ORDER SHEET

IN THE HIGH COURT OF SINDH,

CIRCUIT COURT, HYDERABAD

R.A. No.182 of 2016

DATE	ORDER WITH SIGNATURE OF JUDGE

1. For orders on C.M.A 1565/2017
2. For orders on C.M.A 1098/2016
3. For Katcha Peshi.
4. For hearing of C.M.A. 1099/2016

03.04.2018.

Mr. S.M. Imran Alvi, Advocate for the applicant.

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Zulfiqar Ahmad Khan, J.- This revision has been filed against concurrent findings of the Court below. Admittedly the applicant and private respondents are brothers and sisters. The land admittedly belonged to their parents namely Ghulam Muhammad Chohan and Jamila Begum alias Geemo, after whose death, a Foti Khata in respect of agricultural land bearing Block Nos.363/1 to 4 admeasuring 16 acres and 164/I to 4 admeasuring 15-34 acres situated in Deh and Tapa Mari Wassayo Taluka Shaheed Fazil Rahu was entered on 18.09.2013. The applicant filed F.C.Suit No.49 of 2014 placing reliance on a gift deed, reproduced annexure-G at page No.193 claiming that his parents gifted the said land solely to him. The said suit was contested by other legal heirs and by the judgment dated 30.07.2015, by deciding issue No.2 as to "whether applicant is owner and in possession of the suit land on the basis of gift deed", the trial Court answered this

question in negative by putting test of Article 79 of Qanun-e-Shahadat Order 1984 that the applicant failed to produce in the Court two attesting witnesses in support of his gift deed. The said judgment and decree was appealed against, where the appellate Court maintained the said findings and refused to interfere in the judgment of the trial Court. Against these concurrent findings, the applicant preferred the instant revision.

2. Learned counsel for the applicant submitted that both the Courts below have failed to appreciate the fact that applicant was donee in respect of the subject lands on account of the gift deed signed by his parents. Learned counsel further submitted that merely on the ground that the applicant was unable to produce the second witness, the Courts below could not have decided the case against the applicant.

3. Heard counsel for the applicant, as none has appeared on behalf of the respondents, who are primarily sisters of the applicant.

4. At the face of it the instant revision is very narrow in scope as no illegality has been pointed out nor it can be shown that the judgments are outcome of non-reading or misreading of evidence, clogged with erroneous assumptions of facts, misapplication of law or passed in excess or abuse of jurisdiction. It is to be kept in mind that Foti Khata of the lands in question had already been affected before the date of filing of the suit and alarmingly the possession of the subject land is still in the hands of the applicant as yet. The land is agricultural in nature and other legal beneficiaries are sisters of the applicant who have been continuously deprived from the benefit arising out of the Foti Khata Badal.

5. While the appellate Court has touched the ingredients of a valid gift but seemingly did not expound on the issue, which I hereby do by pointing out that in the instant case where the possession of the land was already with the beneficiary i.e. donee, Islamic law in order to make it a valid gift requires donor to perform any of the overt acts to disassociate himself from the property in order to let the surviving legal heirs know that the property would now solely rest with the donee. In the case in hand no such overt act was done by the parents to inform the remaining legal heirs that they have in fact gifted out the lands to their son and had thus deprived the daughters from their share. In the absence of such overt act, offer/acceptance of possession of the lands did not take place, therefore, the gift itself had

become invalid and no rights could be claimed on the basis of that void gift, once assuming that the gift deed was infact a legit document.

6. In order to constitute a valid gift under Islamic law, there must be an offer (ijab), an acceptance (qabul), and transfer (qabza), while there is no requirement of public depiction of ijab and qabul, the pivotal requirement is the mark-able delivery of possession by the donor and taking of the possession by the donee. It is important to point out that under Islamic law ‘gift’ is considered to be a contract, however under the English law this at best could of the nature defined in Section 2(d) of the Contract Act, 1872.Since the term possession means only such possession as the nature of the subject is capable of, the real test of the delivery of possession is to determine as to who (donor or the donee) reaps the benefits of the property after the gift. If the donor has not handed

over the possession or if he is still reaping the benefit, then the delivery conditionality is not met and the gift remains invalid. Infect this requirement is so critical that gift is said to only takes effect from the date on which the requisite possession of the property is delivered to the donee; not from the date on which the declaration was actually made. Delivery of possession hence becomes concomitant of the gift and so serious that that without delivery of possession to the donee, the gift is held void even if it was made through a registered document.

