

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

IInd Appeal No. 13 of 2010

Date of Hearing : 17.8.2015 & 24.8.2015

Date of Announcement : 30.9.2015

Appellant : Allah Bachayo through L.Rs
Through Mr. Arbab Ali Hakro, Advocate

Respondents : Sain Bux and others
Through Mr. Mir Raja Mansoor,
Advocate

Official Respondents : Through Mr. Allah Bachayo Soomro,
Additional Advocate General, Sindh

ORDER

NAZAR AKBAR, J.- The appellants being aggrieved of and dis-satisfied by the judgment and decree dated 10.04.2010 whereby the Additional District Judge, Shahdadpur while allowing Civil Appeal No. 03 of 2010 filed by the respondents against the dismissal of the F.C. Suit No.29 of 2006 by the Senior Civil Judge Shahdadpur has decreed the same, the appellants have preferred this IInd Appeal to set-aside appellate decree and restore the original order of dismissal of respondent's suit.

2. Brief facts of the case are that the respondents in the court of Senior Civil Judge, Shahdadpur filed F.C. Suit No. 29 of 2006 against the appellant for Declaration, Cancellation, Revocation of Gift, Mesne Profits and Permanent Injunction in respect of agricultural land bearing Survey Nos. 307 (6-23), 308(3-4), 309(9-32), 310(8-25), 311(5-8), 315(4-3), 312(4-21), 314(4-23), 316(8-5) 317(5-17) total area 58-31 acres situated in deh Maldasi Taluka Shahdadpur District Sanghar (hereinafter the suit land). The suit land was originally owned by late Mst. Bhagul wife of Mangan and daughter of Faiz Muhammad who expired in 2003 at village Ghulam Muhammad Leghari.

According to the respondents the deceased Mst. Bhagul was survived by the following legal heirs:-

- (i) Allah Bachayo appellant / defendant No.1 (nephew/sister's son)
- (ii) Sain Bux respondent No.1 / plaintiff No.1 (cousin)
- (iii) Mehmood respondent No.2 / plaintiff No.2 (cousin)
- (iv) Mangan plaintiff No.3 / (husband/cousin)

3. It was averred in the plaint that during her life time Mst. Bhagul was contesting F.C. Suit No. 85 of 1998 filed by one Abdullah Leghari against her and others in respect of the suit land on the basis of false, forged and fabricated sale agreement. Mst. Bhagul died during pendency of the said suit. After her death, the appellant and the respondents as her legal heirs were joined as party. The appellant appeared in court pursuant to notice dated **5.3.2004** and contested the suit. The respondents first came to know on **8.3.2004** that Mst. Bhagul had gifted the suit land to appellant Nos. 2 to 7 / defendant Nos. 2 to 6 under registered gift deed dated **13.10.1999** before Sub-Registrar, Shahdadpur. On coming to know about such gift deed, the respondents contacted appellant and enquired about the alleged forged and fabricated gift deed, therefore the appellant asked the respondents to keep silence and do not disclose such fact to anyone and he will give them their due share from the suit land after the decision of Suit No. 85 of 1998. It was further averred in the plaint that after dismissal of the said suit, the plaintiff in that suit and appellant herein filed Civil Appeal in the court of Additional District Judge, Shahdadpur. The respondent also received notice of the said Appeal and again contacted the appellant who again repeated his earlier promise. It was further averred in the plaint that about a month back before filing of the present F.C. Suit No. 29 of 2006, the appellant had turned down the request of respondents to fulfil his promise and plainly refused to give their share and also threatened that he will alienate / sale the suit land being guardian. It was lastly averred in the plaint that the gift deed dated **13.10.1999** registered in the office of Sub-Registrar, Shahdadpur allegedly executed by Mst. Bhagul in favour of appellant Nos. 2 to 7 through appellant No.1 is illegal, malafide, void, ab-initio and is not executed and signed by Mst. Bhagul. The legal requirements have not been fulfilled as the same is not

registered as per law and is not binding on the respondents and is liable to be cancelled so also the khata in revenue record of Rights on the basis of the said gift deed is liable to be cancelled as the same was entered during the pendency of F.C. Suit No. 85 of 1998.

