

**IN THE HIGH COURT OF SINDH,
AT KARACHI**

Present:

Irfan Saadat Khan and
Yousuf Ali Sayeed, JJ

High Court Appeal No. 22 of 2018

Appellant : Liaquat Mohiuddin, through,
Syed Hassan Ali, Advocate.

Respondent No.1 : Inayat Mohiuddin, through
Izhar Alam Farooqui, Advocate.

Respondent No.2 : Nemo.

Respondent No.3 : Sub-Registrar 1, Jamshed Town
Karachi, through Miran
Muhammad Shah, AAG.

Date of hearing : 09.11.2020

JUDGMENT

YOUSUF ALI SAYEED, J - This Appeal under Section 3 of the Law Reforms Ordinance, 1972, stems from Suit Number 1768 of 2015 (the “**Underlying Suit**”), whereby the Appellant had assailed an oral gift of Plot No. A-196/1, Block-8, Karachi Administration Employees Cooperative Housing Society Ltd., Karachi, along with the ground + 2 floor residential structure thereon (the “**Subject Property**”), reflected as having been made by him in favour of one of his sons, namely the Respondent No.1, vide a registered Deed of Gift of Immovable Property dated 09.07.2013 (the “**Deed**”) on 01.07.2013 in the presence of two witnesses, coupled with the delivery of peaceful vacant physical possession of the Subject Property along with the all the documents of title relating thereto (the “**Gift**”), and recorded accordingly by the aforementioned Society (i.e. the Defendant/Respondent No.2) as Gift Mutation of Bldg/Plot No. KAECHS/N-3347/A-196/1/562/13 dated 08.10.2013, (the “**Mutation**”).

2. The Appellant assailed the Gift through the Underlying Suit, disavowing execution of the Gift Deed and impugning the Mutation, alleging that the same were a product of fraud and deceit, with the case set up through the plaint being broadly premised as follows:
 - (a) That he had purchased/constructed the Subject Property exclusively from his own income and was the absolute owner thereof;
 - (b) That due to the Appellant's old age and ill health, he was mostly confined at home, but upon a visit to the office of Respondent No.2 had come to know that the Subject Property had been mutated/transferred in the name of the Respondent No.1 on the basis of the Gift;
 - (c) That the Appellant then checked the files maintained by him at his home to discover that the title documents of the Subject Property were missing;
 - (d) That as the Respondent No.1 was the beneficiary of the Gift, the Appellant concluded that he must have removed the same, and taking advantage of the Appellant's old age and feeble health, had deceitfully and fraudulently prepared/managed the Gift Deed without his consent and intent so as to procure the Mutation.

3. On that basis, a plethora of prayers were advanced, with it being sought that the Gift Deed and the Mutation be declared as being *ab initio* void; that the Respondent No.1 be directed to surrender the Gift Deed and the Sub-Registrar-I, Jamshed Town (i.e. the Defendant/ Respondent No.3) be directed to cancel the registration thereof; that the Respondent No. 2 be directed to cancel the Mutation in its record; and that the Respondent No.1 be restrained from disturbing the Appellant's possession of the Subject Property or entering into any sale or transfer thereof.

4. Following the issuance of summons, the Respondents entered appearance and filed their written statements, with the Respondent No.1 taking the stance that the claim was completely false and submitting that the Subject Property had in fact originally been purchased by him from one Muhammad Jan Jaffri, who was the holder of a permanent allotment letter dated 23.7.1970 issued in his favour by the Respondent No. 2, and the same was then transferred in his name on 16.2.1976 in the records of the Respondent No. 2 with a loan being obtained by him from the House Building Finance Corporation (“**HBFC**”) amounting to Rs.60,000/-, which was later enhanced for purpose of construction. It was also submitted that besides the loan, the Respondent No.1 spent from his own earning and also sold his wife's golden ornaments to meet the expenses of construction. It was explained that, thereafter, the Respondent No. 1 gifted the Subject Property to the Appellant, with the gift being reduced in writing on 21.04.1979 through a declaration of gift, which was accepted by the Plaintiff and such transfer of the house in question was made by the Defendant No. 2 through his letter dated 21.8.1989 and the Plaintiff had executed indemnity bond on 19.7.1989 in the office of Defendant No. 2. It was submitted that, ergo, there was nothing untoward about the Gift, which was simply a vehicle whereby ownership of the Subject Property was being returned by the Appellant to the Respondent No.1.

5. From an examination of the pleadings, the following issues were settled for determination: -

- “1) Whether the Plaintiff has not executed the Gift Deed dated 09.07.2013?
- 2) Whether the mutation was effected lawfully in the record of Karachi Administration Employees Housing Society?
- 3) What should the decree be?”

6. The evidence was then recorded on commission, with the Appellant leading his evidence through an attorney, namely Firasat Mohiuddin, supported by the testimony of the Appellant's two other children, namely Farhat Fatima and Nusrat Fatima, as well as his second wife, namely Rahat Khanum, whereas the Respondent No. 1 led his evidence by personally entering the witness box.

