

**ORDER SHEET
THE HIGH COURT OF SINDH, KARACHI**

R.A. No. 130 of 2005

Dated: Order with signature of Judge(s)

1. For orders on CMA No. 1688 of 2002
2. For hearing of Main Case.

Date of Hearing : 26 April 2023, 27 April 2023, 28 April 2023, 2 May 2023, 3 May 2023 and 9 May 2023

Petitioner : Mst. Shah Jehan through her LR represented by Mr. Mushtaq A. Memon, Advocate and Barrister Wasim Ahmed Memon.

Respondents : Syed Abid Ali Jafri and Mst. Sultana Jafri represented by Mr. Raghib Baqi, Advocate.

R.A. No. 160 of 2005

Dated: Order with signature of Judge(s)

1. For hearing of Main Case.

Date of Hearing : 26 April 2023, 27 April 2023, 28 April 2023, 2 May 2023, 3 May 2023 and 9 May 2023

Petitioner : Mst. Shah Jehan through her Legal Representatives represented by Mr. Mushtaq A. Memon, Advocate.

Respondents : Syed Abid Ali Jafri and Mst. Sultana Jafri represented by Mr. Raghib Baqi, Advocate.

JUDGMENT

MOHAMMAD ABDUR RAHMAN, J. These two Applications have been maintained by the Applicant under Section 115 of the Code of Civil Procedure, 1908 seeking to revise the Judgement dated 14 February 2005 passed by the 1st Additional District Judge Krachi (East) in Civil Appeal No. 17 of 2004 and Civil Appeal No. 18 of 2004 which had set aside a consolidated Judgement and Decree dated 24 December 2003 whereby Suit No. 1048 of 1996 (which was previously numbered as Suit No. 75 of 1977) that had been filed by the Respondent No. 1 and the Respondent No. 2 was decreed and Suit No. 1053 of 1996 (which was previously numbered as Suit No. 459 of 1976) that had been filed by the Applicant was dismissed.

A. The Dispute

2. The dispute as between the Applicant and the Respondent No. 1 and the Respondent No. 2 is in respect of their right title and interest to an immovable property bearing Plot No. 52/D, Block 2, Pakistan Employees Cooperative Housing Society Limited, Karachi admeasuring 200 square yards (hereinafter referred to as the "Said Property"). The Said Property was admittedly owned by one S. Qurban Ali and which the Respondent No. 1 and the Respondent No. 2 contend was orally gifted to them at the time of their wedding on 24 March 1967.

3. The Respondent No. 1 and the Respondent No. 2 contend that after the demise of the Applicants wife on 10 April 1971, S. Qurban Ali became "distraught and mentally disturbed". They contend that S. Qurban Ali, being of advanced years, was suffering from various ailments and was provided medicines by a Compounder

named Mohammad Aslam who gained S. Qurban Ali's confidence. This relationship purportedly resulted in Mohammad Aslam convincing S. Qurban Ali to enter into an Agreement of Sale on 23 July 1975 sell the Said Property to Mohammad Aslam wife i.e. the Applicant for a sum of Rs 120,000 (Rupees One Hundred and Twenty Thousand) and out of which Rs. 10,000 was purportedly paid by the Applicant to S. Qurban Ali at the time of the execution of the Agreement of Sale.

B. The Litigation as between the Appellant and the Respondent No.1. and the Respondent No. 2

(i) Suit No. 2251 of 1975

4. The Respondent No. 1 and the Respondent No. 2 contend that on 16 September 1975 they discovered the purported Agreement of Sale that had been entered into by S. Qurban Ali which they believed was with Mohammad Aslam. This prompted them to send legal notices to Mohammad Aslam as well as to various government authorities that had a concern with the Said Property directing them not to execute a conveyance deed in respect of the Said Property as the Said Property had already been gifted to them. They followed up these legal notices with the Respondent No. 1 instituting Suit No. 2251 of 1975 for Declaration and Injunction, before the XVth Civil Judge, Second Class Karachi, claiming title to the Said Property in that suit on the basis of the Oral Gift made to them by S. Qurban Ali. An interim injunction was granted by the XVth Civil Judge, Second Class Karachi on 23 October 1975 restraining the transfer of the Said Property, however there is a great deal of dispute as to what happened thereafter in respect of the fate of that injunction application. The Respondent No. 1 contends that an illegal insertion was made in the order dated 23 October 1975 passed in Suit No. 2251 of 1975, with the effect that the interim order

was ordered to only be operational until 15 November 1975. The Applicant denies such a contention and stated that the injunction as per the order passed by the XVth Civil Judge, Second Class Karachi only subsisted till 15 November 1975. It seems that thereafter that the XVth Civil Judge, Second Class Karachi delayed passing an order on that application and in the interim, on the belief that the injunction order didn't subsist, a Sale Deed was executed on 11 December 1975 by S. Qurban Ali in favour of the Applicant and which was duly registered before the Registrar of Rights and Assurances. It is stated that thereafter Mohammad Aslam died in the month of December 1975. The Respondent No. 1 on account of the conduct of the XVth Civil Judge, Second Class Karachi moved an application seeking the transfer of Suit No. 2551 of 2017 to another court. This Application, bearing Civil Transfer Application No. 1 of 1976, was heard by the District Judge Karachi and who after calling for the record of the proceedings and after hearing both the Applicant and the Respondent No. 1 on on 24 February 1976 passed an order, making some quite disparaging remarks about the conduct of the XVth Civil Judge, Second Class Karachi, transferring Suit No. 2251 of 1975 to the Court of the IXth Senior Civil Judge Karachi.

5. After Suit No. 2251 of 1975 was transferred to the Court of the IXth Senior Civil Judge Karachi, on 26 June 1976, S. Qurban Ali appeared before the IXth Senior Civil Judge Karachi and along with the Respondent No. 1 filed an Application under Order 23 Rule 3 of the Code of Civil Procedure, 1908 resulting in Suit No. 2251 of 1975 being decreed in the following terms:

“ ... 1. That on account of the intervention of the respective elders and friends of the family, the parties namely the plaintiffs and the Defendant No. 1 have amicably settled their difference and dispute of whatsoever nature and have further agreed to live together as father and son. The plaintiff will look after their father in his

old age. The defendant No. 1 shall withdraw the AAQ Nama forthwith

2. *That the Defendant No. one acknowledges and admit the entire claim of the plaintiffs in the suit and the property namely 52-D, Block II, P.E.C.H.S. Karachi was gifted over and possession delivered to them and I have no claim whatsoever in the same.*

3. *That the Defendant No.1 states that due to emotional stress and old age, he was persuaded and prevailed upon by Defendant No. 2 (Mohammad Aslam) to sell the property in question to his wife as he was still holding the documents in respect of the property. In fact the whole transaction was conceived to put pressure on his son and daughter in law and was advised that he should do so while the suit was pending. However the sale of the property is voidable as he has not received the entire consideration of the said property and has not delivered the possession on the same and has further not delivered the documents of title to the Mst. Shah Jehan.*

4. *That the Defendant No. 1 hereby undertakes and abide to execute necessary documents for cancellation of said Sale and serve notice thereof upon the purchase and agreed to handover deliver the documents of title to the Plaintiffs.*

5. *That the Plaintiffs withdraw their suit against Defendants No. 2 to 4 who are proforma defendants and have not filed their written statements. The defendant No. 2 is since dead. The compromise does not effect the interest of Defendant No. 3.*

It is ordered that the suit of the plaintiff be and the same is hereby decreed in terms of Compromise with no order as to costs."

6. A bare perusal of the Decree shows that the terms acceded to by S. Qurban Ali were in conflict with the following clauses of the preamble and terms of the Sale Deed dated 11 December 1975:

" ... WHEREAS the Vendor above named is seized and possessed of exclusively in his own absolute and personal rights coupled with the exclusive ownership, well and sufficiently entitled to the whole immovable property vzi Building Property bearing Survey Plot No. 52-D/2, Carrying Survey Sheer No. 35/P-1 situated at Pakistan Employees Cooperative Housing Society Ltd. Karachi measuring 200 Sq. yards...

