

# THE HIGH COURT OF SINDH, KARACHI

## Suit No. 195 of 2013

[Mrs. Suriya Iqbal Chishti through its LRs versus Mrs. Rubina Majidulla and 02 others]

Plaintiff 1 : Suriya Iqbal Chishti [**Now Deceased**].

Plaintiffs 2 & 4 : Hassan-uz-Zaman Iqbal Chishti and Tariq Iqbal Chishti through Mr. Aftab Ali Bhangwar, Advocate.

Plaintiff 3 : Shaheen Iqbal Chishti through M/s. Muhammad Jaffer Raza and Rabia Khan, Advocates.

Defendant 1 : Mrs. Rubina Majidulla through M/s. Khawaja Shams-ul-Islam and Shahzad Mahmood, Advocates.

Defendants 2 & 3 : Nemo.

Dates of hearing : 19-04-2021 & 29-04-2021.

Date of decision : 27-09-2021.

## ORDER

**Adnan Iqbal Chaudhry J.** - The suit is for cancellation of a gift deed dated 21-12-2012 in respect of Bungalow No.3/B-1, Zamzama Street, Clifton, Karachi (the suit house). The suit was filed by the donor herself against the donee, her daughter, the Defendant No.1. Pending suit, the donor (the original Plaintiff) passed away and her other legal heirs, apart from the Defendant No.1 who was already party, were impleaded as Plaintiffs under Order XXII Rule 3 CPC. The Plaintiff No.2 is the husband/widower of the original Plaintiff and the father of the Defendant No.1. The Plaintiffs 3 and 4 are the sons of the original Plaintiff and the brothers of the Defendant No.1. It is therefore to be kept in mind at the outset that since the Plaintiffs 2 to 4 were impleaded in the suit as legal heirs of the original Plaintiff, it is the original Plaintiff's rights and liabilities which are to be considered and not those of her legal representatives.<sup>1</sup>

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<sup>1</sup> *Syed Shafaat Ali v. Syed Feroz Ali* (2018 CLC 1720).

2. CMA No. 1933/2013 was filed by the original Plaintiff, the donor, to restrain the Defendants from creating third-party interest in the suit house. An interim order in like terms was passed on 22-02-2013 which is still operating. It was the case of the original Plaintiff/donor, that she had revoked the gift of the suit house made by her in favor of the Defendant No.1. The reasons for doing so were set out in the plaint as follows:

*“7. That in December 2012 the Defendant No.1 started pressuring the Plaintiff on the grounds that since she does not have any available residence in Karachi and because the Defendant No.1 was one of the people who looked after the Plaintiff in her sickness, the Plaintiff must transfer the suit property in her name by way of a gift deed.*

*8. That the Plaintiff was being subjected to acute mental pressure and in a state of vulnerability transferred/executed the gift deed dated 21.12.2012 in favour of Defendant no 1.*

*9. It is pertinent to mention here that all original documents of the said property were obtained by the Defendant No.1 from the Plaintiff fraudulently and connivingly.*

*10. That it is pertinent to mention here that the Plaintiff was coerced into transferring the property by way of gift deed to Defendant No. 1 on the pretext that all other legal heirs, including Shaheen Iqbal Chishti and Tariq Iqbal Chishti, will get their due share. However, later on it was transpired that the gift deed doesn't include either ones name and in fact the deed only benefits Defendant No. 1 to the detriment of the other legal heirs. This fact alone is a manifestation of the misrepresentation and fraud perpetrated on the Plaintiff by Defendant No.1”.*

Mr. Aftab Ali Bhangwar, learned counsel for the Plaintiffs 2 and 4, and Mr. Jaffer Raza, learned counsel for the Plaintiff No.3 submitted that the donor was neurologically impaired after a surgery at which time the Defendant No.1 obtained the gift deed from her; that a notice revoking the gift deed was sent by the donor to the Defendant No.1 within two month of executing the gift deed; and that the gift was never complete as the donor had not delivered possession of the suit house to the Defendant No.1. Mr. Jaffer Raza Advocate relied on para-167 of Muhammadan Law by D.F. Mulla to submit that a gift may be revoked by the donor at any time before

delivery of possession, and that the burden is on the Defendant No.1 as donee to show that all conditions to the gift had been met.

3. The case of the Defendant No.1/donee is that the gift deed was executed by the original Plaintiff/donor with free will and out of natural love and affection for the Defendant No.1, her daughter; that the original Plaintiff was made to file the suit by her two sons; that the contention that the donor was neurologically impaired at the time of the gift was an afterthought as the gift deed was also signed by the Plaintiff No.2, the husband of the donor and father of the donee as attesting witness before the Registrar.

