

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 341 of 2009

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Date: Order with Signature of Judge
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1. For hearing of CMA No. 8055/2022
2. For hearing of CMA No. 2418/2009
3. For hearing of CMA No. 7218/2020
4. For examination of parties / settlement of issues

29.09.2022

M/s. Abdul Wajid Wyne and Waqas Wajid Wyne, Advocates for Plaintiffs No.1 & 2.

None for Plaintiffs No.3 to 5.

Mr. Ghulam Rehman, Advocate for Defendant No.1.

Mr. Nabeel Ahmed Khan, Advocate for Defendant No.2.

It is clarified that today matter is fixed mainly for the submission of documents by DHA in respect of the Suit Property as observed in the Order dated 22.09.2022, as on earlier date of hearing, their Law Officer filed the Statement along with a Correspondence dated 02.09.2022, confirming that Suit Property has been mutated in the name of Defendant No.2 (Mrs. Rubina Ali), since 31.08.2009.

Mr. Abdul Wajid Wyne, Advocate along with Mr. Waqas Wajid Wyne, has represented Plaintiffs No.1 and 2 (for the sake of reference be referred to as '**Brothers**'), *whereas*, Mr. Muhammad Ilyas Awan, Advocate, represented Plaintiffs No.3 to 5 (the "**Sisters**"). Mr. Muhammad Ghulam Rehman, Advocate, appears for Defendant No.1 ("**Husband / Donor**") and Mr. Nabeel Ahmed Khan, Advocate for Defendant No.2 ("**Donee**"). All Advocates argued the Case at length on previous dates. However, despite providing ample opportunity, the Comments and documents are not filed today and it has been informed that the Law Officer of DHA is busy before another learned Bench, in spite of the fact that this is a date by Court and time fixed matter. Since basic documents relating to the

controversy are not disputed, therefore, today after conclusion of hearing, the following Order is passed_

Learned counsel for Defendant No.2 [Applicant of the C.M.A. No.7128 of 2020, under Order VII, Rule 11 of CPC] states that Defendant No.2 was gifted the **Suit Property**, viz. Bungalow No. 9/II, Zamzama Street No.3 & 8, Phase-V, D.H.A., Karachi, vide registered instrument of Gift dated 31.01.1996 by her husband / Defendant No.1 and the said Gift Instrument is also witnessed by Plaintiff No.2 (Tariq Umer), thus the present suit is filed with *mala fide* intention to deprive the Defendant No.2 of her valuable proprietary rights, as the Suit Property was never a family property of Plaintiffs, which can be subject to the inheritance. Learned counsel has also referred to the chain of documents relating to the property in question, that is, the Agreement to Sale dated 08.12.1980 entered into between the previous owner Ms. Nazli Khatija Haroon and Defendant No.1 (husband of Defendant No.2), subsequently A-Lease and B-Lease, which are title documents, were issued in favour of Defendant No.1 by Pakistan Defence Officers Housing Authority (“**D.H.A.**”) and again witnessed by Plaintiff No.2 (Tariq Umer) and finally the above impugned instrument, that is, the Gift Deed dated 31.01.1996; contended that all these are the public documents well within the knowledge of all the Plaintiffs and the same were never challenged except by the present suit which is filed on 13.03.2009, which means that they are challenging the gift of 1996 in the year 2009, after thirteen years. Learned counsel has further denied the document relied upon by the Plaintiffs, which is “Samjhota / Agreement” (Annexure B of Complaint). Relied upon the following case law_

- i. P L D 2010 Supreme Court 569
[*Ghulam Murtaza versus Mst. Asia Bibi and others*];
- ii. 2020 Y L R 1506,
[*Mst. Parveen Raza Jadun through L.Rs. and others versus Bashir Ahmed Chandio and 5 others*];

- iii. PLD 2014 SC 167,
[*Mst. Grana through Legal Heirs and others versus Sahib Kamala bibi and others*];
- iv. P L D 2022 SC 353
[*Salamat Ali and others versus Muhammad Din and others*];
- v. 2017 S C M R 608
[*Sardar Arshid Hussain and others versus Mst. Zenat Un Nisa and another*];
- vi. P L D 2012 Sindh 92
[*Ilyas Ahmed versus Muhammad Munir and 10 others*].

