

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.2025 of 2017

[Mazharullah Khan & othersv.....Mst. Zainab & others]

Date of Hearing : 30.11.2021
Date of Decision : 08.03.2022
Plaintiffs : Through Mr. Masood Khan Ghori,
Advocate.
Defendants : Nemo.

JUDGMENT

Zulfiqar Ahmad Khan, J:- This suit seeks Cancellation of Gift Deeds alongside seeking Declaration, Possession, Mesne Profits, Damages, Permanent & Mandatory Injunction.

2. Facts narrated in the memo of plaint are that one Tufail Ellahi Qureshi was allotted plot No. 56-B, measuring 427 sq. yards in Block-2, Pakistan Employees Cooperative Housing Society Limited, Karachi (“said house”) by the defendant No.8 and a sub-license was also executed between defendant No.8 and the said Tufail Ellahi Qureshi in 1952 thereafter the same was leased out by the defendant No.8 to said Tufail Ellahi Qureshi on 08th December, 1975 and such occupancy certificate was also issued by the KDA on behalf of defendant No.8 on 15.06.1972. It is stated by the plaintiffs that the said Tufail Ellahi Qureshi being owner/lessee of the said house gifted the said house to his daughter Mst. Rafat Sultana Khan on 04.06.1975 who happens to be mother of plaintiff No.2 to 5 and wife of plaintiff No.1 and the said house was also mutated in the name of Mst. Rafat Sultana Khan vide letters dated 29.11.1976 and 17.01.1977 issued by defendant No. 7 & 8 respectively. Whereafter Mst. Rafat Sultana Khan gifted the

said house to her mother Mst. Rasheed Begum on 20.08.1978 which was later on mutated in her mother's name by letter dated 16.07.1978 issued by defendant No.7 and an entry of such transfer was also effected in the record of defendant No.8 vide its letter dated 20.08.1978 and with the passage of time the said Mst. Rasheeda Begum being mother of Mst. Rafat Sultana Khan again gifted the said house to her daughter to Mst. Rafat Sultana Khan in the year 1983 and such transfer was also acknowledged by the defendant No.8 vide its letter dated 30.12.1984 and the defendant No.7 also approved the said transfer in the name of Mst. Rafat Sultana Khan vide their letter dated 19.11.1984. The plaintiffs averred that Mst. Rafat Sultana Khan being mother of plaintiff No. 2 to 5 and wife of plaintiff No.1 left this mortal world on 15.12.1991 in Canada, thereafter, the plaintiffs being legal heirs of deceased Mst. Rafat Sultana Khan filed an SMA being No. 174 of 2013 before the learned District Judge, East Karachi which was granted vide order dated 24.10.2013 and such letter of administration was also issued in favour of plaintiffs being legal heirs of said deceased and, thereafter, the said house was mutated/transferred in the name of plaintiffs in the record of defendant No. 7 & 8 on 10.12.2014 and 23.12.2014 respectively. Plaintiffs averred in the plaint that all original documents are in their possession and they mostly reside abroad, whereas, Mst. Rasheeda Begum being maternal grandmother of the plaintiffs used to reside in the said house and appointed three maids who are defendant No. 1 to 3 in the suit for her care and lookafter. It is further averred by the plaintiffs that the said maids hatched a conspiracy to deprive the plaintiffs from the said house obtained

thumb impression of said Mst. Rasheeda Begum who was at advance age as well as ailing woman and the said maids/defendant No. 1 to 3 starting receiving pension of husband of Mst. Rasheeda Begum who was employee of Postal Department as well as obtained two forged Gift Deeds dated 21.11.2013 and 04.12.2013 in their favour on the basis of forged and fabricated signatures of Mst. Rasheeda Begum in connivance with defendant No.9. Plaintiffs averred that the alleged Gift Deeds obtained by the maids/defendant No.1 to 3 are forged and fabricated documents as the Mst. Rasheeda Begum was not owner of the said house while she had gifted the said house to the deceased mother/wife of the Plaintiffs namely Mst. Rafat Sultana Khan in the year 1983 and the said house was later on transferred/mutated in the name of plaintiffs being legal heirs of Mst. Rafat Sultana Khan.