4. The appellants/defendant Nos. 1 to 7 filed their written statement and denied the claim of respondents/plaintiffs and stated that the total land is 59-31 acres and not 58-31 acres. It was also denied that plaintiff No.3 Manghan was husband of Mst. Bhagul as he had divorced her in the year 1968. Since then she was residing with the defendant/appellant. It was further denied that respondents / plaintiffs Manghan, Sain Bux and Mehmood were cousins of deceased Mst. Bhagul. It was claimed in the written statement that defendant/appellant Allah Bachayo was nephew (sister's son of Mst. Bhagul) and the gift of her land by Mst. Bhagul to the children of appellant No.1 and one acre of land "waqf" to a mosque of the village was known to all the villagers including the plaintiffs/ respondents, therefore, the gift was genuine, legal, valid and according to law. Lastly it was denied that any promise was made by appellant to the respondents for sharing the gift land.

5. Learned trial Court from pleadings of the parties framed the following issues:-

- (i) Whether the suit of plaintiffs is maintainable?
- (ii) Whether the suit of the plaintiffs is barred by limitation Act?
- (iii) Whether Sain Bux and Mehmood are legal heirs of Mst. Bhagul?
- (iv) Whether gift of Mst. Bhagul to sons of Allah Bachayo is valid and legal?
- (v) Whether plaintiffs have filed appeal against the decision of Senior Civil Judge, Shahdampur in Suit No. 85 of 1998?
- (vi) What plaintiffs are entitled any relief which they claimed?
- (vii) What should the decree be?

6. In order to prove their respective claim, the respondents/plaintiffs examined Mukhtiarkar (R) Shahdampur as Ex.33, he did not produce any document as he deposed in his evidence that there is no any application

available in their record for issuance of sale certificate of landed property of Mst. Bhagul for getting the sale certificate for suit land. The respondents/plaintiffs also examined Sub Registrar Shahdadpur at Ex.36, he produced certified copy of gift deed at Ex.37, attested photocopy of circular No.4064-4307 dated 8.6.1989 which was issued by Inspector General Registration Sindh Hyderabad at Ex.38. The respondents / plaintiffs examined U.C Secretary at Ex.40, he produce photo copy of FIR at Ex.41 lodged at P.S Shahdadpur. Respondent/Plaintiff Sain Bux examined himself at Ex.42 who produced certified copy of gift deed at Ex.43. The respondents / plaintiffs closed the side at Ex.44. Plaintiff Sain Bux failed to examine remaining plaintiffs as witnesses in court.

7. The appellants/defendants examined witnesses of gift deed namely Rahim Bux at Ex.50 another witness of gift deed namely Mushtaq at Ex.55. The counsel for defendants filed an application for examining himself as witness as at the time of Registration of Gift Deed he had identified Mst. Bhagul and affixed his signature on the gift deed which was allowed hence Haji Muhammad Ashraf Umrani advocate examined himself at Ex.66, thereafter, the side of defendants was closed at Ex.67.

8. The learned Trial Court after hearing the learned counsel for the parties, dismissed the suit of respondents/plaintiffs. The learned appellate court in C.A. No. 03 of 2010 filed by respondents/plaintiff framed the following points for determination:-

- (i) Whether the suit is time barred?
- (ii) Whether the Gift Deed No. 12535 dated 13.10.1990 purporting to have been executed by Mst. Bhagul in favour of the sons of Allah Bachayo, Respondent-1 is valid and legal one?
- (iii) Whether Sain Bux and Mehmood are legal heirs of Mst. Bhagul?
- (iv) What should the decree be?

And after hearing learned counsel on the above points for determination the Appellate Court set-aside the order of dismissal of the suit by the trial court and decreed the suit with no order as to costs. The appellant/

defendants have preferred this IInd Appeal against the findings of Ist appellate court.

