

HIGH COURT OF SINDH,

CIRCUIT COURT, HYDERABAD

R.A. No.02 of 2011
[Syed Mazahir Hussain versus Syed Tajammul Hussain & others]

R.A. No. 03 of 2011
[Syed Mazahir Hussain versus Syed Tajammul Hussain & others]

Date of hearing **14.11.2022**
Date of judgment **05.12.2022**

Mr. Kamaluddin, advocate or applicant.
Mr. Farhad Ali Abro, Advocate for respondents.
Mr. Allah Bachayo Soomro, Additional Advocate General, Sindh.

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J U D G M E N T

ADNAN-UL-KARIM MEMON, J. In the captioned revision applications, a common question of law and facts is involved; therefore, both are being taken up together and disposed of by this common Judgment.

2. These Revision Applications are directed against the common Judgment dated 29.09.2010 and decree dated 04.10.2010 passed by learned Additional District Judge Hyderabad in Civil Appeal No.156 of 2009, whereby the Suit No.53 of 2003 filed by the applicant for possession and mesne profit at Rs.2, 40,000/- was dismissed whereas Suit No.35 of 2004 for Declaration, Injunction, Cancellation of Sale Deed, and Damages filed by the respondents was decreed.

The case of the parties in R.A No.02 of 2011 is as follows

3. Applicant Mazahir Hussain Naqvi claiming ownership in respect of entitlement derived from Syed Azhar Hussain Naqvi of the House bearing N.63, block-C, Unit No.7, Latifabad, Hyderabad based on registered sale deed dated 10.08.1998 executed by Hyderabad Municipal Corporation (HMC) in his favor. The applicant claims that he accommodated his younger brother Syed Tajamul Hussain temporarily to reside on the ground floor of the suit house; that due to paucity of proper space for his family, he requested his brother to vacate the ground floor but he blatantly refused, resultantly applicant served him with legal notice dated 26.03.2003 requiring him to vacate the suit premises which was not responded, compelling the applicant to file F.C Suit

No.53 of 2003 before learned Senior Civil Judge Hyderabad for possession and mesne profit at Rs. 2,40,000/-.

4. The aforesaid Suit was contested by Syed Tajamul Hussain by filing written statement wherein he raised the question of maintainability of the suit being barred by law. Respondent narrated that F.C Suit No.53 of 2003 had been filed with malafide intention to usurp his personal property in collusion with his elder brother Syed Azhar Hussain Naqvi and Land Management officials of Taluka Latifabad, Hyderabad by manipulating the document in the year 1998, which was liable to be canceled; that he has been living in the suit house with his family on the ground floor for last about 45-50 years being exclusive owner, while the applicant had no concern with the ground floor which was / is owned by him thus he was / is not liable to vacate the ground floor. Per learned counsel for respondent, the applicant and respondent had been living together with their mother in Suit property since before 1955, and in the intervening period being brother had built up suit property from his pocket as the applicant being infirm was unable to earn his livelihood; that on the instructions of their mother, Syed Azhar Hussain Naqvi, elder brother of applicant and respondent, transferred first floor of suit property to applicant and ground floor to respondent by taking two lacs. Accordingly, the HMC issued allotment order No: 1516 dated 31.3.1995 in respect of Suit property by allotting the upper story portion to applicant and ground floor to respondent, subsequently, the competent authority of HMC transferred the suit property in their respective names by executing such document dated 5.6.1995.

Facts of R.A No.03 of 2011

5. Respondent Syed Tajammul Hussain claims that he in February 1954 accompanying his mother Mst. Kausar Bano, his two brothers Azhar Hussain Naqvi and Mazhar Hussain Naqvi (respondent in the present Suit) arrived in Pakistan, their mother acquired plot No.63 Unit No.7 Block-C Latifabad Hyderabad, where they all except Syed Azhar Hussain Naqvi started living; that from his earnings two-storey building was built-up on the suit plot, at different stages, wherein he and his mother Mst. Kausar Bano started living in the portion of ground floor whereas Mazhar Hussain (applicant) was allowed to live in the upper portion of suit property. Learned counsel for Syed Tajammul Hussain emphasized that in the year 1956, he started domestic industry with the name and style "MARCONI GLASS INDUSTRIES" in a room on ground floor by obtaining import license wherein the address relating to correspondence was given of suit property; that after solemnizing marriage in the year 1967 and on the advice of applicant Syed Mazahir Hussain he built up

