

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.323 of 2013

[Mst. Aziz Bano through Lrs. v. Khalifa Aziz Mian through Lrs.]

alongwith

Revision Application No.203 of 2012

[Shahzad Aziz v. Mst Aziz Bano through Lrs. and others]

Date	Order with signature of Judge
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Date of hearing: 18.01.2023

None present for plaintiff.

Mr. Zeeshan Abdullah, Advocate for defendant/Lrs. No.8 to 13.

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JUDGMENT

Muhammad Shafi Siddiqui, J.- This matter is coming up for final arguments since years but the petitioner/plaintiff has not cared to appear and assist this Court.

2. I have heard learned counsel Mr. Zeeshan Abdullah, appearing on behalf of second set of legal heirs that is defendants No.8 to 13 and also with his assistance perused the record.

3. Brief facts of the case are that the litigation commenced by one Mst. Aziz Bano wife of Mahboob Elahi as a petition for grant of Letter of Administration in respect of a property identified as House No.91, situated at Maqboolabad Cooperative Housing Society, Karachi, measuring 300 sq. yards (hereinafter referred to as the subject property). The property claimed to have been left by deceased Khalifa Muhammad Mian (hereinafter referred to as the deceased), who died on 11.11.1990. Deceased left two legal heirs that is Khalifa Aziz Mian (son) and Mst. Aziz Bano (daughter). Record disclosed that the Succession Petition was filed as SMA No.105/1995. On filing of the said Succession Petition, deceased son Khalifa Aziz Mian filed

counter affidavit/objection on 17.08.1995 stating that he being son of the deceased is in use of the subject property and the property be transferred in the record of the society in the names of the legal heirs of the deceased and that he showed his willingness to purchase the share of his sister/petitioner Mst. Aziz Bano. The order dated 31.3.1996 is reproduced as under:-

Learned counsel for the petitioner states that petitioner is willing to sell her share in the house in question to her brother and only other legal heirs, namely, Khalifa Aziz Mian and that if she is paid her share according to the market value of the property, she will execute the deed of relinquishment in favour of her brother and will have no objection to the grant of letter of administration to him. Similarly, Mr. Zafar Iqbal, learned counsel for the next-of-kin and brother of the petitioner lady states that the only other next-of-kin namely, Khalifa Aziz Mian, is prepared to purchase the share of the petitioner in the house on the market value of the house as stated by her. Both the learned counsel, therefore, request for more time to work-out the settlement.

By consent, adjourned to a date in office after six weeks.

Record also reflects that the said son of the deceased filed additional counter affidavit available at page-87 of the file disclosing that deceased in his lifetime obtained loan from the bank by mortgaging the subject property and when the deceased failed to pay, it was repaid by him (son) in response to a suit for recovery filed by bank as suit No.155/1977, as it is also claimed that he died at the age of 60 years and remained paralyzed for about ten years before his death. It appears that before such offer of the son (Khalifa Aziz Mian) of deceased could be materialized, he (son) passed away on 13.07.2001 and this position is reflected in the orders dated 15.4.2002 and 07.10.2002 which are reproduced as under:-

15.04.2002

Mr. Bhutto states that one of the legal representatives Khalifa Aziz Mian has expired and therefore he would like to bring his legal heirs on record. Let an appropriate application be filed in office and the matter be placed in court on 29.4.2002. File of SMA 201/1997 (which

has since been converted into suit) may also be made available on the next date.

07.10.2002

Let the L.Rs of Khalifa Aziz Mian, as mentioned in the application under Order XXII Rule 4 filed on 27.5.2002, be brought on record. Office is also directed to appropriately number this application. Further proceedings are adjourned on the ground that Mr. Ajeebullah is reported to un-well.

The legal heirs of the said son Khalifa Aziz Mian were also brought on record who was then survived by two widows and 11 children disclosed as two sets of legal heirs in the memo of plaint/ petition.