Whereas, arguments of Mr. Wajid Wyne and Mr. Waqas Wajid Wyne, Advocates, for Plaintiffs No.1 and 2 is that the triable issues are involved in the matter and the plaint cannot be rejected at this stage. It is averred that the above said Agreement / Samjhota dated 11.09.2007, which is Annexure-B at Page-21 of the plaint, is the main document which spells out the arrangement of share-holding in the Suit Property between the three brothers, that is, the two Plaintiffs and Defendant No.1, which is, 50% of Suit Property will be owned by Defendant No.1 and 25% each by both the Plaintiffs [No.1 and 2]. To the question of limitation, he replies that since the Gift Deed is a void document, hence, its cancellation is not sought and the possession, which is one of the main ingredients for a valid gift, is not exclusively with the Defendant No.2 [the purported Donee], but Plaintiffs (Brothers) are also residing in the portion of the suit property. He has relied upon the following case law_

- i. 2021 S C M R 1986,
[*Khalid Hussain and others versus Nazir Ahmad and others*] – *Khalid Case*;
- ii. 2005 Y L R 2645
[*Khushi Muhammad and others versus Noor Bibi and others*];
and
- iii. P L D 1964 Supreme Court 143
[*Shamshad Ali shah and others versus Syed Hassan Shah and others*] – *Shamshad Case*.

In the intervening period vide Order dated 23.04.2021 sisters of the Plaintiffs and Defendant No.1, were impleaded as Plaintiffs No.3, 4 and 5. They are represented by Mr. Muhammad Ilyas Awan, Advocate, whose stance is that the present proceedings is collusive and Suit Property not only belongs to Plaintiffs No.1, 2 and Defendant No.1, but also to the sisters, that is, the Plaintiffs No.3, 4 and 5, who have their respective share in the Suit Property being part of the inheritance, left by the deceased father.

Arguments heard and record perused.

Précis of the case law cited by Plaintiff's counsel. The Honourable Supreme Court in Shamshad Case (*ibid*) has discussed the principle of *Marzul Maut Gift*, wherein, it is held that delivery of possession to the donee is the condition precedent to the validity of the Gift; while holding that Article 91 of the Limitation Act, (three years is prescribed for cancellation of document), would only be applicable if a transaction in question is a voidable and if the Gift Deed is a void transaction, then it does not require any cancellation. The Hon'ble Supreme Court in the Khalid Case (*supra*) has ruled that for a void document, it is not necessary that an aggrieved party should file a suit for cancellation.

The chain of documents appended with the pleadings of Defendants and particularly Defendant No.2 with regard to Suit Property, that how it was purchased by Defendant No.1, subsequently ownership 'B' LEASE issued by D.H.A and instrument of Gift are not disputed. The main stance of the Plaintiffs is that the Suit Property was benami (ostensible ownership) in the name of Defendant No.1, as it belongs actually to the deceased father of Plaintiffs and Defendant No.1, and Plaintiff No.2 did not object to its transfer to Defendant No.2 by way of gift, so that the adverse taxation issues can be avoided. With regard to delay in filing the proceeding after

thirteen years, learned counsel for Plaintiffs No.1 and 2 has referred to Paragraph-13 of the plaint, that they came to know through a public notice appeared in daily 'Dawn' that the Suit Property is being sold, hence they acquired knowledge on 02.02.2009 from the date of that public notice; consequently the present *Lis* is within time. The other arguments is, that since it is void Gift, therefore, no limitation will run against Plaintiffs.