... 1. *That in consideration of the total agreed selling price of the Said Property in the sum of Rs. 1,20,000 (Rupees one lac twenty thousand) only out of which Rs. 77,000 (Rupees seventy seven thousand) only well and truly paid by the Vendee to the Vendor in the manner hereinbefore states and the remaining balance of Rs. 43,000 (Rupees forty three thousand) only agreed to be paid in the presence of the Sub-Registrar Karachi at the time of registration of those precepts by the Said Vendee to the Vendor, which said sum of Rs. 77,000 (Rupees seventy seven thousand) only as earnest money and further residue of Rs, 43,000 (Rupees forty three thousand) only paid this day in presence of Sub-Registrar, Karachi, the Vendor hereby acknowledge having received in full,...*

3. ... and that the Vendor has full and subsisting right to make transfer in the manner hereby done..."

(ii) Suit No. 459 of 1976 (Renumbered as Suit No. 1053 of 1996)

7. The issuance of the Decree dated 26 June 1976 by the IXth Senior Civil Judge Karachi in Suit No. 2251 of 1975, prompted the Applicant to institute Suit No. 459 of 1975 before this Court whereby she, on the basis of the registered Sale Deed dated 11 December 1975, sought:

- (i) the ejectment of the Respondent No. 1 and the Respondent No. 2 from the Said Property; and
- (ii) the possession of the Said Property, that was with the Respondent No. 1 and the Respondent No. 2, to be handed over to her.

The Applicant had also on the basis of the registered Sale Deed dated 11 December 1975 issued notice to various tenants, who were in occupation of two tenements on the ground floor, to pay rent directly to the Applicant. Apparently the tenants originally acceded to this request and thereafter on account of the dispute regarding the ownership of the Said Property started depositing the rent in the court of a rent controller.

(iii) Suit No. 75 of 1977 (Renumbered as Suit No. 1048 of 1996)

8. The Respondent No. 1 and the Respondent No. 2 counter sued and instituted Suit No. 75 of 1977 for Declaration, Cancellation and Injunction before this Court as against the Applicant and S. Qurban Ali asking for a declaration that the Sale Deed dated 11

December 1975 was void or in the alternative that the Sale Deed dated 11 December 1975 was subject to the Decree passed in Suit No. 2251 of 1975. They identified their basis for maintaining Suit No. 75 of 1977 by claiming that:

- (i) S. Qurban Ali had orally gifted the Said Property to the Respondent No. 1 and the Respondent No. 2 on 24 March 1967 and hence S. Qurban Ali did not have the requisite title to sell the Said Property to the Applicant;
- (ii) S. Qurban Ali entered into the Sale Deed dated 11 December 1975 under the duress and undue influence of Mohammad Aslam; and
- (iii) the registration of the Sale Deed dated 11 December 1975 was subject to the notice of *lis pendens*, on account of the pendency of Suit No. 2251 of 1975, and which having been decreed in favour of the Respondent No. 1 vitiated the Sale Deed dated 11 December 1975.
- (iv) ***The Decision of Suit No. 459 of 1976 (Renumbered as Suit No. 1053 of 1996) and Suit No. 75 of 1977 (Renumbered as Suit No. 1048 of 1996)***

9. That both Suit No. 459 of 1975 and Suit No. 75 of 1977 remained pending before this Court for many years. In the year 1996, on the revision of this court's pecuniary jurisdiction, both the suits were transferred to the Court of the Illrd Senior Civil Judge Karachi (East) and were renumbered as Suit No. 1052 of 1996 and Suit No. 1048 of 1996 respectively. Both the suits had been consolidated and the following issues had been framed for determination:

- “ ...
1. *Whether the defendant no. 2 is the real father of the plaintiff No. 1 (in Suit No. 1048 of 1996)*
 2. *Whether the sale of House No. 52-D/2, P.E.C.H.S Karachi by defendant No. 2 to defendant no. 1 is legal and valid, if so, its effects? (in suit No 1048 of 1956)*
 3. *Whether story of verbal gift of the said house to the plaintiff by defendant No. 2 is invented to invalidate the sale to defendant no. 1 (in suit No 1048 of 1956)*
 4. *What is the effect of the decree in Suit No. 2251/75 (Compromise Decree between plaintiff and defendant No. 2 only). on the defendant No. 1 who was not a party to the proceedings? (in suit No 1048 of 1956)*
 5. *Whether full consideration amount of sale has been paid by defendant No. 1 to defendant no. 2? (in Suit No 1048 of 1956)*
 6. *Whether Plaintiff in suit No. 459/76 is entitled for possession of property in question? (in suit No 1053 of 1956)*
 7. *What should the decree be?”*

10. The matter was heard and by a Judgement dated 2 November 1999 and Decree dated 23 November 1999 the Illrd Senior Civil Judge Karachi (East) was pleased to dismiss Suit No. 1048 of 1996 (that had been filed by the Respondent No. 1 and the Respondent No. 2) and Decree Suit No. 1052 of 1996 (that had been filed by the Applicant). Two Appeals bearing Civil Appeal No. 133 of 2000 and Civil Appeal No. 159 of 2000 were preferred by the Respondent No. 1 and the Respondent No. 2 against the Judgement dated 2 November 1999 and Decree dated 23 November 1999 passed by the Illrd Senior Civil Judge Karachi (East) before the Illrd Additional District Judge Karachi (East) and which were by a Judgement dated 23 May 2001 granted and both suits were remanded to the Illrd Senior Civil Judge Karachi (East) for re-adjudication with certain directions as regarding the recording of certain evidence.

11. Suit No. 1048 of 1996 and Suit No. 1052 of 1996 were thereafter transferred by the District Judge Karachi (East) to the court of the Vth Senior Civil Judge Karachi (East) and who by a Judgement

dated 24 December 2003 was pleased to Decree Suit No. 1053 of 1996 (filed by the Applicant) and Dismiss Suit No. 1048 of 1996 (filed by the Respondent No. 1 and the Respondent No. 2) holding that:

- (i) the Respondent No. 1 was the son of S. Qurban Ali;
 - (ii) S. Qurban Ali was the sole owner of the Said Property and had validly conveyed the Said Property to the Applicant by a Sale Deed dated 11 December 1975 to the Applicant;
 - (iii) the Oral Gift purportedly made by S. Qurban Ali in favour of the Respondent No. 1 and the Respondent No. 2 was invalid as on 24 March 1967, the title that S. Qurban Ali held was that of a sub-licensee and which sub-license was not transferrable without the permission of the Licensee i.e. PECHS and which permission having not been obtained by S. Qurban Ali invalidated the Oral Gift dated 24 March 1967;
 - (iv) as the Applicant was not a party to Suit No. 2251 of 1975, the Decree dated 26 June 1976 was not binding on the Applicant;
 - (v) the Applicant was entitled to take possession of the Said Property from the Respondent No. 1 and the Respondent No 2.
- (v) ***Civil Appeal No. 17 of 2004 and Civil Appeal No. 18 of 2004***

12. The Respondent No. 1 and the Respondent No. 2. being aggrieved and dissatisfied by the Judgement dated 24 December 2003, whereby the Vth Senior Civil Judge Karachi (East) had been pleased to Decree Suit No. 1053 of 1996 (filed by the Applicant) and

Dismiss Suit No. 1048 of 1996 (filed by the Respondent No. 1 and the Respondent No. 2), preferred Civil Appeal No. 17 of 2004 and Civil Appeal No. 18 of 2004 under Section 96 of the Code of Civil Procedure, 1908 before the 1st Additional Sessions Judge Karachi (East). The 1st Additional Sessions Judge Karachi (East) was, by her Judgement dated 14 February 2005, pleased to allow both Civil Appeal No. 17 of 2004 and Civil Appeal No. 18 of 2004 and Decree Suit No. 1048 of 1996 (that had been filed by the Respondent No. 1 and the Respondent No. 2) and dismiss Suit No. 1053 of 1996 (that had been filed by the Applicant) holding that:

