

## IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 504 of 1985

[Tewfiq Fikree and others versus Mrs. Umahani Fikree and others]

Date of hearings : 28.09.2016, 02.02.2017, 25.04.2017, 30.05.2017 and 09.10.2017

Date of Decision : 18.01.2018.

Plaintiffs : Tewfiq Fikree and others, through Mr. Moin Azhar Siddiqui, Advocate.

Defendants : Mrs. Umahani Fikree and others, through Mr. Muhammad Safdar, Advocate.

### **Case law relied upon by Plaintiffs' Counsel**

1. 2016 S C M R page-1417  
[*Peer Baksh and others v. Mst. Khanzadi and others*]
2. 2014 S C M R page-1181  
[*Rab Nawaz and others v. Ghulam Rasul*]
3. 2010 S C M R page-1370  
[*Khaliqdad Khan and others v. Mst. Zeenat Khatoon and others*]
4. P L D 2007 Supreme Court page-319  
[*Haji Muhammad Ali v. Muhammad Akram and others*]
5. P L D 1964 Supreme Court page-173  
[*Mst. Hussain Jan and another v. Mst. Asmat Begum and another*]
6. 2003 S C M R page-1920  
[*Muhammad Khan and others v. Mst. Amiran Mai*]
7. P L D 1998 Karachi page-24  
[*Rashid Akhtar and another v. Shakil Akhtar*]
8. P L D 1988 Karachi page-446  
[*Muhammad Fikree and others v. Fikree Development Corporation Ltd. and others*]
9. 2016 Y L R page-1739  
[*Zarka Muzammal v. The Provincial Ombudsman and others*]
10. 2000 Y L R page-1787  
[*Syed Khurshid Ali and others v. Syed Abi Ali and others*]

11. 2000 Y L R page-2417  
[*Mst. Manna v. Muhammad Akhtar and others*]
12. 1994 M L D page-283  
[*Muhammad Shafi v. Nasir Ali and others*]

**Case law cited by private Defendants' Counsel**

1. 1993 S C M R page-2018  
[*Fazal Muhammad Bhatti and another v. Mst. Saeeda Akhtar and others*]
2. P L D 1996 Supreme Court page-543  
[*Brother Steel Mills Ltd. and others v. Mian Ilyas Miraj and others*]
3. 2015 M L D page-296  
[*Muhammad Amin v. Mst. Shaista and others*]
4. 2001 C L C page-97  
[*Muhammad Hanif v. Raja Muhammad Aslam Khan and others*]
5. 2010 M L D page-240  
[*Aftab Ahmed and others v. Muhammad Riaz and others*]
6. 1996 C L C page-497  
[*Saeed Zehri v. Nabi Bux Zehri and another*]
7. 2012 Y L R page-2681  
[*Mst. Zarina Begum v. Muhammad Ali and others*]

**Other Precedents:**

1. 2004 S C M R page-108  
[*Messrs First Women Bank Limited v. Registrar, High Court of Sindh, Karachi and others*]-Bank's Case
2. 2002 C L D page-1466  
[*Malik Jehangir Khan v. Banking Tribunal No.1, Karachi Division, Karachi and others*]

**Research material given by the Plaintiffs' counsel**

1. Dorland's Illustrated Medical Dictionary [Twenty-sixth Edition]

**Book(s)**

D. F. Mulla's Principles of Islamic Law (Muhammadan Law) with "Survey of Case-Law" from the Superior Courts [Sixth Edition] by M. Mahmood.

- Law under discussion:**
1. Hiba / Gift in Islamic Law.
  2. Civil Procedure Code, 1908 ("CPC")
  3. Lunacy Act, 1912.

## J U D G M E N T

**Muhammad Faisal Kamal Alam, J:** Through this action at law, the Plaintiffs have questioned a gift, which they claim was never executed by Defendant No.14 [(Late) Ebrahim Fikree] in favour of the private Defendants in respect of Immovable properties owned by the said Defendant No.14, viz. property No.3 (on Altaf Hussain Road) and Nos. 237, 238 and 247 in Garden West, Karachi; the “**Subject Properties**”. The plaint contains the following prayer clause:

- (i) *a declaration that the Defendants Nos. 3 to 7 stand excluded in the lifetime of their respective mothers as heirs of the Defendant No.14.*
- (ii) *a declaration that any gift transfer relinquishment or other transfer of any property of the Defendant No.14 effected after 1982 is null and void.*
- (iii) *a permanent injunction against the Defendants Nos. 1 to 10 restraining them from effecting any gift transfer relinquishment or other transfer of any property, movable or immovable, owned by the Defendant No.14, by registration with the Defendant No. 11 and by mutation with the Defendants Nos. 12 and 13, or otherwise, in any way whatsoever, or from doing anything in furtherance thereof, without the leave of this Honourable Court.*
- (iv) *a permanent injunction restraining the Defendant No.11 from registering, and the Defendants Nos. 12 and 13 from effecting any mutation, in respect of any gift, transfer, relinquishment or other transfer of any property owned by the Defendant No. 14, without the leave of this Honourable Court.*
- (v) *such other reliefs as the Plaintiffs may be entitled to in the facts and circumstances of the case.*
- (vi) *Costs.*

