

IN THE HIGH COURT OF SINDH AT KARACHI

IIInd Appeal No.143 of 2018

DATE

ORDER WITH SIGNATURE(S) OF JUDGE(S)

Before: Mr. Justice Nazar Akbar

Appellant : Ibad ur Rehman Siddiqui,
Mr. Abdul Basit Afridi, advocate.

Versus

Respondent No.1 : Mudassir Ahmed Siddiqui,

Respondent No.2 : Mst. Shaista Jamal Siddiqui,

Respondent No.3 : Mst. Salma Iftikhar,

Respondent No.4 : Akhtar Jamal Siddiqui,

Respondent No.5 : Mst. Ghazala Khalil,
Through Mr. Ali Azam, Advocate.

Date of hearing : **28.02.2019**

Date of Decision : **26.03.2019**

JUDGEMENT

NAZAR AKBAR, J. The appellant through this IIInd Appeal has challenged the concurrent findings. The VIII-Senior Civil Judge, Central Karachi by consolidated order dated **19.01.2018** decreed suit No.475/2016 filed by respondent No.1 and dismissed suit No.53/2016 filed by the appellant. The V-Additional District Judge, Central Karachi by judgment dated **01.11.2018** passed in Civil Appeal No.23/2018 maintained the said findings of trial Court.

2. Briefly stated the facts of the case are that respondent No.1 filed SMA No.504/2015 for grant of letter of administration under Section 278 of Succession Act, 1925 in respect of one immovable

property bearing House No.R-753, measuring 120 sq. yards, Block No.19, Scheme No.16, Al-Noor Society, Federal B Area, Karachi (the suit property) left by deceased mother of the appellant and the respondents Mst. Qamar-un-Nisa. The appellant filed objections to the said SMA wherein he has taken the plea that the property mentioned in the SMA did not belong to their deceased mother, therefore, since one of legal heirs has raised objection to the said SMA, the succession petition filed by respondent No.1 was converted into civil suit by IInd Additional District Judge, Central Karachi by order dated **05.04.2016**. Therefore, respondents' SMA was converted into civil suit No.475/2016 and the appellant also filed a suit for Declaration, Cancellation and Damages bearing civil suit No.53/2016. In suit No.475/2016 respondent No.1 stated that he is real son of deceased Mst. Qamar-un-Nisa wife of Khalil Ahmed Siddiqui, who expired on **29.03.2015** and at the time of her death she left behind six legal heirs including the appellant and other respondents and there is no other legal heir. Respondents No.2 to 5 supported the pleading of suit filed by respondent No.1 and filed their affidavit of no objection in his favour.

3. The brief facts of the suit No.53/2016 filed by the appellant are that in the year 1966 a plot of land admeasuring 120 sq. yards was leased out to one Ishaq Ahmed Hasanjee S/o Hasnjee vide indenture of lease dated **24.01.1966** vide Registration No.7627-A at Page No.9-12 Volume 1665. It was averred that vide conveyance deed dated **19.12.1970** the appellant has purchased a constructed house bearing House No.753/19, Scheme No.16, admeasuring 120 sq. yards situated in Al-Noor Society, Federal B Area, Karachi (the suit property) from its original owner Ishaq Ahmed Hasanjee. The total

sale consideration was Rs.22,000/-. The conveyance deed was duly registered vide Registration No.4839 at pages 47-56, volume 294, I-Additional Registrar T-Division. The appellant started living in the suit property alongwith his mother and other family members. It was averred that during lifetime of appellant's parents the behavior of respondents was not good with them. It was further averred that in the year 1974 the appellant due to natural love and affection gifted the suit property to his mother and transferred his rights in respect of his mother. It was further averred that in the year 2005 the siblings of the appellant i.e the respondents became dishonest and they manipulated the mind of their mother and tried to sell the suit property in order to usurp the rights of the appellant, therefore, the appellant after consulting his mother cancelled the oral gift deed vide cancellation deed dated **23.06.2005**. Thereafter mother of appellant and respondents has died on **29.03.2015** and the respondents demanded their share in the suit property. It was further averred that the appellant received notice dated **30.11.2016** by the Court about petition under Succession Act and noticed from the documents annexed with the petition that the respondents had prepared a forged writing of their mother and fabricated the documents. It was further averred that the intention of respondents was to usurp the suit property, therefore, the appellant filed the said suit before the trial Court.

4. After service of summons, the respondents filed written statement wherein they contended that once the donor has gifted the property, he cannot cancel the said gift deed, therefore, no valid or legal cause of action has accrued to the appellant for filing the suit.

