

IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT:

Mr. Justice Aqeel Ahmed Abbasi
Mr. Justice Mahmood A. Khan.

High Court Appeal No. 234 of 2016

DISPOSED OF CASE

1. For orders on Misc. No. 1990/2021.
2. For orders on Misc. No. 1991/2021.
3. For orders on Misc. No. 1992/2021.

16.03.2022:

Mr. Suhail Hameed, advocate for the applicant.

Mr. Akhtar Hussain, advocate for the respondent No. 1

ORDER

AQEEL AHMED ABBASI, J ; - Through listed applications filed by one Mst. Aiysha daughter of late Habibullah Mughal through her attorney, the applicant has prayed that the judgment dated 21.12.2018 passed by this Court in the instant High Court Appeal and the judgment dated 22.06.2016 and the decree dated 04.07.2016 passed by the learned Single Judge of this Court in Suit No. 1151/2006 may be set-aside for having been obtained through fraud and misrepresentation by respondent No.1 as according to the applicant, the gift deed dated 15.12.1982 is without delivery of possession, whereas, such gift deed has not identified as to which 50% part of the immovable property has been gifted to the respondent No.1 for the purposes of delivery of possession.

2. It is pertinent to note that the applicant, while preparing the application under Section 12(2) CPC read with Section 151 CPC [CMA No. 1991/2021] has reproduced the entire pleadings of instant High Court Appeal [HCA No.234/2016] agitated through instant High Court

Appeal, however, while narrating the same facts and agitating the same grounds, with the aforesaid prayer.

3. Learned counsel for the applicant, after having read out the judgment dated 21.12.2018 passed by this Court in the instant High Court Appeal and the judgment dated 22.06.2016 and the decree dated 04.07.2016 passed by the learned Single Judge of this Court in Suit No. 1151/2006, has argued that both the aforesaid judgments and decree are liable to be set-aside for having been obtained through fraud, misrepresentation of facts by respondent No.1, as according to learned counsel, the gift deed dated 15.12.1982 in respect of 50% [half share] i.e. 500 square yards in the immovable property bearing No. 4/A, admeasuring 100 square yards, SMCHS, Karachi for the reasons that the ingredients of a valid gift under Mohammaden Law were not complete, as the physical delivery of possession was never handed over to the respondent No.1, whereas, all the legal heirs were enjoying possession of the subject property, their interest, if any, can also be guarded.

4. It has been further contended by the learned counsel for the applicant that the learned Single Judge of this Court, while passing the impugned judgment and decree, whereas, a Divisional bench of this Court, while passing the order dated 21.12.2018 in the instant High Court Appeal, were misled by the respondents through concealment of facts and therefore, obtained impugned judgment and decree as well as the order in the instant High Court Appeal through fraud and misrepresentation, therefore, the order passed by this Court in the instant High Court Appeal is liable to be set-aside. It has been further prayed that while suspending the operation of judgment and decree, execution proceedings may be stayed.

5. On 11.11.2021, when the aforesaid listed applications were fixed for orders before this Court, learned counsel for the applicant was confronted as to maintainability of listed applications in the following terms:-

“1. Urgency granted.

2. Learned counsel for the applicant while confronted as to the maintainability of the listed application(s), as it appears that instant High Court Appeal was finally disposed of vide order dated 02.10.2018, whereafter, appellant preferred an Appeal before the Hon’ble Supreme Court of Pakistan, who has also been pleased to dismiss the said appeal vide order dated 09.03.2021, therefore, the request of the applicant through listed application(s) and that too after the expiry of more than three years appears to be misconceived. Learned counsel for the applicant has requested for time to assist the Court in this regard. At his request, the matter is adjourned to 15.12.2021.”