2. Present suit has been contested by the private Defendants, who have filed their Written Statement. The gift deed challenged in the

present proceeding dates back to 24.03.1985, original whereof was produced in the evidence and exhibited as 9/18, available at page-345 of the Evidence File bearing the heading '**DECLARATION OF GIFTS**'. For the sake of reference, this document may be referred to as the "**Impugned Gift**", by virtue of which the afore-mentioned Subject Properties have been gifted (purportedly) to Farooq Fikree son of late Abdul Aziz Fikree, Fawad Fikree son of late Abdul Aziz Fikree, Zaman Gulzar son of Gulzar Ziadi and Zain Gulzar son of Gulzar Zaidi. These persons are sons of Defendants No.1 and 2 and have been arrayed as Defendants No.3, 4, 6 and 7, who may for the sake of reference only be referred to as the "**Donee Defendants**".

3. The facts, which are not disputed in the present proceeding are the relationship of Plaintiffs and the private Defendants *inter se*; Plaintiffs No.1 and 2 are brother and sister and paternal grandchildren of Defendant No.14 [(Late) Ebrahim Fikree], who owned the aforementioned subject properties, which are the subject matter of the impugned gift deed, whereas the Plaintiff No.3 is the real daughter of Defendant No.14 and paternal aunt of Plaintiffs No.1 and 2. Similarly, Defendants No.1, 2, 8, 9 and 10 are the real daughters of Defendant No.14 and paternal aunts (*Phuppies*) of Plaintiffs No.1 and 2 and real sisters of Plaintiff No.3. Defendants No.3, 4, 6 and 7 (the said Donee Defendants) are maternal grandsons of Defendant No.14, in whose favour the aforementioned properties were purportedly gifted by said Defendant No.14. Thus these Defendants No.3, 4, 6 and 7 are the beneficiaries / donees of the gift in question. Defendant No.5 is again granddaughter of Defendant No.14, but not the alleged donee of the purported gift. One of the main grounds to challenge the impugned gift as pleaded by the Plaintiffs is that Defendants No. 3 to 7, who are

admittedly grandchildren of Defendant No.14, could not be beneficiaries of the estate / subject immoveable properties of Defendant No.14 during his life time because the immediate legal heirs of said Defendant No.14 were / are Plaintiffs No.1 and 2, being children of pre-deceased son [Amin Fikree (late)] of said Defendant No.14, Plaintiff No.3 and Defendants No.1, 2, 8, 9 and 10. But this claim has been disputed by the contesting Defendants, who maintained that the above named Defendants No.3, 4, 6 and 7 are claiming the subject properties being donees and not as legal heirs.

4. The record shows that one of Donee Defendants, Defendant No.6 (Zaman Gulzar Zaidi), son of Defendant No.2, has not signed the written statement and contested the claim of Plaintiffs, whereas Defendant No.14, the purported donor, has signed the written statement through his attorney and not himself. However, the Court record is silent about the Power of Attorney. Similarly, Plaintiff No.2 (Mrs. Saad Fikree) has not signed the plaint.

5. Following Issues were framed by the Court on 19.01.1989.

- 1. Whether Ebrahim Fikree was the exclusive owner of the four properties in the suit till his demise on 09.03.1987?*
- 2. Whether the purported declaration of gift dated 24.03.1985, is a spurious document?*
- 3. Whether the said declaration of gift is bad in law as an imperfect gift?*
- 4. Whether Ebrahim Fikree was of unsound mind in and from 1982?*
- 5. Whether the Defendants 1 to 10 obtained Ebrahim Fikree's signature on the said declaration of gift through undue influence?*
- 6. Whether after his demise on 09.03.1987, the said four properties in the suit devolve on his six daughters and two grand-children from a predeceased son, according to the Muslim Law of inheritance?*

7. *Whether any purported sale transfer gift relinquishment or other disposition of any movable or immovable property by Ebrahim Fikree after 1982 is void by reason of his unsound mind?*
8. *Whether the plaint is properly stamped?*
9. *Whether the plaint is properly verified and signed according to law?*
10. *Whether any cause of action has accrued to the plaintiff?*
11. *What should the decree be?*

6. The parties led the evidence and since physical and mental capacity of Defendant No.14 (the “**purported Donor**”) is also challenged, thus expert evidence was also led and three Doctors, namely, Dr. Tajuddin Manji, Dr. Rashid Jooma and Dr. Khawaja Zaki Hassan, have been examined.

