

ORDER SHEET
**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.**

2nd Appeals No. 45 and 46 of 2019

DATE	ORDER WITH SIGNATURE OF JUDGE
------	-------------------------------

For orders on application u/s 5 of Limitation Act.
For orders on stay applications.
For hearing of main case

18.04.2022.

Mr. Ghulam Sarwar Baloch advocate for appellants.

Mr. Noor Ahmed Memon advocate for the respondent Mst. Shafaq Naz.

Mr. Abid Ali Thebo advocate for respondent No.2(iii) in IInd. Appeal No.45/19.

Zulfiqar Ahmad Khan, J. These twin Second Appeals arise from a common judgment passed in Civil Appeals No.120/2017 and 121/2017, which maintained judgment and decree passed by the learned Senior Civil Judge, Badin in consolidated F.C. Suit No. 82/2009 and 87/2009.

2. Per learned counsel for the appellants, the present respondent No.3 Mst. Shafaq Naz @ Shafqat Naz daughter of Abdul Majeed filed leading F.C.Suit No.82 of 2009 against the appellant Shakeel Ahmed for declaration, cancellation, possession, mesne profits and permanent injunction in respect of shop bearing No.46/1 admeasuring 390 sq. feet, situated at Shahi Bazar, Badin. Case of the lady was that her father purchased the suit property through registered deed dated 29.03.1994 and later on gifted the same to her through registered gift deed dated 07.04.2008, whilst the said shop was rented out to the father of the

appellant Abdul Karim, who was a brother of her father. Once appellant's father failed to pay the rent, Mst. Shafaq Naz filed Rent Application No. 2 of 2008, where it was disclosed by the rival party that appellant's father had in fact purchased the suit property from Mst. Naz's father through an agreement of sale dated 08.10.2006. This version lead the respondent Mst. Shafaq Naz file F. C. Suit No. 82/2009 against the present appellant Shakeel Ahmed for declaration, cancellation, possession, mesne profits and permanent Injunction, whilst F.C Suit No.87/2009 was preferred by the present appellant Shakeel Ahmed for specific performance, cancellation of gift deed and permanent injunction alleging that the said appellant had purchased the shop from defendant No.1 Gulzar (who is his brother) holding a Power of Attorney from defendant No.2 Abdul Majeed (father of Mst. Shafaq Naz). As mentioned earlier, both suits were consolidated and decided by the judgment dated 23.09.2017. Prior thereto, these suits were already tried and on the conclusion of trial, F.C. Suit No.82/2009 was decreed and counter case being F.C. Suit No.87/2009 was dismissed by the same Court vide judgment dated 07.02.2014, however, the defendant in F.C. Suit No.82/2009 and plaintiff of F.C. Suit No.87/2009 (i.e. the present appellant Shakeel Ahmed) preferred Civil Appeals No.22 and 23 of 2014 against that judgment, which appeals were allowed by the Court of learned Ist. Additional District Judge, Badin vide judgment and decree dated 28.05.2016, which remanded both the suits back to the trial Court with direction to decide the matter afresh on merit after recoding evidence of the appellant side, in accordance with law. It seems

that the present appellant even at that juncture raised plea that he was not permitted to cross examine Mst. Shafaq Naz's witnesses. After framing ten (10) issues, the second consolidated judgment concluded that the alleged sale agreement dated 08.10.2006 was forged, false and managed document, liable for cancellation and that Mr. Shakeel Ahmed was liable to pay mesne profit at the rate of Rs.8000/- per month. The judgment also held that the possession of Mr. Shakeel Ahmed of the suit property was in negation to Section 53-A of the Transfer of Property Act, which brother of Shakeel Ahmed i.e. Mr. Gulzar had sold out to Shakeel Ahmed. The judgment also decided that the Power of Attorney granted to the said Gulzar was already cancelled subsequent to the alleged sale agreement dated 08.10.2006 i.e. prior to the date of the Gift Deed. It is worth mentioning that Abdul Majeed i.e. father of Mst. Shafaq Naz filed written statement denying all adverse contentions of the rival party and admitted that he had appointed Mr. Gulzar as his attorney since he had no male-child, but stated that the said power of attorney did not empower Gulzar to sell the suit property and the entire scheme of selling the suit property was cooked between the two brothers (Shakeel Ahmed and Gulzar) to deprive him and his daughter of their valuable property, for which no consideration was even paid to him. Paragraph-7 of the impugned judgment of the learned trial Court is worth reproduction:-

