IN THE HIGH COURT OF SINDH AT KARACHI

IInd Appeal No. 22 of 2009

Present: Mr. Justice Salahuddin Panhwar

Appellants:	Syed Masood Ali and another through Mr. Arshad Jamal advocate
Respondent No.1:	Mst. Feroza Begum through Syed Johar Abid advocate
Respondent No.2:	Nemo
Date of hearing :	06.04.2021
Date of decision :	06.04.2021

JUDGMENT

SALAHUDDIN PANHWAR J.-The appellants have filed instant second appeal against the judgment and decree dated 21.02.2009& 28.02.2009 passed by learned V-Additional District Judge, Karachi Central in Civil Appeal No.95/2007, whereby judgment and Decree dated 27.04.2007 &18.05.2007, passed by learned 1st Senior Civil Judge, Karachi Central in Suit No.581/2004 were upheld and consequently, the Civil Appeal was dismissed with no order as to cost.

2. Heard and perused the record..

3. A perusal of record reveals that the property in dispute was originally owned by one late Syed Mahmood Ali, who was married to Mst. Akhtari Begum and out of the said wedlock appellants as well as Syed Mansoor Ali, Syed Masroor Ali and Syed Ghulam Rasool were born, however Syed Ghulam Rasool died on 09.01.1995, prior to the death of his father. After the death of Mst. Akhtari Begum, Syed Mehmood Ali married to Respondent No.1 Mst. Feroza Begum and out of the said wedlock Mehrunnisa, Rabia, Fouzia, Dilruba alias Sobia and Waheed Ali were born. The case of the

appellants is that during late 80's father of the appellants had not keeping good health and had been confined to bed and due to his illness, respondent No.1 got transferred the disputed property into her name after getting executed Deed of Declaration and Confirmation of Oral Gift of immovable property on 09.02.1991. However, respondent No.1 claimed that the disputed property was gifted to her by her husband during his lifetime in the year 1991 in his full senses and he was not sick at that time. Initially, the appellants filed Civil Suit against the respondent No.1 for Declaration, Cancellation of registered Deed of Declaration & Confirmation of Oral Gift of the disputed property& Permanent Injunction which was dismissed against which civil Appeal was preferred against the appellant but the same also met the same fate, hence instant II-Appeal.

4. At the very outset, it needs to be clarified that scope of the ***Second Appeal*** is limited one and normally the concurrent findings, so recorded, would not be open to interference unless it is, *prima facie,* established that decision of lower courts is contrary to law or that same is contrary to law or usage, having the force of law. Reference may be made to the case of ***Naseer Ahmed Siddique v. Aftab Alam & another*** (PLD 2011 SC 323) wherein it is held as:-

> "17. Where trial Court has, exercised its discretion in one way and that discretion has been judicially exercised on sound principles and the decree is affirmed by the appellate Court, the High Court in second appeal will not interfere with that discretion, unless same is contrary to law or usage having the force of law."

In another case of *Akhtar Aziz v. Shabnam Begum* **(2019 SCMR 524)**, it is held as:-

> "14. … Although in second appeal, ordinarily the High Court is slow to interfere in the concurrent findings of fact recorded by the lower *fora.* This is not an absolute rule. The Courts cannot shut their eyes where the lower *for a* have clearly misread the evidence and came to hasty and illegal conclusions. We have repeatedly observed that if findings of fact arrived by Courts below are found to be based upon **misreading, non-reading or misinterpretation of the evidence on record**, the High Court can in second appeal reappraise the evidence and disturb the

> findings which are based on an incorrect interpretation of the relevant law.…"

5. Since this is a second appeal, hence appellants, per settled principles of law, are required to prove that both judgments are, *prima facie,* contrary to evidence and against such principles of law.

6. At the very outset, learned counsel for the appellants contended that there appears no consent of the Donee regarding the gift, which contention, in my humble view, is misplaced for the reason that the property was gifted vide registered deed, which speaks about the consent of the Donee, as the endorsement of the deed reveals that the Deed of Declaration & Confirmation of Oral Gift was presented by the Donee before the Sub-Registrar, which is sufficient documentary proof of the consent of Donee; the record further shows that entry thereof was also recorded in the Record of the Rights whereby the *Donee* became owner of such property which, she, till date claims. Without prejudice to this, it is well settled that gift can be made orally and requires no registration, even writing is not necessary to the validity of the gift made regarding immovable property. Reference is respectfully made to the case of *Muhammad Ejaz& 2 others v. Mst. Khalida Awan & another* 2010 SCMR 342 wherein such legal position is affirmed as:-

> 6. Under the Muhammadan Law, a gift, in order to be valid and binding upon the parties, must fulfill the following three conditions:-
>
> a) a declaration of gift by the donor;
> b) acceptance of gift by the donee; and
> c) delivery of possession of corpus;
>
> On the fulfillment of the above three ingredients, a valid gift comes into existence. A valid gift can be effected orally, if the pre-requisites are complied with. Written instrument is not the requirement under the Muslim Law nor is the same compulsorily registerable under the Registration Act, 1908.

