

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.2421 of 2014

[Hameeda Iqbal and others v. Abdul Majeed and others]

Alongwith

Suit No.1013 of 2014

[Abdul Majeed and others v. Hameeda Iqbal and others]

Date of Hearing : 25-08-2021
Date of Decision : 19.04.2022
Plaintiffs in Suit No.2421/2014 and defendants in Suit No.1013/2014 : Through Mr. Zahid Hussain, Advocate
Defendants in Suit No.2421/2014 and plaintiffs in Suit No.1013/2014 : Through Mr. Muhammad Nawaz, Advocate holding brief for Kazi Abdul Hameed Siddiqui, Advocate

JUDGMENT

Zulfiqar Ahmad Khan, J:- The lis at hand is posed through two separate suits, which were later on connected. Since the property is same, therefore, it would be just and proper to decide the same through a common judgment.

2. Suit No.2421 of 2014 is filed by the legal heirs of deceased Shamsul Haque S/o Abdul Razzaque for declaration, cancellation of document, possession, recovery of *mesne* profit, damages and permanent mandatory injunction with the following prayers:-

- (i) Declaration that the defendants have no right or claim in respect of the second floor of the House No.3/C 12/16, Nazimabad, Karachi even otherwise the contents of agreement/declaration/undertaking document does not create any right/title in respect of the said house including second floor of the said house i.e. suit property.
- (ii) A further declaration that the arranged Agreement/ Declaration/Undertaking is forged/fabricated and based on fraud upon the plaintiffs as such liable to be cancelled and the plaintiffs

are not legally effected to the said Agreement/
Declaration/Undertaking.

- (iii) To pass judgment and decree directing the defendants to put the plaintiffs in peaceful vacant physical possession of second floor of the said house construction on plot No.3/C12/16, Nazimabad, Karachi.
- (iv) To pass judgment and decree of mesne profit from January 2010 to December 2010 at the rate of Rs.13,000/- per month and from January 2011 to December 2011 at the rate of Rs.14,000/- per month and from January 2012 to December 2012 at the rate of Rs.15,000/- per month and from January 2013 to December 2013 at the rate of Rs.16,000/- per month and from January 2014 till filing of the case (December 2014) at the rate of Rs.17,000/- per month, total amounting to Rs.9,00,000/- and future at 10% increase to Rs.17,000/- per month till the defendants hand over the vacant and peaceful physical possession of the second floor of the said house to the plaintiffs.
- (v) Be further be pleased to pass mandatory injunction against the defendants directing them to immediately pay/clear the electricity dues as well as water charges amounting to Rs.65,037/- and continue to pay the same till vacating the suit property i.e. second floor of the said house to the plaintiffs according to the established practice between the parties of the suit i.e. payment of electricity at the ratio of 2/3 of the total amount of the bills and the amount of water bills at the ratio of 1/3 of the total bill amount.
- (vi) To grant permanent injunction restraining the defendants, their servants, agents, all previous claiming through or under the defendants from creating third party interest in the suit property, handing over it's possession to any other person or persons, removing fittings and fixture installed therein and/or causing damages to the suit property.
- (vii) To order for payment of damages in the sum of Rs.50,00,000/(Rupees Fifty lac).
- (viii) To grant cost of the suit.
- (ix) To grant any other relief or reliefs which this Hon'ble Court may deem proper under the circumstances of the case.

3. Before filing of the instant suit, the defendants (in Suit No.2421 of 2014) filed Suit No.1013 of 2014 for declaration and permanent injunction with the following prayers:-

1. Declare that the property was not a benami property in the name of predecessor No.2 but purchased, as quid pro quo, by late Shamsul Haq whose legal heirs are the defendant Nos.1 to 4.
2. Declare that the Gift Deed executed by predecessor No.2 favoring late Shamsul Haq (predecessor in interest of the defendants 1 to 4) was a subject to certain conditions binding late Shamsul Haq and his legal heirs.
3. Declare that the defendant Nos.1 to 4 have violated the terms conditions binding on them.
4. Declare that in the wake of above violation the Gift Deed is amended up to the extent of only 1/3rd of the property owned by the defendant Nos.1 to 5.
5. Declare that the plaintiffs are entitled to share according to shariah on the rest of the property including the amounts invested by the predecessors of the plaintiffs on the property.
6. Declare that all the rents received by the defendant Nos.1 to 5 through first floor of the property are to be distributed amongst all legal heirs of the predecessor No.2 with markup on prevailing banking rate and in case the defendant Nos.1 to 5 fail to distribute the rent, the same to be deducted from their shares.
7. Direct the defendant No.4 revoke mutation favoring Late Shamsul Haq or any further mutations favoring the defendants and to mutate the property with 1/3rd share to late Shamsul Haq and/or his legal heirs and the rest to be mutated favoring all the legal heirs of the predecessor No.2.
8. Restrain the defendant Nos.1 to 4 perpetually for taking any action violating the proprietary rights of the plaintiffs which include all amenities.
9. Any other relief/reliefs deemed fit may also be granted.