- (i) the Respondent No. 1 was the son of S. Qurban Ali;
- (ii) the Oral Gift dated 24 March 1967 made by S. Qurban Ali in favour of the Respondent No. 1 and the Respondent No. 2 was valid as:
 - (a) S. Qurban Ali had confirmed in his cross examination that he had orally gifted the Said Property to the Respondent No. 1 and the Respondent No. 2 on 24 March 1967;
 - (b) the Said Property having been mortgaged by S. Qurban Ali to the House Building Finance Corporation (which had prevented the Said Property from being mutated into the name of the Respondent No. 1 and the Respondent No. 2) would not override the Oral Gift that had been made by S. Qurban Ali on 24 March 1967 in favour of the Respondent No. 1 and the Respondent No. 2 as in accordance with Islamic

Law, the transfer of the Said Property would having take effect as and when the prescriptions of an oral gift had been completed;

- (c) that the Oral Gift had been acted upon by the Respondent No. 1 and the Respondent No. 2 as the name of the Respondent No. 1 had been entered as the owner of the Said Property in the records maintained by the Excise and Taxation Department, the Sui Southern Gas Company Limited and the Karachi Electricity Supply Corporation Limited;
 - (d) the Oral Gift dated 24 March 1967 had been confirmed by Qurban Ali in the Decree dated 26 July 1976 passed by the IXth Civil Judge Karachi and which Decree had not been set aside under the provisions of Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908;
 - (e) the pronouncement of the Oral Gift on 24 March 1967 had been confirmed by one independent witness, the second witness having since died;
- (iii) that the Sale Deed dated 11 December 1975 was invalid as:
- (a) the Oral Gift made by S. Qurban Ali in favour of the Respondent No. 1 and the Respondent No. 2 on 24 March 1967 being valid, S. Qurban Ali did not possess any title to the Said Property so as

to execute the sale Deed dated 11 December 1975 in favour of the Applicant;

- (b) the District Judge Karachi had in Civil Transfer Application No. 1 of 1976 opined that the injunction order had subsisted and had not lapsed on 15 November 1975, meaning thereby that the Sale Deed was executed in violation of the injunction order passed in Suit No. 2251 of 1975;
- (c) it was under Section 52 of the Transfer of Property Act, 1882 subject *lis pendens* i.e. the proceedings in Suit No. 2251 of 1975;
- (d) the Permission of the Ministry of Housing and Works had not obtained prior to the execution of the Sale Decree;

C. The Revision Applications

(i) Arguments on behalf of the Applicant

13. The Applicant, being aggrieved and dissatisfied by the Judgement dated 14 February 2005 passed by the 1st Additional Sessions Judge Karachi (East) in Civil Appeal No. 17 of 2004 and Civil Appeal No. 18 of 2004 has preferred these two applications, each seeking to revise the Judgement dated 14 February 2005 passed by the 1st Additional Sessions Judge Karachi (East) in Civil Appeal No. 17 of 2004 and Civil Appeal No. 18 of 2004, under Section 115 of the Code of Civil Procedure, 1908. Mr. Mustaq A. Memon, has addressed arguments on behalf of the Applicant and

has contended that the Judgement dated 24 December 2003 passed by the Vth Senior Civil Judge Karachi (East) in Civil Appeal No. 17 of 2004 and Civil Appeal No. 18 of 2004 suffer from the following “material irregularities” and “illegalities”:

- (i) the Decree dated 26 July 1976 passed by the IXth Senior Civil Judge Karachi in Suit No. 2251 of 1975 being a Compromise Decree was in the nature of an agreement and as no suit for specific performance had been maintained by the Respondent No. 1 as against S. Qurban Ali to compel him, under the terms thereunder, to institute a suit to cancel the Sale Deed dated 11 December 1975, the agreement had lost its efficacy and which issue had not been adjudicated on by the 1st Additional District Judge Karachi (East). He relied on the decision reported as **Fazal Mehdi vs. Allah Ditta**¹ and **Peer Dil and Others vs. Dad Muhammad**² and **Khurshid Anwer vs. Ch. Akbar**³ to support this contentions;
- (ii) that the pendency of Suit No. 2251 of 1975 would not attract the provisions of Section 52 of the Transfer of Property Act, 1882 as in the Province of Sindh, it was a mandatory requirement of that section that a notice of *lis pendens* has to be registered with the Registrar of Rights and Assurances and which had not been done. He relied on the decisions reported as **Sharif Muhammad vs. Khudda Buksh**,⁴ **Darul Aman Cooperative Housing Society Limited, Karachi vs. The Secretary, Government Of Pakistan, Ministry Of Works and Rehabilitation Division**,⁵ **Mrs Rashida vs. Mrs.**

¹ PLD 2007 SC 343

² 2009 SCMR 1268

³ 2012 CLC 386

⁴ 1989 CLC 2092

⁵ 1995 MLD 1553

Shahzad Khanem,⁶ **Roshan Ali vs. Taluka Council Khairpur Nathan Shah**⁷ and **Inayatullah Khan vs. Shabir Ahmad Khan**⁸ and contended that this issue had been incorrectly interpreted by the 1st Additional District Judge Karachi (East);

(iii) the requirements of an oral gift as mandated under the Islamic Law of Sharia and the evidence that had been led on these issues had been incorrectly applied by the the 1st Additional District Judge Karachi (East). In particular:

- (a) without prejudice to the fact that a declaration of the oral gift and the acceptance of the oral gift on 24 March 1967 may or may not have been made, delivery of possession of the Said Property had not been made either actually or constructively by S. Qurban Ali to the Respondent No. 1 and the Respondent No. 2;
- (b) the share that was purportedly given to the Respondent No. 1 and the Respondent No. 2 was not specified in the Oral Gift and which would invalidate the gift;
- (c) there is evidence that S. Qurban Ali had exerted rights over the Said Property inasmuch as he rented out the Said Property in 1973 to tenants;

⁶ 1999 YLR 910

⁷ 2003 MLD 1970

⁸ 2021 SCMR 686

Mr. Mushtaq A. Memon, relied on a number of treatise on the Islamic law of Sharia regarding oral gifts and also relied on the decisions reported as **Ghulam Hassan and others vs. Sarfaraz Khan and others**⁹ and **Salehon Muhammad and another vs. Shera another**¹⁰ in support of his contentions.

- (iv) that the Respondent No. 1 could not claim, under a nomination that had been made by S. Qurban Ali in his favour to the Pakistan Employees Cooperative Housing Society Limited, that this nomination should be treated as an Oral Gift as such nominations if so treated would still have to pass the threshold of the requirements of an oral gift and which had not been met. He relied on the decision reported as **Lt. Muhammad Sohail Anjum Khan vs. Abdul Rasheed Khan**¹¹ to support his contentions and which decision Mr. Mustaq A. Memon has stated was upheld in Appeal. This issue he contended had also not been adjudicated on by the 1st Additional District Judge Karachi (East);
- (v) that it was not possible to maintain an application under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908, as such right brought into the law by an amendment in 1980 and which was prior to the institution of the suit and hence the only way to cancel the Decree would be way of a suit;
- (vi) the Decree dated 26 July 1976 passed by the IXth Senior Civil Judge Karachi in Suit No. 2251 of 1975 was not binding on the Applicant as she was not party to Suit No. 2252 of 1975 and which issue had been incorrectly adjudicated on by the 1st

⁹ PLD 1956 SC (Pak) 309

¹⁰ 1977 SCMR 297

¹¹ 2003 MLD 1095

Additional District Judge Karachi (East). He relied on the decisions reported as **Lt.Col. Nawabzada Muhammad Amir Khan vs. The Controller of Estate Duty**¹², **Mst. Marium and 5 others vs. Haji**,¹³ **Ahmad Khan vs. Mst. Irshad Begum**¹⁴ and **Shafi Muhammad Vs. Waseem Ahmed Khan**¹⁵ to advance this proposition.