3. Having instituted the instant suit, the summons/notices were issued to the defendants and in deference to the summons/ notices, the defendant No. 8 & 9 filed their respective written statement, nonetheless, the defendant No.1 to 3 failed to contest the matter and upon having being served properly, they were debarred from filing written statement by the learned Additional Registrar (O.S.) as per his diary dated 24.04.2018.

4. The defendant No.8 in their written statement introduced on record that said house was transferred in the name of plaintiffs being legal heirs of Riffat Sultana on production of letter of administration granted in SMA No.174/2013 while defendant No.9 in his written statement went on to state that any instrument if produced in his

office, he is bound to register the same and has evinced unawareness regarding the dispute of the plaintiffs and defendant No.1 to 3.

5. Perusal of the file reflects that plaintiffs filed an application under Order XXXIX Rules 1 & 2 CPC bearing CMA No. 12811 of 2017 seeking injunctive relief which was granted as prayed by this court vide order dated 15.08.2018.

6. It seems that on 30.01.2019 issues were framed and, thereafter, matter was referred to Commissioner for recording evidence. The issues settled by this court are as under:-

“1. Whether the suit is maintainable?

2. Whether the Declaration and Confirmation of Oral Gift Deeds dated 21.11.2013 and 04.12.2013, executed by the deceased Mst. Rasheeda Begum in favour of defendants No.1 and 2, registered with the Sub-Registrar-I, Jamshed Town, Karachi in respect of the Bungalow No.56-B, admeasuring 427 sq. yds., situated in Block-2, PECHS Karachi are illegal, fraudulent, collusive and void document, required to be cancelled?

3. Whether the plaintiffs are the sole and exclusive owners of Bungalow No.56-B, admeasuring 427 sq. yds., situated in Block-2, PECHS Karachi being their ancestral property and inherited by them from deceased Mst. Rifat Sultana Khan?

4. Whether the plaintiffs are entitled to the possession of Bungalow No.56-B, admeasuring 427 sq. yds., situated in Block-2, PECHS Karachi by ejecting the defendants No.1 to 3 or any person holding the possession of the same through or under them?

5. Whether the plaintiffs are entitled to the mesne profits at the rate of Rs.70/- per day each of defendants No. 1 to 3 for the use and occupation of the Bungalow No.56-B, admeasuring 427 sq. yds., situated in Block-2, PECHS Karachi?

6. Whether the plaintiffs are entitled to the damages amounting to Rs.6,00,00,000/- from

defendants No.1 to 3 for causing mental distress to plaintiffs?

7. Whether the plaintiffs are entitled to the relief claimed for?

8. What should the decree be?"

7. Learned counsel for the plaintiffs at the outset contended that the plaintiffs are overseas Pakistanis and have become victim of fraud of like nature played against them by maids. He strenuously contended that the said defendant No. 1 to 3 were employed by their paternal grandmother on monthly remuneration for looking after and home-chores who in turn hatched a conspiracy to deprive the plaintiffs from their ancestral property, got signatures of their paternal grandmother on the gift deeds while the Donor was not even owner of the said house, therefore, the said gift deeds are forged and fabricated documents just to deprive the plaintiffs from the said property. He vociferously argued that the defendant Nos. 1 to 3 have neither any blood relation with the plaintiffs or Mst. Rashida Begum nor they are any close relatives of the Mst. Rashida Begum, therefore, the question of gifting out the said house to the defendant No.1 to 3 does not arise. His next stance was that the defendant Nos. 1 to 3 used to maltreat the paternal grandmother of the plaintiffs owing to which she remained unconscious and left by the defendant No. 1 to 3 in hospital where she took her last breath and during her admission in hospital, the plaintiffs used to care their paternal grandmother. He further contended that the defendant Nos. 1 to 3 are in illegal possession of the said house without any lawful authority, they be evicted from the said house and also prayed for the mesne profit as well as damages for suffering mental torture as

well as agony at the hands of defendant Nos. 1 to 3. While concluding his arguments, learned counsel placed his reliance on the precedents of Superior Courts reported as PLD 1959 (W.P) Lahore 932, 2017 MLD 1488, PLD 2003 Azad J&K 25, 2017 MLD 1251, 2016 SCMR 1225, 2008 SCMR 1384 and 2017 SCMR 402.

