

IN THE HIGH COURT OF SINDH HYDERABAD CIRCUIT

BEFORE:
Mr. Justice Muhammad Shafi Siddiqui

Civil Revision Application No. 87 of 2019

Mst. Almas Begum & another
Versus
Abdul Aziz Memon & others

Date of Hearing: 24.02.2020

Applicants: Through M/s Nadir Khan and Saleemuddin A. Patoli Advocates.

Respondents No.1 to 5: Through Mr. Muhammad Arshad S. Pathan Advocate.

Respondents No.7 to 11: Through Mr. Allah Bachayo Soomro, Additional Advocate General Sindh.

J U D G M E N T

Muhammad Shafi Siddiqui, J.-This Civil Revision is against concurrent findings of two Courts below. Respondents No.1 to 6 filed Suit bearing No.107 of 2017 against the applicants and some officials, such as Mukhtiarkar, Additional Deputy Commissioner, Sub-Registrar, Member Board of Revenue and Province of Sindh etc., which was decreed against which applicants filed appeal which also met with the same fate. The suit involved a property bearing Survey No.1864 measuring 113-5 sq. yards situated in Ward 'C', Memon Para, Tando Allahyar.

Brief facts are that the subject property was originally owned by one Qadir Bux Memon who died leaving behind four sons, three daughters, and a widow, disclosed as under:-

- i. Abdul Aziz (Son)
- ii. Muhammad Essa (Son)
- iii. Abdul Rehman (Son)
- iv. Muhammad Aslam (Son)
- v. Mst. ShamsunNisa (daughter)
- vi. Mst. NajamunNisa (daughter)
- vii. Mst. Roshan (daughter)
- viii. Mst. Sara (Mst. Anwari) (widow of Qadir Bux Memon)

After death of Qadir Bux Memon, the original owner, the subject property, was mutated in the names of all legal heirs as per their respective shares in the city survey record. On 13.04.1988 Mst. Shams-un-Nisa, Najam-un-Nisa and Mst. Roshan gifted their shares in the subject property in favour of their one brother Muhammad Aslam whereas other brothers Muhammad Essa (plaintiff No.2 and Abdul Rehman plaintiff No.6) sold out their shares in the subject property to Muhammad Aslam under a registered sale deed, having Entry dated 03.11.1994. Though it does not disclose as to how entire property was mutated/transferred in the name of one brother Muhammad Aslam, as it is not clear and/or come on record as to how shares of Abdul Aziz and his mother were transferred however, since none of the legal heirs of deceased Qadir Bux Memon has objected the transfer on this score, therefore, it is immaterial to probe the transfer in favour of Muhammad Aslam.

Muhammad Aslam expired on 02.05.2003 leaving behind his legal heirs as under:-

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|------|----------------------|-------------|
| i) | Tanveer Ahmed | (Son) |
| ii) | Mst. Wajeeha | (Daughter) |
| iii) | Mst. Almas | (widow) and |
| iv) | Mst. Saraan (Anwari) | (mother) |

On 31.10.2007 Tanveer Ahmed son of Muhammad Aslam died unmarried leaving behind his legal heirs, to inherit his (Tanveer's) share from the subject property, as under:-

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|------|----------------------|---------------|
| i) | Mst. Almas | (Mother) |
| ii) | Mst. Wajeeha | (Sister) |
| iii) | Mst. Saraan (Anwari) | (Grandmother) |
| iv) | Muhammad Essa | (Uncle) |
| v) | Abdul Aziz | (Uncle) |
| vi) | Abdul Rehman | (Uncle) |

The daughters of Qadir Bux Memon, being Phoophi's of deceased Tanveer Ahmed were not entitled to inherit any share from the property of the deceased, as pleaded.

Mst. Saraan (Anwari) died on 20.12.2008 leaving behind her legal heirs:-

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|------|--------------------|------------|
| i) | Muhammad Essa | (Son) |
| ii) | Abdul Aziz | (Son) |
| iii) | Abdul Rehman | (Son) |
| iv) | Mst. Shams un Nisa | (Daughter) |
| v) | Mst. Najam un Nisa | (Daughter) |
| vi) | Mst. Roshan | (Daughter) |

Sons and daughters of Muhammad Aslam were not pleaded as legal heirs in view of Fatwah, allegedly obtained, despite the fact that they could have a case under section 4 of Muslim Family Law Ordinance, 1964.