the first storey of the subject premises where, with the amicable settlement, the family of Syed Mazahir Hussain was shifted; that in good faith he paid all the expenses and payments including the price of suit property and got it transferred jointly in his name in respect of occupation of ground floor while the first-floor occupation was mutated in the name of Syed Mazahir Hussain Naqvi, pursuant thereto respondent No.3 being in-charge executed the transfer documents in the joint name of respondent and applicant vide office letter bearing No.DDL.4/3677/95 dated 05.06.1995; that his brothers Syed Mazahir Hussain and Syed Azhar Hussain Naqvi in collusion with officials of Hyderabad Municipal Corporation prepared a bogus transfer order dated 04.08.1998 relating to suit property in the exclusive name of Syed Mazhar Hussain Naqvi, resultantly the respondent served them legal notice dated 06.08.2003 for cancellation of said document but despite of acknowledging the same they failed to cancel the said bogus, fraudulent transfer order prepared at his back without his consent. Per learned counsel based on the bogus transfer order applicant intended to evict / dispossess him from the suit property, compelling him to file F.C. Suit No.35 of 2004 for Declaration, Injunction, Cancellation of Sale Deed, and Damages.

6. On service of notice official respondents failed to file written statements, resultantly ex-parte order dated 21.09.2004 was passed, while applicant Syed Mazahir Hussain Naqvi filed written statement denying certain paras of the plaint by submitting a contrary claim with the narration that respondent had never extended financial help to the applicant as well as their elder brother Syed Azhar Hussain Naqvi; that respondent had not spent a single penny towards construction of any part of suit property; that entire suit property was constructed by the applicant and his elder brother Syed Azhar Hussain Naqvi; that the then Municipal Commissioner after conducting inquiry found the document of respondent forged hence he canceled the same; that sale deed dated 10.08.1998 executed in favor of applicant by H.M.C was genuine one.

7. Keeping in view the aforesaid position of the case, the learned Trial Court consolidated both the Suits and framed as many as eleven consolidated issues and after recording evidence of respective parties decreed Suit No.53 of 2003 while Suit No.35 of 2004 filed by the respondent was dismissed vide Judgment and Decree dated 18.05.2009 and 13.08.2009; hence being aggrieved by and dissatisfied with the aforesaid findings filed Civil Appeal Nos.156 and 157 of 2009 before learned Appellate Court, which was allowed vide Judgment dated 29.09.2010 and decree dated 04.10.2010, whereby Suit No.53 of 2003 filed by the applicant was dismissed whereas Suit No.35 of 2004 filed by the respondent was decreed.

8. Mr. Kamaluddin learned counsel for applicant has contended that learned Appellate Court while passing the impugned judgment dated 29.9.2010 and decree dated 04.10.2010 passed in Civil Appeal Nos. 156 and 157 of 2009, has acted illegally and committed material irregularity by allowing the appeal as he failed to exercise its jurisdiction in accordance with parameters set forth under the law; that learned Appellate Court has not applied its judicious mind while passing the impugned judgment and decree; that learned Appellate Court has totally failed to consider the basic point in issue that the plot in suit was originally allotted to Azhar Hussain it could not be changed/ transferred in favour of any other person on the basis of an alleged sale-agreement by the Deputy Director Lands Latifabad; that under the law, a sale agreement does not create any title in favour of vendee/ purchaser, except it makes him entitled to approach the Civil Court, for specific performance of contract; that in view of the statement of Azhar Hussain (the seller/ vendor) and the applicant (the co-vendee/ co-purchaser) recorded before the Deputy Director Lands Latifabad, the alleged sale-agreement dated 24.11.1994 allegedly attested by A.C.M. (Phuleli) Hyderabad on 28.12.1994 was proved to be false & bogus, which fact has not been considered by the Appellate Court; that the beneficiary of sale-agreement has not led any evidence to prove the execution and genuineness of the documents but the Appellate Court has made the same as basis for its judgment, though the execution of same was denied by its executant (Syed Azhar Hussain) and the applicant; that under the law a registered document carried weight and preference over a un-registered document but the Appellate Court has preferred to rely upon un-registered document over registered documents which is apathy; as such the Appellate Court has acted illegally and without any lawful authority; that the Suit of respondent was hit by Limitation Act, but the Appellate Court misdirected itself, while deciding it in favour of respondent. He referred to the portions of evidence brought on record and submitted that in the light of documentary evidence, the appellate court fell in error by decreeing the suit of respondent; he next argued that there is misreading as well as non-reading of evidence which resulted in the passing of erroneous decision on the part of Appellate Court; that learned Appellate Court has failed to consider the lawful effects of registered gift deed and registered sale-deed of the Suit property in favor of applicant while passing the impugned judgment, that learned Appellate Court failed to consider and determine the aforesaid factum thus committed illegality, hence the impugned Judgment and Decree need to be set aside; that learned Appellate Court erred in not appreciating that before canceling and withdrawing the allotment order passed by Municipal Commissioner on 4.7.1996 in favor of respondent,