6. Record further reveals that even Notices of listed applications were not issued to respondents as the learned counsel for the applicant could not make out a prima facie case for issuance of notices to the respondents, as neither any fraud or misrepresentation as alleged by the applicant could be pointed out, nor the learned counsel for the applicant could satisfy the Court as to maintainability of listed applications filed after final decision by the Divisional Bench of this Court in the instant High Court Appeal vide order dated 18.12.2018, which order was duly confirmed by the Hon’ble Supreme Court in Civil Petition No. 20-K of 2019, wherein, the entire controversy relating to the subject gift stands finally decided. It will be advantageous to reproduce the relevant finding on the subject issue as recorded by the Divisional Bench of this Court in Para:10 to 12, in the instant High Court Appeal:-

“10. Ms. Sofia Saeed Shah, learned counsel for the respondent No.3/Society supported the impugned judgment and has argued that since the gift was recorded after the death of Mst. Zainab Khatoon, the respondent No.3 recorded the gifts accordingly in the ratio of 50% in favour of appellants and respondent No.2 and 50% in favour of respondent No.1. She further contended that the alignment of 222.2 sq. yards was available to be aligned with the Plot No.4-A, SMCHS, Karachi. She also contended that respondent No.3 society are maintained as per its bye laws and the law of the land and no one can influence the respondent No.3 to mutate the record illegally or to the detriment of any of the parties. She urged that as per record of the respondent No.3, 50% undivided share in the suit property was transferred in the name of the respondent No.1 on the basis of registered deed of confirmation of declaration of oral gift dated 15.12.1982 executed by Mst. Zainab Khatoon during her life time. She also urged that appellants were further informed that Mst. Zainab Khatoon by another separate declaration of oral gift has gifted the remaining undivided 50% share in the suit property in favour of (09) persons. She further urged that respondent No.1 retained the 50% undivided share validly gifted to him by his mother during her life time and relinquished his right of inheritance in the remaining 50% undivided share in favour of his other brothers and sisters. She, therefore, submitted that all the grounds taken in the appeal are false, baseless, unsupported and whimsical and as such the appeal is liable to be dismissed.

11. So far the contention of the learned counsel for the appellants/plaintiffs Mr. Abdul Fateh Malik in support of his appeal are concerned, we have given due consideration and with his able assistance examined the material viz. the pleadings of the parties, so also the documents and evidence available on record. we do not find any force in any of the contentions of the learned counsel for the appellants. Though initially it was argued that respondent

No.1 is not owner of 50% share of the property in suit and as such no gift could be made in respect thereof but when the attention of the learned counsel was drawn to the admission of the appellants in his cross-examination with regard to execution of sale agreement dated 23.02.1998 in which they acknowledged the share of respondent No. 1 in the bungalow in suit to the extent of 50%, learned counsel was unable to give any plausible explanation that no gift was executed by Mst. Zainab Khatoon in favour of respondent No.1. When asked to point out from the impugned judgment any illegality or irregularity committed by the learned Single Judge, learned counsel for the appellants was unable to point out any illegality, however, he attempted to state that Donor is an illiterate lady and at the relevant time she was on death bed.

12. It may be noted that respondents No. 4 to 6, who were the plaintiffs No. 1, 4 &5 in Suit No.1151/2006 have filed application under Order XXIII Rule 1 CPC for withdrawal of the instant appeal unconditionally and accept and support the impugned judgment and as such transported their position from appellants to respondents. The record shows that the appellants/plaintiffs were well in the knowledge about the gift executed by mother of the parties, which can be evident from agreement of sale dated 23.2.1998 in which 50% share of the respondent No.1 was admitted by all the legal heirs and they were also signatory of the agreement.”

7. Similarly, the Hon'ble Supreme Court, while hearing Civil Petition No. 20-K of 2019 filed against the aforesaid order passed by the Divisional Bench of this Court in the instant High Court Appeal, has also decided in conclusive terms the legality of the gift deed dated 15.12.1982 in the following terms:-

“ The petition is arising out of judgment dated 21.12.2018 passed by learned High Court of Sindh, Karachi in HCA No.234/2016.