Despite all these events that took place, the property remained in the name of Muhammad Aslam in the revenue record whereas possession remained with immediate family of Mst. Almas who has been receiving rents from the shops. The subject property comprises of seven shops on the ground floor and a residential unit on the first floor.

Earlier a suit was filed as Suit No.71 of 2010 for declaration of rights in respect of property/share of deceased Tanveer Ahmed and deceased Mst. Anwari with prayer that the sons and daughters of Qadir Bux Memon along with Mst. Almas and Mst. Wajeeha be declared as legal heirs of deceased Tanveer Ahmed to inherit share out of the property left and also a declaration to the effect of L.Rs of Mst. Saraan to inherit her share out of the assets left by her. It was at this point of time in the aforesaid earlier suit when it was disclosed that the suit property was gifted by Muhammad Aslam in favour of his wife Mst. Almas on the basis of declaration and confirmation of oral gift dated 08.01.2003 and hence insofar as this property is concerned there was no question of

inheritance as this property was never left as assets either by Tanveer Ahmed or Mst. Saraan (Anwari Begum).

I have heard learned counsel for parties and perused the material available on record as well as the evidence filed along with this Revision Application. The trial Court's record was not summoned as under section 115 CPC parties are required to file all documents with the Revision Application, which they did.

The trial Court on the pleadings of the parties framed following issues:-

1. *Whether suit of the plaintiff is maintainable according to law?*
2. *Whether suit property was originally owned by deceased Qadir Bux Memon, who after his death left four sons being (i) Abdul Aziz, (ii) Muhammad Essa, (iii) Abdul Rehman, (iv) Muhammad Aslam and three daughters being (i) Mst. Shams Un Nisa, (ii) Mst. Najam un Nisa, (iii) Mst. Roshan and one widow Mst. Saran who all inherited suit property to the extent of their respective shares, and then through gift and through sale deed executed by other co-owners deceased Muhammad Aslam became full owner of suit property?*
3. *Whether deceased Muhammad Aslam left behind one son Tanveer Ahmed and Daughter Mst. Wajiha, Wife Mst. Almas, and Mother Mst. Sara, and on 31.10.2007 Tanveer was died as unmarried leaving behind defendant No.1 and 2 being his mother and sister, plaintiffs No.1 and 2 as well as defendant No.8 as his uncles, and Mst. Sara as his grandmother?*
4. *Whether despite death of Muhammad Aslam, Tanveer Ahmed and Mst. Sara Foti Khata was not changed and remain intact in the name of Muhammad Aslam?*
5. *Whether in FC Suit No.07 of 2012 filed by the plaintiff No.1 in the court of Civil Judge I Tando Allahyar for declaration of status of deceased Tanveer Ahmed and Mst. Sara legal defendants No.1 and 2 filed their written statement disclosing that suit property has been gifted by Muhammad Aslam during his life time through Oral Gift statement in favour of defendant No.1, and the oral gift is forged and baseless?*
6. *Whether Mukhtiarkar and District Officer Revenue Tando Allahyar have legally and lawfully refused to change mutation in the name of defendant No.1 on the basis of alleged oral gift deed?*

7. Whether order passed by Member (Gothabad) Board of Revenue Hyderabad dated 01.08.2011 is illegal, and malafide?
8. Whether being uncles of Tanveer Ahmed and sons of Mst. Saran, the plaintiff and defendant No.8 have right to inherit the suit property to the extent of their respective shares?
9. Whether the Revenue entry in the name of defendant No.1 in City Survey record is illegal and unlawful and is liable to be cancelled?
10. Whether plaintiff has any cause of action for filing the suit?
11. Whether suit is not properly valued and suit is barred under the provisions of specific relief act and limitation?
12. Whether defendant No.1 is legal and lawful owner of the suit property by virtue of declaration confirmation of oral gift dated 08.01.2003 made by her husband Muhammad Aslam Memon and mutation in her name has been legally affected in the City Survey Record?
13. Whether suit property is partitioned able?
14. Whether suit is barred by any law of limitation?
15. What should the decree be?

