

IN THE HIGH COURT OF SINDH, KARACHI

HCA No.182 of 2022

[*Abdul Majeed vs.Hameeda Iqbal*]

&

HCA No.273 of 2022

[*Abdul Majeed vs.Hameeda Iqbal*]

**PRESENT:**

**Mr. Justice Arshad Hussain Khan**

**Mr. Amjad Ali Sahito.**

Appellant Through M/s. Kazi Abdul Hameed Siddiqui & Muhammad Nawaz, Advocates.

Respondents 1-5 Through Mr. Danish Raza, Advocate

Date of Hearing: 07.04.2026

Date of Order: 15.04.2026

**ARSHAD HUSSAIN KHAN, J:** The above-captioned two connected High Court Appeals, i.e., HCA No.182 of 2022 and HCA No.273 of 2022, arise out of the common Judgment dated 19.04.2022 and Decree dated 25.04.2022, passed by a learned Single Judge of this Court in Civil Suit No.2421 of 2014 [*Hameeda Iqbal & others vs. Abdul Majeed & others*] and Civil Suit No.1013 of 2014 [*Abdul Majeed & others vs. Hameeda Iqbal & others*]. By the impugned Judgment, the former suit was decreed whereas the latter was dismissed. As both the appeals stem from the same judgment and involve common questions of law and fact, they are being decided together through this single judgment.

2. Briefly stated, the dispute pertains to property bearing Plot No. 3-C-12/16, Nazimabad, Karachi, admeasuring 216 square yards (**the subject property**), which originally stood in the name of Mst. Quresha Bi, the common predecessor-in-interest of the parties, whose children included [late] Shamsul Haq, [late] Nasrullah, [late] Abdul Hameed and the present appellant Abdul Majeed, through whom the parties claim their respective rights. It is evident from the record that an earlier property of the predecessor was sold and thereafter the subject property was acquired in or about the year 1970 in the name of Mst. Quresha Bi, upon which construction was raised from time to time and different portions came to be occupied by various family

members. On record is an Agreement /Declaration /Undertaking dated 30.12.1985, executed by late Shamsul Haq regarding occupation and use of portions of the property by his brothers, alongside a registered gift deed dated 30.06.1985 whereby the property was transferred in his favour; the property also remained mortgaged with the House Building Finance Corporation [HBFC] and was subsequently redeemed. Disputes arose between the parties in or about the year 2013 concerning their respective rights and possession, leading to the institution of Civil Suit No.1013 of 2014 by the appellants for declaration and injunction and Civil Suit No.2421 of 2014 by the respondents for declaration, possession and mesne profits; both suits were consolidated, evidence was recorded, and ultimately, vide Judgment dated 19.04.2022, learned Single Judge decreed the respondents' suit and dismissed that of the appellants, giving rise to the present appeals.

3. Learned counsel for the appellants contended that the impugned Judgment and Decree are the result of misreading and non-reading of material evidence and thus cannot be sustained in law. It is argued that the learned Single Judge failed to appreciate that the subject property remained mortgaged with the HBFC from 1975 till its redemption in 1997, during which period the alleged gift deed dated 30.06.1985 could neither be validly executed nor completed, particularly when the title documents admittedly remained in custody of the mortgagee, thereby falsifying the recital regarding delivery of possession and documents. It is further contended that the essential ingredients of a valid gift under Muslim Law, especially delivery of possession, were not fulfilled as the appellants and their predecessors have remained in continuous possession of portions of the property. Learned counsel also argued that the Agreement / Declaration / Undertaking dated 30.12.1985 constitutes a binding family arrangement creating enforceable rights in favour of the appellants' predecessors, which has been ignored without lawful justification. It is also argued that the respondents failed to establish exclusive ownership or source of funds for acquisition of the property, while material contradictions in their evidence have been overlooked. Lastly, it is contended that the appellants, being co-sharers in

possession, could not be treated as trespassers and the award of mesne profits is wholly illegal, arbitrary, and liable to be set aside.