7. A study of the applicable jurisprudential standards could start from paragraph 152(3)of the Principles of Mahomedan Law by D.F. Mulla. Full text of the said para is reproduced in the following:

> *152: Delivery of possession of immovable property.-*
> *(3) Where donor and donee both reside in the property.-*
> *No physical departures or formal entry is necessary in the case of a gift of immovable property in which the donor and the done are both residing at the time of the gift. In such a case the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift. [underlining is our]*

Paragraph 153 is spot on this point which is reproduced in the following:

> *153: Gift of immovable property by husband to wife.—*
> *The rule laid down in Sec. 152(3) applies to gifts of immovable property by a wife to the husband, and by a husband to the wife, whether the property is used by them for their joint residence or is let out to tenants.*

8. As it could be seen from a combined reading of above two paragraphs that in case of father/mother and son (being donor and donee) both in possession of the

property being gifted, while there is no need of physical departures or handing over of the possession, however to make such a gift complete, donor has to perform some overt act through which he indicates his clear intention to transfer possession and to divest himself of all control over the gifted property. The overt act conditionality becomes critical in such cases since the very essence of a gift (or hiba) is to achieve the delivery of possession in this manner when the matter is between family members. Guidance in this regard could be taken from the case of Muhammad Javed vs. Nisar Ahmed (2012 YLR 1021) where Court dilated upon this aspect of overt act and held that *the act of making a gift was a prerogative of an owner and it should not have been a covert exercise but an overt recital on the beat of a drum.* In the case of Ghulam Rasool vs. Rasheeda Bibi (2006 CLC 531) Court set aside judgments and decrees of Courts below holding them suffering from infirmity of misreading and non-reading of evidence *since the possession of alleged gifted land was not shown to have ever changed hands on the basis of alleged gift, as neither there was any independent proof on the record nor change of possession having been established on account of any overt act of petitioner.* Such transfer of possession is so critical that paragraph 150(2) of DF Mulla (supra) even nullifies the effect of registration of a gift deed where the possession was not delivered. The emphasis on such divestment via an overt act becomes more important since most of the deliberations between

husband and wife are usually taken to be kept private and are given the classical example of things given by one hand and received by another. That's why the overt act becomes

vital so that public at large could get to know the details of the private agreement entered into between the family members, since such act of hiba would affect (for example) other legal heirs' rights in the property being gifted. In this regards guidance could also be sought from the case of Maqbool Alam vs. Khodaija. (66 ASC 1194) where it was held that *a gift of property is not established by mere declaration by the donor and acceptance by the done, there must also be either delivery of possession or some overt act by the donor to put it within the power of the donee to obtain possession.* Example of such over act could be seen from the case of Ibrahim Haji Musa Haji Rasul Samol vs. Sugra bibi (1978 19 G.L.R.) where after the declaration of the gift, and handing over of the possession by the donor to the donee, an application was made on the same day to the Land Records Authority, for mutation of the property from the name of the donor to the name of the donee and that the statements of both the parties were recorded in which the factum of delivery of possession was admitted and in consequence, the Land Records Authority actually mutated the property from the name of the donor to the done and Court held that *this overt act by the donor and the donee establishes compliance with the requisite condition of the delivery of possession of the property*. In the case of S.M.S. Saleem Hashmi vs. Syed Abdul Fateh (72 Pat. 279) where the donor and donee used to reside together in a house, the overt act was done by handing over of the papers related to the property by the donor and Court held that the said act of handing over of the original documents regarding the gifted property satisfied the requisite condition about delivery of possession. In the case of Abdul Razzak vs. Zainab Bi (1933) 63 Mad. LJ. 887 the overt action was shown from the fact that after the execution of the deed, the donee started

paying all municipal taxes and Court held *that the gift was complete although there was no physical*

departure or formal entry.

9. In the case of Haji Muhammad Yaqoob Khan vs. Muhammad Riaz Khan reported as 2016 YLR 2492, the Court gave important finding that "*if corpus of gifted property was not transferred then any condition limiting the authority of donee over the gifted property could validly be restricted*". Court also held that "*the intention of donor would be relevant to determine whether corpus or usufruct of gifted property had been transferred to the donee which could be determined by title of document; terms related in the instrument; incorporation of gift in the revenue record; entries sowing the transfer as reflected in the revenue record*". The said judgment further holds that "*once the gift, in cases to the family members, was proved to be officially recorded in the revenue record or with the registering authority, it would be presumed that donor's subsequent act with regard to gifted property was done on behalf of donee and not on his own behalf*."In the case reported as 2010 MLD 352 of Muhammad Nawaz vs. Abida Bibi who were family members and dispute arose as to gifted property. Court held that in order to be a valid gift, "*donor had to relinquish all rights and dominion over the gift and had to divest himself totally of all ownership over the subject of the gift, whether implied or implicit for the completeness of the grant.*"

10. In the given circumstances with the above added clarity, I am fully satisfied that judgments of learned trial as well as of the appellate Court do not require any interference of this Court.

11. The instant revision alongwith all pending applications stands dismissed with no other as to costs.

JUDGE

Asif.I.Khan