4. Relevant facts as averred in the plaint are that plaintiff No.1 is widow, whereas plaintiff Nos.2 to 5, are sons and daughters of late Shamsul Haque S/o of late Abdul Razzaque, who was *Benamidar* of a House constructed on Plot No.3-C-12/16, admeasuring 216 square yards in Nazimabad, Karachi (“the suit property”). It is claimed that late Shamsul Haque was self-made person and got private jobs between the years 1965 to 1969. Thereafter, he went to Canada in the year 1970 without any financial support from his father or any other member of his family and got some jobs there. His father, namely Abdul Razzaque, came to Pakistan in the year 1962 from India and worked only for two years and thereafter spent a retired life till his death. Late Shamsul Haque being elder brother, maintained his parents as well as all siblings, as the latter had no sources of income, in the like manner he financially supported his younger brother namely Abdul Majeed, defendant No.1 for completing his education. He used to remit money to his father in Pakistan and his father purchased the suit property solely from the earnings of Shamsul Haque in the name of his wife Mrs. Quresha Bi, mother of Mr. Shamsul Haque with an understanding that when Shamsul Haque will return to Pakistan, the suit property will be transferred in his name by way of Gift Deed. He, naturally, allowed his other children to live on ground floor of the suit property whilst the first floor was rented out, whose rent was being paid to the plaintiffs without any claim from the defendants. Shamsul Haque returned to Pakistan in the year 1977 and as per the promise his mother (Quresha Bi) transferred the suit property in his name on 30.06.1985 by

executing an unconditional Declaration of Confirmation of Gift in presence of Abdul Hameed/father of the defendant Nos.8, 9, 10 and Abdul Majeed (defendant No.1), who witnessed the said Gift Deed, which was registered in the office of Sub-Registrar 'T' division VIII, Karachi and the property was transferred/mutated in the KDA (Land Revenue Record) accordingly.

5. The present cause was contested by the rival parties. Both parties are plaintiffs and defendants in their respective suits vice versa filed their written statements and denied the rival assertions. Defendants of Suit No. 2421/2014 claimed that late Shamsul Haque was not owner of the suit property, which was *in fact* mortgaged by Mst. Quresha Bi with House Building Finance Corporation in the year 1975 and its original title documents were lying in HBFC's custody till its redemption in the year 1997 by taking advantage of a Government scheme. They alleged that the Gift Deed dated 30.06.1985 is fake and bogus one, as during that period original title documents were lying with HBFC. They further claimed that late Shamsul Haque worked abroad from June, 1970 to June, 1977, out of which period, he remained jobless for many months hence how could he maintain himself abroad and so also support his family members in Pakistan and at the same time and his brother in completion of his studies.

6. At the joint request of the parties, both the suits were consolidated on 19.05.2016 and it was ordered that Suit No.2421 of 2014 would remain be the leading suit. Thereafter, on 08.09.2016, following issues were framed:-

1. Whether the defendants entire claim is based on forged, unregistered agreement/declaration/undertaking dated 30.12.1985 in respect of so-called IIIrd Floor of the suit property as there is no 3rd floor in the suit property?
2. Whether on 30.06.1985, the mother of Late Shamsul Haque namely Late Mst. Quresha Bi wife of Abdul Razzaq transfer the ownership right of the suit property to it's real owner Late Shamsul Haque by executing unconditional registered Declaration and Confirmation of Gift as the suit property purchased from the income of Late Shamsul Haq in the name of Quresha Bi?
3. Whether the suit property was mutated in the name of Shamsul Haque in his life time?
4. Whether the plaintiffs of Suit No.1013/2014 are entitled for the reliefs as prayed?
5. Whether the Agreement/Declaration/Undertaking dated 30.12.1985 was a quid pro quo by the late husband of the plaintiff No.1 being father of the remaining plaintiffs for an earlier property sold by the father of the said late husband to bear costs of, inter alia, the said late husband going to Canada for higher education?
6. Whether the above said Agreement/Declaration/Undertaking also superseded earlier declaration of oral gift of the even date by the mother of the late husband of the plaintiff No.1 father of remaining plaintiffs to the extent of IIIrd floor of the property only?
7. Whether the registration of gift deed of the property in the name of the late husband of the plaintiff No.1 being father of the remaining plaintiffs was executed after the property was mortgaged with the House Building Finance Corporation and thus the said registered gift deed is forged?
8. Whether the above said agreement (sic)
9. What should the decree be?