7. Thereafter, upon considering the arguments advanced in light of the evidence on record, the learned Single Judge was pleased to enter Judgment in the matter on 22.12.2017 (the "**Impugned Judgment**"), with the aforementioned issues being decided against the Appellant and the Underlying Suit consequently being dismissed, with a decree then being drawn up accordingly on 04.01.2018, hence this Appeal.

8. Proceeding with his submissions, learned counsel for the Appellant assailed the Impugned Judgment by contending that it was the product of a misreading of evidence and misapplication of law. It was argued that the learned single Judge erred in failing to appreciate that the Respondent No.1 had not brought any documentary evidence on record to establish that the Gift shown in the Deed was a genuine transaction. He contended that there was no justifiable reason for the Plaintiff to Gift the property in question to one of his sons so as to exclude his other children; that the Appellant had remained in possession of the Subject Property all along, therefore the Gift was never complete; that the Respondent No.1 had failed to lead evidence through the attesting witnesses of the Deed, therefore its authenticity was doubtful and the onus was on the Respondent No.1 to prove its authenticity in the wake of the Appellant having denied executing the Deed.

9. Conversely learned counsel for the Respondent No.1 supported the Impugned Judgment and submitted that the same was in consonance with the evidence on record, which demonstrated the execution of the Deed as well as validity of the Gift and Mutation carried out on the basis thereof. He submitted that possession of the Subject Property was never exclusively with the Appellant and whilst referring to the evidence pointed to certain admissions in that regard, as considered by the learned Single Judge.

10. He pointed out that the Appellant has failed to come into the witness box to lead his own evidence and submitted that the evidence of the Appellant's witnesses was hearsay and had no probative value; that their testimony was even otherwise either contradictory or belied the Appellant's denial as to execution of the Deed; that such witnesses were even otherwise all interested parties as they were seeking a share in the Subject Property; that no case of undue influence or fraud had been established by the Appellant; that the objection regarding possession of the Subject Property was also misconceived as the Appellant was the father of the Respondent No.1 and had been permitted to continue to remain in residence by him out of love and affection and also permitted to collect the rent; that the allotment order had been issued by Respondent No. 2 in the name of Respondent No. 1, who had carried out the construction, and it stood established that he had gifted the Subject Property to the Appellant who had then returned the same to him, hence the Appellant's claim as to absolute ownership thereof was baseless.

11. Having considered the submissions made by the learned counsel for the parties in light of the material on record, it transpires from a reading of the Impugned Judgment that the learned Single Judge observed the Appellant's failure to come forward personally for recording his evidence and that his appointed attorney was not properly cognizant of the facts enumerated in the plaint and had repeatedly given contradictory answers during the evidentiary proceedings. It was noted that he had firstly stated that the Subject Property was owned by the Appellant but had then gone on to confirm that the same had initially been gifted to the Appellant by the Respondent No.1, who had then gifted it back to him, and had also stated that the Underlying Suit had been filed for securing the shares of other legal heirs, whereas, the plaint was silent in that regard and the Plaintiff could not conceivably have come forward for seeking the share of his other children.

12. It was also observed that the remaining witnesses from the Appellants side were all persons having a vested interest in the matter, with the Affidavits-in-Evidence filed by them being stereotypical and reflecting that they had all come forward as presumptive heirs to claim their shares in the Subject Property, but had failed to adduce any evidence that the Appellant had not executed the Gift Deed or that there had been any fraud or deceit on the part of the Respondent No.1. On the contrary, as observed, it had been conceded by the second wife of the Appellant that she recognized the signatures of the Appellant on the Gift Deed and that she did not know whether any fraud had been committed by the Respondent No.1 in its execution. It was also noted that the Appellant was a member of the Managing Committee of the Respondent No.2 and it was inconceivable that the Mutation could have taken place fraudulently behind his back.

13. From what has been recorded in the Impugned Judgment, it is manifest that certain excerpts from the cross-examination of the Appellant's witnesses weighed heavily with the learned Single Judge in his determination. Whilst the import, significance and effect of these excerpts will be duly considered hereinafter, for reference the same are reproduced verbatim, as follows:

Firasat Mohiuddin (son and attorney of the Appellant)

- *"The plot in question was purchased by my father. The original document of the Suit plot is with my father. The document of the Suit plot is in the name of my father since beginning. It is correct to suggest that I have not filed any documents of the plot in question with the affidavit in evidence as well as plaint."*
- *"It is correct to suggest that the loan was taken of the Suit plot from HBFC and on the basis of the loan the construction was made of the Suit plot. The loan of the HBFC was taken by the Plaintiff in his name. It is incorrect to suggest that the loan of HBFC was taken by the Defendant No.1 and the plot in question is also in the name of the Defendant No.1."*
- *"I do not know who get the loan from the HBFC and the approved of the building plan is in the name of the Defendant No.1 granted by the Karachi Building Control Authority."*
- *"It is correct to suggest that my father Plaintiff is member of the Managing Committee of the Society since long and mutation of the Suit property was completed by the Defendant/ Plaintiff in favour of the Defendant No.1. It is correct to suggest that the Gift Deed was executed in the office of the Sub-Registrar East. It is correct to suggest that the property in question is in the name of the Defendant No.1. The present Suit was filed for the share of the other legal heirs."*

