ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

R.A. No.100/2015

Date	Order with signature of Judge

For hearing of main case.

22.09.2020

Applicant No.2 present.
Mr. Abdul Sattar Gujjal advocate for respondents No.1, 2, 4 and 5.
Mr. S. Hassan Abidi advocate for KMC.
Mr. Aqil Zaidi advocate for respondent No.7.

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SALAHUDDIN PANHWAR, J. Applicant has preferred this revision application against judgment and decree dated 01.09.2015 passed in Civil Appeal No.17/2013 and judgment and decree dated 12.12.2012 passed by the trial court in Civil Suit No.1159/2009.

2. Brief facts of the case are that applicants claim to be legal hairs of deceased Muhammad Khalique Khan son of Hafiz Muhammad Saeed who died at Karachi on 29.12.2000; he was suffering from schizophrenia since 1977 till his death; that deceased was lawful owner of house constructed on plot No.1/163 Shah Faisal Colony No.1, Karachi measuring 80 square yards by virtue of allotment order issued by Government of Pakistan Rehabilitation Commissioner Karachi in 1955; that one late Muhammad Shareef Khan was real brother of deceased Muhammad Khalique Khan and keeping in view the worst financial position of the deceased Muhammad Sharif Khan the late Muhammad Khan allowed him to reside in the suit property who also was authorized to receive the rent from the shopkeepers and utilize the same for himself and for the survival of his large family as Muhammad Khalique Khan was well settled; that since late Muhammad Khalique Khan had blind faith upon his real brother late Muhammad Sharif and even he did

not bother to get the suit property leased in his name from respondent No.7; that on 01.12.2008 when the applicants lastly approached to respondents No.1 to 6 and requested them to hand over the vacant and peaceful possession of the suit property to them and then the respondents No.1 to 6 disclosed that suit property has been transferred in the name their mother Mst. Rabia Sharif and now they are owner of the suit property by way of inheritance; that applicant No.7 rushed to respondent No.7 and moved the application on 28.02.2009 for issuance of documents of the suit property and to conduct inquiry into the illegal transfer of the suit property in the name of Mst. Rabia Sharif and pursuant to that application the notices of inquiry were issued to the respondent No.1 by the Additional District Officer (R-II), Management-I, CDGK (respondent NO.7) on 02.06.2009 and 24.06.2009 and on 15.08.2009 applicant No.7 was intimated by respondent No.7 that the suit property had been transferred in the name of Mst. Rabia Begum now deceased widow Mohammad Sharif in the year or 1982 as such it came into knowledge of the applicant on 15.08.2009 regarding the transfer of suit properly in the name of Mst. Rabia Sharif by respondent No.7; property in question has been transferred in the name of deceased Mst. Rabia Sharif by respondent No.7 on the bases of forged nikahnama while the father of the applicants had never executed any type of documents in favour of the Mst. Rabia Sharif; that from inquiry of respondent No.7 it revealed that in the year 1977 the application was moved to respondent No.7 by the deceased Mst. Rabia sharif for the transfer of suit property in her name but the same remained pending and then was transferred in the year of 1982, which is imaginary and this fact indicates that the property in question was transferred in the name of Mst. Rabia Sharif

fraudulently as neither late Mohammad Khalique Khan was issued any notice and nor was called for recording the statement by respondent No.7 and the suit property was transferred directly by the respondent No.7 in the name or Mst. Rabia Sharif on the basis of forged documents which is unjust and improper.

3. Heard and perused the record as well judgments recorded by both courts below.

4. At the outset applicant in person, being daughter of Muhammad Khalique Khan, contends that Muhammad Khalique was owner of the subject matter property and on the basis of alleged gift attached with nikahnama of Mst. Rabia Shareef with her husband Muhammad Sharif subject matter property with the collusion of staff of KDA was transferred; both courts below failed to appreciate legal and factual position of the case.

5. In contra, learned counsel for respondents No.1, 2, 4 and 5 contends that gift was valid as in nikahnama it was categorically mentioned that Muhammad Khalique gifted the subject matter property to his brother's wife on the eve of their marriage in 1954; on the basis of statement and nikahnama Mst. Rabia Shareef approached KDA and KDA authorities after conducting complete process as well enquiry transferred the property on the basis of that nikahnama while treating the same as gift in favour of Mst. Rabia Shareef. It is further contended that suit is hopelessly time barred; donor was alive when mutation was effected in favour of Mst. Rabia Shareef but he failed to challenge the same hence at the time of his death he was not owner of that property therefore applicants, being legal heirs, were not entitled to receive any share from that property hence trial court and appellate court have passed judgments in

accordance with law. He has relied upon 2014 SCMR 914, 2015 CLR 111, 2010 SCMR 121, 2003 MLD 131M 2011 SCMR 222, 2006 YLR 1783, 2006 YLR 1090 and PLD 2015 Karachi 216.

6. I have carefully heard the arguments, so advanced by respective sides and have also *minutely* examined the available record.

7. Candidly, property in question was transferred on the basis of contents of gift shown in nikahnama executed in 1954, *however,* got materialized (mutation) in the year 1982. Here, before going into merits any further, it is relevant to reiterate certain *legally* established principle of law, so enunciated by honourable Apex Court, being binding in *nature,* in following cases:-

> *Muhammad Sarwar v. Mumtaz Bibi* (2020 SCMR 276):
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> "5. ..... This Court has held in a number of judgments that where the validity of a gift mutation is challenged, it is incumbent upon the beneficiary not only to prove the validity and legality of the gift mutation by producing all relevant evidence **but it is also necessary that the gift itself be proved through cogent and reliable evidence ...."**
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> *Fareed and others v. Muhammad Tufail & another* (2018 SCMR 139):
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> "2. ... In the light thereof the rule laid down by this Court in *Kulsoom Bibi v. Muhammad Arif (2005 SCMR 135) and Ghulam Haider v. Ghulam Rasool (2003 SCMR 1829)* that a done claiming under a gift that excludes an heir, is required by law to establish the original transaction of gift irrespective of whether such transaction is evidenced by a registered deed.....The mere transfer of possession to a done is not sufficient to constitute a valid gift under the law. Furthermore, in the judgment of this Court reported as *Barkat Ali v. Muhammad Ismail (2002 SCMR 1938)* a gift deed as in the present case must justify the disinheritance of an heir from the gift."

