

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Suit No.1733 of 2008

Date	Order with Signature of Judge
Plaintiff	: Khalid Masood through following legal heirs Mrs. Neelofar Khalid. Mr. Muhammad Umair Mr. Muhammad Zubair Mr. Muhammad Huzaifa Mr. Muhammad Hafza Mr. Muhammad Hammad Mr. Muhammad Hunaid Mr. Khola Tariq Mr. Ammara Khalid through Mr. S. Afsar Ali Abidi, Advocate.
Defendant No.1	: Dr. Obaid-ur-Rehman.
Defendant No.2	: Mr. Habib-ur-Rehman.
Defendant No.3	: Mr. Shafiq-ur-Rehman. Through Mr.Mayar Qazi, advocate.
Defendant No.4	: Sub-Registrar "T" Division-VIII, Karachi.
Defendant No.5	: Province of Sindh, through the Secretary Land Utilization Department.
Defendant No.6	: Deputy District Officer (Revenue) And Special Judicial Magistrate First Class, North Nazimabad Town, Karachi.
Date of hearing	: 18.02.2015

JUDGMENT

NAZAR AKBAR, J. This suit was filed by one Mohammad Khalid for declaration, cancellation of instrument, damages and permanent injunction against his three brothers, defendants No.1, 2 & 3. He died on 06.05.2014 during the pendency of the suit.

2. Briefly stated facts of this case are that the deceased plaintiff, Muhammad Khalid had purchased a partly constructed House bearing No.B-26, Block-H, measuring 416.67 sq. yards, North Nazimabad, Karachi (hereinafter referred as the “suit property”) by registered Sanction Deed dated **09.04.1970** from its owner Mirza Asghar Baig for a total sale consideration of Rs.45000/- jointly in his name and in the name of his mother Mst. Noor Jahan. Mst. Noor Jahan, subsequently gifted her 50% share in the suit property to her other three sons, defendants No.1 to 3, by registered Gift Deed dated **02.12.1974**. That on **18.06.2008**, defendant No.1 filed a complaint to DSP North Nazimabad, Karachi alleging therein that the deceased plaintiff who holds 50% share in the suit property has forcibly taken over possession of the suit property. The complaint was transferred to defendant No.6, DDO (Revenue), where to the utter surprise of the deceased plaintiff, it transpired that defendant No.1 claiming that the Plaintiff had allegedly gifted his 50% share in the suit property in favor of defendants No.1, 2 and 3. They produced forged gift deed whereupon the deceased plaintiff who has earlier filed suit for permanent injunction in trial Court bearing suit No.494/2008 withdrew the same with permission to file a fresh suit and filed the instant suit, and prayed for the following relief(s):-

- i) Declaration that Gift Deed dated 14.02.1977 allegedly executed by the plaintiff, in favour of the defendants in respect of his 50% share in the suit property, is a bogus document and plaintiff continue to be owner of 50% share in the suit property.
- ii) Cancel the Gift Deed dated 14.02.1977.

- iii) Decree for Damages to the extent of rupees Five Million.
- iv) Permanently restrain the defendants from ejecting the plaintiff and/or his children from the suit property without due process of law.
- v) Grant any other relief which this Hon'ble Court may deem fit and proper under the circumstances of the case.
- vi) Exemplary cost of the suit may also be awarded.

3. Defendants No.1, 2 and 3 in their written statement took the preliminary objections that suit is barred by the Limitation Act, 1908. The Plaintiff has no cause of action against the defendants as they have not forged any gift deed which is a genuine document and can be ascertained from the record of the defendant No.4. The suit is barred by Section 42 and 56 of Specific Relief Act, 1877 as the plaintiff has no personal interest in the property of defendants No.1, 2 and 3 and his sons have entered into and/or grabbed and/or trespassed the suit property and occupying the suit same illegally. They specifically denied that the plaintiff had jointly purchased the suit property in his name and in the name of their mother Mst. Noor Jehan. They averred that since 1971, plaintiff was residing in the suit property alongwith his family and that now his married sons are residing thereat. It was averred by the defendants No.1, 2 and 3 that they have been in uninterrupted possession of the entire suit property since the day of gift from the plaintiff and Dr. Obaid and Dr. Habib (Defendants No.2 & 3) with Dr. Mustahib, were running an evening clinic in the suit property by the name and style of "The Clinic". Their brother Shafiq (Defendant No.3) was also included in the said business being the co-owner. The Plaintiff had no