Mr. Shams-ul-Islam, learned counsel for the Defendant No.1 submitted that the case set-up in the plaint was that the gift was procured by misrepresenting to the donor that her sons too would get shares in the suit house, and it is no-where alleged that possession of the suit house was not delivered to the Defendant No.1. He submitted that the gift deed recited that possession of the suit house was duly delivered to the Defendant No.1; that title documents of the suit house are with the Defendant No.1; and that in the circumstances, sub-para (2)(b) and (f) of para 167 of Muhammadan Law were attracted which barred the donor from revoking the gift.

4. Heard the learned counsel and perused the record.

5. To reiterate, it was the donor herself who had filed the instant suit to assert that she had revoked the gift of the suit house to the Defendant No.1. From the plaint, relevant paras of which have been reproduced in para 2 above, the case of the original Plaintiff/donor was not only that the gift deed had been obtained from her by misrepresentation, but also that the Defendant No.1 had exercised undue influence in obtaining the same. In *Rab Nawaz v. Ghulam Rasul* (2014 SCMR 1181), the exercise of 'undue influence' as envisaged in section 16 of the Contract Act, was accepted as one of the grounds to annul a gift. Now, whether the Defendant No.1 had exercised any undue influence or misrepresentation to obtain the gift, or whether

this suit was maneuvered by the sons of the original Plaintiff, are all questions of fact requiring evidence.

6. Revocation of gifts is discussed in para 167 of Muhammadan Law by D.F. Mulla 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 subsection (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 sections 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”.

Mr. Shams-ul-Islam, learned counsel for the Defendant No.1 relied on sub-para (2)(b) and (f) of para 167 of Muhammadan Law to submit that the donor was barred from revoking the gift. However, the instances barring the revocation of a gift listed in sub-para (2) appear to be relevant only where the gift was complete by delivery of possession. Where possession is yet to be delivered, sub-para (1) of

para 167 states that the gift can be revoked by the donor, for before that, the gift is not complete.

7. To demonstrate that exclusive possession of the suit house was not delivered by the donor to the Defendant No.1, Mr. Aftab Ali Bhangwar and Mr. Jaffer Raza Advocates had drawn attention to the notice dated 15-02-2013 sent by the donor to the Defendant No.1 stating that her two sons and their families were sharing the upper portion of the suit house. On the other hand, Mr. Sham-ul-Islam drew attention to the written statement of the donor in a previous Suit No. 1137/2012 stating that her son, Tariq Iqbal Chishti was not in possession of the upper floor of the suit house since December 2011. But then, in her counter-affidavit to CMA No. 7488/2013, the donor had averred that the suit house was being enjoyed by her entire family i.e. herself, her husband, her two sons and the Defendant No.1; that the Defendant No.1 was in possession of only one room on the ground floor from which the donor did not intend to dispossess her; but that the exclusive possession of the suit house was never delivered by her to the Defendant No.1. Again, in her counter-affidavit to CMA No. 3784/2013, the donor had denied that she had delivered exclusive possession of the suit house to the Defendant No.1. The recital in the gift deed that possession has been delivered, is not of much help to the Defendant No.1 when it was the case of the original Plaintiff/donor that the gift deed had been obtained by undue influence and misrepresentation. Therefore, the question whether the gift of the suit house to the Defendant No.1 was complete by delivery of possession or not, remains central to the dispute, and one which has yet to be determined by evidence.

8. In the circumstances discussed above, the Plaintiffs have a *prima facie* case for a temporary injunction; the balance of convenience is in their favor; and they will suffer irreparable harm of the same is denied. Resultantly, **CMA No. 1933/2013 is allowed by restraining the Defendants from creating any third-party interest in the suit house pending suit.**

CMA No. 7488/2013, CMA No. 7489/2013, CMA No. 8408/2014 and CMA No. 8409/2014:

9. CMA No. 7488/2013 was filed on behalf of the Defendant No.1 alleging that she apprehended that the original Plaintiff/donor and her two sons will break the lock of the portion of the suit house in her possession to dispossess her. An interim order dated 17-07-2013 was passed directing the parties not to disturb the *status quo* and position of the respective parties on the subject property. That order was also made applicable to the two sons of the original Plaintiff, Shaheen Iqbal Chishti and Tariq Iqbal Chishti, presently the Plaintiffs 3 and 4, although they were not parties to the suit at that time. At the instance of the Defendant No.1, an inspection was also carried out on 23-07-2013 to prepare an inventory of the possessions of the Defendant No.1 at the suit house. Per the inspection report, the donor was not at the suit house at the time and the inventory was prepared on the pointation of the Defendant No.1.

