

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD**

Civil Revision Application No.123 of 2013

[Muzaffar Ali Shajra *versus* Jamal Nasir and another]

Date of hearings : 12.11.2024, 22.11.2024
and 02.12.2024.

Applicant : Muzaffar Ali Shajra, through
M/s. Imdad Ali R. Unar and Shahzad
Daudpoto, Advocates

Respondents No.1 and 2 : Jamal Nasir and another, through
Mr. Irfan Ahmed Qureshi, Advocate.

JUDGMENT

Muhammad Faisal Kamal Alam, J: Through this Civil Revision Application, the Applicant has challenged the concurrent findings of First Appellate Court and the learned Trial Court through Judgment and Decree dated 16.08.2013 and 13.11.2012 [Decrees dated 28.11.2012 and 16.08.2013], handed down in Appeal and Suit, respectively, dismissing the Appeal No.300 of 2012 and F.C. Suit No.180 of 2009, preferred by the present Appellant. The Subject matter of the dispute is a Bungalow No.C-33, Block-D, Unit No.6, Shah Latifabad, Hyderabad [admeasuring 300 Square Yards] – **Suit Property**, claimed to have been purchased by the Applicant from Saifuddin Channa, brother of present Respondents.

2. Mr. Imdad Ali R. Unar, Advocate for Applicant, has referred to earlier litigation/Suits concerning the Suit Property, preferred by Respondents and resulted in dismissal. First Suit, being Suit No.36 of 2005, was filed by Respondents; the plaint and Judgment are at pages-261 and 279 (produced in the Evidence as Exhibits-63/C and E, respectively). Civil

Appeal No.92 of 2006, preferred by Respondents, was also dismissed vide Judgment dated 16.02.2007 (at page-191 of the present *LIS*, Exhibit-57/A). Second Suit No.201 of 2008, instituted by Respondents on a similar cause of action, with the result that plaint was rejected vide Order dated 03.09.2028 (plaint and its rejection Order are at pages-205 and 219), exhibited in the evidence. Third Suit No.83 of 2011 was filed with the same result, that the plaint was rejected vide Order dated 08.09.2011 (at page-347 of the *LIS* Record).

3. Referred to the Complaint filed under the Illegal Dispossession Act by the present Applicant, which was dismissed, and the Criminal Revision Application No.19 of 2009, preferred against the same was also unsuccessful, with the observation that the Applicant should file the Suit for Possession, which he filed being First Class Suit No.122 of 2009 (180 of 2009), but after a Trial, was dismissed through the impugned Judgment dated 13th November 2012. Argued that once all the Issues directly and substantially involved in the above *LIS* filed by the Applicant, were already decided in the earlier unsuccessful litigation, preferred by the Respondents, then both the Courts should have decreed the Suit [of the Applicant], rather than dismissing it. Appraisal of the evidence was not done by both the Courts and thus the jurisdiction was improperly exercised, rather abdicated, by the Appellate Court in particular; that ownership claim of the Applicant is based on the registered documents, that is, the Sale Deed between him and Saifuddin Channa (for reference's sake-**the Donee**), produced in the evidence as Exhibit 50-B, who was the sole owner of the Suit Property by virtue of the Gift Deed, produced in the evidence as Exhibit-72/F and the Lease Deed (Exhibit 50/A) executed by the then Governor of West Pakistan, which were validated by the Courts in the earlier Decisions given

against the Respondents in their Suits, then there was no reason for the Courts to give any adverse finding against the Applicant.

Learned Counsel for the Applicant in support of his arguments has cited the following Case Law_

- 1) **PLD 2014 SC 380**
[Hazratullah and others versus Rahim Gul and others]
- 2) **2004 CLC 1000**
[Muhammad Amin Muhammad Bashir Ltd versus Federation of Pakistan and others]-Bashir Ltd Case.
- 3) **PLD 2021 SC 812**
[Ghulam Qasim and others versus Mst. Razia Begum and others]-Razia Begum Case.
- 4) **2019 SCMR 84**
[Taj Wali Shah versus Bakhti Zaman]

