

IN THE HIGH COURT OF SINDH, KARACHI

IInd Civil Appeal No. 124 of 2016

Abid Hassan.....Versus.....Mrs. Shoukat Naheed and three others.

JUDGMENT

Date of hearing : 09TH March, 2018.
 Date of Judgment : 15TH May, 2018.
 Appellant : Mr. Samsam Ali Khan (Raza), advocate.
 Respondent No.1 : Khawaja Naveed Ahmed, advocate.

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Mrs. Kausar Sultana Hussain, J:- This Second Civil Appeal under Section 100 C.P.C. is directed against the judgment dated 19.10.2016 passed by the learned VIIIth Additional District Judge East, Karachi, whereby Civil Appeal No. 20 of 2015 filed by the appellant was dismissed and the order dated 27.01.2015, passed by the learned XIth Senior Civil Judge East, Karachi in Civil Suit No. 137 of 2014 filed by respondent No. 01 was maintained.

2. The facts of the case relevant for the purpose to dispose of this appeal, in brief, are that respondent No. 1 filed a suit for declaration, cancellation of gift deed and permanent Injunction against the appellant stating therein that she is real mother of the appellant. She is aged about 71 years old. The respondent No. 1 purchased suit property/residential plot bearing No. 222, with single story house constructed thereon measuring 195 square yards, situated at P.I.B. Colony Cooperative Housing Society, Karachi and the said property was originally leased out for a period of 99 years by virtue of sub-lease deed in favour of the respondent No. 1 from her own sources of income. The brothers, nephews and her elder son (appellant) pressurized her since many years that she gift 1/3rd share of the said property to appellant, and for this purpose they prepared some papers and fraudulently took signature on it as well as on some other white papers. The appellant on the basis of forged documents in the month December, 2013, claimed that the respondent, as per her own desire/wish, transferred the suit property in his name through registered gift deed dated 24.12.2011. The respondent No. 1 also received threats from the appellant to vacate the suit property within a month. Since 1980, respondent No. 1 is residing at the suit property alongwith her other family members and appellant without any

dispute/hindrance and she bears all the expenses of her whole family members including appellant but he became dishonest and showed his malafide intention and ulterior motives. Due to illegal act and activities of the appellant, respondent No. 1 through her counsel forwarded an oral intimation to the office of respondent No. 2 because appellant intends to usurp the property. The gift deed registered by the appellant on the basis of cheating, fraud and malafide intention with ulterior motives, without will and wish of the respondent No. 1 thus, she filed the suit for following relief :-

- a) To declare that the respondent No. 1 is the bonafide purchaser/owner of the residential plot bearing No. 222, measuring 195 square yards, situated at Pir Illahi Bux Co-operative Housing Society (Generally known as P.I.B Colony), Karachi, and the said property was originally leased out for a period of 99 years by virtue of form "A" Sub-Lease, executed before the sub-Registrar "T" Division-IV, Karachi, duly registered at No. 2654 at pages No. 161 to 164, Vol No. 1822 of book No. 1-ADDL. Dated 10.04.1980, in favour of the respondent Mrs. Shoukat Ara Naheed D/O Abdul Qayyum and wife of Zahid Hassan, as the same had been purchased by the respondent No. 1 from her personal own source of income.
- b) To cancel the gift deed dated 24.12.2011, Gulshan-e-Iqbal Town, Karachi, M.F. Roll No. 1501, Photo-Registrar, Karachi dated 11.01.2012 being illegal, unlawful and against the law.
- c) To grant permanent injunction in favour of the respondent No. 1 and against the appellant, his agents, workers, employees, attorneys, person or persons do not create third party interest in shape of selling, mortgaging, alienating, subletting in respect of the suit property in any manner whatsoever.
- d) To grant permanent injunction in favour of the respondent No. 1 and restraining the appellant and its workers/employees/officers agents do not entertain any application for change of ownership or anything else prior to permission of the Court till deciding the suit.

e) Cost of the suit may be awarded.

f) To grant any other relief or relieves which this Court deems fit and proper under the circumstances of the suit.

3. The appellant stated in his reply that the suit of respondent No. 1 is not maintainable and hit by non-joinder and mis-joinder, Muhammadan Law and Contract Law as well. Per appellant the suit was also hit under Section 42 of Specific Relief Act, 1925. According to the appellant, the property was purchased through joint income of the family in the name of respondent No. 1 being mother and she herself divided the property and gifted the said portion to him.

4. The respondent No. 2 (sub-Registrar-III, Gulshan-e-Iqbal, Karachi) stated, after consulting records of his office that the declaration of gift in question was executed by respondent No. 1 in favour of the appellant on 24.12.2011, they affixed their photographs and thumb impression on said gift, however, they were identified by an Advocate under his signature. The learned trial Court concluded the matter vide judgment dated 27.01.2015 and decree in favour of respondent No.1/plaintiff. However, the first appellate court after hearing both the sides maintained the judgment and decree of the learned trial Court by dismissing the appeal of the appellant. Hence, instant second appeal has been filed.