Farhat Fatima (daughter)

- *"My father never disclosed to me that the suit property is gifted by him to the defendant No.1 We want the share of all legal heirs. I recognized the signature of my father (plaintiff) I see the picture of my father on the gift deed."*
- *"My father had not disclosed about the gift deed and I cannot say about the fraud committed in the execution of the gift deed."*

Nusrat Fatima (daughter)

- *"The Suit is filed for the share of all the legal heirs from the Suit property. The present suit is filed only for its purpose."*
- *"I recognized the signature of my father and the picture on the gift deed."*

Rahat Khanum (second wife)

- *“I do not know whether the Gift Deed filed by the Plaintiff is false and who filed it. The preset case was filed for the share of the other legal heirs. It is incorrect to suggest that the plot in question was purchased by the Plaintiff. It is correct to suggest that the loan was taken by the Defendant No. 1 from HBFC.”*
- *“...the plot in question is in the name of the Defendant No. 1.”*
- *“It is correct to suggest that the Plaintiff and the Defendant No. 1 were residing in the Suit property before my marriage. They never shifted from the Suit property. It is correct to suggest that I filed affidavit in evidence for the share of all the legal heirs. My husband used to walk and he is fit but he is weak. My husband (Plaintiff) can come to the Court for evidence but it will be difficult to climb the chair.”*
- *“I do not know whether any fraud was committed by the Defendant No. 1 in execution of the Gift Deed”. She also stated that “I recognize the signatures of my husband on the Gift Deed and the picture is also my husband”.*
- *It is correct to suggest that my husband (Plaintiff) is the member of the Managing Committee of the Society.*

14. Whilst the burden of proving the existence of an oral gift rests on a donee when he alleges the same and seeks to assert a claim on that basis, either against the alleged donor or to disassociate the immovable property purportedly gifted from the donor's estate, there is a marked difference between such a circumstance and the matter at hand, where the execution of a written instrument evincing the factum of gift stands established and the transaction stands completed through transfer in the name of the donee, as is the case in the matter of the Subject Property in form of the Deed and Mutation. To our minds, a person who assails such a completed transaction as bogus or fraudulent must prove the same through cogent admissible evidence, and are of the view that in the matter at hand the burden lay on the Appellant to demonstrate that the Gift was a fraudulent transaction, as alleged, with the issue framed in that regard in the Underlying Suit also being oriented accordingly. As such, we are unable to subscribe to the argument that the onus was on the Respondent No.1 to prove execution by examining the attesting witnesses.

15. Having considered the matter from that perspective, we are of the view that when the documents exhibited in evidence and the depositions of witnesses are viewed holistically and in juxtaposition, it is apparent that the Appellant had failed to personally enter the witness box to prove his case and to otherwise lead any evidence to demonstrate that he had not executed the Deed or that its execution was tainted by undue influence or fraud. On the contrary, it is apparent that the Appellant's attorney was not even properly conversant with the matter, and completely failed to make out a case in that regard, with the testimony of the other witnesses confirming the factum of the Appellant's signature on the Deed and admitting to such execution having taken place before the concerned Sub-Registrar. Ergo it follows that the Appellant's challenge to the Mutation, as effected on the basis of the Gift, also does not sustain. Indeed, the competency of an attorney to tender evidence was a matter of consideration before the Honourable Supreme Court in a recent judgment in Civil Appeal No. 1355/2006 and Civil Appeal No. 1495/2006, with the lead case being titled as Mrs. Zakia Hussain and another v. Syed Farooq Hussain, where it was observed in that regard as follows:

“The question before us requiring determination is whether a witness not fully conversant with the facts and circumstances of the case would be a competent witness within the meaning of Rule 1 & 2 of Order III CPC. The case law of the country so far developed regarding this question is based on the facts and circumstances of each case. Initially, it is the party itself to depose about the first hand and direct evidence of material facts of the transaction or the dispute and its attorney having no such information cannot be termed as a competent witness within the meaning of Order III Rule 1 & 2 of CPC. Yes! The attorney can step-in as a witness if he possesses the first hand and direct information of the material facts of the case or the party had acted through the attorney from the very inception till the accrual of cause of action. Deposition of such an attorney under the law would be as good as that of the principal itself. Non-appearance of the party as a witness in such a situation would not be fatal. If facts and circumstances of the case reflect that a party intentionally did not appear before the court

to depose in person just to avoid the test of cross examination or with an intention to suppress some material facts from the court, then it will be open for the court to presume adversely against said party as provided in Article 129(g) of Qanun-e-Shahadat, Order 1984 (QSO, 1984).”

16. Under the circumstances marking the case at hand, we concur with the learned Single Judge’s assessment of the matter and it is apparent that the issues framed for determination were rightly decided against the Appellant. That being so, the Appeal fails and is hereby dismissed, along with all pending miscellaneous applications.

JUDGE

JUDGE

Karachi
Dated _____