

# IN THE HIGH COURT OF SINDH AT KARACHI

IIInd Appeal No. 37 of 2019

[Muhammad Saleem Ghanchi & another.....v..... Mst. Hajiani Khatija  
& others]

Date of Hearing : 14.03.2023

Appellants through : Mr. Irfan Ahmed, Advocate.

Respondents through : Mr. Irfan Aziz, Advocate for  
respondent No.1.  
Mr. Aijazuddin, Advocate for the  
respondent No.2.  
Mr. Gohar Mehmood, Advocate for  
Respondent No.3.

## J U D G M E N T

**Zulfiqar Ahmad Khan, J:-** This Second Appeal moved under Section 100 of the Code of Civil Procedure, 1908 is directed against the Judgment & Decree dated 24.01.2019 passed by the learned First Appellate Court (IX Additional District Judge Karachi South) in Civil Appeal No.106 of 2017 (“Civil Appeal”), whereby, the appeal filed by the respondents were allowed.

2. Precise facts of the case are that the respondents filed a suit for Declaration, Cancellation, Possession and Permanent Injunction before the learned VI Senior Civil Judge Karachi South which was dismissed vide Judgment dated 26.05.2017 & Decree dated 31.05.2017, however, the respondents impugned the said Judgment & Decree of the learned trial Court by filing Civil Appeal No. 106 of 2017. On the appeal filed by the respondents, the Appellate Court reversed the findings of the learned trial Court and set aside the Judgment and Decree recorded by the learned Trial Court.

4. Learned counsel for the appellant emphatically argued that the learned Senior Civil Judge being a Trial Court adjudicated the issues

upon correct appreciation of law as the suit filed by the respondents were barred by Limitation but the learned First Appellate Court reversed the findings of the learned trial Court which findings of the learned First Appellate Court are not tenable in the eyes of law, therefore, the Judgment & Decree Impugned herein be set aside restoring the Judgment & Decree passed by learned trial Court. He further argued that one Mst. Hajiani Khatija was owner of shop No.G/2, on plot No. III-c/186, SR-9/76, measuring 37.05 sq. yards, Serai Quarters, Karachi (“subject shop”) who gifted out the same to his son Muhammad Yaseen (respondent No.2 herein) and such Gift Deed was also executed in his favour who sold out the same to Respondent No.3 from whom the Appellants purchased the same, thus having a valid title. He lastly contended that the said Mst. Hajiani Khatija never filed written statement before the learned trial Court to contest the matter filed by the legal heirs and that the appellants are the owner of the subject shop but has been illegally dragged in to false litigation by the respondents which fact was also observed by the learned trial Court but the learned First Appellate Court reversed the findings of the learned trial Court and passed the Impugned Judgment & Decree which be set aside by this Hon’ble Court under the Second Appellate hierarchy.

5. Learned counsel for the respondents argued that Mst. Hajiani Khatija never gifted the subject shop to respondent No.2, however, he fraudulent obtained thumb impression as well as photograph with the assurance to her to take her to Hajj but got prepared gift deed depriving other legal heirs of Mst. Hajiani Khatija who lateron filed suit for cancellation of the gift deed and subsequent transaction

thereof. While concluding his arguments, he submitted that the learned First Appellate Court having examined the pros and cons of the matter allowed the appeal filed by the respondent No.1 and set aside the Judgment & Decree passed by the learned trial Court which findings of the learned First Appellate Court are based upon correct appreciation of Law as well as facts and evidence.

6. I have heard the respective learned counsel and have also considered the record to which my surveillance was solicited. It is considered pertinent to initiate this deliberation by referring to the settled law in such regard. To start with, it is common knowledge that right to file Second Appeal provided under section 100 of CPC, which can be set into motion only when the decision is contrary to law; failure to determine some material issue of law, and substantial error or defect in the procedure provided by the Code or law.