4. Mr. Irfan Ahmed Qureshi, Advocate, for Respondents has opposed this Revision Application and supported both the impugned Decisions. Contends that no Declaration of Ownership was sought by the Applicant and hence his Suit is rightly dismissed by the learned Trial Court; states that in the transaction between the Applicant and Respondents' Brother Saifuddin Channa as well as the purported Gift Deed in favour of the latter (Saifuddin Channa), are shrouded in mystery. Admittedly, the Suit Property was allotted in the name of the (late) Father (Din Muhammad Channa) of the Respondents and Saifuddin Channa, vide Allotment Order dated 24.09.1958 (Exhibit-72/B, at page-301 of the **LIS**-File). Has referred to the Death Certificate (at page-315) and Affidavit of Saifuddin Channa, that he applied for the Mutation of the Suit Property in his name on the basis of Gift Deed purportedly given by the Deceased Father after his death and not during his lifetime. Referred to the Lease dated 24.10.1963 of the Suit Property (at page-305 Exhibit 72/C), bearing the signature of the Deceased Father, which is different from the one on the alleged Gift, only Photocopy

whereof was produced in the Evidence (Exhibit 72/F) and the onus was on Saifuddin Channa to prove a valid Gift Deed / Hiba, being beneficiary, which he failed to discharge.

Learned Counsel for the Respondents in support of his arguments relied upon following Case Law_

- 1) **2020 SCMR 276**
[Muhammad Sarwar vs. Mumtaz Bibi and others]-Sarwar Case
- 2) **2017 SCMR 1110**
[Abdul Rehman vs. Mst. Majeeda Bibi alias Majeeda]
- 3) **2012 SCMR 1602**
[Mst. Shafqat Parveen vs. Muhammad Iftikhar Amjad and others]-Parveen Case.
- 4) **2012 SCMR 1373**
[Noor Muhammad and others vs. Mst. Azmat-e-Bibi]-Noor Muhammad Case.
- 5) **PLD 2001 SC 213**
[Muhammad Aslam vs. Mst. Ferozi and others]-Aslam Case
- 6) **PLD 2022 SC 395**
[Abid Hussain and others vs. Muhammad Yousuf and others]-Abid Hussain Case
- 7) **2000 CLC 419**
[Manzoor Ahmad vs. Haji Hashmat Ali through legal heirs]
- 8) **1999 SCMR 1245**
[Abdul Majeed and 6 others versus Muhammad Subhan and 2 others]-Subhan Case.

5. Arguments heard and Record perused.

6. From the pleadings of the Parties, the learned Trial Court framed the following Issues_

- “01. Whether the suit is not maintainable according to law?**
- 02. Whether the plaintiff is owner of the suit property?**
- 03. Whether the possession of the suit property was given by the plaintiff to the defendants?**

04. *Whether the defendants are in illegal possession of suit property?*
05. *Whether the plaintiff has no cause of action to file the present suit?*
06. *Whether the plaintiff has no locus standi to file the suit?*
- 06-A *Whether the plaintiff is entitled for mesne profits? If yes since when and at what rate.*
07. *Whether the plaintiff is entitled for any relief as prayed?*
08. *What should the decree be?"*

7. Précis of the Case Law cited by the Applicant's Counsel is, that when a proceeding under Section 8 of the Specific Relief Act (1877), is filed, then it is not necessary to seek a declaration first, due to the inbuilt mechanism provided in the statutory language itself, as the appellant (of the reported case) was the part of the proprietary body of the village side, and had the pre-existing "*entitlement as co-owner to file such nature of proceedings*", it is further laid down, after considering the Case Law, that if a property owned by different co-owners and one co-sharer is in possession of the entire property, then his possession cannot be deemed to be adverse to other co-sharers (*the learned Counsel for the Applicant has emphasized on this Case Law by stating, that possession of the Respondents was not adverse to the possession of the Donee, being their real brother, and thus the issue of possession is not in dispute, which can question the validity of the Gift of the Suit Property in favour of the Donee*).

In **Razia Begum Case (ibid)**, the Hon'ble Supreme Court has reiterated the principle that the possession of the legal heirs is considered to be constructive possession on behalf of all legal heirs

However, it is necessary to observe here that the Hon'ble Supreme Court, in this case, has held that the Gift Deed was not proven, as the Mutation Entry was kept after the death of the Deceased father / Donor.