However, core issue arising out of the pleadings is as to whether a gift in respect of the subject property was executed by Muhammad Aslam in favour of his wife. In case the answer comes in affirmative, all other questions would be rendered immaterial as far as subject property is concerned. Applicants' counsel has not argued on the question of maintainability of the suit and has straightaway argued the merits of the case.

There is no evidence available on record to question the validity and lawful execution of the gift. On the contrary it is claimed that there is sufficient evidence on record, which has gone un-rebuttal that the gift deed was executed in presence of witnesses and there was no necessity of its registration under the law.

The declaration of oral gift is also available on record at page 95 being exhibited as Exh. 70-B. It was never challenged by moving any application to refer the Gift Deed for having an opinion of handwriting or

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signature expert. It is witnessed by one Jamshed Ali Patoli and Muhammad Yousuf, besides being signed by donor and donee i.e. Muhammad Aslam Memon and Mst. Almas Begum wife of Muhammad Aslam. As pointed out above, this would be a core issue as to whether this execution would withstand the pleadings of the respondents/plaintiffs and evidence led by them in support thereof.

The trial Court while discussing this core issue, which he discussed along with other issues, such as Issues No.6, 7, 9 and 12, concluded that it was a mortgaged property before House Building Finance Corporation under the Deed of Assignment, which was redeemed on 16.05.2007 bearing registration No.998, MF Roll No.U-19/714 dated 31.05.2007. It is also maintained by the trial Court that this declaration and confirmation of oral gift of the suit property was neither registered under section 17 of the Registration Act nor any notice was issued by Muhammad Aslam Memon to the mortgagee that this property was being transferred by him to the defendant No.1 who will exercise all the rights as being owner.

The trial Court then reproduced the order of Mukhtiarkar who advised the applicants to approach Civil Court. However, the trial Court by taking cognizance of this issue noted that instead of approaching the Civil Court, the Member (Gothabad) Board of Revenue was approached who passed an order directing the concerned revenue officer to keep the entry of the disputed property in the name of the applicants/donee. It is observed by trial court that this was an unlawful act on the part of the applicants, besides the fact that firstly this declaration and confirmation of oral gift was not registered and secondly the property was mortgaged with Housing Building Finance Corporation.

The appellate Court, being in agreement with the reasoning of the trial Court, dismissed the appeal and declared that mere production of attesting witnesses could not prove the execution of documents as it is

the quality and contents of the depositions of witnesses which shall count. The reasons assigned for not accepting the evidence of the witnesses was that they were related to the Donee and that it was executed in the house of deceased Muhammad Aslam.

With the assistance of the counsels I was able to go through the evidence of two witnesses of the Gift Deed i.e. Jamshed Ali son of Abdul Hameed and Muhammad Yousuf son of Muhammad Ramzan. I have also perused the evidence of Sikandar who appeared as attorney on behalf of applicants.

Let us first examine evidence of two witnesses who recorded their evidence as witnesses of the Gift Deed. They have stated in their examination-in-chief that they were witnesses of the gift deed executed by deceased Muhammad Aslam in favour of his wife Mst. Almas. The witnesses also admitted that the same was executed on 08.01.2003 and that Muhammad Aslam Memon handed over the possession/keys to defendant No.1 Mst. Almas who accepted it. They also confirmed that apart from them, there were Sikandar Ali, late Muhammad Aslam, Mst. Almas Begum and Tanveer who were present.

The cross-examination would eventually conclude the quality of evidence allegedly considered by the two Courts below. Being in relation with the beneficiaries does not mean that a witness does not qualify to be a witness of the gift deed. It was property of Muhammad Aslam which was being gifted to one Mst. Almas, being his wife, and this Deed being witnessed by family members should not have raised the eyebrows, as it was a family transaction and the property was of Muhammad Aslam, the donor. Yes, they could have questioned the execution, had it been cross examined to such an extent. None of the witnesses was questioned that their evidence was mala fide and they were examined only as they are in relations with Mst. Almas. The advocate who has cross examined these

two witnesses himself suggested in cross that Muhammad Aslam died natural death as he was a patient of Hepatitis. It is nobody's case ever otherwise that deed was executed by donor on death bed. It was suggested that the Gift Deed was executed in the house of deceased Muhammad Aslam. One of the witnesses confirmed that the gift deed was reduced in writing consisting of five pages. It was also suggested by the counsel who cross examined one of the witnesses Jamshed Ali that only one page was a stamp paper whereas rest of the papers were ordinary or regular papers.

