

# THE HIGH COURT OF SINDH, KARACHI

## Suit No. 1290 of 2010

[Syed Habib Haider Zaidi versus Syed Hussain Khursheed Bilgrami]

Plaintiff : Syed Habib Haider Zaidi (since deceased) through legal heirs, through Mr. Muhammad Umer Lakhani, Advocate.

Defendant 1 : Syed Hussain Khursheed Bilgrami (since deceased) through legal heirs through Mr. Iftikhar Javaid Qazi, Advocate.

Defendants 2-4 : Nemo.

Dates of hearing : 14-11-2023, 23-11-2023 & 01-12-2023

Date of Judgment : 19-03-2024

## JUDGMENT

**Adnan Iqbal Chaudhry J.** - The suit is for declaration of ownership to House No. 9-B, 4<sup>th</sup> South Street, Phase-II, DHA, Karachi [suit property]; for its possession from the Defendant No.1 along with mesne profits, and for ancillary injunction. Pending suit, both the Plaintiff and the Defendant No.1 passed away and were succeeded by respective legal heirs.

2. The case of the Plaintiff was that the conveyance deed of the suit property, dated 16.02.1992, was held by the Defendant No.1, his brother-in-law, as his *benamidar* as the Plaintiff resided in the United Kingdom; that for this reason, the Defendant No.1 subsequently transferred the suit property to the Plaintiff by a registered Declaration of Gift dated 18.08.1992; that the Plaintiff allowed his sister and brother-in-law (Defendant No.1) to reside at the suit property as licensees; that after the Plaintiff's sister passed away and he intended to sell the suit property, the Defendant No.1 refused to vacate the same contending to be the actual owner, and also stopped the Plaintiff from entering the suit property.

3. The case set-up by the Defendant No.1 was that though he had borrowed some money from the Plaintiff for purchasing the suit property, that amount was a loan and was paid back by him; that the Declaration of Gift was executed by him in favour of the Plaintiff only “to resolve some financial difficulties with his (Plaintiff’s) bank”; that he never delivered possession of the suit property to the Plaintiff to complete the gift; and therefore, he (Defendant No.1) continued to be owner of the suit property.

Issues:

4. Issues were settled by the Court on 16-10-2014. Another issue was added by order dated 02-12-2014. At final arguments, learned counsel for the Defendant No.1 called attention to CMA No. 13990/2021, an application pending for framing an issue on the Plaintiff’s averment of *benami*. It appears though issue No. I was framed to deal with that aspect, it did not categorically recite ‘*benami*’. Since learned counsel for both sides accepted that the parties had led evidence taking issue No. I to cover the averment of ‘*benami*’, therefore, in exercise power under Order XIV Rule 5 CPC that issue is re-cast. With that, the issues that arise for determination are renumbered as follows:

- I. *Whether the Defendant No.1 had purchased the suit property for himself or as benamidar of the Plaintiff ? [as re-casted]*
- II. *Whether the Defendant No.1 is continually in possession of the property in question as its owner and never parted with its possession in favour of the Plaintiff?*
- III. *Whether any valid gift was executed in favour of the Plaintiff by the Defendant No.1?*
- IV. *Whether the gift dated 18.08.1992 has been revoked by the Defendant No.1.*
- V. *Whether the Plaintiff is legal and actual owner and in possession of the suit property i.e. House No. 9-B, 4<sup>th</sup> South Street, Phase No. 2, DHA, Karachi ?*
- VI. *Whether the Plaintiff is entitled to the relief(s) claimed?*
- VII. *What should the decree be?*

5. The Plaintiff was working in the United Kingdom, therefore he led evidence through an Attorney. He also examined three other witnesses. Since the Defendant No.1 too had gone abroad, he appointed his daughter as Attorney to lead evidence.

Submissions of counsel:

6. Mr. Umer Lakhani, learned counsel for the Plaintiffs submitted that the evidence established that the conveyance deed dated 16.02.1992 was held by the Defendant No.1 as the Plaintiff's *benamidar*. He submitted that even if that aspect is ignored, the subsequent transfer of the suit property to the Plaintiff by way of the registered Declaration of Gift dated 18.08.1992 and its mutation conclusively established that the Plaintiff was the owner. He also pointed out that said Declaration of Gift and mutation remain unchallenged to-date.