In *Bashir Limited Case (supra)*, this Court has discussed the principle of *res judicata* as envisaged in Section 11 and other ancillary provisions, by ruling that even if a lis is decided in a writ jurisdiction, the same matter cannot be re-agitated by way of a suit and the *res judicata* principle would be attracted; if in a proceeding, like a writ jurisdiction if rights and obligation of the Parties stood adjudicated, then only its implementation remains and if any other issue remains to be decided, it will be barred by the principles of constructive *res judicata*.

8. Summary of the Case Law cited by the Respondents' Counsel is that burden to prove the Gift is on the beneficiary (the Donee). In **Sarwar Case (supra)**, the Gift Deed was declared as null and void, and the Mutation Entry as forged, where the Mutation on the basis of Gift was registered after four months from the death of Donor / father; besides, not mentioning the names of witnesses in whose presence the late father allegedly gifted the Suit Property in favour of the petitioner, with the effect of disinheriting the other siblings.

In **Perveen Case (supra)**, the Hon'ble Supreme Court has ruled against the petitioner claiming to be the Donee of the House Property, as Dower, which was purportedly gifted by her father-in-law at the time of Nikah. It is held that the alleged Donee / petitioner never attempted to get the House Property mutated through a registered Deed during the lifetime of father-in-law, but mutation was done after the death of Donor / father-in-law, which Entry was held to be collusive, coupled with the fact that

witness of Nikahnama was not examined, who could have deposed with regard to the alleged Gift Deed. The Hon'ble Supreme Court has reiterated the three basic ingredients of a valid Gift (HIBA) under the Islamic Law, viz. Offer by the Donor, Acceptance by the Donee and delivery of possession. It is held that undisputedly, since father-in-law till his death, was residing in the same property, therefore, even the possession was not exclusively handed over to the petitioners / Daughter-in-law, hence, the Gift Deed was invalid.

The Hon'ble Supreme Court in the **Aslam Case (supra)**, has given an adverse finding against the petitioner, who had filed a Suit for Possession in respect of sale transaction, without seeking a declaration.

In **Abid Hussain Case (ibid)**, the Hon'ble Supreme Court, after discussing the validity of Hiba / Gift under the Islamic Law, has observed that a mutation is not a proof of title and beneficiary / Donee of the Gift Deed has to prove the original transaction, so also, "*mere recital in the Gift Deed that possession has been delivered to the Donee would not be enough*".

9. The claim of the present Applicant in his plaint is that the Suit Property was owned by Saifuddin Channa, which was purchased by the Applicant through a Registered Sale Deed dated 28.02.2005 (Exhibit 50/B). The Suit Property was in occupation of Saifuddin Channa along with his family and Respondents. After the sale transaction, its possession was handed over to the Applicant, who permanently resides in Karachi; due to cordial relationship between Respondents and Applicant, the latter permitted the Respondents to reside in the portion of the Bungalow (Ground Floor). Although concurrent findings are against the present Applicant, but looking at the chequered history of the controversy, rival arguments are considered.

10. Undisputedly, Muhammad Din, the Deceased father of Respondents and Saifuddin Channa, was the Original Owner of the Suit Property so also confirmed from the Allotment Order (Exhibit-72/B) and Lease Deed issued by the then Governor of West Pakistan, produced in the Evidence (as Exhibit-72/C).

11. The earlier Decisions referred to hereinabove are taken into account. First, F.C. Suit No.36 of 2005 was filed by Siblings of Saifuddin Channa (the Donee), including the present Respondents against the Donee and the present Applicant (Muzaffar Ali Shajra), for Declaration that the present Respondents and the other Brothers and Sisters are co-owners in the Suit Property and the above Sale Deed, executed by the said Donee in favour of present Applicant is illegal and void. The learned Trial Court gave the Decision against the Respondents and their siblings primarily on the ground that since the above Lease Deed dated 21.05.2000 (actual Document is Lease of 21.05.2001, produced in the present Suit Proceeding as **Exhibit 50/A**), in favour of Saifuddin Channa (the Donee) was not challenged, therefore, the subsequent transaction on the basis of registered instrument-Sale Deed in favour of the present Applicant is valid.

12. The Appellate Court also agreed with the reasoning of the learned Trial Court while dismissing the Appeal of the present Respondents and their siblings, being Civil Appeal No.92 of 2006 (vide Judgment dated 16.02.2007).