- (vii) that the Sale Deed dated 11 December 1975 had not been entered into in violation of the injunction granted in Suit No. 2252 of 1975 as the same had lapsed on 15 November 1975 and which issue had not been incorrectly adjudicated on by the 1st Additional District Judge Karachi (East);
- (viii) that the Judgement dated 14 February 2005 passed by the 1st Additional District Judge Karachi (East) in Civil Appeal No. 17 of 2004 and Civil Appeal No. 18 of 2004 had been passed in violation of the mandatory provisions of Order 41 Rule 31 of the Code of Civil Procedure, 1908 as no points for determination had been settled by the 1st Additional Sessions Judge Karachi (East) in Civil Appeal No. 17 of 2004 and Civil Appeal No. 18 of 2004 and relied on the decisions reported as **Mst. Aisha vs. Mst. Fatima**¹⁶ and **Executive Engineer, C&W, Manshera vs. Muhammad Nasim Khan**¹⁷ to advance this proposition.

(ii) **Arguments on behalf of the Respondents**

14. Mr. Raghbir Baqi, on behalf of the Respondent No. 1 and the Respondent No. 2, has contended that;

¹² PLD 1961 SC 119

¹³ PLD 1985 Khi 705

¹⁴ 2007 MLD 331

¹⁵ 2011 YLR 2576

¹⁶ 1991 CLC 1499

¹⁷ 2002 CLC 427

- (i) this Application under Section 115 of the Code of Civil Procedure, 1908 was not maintainable as a Second Appeal should have been preferred. He however pointed out that a Second Appeal being barred on account of the valuation of the suits, prohibited this Application from being treated as a Second Appeal. He relied on the decision of the Supreme Court of Pakistan reported as **Hakim-ud-Din through L.Rs. and Others vs. Faiz Bakhsh**¹⁸ and **Rafaqat Ali and others vs. Mst. Jamshed Bibi**¹⁹ and the decisions of various High Courts reported as **Taj Muhammad vs. Mst. Zaitooney**²⁰ and **Jetandar Kumar vs. Bibi Meena**²¹ to contend that the jurisdiction of this Court under Section 115 of the Code of Civil Procedure, 1908 is limited and this court could only interfere where there was a question of a material irregularity in the proceedings;
- (ii) Suit No. 1053 of 1006 as maintained by the Applicant only seeks possession of the First Floor of the Said Property from the Respondent No. 1 and the Respondent No. 2 and not the units on the ground floor which are also now in the possession of the Respondent No.1 and the Respondent No. 2;
- (iii) the Sale Deed dated 11 December 1975 is illegal and void as:

¹⁸ 2007 SCMR 870

¹⁹ 2007 SCMR 1076

²⁰ 1996 MLD 1270

²¹ PLD 2000 Khi 280

- (a) the consideration for the sale of the Said Property was never paid by the Applicant to S. Qurban Ali;
- (b) it was registered with the incorrect registrar;
- (c) the witness to the Sale Deed dated 11 December 1975 has denied having attested that document;
- (d) that the Sale Deed dated 11 December 1975 was subject to the decision of Suit 2251 of 1975 as a notice had been sent to the Applicants husband under Section 52 of the Transfer of Property Act, 1882 ;

In this regard he relied on the decision of the Supreme Court of Pakistan reported as **Rafaqat Ali and others vs. Mst. Jamshed Bibi**²² to state that as one of the witnesses to the Deed of Sale Deed had disowned his signature the requirements of Section clause (a) of Sub-Section (2) of Section 17 read with Article 79 of the Qanun e Shahdat Order, 1984 were not complied with and the decision reported as **Mukhtar Baiq vs. Sardar Baiq**²³ to advance the proposition of the rule of *lis pendens* under Section 52 of the Transfer of Property Act, 1882.

- (iv) the Oral Gift dated 24 March 1967 has never been challenged by the Applicant and is therefore valid as the requisite witnesses have deposed to the validity of the oral gift. In this regard he relied on the decision reported as **Alif Khan vs Mumtaz Begum;**²⁴

²² 2007 SCMR 1076

²³ 2000 SCMR 45

²⁴ 1998 SCMR 2124

- (v) the Decree dated 26 July 1976 passed in Suit No. 2252 of 1975 was duly registered with the Registrar of Rights and Assurances and has never been challenged and therefore vitiated the Sale Deed dated 11 December 1975;
- (vi) that as long as substantial compliance had been made of the requirement of the provisions of Order XLI Rule 31 of the Code of Civil Procedure, 1908 then strict compliance can be done away with “unless the same had caused any serious violation of the law or resulted in a grave miscarriage of justice”. Reliance in this regard was placed by Mr Raghbir Singh on the decisions of the Supreme Court of Pakistan reported as **Muhammad Iftikhar vs. Nazakat Ali**²⁵ and the decision of this Court reported as **United Bank Limited vs. Shoaib Ahmed**²⁶

D. The Findings of this Court on the Application

(i) The Supervisory Jurisdiction under Section 115 of the Code of Civil Procedure, 1908

15. I have heard the Counsel for the Applicant and the Counsel for the Respondent No. 1 and the Respondent No. 2 and have perused the record. The Supreme Court of Pakistan in the decision reported as **Mst. Banori vs. Jilani through Legal Heirs**²⁷ has summarised the scope of the jurisdiction of this Court under Article 115 of the Code of Civil Procedure, 1908 and wherein it has been held that:

²⁵ 2010 SCMR 1868

²⁶ PLD 2021 Sindh 394

²⁷ PLD 2010 SC 1186

" ... 8. The above noticed provisions of subsection (1) of section 115 as they stand now after the above-noted amendments, read as under:--

"115. Revision.--(1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears---

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit:

Provided that, where a person makes an application under this subsection, he shall, in support of such application, furnish copies of the pleadings, documents and order of the subordinate Court and the High Court shall, except for reasons to be recorded, dispose of such application without calling for the record of the subordinate Court:

Provided further that such application shall be made within 90 days of the decision of subordinate Court which shall provide copy of such decision within three days thereof and High Court shall dispose such application within six months."

A perusal of the said provisions would reveal as under:

(a) that the jurisdiction conferred by section 115, C.P.C. is essentially a supervisory jurisdiction of superintendence and control meant to ensure correction of illegalities and irregularities found in the decisions of the courts subordinate to the revisional court;

(b) that in the discharge of its said obligation, the revisional court had not been placed at the mercy of the parties to a lis or of some other person and was required to act even suo motu;

(c) that no law prescribed any limit of time for such a court within which such an error could be rectified;

(d) that there was, however, no bar on any person, laying, through an application any information before the revisional court about any such error, illegality or irregularity in any of the decisions of the subordinate courts and seeking correction thereof;

(e) that a person making such an application had, however, been bound to do so within ninety days of the decision sought to be revised;

(f) that such a person was required to furnish, along with the said application, copies of the pleadings and other documents and of course a copy of the order being questioned;

(g) that the subordinate court making the decision which is sought to be revised, was bound to supply a copy thereof within three days of the making of the same;

(h) that the revisional court was then required to dispose such an application within six months and that also, except in exceptional cases, without calling for the record."

9. These provisions of section 115, C.P.C. thus appear to be a complete code vis-a-vis the invoking and exercise of revisional jurisdiction. Confining ourselves to the facts of the present case i.e. to the matter of applications seeking exercise of revisional power, suffice it to say that the said provisions prescribe the form of application to be filed; the documents required to be furnished with such an application; the period of time within which such an application could be made; the obligation of the court making the decision in question to supply a copy thereof; the period of time within which such a copy was to be supplied; such an application to be decided without calling for the record of the subordinate court except in exceptional situations and finally the period of time within which such an application was to be disposed.

10. The provisions of section 115, C.P.C., after the addition of the two provisions, give us a complete scheme including the time limits prescribed for various steps in the matter of applications which could be filed invoking the revisional jurisdiction."