9. Mr. Arbab Ali Hakro advocate for appellant contended that the impugned order / judgment of the Appellate Court is contrary to law on several counts. It is contrary to law as:- (1) the appellate court has re-drafted the same issues as point for determination and decided the same as a court of original jurisdiction without commenting on the findings of the trial court based on the evidence; (2) the appellate court failed to appreciate that the plaintiffs/ respondents have neither sought any declaration about themselves that they are / were legal heirs of deceased Mst. Bhagul; nor the appellate court has determined the nature of relationship of respondents with the deceased so as to appreciate their respective share, if any, in the suit land; (4) the appellate court contrary to the record and evidence available in R&Ps declared that since the suit land was on lease with Raheem Bux D.W-1 the suit land was not handed over to the donees / appellant No.2 to 7. He has referred to Ex. 37 and the cross examination of witnesses namely Sain Bux, D-W-1. Regarding handing over possession of the property the counsel has contended that lessee of the gifted property namely Raheem Bux has also endorsed the gift deed and the thumb impression and NIC number of doner are also mentioned on the gift deed. The witnesses of the gift namely Mushtaq and the lessee of the property Raheem Bux have corroborated the execution of gift and its contents and the registration of the gift was also established, therefore, it was a complete gift and the observation of the Appellate Court that the gift was not established, particularly the observation that the photograph of doner and her NIC was not mentioned on the gift deed was contrary to the record to the extent that the NIC number was specifically mentioned under the thumb impression of the doner and the photograph was not the requirement at the time of gift deed on 2.9.1999. The possession on the date of signing of gift deed in presence of lessee Raheem Bux who endorsed the same in front of the Sub Registrar was also specifically mentioned in the gift deed that the possession is constructive and it was physically handed over but it was termed as constructive since the lease continued even after the gift deed. The applicant has relied upon the following case law:-

- (1) 2014 YLR 1244 (Mst. Bai and 3 others v. Province of Sindh & others)
- (2) 2004 SCMR 1734 (Muhammad Sadiq and others v. Bashir Ahmed and others)

10. In rebuttal the counsel for respondents Mr. Mir Raja Mansoor advocate contended that the respondents were cousins and husband of deceased Mst. Bhagul and they had challenged the fraudulently obtained gift as soon as it came to their notice. They were impleaded as respondents in Suit No. 85 of 1988 on the demise of Mst. Bhagul and during the proceeding of Suit No. 85 of 1998. The appellant who were also impleaded as legal heirs have promised with the respondents that as soon as the case will be over they will give their share in the estate of deceased Mst. Bhagul. The respondents counsel also raised a new plea that the gift was invalid since the doner was a pardanashin lady. However, such plea was not taken by him in the pleadings before the Trial Court as well as Appellate Court. He has contended that there is no bar in taking new plea even at the appellate stage. He has further contended that since the respondents had been impleaded in the litigation between Mst. Bhagul and Abdullah in earlier F.C. Suit No. 85 of 1998, therefore, admittedly the respondents are legal heirs of deceased Mst. Bhagul and were entitled to the estate of deceased. He claims knowledge of the gift from 2004 when through the pleadings of Suit No. 85 of 1998 they came to know about the existence of gift. He has relied on the following case law:-

- (1) PLD 2010 S.C 906 (Bashir Ahmed v. Mst. Taja Begum and others)
- (2) PLD 1988 Quetta 60 (Syed Abdullah Shah and 3 others v. Abdul Ghaffar and another)
- (3) 1989 MLD 3795 (Mst. Farrukh Sultana v. Messrs Darul Aloom Amjadia)
- (4) PLD 2013 Sindh 501 (Muhammad Ibrahim v. Province of Sindh through D.C.O. Revenue and 4 others)
- (5) 2012 SCMR 1373 (Noor Muhammad and other sv. Mst. Azmat-e-Bibi)
- (6) 1996 (W.P) Pesh. 121 (Abdur Rehman v. Khalilur Rehman and others)