4. Learned counsel for respondents No.1 to 5, while supporting the impugned Judgment and Decree, contended that the same is a well-reasoned and speaking judgment based on proper appreciation of evidence and law calling for no interference in appellate jurisdiction. It was argued that the appellants have failed to point out any illegality or material irregularity and have, in fact, suppressed true facts while raising inconsistent and belated pleas. Learned counsel further contended that the ownership of the suit property in favour of [late] Shamsul Haq stands fully established through a registered gift deed dated 30.06.1985, which was never challenged during the lifetime of the donor or donee and, in fact, was witnessed by the appellants themselves, who are now estopped from disputing its validity. It is also contended that the evidence on the record, including admissions of appellant No.1 in cross-examination, clearly establishes that the property was purchased from the earnings of late Shamsul Haq, construction was raised by him, the HBFC loan was obtained and repaid by him, and rental income was exclusively received by him without any claim from the appellants. Learned counsel argued that there is no legal bar to transfer or gift of mortgaged property, as mortgage creates only a limited interest, and the donee takes the property subject to such encumbrance, which in the present case was subsequently redeemed by [late] Shamsul Haq during the lifetime of the donor. It is also argued that all essential ingredients of a valid gift under Muhammadan Law, including declaration, acceptance, and delivery of possession actual or constructive stand fulfilled, particularly when the donee was residing jointly with the donor and the gift has been acted upon, followed by mutation in his favour. Learned counsel next contended that the so-called Agreement / Declaration / Undertaking dated 30.12.1985 is an unregistered and legally ineffective document, which neither creates any title nor confers ownership rights, and has remained unproved in accordance with law, especially when material witnesses were not produced and even the existence of a "third floor" mentioned therein is not borne out from record. It is urged that the appellants, being merely

permissive occupants and presumptive heirs, have no locus standi to challenge the gift or assert co-ownership in derogation of the donor's intention, particularly after an inordinate delay. Lastly, it was contended that the learned Single Judge has rightly decreed the respondents' suit and dismissed that of the appellants on the basis of cogent evidence, and the present appeals, being devoid of merit and filed with mala fide intent, are liable to be dismissed.

5. We have heard the learned counsel for the parties, perused the record and the relevant law.

In the aforesaid suits, the learned Single Judge, after examining the evidence and pleadings, held that the registered gift deed dated 30.06.1985 in favour of [late] Shamsul Haq was valid, fulfilling all essential ingredients of a Muhammadan Law gift, including declaration, acceptance, and delivery of possession. The unregistered Agreement/Declaration/Undertaking dated 30.12.1985 was found legally ineffective and unproved. The Single Judge further noted that [late] Shamsul Haq acquired the property from his earnings, repaid the HBFC loan, raised construction, and received rental income, while the appellants were permissive occupants. Accordingly, the respondents' suit was decreed, and the appellants' suit dismissed.

6. In essence, the appellants' objections in the present appeal are fourfold, namely: **(i)** that the alleged gift deed dated 30.06.1985 is legally ineffective, as the property remained mortgaged with the House Building Finance Corporation from 1975 until its redemption in 1997, during which period neither a valid transfer could have been effected nor lawful delivery of possession could have taken place, particularly when the title documents were admittedly in the custody of the mortgagee; **(ii)** that the Agreement/Declaration/Undertaking dated 30.12.1985 constitutes a binding family arrangement conferring enforceable rights upon the appellants' predecessors, which has been disregarded by the learned Single Judge without lawful justification; **(iii)** that the respondents failed to establish their exclusive ownership or disclose the source of funds for acquisition of the property; and **(iv)** that the appellants, being co-sharers in possession, could not have been treated as trespassers, and, therefore, the award of mesne profits is illegal, arbitrary, and liable to be set aside.

7. Insofar as the first objection is concerned, the same appears to be misconceived and contrary to the stance earlier adopted by the appellants in their own suit (Suit No. 1013 of 2014). Admittedly, the appellants never raised any challenge to the validity of the gift deed in their plaint; rather, they sought to derive benefit therefrom. Such inconsistent and shifting stance cannot be permitted at this stage. Moreover, it is an admitted position that Abdul Majeed (appellant No.1) and Abdul Hameed (predecessor of appellants No.7, 8, and 9) were witnesses to the said gift deed, which further belies the present attempt to question its legality and effect.

Notwithstanding the above, insofar as the objection to the validity of the Gift Deed dated 30.06.1985 on the premise that the same could not have been executed during the subsistence of the mortgage with the House Building Finance Corporation (1975–1997) is concerned, the same is devoid of substance. The argument that, since the title documents were in the custody of the mortgagee, neither a valid transfer could be effected nor possession lawfully delivered, is not tenable in law. The record clearly demonstrates that the subject property stood in the name of Mst. Quresha Bi and that [late] Shamsul Haq became the beneficiary of a registered gift deed executed in his favour on 30.06.1985. It is a settled principle of Muhammadan Law that a gift of mortgaged property is not per se invalid; the donor is competent to transfer his/her interest in the property, and the donee takes the same subject to the existing encumbrance.