7. By consent of the parties Mr. Kabiruddin, Advocate was appointed as Commissioner for the purpose of recording evidence. Fee of the Commissioner was fixed in the sum of Rs.10,000/- per

witness to be borne by the respective parties. The parties were left at liberty to file affidavit-in-evidence before the learned Commissioner. It was made clear that the learned Commissioner, in case of non-cooperation, would close the side of either party. The Commissioner was expected to return the commission duly executed within six months.

8. A close scrutiny of Record & Proceedings, it manifests and unfurls that on 26.02.2021 following issues were recasted with the consent of the parties:-

1. Whether subject property was/is in the ownership of late Shams-ul-Haq? Or the same is opened to partition and preliminary decree in this regard be passed?
2. What should the decree be?

8. Mr. Zahid Hussain, Advocate set forth the case of plaintiffs in Suit No.2421/014 and defendants in Suit No.1013/2014. He emphatically argued that deceased Shamsul Haque is owner of the suit property which was purchased by him from his funds. He next contended that Plaintiffs are the legal heirs of deceased Shamsul Haque and by the dint of law of Inheritance, they are owners of the suit property. He further stated that late Shamsul Haq used to do job as Punch Press Operator in "Tru-View", which is a company of Aluminum Products in Ontario and used to earn handsome income and that the suit property was purchased by him in the name of his deceased mother Qureshi Bi which was later on gifted to him and such Deed of Gift was also registered with the Sub-Registrar. He further contended that the suit property was constructed by the deceased Shamsul Haq and is being maintained by the plaintiffs. While concluding his submissions, he contended

that the deceased Shamsul Haq was a selfless person, he accommodated the defendants in the suit property as they had no roof over their heads but the defendants are deceitfully bent upon to usurp the suit property on the basis of false, concocted family settlement which was never handed down by the deceased Shamsul Haq. He unequivocally contended that the defendants are claiming their right in the suit property on the basis of some forged family agreement which is neither a registered document nor the witness of the same appeared in the witness box to strengthen the veracity of the said agreement and defendants amid cross examination admitted that he had not filed any ownership documents in respect of the suit property. He further admitted that in the registered Gift Deed it is nowhere mentioned that the rival side is entitled to have one third share in the suit property, therefore, taking into consideration the overwhelming material available on record, the plaintiffs are entitled for decree as prayed in the present lis.

9. In contra, learned counsel for the defendants argued that it has been an order of the day that the legal shares from ancestral properties are usurped from innocent and same thing has happened in the present case, the present plaintiffs managed a fake Gift Deed owing to which they want to usurp the legal shares of the defendants from the suit property. He further introduced on record that the suit property was mortgaged with the HBFC in the year 1975 and the original documents were also in the custody of the HBFC till 1997 while the alleged Gift Deed on the basis of which the plaintiffs are claiming ownership rights alleged to have been prepared in the year 1985 which is not possible for the reasons that

the whenever any person agrees to execute a Gift Deed in favour of the donee, he has to show the original documents of the property before the concerned Sub-Registrar and the alleged Gift Deed stated to have been executed in the year 1985 but at the same time the original documents of the suit property were lying with the HBFC, therefore, it is proved that the alleged Gift Deed is forged and fictitious documents hence liable to be ignored. So as to meet the objection of genuineness of the family settlement agreement introduced on record by the legal counsel of the plaintiffs, he argued that the said agreement is a genuine document and the witness Dr. Abdul Majeed in his examination-in-chief introduced on record the factum of execution of the said agreement and fully corroborated the stance of the defendants, therefore, defendants are entitled to have their legal shares in the suit property being an ancestral property purchased by their deceased father in name of their mother Qureshi Bi.

10. I have appreciated the arguments of the respective learned counsel and have also considered the law to which surveillance of this court was solicited. From a close examination of the record and proceedings, it surfaces that in order to decide the lis at hand, originally nine (09) Issues of fact and law were formulated vide order dated 08.09.2016, however, as the time went by, the learned counsel consented the court to recast the issues and with the consent of the parties vide order dated 26.02.2021 issues were recasted which has already been pointed out in the earlier part of this judgment and, therefore, it is considered appropriate to not to give any observations on issues framed earlier. The crux of the

present determination is circumscribed to address the question as to whether subject property was/is in the ownership of late Shamsul-Haq; or the same is available for partitioning and preliminary decree in this regard could be passed? Let's see what evidence had been introduced on record by both the parties to strengthen their respective stance.