thereafter an inquiry was conducted and forgery was found in the sale-agreement for that appeal filed by the respondent was also dismissed by the Administrator, HMC, Hyderabad vide order dated 11.10.1997; that learned Appellate Court has not given lawful and cogent reasons, in setting aside the Judgment / decree passed by the trial court in favor of applicant. Learned counsel pointed out that based on long possession as licensee one cannot be declared as owner of the property. Learned counsel referred to the gift deed and submitted that this document was executed and registered in favor of applicant he become its exclusive owner & the donor severed his all rights, title & interest from the gifted property; that learned Trial Court dealt with each issue framed in the Suit, in the light of evidence and documents available on record, but learned Appellate Court has neither touched nor dealt with the said issues nor determined them, and thereby committed illegality in passing the impugned judgment and decree. He lastly prayed for allowing these revision applications and to set aside the impugned judgment of learned Appellate Court by restoring the Trial Court's Judgment and Decree.

9. Mr. Farhad Ali Abro learned counsel for respondents while refuting the above contentions has argued that instant revisions are not maintainable under the law; that the appellate Court has rightly allowed the appeal, such judgment can't be disturbed in revisional jurisdiction under section 115, C.P.C., and, there is no perversity in the appellate court's judgment and decree. Learned counsel also called in question the authenticity of registered gift / sale deed and submitted that irrespective of the fact that the applicant has registered gift / sale deed in his favor but the same is not proved in evidence and he has no possession of property cannot get any advantage of the same. Besides, the applicant has claimed the gift in his favor vide impugned registered deed but the basic ingredients of gift i.e. offer, acceptance, and delivery of possession have also not been proved by him.; that mere registration has no legal value under the law until and unless the aforesaid ingredients are met, which are missing in this case as the possession of suit property since 50 years is with the respondents. He prayed for dismissal of instant revision applications. At this stage learned counsel for applicant denied the allegations of respondents on the issue of possession, he submitted that the admission of execution of the document and then its registration in the name of applicant would be sufficient proof of its offer by the donor and acceptance by the donee / applicant. As it was property owned and possessed by the predecessor of applicant which was transferred through said registered deed, delivery of physical possession in the circumstances was implied, and constructive possession; in the circumstances would be sufficient to validate a gift and the delivery of possession has to be considered by taking into

consideration all the facts and circumstances of the case. He emphasized that if the actual possession cannot be delivered as portrayed by the respondents / donor to the donee/applicant and the donor has done all that he was required to do to divest himself of the gifted property then the gift would be considered to be complete and effective, thus the objection of respondent is inadmissible under the law. Besides, the applicant had allowed the respondent to use the premises and thereafter called upon him to leave the premises, who subsequently refused, purposefully, and litigated.

10. I have heard learned counsel for the respective parties and also gone through the record with their assistance.

11. The questions involved in the present matter are whether sanctity is attached to the registered document and has always precedence and preference over the unregistered document / agreement to sell and whether the decision of the learned Trial Court is within the preamble of law.

12. The main contention of learned counsel for the applicant is that learned Appellate Court has set aside the judgment and decree of learned Trial Court by preferring unregistered sale/agreement deed of respondent over registered gift deed of applicant in respect of suit property, in terms of Sections 17, 49, 50 and 54 of Transfer of Property Act, 1882; that preference should be given to registered documents over unregistered documents. Per learned counsel, the claim of respondent over the suit property is based upon sale agreement with affidavits dated 24.11.1994 and 28.12.1994 which has not been proved to have been executed in his favor under Qanun-e-Shahadat; that unregistered sale deed dated 05.06.1995 already canceled/withdrawn by Municipal Commissioner as well as Administrator in Appeal and the claim of applicant is based upon registered gift deed dated 05.12.1994, order of Municipal Commissioner HMC, Order of Administrator HMC and registered sale deed dated 10.08.1998.