concern with such partnership of the Clinic which commenced some time in 1984 and continued till sometime after the death of Dr. Mostahibul Islam in 1996 and they reserve their right to dispossess the plaintiff and/or anyone in illegal possession on behalf of the plaintiff from the suit property with due process of law. The Defendants denied the allegation that defendant No.2 filed a forged gift deed before defendant No.6. It is averred that the gift is not forged as the concerned Sub-Registrar Central Record, City Courts, Karachi by his letter No.683/SR/CR/2008 dated 28.10.2008 has confirmed that the documents/deeds were genuine. Therefore, they prayed for the dismissal of the suit with exemplary cost.

4. The Court by order dated **08.11.2010** framed the following issues:-

- i. Whether the suit is maintainable under the law.
- ii. Whether the gift was validly made by the Plaintiff to the Defendants.
- iii. Whether the Plaintiff is entitled to the cancellation of Gift Deed made by him? If yes, what is the effect.
- iv. What should the Decree be?

5. The Plaintiff appeared as his own witness **PW-1** and filed his affidavit-in-evidence as PW-1/1 and produced the following documents

- i. original indenture of assignment of lease hold property as PW-1/2
- ii. PT-1 issued by Excise and Taxation Officer K-1-Div as Ex.1/3.
- iii. Paid up challan of suit property pertaining to the year 2008-2009 as Ex.PW.1/4.

- iv. Utility Bills in original as Ex.PW-1/5 to PW-1/12.
 - v. Copy of complaint dated 18.6.2008 filed in the office of DSP Police Station North Nazimabad Karachi as Ex.PW.1/13.
 - vi. Photocopy of notice issued to the parties by DDO Revenue North Nazimabad Karachi as Ex.PW-1/14.
 - vii. Photostat copy of the alleged Gift Deed which was supplied during the proceedings before DDO Revenue as Ex.PW.1/15.
 - viii. Application under Order 23 Rule 1 CPC and order passed thereon as Ex.PW.1/16 & PW.1/17.
 - ix. Photocopy of partnership deed dated 02.08.1978 as Ex.PW.1/18.
 - x. Photocopy of Declaration of Gift dated 12.02.1977 executed by Defendants No.1 to 3 and returned as Ex.PW.1/19.
 - xi. Certified copy of the application filed in suit No.649/2004 under Section 30 and 33 of Arbitration Act by the Defendant No.3 Shafiqur Rehman as Ex.PW.1/20.
 - xii. Copy of Notice under Article 77 of Qanoon-e-Shahadat Order 1984 read with Order XII Rule 8 CPC received by Plaintiff from the counsel of Defendants No.1 to 3 and the reply thereto dated 12.03.2011 alongwith TCS Receipt sent to the Advocate for the Defendants No.1 to 3 as Ex.PW.1/22 and as Ex.PW.1/23.
 - xiii. Notice under Article 77 of Qanoon-e-Shahadat read with Order XII Rule 8 CPC upon the Defendants No.1 to 3 through plaintiff's Advocate to which plaintiff received no reply, as Ex.PW.1/24 to Ex.PW.1/29.
6. Defendant No.1 appeared as witness for self and attorney for the other private Defendants as **DW-1** and filed affidavit-in-evidence as DW-1/1 and produced the following documents:-
- i. Certified copies of statements dated 10.6.2008 of Plaintiff and his son Umair as Ex.DW-1/2 & DW-1/3.
 - ii. Copy of tenancy agreement dated 09.6.2007 and two receipts as Ex.DW-1/4, DW-1/5 and DW-1/6.
 - iii. Schedules-I to VI as Ex.DW-1/7 to Ex.DW-1/12.