It may be observed that the essential ingredients of a valid gift declaration by the donor, acceptance by the donee, and delivery of possession are satisfied either actually or constructively. The appellants' claim that delivery of possession was not effected is belied by the fact that the donee occupied the property jointly with the donor, exercised exclusive use of portions of the property, and received rental income therefrom. The gift deed, being registered and acted upon, enjoys the protection of law, and the appellants cannot lightly impugn its validity after such an inordinate lapse of time.

The Honourable Supreme Court, in *Ghulam Muhammad v. Mian Jinda* [1983 SCMR 749], while dilating upon the identical issue

has held that a gift of land subject to a subsisting usufructuary mortgage, specifically the equity of redemption, could be validly made in favour of the donees. It was observed that notice to the mortgagee was not a legal requirement or sine qua non for the completion of such a gift. The donor, having done all that was reasonably possible to divest himself of the property and to transfer the equity of redemption, including executing a registered deed, had perfected the gift. Physical possession, where not transferable due to the mortgage, did not invalidate the gift. Consequently, once properly completed, such a gift could not be revoked, and the donees were entitled to retain their rights under the deed.

In another case of *Syed Masood Ali v. Mst. Feroza Begum* [PLD 2025 SC 339], the Supreme Court of Pakistan held that a gift (*Hiba*) under Muslim law is the immediate and unconditional transfer of property without consideration, which becomes valid upon (i) a clear declaration by the donor, (ii) acceptance by the donee, and (iii) delivery of possession. The Court held that a gift may be oral or written, and registration is not essential. It was further clarified that in gifts within close family, continued residence or receipt of rents by the donor does not invalidate the gift, and once completed, a valid gift is irrevocable and binding against heirs, except in cases of fraud, coercion, undue influence, or mistake.

In the present case, it has further come on record that the mortgage was duly redeemed by [late] Shamsul Haq during the lifetime of the donor, thereby perfecting his title. Significantly, no challenge to the said gift deed was ever raised by the appellants either at the time of its execution or during the lifetime of the donor or the donee, which lends further strength to its validity.

In view of the above discussion and consistent judicial pronouncements, it is evident that the gift deed dated 30.06.1985 fulfills all the essential requirements of a valid gift under Muslim law. The appellants' objections, whether based on the prior mortgage or alleged non-delivery of possession, are without merit and cannot affect the legal efficacy of the registered deed.

8. Insofar as the second objection is concerned, it may also be noted that the appellants rely on the Agreement /Declaration/

Undertaking executed by late Shamsul Haq on 30.12.1985, asserting that it created enforceable rights in their favour. Upon careful examination, it is evident that the said document is unregistered, legally ineffective, and incapable of creating proprietary rights. Material witnesses to corroborate the alleged family arrangement were not produced, and the existence of structures referred to therein, such as a “third floor,” is not supported by the record. The appellants’ occupation of portions of the property was permissive, and mere permissive occupation cannot confer ownership or co-sharer status capable of overriding the valid and registered gift deed executed in favour of late Shamsul Haq.

9. Insofar as the objection with regard to Ownership and Source of Funds is concerned, the respondents have satisfactorily established that the property was acquired and construction undertaken from the personal earnings of late Shamsul Haq, including repayment of the HBFC loan and receipt of rental income. The appellants’ own admissions in cross-examination corroborate this position. There is no credible evidence to indicate that the respondents’ title is defective or that the property was acquired from sources other than those claimed. In such circumstances, the appellants cannot lay claim to co-ownership or challenge a duly executed gift merely on the basis of family arrangement or permissive occupation.

10. Regarding possession and mesne profits, it is observed that the appellants were in permissive occupation only and cannot be treated as co-owners so as to assert any right in respect of possession. Moreover, the appellants neither disputed the quantum of mesne profits nor cross-examined the relevant witness on this aspect; consequently, their stance regarding mesne profits has remained un rebutted. The learned Single Judge has rightly held that the respondents are entitled to possession of the entire property and has lawfully awarded mesne profits, duly determined on the basis of the evidence available on the record in respect of the portions retained by the appellants after institution of the suit. The said finding is fully consistent with law as well as the principles of equity, and the appellants’ objection against the award of mesne profits is wholly untenable.

11. The foregoing discussion leads to the conclusion that the registered gift deed dated 30.06.1985, having attained finality, cannot be questioned at this stage, while the appellants are merely permissive occupants without any independent title or vested interest in the property and the unregistered Agreement/Declaration/Undertaking dated 30.12.1985 is legally ineffective. The learned Single Judge has thus properly appreciated the evidence and applied the law, and the impugned Judgment and Decree suffer from no illegality, perversity, or material irregularity. Accordingly, the appeals, being devoid of merit, are dismissed in their entirety.

JUDGE

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