13. It appears from the record that No.63, Block-C, Unit No.7, Latifabad measuring 150-0 square yards was originally allotted in the name of Syed Azhar Hussain vide Allotment Order No.151 dated 28.3.1957. The lease deed was executed before Sub-Registrar Hyderabad in the name of allottee on 15.12.1961. The record further reflects that the applicant and respondent submitted a joint application on 20.11.1996 for transfer of above-said plot in their names based on sale agreement duly attested by 1st Class Magistrate dated 28.12.1994. After completing formalities the transfer and proprietary rights were granted on 05.6.1995 in favor of applicant and Syed Tajammul Hussain Naqvi (brothers). Syed Azhar Hussain and the applicant submitted

another application on 09.8.1995 for transfer of above-said plot in favor of applicant on the basis of registered gift deed dated 05.12.1994. On this statement of Syed Azhar Hussain and the applicant the Deputy Director Land Latifabad on 15.1.1996 stated that the sale agreement was/is bogus and fictitious document as the same was not signed by the allottee; therefore, this earlier transfer / proprietary rights of the applicant and Syed Tajammul Naqvi were canceled and withdrawn under Order No.DDL(L) 533 dated 05.7.1996. Against this cancellation, Syed Tajammul Hussain filed an Appeal before Administrator Hyderabad Municipal Corporation which was decided in the year 1997 with the findings that the sale agreement was executed on 24.11.1994 attested by Magistrate on 28.12.1994 whereas the gift deed was registered before the Sub-Registrar Latifabad on 05.12.1994 and respondent Tajammul Hussain failed to produce any authenticate documentary proof in support of his claim over the property; that mutation affected based on sale agreement is illegal and Syed Azhar Hussain Naqvi was divested of his rights, powers, and authority to cancel the registered instruments, and Syed Tajammul Hussain was advised to prove his case in the competent Court of law and seek proper declaration regarding sale agreement. He also endorsed that registered gift deed was authenticated and a valid document as such the transfer/property rights could be granted in favor of applicant.

14. Both parties filed F.C. Suit No.53 of 2003 and F.C. Suit No.35 of 2004. Both the suits were consolidated and vide common judgment dated 18.5.2009 and decree dated 13.8.2009 Suit No.53/2003 was decreed while Suit No.35/2004 filed by Syed Tajammul Hussain was dismissed. He being aggrieved by the judgment and decree dated 18.5.2009 and 13.8.2009 respectively Syed Tajammul Hussain filed Civil Appeal No.156 of 2009, which was allowed vide judgment dated 29.9.2010 and decree dated 04.10.2010 whereby F.C. Suit No.53 of 2003 filed by the applicant was dismissed and F.C. Suit No.35 of 2004 was decreed, on the premise that the property was transferred from Syed Azhar Hussain in favor of applicant and Syed Tajammul Hussain in equal share basis and the gift deed was incomplete as the possession of Syed Tajammul Hussain was admitted.

15. There is no cavil to the proposition that an unregistered agreement to sale would not confer any title upon the vendee in immovable property and the registered gift deed has precedence over prior unregistered agreement to sale. It is well-settled that if the document is not a registered document that cannot be accepted in evidence until and unless the original and registered document is produced in evidence, and confronted to the party concerned.

16. As to the question whether the unregistered document / sale agreement can be given any preference over registered gift / sale deed in favor of the party. The Honourable Supreme Court has settled this proposition and held that a registered deed reflecting transfer of certain rights qua a property though will have sanctity attached to it regarding its genuineness, and stronger evidence would be required to cast aspersions on its correctness but cannot be given preference over an unregistered deed vide which physical possession of property has also been given. Subsection (1) of Section 50 of Registration Act, 1908 also provides that a registered document regarding transfer of certain rights in an immovable property will have effect against every un-registered document relating to the same property and conferring the same rights in the property as shown in the registered document but the law has also provided certain exceptions to the above said provisions of law. If a person has an unregistered deed qua transfer of certain rights in the property along with possession of the same he can legally protect his rights in the property and even a registered deed subsequent in time will not affect his / her rights. The first proviso to section 50 of Registration Act, 1908 provides that such rights in the property can be protected under Section 53-A of the Transfer of Property Act, 1882. Reliance in this regard can be placed on the cases of *Fazla v. Mehr Dina and 2 others* (1999 **SCMR 837**) and *Mushtaq Ahmad and others v. Muhammad Saeed and others* (2004 **SCMR 530**).