Thereafter, by a contempt application, CMA No. 8408/2014, the Defendant No.1 alleged that on 27-06-2014 her father Hassan-uz-Zaman Iqbal Chishti (subsequently the Defendant No.2), her brother Tariq Iqbal Chishti (subsequently the Defendant No.4) and his wife Fozia Chishti had disobeyed the interim order dated 17-07-2013. The Defendant No.1 stated that she resided in Kazakhstan, but visited her ailing mother (the original Plaintiff) at Karachi from time to time; that on a recent visit on 27-06-2014 around 12:30 p.m., the alleged contemnors misbehaved with her and obstructed her entry to the suit house.

10. In reply, Tariq Iqbal Chishti and Fozia Chishti stated that they had never stopped the Defendant No.1 from visiting her mother (original Plaintiff) at the suit house; that at the day and time of the alleged contempt they were not even present at the suit house; that Tariq was out to pick his children from school while Fozia was out shopping; and that at such time only the donor and her husband were present at the suit house. Tariq and Fozia also stated that the

inspection of the suit house was carried out at their back when they were away from the suit house, and that the items inspected were theirs and not of the Defendant No.1 who was all along residing in Kazakhstan.

11. It appears that around the time of the gift deed dated 21-12-2012, if not before, the Defendant No.1 was ordinarily residing in Kazakhstan with her husband, but from time to time she came to Pakistan and stayed with the original Plaintiff at the ground floor of the suit house. It seems that even at the time CMA No. 7488/2013 was moved, the Defendant No.1 was not at Karachi as the affidavit to that application is sworn by a *perukar* (*albeit* she was in Karachi on 23-07-2013 when the suit house was inspected). Therefore, in moving CMA No. 7488/2013 it was not the case of the Defendant No.1 that she apprehended physical dispossession from the suit house, but that her constructive possession over a portion on the ground floor under her lock and key was at risk. On 09-04-2021, when this case came up for hearing, learned counsel for the Defendant No.1 acknowledged that the Defendant No.1 still resides abroad, and that the order she seeks is to reside at the ground floor of the suit house whenever she visits Karachi.

12. Since the Defendant No.1 was not ordinarily residing at the suit house, it is clear that the purpose of CMA No. 7488/2013 was only to preserve constructive possession over a portion of a ground floor of the suit house. As noted above, the donor had stated in her counter-affidavit that the suit house was being enjoyed by her entire family including the Defendant No.1 who was given one room on the ground floor from which the donor had no intention of dispossessing her. Therefore, in my view, the purpose of CMA No. 7488/2013 has been achieved. After the demise of the original Plaintiff/donor, the relations between those Plaintiffs who are residing in the suit house and the Defendant No.1 are acrimonious. In her affidavit to the contempt application the Defendant No.1 herself states that she felt a danger to her life during her last stay at the suit house. In such

circumstances, to pass an order for the Defendant No.1 to reside at the suit house on her visits to Karachi, would not only be pointless, but would also amount to putting the parties on a collision course. Therefore, I dispose of CMA No. 7488/2013 with the observation that the Defendant No.1 retains constructive possession of one room on the ground floor of the suit house. This of course is without prejudice to the case of the Defendant No.1 that she was delivered exclusive possession of the suit house by the donor, and without prejudice to any claim that she may have for mesne profits against the Defendants 2 and 4.

13. The inspection application, **CMA No. 7489/2013, was wrongly listed for hearing as it had been disposed of** by order dated 17-07-2013.

No case for initiating contempt proceedings is made out. Therefore, **CMA No. 8408/2014 is dismissed.**

CMA No. 8409/2014 by the Defendant No.1 prayed for orders to enable her to meet her ailing mother, the original Plaintiff, at the suit house. After the demise of the original Plaintiff, **CMA No. 8409/2014 has become infructuous** and is disposed of accordingly.

#### CMA No. 584/2015

14. By CMA No. 584/2015 under Order XL Rule 1 CPC the Defendant No.1 prays for appointing Receiver over the suit house. The thrust of the application is the allegation that the Plaintiffs are in unlawful possession of the suit house and the Defendant No.1 is prevented from using the same. However, as already discussed, the Defendant No.1 has yet to demonstrate that she was delivered possession of the suit house to exclude the Plaintiffs. In such circumstances, I am not inclined to dispossess the Plaintiffs from their residence by appointing a Receiver. Mr. Shams-ul-Islam Advocate then submitted that subsequently the suit house is being let by the Plaintiff No.4 and his spouse for private parties which is likely to damage the property. In support of that he relied upon a news report



dated 31-01-2017 which reported an incident of firing at a party arranged at a rented venue. Though the house number mentioned in the news report is not entirely accurate, it does name 'Fozia Tariq', the spouse of the Plaintiff No.2 as the owner. While that news report has yet to be proved, there is a *prima facie* case for an injunction to prevent damage to the suit house. Therefore, **CMA No. 584/2015 is disposed of by restraining the Plaintiffs from letting the suit house or from creating any other third party interest therein pending suit.**

**JUDGE**

Karachi:  
Dated: 27-09-2021