“7) The defendant No.2 Abdul Majeed filed his separate written statement available at Ex.29 wherein, denying the all adverse contention of the plaintiff against him, he has further stated that the defendant No.1 was appointed as an attorney but it was specifically and categorically denied that defendant No.2 was also given the

power to defendant No.1 for selling of the suit shop. It has also been denied by defendant No.2, that any sale to the extent of suit shop was made with the consent of defendant No.2. According to defendant No.2 Abdul Majeed, the defendant No.1, with the malafide intention to usurp the property of defendant No.3, arranged false agreement in previous dates in respect of suit shop to his brother plaintiff. According to defendant No.2, he has neither received any single penny from the plaintiff or defendant No.1 nor handed over the possession of the suit shop to the plaintiff. According to defendant No.2, the suit shop was given to Abdul Kareem, the father of plaintiff and defendant No.2 on rent and in the first instance, Abdul Kareem had paid the rent to him but subsequently, he stopped the payment of rent. According to defendant No.2, on 12.11.2006, a publication was made in daily "Khabroon" that defendant No.1 intend to sale the suit shop to one Ghulam Mustafa son of Haji Muhammad Usman Memon and when he (the defendant No.2) came in knowledge about such publication, he immediately published article/notice in daily "Halchal" dated 17.11.2006 and cancelled the power of attorney which was given to defendant No.1 and application was also made to Sub-Registrar, Badin for cancellation of the registered power of attorney. According to defendant No.2, on 23.12.2006, the father of plaintiff and defendant No.1 made publication in daily "Kawish" Hyderabad that his son defendant No.1 is still attorney of the defendant No.2 and he want to sale the suit shop which shows that till 23.12.2006, no any sale was made as if any sale was made in favour of his son then, it was not possible that father would have given such type of publication in the newspaper. According to defendant No.2, the alleged agreement of sale is false, manipulated and managed one and not binding upon defendant No.2 or his legal heirs. According to defendant No.2, he has never given the possession to the plaintiff who has forcibly and illegally occupied the same with malafide intention just to usurp his property. According to defendant No.2, he never entered into contract with plaintiff but he has gifted out the suit shop to defendant No.3 through registered gift deed and on the basis of registered gift deed, the mutation has been affected in the record of rights. According to defendant No.2, he executed the registered gift deed in favour of defendant No.3 and at that time, no sale agreement of the suit shop was ever in field and the possession of suit shop was handed over to the defendant No.2 while Abdul Kareem was the tenant of the suit shop and such possession was given to the defendant No.3 and Abdul Karim was tenant of defendant No.3 as such, the registered gift deed and entry made in favour of defendant No.3 is legal, valid and made in accordance with law and liable to be maintained. According to defendant No.2, suit is time barred as well as barred by law and no cause of action has accrued to the plaintiff, who is not entitled for any relief as claimed therefore, the suit of plaintiff may kindly be dismissed with special compensatory cost.

3. Assertions of the counsel for the appellant is hinged on the point that his client was not given opportunity to cross the witness.

4. With regards to this assertion, learned counsel for the respondent states that on both the occasions when the matter was reserved for cross examination, concerned counsel sought adjournment. Eventually, the cross was recorded as Nil, however,

learned counsel states that being aggrieved an application was moved under Order 18 Rule 17, CPC which was decided by trial Court's order dated 16.11.2013 for the following reasons :-

"I have considered the arguments from both the sides and it appears that three PWs of plaintiff viz. PW-1 Muhammad Rafique, PW-2 Muahesh Kumar, and PW-4 Abdul Jabbar are official witnesses and they have been examined without oath because they have simply produced the documents. It is to be noted that at the time of their examination-in-chief, the advocate for defendant Mr. Abdul Hafeez Memon was very much present on that days, therefore, his plea for cross examination to all the witnesses of plaintiff is not correct and shows his malafide intention. Moreover, when the PW-3 namely Inayatullah was examined i.e on 6/7/2013, the Advocate for defendant Mr. Abdul Hafeez Memon sent an adjournment application which was allowed and cross of this witness was reserved. On 3/8/2013 Mr. Abdul Hafeez Memon Advocate was present and he filed an application for adjournment but the same was rejected on the ground that it was an old Suit pertaining to the year 2009 but he refused to cross-examine the witness. Therefore, the cross of this witness was nil. Why he had not cross examined the witness on 3/8/2013 even the witness was present ?. It appears that opportunities were given / provided to the defendants to cross examine the witness and avoided to cross examine the witness on one or other pretext. Therefore, the defendant has not shown the good reason to re-call the witness as such under the circumstances, the application in hand merits no consideration, the same stand rejected with no order as to costs."