From the above, it can *safely* be concluded that the burden was upon the *beneficiaries* i.e respondents not only to prove the claimed *gift* but also *validity* thereof.

8. The perusal of the available material shows that *undeniably* the ownership of the subject matter was with father of the applicants i.e **'Muhammad Khalique'** who was the brother of the husband of the claimed *donee* i.e **'Mst. Rabia Sharif'**. There can be no exception to position that ***'nikahnama'*** is a document between two i.e **'bride and bridegroom'** whereby they both *alone* own and take certain liabilities for each other. Other persons do sign the ***'nikahnama'*** but only as **'witnesses** or **wakeel'** of the marriage or contracting parties thereto i.e **'bride and bridegroom'** , therefore, I would insist that mere referral to a *signature* of a person in such capacity shall not bind him of any term, agreed or mentioned in ***nikahnama*** which, *otherwise,* pertains to the ***bridegroom.*** An exception to this would always require an ***authorization*** and in absence thereof a writing, mentioned in the ***nikahnama,*** would not bind any other person who, *even,* if acted as witness to marriage or wakeel to a party to such contract (nikahnama). Guidance is taken from the case of <u>*Fawad Ishaq v. Mehreen Mansoor*</u> (PLD 2020 SC 269) wherein, while responding to a *similar* question, it is held as:-

> "7. Mst. Khurshida acquired land in the year 1964 on which subsequently a house was constructed. It is also admitted that Mst. Khurshida was not a signatory to the *Nikahnama* nor had executed any other document agreeing to transfer the Property, either before or after a house was constructed on it, to her daughter-in-law. Mst. Khurshida also did not grant a power of attorney or otherwise authorize her husband to make any commitment on her behalf with regard to the Property, let alone to transfer it. The 'Declaration' (Exhibit DW-1/1) executed by Mansoor stated that his father had agreed to construct and deliver the possession of the Property, which is of little consequence because, firstly, it is self-serving document and, secondly, the Property was owned by Mst. Khurshida, who had not agreed to part with it.

In the instant matter, *too,* there has not been claimed nor produced any such document which could suggest such authorization or *declaration* by the late Muhammad Khalique. In absence thereof,

mere presence of signature on *Nikahnama* and alleged statement would not be sufficient to take such mentioning as valid ***gift*** by Muhammad Khalique.

Be that as it may, it is also an *undeniable* position that nikahnama and alleged gift statement was with the respondents till 1982 and in 1982 at their request property was transferred in the name of Mst. Rabia Shareef and at such time admittedly the claimed donor was alive hence if there had not been any *dispute* or *denial* by such alive donor then keeping the *donor* away from proceedings before KDA authorities is quite *illogical.* Even otherwise, the KDA authorities before relying such a document (*unregistered)* for transferring title (depriving one from property) was required to have served notice upon such person *least* to resort all possible courses to put all interested persons onto notice of such proceedings. In the case of *Muhammad Sarwar* (supra) it is also observed as:-

> "5. Further, on the basis of the alleged oral gift, a gift mutation bearing No.252 dated 17.06.1985 was sanctioned in favour of the petitioner. In terms of section 42 of the Land Revenue Act, 1967, it is obligatory that a mutation of this nature be sanctioned in *Majlis-e-Aam* so that every person of the village may have knowledge of such alienation and the possibility of fraud, collusion or secretly undertaken transaction may be eliminated."

9. I would also not hesitate for a *single* moment even that statement with *'nikahnama'* shall not operate as a ***'registered document'*** hence in case of dispute or absence of the ***'donor'*** such declaration regarding validity of ***gift*** etc shall be required by none but a competent court of law. Such is also not the position rather it appears from perusal of the record that no effort was made by the Authorities to get statement of *claimed* donor nor any effort was made so as to put him on notice of such proceedings, therefore, the Authority, I would insist, was not competent to transfer the title

merely with reference to such statement attached with nikahnama. Besides, such statement is not fulfilling three ingredients of gift i.e. declaration, acceptance and possession.

10. Further, it is also matter of record that original nikahnama as well as statement attached is not produced and yet same is not in possession of respondents. In absence of *original,* a mentioning regarding gift of property of brother of bridegroom was always opening a question that *'whether this existed in original or otherwise?.* which question always burdens the *beneficiaries* to establish the gift coupled with validity thereof which was never discharged within meaning of Article 79 of the Qanoon-e-Shahadat Order 1984 whereby the examination of witnesses of *gift (nikahnama)* was nothing short of a mandatory obligation to establish the *valid gift.* This was never resorted to by respondents.

11. With regard to contention of learned counsel for respondents that suit was time barred suffice to say that illegal order passed by KDA authorities will not come in the way of plaintiffs particularly when the donor himself never appeared before authorities for conforming the claimed gift. No doubt, *normally* this Court in revisional jurisdiction is slow in interfering in current findings of two courts below but where there appears *prima facie* misreading as well departure from settled principles of law this Court is always competent to disturb such concurrent findings. Accordingly both judgments are set aside. Instant revision application is allowed and suit is decreed for prayer clauses (a), (b), (c) and (d).

J U D G E

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