

HIGH COURT OF SINDH CIRCUIT COURT MIRPURKHAS

Civil Revision Application No.S-264 of 2024

Civil Revision Application No.S-268 of 2024

Present

Mr. Justice Dr.Syed Fiaz ul Hasan Shah.

Applicant: Saeed Ahmed S/o Babuddin.

Through Mr. Muhammad Asif Zai, Advocate,

Respondent: Shabbir Ahmed & 04 others.

Through, Mr. M. Noordin Bhatti, advocate.

Through, Mr. Ayaz Ali Rajpar, A.A.G Sindh.

Date of hearing: 11.03.2025.

Date of Judgment: .03.2025.

J U D G M E N T

Dr. Syed Fiaz ul Hasan Shah, J: Through above Civil Revision Applications the applicant Saeed Ahmed has challenged the legality of Judgment dated 15.02.2023 and Decree 21.02.2023 passed by learned District Judge Mirpurkhas in Civil Appeals No.68/2022 and 69/2022 as well as Judgment and Decree dated 31.05.2022 passed by learned 2nd Senior Civil Judge Mirpurkhas in F.C Suit No.59/2013(old) & F.C Suit No.48/2013 (new) so also in F.C Suit No.218/2012 (old) & F.C Suit No.01/2014 (new), both the Courts had dismissed the appeal/suit of applicant ,therefore, applicant preferred these revision applications with prayer to set aside the impugned Judgment dated 15.02.2023 and Decree 21.02.2023 passed by learned District Judge Mirpurkhas in Civil Appeals No.68/2022 and

69/2022 as well as Judgment and Decree dated 31.05.2022 passed by learned 2nd Senior Civil Judge Mirpurkhas in F.C Suit No.59/2013(old) & F.C Suit No.48/2013 (new) so also in F.C Suit No.218/2012 (old) & F.C Suit No.01/2014 (new).

1. The brief facts of F. C Suit No. 01 of 2014 Old Suit No. 218 of 2012 are that the plaintiffs and defendant No. 01 are sons and daughters of Babuddin who expired in year 2007 leaving behind him, plaintiffs No. 01 to 07 and defendant No. 01 as his legal heirs. It is averred that plaintiffs father was owner of house No. 62 situated in Goa Shahla Thamsabad Mirpurkhas, which was a small one and then plaintiffs father purchased plot bearing C.S No. 1151/42 admeasuring 150 sq yards 1350 sq feet situated in Ward B Noor Shah Colony Mirpurkhas, thereafter, father of established double storey house on purchased plot and all the family members shifted in the house. It is averred that 2 brothers namely Saeed Ahmed and Siddique Raja were residing in the ground floor along with their mother, whereas one brother namely residing on the upper story and passing their life happily and old house is locked because the area of that plot is very small one, therefore, the plaintiffs father purchased this plot in the year 1991-1992 and constructed the house in the year 1995 and all the families were shifted to new constructed house. It is averred that all the brothers are married and the accommodation is the old one and very short. It is averred that plaintiff is residing on the upper storey whereas the defendant No.01 and younger brother were residing on the ground floor along with the mother and there was no any dispute and it was settled that the sister who are equal share-holders in old house and share will be given to the sisters, after the sale of old one. It is averred that plaintiff and defendants are residing peacefully and there was no any dispute and the defendant No.

01 at no time informed plaintiff that the suit house has already been gifted to defendant No. 01 by the father and even during the lifetime the father did not disclose to nay member of family and even to the mother that the father has gifted the suit house to the defendant No. 01. It is averred that during the month of 2012, there was fight between the wife of defendant No. 01 and younger brother wife and mother and then the defendant No. 01 disclosed that this house has already been gifted by the father to the defendant No. 01 in year 2004 through registered gift deed and the plaintiff requested for supply of the Photostat copy of gift deed on which the suit house was gifted and deed was registered before Sub Registrar but the defendant no. 01 refused. Thereafter, the plaintiff approached to registrar for copy of gift deed and after great efforts plaintiffs succeeded to obtain the Photostat copy of gift deed and thereafter, plaintiff came to know that the defendant No. 01 malafide without knowledge of plaintiff deceased father this false gift deed was fabricated. It is averred that after that the plaintiff collected the brother for decision and Nek-Mards of the brother asked the defendant No. 01 to withdraw from this deed and make the statement before the Mukhtiarkar so that the Khata of house be mutated in the name of all the legal heirs but the defendant No. 01, hence this suit for declaration and cancellation of gift deed. It is averred that the gift deed is illegal and fabricated by the defendant No. 01 without the knowledge of any legal heir and even knowledge of deceased, therefore, the gift deed is not binding upon the plaintiff and the plaintiff and defendants are joint owners of property and jointly in possession of the same. It is averred that in the gift deed nowhere mention was made that the deceased father handed over the possession of gifted property and when suit house was handed over to the defendant No. 01.