The two sets of legal heirs are as under:-

First set of legal heirs of the deceased:-

- | | | |
|----|--------------|------------|
| 1. | Zeb Gul | (widow) |
| 2. | Shahzad Aziz | (son) |
| 3. | Shahbaz Aziz | (son) |
| 4. | Sheeraz Aziz | (son) |
| 5. | Shahzeb Aziz | (son) |
| 6. | Mahvish Gul | (daughter) |
| 7. | Kiran Aziz | (daughter) |

Second set of legal heirs of the deceased:-

- | | | |
|-----|--------------|------------|
| 8. | Naseem Begum | (widow) |
| 9. | Kamran Aziz | (son) |
| 10. | Nadeem Aziz | (son) |
| 11. | Ahmed Aziz | (son) |
| 12. | Tanveer Aziz | (daughter) |
| 13. | Sima Aziz | (daughter) |

4. On 03.11.1996 one of the children that is Shahzad Aziz filed CMA No.1962/1996 to be joined as necessary and proper party, in consequence of a purported gift executed by deceased Khalifa Muhammad Mian in his favour out of love and affection. Vide order dated 21.09.1998 the said application was allowed and he was impleaded as necessary and property party. On 13.12.1999 the Court framed two issues/points of controversy and directed the parties to lead evidence in support of their respective claims. The issues/points as framed on 13.12.1999 are reproduced as under:-

1. *Whether house bearing No.91, measuring 300 sq. yds situated at Maqboolabad Cooperative Housing Society Karachi was gifted to the Intervener/Objector Shahzad Aziz by his grand father deceased Khalifa Muhammad Mian?*
2. *Whether the petitioner is entitled to issue of Letter of Administration in her name for Administration of the aforesaid property amongst the next of kins of deceased Khalifa Muhammad Mian?*

The evidence was not recorded for about five years and was being delayed when suddenly a statement was filed on behalf of the objector on 13.02.2007 that issue with regard to Gift in respect of the subject property has been resolved in suit No.426/99 filed by the objector in the Court of Senior Civil Judge, Karachi East and certified copy of judgment and decree was also filed. The said judgment and decree was ex-parte which was challenged by the petitioner/ plaintiff under Section 12(2) CPC. That on 04.02.2008 the proceedings of the instant suit were adjourned sine-die till the decision on the application under Section 12(2) CPC. The application under Section 12(2) CPC was then allowed on 03.03.2011 and in consequence whereof the judgment and decree of the Civil Court was set aside. This suit was then revived vide order dated 13.05.2011 and the appeal in response to the order on application under Section 12(2) CPC was filed which was also dismissed. Then the objector Shahzad Aziz filed Civil Revision No.203/2012 which is tagged with this suit as it was converted in the year 2013 on the application bearing CMA No.138/2013 vide order dated 28.02.2013.

5. On 25.03.2013 the issues were resettled. On 30.04.2013 application for appointment of commissioner for recording evidence bearing CMA No.137/2013 was allowed and by consent, commissioner was appointed. In the said order the objector was directed to record evidence in the first instance. The evidence of the

parties was recorded. The objector examined three witnesses, namely Shahzad Aziz, Shiraz Aziz (his real brothers) and Abdul Waheed Khan as exhibit P/1, P/12 and P/14 respectively and they produced documents. Their side was then closed by this Court on 17.2.2015 whereafter evidence of the petitioner/ plaintiff was recorded. One of the legal heirs of Aziz Bano that is Badr-ul-Islam recorded his evidence. An application for the transfer of this case to the Civil Court on account of pecuniary jurisdiction was also dismissed on 10.4.2014. Final report of the commissioner recording evidence was taken on record on 02.11.2015. The matter since then is coming up for final arguments.