It was nowhere suggested by the counsel that they (witnesses) appeared as a witness on account of relationship with beneficiary. It was nowhere suggested that no such gift was ever executed and it was a forged and fabricated document. It was nowhere suggested that in order to deprive other legal heirs this gift deed was maneuvered. All that was suggested to witness Muhammad Yousuf was that it was not gifted in his presence, which he denied. For the sake of convenience the examination-in-chief and the cross-examination of the two witnesses, which goes to the root of the case, is reproduced as under:-

DEPOSITION OF JAMSHED ALI

"EXAMINATION IN CHIEF

THROUGH: MR. SALEEMUDDIN PATOLI LEARNED
ADVOCATE FOR DEFENDANT NO.1 AND 2

I am witness of gift deed executed by deceased Mohammad Aslam in favour of defendant No.1 Mst. Almas, same was executed on 08.01.2003. Deceased Mohammad Aslam handed over the possession/ keys to defendant No.1 Mst. Almas who accepted it. At the time of gift Sikandar Ali, Late Mohammad Aslam, Mst. Almas Begum, Mohammad Yousuf, Late Tanveer Ahmed were present with me. This is what I have to say.

CROSS TO MR. WALI MOHAMMAD THEBOW LEARNED
ADVOCATE FOR PLAINTIFF NO.2 TO 6

It is correct to suggest that deceased Mohammad Aslam is my brother in law. It is correct to suggest that Mohammad Aslam got natural death as he was the patient

of hepatitis C. Deceased Mohammad Aslam was seriously ill for last 14/15 months till death. Voluntarily says, that he was not bed ridden. The gift deed was executed at the house of deceased Mohammad Aslam. I don't know where the gift deed was written. Gift deed was reduced in writing on stamp paper. The gift deed is written on 5 pages. It is correct to suggest that only one page is stamp paper whereas the remaining are ordinary/regular papers. The matter pertains to fifteen years old so far as my memory is working I made one signature on gift deed. I am not confirm about the quantity of signature made by deceased Mohammad Aslam and Mst. Almas. I am only the witness and I don't know who attested the gift deed. It is incorrect to suggest that we have mutated the entry in favour of defendant No.1 Mst. Almas with malafide collusion of Member Board of Revenue. It is incorrect to suggest that plaintiffs are entitled for relief sought in this suit. It is incorrect to suggest that I am deposing falsely.

CROSS TO: MR. MOHAMMAD YASEEN LEGHARI LEARNED ADVOCATE FOR PLAINTIFF NO.1

DEPOSITION OF MUHAMMAD YOUSUF

"EXAMINATION IN CHIEF

THROUGH: MR. SALEEMUDDIN PATOLI LEARNED ADVOCATE FOR DEFENDANT NO.1 AND 2

I am witness of gift deed executed by deceased Mohammad Aslam in favour of defendant No.1 Mst. Almas, same was executed on 08.01.2003. Same was executed in my presence and I signed the same. We six persons namely Late Mohammad Aslam, Mst. Almas, Jamshed Patoli, Sikandar Patoli, Late TANveer Ahmed and me were present. Mohammad Aslam gifted the suit property and same was accepted by defendant No.1 Mst. Almas. This whole took in my presence. This is what I have to say.

CROSS TO MR. WALI MOHAMMAD THEBOW LEARNED ADVOCATE FOR PLAINTIFF NO.2 TO 6

The handing and taking of suit property as a gift was reduced in writing in my presence. I was only called for signature as deceased Mohammad Aslam disclosed me for this gift. It is correct to suggest that gift deed was read over to me by Sikandar. I do not know about any survey number or etc of the gift/suit property. As the matter is quite old one so I don't know the accurate number of signatures. My mother tongue is Urdu. It is correct to suggest that I have no any relation with defendants. It is incorrect to suggest that suit property was not gifted by deceased Mohammad Aslam in favour of defendant No.1 in my presence. I think the gift deed was in writing in English language but I am not confirm. I don't know on how many pages the gift deed was written. I have no any further

involvement in this gift matter except as signatory witness. It is incorrect to suggest that I am deposing falsely.

