

# IN THE HIGH COURT OF SINDH AT KARACHI

SUIT NO.746 OF 1998

PRESENT: MR. JUSTICE SALAHUDDIN PANHWAR

Plaintiff : Muhammad Ismail & 7 others  
through Ms. Naila Tabassum, advocate for plaintiffs

Defendant : Muhammad Ahmed and others,  
Through Mr. Ehsanullah Khan, advocate for  
defendant No. 2.  
Defendant No.1 present in person.

Date of hearing: 3<sup>rd</sup> March, 2016.

Date of Judgment: 12<sup>th</sup> April, 2016.

## JUDGMENT

Succinctly, facts as set out in the plaint are that plaintiffs filed a suit for Declaration, Administration, Partition, Permanent & Mandatory Injunction for following relief (s):-

- a) To declare that the oral gift pronounced by the defendant No.1 in favour of his mother (mother of the plaintiffs) on 10.12.1988, confirmed in writing and signed by the defendant No.1 on 15.11.1995 was duly accepted by the said deceased mother of defendant No.1 i.e Mst. Amna Begum and it was a valid gift UNDER THE MUHAMMADAN LAW and the house / property bearing No.C-93, Block-6, Scheme No.24, admeasuring 580 sq. yards situated at Ghulshan-e-Iqbal Karachi was legally transferred in the name and ownership of the deceased Mst. Amna Begum the mother of the plaintiffs and defendant No.1 and 2.
- b) To further declare that after the death of deceased mother of the plaintiffs and defendant No.1 and 2 i.e Mst. AMNA BEGUM, the said house / property is inheritable to all her legal heirs according to Hanfi Musim Law and the plaintiffs are entitled to have the respective shares as per schedule annexed hereto.

- c) To order for partition of the said house / property bearing No.C-93, Block-6, Scheme No.24, admeasuring 580 Sq.yards situated at Gulshan-e-Iqbal, Karachi as per schedule (Annexure-F) to the plaint;
- d) Mandatory injunction directing order the defendant No.3/KDA to amend its record accordingly and the said house / property bearing No.C-93, Block-6, Scheme No.24 admeasuring 580 sq. yards situated at Gulshan-e-Iqbal, Karachi be mutated / transferred in the names of the plaintiffs and defendant No.1 and 2 and one other legal heir namely Muhammad Farooq s/o Abdul Aziz in their joint or single names.
- e) Permanent injunction restraining the defendant No.1 and 2 , their men, agents, legal heirs, administrators, workers, attorneys, assigns, executors or any person or persons working under them or on their behalf to alienate, transfer, sell , mortgage, to take loan , dispose off or creating third party interest in any manner in and from dispossessing / ejecting and / or interfering / disturbing in the enjoyment of the plaintiffs peaceful possession, and / or disconnecting the amenities such water, electricity, gas and telephone from the said house / property bearing No.C-93, Block-6, Scheme No.24, admeasuring 580 sq. yards situated at Gulshan-e-Iqbal, Karachi in any manner without due course of law till final disposal of the above suit;
- f) Cost of the suit;
- g) Any other relief in the circumstances of the case.

The above reliefs were sought while pleading and claiming that plaintiffs and defendants are real sons and daughters of late Abdul Aziz, died in 1961; all were residing with their mother late Mst. Amna Begum in house No.15/2, 4-E Nazimabad Karachi. Defendant No.1 was eldest brother of plaintiffs and defendant No.2 including their brother namely Muhammad Farooq were working abroad (KUWAIT). Defendant No.1 got allotted and leased suit plot in his own name with consent of all and double storey building was constructed thereon with joint income of parties (*plaintiffs & private defendants*) by selling their plot of Nazimabad. After construction they shifted therein however plaintiff Nos.6 to 8 shifted to respective houses of their in-