8. The private defendant Nos. 1 to 3 who are the main contesting parties in this suit failed to appear to defend their stance nor filed their notions but they have been debarred despite extending considerable time.

9. Heard the arguments. Issue No.1 is correlated and concomitant to the maintainability of the suit. Nonetheless, the nomenclature and cataloguing of the lawsuit expresses and articulates a suit for declaration, cancellation, possession, mesne profit, damages and permanent & mandatory injunction. The burden to prove this issue rests upon the plaintiff. Since, there can be no denial to the legally established principle of law that locus standi and legal character are mandatory requirement for one to maintain a suit and in absence thereof a suit shall not be maintainable. The present plaintiffs filed the instant suit not only for declaration of their own legal status as actual owner but also sought cancellation of the Gift Deeds. The plaintiffs could maintain the suit for declaration of their legal status and could also maintain a suit for cancellation of a document under such declaration. The legal position, being so, shall stand clear from a reference to Section 39 of the Specific Relief Act, 1877 which reads as:--

“39. When cancellation may be ordered: Any person against whom a written instrument is void

or voidable, who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it an order it to be delivered up and cancelled.”

10. It is gleaned from the appraisal of the foregoing that “any person” can seek cancellation of a written instrument as 'void or voidable' only if remaining of such document outstanding may cause him serious injury. The other questions being mixed questions of law and fact, would require adjudication and determination hence suit cannot be said to be not maintainable in its present form. Accordingly, **Issue No.1 is answered in affirmation.**

11. Issue No.2. The penultimate issue before this court is in respect of genuineness of the Gift Deeds dated 21.11.2013 and 04.12.2013 executed in favour of defendant No.1 & 2. The present cause hinges upon the private defendant Nos. 1 to 3 as well as plaintiffs. From a cursory glance on the record, it reveals that on 29.11.2017 defendant Nos. 1 to 3 were represented by their advocate but since filing of the vakalatnama, the learned counsel as well as defendant Nos. 1 to 3 remained absent. Neither any written statement had been filed nor any single document had been introduced on record to support the version of the defendant No.1 to 3.

12. From an austere look on record, it came on the surface that having framed the issues, evidence was led by the plaintiffs to support their version. Plaintiff No.2 during his examination-in-chief introduced on record certain documents. Exh. P/3 and P/3-A being allotment letter and Sub-Licence Form-A issued by defendant No.8 in favour of one T.E. Qureshi who happens to be maternal grandfather

of the plaintiff No.2 to 5 and father-in-law of the plaintiff No.1 as well as original owner of the said house. Plaintiff No.2 further produced an application dated 26.08.1976 addressed to defendant No.7 by the T.E. Qureshi as Exh. P/6 affirming that he has gifted out the said house to his daughter Mst. Rifat Sultana, thereafter, the defendant No.7 referring the said request of Mr. T.E. Qureshi, mutated/ transferred the said house in favour of Mst. Rifat Sultana vide their letter dated 29th November, 1976, the said letter was also exhibited by the plaintiff as Exh. P/7. Plaintiff No.2 also introduced on record Exh.P/8 which connotes that said Mst. Rifat Sultana gifted out the said house in favour of Mst. Rashida Begum and such letter was also issued by the defendant No.8, thereafter, the said Mst. Rashida Begum by way of a Gift Deed 24.10.1983 gifted out the said house to her daughter Mst. Rifat Sultana who happens to be mother of plaintiff No. 2 to 5 and wife of plaintiff No.1 the same Gift Deed was also exhibited by the plaintiff No.2 in his evidence as Exh. P/9 and such mutation letter was also issued by the defendant No. 7 & 8 which was also exhibited by the plaintiff No.2 as Exh. P/10 & P/11 respectively affirming that the deceased wife of plaintiff No.1 and mother of plaintiff No.2 to 5 namely Mst. Rifat Sultana was absolute and lawful owner of the said house and with the passage of time, the said Mst. Rifat Sultana died on 15.12.1991, whereafter, plaintiffs being legal heirs of the said Mst. Rifat Sultana applied for the letter of administration for the administration of the said house before the learned District Judge East, Karachi vide SMA No.174/2013 which was granted vide order dated 24.10.2013 and in deference of the said order, the defendant No.7 & 8 transferred/mutated the said house in