Mr. Iftikhar Jawed Qazi, learned counsel for the Defendants submitted that there was no understanding between the Defendant No.1 and Plaintiff that the former would stand as *benamidar* for purchasing the suit property; that there was also no evidence that the Plaintiff resided at the suit property; that the gift was incomplete as possession of the suit property was never delivered to the Plaintiff; therefore, the Defendant No.1 was competent to revoke the gift when he did by way of legal notice dated 29-06-2010; that since the parties belonged to *Fiqa-e-Jafria*, the gift could have been revoked without a registered instrument.

7. Heard learned counsel and appraised the evidence.

Opinion of the court:

8. The undisputed facts of the case emerged as follows. The Plaintiff was a doctor settled in the United Kingdom and visited Pakistan from time to time. The Defendant No.1 was his brother-in-law. Though the conveyance deed of the suit property, dated 16.02.1992 (Exhibit PW-1/2), was registered in the name of the

Defendant No.1, but soon thereafter on 18.08.1992, the Defendant No.1 executed a Declaration of Gift in respect of the suit property in favour of the Plaintiff (Exhibit PW-1/3), which was duly registered. On 07.07.2003, the suit property was also mutated to the name of the Plaintiff in the record of the DHA and the Clifton Cantonment (Exhibit PW-1/6 and PW-1/7).

9. Since the suit property still stands in the Plaintiff's name pursuant to the Declaration of Gift dated 18.08.1992, the question whether the preceding conveyance deed dated 16.02.1992 was held by the Defendant No.1 as the Plaintiff's *benamidar*, can take a back seat for now. I first take up the issues pertaining to the said gift.

**Issues No. II and III re validity of the gift:**

10. To reiterate, the 'execution' of the Declaration of Gift was admitted by the Defendant No.1 in his written statement. However, he pleaded that the gift only as a formality to facilitate the Plaintiff "to resolve financial difficulties with his bank" and possession of the suit property was not delivered to the Plaintiff. Thus, the case of the Defendant No.1 was that the gift was not completed by delivery of possession and therefore the Defendant No.1 continued to be owner of the suit property.

11. There can be no cavil with the proposition, as in para 150(1) of *Principles Muhammadan Law* by D.F. Mulla, that a gift of immovable property is not complete until possession is delivered to the donee. However, para 150 also states that what is to be delivered is "such possession as the subject of the gift is susceptible of", and thus possession by the donee can either be actual or constructive. Sub-para (3) of para 152 of the same treatise goes on to opine that :

*"Where donor and donee both reside in the property. — No physical departure for formal entry is necessary in the case of a gift of immovable property in which the donor and the donee are both residing at the time of the gift. In such a case the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift. ...."*

In *Alif Khan v. Mumtaz Begum* (1998 SCMR 2124), the Supreme Court also held that the delivery of possession of the property subject matter of the gift can either be actual or constructive; and “if the corpus of a gift is, at the time of declaration, shared between donor and donee, the donor is not required to vacate and may continue jointly in possession with the donee, without entailing any adverse repercussions on the fact of the gift.”

12. The Declaration of Gift (Exhibit PW-1/3) recited that physical possession of the suit property was delivered to the Plaintiff, and it also bears the Plaintiff’s acceptance as donee. The said Declaration was duly registered and manifests that the Plaintiff was in Pakistan at the time. But apart from that, as delivery of possession is to be established by independent evidence if disputed by the donor, there was other evidence to that effect.

13. PW-1, Anjum Sadiq Jaffery, who led evidence as the Plaintiff’s Attorney and was related to the Plaintiff, deposed that at the time of the gift the Plaintiff was staying at the suit property along with his sister and brother-in-law (Defendant No.1), and given such relationship, when the Plaintiff went back to the U.K. he allowed them to continue to reside at the suit property. PW-1 further stated, that thereafter whenever the Plaintiff visited Pakistan he resided at the suit property. PW-2, Abbas Hasan Bilgrami, was the brother-in-law (*hum-zulf*) of the Plaintiff and claimed to be close to the Defendant No.1 as well. He too affirmed the same facts. As persons related to the Plaintiff it was plausible that PW-1 and PW-2 had personal knowledge of the Plaintiff’s possession. Their evidence does not come across as doubtful and brought out the fact that at the time of the gift in the year 1992, both the Plaintiff (donee) and the Defendant No.1 (donor) were residing at the suit property and shared possession as envisaged in sub-para (3) of para 152 of Mulla’s *Muhammadan Law*.