As clarified above, the supervisory jurisdiction of this Court under Section 115 of the Code of Civil Procedure, 1908 extends to remedy "illegalities and irregularities" and which, as correctly relied upon by Mr. Mustaq A. Memon, has been clarified in the decision of the Supreme Court of Pakistan reported as **Barkat Ali vs, Muhammad Nawaz** includes the right to reappraise the evidence that was applied by a court and to reverse the findings when they are found to have been applied incorrectly. In that Judgement, the Supreme Court of Pakistan, held that:

" ... 4. We have carefully examined the contentions as agitated on behalf of appellant in the light of record of the case. We have minutely perused the judgment/decree passed by the learned Additional District Judge, Gujrat on 18-12-2002 as well as the Judgement impugned. The main thrust of the argument seems to be that the Judgement of the learned Appellate Court should have not been reversed in exercise of revisional jurisdiction as conferred upon by the learned High Court under section 115, C.P.C. and the affidavit furnished by Ch. Sikandar Hayat, Advocate, has rightly been considered by the learned Appellate Court. We have adverted to the prime contention of Mr. M. Ibrahim Satti that the learned High Court should have not reversed the Judgement of the learned Appellate Court in exercise of revisional jurisdiction which appears to be fallacious for the simple reason that in exercise of revisional jurisdiction, **the High Court is competent to reverse the findings of Appellate Court when it is based on insufficient evidence, misreading of evidence, non-consideration of material evidence, erroneous assumptions of facts and consideration of**

inadmissible evidence. The findings of the learned Appellate Court cannot be treated as a sacrosanct and has rightly been reversed by means of Judgementimpugned which is well-reasoned."

This finding is in consonance with the decision of the Supreme Court of Pakistan reported as **Hakim-ud-Din through L.Rs. and Others vs. Faiz Bakhsh**²⁸ and **Rafaqat Ali and others vs. Mst. Jamshed Bibi**²⁹ and the decisions of various High Courts reported as **Taj Muhammad vs, Mst. Zaitooney**³⁰ and **Jetandar Kumar vs. Bibi Meena**³¹ that were relied upon by Mr. Raghbir Baqi in his arguments each of which clarified that this Court has the jurisdiction under Section 115 of the Code of Civil Procedure, 1908 to see whether or not a material irregularity exists in the proceedings and which has been held by the Supreme Court of Pakistan to include the power to reappraise the evidence led. It is therefore incumbent on this Court to not only assess whether the Judgement dated 14 February 2005 passed by the 1st Additional District Judge Krachi (East) in Civil Appeal No. 17 of 2004 and Civil Appeal No. 18 or 2004, that had been passed by that Court, had correctly decided the issues of the maintainability of Suit No. 1048 of 1996 and Suit No. 1052 of 1996 and as to whether the Appellate Court had correctly applied the law but also to to appraise the evidence led and applied by that Court while deciding the issues framed in each of the Suits.

(ii) Issues as to Maintainability

16. Order XL Rule 31 of the Code of Civil Procedure, 1908 prescribes that:

“ ... 31. The Judgementof the Appellate Court shall be in writing and shall state –

a. the points for determination;

²⁸ 2007 SCMR 870

²⁹ 2007 SCMR 1076

³⁰ 1996 MLD 1270

³¹ PLD 2000 Khi 280

- b. the decision thereon;*
- c. the reasons for the decision; and*
- d. where the decree appealed from is reversed or varied, the relief to which the appellant is entitled;*

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

Mr. Mustaq A. Memon had relied on the decisions reported as **Mst. Aisha vs. Mst. Fatima**³² and **Executive Engineer, C& W, Manshera vs. Muhammad Nasim Khan**³³ and had stated that the provision of this Rule were mandatory and a failure on the part of the Appellate Court to comply with this Rule of the Code of Civil Procedure, 1908 mandated that the Judgement dated 14 February 2005 passed by the 1st Additional District Judge Karachi (East) was liable to be set aside. Mr. Raghob Baqi on behalf of the Respondent No. 1 and the Respondent No. 2 relied on the decision of the Supreme Court of Pakistan reported as **Muhammad Iftikhar vs. Nazakat Ali**³⁴ in which it was held that:

“ ... 4. We asked the learned counsel as to what were the arguments specifically urged before the learned High Court during the hearing of the regular second appeal but he failed to specifically refer the law points urged during the course of arguments before the learned High Court. However, perusal of para No. 6 of the impugned Judgement indicates that the only ground urged before the learned High Court was that the learned Courts below did not strictly adhere to the provisions of the Order XLI, Rule 31, C.P.C.; which contention has been properly and correctly addressed to by the learned High Court in the impugned judgment. It appears from the perusal of the impugned Judgement and that by the first appellate Court in substance compliance of the provisions of Order XLI Rule 31, C.P.C. was made and it is not always required that in each case the appellate court would deal with each of the issue and to resolve the same separately in the light of the evidence available on the record unless the same had caused any serious violation of the law or resulted into a grave miscarriage of justice to any of the parties to the Suit.

Reliance may also be placed on the decisions of the Supreme Court of Pakistan reported as **Roshi vs. Fateh**³⁵ and **Ch. Abdul Kabeer**

³² 1991 CLC 1499

³³ 2002 CLC 427

³⁴ 2010 SCMR 1868

³⁵ 1982 SCMR 542

vs. Mian Abdul Waheed³⁶ which advance the same proposition and which were relied upon by this Court in the decision reported as **United Bank Limited vs. Shoaib Ahmed**.³⁷ On the basis of each of these decisions, I believe that it has now been settled that if substantial compliance had been made with the provisions of Order XLI Rule 31 of the Code of Civil Procedure, 1908 then strict compliance can be done away with “unless the same had caused any serious violation of the law or resulted in a grave miscarriage of justice”. I have examined the Judgement dated 14 February 2005 passed by the 1st Additional District Judge Krachi (East) in Civil Appeal No. 17 of 2004 and Civil Appeal No. 18 or 2004 and note that while no points for determination have been specifically been listed in the Judgement, the decision, the reasons for the decision, the decision on the decree that had been passed by the 3rd Senior Civil Judge (East) and the relief that was granted has been specifically mentioned in the Judgement. I am therefore of the opinion that substantial compliance of Order XLI Rule 31 of the Code of Civil Procedure, 1908 was made by the by the 1st Additional District Judge Krachi (East) in passing the Judgement dated 14 February 2005 in Civil Appeal No. 17 of 2004 and Civil Appeal No. 18 or 2004 and no grave miscarriage of justice was caused to the Applicant while passing that Judgement.

(iii) **The Decree Passed in Suit No. 2551 of 1975 on the Applicant**

17. Mr. Raghbir Baqi advanced the proposition that after the institution of Suit No. 2551 of 1975 an interim order was passed therein restraining the transfer of the Said Property. While there is much dispute as to whether or not that injunction remained operative

³⁶ 1968 SCMR 464

³⁷ PLD 2021 Sindh 394

during the period when the Sale Deed was registered on 11 December 1975, the fact that is not disputed is that neither the Applicant nor the Registrar of Rights and Assurances were made a party to Suit No. 2551 of 1975 and to my mind that order would not be binding on her or for that matter on the Registrar of Rights and Assurances who was also not a party to those proceedings. Mr. Mustaq A. Memon has correctly relied on the decisions reported as **Lt.Col. Nawabzada Muhammad Amir Khan vs. The Controller of Estate Duty**³⁸, **Mst. Marium and 5 others vs. Haji, Ahmad Khan vs. Mst. Irshad Begum**⁴⁰ and **Shafi Muhammad Vs. Waseem Ahmed Khan**⁴¹ to advance this proposition. However, keeping in mind that S. Qurban Ali was a Defendant in Suit No. 2551 of 1975, the question would however still remain as to whether any interim order that was subsisting in Suit No. 2551 of 1975 would have restrained S. Qurban Ali from executing the Sale Deed dated 11 December 1975.

18. I have considered the Judgement dated 14 February 2005 passed by the 1st Additional District Judge Krachi (East) in Civil Appeal No. 17 of 2004 and Civil Appeal No. 18 of 2004 and note that no specific finding has been made in that Judgement on this issue. As this was an issue that had been framed and no finding have been given in the Judgement dated 14 February 2005, this is clearly an irregularity in the proceedings. I have therefore reviewed the evidence available and consider that the only evidence that is available on the record in respect of the interim order that was passed in Suit No. 2551 of 1975 is in the form of the order dated 24 February 1975 passed by the District Judge Karachi in Civil Transfer Application No. 1 of 1976. In that order the court has averred that it

³⁸ PLD 1961 SC 119

³⁹ PLD 1985 KHI 705

⁴⁰ 2007 MLD 331

⁴¹ 2011 YLR 2576

was usual “to grant interim stay not upto a particular date but till the decision of the application” there is no finding in that order to state that the interim order was operational when the Sale Deed dated 11 December 1975 was registered. There is also no finding of the court in Suit No. 2551 of 1975 which clarified that the interim order was subsisting at the time of the registration of the Deed of Sale on 11 December 1975 or for that matter whether any contempt proceedings were instituted to allege that S. Qurban Ali had registered the Sale Deed on 11 December 1975 in violation of an interim order passed in Suit No. 2551 of 1975. I am therefore inclined to hold that on the evidence there is nothing to show that an interim order was in the field in Suit No. 2551 of 1975 and therefore am of the opinion that the Sale Deed dated 11 December 1975 was not registered in violation of an interim order passed in Suit No. 2551 of 1975.