- iv. Certified copy of order dated 19.4.2006 in CP No.D-65/1997 as Ex.DW-1/12-1.
- v. KBCA' letter dated 08.06.1994, 16.05.1996 and 16.01.2007 as Ex.DW-1/12-2, Ex.DW-1/12-3 and Ex.DW-1/12-4.
- vi. Other 22 Complaints to KDA/KBCA/CDGK as Ex.DW-1/12-5 to Ex.DW-1/12-26.
- vii. Certified copy of Mother's Gift Deed dated 02.12.1974 as Ex.DW-1/12-27.
- viii. Death Certificate of Mother dated 1982 as Ex.DW-1/12-28.
- ix. Old NIC and the NIC's of Defendants No.2 & 3 as Ex.DW-1/12-29 and Ex.DW-1/12-31.
- x. Two bills of the Clinic's equipments dated 03.03.1985 and 27.03.1985 as Ex.DW-1/12-32 and Ex.DW-1/12-33.
- xi. Copy of FIR No.318/2008, two letters/orders of learned DDO both dated 08.11.2008 and report of police dated 10.11.2008 as Ex.DW-1/13-1 to Ex.DW-1/13-4.
- xii. Certified copies of complaint by defendant No.1, 2 & 3 dated 22.10.2008 as Ex.DW-1/14-1 and Ex.DW-1/14-2.
- xiii. Certified copies of the letter from the DDO dated 21.10.2008 and the reply verification of document from the Registrar dated 28.10.2008 as Ex.DW-1/15 and DW-1/16.
- xiv. Plaintiff's objection under Section 30 and 33 of the Arbitration Act 1940 as Ex.DW-1/17.
- xv. Two My bank's letters dated 26.06.2008 and dated 02.06.2009 as Ex.DW-1/18 and Ex.DW-1/19.
- xvi. Power of attorneys as Ex.DW-1/20 and Ex.DW-1/21. The Defendants also summoned and produced three witnesses namely Fareed Ahmed, an employee of the office of Sub-Registrar, Central, Karachi as **DW-2**, Mohammad Sohail, an

employee of Central Stamp Office, Karachi as **DW-3** and Tariq Ahmed, an employee of National Bank, City Court Branch as **DW-4**. They were cross examined by the counsel for the plaintiff.

I have heard learned counsel for the parties and perused the record. My issue-wise findings are as follows:-

Issue No.1. This issue has not been pressed by both the parties.

Issue No.2 & 3. These are interconnected issues. The learned counsel for the Plaintiff has contended that the Plaintiff has categorically denied the very execution of the gift deed which came to his hands sometime in 2008 during the proceedings before the DDO Revenue on the complaint of Defendants No.1, 2 and 3. It was a photocopy of true certified copy of a gift deed said to have been executed on **14.02.1977** by the Plaintiff in respect of his 50% share in the suit property. Therefore, he immediately filed the instant suit for cancellation of the same in 2008. The Plaintiff's counsel contended that the Defendants from 1977 till 2008 have neither disclosed nor acted upon the so-called gift deed by using the same in KDA or any other relevant authority for mutation of the suit property in their name. He referred to the following pieces of cross examination from the evidence of the Defendant.

“It is correct that up till today in record of KDA, KESC, KWSB, Excise and Taxation Department, the name of Mst. Noor Jehan and the Plaintiff's name appears as owners. It is correct that till today I have not got effected mutation in respect of the suit property in the record of KDA and CDGK in my name and in the names of Defendants No.2 and 3. It is incorrect that I did not produce the original gift deed or photo copy thereof as the same contains forged signature of the Plaintiff. It is correct that I did not got produced any document from

the office of concerned Sub-Registrar containing the signature and finger prints of the Plaintiff relating the process of Registration of alleged gift deed showing love and affection of an elder brother to his youngers”.