7. In the intervening period, the present *lis* was transferred to the Court of learned First Senior Civil Judge, Karachi South, on account of change of pecuniary jurisdiction. The learned Judge framed the following three additional Issues:

1. *Whether this Court has jurisdiction to entertain this suit?*
2. *Whether suit is not maintainable as framed?*
3. *Whether this Court has got pecuniary jurisdiction to entertain the suit?*

8. The learned Senior Civil Judge decided the case by Judgment dated 31.07.2003, followed by Decree dated 06.08.2003, which when challenged in Civil Appeal No.2011 of 2003, was set aside and the case was sent back to this Court for the reasons mentioned in the decision of Appellate Court (dated 30.10.2010), primarily, on the issue of pecuniary

jurisdiction. Thus Issue No.3 has been decided in the above Civil Appeal.

9. The Issue-wise finding is mentioned herein under:

Issue No.1 \_\_\_\_\_ Affirmative.

Issue No.2 \_\_\_\_\_ Affirmative.

Issue No.3 \_\_\_\_\_ Affirmative.

Issue No.4 \_\_\_\_\_ As under.

Issue No.5 \_\_\_\_\_ As under.

Issue No.6 \_\_\_\_\_ Affirmative.

Issue No.7 \_\_\_\_\_ As under.

Issue No.8 \_\_\_\_\_ Affirmative.

Issue No.9 \_\_\_\_\_ Affirmative.

Issue No.10 \_\_\_\_\_ Affirmative.

Issue No.11 \_\_\_\_\_ Suit decreed.

#### **Discussion / Reasons of the Issues;**

##### **Issues No. 8, 9 and 10:**

10. Since Issues No.8, 9 and 10 and the above additional Issues also broadly relate to the category of maintainability of present *lis*, therefore, it can be decided by giving findings on Issues No. 8, 9 and 10. Therefore, these Issues have to be decided along with the preliminary objection raised by Mr. Muhammad Safdar (Advocate) representing the private Defendants, that instead of filing the present proceeding, the Plaintiffs should have invoked the jurisdiction of learned District Court under Section 62 of the Lunacy Act, 1912, as the Plaintiffs have alleged that the said Defendant No.14 was of unsound mind and, therefore, the impugned gift was invalid. It is further submitted by learned counsel for

the Defendants that such type of declaration can only be given by the concerned District Court and not this Court. He has further submitted that the Plaintiffs themselves have initially filed C.M.A. No.2411 of 1985, for examining the mental condition of Defendant No.14. Learned counsel for the Defendants has placed reliance upon the judgments on the Issue of lunacy already reproduced hereinabove, viz. (i) Aftab Ahmed's case, (ii) Saeed Zahri's case, (iii) Muhammad Hanif's case and (iv) Mst. Zarina Begum's case. The last reported decision is primarily with regard to the status of Special Law and its overriding effect over the general law. It is a settled principle of law and does not need further elaboration. This case is cited by the learned Counsel for the Defendants in support of his arguments that said Lunacy Act being a special law has overriding effect over the Civil Procedure Code and present proceeding is thus barred under the said Lunacy Act. In the first case (Aftab Ahmed's case), the crucial issue was that property was transferred by its owner to his son, who died issueless, whereafter as per the prevailing customs, the said property was transferred in the name of mother of deceased's son. This transfer was challenged by the predecessor-in-interest of the Applicant of the reported case (Aftab Ahmed's case), namely, Muhammad Alam though after three decades. The Applicant's predecessor-in-interest attempted to justify the delay on the ground that he being a lunatic was not capable of understanding right or wrong and that is why he also instituted the suit through his next friend. In this context the learned Courts below had given the decisions against the Plaintiff / Applicant (of the reported case) that unless a declaration is sought under Section 62 of the said Lunacy Act, such a plea could not be taken. Similarly in the second reported case (Saeed Zehri's case), an administration suit was filed by one of the sons of Defendant No.1 of that case with a prayer that the properties of the father / Defendant No.1



should be administered by his children as the said father has become too old to manage such properties / assets and also suffering from illness like hallucination, paranoid and other mental disorders. The suit was registered and finally it was compromised and the Plaintiff of the above case withdrew his claim, but the learned Judge while allowing the withdrawal of case specifically mentioned that the ratio for deciding the case shall remain intact. In this reported case a detailed discussion on the Lunacy Act has been made, crux of which is that before appointing someone a Manager of the person and property of a lunatic, the prerequisites mentioned in the Sections 62 to 83 of the Lunacy Act, 1912, should be complied with. It has been further held that such declaration can only be given by a District Court that enjoys exclusive jurisdiction in the matter and ordinary suit does not lie for seeking such a relief.