13. Second F.C. Suit No.201 of 2008 was also preferred by the same Respondents and siblings, this time also challenging the Subject Gift (in favour of the Donee) and the above Lease Deed as bogus and fraudulent, so also cancellation of the Allotment Order of the Suit Property, but this time their plaint was rejected vide Order dated 03.9.2008, on the ground of *res judicata*.

14. Another attempt was made by the Respondents and the siblings through third Suit, F.C. Suit No.83 of 2011, but it also met the same fate, that is, plaint whereof was rejected vide Order dated 08.09.2011.

15. For resolution of controversy, the following documents are significant_

Sr. No.	Description of Documents	Page No.	Dated	Exhibits
i.	Allotment Order , which shows that mutation was done in favour of Donee-Saifuddin Channa on the Application of the Donee dated 20.01.1976, but the Predecessor of Donee is the Deceased Father of Respondents and Donee, (Late) Muhammad Din Channa.	301	24.07.1958	72/B
ii.	Lease Deed issued by the then Government of West Pakistan in favour of Deceased Father-Muhammad Din Channa	305	24.10.1963	72/C
iii.	Application to District Housing Officer and Secretary Administrative Committee, Latifabad, Hyderabad, by the above Donee requesting for mutation of the Suit Property on the basis of Declaration of Gift dated 09.10.1967. Pertinent to mention, that it is stated that the Deceased Father (Muhammad Din) <u>passed away on 24.01.1975</u>	311	04.12.1975	72/D
iv.	Affidavit of the Donee submitted before the Authority, undertaking to Abide by all the Regulations; it is stated in Paragraph-4 that the Donee was in <u>exclusive possession of the Suit Property.</u>	313	06.12.1975	--
v.	Declaration of Gift by the Deceased Father (<i>ibid</i>) to the Donee in respect of the Suit Property and 6 Acres of Agriculture Land.	317	09.10.1967	72-F

vi.	Subsequent Lease Deed in favour of Saifuddin Channa	157	21.05.2001	50/A
vii	Sale Deed between Applicant and Saifuddin Channa	163	28.02.2005	50/B

16. Undisputedly, the purported Gift Document/Declaration (unregistered) **in favour of the Donee is of 09.10.1967**, which was for the first time disclosed by him in his Mutation Application dated 04.12.1975 (Exhibit-72/D), that is, after about seven and a half years. Saifuddin Channa, being the beneficiary of the said Gift by virtue of which he has claimed the sole ownership of the Suit Property to the exclusion of the other siblings, has to prove the validity of the Gift, whereas, the present Applicant, being the subsequent purchaser and successor-in-interest, is also saddled with the same legal obligation to discharge the burden of proof of a valid transaction in his favour. In this context, the testimonies have to be appraised; although, subsequently Mutation [Exhibit 72/B] in favour of the Donee was accepted by the concerned Government Authorities, a Lease Deed [Exhibit 50/A] *ibid* (erroneously mentioned in the earlier Proceedings as a Sale Deed) was executed by the Municipal Commissioner of Municipal Corporation Hyderabad, followed by the Sale Deed (Exhibit 50/B, *supra*) and current Mutation Letter dated 2-05-2005 [Exhibit 46/A] in favour of the Applicant, but, all of this **emanates, from the foundational transaction of the above Gift.**

17. The said Sale Deed (Exhibit-50/B) is witnessed by Salman Saif Channa, the son of the Donee, and the Latter (the Donee) has affixed his thumb impression as, due to paralysis, he was unable to sign the documents. This fact is mentioned in the Sale Deed itself and is to be considered along with the Application dated 11.04.2005, addressed by

Respondent No.1 (Jamal Nasir) to the Municipal Officer (Exhibit 72/G), mentioning his doubts about the authenticity of sale transaction between the Applicant and the Donee, as the latter was suffering from Paralysis since the year 2001, that is, before his above sale transaction with the present Applicant.