19. A second argument was raised on the basis of the Compromise Decree dated 26 July 1976 passed by the IVth Senior Civil Judge Karachi (East) in Suit No. 2551 of 1975 that the Decree dated 26 July 1976 passed by the IXth Senior Civil Judge Karachi in Suit No. 2251 of 1975 had been subsequently registered with the Registrar of Rights and Assurances and therefore vitiated the Sale Deed dated 11 December 1975. Mr. Mustaq A. Memon had contended that a Compromise Decree was in the nature of an agreement and as no suit for specific performance had been maintained by the Respondent No. 1 as against S. Qurban Ali, to compel him under the terms thereunder to institute the suit to cancel the Sale Deed dated 11 December 1975, the right had lapsed. He relied on the decision reported as **Fazal Mehdi vs. Allah Ditta**⁴² and

⁴² PLD 2007 SC 343

Peer Dil and Others vs. Dad Muhammad⁴³ and **Khurshid Anwer vs. Ch. Akbar**⁴⁴ to support his contentions.

20. I find myself in agreement with the contentions of Mr. Mustaq A. Memon. To my mind the compromise decree is an agreement which had recorded the following terms:

- (i) the Respondent No. 1 would take care of S. Qurban Ali;
- (ii) S. Qurban Ali would withdraw an Aaq Nama that he had issued as against the Respondent No. 1;
- (iii) S. Qurban Ali acknowledged the oral gift that he had made to the Respondent No. 1 and the Respondent No. 2 transferring them the Said Property and confirming that he had no claim over the Said Property;
- (iv) S. Qurban Ali had executed the Sale Deed on 11 December 1975 on account of “emotional stress” and “old age” and so as to put pressure on the Respondent No. 1 and the Respondent No. 2;
- (v) S. Qurban Ali had not received the entire sale consideration as recorded in the Sale Deed dated 11 December 1975 and as such the conveyance was voidable; and
- (vi) S. Qurban Ali would execute whatever documents were necessary to cancel the Sale Deed dated 11 December 1975.

Assuming that the Oral Gift dated 24 March 1967 was invalid, I am clear that the Sale Deed dated 11 December 1975 having been executed and registered as between the Applicant and S. Qurban Ali would have conveyed whatever right, title or interest S. Qurban Ali

⁴³ 2009 SCMR 1268

⁴⁴ 2012 CLC 386

held in the Said Property to the Applicant. To my mind, once that had occurred, the only way one could undo the “conveyance of right, title and interest” as effected by the Sale Deed dated 11 December 1975 would be if the Applicant reconveyed the right, title and interest in the Said Property back to S. Qurban Ali through a registered instrument. The registration of the Decree dated 26 July 1975 passed by the IVth Senior Civil Judge Karachi unilaterally declaring the intent of S. Qurban Ali to make efforts to vitiate the Sale Deed dated 11 December 1975 does not achieve this. I have considered the Judgement dated 14 February 2005 passed by the 1st Additional District Judge Krachi (East) in Civil Appeal No. 17 of 2004 and Civil Appeal No. 18 of 2004 and note that no specific finding has been made in respect of this issue as well. This was an issue that had been framed and no finding have been made on it to my mind is another irregularity in the proceedings. I am therefore inclined to hold that the registration of the Compromise Decree dated 26 July 1975 passed by the IVth Senior Civil Judge Karachi would not vitiate the Sale Deed dated 11 December 1975 and would at best record certain obligations as between the Respondent No. 1 and S. Qurban Ali and for which no performance was ever sought by the Respondent No.1 as against S. Qurban Ali. Needless to say, such right having never been enforced by the Respondent No. 1 as against S. Qurban Ali would only render the Decree as having not been performed as against S. Qurban Ali and the right to enforce such rights being now most probably barred under Article 113 of the First Schedule read with Section 3 of the Limitation Act, 1908.

21. The last contention that was addressed by Mr. Mustaq A. Memon in respect of the Compromise Decree dated 26 July 1975 that was passed by the IVth Senior Civil Judge Karachi in Suit 2551 of 1975 was in respect of the finding of the 1st Additional District

Judge Karachi (East) that no application was ever maintained by the Applicant to set aside that decree under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908 to the extent that the validity of the Oral Gift dated 24 March 1967 had been upheld therein. Mr. Memon had rightly contended that aside from the fact that this provision was inserted into the Code of Civil Procedure, 1908 in the year 1980 by the Code of Civil Procedure (Amendment) Ordinance, 1980 and it could not have been invoked by the Applicant to challenge the Compromise Decree dated 26 July 1975 that was passed by the IVth Senior Civil Judge Karachi in Suit No. 2551 of 1975. In addition, he contended, as held in the decisions reported as **Fazal Mehdi vs. Allah Ditta**,⁴⁵ **Peer Dil and others vs. Dad Muhammad**⁴⁶ and **Khurshid Anwer vs. Ch. Akbar**,⁴⁷ that a Compromise Decree was merely an agreement as between the parties to the decree and would therefore not be binding on any person who was not party to that agreement. I have no hesitation in saying that, the finding made in the Judgement dated 14 February 2005 passed by the 1st Additional District Judge Karachi (East) in Civil Appeal No. 17 of 2004 and Civil Appeal No. 18 of 2004 that the validity of the Oral Gift as recorded in the Compromise Decree dated 26 July 1975 passed by the IVth Senior Civil Judge Karachi in Suit No. 2551 of 1975 would be binding on the Applicant is incorrect. The Compromise Decree not being a finding of any point of law was not a Decree passed on merits and would not operate as being binding on any person other than the persons who were parties to the Compromise Decree. The recording of such a fact regarding the validity of the Oral Gift would only be operative *inter se* the Respondent No. 1 and S. Qurban Ali and would not be enforceable as against the Applicant.

⁴⁵ PLD 2007 SC 343

⁴⁶ 2009 SCMR 1268

⁴⁷ 2012 CLC 386

(iii) **The Validity of the Oral Gift dated 24 March 1967**

22. The prescriptions for an Oral Gift under the Islamic Law of Sharia are well settled. The Supreme Court of Pakistan in **Maulvi Abdullah vs. Abdul Aziz**⁴⁸ it was held that:

“ ... that a gift by a Muslim, would be complete even if there is no writing, and, it depends, fir its validity upon: (1) a declaration of gift by the donor (2) acceptance of gift expressly or impliedly by or on behalf of the donee (3) delivery of possession of the Subject matter by the donor to the done, If these three condition are complied with the gift is complete.”