11. In the case of Muhammad Hanif (*supra*), the facts are altogether different from the present *lis*. The facts in the reported case are that the said Appellant (Muhammad Hanif) wanted to wriggle out himself from a sale transaction of his property and his counsel took defence of lunacy (mental unsoundness) for the said Muhammad Hanif. The plea of Appellant was dismissed and decisions of Courts below were affirmed by holding, *inter alia*, that when the said Muhammad Hanif, seeking declaration of lunatic, himself appeared in the witness box and was subjected to extensive cross examination, then the defence of lunacy is frivolous and even otherwise such declaration can be given only by a Court of competent jurisdiction.

12. All the above cases are distinguishable from the facts of present *lis*. The significant distinguishing factor is apparent from the discussion of these reported decisions in the foregoing paragraphs.

13. In the present case, the Plaintiffs have not exclusively pleaded that Defendant No.14 was of unsound mind, but have claimed other reliefs also. It is an undisputed fact that a challenge to the impugned gift is made on the ground that the Private Defendants are in collusion with each other for getting the subject properties transferred or gifted, through manipulation. This Court having extraordinary original civil jurisdiction can decide all the controversies involved in the present case, even if for a particular relief (for the argument's sake), jurisdiction is available with some other Court or forum. At best for such particular relief a particular Court can be said to have a concurrent jurisdiction. More so, plenary jurisdiction of this Court cannot be ousted in the present context. This can find support from the rule that the 'greater includes the less'. This legal principle is expounded in the case of *Malik Jehangir Khan v. Baking Tribunal No.1, Karachi Division, Karachi and others*, the Judgment was handed down by this Court and was reported in *2002 C L D page-1466*, which was maintained by the Honourable Apex Court by the decision given in the Bank's case (*ibid*).

14. The other convincing reason for not treating the present case within the purview of Lunacy Act is the two decisions cited by the Plaintiff's side and has been mentioned herein above, viz. Rab Nawaz and Khaliqdad Khan cases decided by the Honourable Supreme Court [*2014 S C M R page-1181 and 2010 S C M R page-1370*]. In both these cases, the validity of gift of immoveable properties were successfully challenged through civil suits, in which the donors of the said reported cases were also of old age (around 90 years) and their mental and physical capacity were questioned in the same proceedings by leading the evidence.

15. Adverting to the other Issues. Court fee has been affixed on the plaint, which has been signed by Plaintiffs No.1 and 3 and verified and stamped by the Oath Commissioner; neither any office objection has been raised to this effect nor this point has been agitated by the counsel representing the private Defendants / contesting Defendants. Secondly, paragraph-9 of the plaint specifically contains the cause of action that when these Plaintiffs discovered the impugned gift dated 24.03.1985, they filed the present *lis* originally on 20.08.1985, as is reflected from the Office stamp available on the back side of the first page of the plaint, therefore, **Issues Nos. 8, 9 and 10** are answered in **Affirmative** and in favour of the Plaintiffs that the plaint is properly stamped, signed and verified as well as cause of action did accrue for filing the present proceedings. Similarly, the objections of Mr. Muhammad Safdar, learned counsel representing the contesting Defendant, about the applicability of Lunacy Act is overruled, in view of the above discussion.

**Issues No. 1, 2 and 3:**

16. As already mentioned that two sets of witnesses have been examined in this case. The first set is of doctors, who have given the evidence with regard to mental health of late Ebrahim Fikree-Defendant No.14, (the purported) donor of the Subject Properties by way of the impugned gift. The second set of the witnesses are the Plaintiff No.1, Defendants No. 2 and 6 and one Abdul Ghani, who was the tenant in one of the properties. Looking at the controversy, it is necessary to answer the Issues No.1 and 3 first. The first part of the Issue No.1 is an undisputed fact; that said Defendant No.14 was the exclusive owner of the Subject Properties of the impugned Gift. The second part of Issue No.1, that is, whether the said Defendant No.14, remained the owner of

the Subject Properties till his demise, can be answered after a finding is given on Issue No.3.

17. First the impugned gift (Exhibit 9/18) is to be examined in the light of the definition and explanation of a Gift-*(Hiba)* as envisaged in the Islamic Jurisprudence. There is a consensus amongst the jurists and so also mentioned in one of the well-known books on Islamic Jurisprudence-D. F. Mulla's Principles of Islamic Law (Muhammadan Law), that there are three basic ingredients of a valid gift; **(i)**. it should be rendered by its lawful owner who is called the donor, **(ii)**. accepted by the beneficiary, to whom the gift is rendered, that is the donee, **(iii)**. thirdly, the possession should be given to the donee. About the third ingredient, there are certain exceptions, which are also discussed herein below while replying to the Issues No.2 and 3.