7. The learned trial Court based its findings on question of limitation observing that the respondent No.1 filed suit for cancellation of the alleged Gift Deed in the year 2011, however, they were in active knowledge about the existence of Gift Deed (Exh. D/4/2 at page 567 of R&Ps of Civil Suit No. 284/2011) in favour of respondent No.2 executed in the year 2005 after the delay of 6 years. Upon scanning record and proceedings of Civil Suit No. 284/2011 it unfurls that Muhammad Abid being attorney of the plaintiff/ respondent No.1 in suit ventured into witness box and admitted during course of cross-examination as under:- (cross examination of Muhammad Abid is available at page 320 of R&Ps of Civil Suit No.284/2011)

“It is correct to suggest to suggest that in 2005 plaintiff filed the application before the Union

council Saddar town in respect of fraud of defendant No.1. In said application she claimed that fraudulently defendant No.1 sold out the property in question and usurped the all amount”

8. It is gleaned from appraisal of the foregoing that the respondent No.1 addressed an application to the Union Council Saddar Town, Karachi in the year 2005 informing him about the execution of Gift Deed but after the delay of six years, the respondent No.1 filed suit for cancellation of the Gift Deed in the year 2011. The learned trial Court being a fact finding authority also observed in its Judgment this fact and it is considered expedient to reproduce the relevant excerpt of the Judgment of the learned trial Court which is delineated hereunder:-

“The most important and pivotal aspect of the suit is the knowledge of the fraud, the approval of cause of action, root of cause of action and this aspect need a huge consideration from four corners. The first admission of the part of attorney is that plaintiff has knowledge of fraudulent transfer of suit property in 2005 and parties had approached the Union Council Saddar Tow in 2005. The accrual of cause of action and reckoning the limitation of best upon para No.7 of the affidavit in evidence and the contents of same were not directly disclosed by the plaintiff to attorney but by the daughter of the plaintiff to attorney. It is surprising that plaintiff has seven sons and four daughters but neither any one appeared in the proceedings nor any one was authorized as attorney and one so called stranger was authorized as attorney. The most important thing which was left unheeded by the plaintiff side that family meeting held in first week of January 2011 as per contents of para No.7 of affidavit in evidence does not contain that names of the participant. Suffice is to say that neither there was any cogent proof regarding that meeting and suposing nor any of the sons and daughters appeared to step into witness box to support such contentions.

The sequel of above discussion reflect that suit is hit by the provisions of the Limitation Act 1908, meaning thereby suit is barred by law in respect

**of prayer of cancellation of gift deed.** The discussion on the cancellation and declaration as hereinabove is necessary to be continued now as the plaintiff's suit is hit by the provisions of Law of Limitation which puts an embargo on the legal entitlement of the plaintiff over the right on the suit plot by way of title documents; therefore, Section 42 of the Specific Relief Act 1877 are seen moving away and avoiding to provide aid to the prayer of the plaintiff. The suit of plaintiff is also hit by the provisions of Section 42 of the Specific Relief Act. The discussion as above also debars the plaintiff from the relief of injunction at this stage.”

9. For the purposes of cancellation of a document, three years of limitation is provided under Article 91 of the Limitation Act and time begins running when the fact entitling the plaintiff/respondent No.1 to have the instrument cancelled or set aside becomes known to them. Herein in the case at hand, the respondent No.1's attorney deposed before the learned trial Court that they filed an application before the Union Council in the year 2005 about the alleged fraudulent act of the respondent No.2, meaning thereby said respondent No.1 and her legal heirs were in full knowledge of the existence of Gift Deed in the year 2005 but the suit for cancellation of the said Gift Deed was filed in the year 2011 after the delay of six year. The relief claimed in the suit for cancellation of Gift Deed clearly comes within the ambit and scope of Article 91 of the Limitation Act. Similar view was held in the case of **Ilyas Ahmed v. Muhammad Munir & others (PLD 2012 Sindh 92)**. It is considered pertinent to reproduce the relevant excerpt of the dictum which is delineated hereunder:-

S. 39 Limitation Act (X of 1908). Art. 91 Cancellation of document Limitation. Plaintiff came to know about conveyance deed, sought to be cancelled, in the month of June/July, 2005 and suit for cancellation was filed in the month of May, 2009. Suit was filed beyond the period of three years, as for the purposes of

cancellation of documents three years of limitation was provided under Art. 91 of Limitation Act, 1908 and time began to run when fact entitling plaintiff to have the instrument cancelled or set aside became known to him. Suit was time barred in circumstances.”