6. The issues resettled on 25.03.2013 are as under:-

1. *Whether House bearing No.91, measuring 300 sq. yds, situated at Maqboolabad Cooperative Housing Society, Karachi was gifted to the Intervener/ Objector Shahzad Aziz by his grandfather deceased Khalifa Muhammad Mian?*
2. *Whether the subject property is liable to be partitioned amongst the legal heirs of the deceased for their respective shares?*
3. *What should the decree be?*

7. My findings on the above issues with reasons are as under:-

Issue No.1

8. It is claimed by the objector that the subject property was transferred/ conveyed to him by virtue of a Gift Deed dated 29.6.1989, Ex. P/3, however, the Gift is not registered, therefore, in view of Section 17 read with Section 49 of the Registration Act, 1908, it does not create any right or interest in favour of the objector in respect of the property under the subject law i.e Transfer of Property Act unless a case otherwise is made out under Mohammadan Law by supporting evidence. Shahzad Aziz son of Khalifa Aziz Mian has not

disclosed any such bond of love and affection which could have prevailed over as consideration. There is no logical justification in the instant case that the grandfather would gift his property to one grandchild excluding his real son, daughter (who were alive at that time) and other grandsons and granddaughters. Notwithstanding such failure to prove such gift under Transfer of Property Act, even under Mohammadan Law the objector failed to prove the same.

9. In the present case the entire controversy between the parties revolves around the Declaration of Gift Exhibit "P/3". Objector Shahzad Aziz claimed ownership over the suit property on the basis of said Gift Deed. In the present controversy, the onus to prove the gift heavily lies on the donee who claims to be its beneficiary, as he wants the Court to believe in the factum of valid gift and such was clearly in their personal knowledge, attracting Articles 119 read with 122 of the Qanoon-e-Shahadat Order, 1984. In the instant case the objector claims exclusive ownership of the subject property being donee, hence the onus to prove the valid Gift is upon the objector and the Objector/alleged Donee has failed to prove the Gift Deed.

10. The objector claims that his deceased grandfather gifted the suit property before witnesses, however, the objector failed to produce the two witnesses of the alleged Gift Deed namely, Mr. Tajamul Khan son of Muhammad Muhabbat Khan and Mr. Zulfiqar son of Nazir Ahmed, which names appear on the alleged Gift Deed.

11. It is settled law that where a document is required by law to be attested by two witnesses under Article 17 of the Qanoon-e-Shahadat Order, 1984, in case of a dispute regarding the validity of the said document, the same can be, amongst other evidences, be proved by examining the two witnesses by virtue of Article 79 of the Qanoon-e-

Shahadat Order, 1984 and if the party relying or beneficiary of the said document fails to examine the said witnesses, the existence of document cannot be proved. In the present case the objector, without assigning any reason, not only failed to examine the marginal witnesses of the alleged Gift Deed, but also failed to examine the author of the said disputed document. Best evidence thus not produced, rather presumed that it never was and thus the Gift deed could not be proved.

12. It is claim of the objector that the property is validly gifted in his favour and all the ingredients of a valid Gift were fulfilled viz-a-viz proposal, acceptance and delivery of possession, whereas, he deposed in his cross examination as under:

“I was born in 1971. It is correct that my mother had the second marriage with my father and had three children from her previous husband. I have educated from New Monana School PIB Karachi. It is correct that after marriage, my parent shifted to Nazimabad. I was born when my parents were residing at Nazimabad. It is correct that we shifted to PIB Colony from Nazimabad. I have resided at PIB Colony and also resided with my grandfather at Sharfabad.

Q. Is it correct to suggest that you had been residing at PIB Colony, however you might used to visit your grandfather?

Ans. I used to reside at both the places.

It is correct that all my younger brothers and sister were born while we were residing at PIB Colony, Karachi. The age of my younger brother is about 22-23 years. It may be that he was born in 1991. It is correct that longer period was passed at PIB Colony House. It is correct aht subsequently; we shifted to Gulshan-e-Iqbal, BVlock-II Karachi. We were resided at Gulshan e Iqbal about 10 years. It is not correct to suggest that we resided at Gulshan e Iqbal in the year 2000. Accordingly, to my knowledge we shifted from Gulshan e Iqbal flat to Maqboolabad, in the suit property in 1994.