7. Learned counsel for the appellants then attempted to argue that physical possession of the disputed property was never handed over to the respondent No.1 by their father, hence the alleged Deed of Declaration & Confirmation of Oral Gift has no value in the eyes of law. I have carefully

read said Declaration Deed and found that in clause (2) of the Deed of Declaration & Confirmation of Oral Gift, it is mentioned that physical possession of the disputed property was taken over by the respondent No.1. The said clause is reproduced as under:

> "2. That at the time of pronouncement of Oral Gift, the Declarant/Donor as handed over the physical possession of the said property to the Donee Mst. Feroza Begum and she has taken over the possession."

8. Therefore, in presence of above clause the argument of learned counsel for the appellants is untenable and is misconceived, particularly when there was failure on part of the appellants to prove such aspect before the trial Court. It is also worth mentioning here that status of the *Donee* to be wife of the donor as well her remaining with deceased Donor are not matters of dispute, therefore, categorical mentioning of delivery of possession of the subject matter, would prevail over mere denial unless, *otherwise,* proved.

9. It is further observed that the said Declaration of oral gift executed by the Donor stood proved through attestation of registered deed and endorsement thereupon by the Sub-Registrar, which has got presumption of truth. It is further noted that the appellants have failed to produce any document regarding illness of their father at the relevant time and even since 1991 when such Deed was registered, the appellants did not make any claim over the disputed property or even in the year 1999, when their father expired. The appellant No. 2 during her cross-examination has admitted that in the year 2000, she came to know about the transfer of disputed property in the name of the respondent No.1, but even then the suit was filed in the year 2004, after the lapse of four years. If the appellants were aggrieved of such transfer through gift then it was obligatory upon them to have challenged the same as soon as they acquired knowledge about the same but it is matter of record that they (appellants) from their own conduct and attitude proved otherwise. When query made to the learned counsel for the appellants to explain that as to what were the circumstances which compelled the appellants to remain calm for such a long a period of four years, he had no answer.

10. Lastly, learned counsel for the appellants contended that marginal witnesses of the Deed of Declaration & Confirmation of Oral Gift were not produced before the learned trial Court. Such contention of learned counsel is untenable for the reason that writing or registration of Deed of Declaration & Confirmation of Oral Gift is not the requirements/essentials of valid gift, gift can even be made orally and the disputed property was gifted by the Donor in favour of Donee and she has accepted the same and obtained the possession of the same upon execution of such Deed. Be that as it may, the challenge was made by the appellants and the respondent (*Donee)* was to discharge *initial* burden only which she, *prima facie,* did by establishing that document was properly executed and all other required ingredients for making a *gift* valid do exist then it was turn of the appellants (challengers) to prove factum of fraud etc wherein they failed. Reference is made to the case of *Khan Muhammad v. Muhammad Din through L.Rs [*2010 SCMR 1351] wherein it is held as:-

> "It is also settled principle of law that appellant is a beneficiary of the aforesaid document therefore it is the duty and obligation of the appellant to prove the documents as pointed out by the learned counsel in accordance with the provisions of Qanoon-e-Shahadat Order 1984. See 1979 SCMR 549 Akhter Ali V. University of the Punjab), 1992 SCMR 2439 (Haji Muhammad Khan etc v. Islamic Republic of Pakistan). It is well settled principle of law that initial burden to prove execution of document is on party which is relying on documents. Once this onus is discharged burden to prove factum of fraud or undue influence or genuineness of documents shifts to party which alleges fraud."

The appellants *legally* can't take advantage of their own failure while referring to lacking or weakness of rival, therefore, I do not find much strength in such plea.

11. In view of above findings, the appellants have failed to point out any illegality or infirmity in the concurrent findings of the Courts below, which were arrived at after proper assessment of the evidence and material available on record, hence the same do not require any interference by this Court. Consequently, the instant II-Appeal is dismissed along with pending applications.

JUDGE

Sajid