11. So as to strengthen and validate their case, the plaintiff No.1 & 2 ventured into witness box before the learned Commissioner and also produced overwhelming and plethora of documents to support their notion alongside a witness namely Syed Zafar Hussain who validated the stance of the plaintiffs. Plaintiff No.1 (in suit No. 2421/2014) being widow of late Shamsul Haq during her examination-in-chief produced appointment letters, letter of confirmation in service of late Shamsul Haq in different companies along with remuneration/salaries letters as Exh. P-2 to Exh. P-9 respectively, passport of late Shamsul Haq showing that he went abroad for employment purpose. She also produced different employment letters issued from different companies in Ontario, Canada as Exh. P-11 to Exh. P-14, mutation letter dated 18.01.1977 issued by KDA in the name of Qureshi Bi mother of late Shamsul Haq as Exh. P-15, Sale Agreement, Site Plan of the suit property, letter of approval issued by Architect Control, KCM, General Power of Attorney issued by Mst. Qureshi Bi (mother of late Shamsul Haq) in favour of Shamsul Haq, different receipts of construction material and news clippings as Exh. P-16 to P-27 respectively. She also produced Gift Deed issued in favour of late Shamsul Haq by Qureshi Bi, Mutation Order in favour of Shamsul

Haq issued by KDA, Search Certificate, Loan Application Form of HBFC, Deed of Redemption as Exh. P-29 to P-39 respectively. Plaintiff No.2 and Plaintiffs' witness namely Syed Zafar Hussain supported deposition of plaintiff No.1 in their examination-in-chief.

12. On the other hand, defendants in order to strengthen their stance and bring the guilt of the plaintiffs at home, produced two witnesses namely Mirza Muhamamd Mateen Baig and Abdul Majeed while defendant No.3 Samiullah also ventured into the witness box before the learned Commissioner and produced a power of attorney to adduce evidence on behalf of remaining defendants and a Family Settlement Agreement/Undertaking as well as a certificate issued by HBFC.

13. A glance on the recasted Issue No.1 manifests that the said issue poses two aspects to be decided, one depicts the ownership of the suit property while the other relates to its partition. A close scrutiny of the material introduced on record by the plaintiffs amid their examination-in-chief, it surfaces that overwhelming documents are available on record which shows that late Shamsul Haq was owner of the suit property. Gift Deed available at page 163 to 166 of the evidence file suggests that the suit property was gifted to late Shamsul Haq by Qureshi Bi (who was mother of late Shamsul Haq (husband of plaintiff No.1 and father of plaintiff No. 2 to 5) and also mother of defendant No.1) which was witnessed by defendant No.1 and Abdul Hameed (father of defendant No.8, 9 & 10). It is important to mention here that Deed of Gift is a registerable instrument which was also registered by the late

Shamsul Haq in his life time with the concerned Sub-Registrar, not only the said Gift was registered but also the three ingredients i.e. declaration by donor of property, acceptance by donee and delivery of possession which *prima facie* makes any Gift valid are also available. Exh. P-29 is the Mutation Order issued by the KDA in favour of late Shamsul Haq declaring him as lawful owner of the suit property. The term 'owner', per Black's Law Dictionary (Eighth Edition) is:

“**Owner.-** One who has the right to possess, use, and convey something; a proprietor.”

14. Per law, one would normally be regarded “owner” who is so appearing from the Record of the Rights. Exh. P-29 to P-31 (available at page No. 167 to 176 of the evidence file) are the Gift Deed and Mutation/Transfer Order issued by the KDA showing that late Shamsul Haq was owner of the suit property and now the plaintiffs being legal heirs of deceased Shamsul Haq and the suit property being their ancestral property, they are entitled for the possession thereof. Apart from above, the defendants in Suit No. 2421/2014 denied the very existence of the Gift Deed in their written statement and claimed that it is an engineered document and got prepared by late Shamsul Haq in order to deprive the defendants from the suit property but the defendants failed to produce any iota of evidence to prove that the said Gift Deed is false and engineered one. It is well-established principle of law that a written statement contains averments of a party, which are to be proved through cogent evidence. If a party does not produce, any evidence to support the contents of its written statement, in absence of any admission on the part of a plaintiff, the averments

contained in the written statement cannot be treated as evidence. Furthermore, defendant No.3 was put to the test of cross-examination by the learned counsel for the plaintiff and during his cross-examination, he went on to admit that he failed to file any ownership documents of the suit property suggesting that they are owners of the suit property. In the given circumstances and deliberation, the first aspect of Issue No.1 is answered in **affirmation.**