CROSS TO: MR. MOHAMMAD YASEEN LEGHARI LEARNED ADVOCATE FOR PLAINTIFF NO.1

Adopted the same cross conducted by learned counsel for plaintiff No.2 to 6."

The trial Court considered two points i.e. firstly the gift deed was not registered and the other that it was mortgaged with House Building Finance Corporation. Let us now discuss these two points.

The question of transferring the property as being a mortgaged property came under discussion before Hon'ble Supreme Court in the case of Muhammad Sadiq v. Muhammad Mansha reported in PLD 2018 SC 692. The question was/is whether a mortgagor, despite fact that the property was mortgaged by him/her could enter into a transaction for the transfer of the property. This was answered categorically in paragraph 6 of the said judgment, which is reproduced as under:-

"6. In our view, law that was regarded as settled 125 years ago can hardly be disturbed today. As will be seen from the foregoing passages, the equity of redemption is simply the interest in the property that remains with the mortgager minus the interest created thereon in favour of the mortgagee, and it is in this interest that can be dealt with by the mortgager in accordance with law. It follows from this that if the mortgager enters into an agreement to sell subsequent to the creation of the mortgage, he can do so. He is then selling his property burdened as it is with the mortgage in favour of the mortgagee, i.e., he is disposing off the equity of redemption. As this is permissible under law, it follows that if the mortgager having entered into such an agreement to sell does not abide by the same, then the buyer of the property is entitled to bring a suit for specific performance. Of course, the rights and interests of the mortgagee will not be defeated, since the buyer will step into the shoes of the mortgager as seller. If the factum of the mortgage is known to the buyer then he can simply join the mortgagee as a defendant in the suit so that if he succeeds in obtaining a decree for specific performance the rights of the various parties can be appropriately dealt with. However, even if the factum of mortgage is unknown to

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the buyer and does not come to light during the course of the suit, any decree obtained by the buyer would still, and nonetheless, remain subject to the rights and interests of the mortgagee."

Thus, the Bench concluded the equity and rights under the redemption could be passed on to a prospective Donee or buyer who then either as a donee or buyer can act as mortgager for the redemption of the property. Thus the right of the mortgagor insofar as transferring the property is concerned are protected minus the interest created thereon in favour of mortgagee or any financial institution. The transfer of the subject property being mortgaged cannot be questioned as long as the interest of mortgagee is intact. In the said case that aspect was taken care of and all rights of the mortgagees were intact.

The subsequent question that relates to registration of gift was also considered by Hon'ble Supreme Court in the case of Abdullah v. Abdul Aziz reported in 1987 SCMR 1403. It all depends upon execution and proof of the oral gift. As long as an oral gift is proved without a shadow of doubt, under Mohammaden Law, such gifts are not necessarily required to be registered. On account of fiscal issues, which may involve duties etc a lien could be made by a party having interest but the execution of the document itself cannot be challenged on the basis that it was not registered. This question was decided by the Hon'ble Supreme Court in the aforesaid case and though subsequently the Bench in the case of Allah Diwaya v. Ghulam Fatima reported in PLD 2008 SC 73 distinguished it however gist of the arguments in the subsequent case was that the oral gift was never proved by the witnesses. This distinction is sufficient for not applying it in the present case as the witnesses categorically deposed about execution of gift and their evidence on that score was not seriously challenged/cross examined and hence the factum of execution of gift virtually remain un-rebutted.

It is thus a case of mis-reading and non-reading of evidence. With these finding, on the crucial issue of "Gift" this revision is allowed and so far as subject property is concerned it was not available for respondent to claim their share as being legal heirs of Muhammad Aslam and Mst. Sara (Mst. Anwari) as no shares were passed on to them.


JUDGE. 13/3/2020.