5. Seemingly, an appeal was filed against that order, which was dismissed by order dated 15.10.2016 where against a civil revision was also preferred in the Court of Ist. Additional District Judge, Badin, who also dismissed such revision application with the following observations :-

"Perusal of the record, it reveals that suits were decided by learned trial court on merits vide judgment and decree dated 7-2-2014. The plaintiff in F.C Suit No. 87 / 2009 and defendant in F.C Suit No. 82/2009 filed appeals Nos. 22 and 23 of 2014 which were allowed by this court with the directions to decide the matter afresh on merits after recording evidence of the appellant side in accordance with law. Perusal of record further shows that in the earlier round of litigation, the applicant had filed

application U/O XVIII, Rule 17 CPC read with section 151 CPC on 24-8-2013 which was dismissed by the trial court vide order dated 16-11-2013. Perusal of the said order it reveals that counsel for applicant had refused to cross examine the witness. This reflects the opportunity was provided to applicant's counsel for cross examining the witnesses but he did not avail the same. it could not be left at the choice of litigant as to when he wants, he may put the cross. The order 18 Rule 17 CPC could not be termed as simply procedural in nature and thus a mere technicality. The exercise of discretion by the court in terms of O. XVIII R. 17 CPC is circumvented with due care and caution and it should be exercised in exceptional circumstances.

In the light of above discussion, I do not find any illegality or irregularity in the order passed by the learned trial court, as such, the same is hereby maintained and the revision merits no consideration which is hereby dismissed with no order as to costs”.

6. It is an admitted position that appellant's did not challenge the said order of the revisional Court. Having lost on this ground, learned counsel for appellant took the stance that gift itself was inherently defected since the possession of the shop was not handed out to the donee and he in this regard has placed reliance on the judgment cited as (2019 MLD 701) Mst. ANWARI vs. ABDUL WAHEED and another, wherein ingredients of such gift have been detailed out in line of dictum laid down by the apex Court in the case of BILAL HUSSAIN SHAH and another vs. DILAWAR SHAH (PLD 2018 SC 698), while this aspect of the learned counsel's contention will be answered in the later part, it is worth reverting to the appellant Court's judgment, which dismissed first appeal by placing reliance on the case reported as 2009 SCMR 114, where the Hon'ble Supreme Court held that if a person holding general power of attorney transfers a property of a principal in his own name or in the name of his closed relative, he has to seek special permission from the principal. Hence in the

case at hand, when the attorney Gulzar ended up allegedly making a sale of the shop in favour of his brother, he ought to have acquired special permission from Mr. Abdul Majeed (father of Mst. Shafaq Naz) and since no such permission was brought to the Court, the appellate Court maintained the finding of learned trial Court. Counsel for the respondents as mentioned earlier, stated that discrepancies in the case of appellant's are obvious and there is ample proof that the appellant was given a number of opportunities to cross examine the witnesses, but he failed to do so.

7. Heard the learned counsel for the parties and perused the record.

8. Following points are framed for my determination :-

- (i) Whether the impugned judgments and decrees required any interference ?
- (ii) What decree should be ?

9. My findings on the above points are as under:-

Point No.1. In negative.

Point No.2. Both appeals dismissed.

REASONS.

10. The admitted fact is that the property originally belonged to the father of Mst. Shafaq Naz, who rented out to his brother Abdul Kareem (father of the present appellant) and said Abdul Majeed having no male child admittedly granted power to his nephew

Gulzar, however, stated that the said nephew did not had any power to sale the property. At this juncture it is not out of place to consider what Mst. Shafaq Naz stated in her support. In her examination-in-chief she states that her father appointed her cousin Gulzar as his general attorney to look after the suit shop and to collect rent from Gulzar as her father was an uneducated person. Whereas both these brothers were educated individuals and stated that her father had given no power to sell the subject property to Gulzar. She has stated that her father never sold the suit property to Shakeel nor received any consideration from Shakeel or his brother Gulzar. Mst. Shafaq Naz has stated that the possession of the said shop was never handed over to Shakeel as the said shop was rented out to her uncle Abdul Karim and she being pardanasheen lady was kept away from daily proceedings in respect thereof, and such matters were only left to be attended by her cousin Gulzar. She has stated that the shop was gifted out to her by her father and when her father came to know through a publication in daily "Khabroon" that the said shop was put to sale to one Ghulam Mustafa, her father immediately cancelled the power of attorney given to her cousin Gulzar and appropriate application was made to Sub-Registrar, Badin for cancellation of the registered power of attorney. She further stated that father of the plaintiff Shakeel and Gulzar to the contrary made publication in daily "Kawish" stating that Gulzar was still his attorney. She also stated that her father never handed over possession of the shop to Shakeel who forcibly and illegally took over possession thereof

from his own father without consent of the actual owner of the shop i.e. her father.