He further contended that in absence of production of original gift deed, the gift cannot be established. The Plaintiff has specifically put the Defendants’ on notice under **Article 77** of Qanoon-e-Shahadat Order, 1984 for production of the original Gift Deed dated 14.02.1977 and he produced the said notice as Ex.PW-1/24 in his examination-in-chief and yet the gift deed was not produced by the Defendants who claim it as their title document. In the course of arguments, he has also raised the following contentions.

- (i) Original registered gift deed allegedly executed by the deceased Plaintiff has not been produced and the true certified copy of the alleged gift deed which has been produced and exhibited does not bear the signature of the Doner (the Plaintiff) as well as the signature of the parents who have been shown as witnesses.
- (ii) Even the photocopy of the alleged original gift deed containing the signatures of the executants has not been produced as secondary evidence.
- (iii) No relation or friend of the family has been produced to testify that the deceased Plaintiff had signed the alleged gift deed in his presence and that the parents had signed as witnesses.
- (iv) Had the said documents in original or photocopy thereof been produced the signature could have been compared with the specimen signatures of the Plaintiff or sent to the handwriting expert for opinion?

- (v) There is no evidence as to when the original registered gift deed was misplaced or lost by Defendants No.1 to 3 which led to publication of a public notice in Daily Aman dated 20.06.2008 (Ext. DW-1/30).
- (vi) There is no explanation as to why mutation was not got affected in the relevant records of KDA, CDGK, KESC, KWSB and Excise & Taxation Department, Government of Sindh for the last 31 years.
- (vii) Defendant No.1 in his complaint to DSP in 2008 stated that the deceased Plaintiff holds 50% share in the suit property.
- (viii) It is highly inconceivable that in presence of his wife, sons and daughter the deceased Plaintiff could have gifted his 50% share in the suit property to his three brothers out of love and affection that too not in equal proportion.

He finally contended that the Plaintiff's statement regarding the non-execution of Gift Deed in his evidence was consistent with the contents of the plaint and it remained unshaken. It is settled principle of law that once the executants of the document creating charge on his immoveable property or transferring the same in favor of others through registered document denies such execution, the burden to prove such execution is shifted on the beneficiary of such documents. In support of his contentions he has relied on the following case law.

1. **PLD 2003 SC 410** (Amirzada Khan and others versus Ahmad Noor and others).
2. **PLD 2005 SC 658** (Ch. Muneer Hussain versus Mst. Wazeeran Mai alias Mst. Wazir Mai).
3. **2005 SCMR 152** (Anwar Ahmad versus Mst. Nafis Bano through Legal Heirs).
4. **2004 SCMR 770** (AAS Muhammad and others versus Chahat Khan and others).

5. **2007 SCMR 1884** (Syed Shabbir Hussain Shah and others versus Asghar Hussain Shah and others).

The Defendants have taken pains to rely on various documents including certain entries in the diaries of Plaintiff and statement of the Plaintiff's sons recorded by Inspector Qudrat Sher Lodhi and the evidence of DW-2 and DW-3 namely Fareed Ahmed, an employee of Sub-Registrar, Central, Karachi and Mohammad Sohail, an employee of Central Stamp Office to establish that a gift deed has been executed by the Plaintiff. He referred to the evidence of Plaintiff.

“I see the diaries pertaining to the year 1974 and 1977 and say that yes it is mine and contain my writing, however, I do not remember the context thereof. I produce the said two diaries as Ex.1/33 and Ex.PW 1/34. I do not remember if I got register any document before sub-registrar on **14.2.1977**. I did deposit the gift deed in Bolan Bank, it mine and did not belong to my mother. I think the said gift deed pertained to the suit property. I do not remember if the said gift deed was deposited in Bolan Bank for guaranteeing Sui Southern Gas Company.”