11. I have heard learned counsel for the parties and perused the record as well as the case law.

12. From the pleadings of the parties and the arguments there were only two main issues between them namely whether deceased Mst. Bhagul has validly gifted the property to the children of appellant No.1 on 2.9.1999 and (2) whether the respondents / plaintiffs were legal heirs of deceased Mst. Bhagul. It is admitted position from the record that the respondents in their plaint have not even sought declaration of their relation with deceased Mst. Bhagul nor even they have disclosed the relationship with the deceased. Merely by stating that plaintiff Nos. 1 and 2 were cousins and plaintiff No.3 was husband and cousin of deceased was not sufficient to come within the purview of legal heirs who could claim inheritance in the event of death. While challenging the gift the respondents have failed to comment on the contents of the gift to the extent that plaintiff No.3 had divorced the doner 30 years prior to the execution of gift and that he had contracted second marriage. It was alleged in the plaint that the requirement of execution of gift and registration was not lawfully effected. However, no evidence regarding illegality in the execution of gift and its registration was brought on record. The ingredients of gift i.e. offer, acceptance and delivery of possession of the corpus of the gift were admittedly mentioned in the gift deed which was produced in evidence as Ex.37. The plaint and evidence is silent on the legal requirements of gift which were not completed. In this context from the registered gift deed the following passages with their English translation, are enough to appreciate the offer, the acceptance and the delivery of possession.

هن وقت زمين جو (Physical) قبضو مذڪوره زمين تي مقاطعيدار مٿي
ذڪر ڪيل جو آهي مگر (Constructive) قبضو ڌر نمبر (1) جو
مذڪوره زمين تي آهي جو زباني مقاطعي جي وقت کان ڌر نمبر (1) ڌر
نمبر (2) جي حوالي روبرو شاهدن جي ڪري ڇڏيو آهي ۽ ڌر نمبر (2)
زباني بخشش کانپوءِ مذڪوره زمين جا مالڪ آهن سڀني حقن واسطن
سميت ۽ ائنده رهندا. اها بخشش ڌر نمبر (2) جي پنهنجي پيار ۽ محبت
جي ڪري ڪئي آهي ۽ بنا ڪنهن معاوضي جي. مذڪوره زمين جي کاتي
جو سڄو نقل رجسٽرڊ مقاطعو جريان نمبر 321 تاريخ 18.2.1998 جي
قوتوڪاپي مان ڌر نمبر (2) جي حوالي ڪري ڇڏي آهي. زباني بخشش

ڪرڻ وقت زمين جو (Constructive) قبضو ڌر نمبر (1) الهه بچايو ولد پنهنون جي حوالي ڪيو آهي جيڪو ڌر نمبر (2) جريان نمبر 1 کان 6 تائين جو سڳو پيءُ آهي ۽ ان قبضو وٺڻ قبول ڪيو ۽ اهو قبضو مقاطعيدار جي روبرو ڏنو ويو ۽ ان کي اهڙو اطلاع ڏنو ويو. مٿئين بخشش ڌر نمبر (1) پنهنجي خوشيءَ سان ۽ مڪمل هوش حواس سان ۽ بنان ڪنهن زيرزبر جي بنان ڪنهن نشي جي لکي ۽ صحيح ڪئي آهي ۽ جيڪا مونکي قبول آهي ۽ رهندي ۽ شاهدن جي روبرو صحيح ڪري ڏني آهي. اڄ تاريخ 2 سيپٽمبر 1999.

سڄو آنگونو

مسمات پاگل ڌيءُ فيض محمد
NIC No. 486-45-354976

بخشش جي قبوليت

آئون هيٺ صحيح ڪندڙ الهه بچايو ولد پنهنون ذات لغاري

“At the moment, the physical possession of land is with above named lessee but the (constructive) possession is with party No.1, which at the time of oral gift by party No.1 before the witnesses was handedover to party No.2 and after the oral gift the party No.2 is / will remain owner of the said land with all their rights and privileges. This gift is made due to love and affection for party No.2 and without any consideration. Photostat copy of certified copy of Entry (khata), registered lease entry No. 321 dated 18.2.1998 is handed over to party No.2. At the time of oral gift the constructive possession of land was handed over to Allah Bachayo son of Punhoon who is real father of donees No.1 to 6 of party No.2 and he accepted the possession. The said possession was handed over in front of lessee and the lessee was also informed accordingly. The above gift is made by party No.1 with conscious mind, will & wish, without any duress, compulsion and without being intoxicated, which I have given in writing and signed before the witnesses today on 2nd September, 1999.