the names of plaintiff being legal heirs of Mst. Rifat Sultana and the said mutation/transfer letter issued by defendant No. 7 & 8 were also exhibited by the plaintiff No.2 in his examination-in chief as Exh. P/13, P/14 and P/15 respectively.

13. A question arises in a prudent mind whether a property can be gifted in favour of donee by the donor when at the time of gifting out a property he/she/donor not the owner? The private defendant Nos. 1 & 2 claim that the said house was gifted to them by Mst. Rashida Begum in the year 2013. It is conducive to mention here that the said Mst. Rashida Begum through a declaration of gift dated 24.10.1983 gifted out the said house to her daughter Mst. Rifat Sultana who happens to be wife of plaintiff No.1 as well as mother of plaintiff Nos. 2 to 5 and in deference of the said Gift Deed dated 24.10.1983, the defendant No.7 & 8 mutated/transferred the said house in the name of Mst. Rifat Sultana, therefore, the right to transfer/gift the said house rested with Mst. Rifat Sultana but the alleged claim of defendant No.1 & 2 appears to be concocted one for the reasons that Mst. Rashida Begum was not the owner of the said house in the year 2013 nor she had any right to gift/transfer the said house in the name of defendant No. 1 & 2, therefore, the alleged Gift Deeds which are nucleus of the issue under discussion appeared to be forged and liable to be cancelled. It is by now judicially settled that at the time of gifting out a property/asset, the donor must be owner of the said property/asset otherwise the Gift Deed cannot be honoured and liable to be cancelled outrightly.

14. No doubt the alleged Gift Deeds executed in favour of the defendant No. 1 & 2 appears to be a registered instrument with the defendant No.9. The execution or appearance of the party before the Registrar/Sub-Registrar is not conclusive proof of the execution of Gift. In such a case, the Court will have an overall view of all the attending circumstances of transaction and no presumption could be attached to such type of document. Reliance can be placed on the cases of Qazi Altaf Hussain and another v. Ishfaq Hussain 1986 SCMR 1427 and Muhammad Khan v. Mst. Rasul Bibi PLD 2003 SC 676. There is no doubt that the certificate of registration or endorsement on the registered document carries a presumption but no such presumption can be drawn therefrom that such person has really executed the same and it will be open to the parties to prove that the document in question was not really executed by the person shown to have executed the same. The certificate of registration is only to show the execution of the document and presumption beyond that cannot be drawn therefrom. This view is supported by the dictum laid down in the cases of Gopal Das and others v. Sri Thakurji and others AIR 1943 PC 83 and Siraj Din v. Mst. Jamilan and another PLD 1997 Lah. 633. In the latter case, a Division Bench of the Lahore High Court observed that the endorsement made by the Registrar on questioned document would not prove that such document was executed by donor in favour of donee; contents of gift-deed and constituents of gift must be proved in consonance with the provisions of "Qanun-e-Shahadat" and Rules of gifts under Muhammadan Law. The deliberations and rationale in the preceding paragraphs suggest that Mst. Rashida Begum was not the owner of the said house at the time of execution

of the alleged Gift Deeds in favour of the defendant No. 1 & 2 hence she was not competent to make a Gift in favour of the defendant No. 1 & 2.