With regard to the date of knowledge, argument of Plaintiffs is misconceived in nature, because Plaintiff No.2 admittedly himself was a witness to **B-Lease**, so also the Gift Deed in favour of the Defendant No.2, which shows that at all material times the Plaintiff No.1 and 2 (Brothers) were / are in the knowledge about the said Gift Deed in favour of Defendant No.2. As far as the defence of void Gift is concerned, this argument is also not correct; because it is not disputed that both the Defendants [Donor and Donee] also reside in the same property, that is, are in the possession of the Suit Property. Plaintiffs No.1 and 2 being real brothers were never called upon to leave the premises. Perhaps a good gesture on the part of the Defendants became a hurdle in the use and enjoyment of the Suit Property. *Secondly*, it does not appeal to common sense, that one of the Brothers, viz. Plaintiff No.2, is a witness to both the Registered Documents (*ibid*), other siblings, that is, all other Plaintiffs never had the knowledge of the existence of the Gift Deed. *Thirdly*, the above Agreement (Annexure 'B' of the plaint) *ex facie* loses significance, due to the terms mentioned therein, that Plaintiffs No.1 and 2 (Brothers) will inherit 25% each in the Suit Property, *whereas*, Defendant No.1 will get 50% of the Suit Property, excluding Plaintiffs No.3, 4 and 5 (Sisters), which is completely illogical and contradictory to the stance of Plaintiffs, that the Suit property is purportedly a family property and is to be inherited as an estate of the deceased father. *Fourthly*, the said document

– Annexure ‘B’ cannot be given preference to the undisputed registered documents mentioned in the foregoing paragraphs [all available in the Record], so also the first Sale Agreement between present Defendant No.1 and the erstwhile owner of the Suit Property, which completes the chain of ownership in favour of Defendant No.1 and subsequently Defendant No.2, right from the inception, that is, acquiring the Suit Property way back in the year 1980 and subsequently it passed through a detailed process of transfer in favour of Defendants, in accordance with law.

Adverting to the contention of Plaintiffs No.3, 4 and 5, about the collusive proceedings. They [the said Plaintiffs sisters] have not brought on record any tangible material in this regard and mere assertion does not itself become a triable issue, unless it has an intrinsic ingredient, *inter alia*, a relevant fact or issue that cannot be decided except through the evidence, requiring a full dress trial. *Secondly*, the undisputed documents [*ibid*], which are public documents having sanctity and authenticity as mentioned in the Qanoon-e-Shahadat Order, 1984, particularly Articles 90 to 92, effectively supports the stance of Defendants. The Hon’ble Supreme Court in the judgment of *Agha Syed Mushtaque Ali Shah versus Bibi Gul Jan*, reported in **2016 S C M R 910**, has clarified, that it is not necessary that a question of limitation can only be determined after a trial; but if limitation issue can be decided by looking at the undisputed facts and record, then no evidence is required and application under Order VII Rule 11 of CPC, can be decided.

The case cited above by the Plaintiffs’ counsel is distinguishable and with respect is not applicable to the undisputed facts of present case, as already discussed in the preceding paragraphs. All the ingredients of a valid Gift is present in this case, as husband – Defendant No.1 being the exclusive owner is the Donor, who has gifted the Suit Property, which was

accepted by the Donee – Defendant No.2 (wife of Defendant No.1), undisputedly witnessed by one of the Plaintiffs. Possession is also handed over by Defendant No.1 to Defendant No.2 and if the latter allowed the Plaintiffs No.1 and 2 (Brothers) to reside in the Suit Property with them, then this cannot not be considered that exclusive possession of the Suit Property is not with Defendant No.2 / Donee, as from beginning (as discussed above) the Suit property belongs to Defendant No.1. *Secondly*, since the present instrument – Gift Deed dated 31.01.1996 is a valid Gift and not a void one, therefore, question of limitation does arise in the present case and Article 91 of the Limitation Act, 1908, is applicable. Since, the present Lis is not filed within three years from the registration of the above Gift Deed, but after around **thirteen years**, therefore, the claim of the Plaintiffs is hopelessly time barred.

Consequently, Application under consideration filed under Order VII, Rule 11 of CPC is allowed and the plaint is rejected. All pending Applications are disposed of. Office to draw up a decree. There is no order as to costs.

Imran / P.A

J U D G E