5. The trial Court from pleadings of the parties had framed the following issues in both the consolidated suits:-

1. *Whether the suit property bearing house No.753/19, Scheme No.16, Measuring 120 Sq. yards situated in Al-Noor Society, Federal B Area is the property left by deceased Mst. Qamar-un-Nisa wife of Khalil Ahmed Siddique, who expired on 29-Mar-2015?*
2. *Whether suit property bearing house No.753/19, Scheme No.16, Measuring 120 Sq. yards situated in Al-Noor Society, Federal B Area is the property of Ibadur Rehman Siddique son of Khalil Ahmed Siddique being sole owner of the property?*
3. *Whether the other legal heirs of Mst. Qamar-un-Nisa are entitled for their legal shares from the property in question bearing house No.753/19, Scheme No.16, Measuring 120 Sq. yards situated in Al-Noor Society, Federal B Area?*
4. *Whether the cancellation of gift deed was executed and same was Genuine?*
5. *What should the decree be?*

6. The trial Court after recording evidence and hearing learned counsel for the parties, preliminary decreed suit No.475/2016 filed by respondent No.1 and dismissed suit No.53/2016 filed by the appellant by judgment dated **19.01.2018**. Against the said judgment, the Appellant filed consolidated Civil Appeal No.23/2018 before the V-Additional District Judge, Central Karachi which was also dismissed by the appellate Court by judgment dated **01.11.2018**. The appellant has preferred the instant second appeal against both the judgments of the two Courts below.

7. I have heard learned counsel for the parties and perused the record as well as written arguments filed by the counsel for the appellant.

8. Learned counsel for the appellant has contended that two Courts below have failed to appreciate that there was no valid gift

executed by the appellant in favour of the respondents because the gifted property was not handed over to the donee by the donor and in this aspect he has referred to several case laws. There is no cavil to the proposition that in case any of the ingredients of GIFT is missing the gift is not valid. However, he has failed to appreciate that the case of respondents was that the appellant was benami owner for a brief period from 1970 to 1974 when he gifted the suit property to his mother and wife of real owner from whose funds the suit property was purchased in his name. When the appellant raised objections to the succession petition filed by the respondents on the demise of their mother on the basis of gift deed, the burden was on him to prove that he was owner and gift was not made by him or it was not completed. He added to his burden when in addition to objections he filed suit with the following prayer:-

- a) *Declare that the Plaintiff is the lawful owner of Suit Property H No.R-753, Block 19, Scheme No.16, Al-Noor Society, F.B Area, Karachi.*
- b) *Declare that the Oral gift dated 13.07.1974, has been validly cancelled by the Plaintiff on 23.06.2005 vide cancellation deed.*
- c) *Declare that the alleged settlement dated 03.08.1990 filed by the Defendants is forged and fabricated document and has no value.*
- d) *Pass a monetary decree of Rupees 10 lacs as damages for causing mental torture, agony and anguish to the Plaintiff?*
- e) *Cost of Suit.*
- f) *Any other relief which Hon'ble court deems fit and proper.*

In his own suit he has not prayed for declaration that gift executed by him was not completed and, therefore, he continued to be the owner and he only wanted a declaration that he has validly cancelled the gift deed on **23.6.2005** and he has sought declaration of ownership

without showing any proof of having purchased the suit property from his own funds.

9. Once the title has been challenged by the real brothers and sisters that the owner is not having exclusive ownership rights because he has not purchased the suit property from his funds as at relevant time he was not in a position to buy it, the burden was on him to prove that he is owner in his own right. Admittedly in his cross-examination the appellant has conceded that he is illiterate and do not know English, and in 1970 he was 20 years of age. However, he claimed that he was in service from 1966 meaning thereby when he was just 16 years of age. His illiteracy and age factor has negated his claim that he has purchased the property from his own funds. In absence of any documentary proof of service record or that he had enough resources to purchase the property, the two Courts below had no material before them to hold that the suit property was owned by him (issue No.2). It is also borne from the record that the appellant has gone to KDA for getting the property transfer in the name of his mother on the basis of gift deed way back in 1974. Therefore, he was aware of transfer of the suit property in the name of his mother, but when he cancelled the said gift deed, he did not go back to KDA for re-mutation of the property in his name on the basis of deed of cancellation. The appellant by conduct has divested himself from title and ownership of the property which he even otherwise he was holding as benami owner and, therefore, all the case-laws relied upon on the question that whether the gift has been completed or not in the facts of the case is out of context. The appellant has not even sought a declaration about the gift but he has sought declaration about cancellation of the gift which admittedly is

not even a registered document nor before cancellation any notice was issued to the beneficiary of the gift when the mutation was recorded in KDA.

10. In the above circumstances, the concurrent findings of the two Courts below in this second appeal cannot be interfered with.

11. In view of the above, instant Second Appeal is dismissed with no orders as to cost.

JUDGE

Karachi
Dated:26.03.2019

Ayaz Gul