellants and exhibited in evidence accordingly as Exhibits D/4 to D/4/4, which is consistent with their claim of ownership.
- (c) The income from the tenancy of the Subject Property was reflected in the tax returns of the Appellant No. 1.

22. In fact, the following statements emerge from the cross examination of the Respondent No.1:

“It is correct that the plot No.63-I was mutated in favour my two brothers, the defendant No.1 and 2 in 1981. I have gone through the gift deed Ex.P/3 and say that whatever stated in the gift deed is correct. It is correct that my father was alive for about 25 years after the execution of gift deed Ex.P/3. It is correct that my father did not apply for the cancellation of the gift deed Ex.P/3 except the “WILL”. It is correct that the “WILL” is not in the hand writing of my father. Volt. States that it was written on the dictation of my father by my sister Khalida Hamid. It is correct that my father expired on 20.02.2005. The WILL is dated 15.01.2005.”

As such, it is evident that in furtherance of the Gift, the process of transfer of the Subject Property in the names of the Appellants was initiated by the Deceased as far back as 1981.

23. Furthermore, although it is correct that writing is not essential to the validity of a gift under Islamic law, that is not to say that if an oral gift is evinced by a written instrument, such written instrument and the terms encapsulated there would not be conclusive or at least strongly probative in determining the basis and understanding on which the gift was made.

24. Whilst the burden of proving the existence of an oral gift rests on a donee when he alleges the same and seeks to assert a claim on that basis, either against the alleged donor or to disassociate the immovable property purportedly gifted from the donor's estate, there is a marked difference between such a circumstance and the matter at hand, where the execution of a written instrument in the shape of the Deed evincing the factum of Gift is not disputed and it stands established from the documentary evidence on record that the Donor personally took steps soon after execution of the Deed to effect transfer of the Subject Property in the names of the Appellants and the transaction thus came to be completed.
25. To our minds, a person who attacks such a completed transaction as a sham, bogus or fictitious must prove the same. Accordingly, under the prevailing circumstances, we are unable to subscribe to the view taken by the learned single Judge that the burden lay on the Appellants to establish that the Gift was (i) bona fide, (ii) that the Deceased had divested himself from all rights of ownership and dominion over the Subject Property, and (iii) that there had been delivery of possession.
26. On the contrary, under the given circumstances we are of the opinion that the burden lay squarely on the Respondent No.1 in her capacity as plaintiff to demonstrate that the Gift was a sham transaction, as alleged, and are afraid that the vague allegation that the Gift was for "the purpose of income tax and some administrative purpose", bereft of any further elucidation as to what this assertion connotes, could not of itself serve to shift the burden on to the Appellants, especially when unsupported by

evidence duly admissible and admitted into evidence in accordance with law.

27. Indeed, as contended by learned counsel for the Appellants with reference to the cases of Muhammad Sharif (Supra), a written instrument evincing a gift is a strong piece of evidence that goes towards proving such a transaction. Similarly, as observed in the case reported as Ghulam Zainib & Another v. Said Rasool & 8 Others, 2004 CLC 33, it was observed by a learned single Judge of the Lahore High Court in the context of a claim of oral gift that the sanctioning of a mutation is also a strong circumstance in support of such transaction. Furthermore, in the case of Qutab Din (Supra), where the question before the Honourable Supreme Court was whether a gift by a father in favour of his daughter had been challenged by the collaterals on the ground that the gift was void as no delivery of possession took place, the Apex Court, whilst dismissing the CPLA for the reason inter alia that such an objection could not be raised at the stage of second appeal, also went on to observe that (emphasis supplied) “besides that the land in dispute was in possession of the tenants and the name of the respondent was recorded as owner of the said land in the Revenue record”. Here of course the Transfer Order of 1981 stands in for the relevant reflection in the official record.

28. Even otherwise, as far as excerpt from the cross-examination of the Appellant No.2 in relation to the matter of possession (as reproduced in Para 11 above) is concerned, we are of the view that the same is correlated to the tenancy of the Subject Property created in 1994 and can only properly be viewed so as to show that the Appellants, having placed the tenant in possession, were then not in physical possession of the Subject Property during the subsistence of the tenancy, but cannot be taken so as to mean that the elements of a valid gift were never completed by the Deceased.

29. We do not consider the issuance of a power of attorney by the Appellants to the Deceased in respect of the Subject Property to of itself be definitive or even strongly indicative of the ownership continuing to remain with the latter, particularly since in this instance the Power of Attorney was issued in the year 1993 , and it stands to reason that the Deceased would have procured the execution of such a document virtually contemporaneously to the Deed had the intention been to retain control over the Subject Property vide such an instrument. Even otherwise, the Power of Attorney itself contains a plausible narration as to why it was given.
30. Furthermore, as far as the subject of the Will and its effect are concerned, it merits consideration that since the Will was not produced in original, an objection was raised as to admissibility of the alleged copy sought to be exhibited. As such, this document was not marked as an exhibit and was placed under objection for appropriate orders of the Court. However, it appears that no specific ruling was made on the point of admissibility at the time of adjudicating the Underlying Suit, and the learned single Judge read the excerpt from the cross-examination of the Appellant No.2 in relation to the Will and its execution (as reproduced in Para 12 above) as an endorsement by the Appellants of its validity (Para 21 of the Impugned Judgment). Whilst the question remains as to whether such document or any questions posed with regard thereto could validly have been read as part of the evidence on this basis in the absence of a positive finding as to admissibility, it is not necessary to enter into a protracted discourse as in our opinion the Will even otherwise cannot serve to undo the Gift, which was acted upon and given full effect by the Deceased, and it is well settled that a complete gift in which possession has been delivered is irrevocable if the donee is related to the donor within the prohibitory degree, as is the case in the matter at hand. For good measure, reliance has been placed in support of this proposition by the learned counsel for the Appellant on the case reported as Mst. Hamida Bibi v. Wali Muhammad 1999 MLD 1687.

31. In view of the foregoing, we are constrained to say with utmost respect that the Impugned Judgment suffers from certain material infirmities which go to the root of the matter, as discussed, and cannot therefore be sustained. Thus, the Appeal is allowed with the result that the Impugned Judgment is set aside and the Underlying Suit stands dismissed. There is no order as to costs.

JUDGE

JUDGE

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Dated _____