It is therefore to be examined on the basis of the evidence that had been led by the Applicant, the Respondent No. 1 and the Respondent No. 2 as to whether the Oral Gift had been perfected and whether the findings of the Appellate Court were **“based on insufficient evidence, misreading of evidence, non-consideration of material evidence, erroneous assumptions of facts and consideration of inadmissible evidence.”**

(i) **Evidence led by the Respondent No. 1**

23. Section 101 of the Evidence Act, 1872, as was applicable at the time of the institution of the proceedings, clarifies that the person who alleges as to the existence of a fact has to prove the same. As the Respondent No. 1 and the Respondent No. 2 had averred as to the existence of the Oral Gift dated 24 March 1967, it was incumbent on the Respondent No. 1 and the Respondent No. 2 to prove that the Oral Gift had been made in their favour. The evidence adduced by the Respondent No. 1 in his evidence stated that:

⁴⁸ 1987 SCMR 1403. See also **Ashiq Hussain and another vs. Ashiq Ali** 1972 SCMR 50; **Mst. Umar Bibi and 3 others vs. Bashir Ahmad and 3 others** 1977 SCMR 154; **Saadia vs. Gul Bibi** 2016 SCMR 662; **Syed Ahmad vs. Ali Akbar** 2021 SCMR 743; **Faqir Ali vs. Sakina Bibi** PLD 2002 SC 85;

- (i) the Said Property was gifted to him and the Respondent No. 2 by S. Qurban Ali at the time of his marriage on 24 March 1967;
- (ii) that the Respondent No. 1 was in occupation of the Said Property when it was orally gifted to him on 24 March 1967;
- (iii) the Oral Gift was accepted by the Respondent No. 1 and the Respondent No. 2 at the time of the pronouncement of the Oral Gift on 24 March 1967;
- (iv) the Oral Gift was subsequently reduced into writing about three or four months after it was pronounced;
- (v) the keys to the house were handed over by S. Qurban Ali to the Respondent No. 2 at the time of the Rukhsati;
- (vi) the original title documents of the Said Property are in the possession of the Respondent No. 2;
- (vii) the following persons were present at the time of his marriage and who could testify to the validity of the Oral Gift dated 24 March 1967:
 - (a) Qari Syed Yakoob Ali Shah,
 - (b) Fakhruddin,
 - (c) Faryad Hussain,
 - (d) S.M. Naqi,
 - (e) Iqbal, and
 - (f) Liaquat Hussain.
- (viii) that the Respondent No. 1 and the Respondent No.2 remained in possession of the First Floor of the construction that existed on the Said Property;

There were also the following contradictions that existed in the evidence that was recorded by the Respondent No. 1 and which are listed as under:

- (i) **Collection of rent:** In the deposition it is recorded that rent was being collected by the Respondent No. 2 and the children of the Respondent No. 1 and the Respondent No. 2. However, when confronted it was discovered that the rent was being received by S. Qurban Ali prior to his marriage;
- (ii) **Property not transferred in PECHS record:** In the deposition it was contended by the Respondent No. 1 that the property had been transferred into his name but on being confronted to prove such a fact, he is unable to show any documentary evidence to confirm such a fact;
- (iii) **Lease:** In the deposition the Respondent No. 1 is unable to confirm as to whether a lease has or has not been executed in respect of the Said Property.

(i) Evidence led by Shah Jehan

24. The evidence adduced by the Applicant in her evidence stated that:

- (i) S. Qurban Ali had never informed her that he had orally gifted the Said Property to the Respondent No. 1 and if she had known this fact that she would not have purchased the Said Property;
- (ii) that her husband Mohammad Aslam was looking after the transaction; and

- (iii) that she had no knowledge of the existence of Suit No. 2551 of 1975 when she executed the registered Sale Deed on 11 December 1975.

(iii) **Evidence of S. Qurban Ali**

25. The evidence of S. Qurban Ali is full of contradictions which are indicated as under:

- (i) he states that he never orally gifted the Said Property to the Respondent No. 1 and the Respondent No. 2 on the day of their marriage i.e. 24 March 1967
- (ii) he states that he has received the entire sale consideration from the Applicant for the sale of the Said Property;
- (iii) he accepts that he executed the Application under Order 23 Rule 3 of the Code of Civil Procedure, 1908 in Suit No. 2551 of 1975 and that he appeared before the IX Civil Judge Karachi in Suit No. 2551 of 1975 and accepted its contents including, but not limited to, the fact that he had orally gifted the Said Property to the Respondent No. 1 and the Respondent No. 2 and then states that he executed this document under the pressure of his two brothers;
- (iv) he then issues a declaration where he states that he has no objection if the Said Property is transferred into the name of the Respondent No. 1 and then revokes the same on 28 January 1979;

- (v) he writes a letter to the Applicant stating that the entire sale consideration has not been paid to him which is contradiction to his testimony.

26. While considering the evidence that has been led in these proceedings, I would begin by showing my utter disdain to the evidence that has been led by S. Qurban Ali as being completely contradictory. In **Ashiq Hussain and another vs. Ashiq Ali**⁴⁹ the Supreme Court of Pakistan while considering a matter where a gift had been made of a certain piece of land referred to the testimony of the one of the witnesses as follows:

“ ... *After hearing the learned counsel for the parties, we are satisfied that the finding of the Courts below that a gift deed was executed by Ashiq Ali deceased in favour of the appellants is proved beyond reasonable doubt. The finding of the Courts below that it was not obtained by fraud or mis-representation is based on - proper appreciation of the evidence led in the trial Court. In fact, the deceased Ashiq Ali took three different positions so far as the execution of the gift deed is concerned. In the waqf deed, he stated that the gift deed has been obtained by undue influence. In the written statement it was stated that the gift deed was obtained by fraud and misrepresentation Ashiq did execute the gift deed in favour of the appellants but he wanted to incorporate a condition that he would remain as the owner of the property in dispute during his life time and this condition was not incorporated in the gift deed. In view of the fact that Ashiq Ali had been changing his position in regard to the execution of the gift deed, we are satisfied that the Courts below are perfectly justified in coming to the conclusion that the gift deed was not obtained by fraud or misrepresentation.”*

(Emphasis is added)

It is apparent that the Supreme Court of Pakistan when seeing clear contradictions being made by a witness in his deposition has considered such evidence should not to be relied on. I can see no reason why I should not treat the evidence of S. Qurban Ali in the same manner. His testimony admitting that he executed the Application under Order 23 Rule 3 of the Code of Civil Procedure, 1908 before the IXth Senior Civil Judge Karachi (East) and in which

⁴⁹ 1972 SCMR 50

he accepts that he orally gifted the Said Property to the Respondent No. 1 and the Respondent No. 2 is in direct contradiction to his earlier statements that he never orally gifted the Said Property. He makes similar contradictory statements regarding the transaction pertaining to the Sale Deed dated 11 December 1975 both admitting receiving the entire consideration and in letter correspondence denying receiving the same. Such testimony in my opinion cannot be relied on.

27. Notwithstanding the evidence of the S. Qurban Ali, it is still necessary for the Respondent No. 1 and the Respondent No. 2 to prove that the three elements of an oral gift have been proved by them. Mr. Mushtaq A. Memon has clarified that the Respondent No. 1 could not claim that the nomination that had been made by S. Qurban Ali in respect of his title to the Said Property would tantamount to a gift and has relied on the decision reported as **Lt. Muhammad Sohail Anjum Khan vs. Abdul Rasheed Khan**⁵⁰ to support his contentions and which decision Mr. Mustaq A. Memon has stated was upheld in Appeal. In **Mst. Amtul Habib and others vs. Mst. Musarrat Parveen and others**⁵¹ the Supreme Court of Pakistan held that:

“ ... *Apart from this, it appears to us that, unless a nomination can amount to a valid gift inter vivos, it cannot pass title to the nominee in respect of immovable property, nor can the making of a nomination give the right to the nominator at his own choice to change the law of succession B which would otherwise be applicable in the case of his death. Obviously, the nomination cannot operate as a valid gift under the Muhammadan Law, because, such a gift, in order to confer title on the donee, must be accompanied by delivery of possession of the property gifted*

As such, while a nomination can be considered to be a gift, it would still be incumbent on the Donee to prove the three elements of a gift