laws after their marriages. It is further pleaded that defendant No.1 with consent of all gifted the suit house to his mother Mst. Amna Begum orally on 10.12.1988 which was accepted by her on 12.12.1988; such oral gift was *later* confirmed in writing and signed by defendant No.1 and donee Mst. Amna Begum in presence of witnesses on 15.11.1995 *however* gift could not be mutated in record, being maintained by defendant No.3 (KDA), because she (*donee*) was a simple, old and sick lady and even was not felt necessary. She died on 08.3.1996 leaving behind plaintiffs and private defendants as surviving legal heirs entitled to inherit the property as per Muslim Hanfi Law. It is further pleaded that after death of mother (*donee*) plaintiffs asked defendant No.1 to settle share who *first* promised but later refused thereupon he (*defendant No.1*) was served with legal notice to which he (*defendant No.1*) replied admitting gift and signing of Declaration of gift but denied that gift was not accepted by Mst. Amna Begum (*donee*) thereby attempted to usurp whole property by winning over defendant No.2 and plaintiffs were also threatened for their forcible eviction.

2. Defendant Nos.1 and 2, *after service*, filed their joint written statement wherein claimed that defendant No.1 purchased plot in question in auction in year 1972 and paid first installment while rest of installments were paid by defendant No.2; allotment was made by defendant No.3 and indenture of lease was also executed between him (*defendant No.1*) and defendant No.3. It was claimed that defendant No.1 and 2 bore all construction expenses as they were working abroad and were remitting amount in account of plaintiff No.2. It was pleaded that plot in Nazimabad was sold in 1970 and whole consideration thereof remained with mother Mst. Amna Begum which she spent on operations of plaintiff Nos.2,3,5 and

daughter-in-law Safia and for defendant No.2 so also marriages of plaintiffs. It was denied that plaintiffs had spent any thing in construction hence defendant Nos.1 and 2 denied entitlement of plaintiffs. It was also pleaded that loan was also obtained from HBFC and documents of property are still with HBFC as dues are still pending. It was *however* admitted that gift deed was signed by defendant No.1; was handed over to late mother as token of love and gratitude in 1989 which she had refused to accept and did not affix her thumb impression hence gift was *invalid*. The defendants claimed manipulation and interpolation with gift deed. Defendants did not deny status of parties (*plaintiffs and defendant Nos.1 & 2*) as legal heirs of Mst. Amna Begum but denied the ownership of Mst. Amna Begum. They admitted to have been served with legal notice and reply thereto. It was denied that defendant No.1 ever agreed to distribute property; denied to have threatened for forcible possession but admitted to have asked *politely* for eviction of plaintiffs. In the last, it was pleaded that plaintiffs are not entitled for any relief and their suit merits dismissal.

3. Defendant No.3 (KDA) also filed written statement wherein took legal pleas regarding maintainability of suit; affirmed title in favour of defendant No.1 *as per record* while regarding rest of claims of plaintiffs, it was pleaded to be *family dispute*. The claim regarding gift was responded as not having any thing on record relating to gift.

4. Out of pleadings of parties, the following issues were struck vide order dated 18.12.2000:-

- 1) *Who contributed into acquiring / purchasing the plot of the suit plot?*
- 2) *Who contributed in raising construction on the said plot?*
- 3) *Whether the gift dated 10.12.1988 by the defendant No.1 in favour of the mother of the plaintiff and defendants No.1 & 2 is legal and effective?*
- 4) *What should the decree be?*

5. The plaintiff No.1 Muhammad Ismail examined himself; produced his *affidavit in evidence*, original General Power of Attorney, photo copy of Burial certificate of Mst. Amna Begum, photocopy of NIC of Mst. Amna Begum, photocopy of notice dated 01.11.1997 and reply dated 18.11.1997, letter / notice dated 01.11.1997 addressed to Land Director and photo copies of Schedule 'F' and Schedule G as Ex.P-1 to P-9 respectively; PW-2 Muhammad Yaqoob who produced his *affidavit in evidence* they were also cross-examined.

6. On the other hand, the defendant Muhammad Ahmed examined himself as DW-1 and produced his *affidavit in evidence* and paid Challan of HBFC , original allotment order dated 20.12.1972, photocopy of indenture of lease dated 20.6.1979, photocopies of remittances and original letter dated 07.7.1980 of HBFC; DW-2 Chaudhry Shuabuddin was examined who produced his *affidavit in evidence*. Both were cross examined

7. Defendant No.2 Muhammad Yousuf also examined himself as DW-3; produced his *affidavit in evidence* and original *Halafnama/*

*Iqrarnama/Moada* on stamp paper dated 22.10.1999(Ex.13/1). He was also cross examined.