Learned counsel for the Defendants No.1, 2 & 3 contended that the execution of the gift deed was confirmed through several documents produced by the Defendants particularly Ex.X/7 and Ex.X/8 which are photocopies of letter sent by the DDO (Revenue) North Nazimabad Karachi (Defendant No.6) to Sub-Registrar Properties (Defendant No.4) regarding gift deed dated 14.1.1977 and the admission of the Plaintiff about gift through notes of the Plaintiff in his personal diaries which are produced as Ex.PW-1/33 and PW-1/34 coupled with possession of this suit. Regarding the possession of gifted properties learned counsel for the Defendants argued that since the Plaintiff and the Defendant being real brothers and they were living in the gifted properties,

therefore, there was no need of formal handing over of the property gift by the Plaintiff to his brothers. He has relied on the following case law:-

1. **PLD 1978 Baghdad-ul-Jadid 74** (Muhammad Faiz Rasool and another ..Vs.. Nazir Begum Etc).
2. **1972 SCMR 295** (Sahib Dad ..Vs.. Muhammad Ajaib and another).
3. **PLD 1967 Lahore 1087** (Ibrahim ..Vs.. Mst. Wazir Begum).

He further argued that under the circumstances of the donor and the donees it was not necessary for the Plaintiff to physically part with the possession of gifted property and mere such contentions were enough. He has also referred to the piece of evidence from the cross-examination of the Plaintiff that the Plaintiff has shifted with his family to the ground floor of House No.F-37 Block-F North Nazimabad Karachi. He has drawn my attention to the following piece of cross-examination of the Plaintiff.

“it is correct that myself and my family shifted from suit property to property No.F-37, Block ‘F’ North Nazimabad, Karachi after the demise of my mother. Thereafter my sons shifted there. It is incorrect to suggest that my sons shifted in said property in the year 2008.”

Learned counsel for the Plaintiff while exercising his right of rebuttal has vehemently referred to the evidence of the three DWs to show that even if their evidence is accepted the requirement of Qanoon-e-Shahadat Order, 1984 would not met to establish that a valid gift deed has been executed by the Plaintiff. He read following statement of witness DW-2 namely Fareed Ahmed, Sub-Registrar Central Record, District Registrar Office Karachi.

“I have not brought any such record containing signature and thumb impression of the Donor (Plaintiff) and the signature of the witnesses.....
.....

Q. Do you maintain Record of Register of thumb impression and signature of the parties?

A. Yes we do maintain. I can produce the thumb impression register in respect of property mentioned above if the same has been shifted to central Registrar office by the concerned Sub-Registrar.

I can produce the thumb impression register in respect of property mentioned above if the same has been shifted to central Registrar office by the concerned sub-registrar.”

And read from the evidence of DW-3 Muhammad Sohail as under:-

“I have not brought the ‘Sale Register’ as the same is missing and not available. It is correct that in Sale Register the parties signature are not obtained. We obtain receiving signature at the back of paid up challan while delivering the document after affixation special adhesive stamp. I have neither brought the register nor paid challan as the same are missing and not available.”

He has refers to the provision of **Articles 72, 74, 117 and 129** of the Qanoon-e-Shahadat Order, 1984 in support of his contention that how the execution of document is to be proved by the beneficiary of the document which is missing in the suit in hand. The Defendants No.1, 2 and 3 are admittedly not in possession of the gift deed as well as the title documents of the property said to have been gift to them. No explanation offered by the defendants to justify their failure to produce the original or even copy of it. The defendants have failed to discharge their burden of proof of execution of gift deed which squarely was on them being beneficiary of the gift.

The conclusion of the above discussion is that the defendants have failed to establish execution of gift deed and therefore, issue No.2 is decided in negative. No gift was validly executed. Consequently issue No.3 is decided in affirmative and if there is any gift deed that should be treated as cancelled and of no legal consequence.

Issue No.4. In view of the above discussion on issues NO.2 & 3 the suit is decreed only to the extent of prayer clause (i) and (ii) with no order as to cost.

Karachi
Dated:24-03.2015

J U D G E