10. Now reverting the second issue of Gift, presenting a gift whether grand or tiny is an act of kindness and compassion, and between the parents and children it is somewhat out of love and affection. According to Hedaya, “Hiba”, in its literal sense, signifies the donation of a thing from which the donee may derive a benefit; in the language of the law it means a transfer of property, made immediately, and without any exchange.” While according to Ameer Ali, “A hiba, pure and simple, is the voluntary transfer, without consideration, of some specific property (whether existing in substance or as a chose in action)”. According to Mulla, “A hiba or gift is “a transfer of property, made immediately and without any exchange,” by one person to another, and accepted by or on behalf of the latter”. Whereas according to Fyzee, “Hiba” is the immediate and unqualified transfer of the corpus of the property without any return”. According to Sir Abdul Raheem, “The Muhammadan law defines hiba or a simple gift inter vivos as a transfer of a determinate property without an exchange”. A similar definition is provided by Baillie “Gift (hibut.), as it is defined in law, is the conferring of a right of property in something specific, without an exchange”. Similarly, according to Sahih Muslim, “A Hiba is defined as the transfer of possession of property, movable and immovable, from one person to the other willingly and without reward”.

11. It is well settled that the Transfer of Property Act, 1882, has no application to the hiba/gift envisioned and encapsulated under the Muhammadan Law and for this reason, Section 123 and 129 of the

Transfer of Property Act can neither surpass nor outweigh or preponderate the matters of oral gifts contemplated under the Muslim Law for which a registered instrument or indenture is not mandatory. All orthodox and unequivocal annotations and explications based on Islamic Jurisprudence vis-à-vis “Hiba” have unambiguously emphasized and underlined the fact that the donor should be *compos mentis*, meaning thereby a person who is of sound mind and has the mental capacity to understand the legal implications of his act of making gift and he must be major and the owner of the property which is intended to be gifted; the thing gifted should be in existence at the time of hiba; the thing gifted should be such to benefit from which is lawful under the Shariat; the donor must be free from any coercion/duress or undue influence while making a gift; the thing gifted should come in the possession of the donee himself or through his representative/guardian for an effective hiba. Under the said law, the constituents and components of a valid gift are tender, acceptance and possession of property. A Muslim can devolve his property under Muslim law by means of inter vivos (gift) or through testamentary dispositions (will). Islamic law does not make any distinction between movable or immovable property with regard to the conception of hiba, rather any property may be gifted by any person having ownership and dominion over the property intended to be gifted on fulfilling requisite formalities. It is also obligatory that the donor divest and dissociate himself downrightly from the dominion and ownership over the property of gift and put into words his categorical intention to convey the ownership to the donee distinctly and unambiguously with delivery of possession of the

property and ensure that donee has secured physical ascendency over the property in order to constitute the delivery of possession.

12. Perusal of Gift Deed (Exh. D/4/2 at page 567 of R&Ps of Civil Suit No. 284/2011) reveals that the same had been registered by the concerned registering authority and an endorsement was also imposed by the Sub-Registrar T. Division I-B. The plea of legal heirs of respondent No.1 is that the respondent No.2 obtained signatures of the respondent No.1 Mst. Hajiani Khatija as well as her photographs with the sole intention to send Mst. Hajiani Khatija for performing Hajj but deliberately on the basis of said signature as well as photographs obtained a Gift Deed. It unfurls from the record that the attorney of the plaintiff/respondent No.1 deposed before the learned trial Court that Mst. Hajiani Khatija performed Hajj in 2005 and in the same year the Gift Deed was also executed in favour of the respondent No.2 by Mst. Hajiani Khatija, therefore, the question of obtaining a fake Gift Deed does not arise. The learned trial Court also observed as under:-

**“The facts and circumstances discussed hereinabove are sufficient to make it evident that the inception of fraud was the obtaining of thumb impression, photographs and copy of CNIC by defendant No.1 from the plaintiff and plaintiff could not go for Hajj but as admitted by attorney of plaintiff, the plaintiff had performed the Hajj in the same year of 2005. This fact is totally concealed by the plaintiff in the pleadings as well as in the evidence through attorney.”**

13. Appellants before this Court are now owners of the subject shop which was purchased by them and according to Section 54 of the Transfer of Property Act 1882, “sale” means the transfer of ownership in exchange for a price paid or promised or part paid

and part promised which is made in the case of tangible immovable property of the value of one hundred rupees and upwards or in the case of a reversion or other intangible thing, can be made only by a registered instrument with further rider that a contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

14. In light of the above discussion, the instant IInd Appeal is allowed. The impugned Judgment & Decree dated 24.01.2019 passed in Civil Appeal No. 106/2017 is set aside and that the Judgment & Decree of the learned trial Court is maintained, whereby, the suit filed by the respondent No.1 was dismissed.

Karachi  
Dated:14.03.2023

JUDGE

Aadil Arab