18. That when such type of specific challenge is thrown to the validity of a gift, then the onus shifts on to the donee to disprove the challenger, in the instance case, present Plaintiffs. This point of law is reiterated by the Honourable Supreme Court in its two reported decisions already mentioned in the opening part of this decision, viz. ***Rab Nawaz and Khaliqdad Khan's cases.***

19. The Defendants' witness (Mst. Muneera Fikree-the Defendant No.2) in her cross examination has acknowledged that she was not present, when the impugned gift document (Exhibit 9/18) was executed, though she was present in the house, where it was executed. She has again acknowledged the fact that two of the beneficiaries / donees are her sons and the other two donees are the sons of Defendant No.1 (Umehani Fikree). To a question, the said Defendants' witness testified that possession of the Subject Properties was not handed over to the

Defendants Donee because these properties were already in possession of tenants. To a specific question, she has not denied that when the impugned gift document was signed on 24.03.1985, one of the Defendants donee, Zaman Gulzar, who has also appeared as one of the Defendants' witnesses, was not in Pakistan. It is also not denied that the two attesting witnesses of this impugned document (Exhibit 9/18), namely, Mst. Fozia Fikree and Mst. Shafiq Fikree, are related to the Defendants donees. It is quite surprising that the said witness-Mst. Muneera Fikree, in reply to a question, has deposed that she had to verify from her other sisters about the presence of her son (above named Zaman Gulzar), in Pakistan, when the impugned document is signed. She has further stated in response to a next question that her son Zamar Gulzar (one of the donees Defendants) was in Pakistan. If this evidence is analysed with that of Zaman Gulzar, who appeared as a Court witness and is one of the donee Defendant No.6, the contradiction is quite apparent. The said witness Zaman Gulzar, in his evidence could not prove his arrival in and departure from Pakistan. He has admitted that the impugned gift document does not bear his signature nor he has accepted the same in writing, but verbally. However, he showed his ignorance about the general state of affairs of the Subject Properties. To a specific question, he has admitted that the possession was not handed over by the said Defendant No.14 to the Donees Defendants. He has further admitted that he did not come to Karachi when his grandfather, the Defendant No.14 (donor) died on 09.03.1987. To a specific question, he deposed that the reason he did not attend the funeral of Defendant No.14, because his mother (Mst. Muneera Fikree, the Defendant No.2) advised him that it is not required. He has given a very interesting answer, when he testified that he saw the impugned gift document on a table in the sitting room. He has further deposed that he never asked for the delivery of

possession of the Subject Properties. However, when he was cross examined by the then counsel of the Defendants, Mr. Afsar Abidi, Advocate, the said witness (Zaman Gular-the Defendant No.6), made a contradictory statement that the impugned document was signed in his presence. He further testified that the other beneficiaries, who are donees Defendants were also present besides the notary public. The cross examination of this donee Defendant is *ex facie* contradictory and has shaken his credibility (as a witness). The travel documents / passport pages produced by the said witness (Donee Defendant No.6) on the contrary belies the claim of the said witness that he was in Pakistan at the time of the execution of the impugned Gift document. A logical conclusion is that if the other donees / beneficiaries (Donees Defendants) were there, then why they did not put their respective signatures on the impugned gift document as a token of acceptance being donees, which otherwise is a legal requirement. This is a question, which could not be convincingly replied to by the learned counsel for the Defendants.

20. The two attesting witnesses, who are Defendants No.9 and 10, did not come forward to testify the authenticity of the said impugned gift. The Defendant No.14 had passed away on 09.03.1987 and did not give evidence in support of the impugned gift being the donor (allegedly). However, the said Defendant No.14 was examined on one of the dates of hearing at a pre-evidence stage, as is evident from the order of 11.01.1987. The same order has also been produced in the evidence and is available at page-155 of the Evidence file. It would be necessary to produce the relevant portion of the order dated 11.01.1987, which was passed in presence of the learned counsel for the parties as well as Defendant No.2 (Mst. Muneera Fikree):

**“ORDER**

**11-1-1987. Mr. S. A. Samad Khan, Advocate**

*Mr. Rasheed Akhund, Advocate  
Defendant No.2 present in person  
accompanying the defendant No.14.*

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*The defendant No.14 was brought in my chamber on wheel Chair, accompanied by the defendant No.2 and Mr. Rashid Akhund Advocate. Mr. Samad Khan Advocate was also present.*