15. Apart from above, if it is assumed that the alleged Gift Deeds are valid and registered with the defendant No.9 in favour of the defendant No. 1 & 2 but the said defendant Nos. 1 & 2 have neither any blood relations with the donor Mst. Rashida Begum nor are close relatives of the donor Mst. Rashida Begum for which the preference could be given to them. It is the responsibility of the donees/ defendant No.1 & 2 to prove that why this property was gifted to them? What was the reason behind it? It was the basis responsibility of the donees/defendant No.1 & 2 to prove that the gift was outcome of donor free will and not of their influence. Furthermore, the Hon'ble Supreme Court of Pakistan in the same of Mst. Kalsoom Bibi v. Muhammad ARif (2005 SCMR 135) held a dictum and it is conducive to reproduce the relevant constituent/excerpt of the said verdict which is delineated as follows:-

“9. The next important question is with regard to the proof of the gift-deed in question. It is a matter of record that the decd as such is challenged on grounds of conspiracy, fakeness and forgery amounting to fraud. In these circumstances, the beneficiary under the document is bound not only to prove the execution of document but also to prove the, actual factum of gift by falling back on the three ingredients of proposal, acceptance and delivery of possession. These have to be proved independent of the document. This Court has quite recently held in case of Ghulam Haider 2003 SCMR 1829 that essentials of a valid gift were required to be proved independent of the deed even if it was registered, in case it is challenged on grounds of forgery etc. Keeping in view the principle so enunciated, we are clear in our mind that the

defendants have not produced an iota of evidence to prove the original factum of gift; the proposal, the acceptance and the delivery of possession. We have already discussed that the possession under the gift has not been delivered at all. The gift can be declared void on this score alone and as well.

10. The lady plaintiff and her son, who was minor at the time of Muhammad Fazil's death, are the actual legal heirs of the deceased besides his mother Mst. Barkat Jan. In the instant case it is a gift which tantamounts to disinheriting the closest of the legal heirs or, even if genuine, it otherwise practically disinherits the legal heirs. In such given circumstances, when, through a gift, deprivation of legal heirs is involved, either intended or unintended, the burden to prove original transaction of gift with all its ingredients strongly rests, upon the beneficiaries of such gift. This Court, in similar circumstances, had nullified a transaction of gift in case of Muhammad Ashraf 1989 SCMR 1390, where the question arose as to why in the presence of legal heirs, particularly the children, the donor would have gifted out the entire land to a nephew. Quite recently in case of Barkat Ali 2002 SCMR 1938, this Court once again reiterated such principle holding that in cases of gifts, resulting into disinheriting of the legal heirs, the burden to prove original transaction of gift squarely rests upon the donees. Such burden has not been touched at all, much less proved.”

16. Reverting to the merits of the issue under discussion, Section 39 of Specific Relief Act, 1877 empowers and enables the court to cancel any instrument when it is established by the person appeared before the court that the instrument is void. For the ease of reference, Section 39 of Specific Relief Act, 1877 is reproduced as under:-

“...39. When cancellation may be ordered: Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it an order it to be delivered up and cancelled...”

17. It is gleaned from the appraisal of the foregoing that “any person” can seek cancellation of a written instrument as “void or voidable”. Since it has been established from the foregoing deliberation that the Gift Deeds dated 21.11.2013 and 04.12.2013 are void and voidable instrument which needs to be cancelled, therefore, in view of the rationale contained hereinabove, the **Issue No.1 is answered in affirmation.**

18. In my considerate view, the Issue Nos. 3, 4 & 5 are inextricably linked based upon similar evidence & record, therefore, it would be advantageous to discuss the same simultaneously, in the same breath. Plaintiff No.2 in his examination-in-chief produced an application dated 26.08.1976 addressed to defendant No.7 by the T.E. Qureshi as Exh. P/6 affirming that he has gifted out the said house to his daughter Mst. Rifat Sultana, thereafter, the defendant No.7 referring the said request of Mr. T.E. Qureshi, mutated/ transferred the said house in favour of Mst. Rifat Sultana vide their letter dated 29th November, 1976, the said letter was also exhibited by the plaintiff as Exh. P/7. Plaintiff No.2 also introduced on record Exh.P/8 which connotes that said Mst. Rifat Sultana gifted out the said house in favour of Mst. Rashida Begum and such letter was also issued by the defendant No.8, thereafter, the said Mst. Rashida Begum by way of a Gift Deed 24.10.1983 gifted out the said house to her daughter Mst. Rifat Sultana who happens to be mother of plaintiff No. 2 to 5 and wife of plaintiff No.1 the same Gift Deed was also exhibited by the plaintiff No.2 in his evidence as Exh. P/9 and such mutation letter was also issued by the defendant No. 7 & 8 which was also exhibited by the plaintiff No.2 as Exh. P/10 & P/11 respectively