18. The Applicant has testified in his cross-examination that he knows the other siblings of the Donee-Saifuddin Channa; did not deny the suggestion that the Father (Original Owner) passed away before the year 2000; nor disputed the suggestion that the legal heirs of the Original Owner / Din Muhammad, moved an Application for Mutation in the names of all the legal heirs, who also preferred earlier suits. Accepted the illness of the Donee but has replied (in his cross-examination) that the Donee was able to move and talk and the Applicant accompanied him to the Office of Sub-Registrar and the Town Municipal Administrator (TMA), Latifabad. Stated that he inquired from Respondent No.1 (Jamal Nasir), but he threatened to kill the Applicant if he purchased the Bungalow. Stated that the present Respondents did not disclose the fact that the Suit Property belonged to their Deceased Father. Did not deny the possession of present Respondents since the lifetime of the Deceased Father and utility bills were not in the name of the Applicant. In his cross-examination, he reiterated the stance that the transaction between him and the Donee was / is lawful.

19. The Applicant examined one witness-Muhammad Shafi (Exhibit-62), who attempted to corroborate the testimony of the Applicant. In cross-examination, he admitted that he is not the witness of the Sale Deed dated 28.02.2005 between the Applicant and the Donee (Exhibit-50/B). After seeing his cross-examination, it is not difficult to conclude that the evidence of the said witness is **self-contradictory**, because he has stated that he was

not the witness of temporary possession given to the Respondents; has admitted that neither he nor the Donee were present when the temporary possession of the Suit Property was handed over to the Respondents.

20. Deposition of Respondent No.1 is the Exhibit-74 (at page-325 of the *LIS*-Record). In his examination-in-chief, he has reiterated that the Deceased father never gifted the Suit Property to the Donee, and the sale transaction between the Donee and the Applicant is illegal and they [present Respondents] were always in possession of the Suit Property. The Gift Declaration (*ibid*) is a forged and fabricated documents.

21. The main part of the cross-examination of Respondent No.1 is related to the earlier unsuccessful litigation preferred by the Respondents against the present Applicant. He has admitted that after the death of the above named (late) Father, the legal heirs, including the Respondents, did not file any Application before the Town Municipal Administrator (TMA), Latifabad, for change of Foti Khata Badal [inheritance mutation] till the year 2005; did not deny the fact that some of his Siblings reside outside Pakistan, although he has testified that all the legal heirs of the Deceased Father reside in the Suit Property. Although did not deny the factum of mutation in favour of the Donee [Exhibit-72/B (*supra*)], but refused to accept the same.

22. The Respondent No.2 (DW-2), namely, Ameer Khalid Channa, corroborated the evidence of Respondent No.1 by reiterating the same stance. His cross-examination is also primarily related to the earlier litigation. Deposed about the knowledge of the transaction in question, that when on 06.05.2005, Respondent No.1 approached the Sub-Registrar Office, he found one Photocopy of the Affidavit for the purposes of the Lease Deed. The Second Part of the cross-examination is about rate of rent,

which the Suit Property can fetch had it been given on rent, to justify the stance of the Applicant about the payment of mesne profit.

23. The Official Documents were produced through the concerned Officials, but they were not cross-examined as they did not take Oath, except Muhammad Akram Khan, who appeared as Respondents' Witness [Exhibit 72], and was the Inspector of the Land Department of TMA, Latifabad. Inter alia, produced the Death Certificate of the Deceased Father (Exhibit-72/E) to confirm that Muhammad Din Channa passed away on 24-01-1975. In his cross-examination to the Applicant's Advocate, he testified that after the death of the Deceased Father, the Mutation of Gift was effected in the Office of the Deputy Commissioner vide Order dated 20.01.1976 in the name of Donee (*ibid*) and the same Entry was made in the Allotment Order (as already stated in the foregoing Paragraphs). Admitted that neither any application for mutation nor cancellation were/ are available in the record on behalf of the Legal Heirs of the above Deceased Father. Admitted that when the Application of Respondent No.1 was filed for cancellation of the Gift, before that the registered Sale Deed in favour of the Applicant was already executed.

24. The conclusion of the above evidence is, that the possession always remained with the Respondents and it was never handed over to said Saifuddin Channa, who was never examined in any of the Proceedings/ Cases. The onus to prove a valid Gift was never discharged, therefore, the Document-Declaration of Gift (Exhibit-72/F), cannot be adjudged as a valid Document. Even otherwise, this Gift Document was kept in dark by the Donee and for the first time was brought to light after the death of the Deceased Father/Donor, and around eight years when the purported Gift Declaration was made, that is, on 09.10.1967 (Exhibit 72/F).