*Pointing out to defendant No.2, I asked from defendant No.14 who is she? He replied she is his daughter sitting before him. Pointing to Mr. Rashid Akhund Advocate I asked do you recognize him. He questioned, who is he? To another question how many daughters you have he replied 'I have five daughters. I have no sons.' On question whether you had a son he nodded in affirmative. He was not able to name the doctor who is treating him. I showed him four fingers and asked how many fingers there are, he answered six. He could not state how many buildings he owns. To a question who has filed cases against him he stated that 'cases have been filed by my daughter and son in law.' In reply to question who lives with you and looks after you he replied 'my daughter'. He also stated 'I have five daughters'. He nodded in affirmative that the lady who has filed cases is also his daughter. He was not able to read the general power of attorney shown to him from the file nor he was able to read bold letters from the Magazine.*

*The defendant No. 14 is physically weak, unable to walk by himself. He cannot properly speak, see or hear. His understanding is very weak and seems to be completely dependent on others. From the questions I have asked from him, it seems that he cannot properly and correctly follow or understand business transactions and affairs without the help of others. He is mentally weak and infirm."*

*(Underlined to add emphasis)*

21. As to the possession, which is one of the basics to constitute a valid gift, Mr. Muhammad Safdar, Advocate, states that the properties were already in occupation of the tenants and the constructive possession of the subject properties was handed over to the donees in accordance with the requirement of law, because the case of present donees falls within the exceptional clause of delivery of possession as envisaged under the Islamic Jurisprudence. The evidence that is come on record has

not proved this plea of Defendants about handing over of the possession of the subject properties to the Donee Defendants. *Firstly*, the impugned gift (Exhibit 9/18) itself is silent about the factum of handing over of possession of the subject gifted properties to the Donee Defendants. *Secondly*, the defence setup by the Defendants that constructive possession was handed over to the Donee Defendants and the gift in all respect is a valid and complete one, I am afraid, is devoid of merits. In the afore-referred Book about Principles of Islamic Law, under paragraph 152 of Chapter 11 relating to the Gifts, it has been specifically mentioned that where a gifted property is in the occupation of tenants, then the gift can be completed by a request by the donor to the tenants to attorn to the donee or by delivery of the title deed or by mutation in the revenue register. A specific question was put to the Defendants' witness (Mst. Muneera Fikree) and she admitted that no letter of attornment was sent on account of the Court injunction. She further admitted that on the date when the impugned gift was executed, that is, 24.03.1985, there was no Court injunction. The Defendants did not bring on record any other material to prove that even the constructive possession, as argued by the Defendants' learned counsel, was in fact handed over to the Donee Defendants.

22. Looking at the evidence led by the parties, the reported Judgment handed down in **Rab Nawaz's case** (*supra*) cited by the Plaintiff's side, is applicable for resolving the controversy at hand. In this case, the Honourable Supreme Court has maintained the orders of the learned Courts below, whereby the gift in respect of immovable property by way of mutation entries was *set aside* on the ground that the donor was a person of 92 years of age when the purported gift was made and the evidence about his poor mental health at that relevant time was also



convincing, besides elements of undue influence, as the donor (of the reported decision) being old, infirm and incapacitated was living at the mercy of the donee, in the latter's house, and most importantly, non-delivery of possession, because **no evidence of attornment was brought on record.** Similar is the situation here. It is an admitted fact that the Defendants as well as the Donees were residing with the donor-Defendant No.14 in the same House No.121, Muslim Colony, Karachi.

23. Mr. Moin Azhar Siddiqui, learned counsel representing the Plaintiffs, has also placed reliance on the case of Muhammad Khan (*ibid*) in support of his arguments that even the basic ingredients of a valid gift are missing, therefore, the impugned gift document is a spurious one. Obviously, this argument is vehemently controverted by Mr. Muhammad Safdar, learned counsel for the private Defendants, primarily on the ground that the Plaintiff No.1 in his cross-examination was not consistent about his stance and, therefore, the latter (Plaintiff No.1) could not prove that the donor-Defendant No.14 was physically and mentally incapacitated to execute such a document (impugned gift).

24. The relevant portion of the cross-examination of Plaintiff No.1, if perused, the conclusion is that he remained consistent about his plea that the Subject Properties were never gifted by the Deceased-Defendant No.14. No significant contradiction can be pointed out in the testimony of the Plaintiff witness, however, his answers about the poor mental health of Defendant No.14 will be dealt in the following paragraphs of this Judgment, but to answer the above Issues, the evidence of the private parties-Plaintiff No.1 being the challenger of the gift and private Defendants, who are defending the impugned gift, if analysed together

with the impugned gift (Exhibit 9/18) itself, only leads to the conclusion that the impugned gift was / is not a valid one, when, as already observed hereinabove, that the onus to prove the validity of gift is on the Defendants and particularly on the Donee Defendant No.6. The above reported Judgment of *Muhammad Khan (2003 S C M R page-1920)* was also amongst the legal heirs and one of the undisputed factual aspects of the reported case was that donor in that case at the time of purported execution of gift, was of 90 years of age. The Honourable Apex Court has maintained the findings of the Courts below, by holding that the purported donees / petitioners of the reported case, failed to establish the three basic elements of a valid gift, that is, declaration, acceptance and delivery of possession of the property, hence the mutation entries in pursuance of the purported gift were held to be wrongly sanctioned in favour of the Petitioners.