15. The second phase of Issue No.1 is with regard to the partition of the property. The purpose of a suit for administration and partition is to decide whether a property belongs to deceased or not and without deciding this it is not possible for the Court to administer and partition the property, hence having a limited scope. The question of title to a property claimed by any heir in his own independent right cannot be determined in these proceedings. The object was to determine the estate of the deceased at the time of his death. Admittedly at the time of death Qureshi Bi (who happens to be mother of defendant No.1 and paternal grandmother of other defendants in suit No. 2421), the property stood in the name of late Shamsul Haq being owner of the suit property and the defendants have failed to produce any iota of evidence or documents suggesting that the suit property stands in the name of Qureshi Bi, therefore, it is hard nut to crack to make a partition of the suit property.

16. The only document/evidence produced by the defendants is a Family Settlement/Undertaking alleged to have been executed by the late Shamsul Haq. The entire case of the defendants hinges

upon the authenticity of alleged Family Settlement/Undertaking reported to have been executed by late Shamsul Haq in favour of defendants in presence of late Quresha Bi and the same is attested by the Magistrate First Class Karachi Division. Under section 17(b) of the Registration Act, 1908 any document that purports to create right, title or interest in immovable property requires compulsory registration. The said Family Settlement/Undertaking should have been compulsory registered as per law and its mere attestation by the Notary Public/Magistrate was not sufficient to meet the prescriptions of law. Furthermore, plaintiffs challenged the veracity and authenticity of the said Family Settlement/Undertaking on the ground that the defendants claimed that the late Shamsul Haq undertook in the said Family Settlement/Undertaking that he will not create any hurdle in the possession of the 3rd floor of the suit property which is occupied by the defendants. Perusal of record and proceedings, it revealed that the suit property was inspected twice by the Nazir of this Court to report the factum of supply of amenities in the suit property and the Nazir of this court too reported about the factum of ground floor, first floor and the second floor, and that there is no existence of third floor on the suit property. It is gleaned from the appraisal of the Nazir's reports that the suit property consists of ground + two floors and there is no existence of third floor on the suit property, therefore, the mentioning of third floor in the Family Settlement/ Undertaking is questionable.

17. In view of the rationale and deliberation contained hereinabove, the second phase of Issue No.1 is answered in negation.

18. So far as recasted Issue No.2 is concerned, sanguine to the set of circumstances and ramification as well as connotation of statues, Suit No.1013 of 2014 is dismissed, whereas, Suit No.2421 of 2014 is disposed of in the following terms:-

(i). The defendants of suit No.2421 of 2014 (plaintiffs in connected suit No. 1013 of 2014) have no right or claim in the suit property and the claim of 3rd floor which is being sought by the said defendants in the suit property on the basis of Family Settlement/Undertaking is neither in existence nor the said Family Settlement/Undertaking has any evidentiary/legal value in the eyes of law and the same is hereby cancelled under Section 39 of the Specific Relief Act, 1877.

(ii). The defendants of suit No.2421 of 2014 (plaintiffs in connected suit No. 1013 of 2014) are directed to hand over peaceful and vacant possession of the portion of the suit property in their possession to the plaintiffs of Suit No.2421 of 2014 within sixty days from the date of this judgment.

(iii). Since the defendants of suit No.2421 of 2014 (plaintiffs in connected suit No. 1013 of 2014) were illegally residing in a portion of the suit property and the plaintiffs claimed a total amount of Rs. 900,000/- as mesne profit from January, 2010 to December, 2014, they are directed to pay the same to the

plaintiffs of suit No. 2421/2014. On 22.05.2015 a Joint Statement was filed by the plaintiffs, defendants and their legal representatives/counsel that the defendants of suit No.2421/2014 will contribute 60% towards electricity charges and further contribute 33% towards water and sewerage charges as well as a fixed amount of Rs. 60,000/- was deposited by the defendants of suit No.2421/2014 in compliance of order dated 22.04.2015 which was also received by the plaintiffs of suit No.2421/2014, therefore, the interest claimed by the plaintiffs will not be allowed.

(iv). Parties are left to bear their own cost.

(v). Office is directed to prepare the decree in terms settled above

Karachi
Dated:19.04.2022

JUDGE

Aadil Arab