RTI

Mst. Bhagul
d/o Faiz Muhammad
NIC 486-45-354976

Acceptance of gift

I, the undersigned Allah Bachayo son of Punhoon by caste Leghari ”

13. In the cross-examination and even in the plaint it has not been denied that the document of gift was not carrying thumb impression of the doner or NIC number mentioned and it was wrong. The appellants have produced witness of the execution of gift before the Sub-Registrar. In the same gift deed

the doner has declared that plaintiff No.1 had divorced her 30 years back in the following terms:-

جيئن ته ڌر نمبر (1) مذڪوره زمين جي سڀني حقن ۽ واسطن سميت مالڪ آهي ۽ ڪنهن ٻئي جو حصو پتي نه آهي ۽ ڌر نمبر (1) کي ڪوبه پنهنجي پيٽ جو اولاد نه ٿيو ۽ نه آهي. ڌر نمبر (1) جو گهڻا سال اڳ مگڻ ولد اولادي ذات لغاري سان شادي ٿي هئي ۽ ان مان ڪوبه اولاد ڪونه ٿيو هو ۽ پاڻ اثبوت ڪري اٽڪل 30 سال اڳ طلاق ٿي وئي ۽ هن طلاق کانپوءِ ٻي شادي ڪئي هئي. انهيءَ ڪري مان مذڪوره زمين (1-00) هڪ ايڪڙ سروي نمبر 307 مان پنهنجي گونڻ جي مسجد المدينه جيڪا سنت جماعت جي آهي انکي هڪ جدا دستاويز جي ذريعي اڄ وقف ڪري ڏني آهي ۽ باقي ايراضي 58-31 ايڪڙ مون اڄ کان ڪجهه ڏينهن اڳ زباني بخشش جي ذريعي ڌر نمبر (2) کي هيٺئين ريت شاهدن جي روبرو ڏني آهي.

“As party No.1 is owner of the land with all rights and privileges without any share / partnership with anyone. The party No.1 has no offspring. Party No.1 was married several years ago with Magan son of Auladi by caste Leghari but there was no issue from the said wedlock and due to strained relations, the marriage was dissolved about 30 years back and after marriage he (Magan) got second marriage. That's why I gave 1-00 acre of land from Survey No. 307 to Al-Madina mosque of my village which is of Ahl-e-sunnat. The said land is given by me today as waqf through separate stamp and for remaining area i.e. 58-31 acres, few days ago I orally gifted the same to party No.2 before the witnesses as described below.

14. Plaintiff No.1 did not appear in the witness box to deny that he has divorced the doner and he has not contracted second marriage. Even the waqf part of the registered gift to the extent of 1-00 acre of land has not been challenged. In view of the above facts, the reliance placed by the learned counsel for the appellant on 2014 YLR 1244 (Mst. Bai and 3 others v. Province of Sindh and others and 2004 SCMR 1734 (Muhammad Sadiq and others v. Bashir Ahmed and others) fully covers the case of the appellant. The relevant portion from the judgment reported in 2014 SCMR 1244 is reproduced below:-

“I have perused the contents of gift deed in the light of provisions referred to hereinabove. No doubt, the scribe of the gift deed has not prepared separate statements of donor regarding declaration of gift and of donee regarding the acceptance of gift. However in the gift deed the scribe has shown Haji Jumo as party No.1 to be "DONOR" and Muhammad Khan as Party No.2 to be "DONEE". In the body

of gift deed it is clearly mentioned on behalf of Haji Jumo, the donor that since he was issueless and his nephew Muhammad Khan during his ailment has devoted his best services, therefore due to love and affection he made gift of his 23-20 acres agriculture land to him. Likewise it is mentioned on behalf of Muhammad Khan the donee that he accepts the gift declared by Haji Jumo the donor. The scribe has also mentioned in the gift deed categorically that the possession of land under gift has been delivered by the donor to donee. The above contents were admitted by both the parties, and thereafter the donor and donee signed the gift deed in presence of witnesses Mian Bux and Abdul Karim as such all the three essentials of gift were complied with in accordance with law. So far the plea of learned counsel for the applicants regarding the delivery of possession of gifted property is concerned; both the parties in their evidence before the trial court have claimed their possession over the suit-land. However, neither they have produced any land revenue receipt nor led corroborative evidence regarding possession. The trial court also examined the Tapedars of the concerned area. Tapedar Ali Nawaz was cross-examined by the counsel for both the parties but they did not suggest any question regarding the possession of either party over the suit-land. In these circumstances, I will refer to section 150 reproduced in the preceding paras along with the observation of Judicial Committee that "the taking of possession of the subject-matter of the gift by the donee either actually or constructively is necessary to complete a gift. In Black's Law Dictionary, 6th Edition the constructive possession has been defined to be the possession not actual but assumed to exist, where one claims to hold by virtue of some title, without having the actual occupancy. In this case if there is any ambiguity in delivery of the actual possession of the gifted property by the donor to the donee, even then on the basis of title created by the gift and on the basis of registered gift deed mutation of suit-land exists in the name of the donee in the revenue record of rights, the constructive possession of the donee over the gifted property is proved, such possession in view of Judicial committee's observation referred to in section 150 satisfy the condition of delivery of possession of gifted property as such all the three essentials for a valid gift have been complied with which squarely make the gift complete in all respect."