affirming that the deceased wife of plaintiff No.1 and mother of plaintiff No.2 to 5 namely Mst. Rifat Sultana was absolute and lawful owner of the said house who with the passage of time, died on 15.12.1991, whereafter, plaintiffs being legal heirs of the said Mst. Rifat Sultana applied for the letter of administration for the administration of the said house before the learned District Judge East, Karachi vide SMA No.174/2013 which was granted vide order dated 24.10.2013 and in deference of the said order, the defendant No.7 & 8 transferred/mutated the said house in the names of plaintiff being legal heirs of Mst. Rifat Sultana and the said mutation/transfer letter issued by defendant No. 7 & 8 were also exhibited by the plaintiff No.2 in his examination-in chief as Exh. P/13, P/14 and P/15 respectively. Exh. P-13 to P-15 elucidate that the plaintiffs being legal heirs of deceased Mst. Riffat Sultana are lawful owners of the said house being their ancestral property. The private defendant No. 1 to 3 neither turn up to cross-examine the plaintiffs to controvert the claim nor filed any written statement, therefore, the claim of the plaintiffs is unrebutted. 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.”

19. Per law, one would normally be regarded “owner” who is so appearing from the Record of the Rights. Exh. P-13 to P-15 (available at page No. 83 to 91 of evidence file No.1) are the Mutation/Transfer Order issued by the defendant No. 7 & 8 showing that the plaintiffs are the owners of the said house being legal heirs of deceased Mst. Riffat Sultana and the said house is their ancestral property,

therefore, not only they are entitled for the possession thereof but also mesne profit as claimed by the plaintiffs. In the given circumstances and deliberation, the **Issues No. 3 to 5 are answered in affirmation.**

20. Issue No. 6 germane to the damages claimed by the plaintiffs for causing mental distress at the hands of private defendant Nos. 1 to 3. It is clear that the plaintiffs did not claim any special damages but damages in general. Mental shock, agony and torture imply a state of mind. Such state of mind can be proved only by a positive assertion of one who experiences the same. Such assertion on oath was always there in verified plaint and was reiterated through affidavit in evidence. Mental shock, agony and torture did not imply that plaintiffs should have suffered collapse or heart condition to justify his claim for damages arising from causing mental distress on the part of defendant No.1 to 3. Mental shock, agony and torture is thus proved on proof of circumstances when plaintiff No.2 landed Pakistan from abroad to see their ancestral house and kept himself in search of the defendant No.1 to 3 being maids of the plaintiffs or maids of their paternal grandmother. The plaintiffs asserted such other facts in the plaint which proves that owing to the certain acts of the defendant Nos. 1 to 3, the plaintiffs suffered a lot, however, since the defendant Nos. 1 to 3 used to be maids of the paternal grandmother of the plaintiffs and the plaintiffs admitted this fact in their plaint as well as in affidavit-in-evidence. It is settled exposition that damages are awarded not to punish to wrongdoer but to compensate the man injured but here in this case where the private defendants No. 1 to 3 are the maids token damages of Rs.500,000/-

(Rupees Five Hundred Thousand) are awarded, therefore, the **Issue No. 6 is answered accordingly.**

21. So far as issue No.7 & 8 are concerned, sanguine to the set of circumstances and ramification as well as connotation of statues, the plaintiffs are entitled to the decree in view of the foregoing. Office is directed to prepare the decree in terms settled above.

JUDGE

Aadil Arab