8. Learned counsel for plaintiff *inter alia* contends that .....  
In support of his arguments he relied upon .....

9. Conversely, learned counsel for defendants argued that  
.....

### FINDINGS.

Issue No.1	As discussed.
Issue No.2	As discussed.
Issue No.3	Affirmative.
Issue No.4	Suit is decreed, as prayed.

### ISSUE NO.3

‘Whether the gift dated 10.12.1988 by the defendant No.1 in favour of the mother of the plaintiff and defendants No.1 & 2 is legal and effective?’

Since the root question, *involved in the suit*, is *prima facie* revolving round **issue No.3**, therefore, it would be in all fairness to decide the same *first*.

Before going into details it would be relevant to keep in view the Section 149 of the Muhammadan Law which defines the *essential (s)* of a **gift** as:-

149. The Three essentials of a gift.

- i) *a declaration of a gift by the donor;*
- ii) *an acceptance of the gift;*
- iii) *delivery of possession of the subject of the gift by the donor to the donee as mentioned in Sect. 150;*

In the instant matter, the donor (*defendant No.1*) himself acknowledges in his pleading that:

“It is further submitted that the gift deed **duly signed by the defendant No.1**, was handed over to his late mother as token of love and gratitude (gratitude) in 1989 which she had refused to.....’

The donor *even* in his affidavit in evidence (examination-in-chief) admits that:

“It is further stated that the gift deed **duly signed by me**, was handed over to my late mother as token of love and gratitude in 1989 which she had refused to accept...”

From the above admission (s), it remains no more disputed that there was a valid, legal and bonafide ‘**offer**’ by the donor (*defendant No.1*) to which the donor (*defendant No.1*) *at no material times* claimed to be under any duress, coercion or result of fraud, therefore, it can safely be concluded that there was a *valid declaration* of gift by the donor (*defendant No.1*).

10. Now, let’s see what the *evidence* and *material* speak about ‘*delivery of possession*’ . It is an admitted position that the status and relation of the donor (*defendant No.1*) and donee (*Mst. Amna Begum*) was that of ‘**son & mother**’ and at relevant time both were residing in the subject matter. In such eventuality, I would say that requirement of ‘*delivery of possession*’ shall stand complete only by mere assertions and recital thereof in this regard. In matter (s) of gift between ‘*blood-relation*’ residing / possessing subject matter of *gift* it would not be necessary for *donor* to *first* oust the blood-relation (*donee*) out and then to put him / her back in possession thereof nor it would necessarily require the *donor* to leave away the subject matter after making a

*declaration* of gift when he / she *otherwise* is not asked by *donee* to do so. Thus, a bonafide intention of '*donor*' in that regard would be sufficient to satisfy requirement of '*delivery of possession*' even without formal transfer of possession. Thus, the fact of the defendant No.1 (*donor*), being in joint possession of the subject matter, is of no help for him to bring any cloud on this aspect (*one of the essentials of gift*). The bonafide intention of the donor (*defendant No.1*) is *undeniable* because he (*defendant No.1*) himself admits about execution of gift and he at no material times denied his signature on the '**gift deed**' hence *bonafide intention* of the donor (*defendant No.1*) in making a valid gift is an irresistible conclusion.

11. Now, let's examine the last *essential* of the gift which is *disputed*. The plaintiffs claim acceptance of the gift by the donee (*Mst. Amna Begum*) while the donor (*defendant No.1*) denies acceptance of the gift by the donee (*Mst. Amna Begum*). I am fully conscious of the legal position that *normally* the onus probandi is upon the beneficiary (donee) but where the donor admits bonafide offer but denies acceptance thereof by the donee then position changes because in such eventuality the donor would be beneficiary of proving refusal / denial of offer. A reference can be made to the case of '*Aurangzeb through L.Rs and others v. Muhammad Jaffar and another* 2007 SCMR 236, wherein it is held that:

9..... It is a settled law qua the transaction or sale or gift, that it is the duty of the beneficiary and a heavy onus lay on the beneficiary to prove by convincing evidence satisfying the judicial conscience of the Court that the transaction shown to be a gift was **executed by the donor** in favour of the donee.