2. *The matter is between siblings regarding the administration/partition of property as some portion of the property was allegedly gifted to respondent No.01- Sana Ullah. The gift was challenged on the grounds inter-alia that at the time of gift i.e. 15.12.1982, mother-Zainab Khatoon was on death bed and secondly the property could not have been gifted when it was in joint possession of all the family members.*

First contention of the learned counsel was effectively attended to by the learned appellate court in para No.11 of the impugned judgment which runs as follows:-

'So far the contention of the learned counsel for the appellants/plaintiffs Mr. Abdul Fateh Malik in support of his appeal are concerned, we have given due consideration and with his able assistant examined the material viz. the pleadings of the parties, so also the documents and evidence available on record. We do not find any force in any of the contentions of the learned counsel for the appellants. Though initially it was argued that respondent No.01 is not owner of 50% share of the property in suit and as such no gift could be made in respect thereof but when the attention of the learned counsel was drawn to the admission of the appellants in his cross examination with regard to execution of sale agreement dated 23.02.1998 in which they acknowledged the share of respondent No.01 in the bungalow in suit to the extent of 50%, learned counsel was unable to give any plausible explanation that no gift was executed by Mst. Zainab Khatoon in favour of respondent No.01. When asked to point out from the impugned judgment any illegality or irregularity committed by the

learned single judge, learned counsel for the appellants was unable to point out any illegality, however, he attempted to state that Donor is an illiterate lady and at the relevant time she was on death bed.'

4. *When the attention of the learned counsel was drawn to such aspect of the matter that they were fully cognizant of the gift dated 15.12.1982 (available at page No.167 of the file). They also later on entered into some sale transaction through agreement dated 23.02.1998, wherein it was specifically admitted that 50% share has been conveyed in favour of one of the siblings Sana Ullah- the contesting respondent, though such sale transaction could no go through yet the facts and circumstances remains that factum of gift was admitted.*

5. *The second contention of the learned counsel is that they were in joint possession of property and unless the property is bifurcated/partitioned, the same could not be gifted. Such contention is not substantiated from any legal proposition. Joint possession indeed reflects possession of each of the co-owners on the each part of the property. Even they were on the date of the gift not the co-owners of the property as they acquired inheritance right on the demise of their mother on 15.03.1983. To the extent of rights left in the mother, even the court did not consider an area of 222.2 sqr. Yards annexed to the property which was annexed and acknowledged by the authority-Sindhi Muslim Cooperative Housing Society Limited, Karachi considered subsequent to her demise and it was kept out of the privy of the gift.*

6. *No case under facts and circumstances is made out hence, leave is accordingly declined."*

8. From perusal of the order passed by the Divisional Bench of this Court in the instant High Court Appeal, as well as the order passed by the Hon'ble Supreme Court, there seems no iota of any doubt with

regard to validity of gift deed dated 15.12.1982, whereas, the applicant has miserably failed to point out any factual defect and legal infirmity or element of any fraud or misrepresentation in this regard.

9. While confronted with hereinabove factual and legal position, as emerged in the instant High Court Appeal, the learned counsel for the applicant could not submit any reasonable explanation, however, attempted to argue the matter afresh on the same facts and material, and requires this Court to recall the order passed in the instant High Court Appeal by taking a different view on the legal position already decided by this Court, as well as by the Hon'ble Supreme Court in the instant matter relating to validity of the gift deed, which authority is not vested in this Court, after recording conclusive finding on the issue through detailed order passed in the instant High Court Appeal as well as by Hon'ble Supreme Court, therefore, this Court has become functus-officio and cannot otherwise pass any further order(s) as the order passed by this Court has emerged into the order of the Hon'ble Supreme Court.

10. Accordingly, we do not find any substance in the listed applications, which are devoid of any merits and have been filed after lapse of more than three years without explaining delay, whereas, no material, whatsoever has been produced to demonstrate as to how fraud or any misrepresentation has been made by the respondent, which may attract the provision of Section 12(2) CPC in the instant matter. Moreover, except the applicant, who claims to be attorney of one of the legal heirs of donor, none of the remaining legal heirs have ever agitated the factum of gift deed in respect of 50% share in the subject property, therefore, the listed applications were dismissed vide our short order dated 16.03.2022 and above are the reasons of such short order.

JUDGE

JUDGE

A.S.