5. Learned counsel for the appellant argued that judgment of the first appellate court is against the record and settled principle of law. By referring to the judgment and decree passed by the first appellate court, the learned counsel for appellant submitted that the preliminary legal issues/question have not been appreciated by the trial court as well as the appellate court. Per learned counsel for the appellant suit of the respondent No. 1 bearing No. 137 of 2014 is barred under Muhammedan Law as in instant matter Donor is a mother and Donee is a son and comes within a prohibited degree, therefore gift cannot be revoked. In this regard he has referred section 167 of Muhammedan Law. For ready reference, I am reproducing the section 167 of Muhammedan Law as under :-

167. Revocation of gift.--(1) *A gift may be revoked by the donor at any time before delivery of possession. The reason is that before delivery there is no complete gift at all.*

2) *Subject to the provisions of subsection (4), a gift may be revoked even after delivery of possession except in the following cases—*

a) *When the gift is made by a husband to his wife or by a wife to her husband.*

6. The learned counsel for the appellant has further argued that the basic ingredient of Gift Deed i.e. offer, acceptance and delivery of possession are admitted, hence Gift is legally materialized. He further contended that the respondent No. 1 who claimed that the gift has been obtained by fraud and cheating is to be proved by her beyond doubt. Per learned counsel for the appellant, the suit of the respondent No. 1 is not maintainable in the light of the Muhammedan Law discussed above, thus the judgment and decree passed by both the courts below are bad in the eyes of law, hence liable to be set aside. The learned counsel for the appellant has relied upon the case laws as under :-

- i. 1990 CLC 2007 (Lahore)
- ii. 2001 YLR 2567 (Lahore)
- iii. 2006 MLD 1016 (Lahore)
- iv. PLD 1960 (W.P) Lahore 130.

7. Conversely, the learned counsel for the respondent No. 1 has argued that the judgment and decree passed by the first appellate court, has rightly been decided by maintaining the judgment and decree passed by the learned trial Court while appreciating the evidence on record by referring the laws concerned. The learned counsel for the respondent No. 1 has further contended that the respondent No. 1 has produced relevant yet strong evidence before the learned trial Court, who after appreciating the said evidence of the respondent No. 1 decided that she is entitled for revocation of the gift deed in her favour. He prayed for dismissal of the IInd Appeal filed by the appellant.

8. While deciding second appeal this Court has to consider whether the case is decided against the law has some material point of law been left undecided or contains some substantial error or procedural defect, which resulted in error or defect in the decision making on merits. Misreading, misinterpreting and non-reading of evidence has been termed as a substantial error resulting in miscarriage of justice. In foregoing context

while going through the impugned judgments of two courts below, it reveals that the learned trial Court first of all gone through the suit of the respondent No. 1/plaintiff, as to whether the suit of the respondent No. 1/plaintiff is maintainable under the law? Come to conclusion that as per record the suit property registered in the name of respondent No. 1 as sub-lease and that it is an admitted position that the appellant/defendant No. 1 being son of the respondent No. 1 is residing with her in the same house since his birth, therefore it cannot be concluded that he has occupied the possession of suit property, as a result of execution of gift deed. The marginal witness of alleged gift deed Syed Salman-ul-Haq deposed in his evidence that he signed the declaration of gift (Ex-D/1) in absence of respondent No. 1/plaintiff at his house prior to the signatures of donor and donee, thus the gift deed without leading supportive evidence by the marginal witness has lost its sanctity.

9. Relevant part of Transfer of Property Act is reproduce below :-

“Gift is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another called the donee, and accepted by or on behalf of the donee”

10. It is required that transfer of property should be voluntarily to another made gratuitously and without consideration. In this section the word “Voluntarily” bears its ordinary popular meaning. It denoting the exercise of the unfettered free will, and not its technical meaning of “without consideration” when a gift is made, it must satisfactorily appear that the donor know that he/she was doing and understood the contents of the instrument and its effect. Record of instant matter shows that the alleged gift deed was not executed voluntarily by the respondent No. 1 in favour of the appellant, which is confirmed by the admitted fact that the property in question is still hold ground in her name as per record of respondent No. 2. Marginal witnesses have not supported the version of the appellant as to validity of gift deed as it lacks legal formalities of valid gift. Keeping in view the above circumstances, it cannot be concluded that the judgment and decree of two learned Courts are against the law or material point of law has been missing or misreading, misinterpreting or non-reading of evidence has been found which could be

termed as substantial error. The IInd Appeal of appellant found deficient in merits, hence the impugned judgments are hereby maintained. The instant second appeal for the above reasons, is therefore declined with no orders as to costs.

J U D G E

Faheem Memon/PA