2. The Plaintiffs prayed as under:

- a. This Honourable court may be pleased to declare that the gift deed No. 1220 dated 03-01-2005 is illegal void as the defendant No. 01 fabricated this gift deed without the knowledge of the plaintiffs and their deceased father.
- b. This Honourable court be pleased to cancel the gift deed as the plaintiffs and defendant No. 01 are equal share-holders and in physical possession of the property.
- c. This Honourable court be pleased to restrain and prohibit the defendant No. 01 from sale transfer the suit house to any other person by himself through his agent servants associate or through any other agency till pending decision of the suit.
- d. Cost of the suit be borne by the defendant.
- e. Any other relief be granted as may deem fit and proper under the circumstances of the case.

The F.C Suit No.218/2012, in which they have challenged the gift, and started to threat and harass the plaintiff, hence plaintiff this suit with following prayers:-

- a. That this Honourable Court may be pleased to declare that the plaintiff is owner of suit plot and he is legally entitled for the vacant possession of portion which has been occupied by the defendant No.1 and 2 as licensee.
- b. That this Honourable Court may be pleased to further declare that plaintiff is entitle 16.6 paisa share out of House No.62 situated in Mohallah Gao Shalla, Thamsabad, Mirpurkhas, being one of L.Rs of deceased Babo Din S/o Nany Khan Qureshi who died in year 2017, which is in the possession of the defendants No.1 & 2.
- c. This Honourable court may be pleased to direct the defendants to hand over the vacant possession of the portion of suit property and also share 16.6 paisa out of house No. 62, Gao Shalla Thamsabad, Mirpurkhas to the plaintiff.
- d. That this Honourable court may be pleased also to direct the defendants No; 1 and 2 to pay the rent of Rs.10,000/- per month, for the portion of suit plot and share of House No. 62, Gao Shalla Mohallah Thamsabad, Mirpúrkhās, which they have been using since July, 2012 till they handover vacant possession to the plaintiff.
- e. This Honourable court may be pleased to grant permanent injunction against the defendants that they should not transfer

the possession of portion of suit plot, which is in their occupation and also not sell out the share of the plaintiff out of house No. 62, situated in Mohallah Gao Shalla Thamsabad, Mirpurkhas till the final decision of this suit.

- f. That defendant pays the costs of the suit.
- g. That this Honourable court may be pleased to grant any other relief, which this Honourable court deem fit and proper according to the facts and circumstances of the case.

3. After the admission of the suit. Service was made upon the defendants.

Defendants No.1 & 02 filed their joint written statement wherein he denied the contents of plaint that further submitted that plot was purchased by the father in the year 1990-91 and thereafter, the house was constructed by the father and not by the plaintiff and plaint is admitted to extent of purchase of plot and rest is denied as plaintiff fabricated false gift deed, in fact no gift deed was made by father. It is further submitted that defendants are residing there since 1994-95, therefore, plaintiff has no cause of action to file present suit and he is not entitled for any relief as claimed and suit is liable to be dismissed with special cos.,

4. Both the above mentioned suits were consolidated vide order dated 18-01-2014. The suit No. 01/2014(old No. 218/2012) was instituted, prior to suit No. 48/2013(old No. 59/2013), therefore, suit No. 48/2013 is amalgamated in suit No. 01/2014(old No. 218/2012) and suit No. No. 01/2014(old No. 218/2012) treated as leading suit.

5. From pleadings of the parties, the then learned predecessor judge of this court framed following consolidated issues.

- 1. Which suit is not maintainable?
- 2. In which suit plaintiff(s) has/have no cause of action?
- 3. Whether defendant No.1 purchased plot No.1151/38 area 1350 sqft, situated in Noor Shah Colony Mirpurkhas in the year 1990 and thereafter, it had been exchanged with plot

No.1151/42 of Riazuddin S/o Azeemuddin by mutual understanding and constructed it from his own earning?

4. Whether father of plaintiffs and defendant No.1 Babuddin was benamidar of plot No. 1151/42 and in the year 2004 the said plot was transferred in favour of defendant No.1 through registered gift deed during his life time and there-after he died in the year 2007?