Since, the defendant No.1, having admitted execution of gift, denies its acceptance hence the burden is upon him to prove this fact. Since, it is also not the requirement of the law that the *gift* must always be in writing or should be registered but requirement of law is only to see fulfillment of required *essentials* . A reference can well be made to the case of 'Muhammad Ejaz & 2 others v. Mst. Khalida Awan & another. (2010 SCMR 342), wherein it is held that:

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.

The defendant No.1 claims in his pleading that:

"It is further... gratitute (gratitude) in 1989 which **she had refused to accept** and **did not affix her thumb impression** and refused to go to register office and the K.D.A. Office as she did not want to deprive the defendants No.1 and 2 of their lawful rights.'

The donor *even* in his affidavit in evidence (examination-in-chief) admits that:

"It is further stated that..... in 1989 which she **had refused to accept** and **did not affix her thumb impression** and refused to **go to registrar office and the K.D.A. Office as she did not want to deprive me and defendant No.2 of our lawful rights.**"

This means that the defendant No.1 (*donor*) claims refusal of the donee (*Mst. Amna Begum*) in accepting the gift from the moment he (*defendant No.1*) handed over gift deed to donee (*Mst. Amna Begum*) yet the document (*gift deed*) was signed by the defendant No.1 (*donor*) and was handed over to the donee (*Mst. Amna Begum*). It is no worth believing that the defendant No.1 (*donor*) got prepared the document (*gift deed*); signed it bonafide and handed it over to donee (*Mst. Amna Begum*) without any consent , notice or knowledge of the donee (*Mst. Amna Begum*) when she , *per defendant No.1*, was not interested in depriving the defendant No.1 of subject matter. At this point, it is material to refer relevant portion of the evidence of DW-2 Chaudhry Shuabuddin which is:

'I was told by my wife that the mother of the defendant No.1 had asked her to inform me that defendant No.1 was gifting the property to me (mother) and tell him (defendant No.1) not to do so because he (defendant No.1) has got his own children and I do not want the gift.'

This piece of evidence is sufficient that *Mst. Amna Begum* (donee) had active knowledge and notice of *gift* and preparation of such gift deed hence the act of the donee (*Mst. Amna Begum*) receiving the gift deed and keeping it (original) with her gives rise to nothing but to a conclusion that donee (*Mst. Amna Begum*) had not refused, *as* claimed by the defendant No.1 (*donor*) because had she (*Mst. Amna Begum*) refused to accept the gift then she would not have received the gift deed nor would have kept the same with her. Further, it is not the case of mere preparation of the document but admittedly the defendant No.1 (*donor*) not only got prepared the *gift deed* but also handed it over to the donee (*Mst. Amna Begum*) which too after signing the same which is sufficient to establish *bonafide intention* of the defendant No.1 (*donor*) regarding gift. Further, it is also a matter of record that the

defendant No.1 (*donor*) at no material times attempted to get the same back or to revoke it either by way of any notice or gesture *even* though he (defendant No.1) was in active knowledge of the fact that he (*defendant No.1*) had, *to his extent at least*, made a bonafide gift. The defendant No.1 (*donor*) is an educated person hence his subsequent act (s) / omissions and intentional silence in letting the document alive *least* to his extent may well be taken into account in drawing an inference against the stand of the defendant No.1. Such presumption is permissible within meaning of the Article 129(i) of the Order which insists that:

*'that when a document creating an obligation is in the hands of the obligor the obligation has been discharged.'*

Thus, to seek exception to his (*defendant No.1's*) bonafide offer it was obligatory upon him to have the document *in his hands* so as to claim discharge of obligation (s), arising there-from. I am mindful of the fact that document (*gift deed*) is on a stamp paper dated 5<sup>th</sup> September 1989 while thumb mark of the donee (*Mst. Amna Begum*) is claimed by plaintiffs to be marked on 15.11.1995 but in continuation of *oral gift* hence , in my view, mere delayed thumb mark would not bring any effect upon the validity of '*acceptance*' which *otherwise* appear to have been accepted from all facts, circumstances and even conduct of the parties i.e *donor and donee* , as discussed above.