17. Going a head further, primarily unregistered document is inadmissible in evidence and no suit could be filed on the basis thereof, however only the suit for specific performance based on sale agreement could be entertained subject to all just exceptions as provided under the law, however, no declaratory suit could be filed on the basis of sale agreement as this cannot be treated as the title document. It is settled rule that the suit for specific performance if decreed passes no title to the decree-holder till such time that a registered sale deed is executed in favor of the party in the implementation of decree. It is also settled rule that if the owner of property, despite knowledge of transactions, did not challenge the transaction in his life for years, the legal heirs shall have no locus standi to challenge the validity of those transactions after the demise of original owner. Reference can be made to the case of *Nasir Fahimuddin and others v. Charles Phillips Mills and others* (2017 **SCMR 468**).

18. In the present case late Syed Azhar Hussain original owner did not challenge the gift deed duly executed by him in favor of applicant during his lifetime, and allowed the applicant to enjoy the fruit of gift deed, merely preparing sale agreement by Syed Tajammul Hussain in his favor after registered gift deed is of no value under the law, and, consequently, no valid

locus standi would pass onto the legal heirs of Syed Tajammul Hussain for claiming ownership or to challenge such document at belated stage through the suit proceedings based on the sale agreement subsequently made, which has already been declared nullity by the trial court vide judgment and decree discussed supra. Reference in this context can also be made to the cases of *Abdul Haq and another v. Mst. Surraya Begum and others* (2002 §CMR 1330), *Muhammad Rustam and another v. Mst. Makhan Jan and others* (2013 §CMR 299), and *'Noor Din and another v. Additional District Judge Lahore and others* (2014 §CMR 513).

19. Additionally, the respondent did not examine the attesting witnesses of purported agreement in terms of Articles 17 and 79 of Qanun-e-Shahadat Order, 1984 to prove authenticity of agreement as the applicant called in question its authenticity. As it is well settled that a document that proposes to create financial or future obligation requires to be witnessed by at least two male witnesses, which factum has been ignored by the learned Appellate Court.

20. The deceased brothers had not challenged the gift transaction despite knowledge during their lifetime, through independent proceedings, the respondents as heirs of deceased Syed Tajammul Hussain Naqvi did not have any locus standi to file a suit to challenge the transaction as Syed Tajammul Hussain Naqvi during his lifetime did not call in question the appellate order passed by the official respondents, whereby the transaction in his favor was canceled with certain reasoning; and even the same cannot be assailed after the demise of Syed Azhar Hussain original owner/donee, for the reason that such gift deed attained finality with acceptance and constructive/implied possession.

21. On the issue of gift honorable Supreme Court in the case of *Mst. Kaneez Bibi and another vs. Sher Muhammad and 2 others* (PLD 1991 Supreme Court 466),) has resolved the issue in case like the present one with the observation that strict proof by the donee of transfer of physical possession, as in other type of cases, is not insisted upon. Whereas in the case of *Bahadur Khan vs. Mst. Niamat Khatoon and another* (1987 §CMR 1492), the Honorable Supreme Court held that under the provision of Section 167(2)(b) of Muhammadan Law by D.F. Mulla, when the donor and the donee are related within the prohibited degree, a gift made cannot be revoked. Though in the present case original donor has not revoked the Gift Deed in his lifetime, however, respondent being the brother of donor claims that the subject suit land was sold out by his elder brother to him through sale agreement, which

document has not been relied upon by the trial court on the premise that once registered documents came on record unregistered sale agreement could not be relied upon. In my view, this was the correct approach and is hereby endorsed.

22. In view of the settled law and that the suit having been instituted by the respondents after 6 years was time-barred in terms of Article 91 of the Limitation Act and that the yarn spun by the respondents to lay an explanation for the late institution of suit was proved to be fatal. The trial court did analyze the entire evidence in its proper perspective and thereafter concluded that the suit instituted by the respondent was liable to be dismissed.

23. Findings so recorded by the trial court do not suffer from any misreading and non-reading of evidence or any error of law or jurisdiction to warrant interference, however in upsetting the decision of trial court by the appellate court vide impugned judgment and decree was the erroneous decision as the same suffer from perversity and illegalities, thus liable to be set aside.

24. So, what has been discussed above, the finding of learned trial Court being in accordance with law are upheld and the judgment and decree passed in appeal are set aside with no order as to costs.

25. These revision applications are allowed in the above terms.

JUDGE

Muhammad Danish