5. Whether the gift deed No.1220 dated 03-01-2005 is illegal, void and foisted by defendant No.1 without knowledge of other legal heirs and after the death of deceased father?

6. Whether plaintiff and defendants are legal heirs of deceased father and entitled for equal share from the property left by the deceased?

7. Whether defendant Saeed Ahmed is entitled to 16-6 paisa share from house No.62, situated in Mohallah Gao-Shalla being one of legal heirs of the deceased Babuddin, which is in possession of plaintiffs Shabbir Ahmed and others?

8. Whether the plaintiffs are tenant and defendant entitled to receive the rent from plaintiff at the rate of Rs.10,000/per month from July 2012?

9. Whether the plaintiffs and defendants are in possession of house equally after death of their father?

10. Whether defendant Saeed Ahmed is entitled for vacant possession of portion which has been occupied by the plaintiffs as licensee?

11. In which suits plaintiffs are entitled for relief claimed?

12. What should the decree be?

6. In support of his case, plaintiff namely Shabbir Ahmed examined himself as PW-01, at Exh.55, he produced original power of attorney, certified true of declaration of oral gift in respect of built residential single storey house bearing City Survey No. 1151/42 ward No. B admeasuring area 1350-0 square feet situated at Noor Shah Colony Mirpurkhas Taluka and District Mirpurkhas and Iqrarnama reduced in writing in between plaintiff No. 01 and defendant No. 01 dated 28-05-2012 at Exh 55/B to at Exh.55/C. Plaintiffs also examined official witness namely Ghulam Nabi Record keeper of the office of City Survey Mirpurkhas as P.W -02 at Exh.56, photo copy of sale deed number 1572 dated 10-12-1990 executed in between Sht. Hasi Bai and

Babuddin and extract form registered property card as marked 105/A & marked 105/B. Plaintiffs also examined his witness namely Muhammad Usman as P.W-03, at xh.106. Plaintiffs also examined his witness namely Nawab Qureshi as P.W-04, at h.107 and then they were cross examined by learned counsel for defendant No. 01. Thereafter learned counsel for plaintiffs closed their side for evidence vide statement at Exh.108.

7. In rebuttal defendant No. 01 namely Saeed Ahmed examined himself as DW.01 at Exh.109, he produced original sale agreement at Exh.109/A, original gift deed at Exh.109/B, extract form property registered card at Exh.109/C, affidavit at Exh.109/D, rent agreement with tenants at Exh.109/E-1 to at Exh.109/E-5. Learned counsel for defendant No. 01 filed statement wherein he gave up the city survey because he has already been examined at Exh.110. defendant No. 01 examined official witness Sub Registrar Mirpurkhas as D.W-02 as marked 111, he produced thumb print register of document serial number No. 2898 dated 02-11-2004, produced day register of document serial number No. 2898 dated 02-11-2004 with RD No. 2655 dated 02-11-2004 and produce index No. II for year 2004 RD No. 2655 dated 02-11-2004 as marked 111/A as marked 111/C and then defendant No. 01 was cross examined by learned counsel for defendant No. 01. Thereafter, learned counsel for defendant No. 01 closed side for evidence of defendant No. 01 vide statement at Exh.112.

8. This is Civil Revision application under section 115 Civil Procedure Code, 1908 is filed against the concurrent findings passed by the Courts below. The Applicants and Respondents are brothers, sisters while Bani Gegum is a mother. The Respondents instituted a suit No.218/2012 for declaration, injunction and cancellation of

registered Declaration of Oral Gift allegedly executed by the deceased father in favor of the Applicant in the year 2004 while the Applicant has also filed a Suit No.59/2013 for Declaration, Injunction and recovery of possession of 1st floor of suit property on the basis such Gift Deed.

9. After recording the evidence and hearing of parties, the trial Court through a consolidated Judgment dated 31-05-2022 dismissed the Suit No.218/2012 filed by the Applicant for declaration in respect of Gift deed being invalid document while suit for the recovery of possession, a Judgment and Decree has granted in favor of the Respondents in Suit No.218/2012 for Declaration and cancellation of Gift deed. Being aggrieved with the said Judgment, the Applicant filed two Appeals under section 96 Civil Procedure Code, 1908 before the learned District Judge, Mirpur Khas and after hearing the parties, the Appellate Court vide impugned Judgment dated 15-02-2023 maintained the Judgment and decree passed by the trial Court.