The Case Law cited by the Applicant's Counsel is distinguishable from the facts of the present *LIS*, whereas the Judgments relied upon by the Respondents' Counsel are applicable, in particular the **Sarwar Case** (*ibid*) [2020 SCMR 276], in which the Gift was declared invalid, so also the Mutation Entry, as it was kept after the demise of the Donor / Father. Rule propounded in **Parveen Case** [*ibid*] is also against the stance of the present Applicant; whereas, the Hon'ble Supreme Court has invalidated the Gift of a House Property on the ground that no independent witnesses were examined to prove the factum of the Gift and consequently the impugned Decision of the High Court was set-aside and that of the First Appellate Court was maintained (2021 SCMR 1986-Khalid Hussain and others versus Nazir Ahmad and others).

25. Adverting to the arguments of the learned Counsel for the Applicant, that the Respondents' witnesses have admitted the fact of not challenging the Gift for a very long time till year 2004, and remained throughout unsuccessful in their litigation, and the controversy being laid to rest, thus the entitlement of the Applicant as Purchaser and Owner [having mutation in his favour], should have been decided by both the Courts below, in favour of the Applicant. This line of argument is untenable. The main ground on the basis of which the First Suit (*supra*) filed by the Respondent and his Siblings was dismissed, was, that the Respondents had not challenged the Lease Deed (Exhibit-50/A) in favour of the Donee / Brother, therefore, the transaction between the Applicant and the Donee (Saifuddin Channa) was held to be valid. Mutation in the name of the Donee, subsequent Lease Deed (Exhibit-50/A) and finally the Sale Deed and the Mutation (*ibid*) between the Applicant and the Donee, are based on the premise, **rather foundational fact**, that the Suit Property was validly gifted to the Donee, which is not the case as discussed above, therefore, the

principle of *res judicata* cannot be invoked in favour of the present Applicant for decreeing his Suit. The finding of the learned Trial Court and maintained by the Appellate Court, that the Gift in favour of the Donee by the Father is doubtful, is correct, in view of the above discussion.

26. The validity of the Gift has to be decided under the provisions of the Islamic Law and Jurisprudence and, therefore, it has an over-riding effect on the general principles of law, like the **res judicata**, *inter alia*, for the reasons mentioned in the foregoing Paragraphs. The learned Division Bench of this Court, in the Case of ***Habib Bank Limited versus M/s. Farooq Compost Fertilizer Corporation Ltd and 4 others (1993 MLD 1571)***, has held, that if more than one interpretation is possible, Courts have to interpret Statute Law in a manner consistent with the Islamic Principles and Jurisprudence.

27. As far as the contention of the Applicant's Counsel is concerned, that Declaration is not required in such nature of Suit; in view of the Case Law cited by him, the argument appears to be correct, but it has hardly any positive impact on the overall merits of the controversy.

28. Adverting to the sale transaction between the Applicant and the Donee. The Sale Deed (*supra*) between the Applicant and the Donee was also challenged but neither the purported Seller [the Donee] nor witnesses of the said Sale Deed were examined, although one of the Witnesses was his Son [Salman Saif Channa]. This fact has further put a dent on the claim of the Applicant with regard to the Suit Property, as even the sale transaction has not been proven in accordance with law, that is, in terms of Articles 17 and 79 (of the Qanun-e-Shahadat Order, 1984). The Decision of **Subhan Case (*ibid*)**, cited by the Respondents' Counsel, is applicable to these facts, that in such a situation it is not necessary to seek a relief of

cancellation of a Sale Deed when it is not proven in the evidence as required.

29. The summation of the above discussion is that the Gift of the Suit Property was not a valid transaction and thus the subsequent Mutation (Exhibit-72/B), Lease Deed (Exhibit-50/A), Sale Deed (Exhibit-50/B) and Mutation dated 02.05.2005 [Exhibit 46/A] are all void *ab initio*. Both the Courts have correctly decided the matter by discussing the controversy in its entirety, and thus no interference is required in this revisional jurisdiction, and hence, this Revision Application is dismissed.

JUDGE

Hyderabad,

Dated: 12.12.2025

M.Javid P.A