In 2004 SCMR 1734 it has been held as under:-

We have considered the arguments raised by the learned counsel and have examined the documents brought on record with his assistance. We have noticed that possession of the disputed property is with the respondents. The predecessor-in-interest of the parties died on 13-2-1992. The factum of

gift has been supported by the evidence of scribe, marginal witnesses and the Sub-Registrar who registered the disputed gift-deed. The latter in his testimony had categorically deposed that the late donor had gifted the disputed property to the respondents out of his free-will. He before registering the gift-deed undertook all the legal formalities. The two Courts below after evaluating the evidence threadbare upheld the factum of gift which has been maintained by the learned Single Judge of the Lahore High Court. Learned counsel for the petitioners has failed to point out any legal infirmity of misreading in the, impugned order warranting interference by this Court.

15. The contentions of the learned counsel for the respondents that he could take a new plea of pardanashin lady at the stage of second appeal is without force in the given facts and circumstances of the case. In the first place the respondents have to stick to their pleadings to establish their claim. The respondents case before the Trial Court was that the factum of possession was not established and it was not signed by the doner though as discussed above the delivery of possession was established by the contents of the gift deed in presence of the lessee who was in physical possession at the time of execution of gift and also that it was within the knowledge of the lessee that the lesser has gifted the property to the donees are established from the fact. The endorsement of lessee was also available on the gift deed who was himself present before the Sub Registrar at the time of registration and execution of gift deed. The registered document bears the signature of lessee and the lessee has also admitted this fact in the evidence which was not shaken in cross-examination, therefore, even the plea of pardanashin lady though it is new plea at the stage of second appeal, if allowed to be taken, it would not improve the case of the respondents. The plea of pardanashin lady is available only to the lady herself if she denies the very execution of the document. The stranger to the gift deed cannot dispute that the execution of the gift was not proper since it was executed by a pardanashin lady. In the plaint itself the respondents have admitted that appellant No.1 (Allah Bachayo) is son of sister of doner who had accepted the gift on behalf of the minors from the doner, his aunt i.e. sister of his mother and therefore, mere being pardanashin lady was not fatal to the execution of gift since she has gifted the property in presence of her nephew and other independent witnesses to the donees. If a pardanashin lady can give her agricultural land on lease for

10 years to an stranger, she can gift the same to the children (minor) of her sister's son.

16. The respondents have not lead any evidence to show their relation with the doner and it is not denied that one of the respondents who happened to be husband of the doner had divorced her 30 years prior to the execution of gift and therefore plaintiff No.3 had lost his right of inheritance as the husband of deceased Mst. Bhagul. In this view of the matter the observation of the Appellate Court on issue No.3 that there is un-shattered evidence on record that Mst. Bhagul was wife of Magan and plaintiff Sain Bux and Mehboob were her cousins was devoid of any evidence. The learned Appellate Court has not taken the pains to refer to any statement or evidence showing the relationship of respondents with deceased Mst. Bhagul. The case law relied upon by the learned counsel for respondents on the question of taking new plea and on the point of gift by pardanashin lady was out of context in the given facts of the case and therefore the case law relied upon by him are distinguishable and not relevant.

17. The upshot of the above discussion is that the findings of the Appellate Court whereby civil appeal was allowed are set aside being contrary to record and evidence as well as the law. This IInd Appeal is allowed and the order of dismissal of suit by learned 1st Senior Civil Judge is maintained. The parties to bear their own cost.

JUDGE

Karar/-