12. Since, the issue, *under discussion*, also contains the word '**legal**' therefore, I would also attend the plea that at time of the gift by defendant No.1 (*donor*) the property was *mortgaged* hence it was not valid. A reference to Section 144 and 145 of the Chapter XI of Muhammadan Law would be sufficient for this objection which are :

144. Gift of a actionable claims and incorporeal property. – Actionable claims and incorporeal property may from the subject of gift equally with corporeal property.

Explanation. A gift may be made of debts, negotiable instruments, or of government promissory notes, of malikana or of zemindari, rights also of property let on lease, and property under attachment. Similarly, a gift may be made of a right to receive a specified share in the offering that may be made by pilgrims at a shrine.

145. Gift of equity of redemption. – (1) A gift may be made by a mortgagor of his equity of redemption.

There is another aspect conforms the legality of the gift but before stepping thereon it would be relevant to say that defendant No.1 in his pleading (*written statement*) and *affidavit in evidence* admits status of defendant No.2 as co-owner. A reference to relevant portion, *being necessary*, is made hereunder:-

“It is further... gratitute (gratitude) in 1989 which she had refused to accept and did not affix her thumb impression and refused to go to register office and the K.D.A. Office as she did not want to deprive the defendants No.1 and 2 of their lawful rights.’

In his affidavit in evidence:-

“It is further stated that..... in 1989 which she had refused to accept and did not affix her thumb impression and refused to go to registrar office and the K.D.A. Office as she did not want to deprive me and defendant No.2 of our lawful rights.”

It is a matter of record that the defendant No.2 in his evidence produced a **Halafnama/Iqrarnama or agreement** , signed by all male legal heirs of Mst. Amna Begum, on a stamp paper dated 22<sup>nd</sup> October, 1999 (Ex.13/1). The reason of such writing is mentioned therein as:

‘Ye muahida / Iqrarnama Mandarjazeel Umooor par ye Ittifaq-i-Rai bila kisi uzar tay paya hai. Jis ki ro se jaidad Masula Makan No.C-93 Block No.6 Gulshan Iqbal Karachi, Alhamdu-lillah k mumliqat-i-pakistan key Jayyed Ulma kef aise kay mutabik **hiba nahi ho sakti ke ye halat rehan me he.....**’

This also conforms the fact that there had been a gift which , *per parties*, was not valid for reason that it (subject matter) was mortgaged at such time. The defendant No.1 never denied execution of such document nor denied his signature on such document (Ex.13/1) which is also sufficient to establish gift proceedings at relevant time.

13. From above, it also becomes quite obvious and clear that the defendant No.1 even was acknowledging the gift in favour of Mst. Amna Begum in year 1999 i.e after death of Mst. Amna Begum (*donee*) hence if he was interested in getting such *gift* adjudged as invalid he was *legally* required to have sought the course, provided by Section 167(4) of Mohammadan Law because it (*gift*) was within prohibited degree couple with delivery of possession. The Section 167(4) reads as:-

(4) Once possession is delivered, *nothing short of a decree of the Court*, is sufficient to revoke the gift. Neither a declaration of revocation by the donor nor even to revoke the gift.

14. In view of above discussion, I am inclined to answer the issue No.3 as ‘**affirmative**’.

#### **ISSUE NOS.1 & 2**

- 1) Who contributed into acquiring / purchasing the plot of the suit plot?
- 2) Who contributed in raising construction on the said plot?

These both issues are *inter-linked* with each other but since the root question in the matter was with regard to claims of parties with reference to '*gift*' because the plaintiffs confined their rights under Mst. Amna Begum (*donee*) while pleading that defendant No.1 (*donor*) had made a gift hence the plaintiffs acknowledged the ownership of the defendant No.1, hence these issues have lost their significance in view of specifically framed issues, relating to *validity and legality* of **gift**, hence have become redundant *rather* in view of findings on issue No.3.

ISSUE NO.4.

15. In result of the discussion, *made* on issue Nos.1 to 3, the suit of the plaintiffs is decreed, as prayed. Let such decree be drawn. However, parties are left to bear their own costs.

J U D G E