14. Be that as it may, following the gift in 1992, there were a number of overt acts by the Defendant No.1 which signified that he had in fact delivered possession of the suit property to the Plaintiff.

- (a) The original title documents of the suit property were in the Plaintiff's possession. This fact was acknowledged by the Defendant No.1 in his legal notice dated 29-06-2010 (Exhibit PW-1/10).
- (b) Exhibit PW-1/4 was an affidavit executed by the Defendant No.1 on 20.03.2001, acknowledging that the Plaintiff was owner of the suit property and residing in the U.K. On cross-examination, the daughter and Attorney of the Defendant No.1 was confronted with this affidavit, but gave an evasive reply that she did not know whether the signature on the affidavit was of her father.
- (c) Exhibit PW-1/6 dated 07.07.2003 was the mutation letter of the suit property issued by the DHA to the Plaintiff on the basis of the Declaration of Gift. This letter was also copied to the Defendant No.1 who never objected to the mutation. As per PW-1, the Defendant No.1 himself had gone to the office of the DHA to complete the process of mutation in favour of the Plaintiff. The address of both the Plaintiff and the Defendant No.1 in the mutation letter is that of the suit property.
- (d) The Plaintiff had also examined a property dealer namely Zabeeh-ullah as PW-4. He stated that in the year 2009-2010 he had been asked by the Plaintiff to find a buyer for the suit property; that he inspected the suit property in the presence of the Defendant No.1; that when he queried how soon the property could be vacated, the Defendant No.1 had replied that since the property was owned by the Plaintiff, only he could give a time frame.

(e) PW-2, Abbas Hassan Bilgrami, had stated that on more than one occasion, he had collected challans in respect of taxes of the suit property from the Defendant No.1 and paid them on the instructions of the Plaintiff; that he (PW-2) had forwarded money received from the Plaintiff to the Defendant No.1 for paying the mutation fee; and that it was in his presence that the son of the Defendant No.1 had called the Plaintiff over the phones and had asked for money to vacate the suit property.

15. As against the aforesaid evidence produced by the Plaintiff, there is nothing to show that from 1992 uptill 2010 the Defendant No.1 had ever disputed the validity of the gift. Even after the Plaintiff filed this suit to assert ownership of the suit property, the Defendant No.1 did not seek cancellation of the Declaration of Gift and the mutation standing in the Plaintiff's name. Therefore, on a preponderance of the evidence, it was proved that the Defendant No.1 had delivered constructive possession of the suit property to the Plaintiff to complete the gift recorded *vide* Declaration of Gift dated 18.08.1992. Resultantly, Issue No. II is answered in the negative against the Defendants, and Issue No. III is answered in the affirmative in favor of the Plaintiffs.

**Issue No. IV re revocation of the gift:**

16. The written statement of the Defendant No.1 did not expressly plead that he had revoked the gift. Neither was that expressly stated in the affidavit-in-evidence of the witness for the Defendant No.1. Rather, the revocation was alleged in the legal notice dated 29.06.2010 (Exhibit PW-1/10) sent on behalf of the Defendant No.1 to the Plaintiff, the contents of which were then adopted in the written statement. Be that as it may, having concluded above that the gift was complete by delivery of possession, the consequence of that stated in sub-para (4) of para 167 of Mulla's *Muhammadan Law* is that: "Once possession is delivered, nothing short of a decree of the Court is sufficient to

*revoke the gift.*" This view was noted with approval by the Supreme Court in *Abid Hussain v. Muhammad Yousuf* (PLD 2022 SC 395). No such suit was filed by the Defendant No.1 during his lifetime, and had he done so, he would have been confronted with sub-para 2(f) of para 167 of Mulla's *Muhammadan Law* which opines that a gift cannot be revoked "*when the thing given has increased in value*". Therefore, I hold that the gift of the suit property by the Defendant No.1 to the Plaintiff could not have been revoked by the Defendant No.1. Issue No. IV is answered in the negative.