25. In the present *lis* also the beneficiaries / Donee Defendants have failed to discharge the onus to prove that the impugned gift document is a valid one and the same was duly executed / signed by the donor, accepted by the donee Defendants and possession of the subject properties was delivered to the said donee Defendants. Consequently, I hold that the Exhibit 9/18, the impugned declaration of gift (dated 24.03.1985) is bad in law and cannot be declared and considered as a valid gift document. The authenticity of this impugned gift document, taking into the account the depositions of the Defendants, is also questionable. Therefore, my findings on the above Issues are that deceased Ebrahim Fikree (Defendant No.14) was the owner of the subject properties till his demise on 09.03.1987. Issue No.1 is answered accordingly, whereas, Issues No.2 and 3 are also answered in **Affirmative** and against the Defendants.

**Issues No. 4, 5 and 6:**

26. On these Issues, the expert evidence was also led and the above named Doctors were examined by the Court. These learned professionals were earlier called upon to examine the deceased Defendant No.14 and to submit a report about the latter's mental health. The Report dated 26.10.1985 from the Jinnah Postgraduate Medical Centre ("JPMC") is at page-73 of the evidence file. At that time, the deceased Defendant No.14 was 95 years of age. The crux of this Report is that the deceased Defendant No.14 was suffering from nominal aphasia. The memory recall was poor. Senescence and multiple brain infarcts (confirmed on C.T. Scan), which were caused due to cerebral atherosclerosis resulted in decline in attention, memory and higher cognitive functions, but these were not vastly out of proportion considering the age of Defendant No.14. Morbid dementia was not present. However, it is mentioned that he was not expected to manage worldly affairs of any complexity, but can distinguish at a fundamental level right from wrong. He could write but with difficulty due to tremors.

27. It is also not disputed fact that the said Defendant No.14 was under treatment of Dr. Tajuddin Manji for quite some time. The testimony of Dr. Manji is available as Exhibit No.4. During cross examination, he admitted that earlier he issued a certificate dated 17.04.1985 produced as Exhibit 4/3, in which the said witness has mentioned that Defendant No.14 was suffering from progressive senile dementia and his memory was fading and he was unable to manage his own personal and business affairs. However, consequently, another certificate dated 25.08.1985 (Exhibit 4/2) was also issued by the same Doctor on the request of Defendant No.2 (Mst. Muneera Fikree), wherein his illness and signs of senile dementia was linked to high fever

caused due to urinary tract infection and it has been mentioned that it is of temporary nature. In his cross examination, he has described the term ‘progressive disease’ that advances and does not regress. It has been admitted that said Defendant No.14 cannot correctly count 3, 4, 5 in the reverse order and there were lapses.

28. Dr. Rashid Jooma, in his evidence, has stated that Defendant No.14 at that relevant time had multiple brain infarcts (small holes) and were irreversible. He further testified that the said Defendant No.14 when examined was found deficient in attention, memory and ‘higher cognitive functions’, which means decline in ability to think in abstract terms and to reason with power and logic. It was further deposed that during the examination, the said Defendant No.14 could not reply the simple question about the colour of Pakistan flag nor he could give his correct date of birth. To a specific question, the said witness (Dr. Jooma) replied that one could not expect from Defendant No.14 to understand or comprehend the complex legal documents. It would be advantageous to reproduce the question and the answer put to and replied by the witness\_

***“Q. Can defendant No.14 read and answer the legal documents like power of attorney, gift deed and sale deed?”***

***A. I would not expect him to understand the nuance of legal matters or to comprehend a complex legal document, or its implication.”***

29. Third expert witness was Dr. Khawaja Zaki Hassan, whose evidence was recorded as Exhibit No.6. He was also extensively cross examined by the counsel for the parties. The gist of opinion of Dr. Zaki is that the testamentary capacity of Defendant No.14, when he was examined, was intact. He clarified that testamentary capacity means to make a Will and to understand the implications of such documents. To a

particular question of the Court, his reply was that the Defendant No.14 could not be unduly influenced by persons living around him to the detriment of those who are not living with him. To a one question, the said witness replied in negative that confabulation is a characteristic of defused organic brain disease. According to Mr. Moin Azhar Siddiqui, learned counsel representing the Plaintiffs, the term confabulation is defined in the Medical Dictionary (*supra*) means *“The recitation of imaginary experiences to fill gaps in the memory, specially seen in organic psychoses, such as Korsakoff’s psychosis; called also fabrication.”* He has further argued that the expert evidence of these witnesses is contradictory. In support of his arguments, he has referred to the meanings of ‘**dementia**’ and ‘**aphasia**’ as mentioned in the aforesaid Medical Dictionary as follows:

*“dementia (de-men’she-ah) [de- + L. mens mind] organic loss of intellectual function; called also aphrenia, aphronesia, and athymia. Senile d., senile psychosis. Tabetic d., that which sometimes follows tabes dorsalis. Terminal d., dementia coming on as a final result of nervous or mental disease.”*

*“aphasia (ah-fa’ze-ah) [a neg. + Gr. Phasis speech] defect or loss of the power of expression by speech, writing, or signs, or of comprehending spoken or written language, due to injury or disease of the brain centers.”*

30. In response, Mr. Muhammad Safdar, Advocate, has argued that it is an undisputed fact that Plaintiff No.1 was given membership of Karachi Stock Exchange [KSE, at that relevant time] on the basis of recommendation letter dated 09.02.1985 (Exhibit 9/17 at page-343 of the Evidence File) of Defendant No.14 and when Plaintiff No.1 himself is a beneficiary of one of the acts and a conscious decision of Defendant No.14, which was taken round about the same time when the impugned

gift document was signed (on 24.03.1985), then Plaintiff No.1 could not challenge the physical and mental infirmity and incapacity of Defendant No.14 in such a manner, and in this regard the very stance of the Plaintiffs is false and frivolous.

31. At the first instance, the arguments of the Defendants' legal team appear to be convincing, though the Plaintiff No.1 in his cross examination has stated that the aforesaid Recommendation Letter for Karachi Stock Exchange was signed earlier, but the fact remains that the authenticity of the above letter (Exhibit 9/17) is not disputed, nor, the Plaintiff No1 led a contrary evidence. But here the deciding factor to hold the impugned gift document as invalid or spurious one is not solely depending on the mental soundness of the donor (Defendant No.14), but mainly on the evidence which has been discussed in the foregoing paragraphs that the impugned gift since does not fulfil the fundamentals of a valid gift, therefore, the said impugned gift is a nullity in the eyes of law. Secondly, once it is held that the impugned gift document (Exhibit 9/18) is not a genuine one, then mentioning of date (24.03.1985) on the impugned Gift (exhibit 9/18), which is only six weeks after the above Recommendation Letter for the Karachi Stock Exchange was signed by the said Defendant No.14, loses its significance, or, is irrelevant. Although from the evidence led and unrebutted record in this regard, including that of other court cases pursued by the said Defendant No.14, produced by the Defendants, it has not been proved by Plaintiffs that the late Ebrahim Fikree (Defendant No.14) was of unsound mind since 1982; but what is relevant here is that present case is to be examined in the light of the finding of the Honourable Supreme Court of Pakistan in the afore-referred Khaliqdad Khan's case (2010 S C M R page-1370); that beneficiary of gift is to prove (i) voluntary execution of gift, and

(ii) which is a result of conscious application of mind of donor and not under influence or fraud played with him.

32. The appraisal of the over-all evidence and invoking the rule of preponderance, particularly in view of the discussion of expert evidence hereinabove, *inter alia*, that he was unable to handle his worldly affairs, then at least in my considered view, looking at the old age of Defendant No.14 (95 years) at the relevant time and considering the undisputed fact that he was living with the Defendants in the same house, even the factor of undue influence in this case cannot be overruled. But, in view of the above Finding on Issues No1, 2 and 3, this Issue of 'obtaining signatures' through undue influence has become irrelevant, as signature of the donor/Defendant No.14 on the impugned gift document (exhibit 9/18) could not be proved by the Defendants. Consequently, I answer, the Issues No.4 and 5 accordingly, *whereas*, the logical finding on the Issue No.6 is also in **Affirmative**, that the Subject Properties have devolved upon the legal heirs of Defendant No.14, that is, the Plaintiff No.3 and private Defendants-the six daughters of Defendant No.14 and Plaintiffs No.1 and 2, the two grandchildren from the predeceased son of Defendant No.14 and the Subject Properties are to be distributed amongst the parties hereto in accordance with the Islamic Law of Inheritance and as per the respective shares of each private party in the inheritance.

**Issues No.7 and 11:**

33. For the foregoing reasons, I hold that any transfer of the afore-mentioned Subject Properties based on the impugned gift in favour of Donee Defendants or any other person claiming through them, is void *ab initio*, having no legal effect. Accordingly, suit of the Plaintiffs is

decreed only to the extent of prayer clauses-(i), (iii) and (iv), but on the terms mentioned hereinabove.

34. Parties to bear their own costs.

**JUDGE**

**Karachi Dated: 18.01.2018.**

Riaz / P.S.\*