10. I have heard the Counsel for parties and perused the record. On close scanning of the evidence adduced by the parties together with the impugned Judgments, I am of the view that following point of determination are required to be determined:

- (1) Whether a registered document produced by Official witness requires test to prove its execution by way Article 79 of Qanun-e- Shahadat Order, 1984?
- (2) What would be the effect of essential ingredient of Gift when Respondents are in part possession of suit property?

11. The concurrent findings of Courts below patently suffers with error of law as it has failed to consider that the mode of proof for the registered document is at variance. It is not like always the unregistered mandatory document having requirement of attestation of two or more witnesses and such mode of proof further alleviated the concept of mode of proof

under Article 79 of ibid Order when the Executor during his lifetime has not challenged it. The Revisional jurisdiction of High Court is well-defined by the Hon'ble Supreme Court. Reliance can be placed on Ameer Afzal's case¹

“The scope of jurisdiction of the High Court under Section 115 of the CPC is limited in relation to concurrent findings of the competent courts. The exceptions to this rule are when **the findings are based on insufficient evidence, misreading of evidence, non-consideration of material evidence, patent errors of law, consideration of inadmissible evidence, abuse of jurisdiction, when the conclusions drawn are perverse and based on conjectural presumptions.** The erroneous decisions of fact are ordinarily not revisable and the mere fact that the High Court may differ on a question of fact or mixed question of law and fact is not a valid ground for interfering with concurrent findings.”

Emphasize supplied.

- 12.** It is admitted position that the Applicant has taken two stances in his pleadings as well as during testimony; firstly, in the year 1990 at aged about 22 years, the Applicant had claimed to have had purchase another property 1151/38 and due to double sale, it has been exchanged or dropped the idea to purchase the same and it has decided by him in consultation with brokers that the present suit Property No.1151/42 which is subject matter of the lis, can be bought. However, the Applicant at that time, had lost NIC, therefore, he had purchased the suit property in the name of his deceased father from Sht. Hasi Bai under registered Sale Deed. Both the Courts below have rightly rejected the said stance of the Applicant as he has failed to produce any documentary evidence that is to say payment record, his financial status at the age of 22 years or by calling marginal witnesses

¹ “Ameer Afzal & another v. S. Akmal thr. Legal heirs” (Civil Appeal No.648 of 2022)

to prove Exh.109/A sale agreement, broker who names have been given by the Applicant in evidence, and of course its executor Sht. Hasi Bai or her attorney through him the sale agreement Exh.109/A was executed. Therefore, the Applicant failed to undergo the test of Article 79 of the Qanun-e-Shahadat Order, 1984 and has failed to prove that it was the Applicant who had purchased the suit property with his own money and in the name of his deceased father.

13. The second stance of the Applicant is based on the Exh.109/B Declaration of Oral Gift dated 02-11-2004 and Exh.109/C Mutation dated 16-02-2005. The Declaration of Gift has also come from the Official record produced by Public Official Marked.111 namely Mr. Sadfar Ali, Sub-Registrar, District Mirpur Khas so also the certified copy of such Oral Gift deed was attached by the Respondents alongwith their plaint in Suit No.218/2012 for cancellation. In addition to the official Witness Sub-Registrar, a Senior Clerk of City Surveyor Office Mr. Ghulam Nabi also appeared at Marked 105 and produced Mutation record in favor of the Applicant pertaining to the year 2005.

14. On examination of Judgment impugned before me, it may be observed that both the Court below dismissed the Suit No.59/2013 of the Applicant mainly on the ground that the Applicant has failed to prove the execution of Exh.109/B Gift deed dated 02-11-2004 by producing at least 02 Marginal witnesses of document of Gift as well as scribe and therefore, both the Courts have dismissed the suit of the Applicant by placing reliance on Article 79 of the Qanun-e-Shahadat Order, 1984. For the convenience and to understand the applicability or non-applicability of Article 79 of the Qanun-e-Shahadat Order, 1984 according to the situation of the cases, I refer Article 79 of ibid Order which is re-produced:

Article 79 of the Qanun-e-Shahadat, 1984:

79. Proof of execution of document required by law to be attested. If a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of given Evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

Emphasized added

- 15.** Undoubtedly, where the execution of the document is denied or disputed, it is the mandatory requirement of law of evidence i.e. Qanun-e-Shahadat Order, 1984 to prove the execution of such document by way of confirmation of question document through at least two witnesses who have put their signatures on the question document as per the qualification of Article 17 of the ibid Order. However, the law of evidence (ibid Order) provides certain departures from this condition. Firstly, the exception to the general rule of Article 17 and 79 of ibid Order is that where the execution is being admitted by the Executor before the court in his pleadings or during evidence. This exceptional provision is reproduced hereunder:

“81. Admission of execution by party to attested document- The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.”