**Issue No.V:**

17. Having answered Issues No. II, III and IV as above, the Plaintiff continues to be the owner of the suit property. Issue No. V is answered in the affirmative.

**Issue No. I re benami:**

18. It was observed by the Supreme Court in *Muhammad Sajjad Hussain v. Muhammad Anwar Hussain* (PLD 1991 SCMR 703) that for determining whether a transaction is a *benami* or not, some of the factors taken into consideration are:

- “(a) source of consideration;
- (b) from whose custody the original title deed and other documents came in evidence;
- (c) who is in possession of the suit property; and
- (d) motive for the Benami transaction.”

Evidence of the fact that the original title documents of the suit property were in the Plaintiff's possession, and the fact that the Plaintiff was in constructive possession of the suit property, has already been discussed above. The evidence as to the source of payment for the suit property and the motive for the *benami* transaction is as follows.



19. The conveyance deed dated 16.02.1992 recorded a payment of Rs. 19,50,000/- to the seller/previous owner by a pay-order dated 16.02.1992 drawn on Grindlays Bank. A copy of such pay-order is part of the conveyance deed (Exhibit PW-1/2) which shows that it was made to the order of 'Kaneez Raza Bilgrami', who was the Plaintiff's sister and the spouse of the Defendant No.1. It was the Plaintiff's case that the amount of the pay-order was remitted by him to his sister's bank account by telegraphic transfer from his bank account at Midland Bank, U.K. The statement of account of that bank was produced as Exhibit PW-1/2-A, which shows that on 07.02.1992, a few days before the conveyance deed, a sum of £ 58,000 was debited from the Plaintiff's bank account for telegraphic transfer.

20. Both PW-1 and PW-2, who were related to the Plaintiff, had deposed that they had personal knowledge that the purchaser of the suit property was the Plaintiff; that before the transaction could be completed, the Plaintiff had to travel back to the U.K. and therefore he instructed the Defendant No.1 to get the conveyance deed executed in his name.

21. The most compelling evidence was by PW-3, Shahid Iqbal, who was one of the attesting witnesses to the conveyance deed and the property dealer who had brokered the sale. He too stated that the purchaser of the suit property was the Plaintiff and the conveyance deed was executed in the name of the Defendant No.1 as the Plaintiff had to travel back to U.K.

22. The evidence of PW-1, PW-2 and PW-3 remained unshaken on cross-examination and learned counsel for the Defendants gave no reason to doubt the same. On the other hand, the Defendant No.1 had not brought any evidence whatsoever to show that he had the means to pay for the suit property. In fact, in pleading that he had obtained a loan from the Plaintiff for purchasing the suit property, he acknowledged that he did not have the resources. Admittedly, a few months after the conveyance deed, the Defendant No.1 executed the

Declaration of Gift to transfer the suit property to the Plaintiff. In hind-sight, the Declaration of Gift fortifies the Plaintiff's version that the conveyance deed was held by the Defendant No.1 as his *benamidar*.

23. As observed in *Alif Khan v. Mumtaz Begum* (1998 SCMR 2124), civil proceedings are decided upon preponderance of evidence, and unlike criminal matters, the certainty of an act having been done is not required to be established. Therefore, on a preponderance of evidence I hold that prior to the Declaration of Gift dated 18.08.1992, the suit property was held by the Defendant No.1 as the Plaintiff's *benamidar*. Issue No.I is answered accordingly.

**Issues No. VI and VII:**

24. The suit is decreed in favour of the Plaintiffs and against the Defendants 1(a) to 1(c) as follows:

- (a) Declared that House No. 9-B, 4<sup>th</sup> South Street, Phase-II, DHA, Karachi [suit property] is the property of Syed Habib Haider Zaidi;
- (b) The Defendants 1(a) to 1(c) shall deliver vacant and peaceful possession of the suit property to the Plaintiffs;
- (c) A preliminary decree is passed under Order XX Rule 12 CPC for making an inquiry as to the amount of mesne profits of the suit property payable to the Plaintiffs from the institution of the suit until delivery of possession;
- (d) Costs of the suit are allowed.

Karachi  
Dated: 19-03-2024

**JUDGE**