11. Case of the appellant Shakeel is that, he purchased the suit shop from the respondent No.1 Gulzar, who was attorney of Abdul Majeed, in the sum of Rs.16,00000/- out of which he had paid the sum of Rs.14,00000/- in the presence of witness Abdul Kareem and Muhammad Hassan and in consequence thereof, the possession of suit shop was delivered by his brother Gulzar to him (Shakeel Ahmed). He examined himself as DW-1 as well as both the purported attesting witnesses as DW-2 and 3. Gulzar, who is real brother of the appellant Shakeel was also examined as DW-4. The purported vendor Gulzar in his evidence admitted to have sold out the shop to Shakeel in the mode and manner as claimed by his brother Shakeel, which shows that he purportedly acted as an agent on behalf of actual owner Abdul Majeed and sold out the suit shop to his real brother Shakeel Ahmed. The learned trial Court by placing reliance on the case of MUHAMMAD TAJ v. ARSHAD MEHMOOD and 3 others (2009 SCMR 114) held that since the attorney has made sale to his own brother, therefore, special permission from the principal would have been obtained, which is missing in the case. At later stage, he though produced an Iqarnama dated 21.12.2016 when it was submitted with an application under Order XIII Rule 1 and 2, CPC whilst he had filed written statement on 14.11.2009, but until 21.12.2016 the said Iqarnama was never produced in the Court, and during proceedings of the suit Abdul Majeed had died. The learned trial

Court while placing reliance on the judgment of MUHAMMAD YAKOOB BROHI v. MINISTRY OF HOUSING & WORKS and two others (2017 CLC 369) in an articulated manner chose to decide such evidence and held that plea not taken in the pleadings cannot be looked into by the Court. The trial Court also observed certain cuttings on the 'Iqrarnama" making it doubtful and afterthought. The trial Court also observed that the said attorney even did not apply to send the purported thumb impression of late Abdul Majeed on the alleged "Iqrarnama" for handwriting expert, therefore, held it to be of no legal sanctity. Mst. Shafaq Naz was represented through her husband Inayatullah, who stated that his wife was owner of the subject property, which was originally owned by her late father, who rented out the said shop to Shakeel's father (i.e. his own brother) during his life time. He also admitted that late Abdul Majeed appointed Gulzar as an attorney and that he also cancelled the said power of attorney on 05.04.2008 and he has produced Cancellation Deed as Ex.45. Mst. Shafaq Naz also examined Muhammad Rafique, Sub-Accountant, the office of District Accounts Officer, Badin who caused serious dent to the case of Shakeel's family and showed to the Court that the stamp paper was not issued from the office of District Accounts Officer, Badin. In the present circumstances, where there is no doubt that the property changed hand through Mr. Gulzar who was appointed as an attorney by late Abdul Majeed for the benefit of Shakeel Ahmed, who admittedly is his brother, therefore, such transaction cannot escape from the requirements posed by the Hon'ble Supreme Court in the case

reported as (2009 SCMR 114). Sanctity of the Iqrarnama presented after seven years of filing of written statement has been seriously challenged and shrouded in doubt by the testimony of the witnesses. The trial Court in para-17 has dealt with this matter at length and concluded that the said Iqrarnama is nullity in the eye of law, hence the incompetency of making sale of the subject property by Gulzar to his own brother Shakeel has been proved. This view was taken by the learned trial Court as well as the appellate Court.

12. Now coming to the question as to the ingredients of a valid gift, the learned counsel has rightly placed reliance on the judgment of Mst. ANWARI v. ABDUL WAHEED, however, that case could be distinguishable from the circumstances of the case in hand, as the instant property is a shop which is already rented out to the father of appellant Shakeel and Mst. Shafaq Naz being the sole survival of Abdul Majeed is a pardanasheen lady, it could not be expected that she would have taken physical possession of the shop in question. With regard to the overt acts, it could be satisfactorily presumed that having cancelled the power of attorney, making registration of such cancellation and placement of Notice on the newspaper were sufficient overt acts made by late Abdul Majeed to save his family's property. Even at best if the sanctity of the gift is challenged, the property falls back to Abdul Majeed, who was fully competent to disposing it of in any manner, but there is no possibility that appellant Shakeel could have taken possession thereof in the circumstances narrated here.

13. Resultantly, I am of the considered view that both the Courts below have dealt with the matter meticulously and rendered well reasoned judgments, which do not require any interference. Resultantly, both these appeals are dismissed and the consolidated judgments / decrees of learned trial Court as well as appellate Court are maintained.

J U D G E

g