⁵⁰ 2003 MLD 1095

⁵¹ PLD 1974 SC 185

under the Islamic Law of Sharia and it would be incumbent on this court to examine as to whether the Respondent No. 1 and the Respondent No. 2 have been able to cross this threshold. To prove this issue the Respondent No. 1 adduced evidence of the fact that the Said Property was transferred by way of an Oral Gift that was pronounced by S. Qurban Ali on 24 March 1967 and which Oral Gift was accepted by the Respondent No. 1 and the Respondent No. 2 on the same day. One Witness, the Father of the Respondent No. 2 has testified to the Oral Gift having been made in front of them at the time of the wedding on 24 March 1967. Keeping in mind that the gift was an Oral Gift and there was no requirement to reduce the same to writing I am of the opinion that the evidence of the Respondent No. 1 having been corroborated by a witness must be preferred over the inconsistent testimony of S. Qurban Ali. I am therefore of the opinion that while the fact of the pronouncement of the Oral Gift and of the acceptance of the oral gift had been proved by the Respondent No. 1, the evidence that remains to be examined is as to whether the "actual" or "constructive" possession of the Said Property was handed over by S. Qurban Ali to the Respondent No. 1 and the Respondent No. 2. The evidence on this fact is less clear. It has come on record in the Respondent No. 1 deposition that he was in possession of the Said Property at the time of his marriage and therefore his or for that matter the Respondent No. 2 possession of the Said Property cannot be conclusive to determine as to whether or not "actual" or "constructive" possession was handed over to the Respondent No. 1 and the Respondent No. 2 on the basis of their occupation of the Said Property. It is however interesting to note, that despite the execution of the Sale Deed dated 11 December 1975, the title documents of the Said Property remained and continue to remain in the possession of the Respondent No. and the Respondent No. 2. It is the Respondent No. 1 and the Respondent

No.2 contention that the title documents were handed over to them by S. Qurban Ali and this fact, in the entire testimony of all the witnesses, has gone un rebutted. If there was evidence to suggest that the Respondent No. 1 and the Respondent No. 2 had forcibly taken possession of the title documents or that they had been stolen I might have considered otherwise, but this is not the case over here. In the absence of any untowardly act, the custody of title documents coupled with the physical possession of the Said Property being with the Respondent No. 1 and the Respondent No. 2 would to my mind show that constructive possession of the Said Property vested with the Respondent No. 1 and the Respondent No. 2 and which would satisfy the requirements of showing that the possession of the Said Property had been handed over by S. Qurban Ali to the Respondent No. 1 and the Respondent No. 2. Mr. Mustaq A. Memon had relied on testimony, which no doubt exists in the evidence, to show that S. Qurban Ali was asserting rights over the Said Property by claiming rent and executing lease deeds over the Said Property and while I am clear that this is factor that one should be considered while determining whether actual or constructive possession has in fact been handed over to the Respondent No. 1 and the Respondent No. 2, in the particular facts and circumstances a I am inclined to believe the Respondent No. 1 that this was just a convenience keeping in mind the busy work schedule of the Respondent No. 1.

28. Mr. Mustaq A. Memon, finally stated that even if all the requirements of an Oral Gift were found, the same must fail as the share that was purportedly given to the Respondent No. 1 and the Respondent No. 2 was not specified in the Oral Gift. He referred in this regard to Section 161 of the Principles of Mohammedan Law and which states that where a gift is made jointly to two or more persons of a property which is capable of being partitioned the gift would be

invalid as prima facie actual or constructive possession has not been conveyed to the donees of their share in the property. However as per the Principles of Mohammedan Law, the oral gift could subsequently be made valid by the donees taking possession of a specific portion of the property. The donees having the ability to validate the gift in the aforesaid manner, I do not see a basis to vitiate the Oral Gift dated 24 March 1967 on this ground and which I therefore reject.

29. It is noted that the 1st Additional District Judge Krachi (East) in her Judgement dated 14 February 2005 passed in Civil Appeal No. 17 of 2004 and Civil Appeal No. 18 of 2004 has failed to discuss the issue of actual or constructive possession being handed over to the Respondent No. 1 and the Respondent No. 2 by S. Qurban Ali. This is to my mind a material irregularity in the proceedings and which had compelled me to reassess the evidence that had been adduced by the Applicant and the Respondent No. 1 and the Respondent No. 2. For the foregoing reasons and on the basis of the evidence adduced, I am of the opinion that all the requirements of an Oral Gift as contained in the Islamic Law of Sharia have been proved and that the Respondent No. 1 and the Respondent No. 2 had been orally gifted the Said Property by S. Qurban Ali at the time of their marriage on 24 March 1967.

(iv) The Validity of the Sale Deed dated 11 December 1975

30. Having come to the conclusion that the Said Property had been orally gifted by S. Qurban Ali to the Respondent No. 1 and the Respondent No. 2 on 24 March 1967, it would naturally follow that at the time of registering the Sale Deed dated 11 December 1975, S. Qurban Ali did not have proper title to convey the Said Property to

the Applicant. While this would be a breach of the covenant of the Sale Deed dated 11 December 1975 and which would give the Applicant a right to maintain a lis pendens against S. Qurban Ali it would invalidate the Sale Deed dated 11 December 1975. Reliance in this regard may be placed on the decision reported as **Talib Hussain vs. Member, Board of Revenue**⁵² wherein it was held that:

“ 6. Now the next question is as to whether the petitioner who are the vendees can enjoy the protection as it has been envisaged under section 41 of the Transfer of Property Act suffice it to observe that in respect of evacuee property no such protection is available to a vendee as it has been held in the judgments (1) Kanwal Naim and 3 others v. Fateh Khan and others (PLD 1983 SC 53) (2) Manzoor Hussain v. Fazal Hussain and others (1984 SCMR 1027), (3) Gul Muhammad and others v. The Additional Settlement Commissioner and others (1985 SCMR 491). (4) Ejaz Ahmad Khan v. Chahat and others (1987 SCMR 192), (5) Mst. Resham Bibi v. Mst. Elahi Sain (PLD 1991 SC 1034) and (6) Sufi Zaheer Ahmad (deceased) through Legal Heir v. Chief Settlement and Rehabilitation Commissioner and others (1993 MLD 195). It is important to emphasise that petitioner's entitlement is based upon the entitlement of Syed Nizamuddin, therefore, petitioner either to have survive or sink depending upon determination of legal status of the property which was transferred to him and as now he has failed to keep his entitlement alive, therefore petitioners claim is bound to be rejected.”

31. The Applicants claim having “sunk” renders the issue raised by Mr. Mushtaq A. Memon, pertaining to the application of the rule of lis pendens under Section 52 of the Transfer of Property Act, 1882 to the Sale Deed dated 11 December 1975 as academic. I have nevertheless considered the contentions of Mr. Mushtaq A. Memon. Section 52 of the Transfer of Property Act, 1882 as applicable to the Province of Sindh reads as under:

“ ... "52. Transfer of property pending suit relating thereto.

(1) During the pendency in any Court having authority in Pakistan, or established beyond the limits of Pakistan by the Federal Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question if a notice of the pendency of such suit or proceeding is registered under section 18 of the Indian

⁵² 2003 SCMR 549

Registration Act, 1908", the property after the notice is so registered cannot be transferred to otherwise dealt with by any party to the suit or proceeding so as to affect the right of any other party thereto under decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

(2) Every notice of pendency of a suit or a proceeding referred to in sub-section (1) shall contain the following particulars, namely:-

- (a) the name and address of the owner of immovable property or other person whose right to the immovable property is in question;*
- (b) the description of the immovable property the right to which is in question;*
- (c) the Court in which the suit or proceedings is pending;*
- (d) the nature and title of the suit or proceedings; and*
- (e) the date on which the suit or proceeding was instituted.*

Explanation. For the purpose of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

Suffice to say that I am in agreement with the contentions of Mr. Mustaq A. Memon that the amendment made to the Transfer of Property Act, 1882 would, in respect of an immovable property located within the Province of Sindh necessitate a notice of *lis pendens* to be registered with the Registrar of Rights and Assurances of competent jurisdiction to allow the decision in a *lis* mentioned therein to prevail over a transfer of immovable property. This having not been done by the Respondent No. 1 and the Respondent No. 2 would not have vitiated the Sale Deed dated 11 December 1975 if the same was found to be valid.

32. To conclude while I have come to the conclusion that there have been substantial irregularities made by by the 1st Additional District Judge Krachi (East) in the Judgement dated 14 February 2005 passed in Civil Appeal No. 17 of 2004 and Civil Appeal No. 18 or 2004 and which I have revised by this order however the impact of the revision on the two lis remains the same i.e. Suit No. 1048 of 1996 (which was previously numbered as Suit No. 75 of 1977) that had been filed by the Respondent No. 1 and the Respondent No. 2 is decreed and Suit No. 1053 of 1996 (which was previously numbered as Suit No. 459 of 1976) which was filed by the Applicant is dismissed however with no order as to costs.

JUDGE

Karachi dated 09 August 2023