“It is correct that I am not in possession of any title documents relating to the suit property except the site plan. It is correct that I have not produced the site plan with my affidavit in evidence.”

“ It is correct that my grandfather was good businessman. It is correct that he had closed his business about 10 years prior to his death. It is correct that he closed his business due to his illness. It is not correct to suggest that he was paralyzed. Volt; states that he was slightly paralyzed. He used to do his work himself.

Extract of the relevant piece of cross examination of the Objector’s witness Shiraz Aziz as under:-

“It is correct that I am not one of the witnesses to the gift deed Exhibit “P/3”

Mr. Abdul Waheed Objector’s another witness deposed as under:-

“ It is correct to suggest that I had no knowledge about family affairs of Khalifa Aziz Mian.

. It is correct to suggest that I am not a witness to the Gift Deed Exhibit “P/3.

Ans. I have no knowledge about the delivery of possession to Mr. Shehzad Aziz.”

13. The perusal of aforesaid evidence of the objector as well as his witnesses leaves no manner of doubt that the objector has failed to prove execution of the Gift in his favour. During his cross-examination it was established that he has never been delivered vacant physical possession of the subject property, nor the original title documents are available with him, therefore, one of the basic elements i.e. delivery of possession is missing. He is not even in possession of title documents. The witnesses produced by the objector have also categorically admitted that they were not witnesses hence cannot testify the occasion i.e execution of the said Gift Deed. Hence it cannot be said, by any stretch of imagination that the

objector succeeded in discharging the burden which lies upon him. On the contrary, he has miserably failed to discharge his onus to prove factum of Gift.

14. **In view of the above discussion, Issue No.1 is answered in “Negative”.**

Issue No.2

15. Admittedly the subject property was exclusively owned by the deceased (Khalifa Muhammad Mian). The objector has failed to substantiate and or prove his claim of Gift, as discussed above, therefore, under the law of inheritance, all the legal heirs left by the deceased are entitled to have their respective shares in the subject property. Deceased son’s version also remained unproved, as nothing in support of additional counter affidavit was recorded.

16. At the time of death, the deceased left behind two legal heirs that is Khalifa Aziz Mian (son) and Mst. Aziz Bano (daughter), however, both have passed away, therefore, all of their legal heirs have stepped into their shoes. Evidence disclosed that the second wife of deceased Khalifa Aziz Mian i.e (Zeb Gul) had three children from her first marriage. In this regard deposition of objector Shahzad Aziz is as under:-

“It is correct that my mother had the second marriage with my father had had three children from her previous husband.”

They are excluded from the claim of inheritance. The second amended title filed on 30.08.2007 in the instant case shows the names of all the legal heirs of deceased to whom the subject property devolved and to be partitioned. In case it cannot be partitioned, the subject property should be sold and proceeds be distributed amongst

the legal heirs as per the respective shares of legal heirs of the deceased under Mohammadan Law.

17. **In view of the above discussion, Issue No.2 is answered accordingly.**

Issue No.3

18. In view of the facts and circumstances of the case, initially the instant suit was filed as SMA for the grant of Letter of Administration, however, upon filing of objections by the objector, the same has been converted into a suit and since the objector has failed to prove Gift in his favour, following order is passed:-

Preliminary decree for partition in respect of the subject property be issued and Nazir of this Court is appointed to enquire as to whether the property is divisible or not and also ascertain the legal heirs and their respective sharers and if the property is found to be non-divisible, the same be put on sale through the Nazir and after receiving sale proceeds, determine the respective shares of the legal heirs for distribution amongst them.

19. Suit No.323/2013 is disposed of in the above terms, however, in view of the above, connected Revision Application No.203/2012 merits no consideration and is accordingly dismissed.

JUDGE

Karachi
Dated: 20.02.2023

Ayaz Gul