- 16.** The wisdom of law has covered almost possible implications. For instance, if the attesting witnesses collude with opposite party² or due to some greed or avarice³ refuse to cooperate with the beneficiary of document. The law gives alternative way to the beneficiary of document to proof his document.

82. Proof when attesting witness denies the execution: If the attesting witness denies or does not, recollect the execution of the document, its execution may be proved by other evidence.

Therefore, a party is not required to prove document in the ordinary mode of prove and a departure from Article 79 of ibid Order is permissible. A plenary reading of Article 81 confirms that where the execution of a document is admitted by the executant himself, the examination of attesting witness is not necessary and a party is not under burden of proof to comply with the requirement to produce or call at least two attesting witnesses of document. This view has also been approved by the Supreme Court of Pakistan. Reliance can be placed on Abbas Ali's case.⁴ It has been held by Hon'ble Supreme Court of Pakistan that although the document is required to be attested by two witnesses but where the executant admits the execution of the document, then in terms of Article 81 of ibid Order such document can be used against executor of document though it was required by law to be attested. The non-examination of at least two marginal witnesses is not fatal to the case of a party due to admission by the executor of document.

² For instance, the Doctrine to Hostile under Criminal jurisprudence

³ This aspect is rarely used for witness in Civil Cases although actively use in regular civil litigation against party and not against witness, however, in criminal cases this concept is available is Pakistan Panel Code, 1860, one can say extortion or cheating by person

⁴ "Abbas Ali Vs. Liaqat Ali and another" (2013 SCMR 1600)

17. Further exceptions are provided under Articles 91 to 101 of the *ibid* Order. For the relevancy to the case, I would deal with Articles 91 & 92 of the *ibid* Order. The Lahore High Court⁵ while dealing with the case where only one marginal witness was examined while the beneficiary of document produced the judicial record of previous litigation wherein the executor has admitted the execution of Sale Agreement has allowed the Revision Application by applying Article 91 of the *ibid* Order as the presumption of genuineness is attached to documents forming part of the judicial proceedings, which reads as under:

“91. Presumption as to documents produced as record of evidence—Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate or by any such officer as aforesaid, the Court shall presume that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.”

92. Presumption as to genuineness of documents kept under any law. —The Court shall presume the genuineness of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody

18. It is obvious the “presumption of truth” are not conclusive but rebuttable. The strong rebuttable situation is when the executor himself challenge it which is lacking in the present case. Therefore, the substantive question of law is answer in affirmative. A party having registered

⁵ “Muhammad Islam v. Bagh Ali through Legal heirs” (RSA No.230 of 2016)

document which is neither disputed in execution of signature or in the manners of registration nor by the Executor during his lifetime, does not need to undergo mode of proof under Article 79 of *ibid* Order rather a party can proof through mode of Article 92 of *ibid* Order.

- 19.** The Honorable Supreme Court of Pakistan rule handed down in Manzoor Ahmed's case⁶ "Where sale-deed was registered document and purchaser was in possession of disputed land on the basis thereof then non examination of its attesting witnesses would not be fatal" and in Rasool Bux's case⁷ held that "It is a settled law that the registered document has sanctity attached to it and stronger evidence is required to cast a aspersion on its genuineness as law laid down by this court in Mirza Muhammad Sharif's case NLR 1993 Civil 148".
- 20.** Turning to second point, no evidence has come on record about this point of determination on the issue of possession of the Respondent (brother or sister) at the time of execution of Gift by his father which is essential ingredient of a Gift under Muslim Personal Laws after the pre-requisites i.e. Offer and acceptance.
- 21.** In view of above, the impugned Judgment dated 15.02.2023 and decree dated 21.02.2023 passed by the learned Appellant Court is set aside with directions to the trial Court to give a fresh decision on the point of determination about the "possession" of the Applicant at the time of execution of Declaration of (Oral) Gift deed by his father in his favor and its registration with the Sub-Registrar concerned. The trial Court will be at liberty to record evidence of parties if it deems necessary.

⁶ Manzoor Ahmed and Others V. Mehrban and others (2002 SCMR 1391)

⁷ Rasool Bukhsh & Others V. Muhammad Ramzan reported in (2007 SCMR- 85)

22. Both Revision Application are disposed of in above terms.

JUDGE

Adnan Ashraf Nizamani