

Form No: HCJD/C

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Case No: Civil Revision Petition No. 181 of 2014

Mst. Shamim Akhtar

Vs.

Pirzada Khalil ur Rehman and 2 others

Petitioner by: Syed Asghar Hussain Sabzwari, Advocate.
Respondents No.1 by: Mr. Zulfiqar Ali Abbasi, Advocate.
Respondents No.2 & 3 by: Mr. Muhammad Anwar Dar, Advocate.

Date of hearing: 28.04.2015.

AAMER FAROOQ, J.- Through this consolidated judgment I shall decide the instant civil revision as well as Civil Revision No.256 of 2014 as both the petitions arise out of the same judgment and decree dated 31.05.2014 passed by District Judge (West), Islamabad.

2. The dispute between the parties pertains to property bearing plot No.140 F-11/4, Islamabad (the property). The petitioner and respondent No.1 are related to each other being daughter and father. Respondent No.1 was allotted property in 1983 and the construction on the same was raised and completed in the year 1997. On 19.12.1991 respondent No.1 transferred half of the property in favour of the petitioner and in this regard Capital Development Authority (CDA)-respondent No.3 issued the transfer letter on 19.12.1991. Subsequently respondent No.1 made an oral gift of the remaining portion of the property in the year 1998 to the petitioner. On the basis of the said gift, application and other documents were moved in the office of respondents No.2 & 3 for transfer of the property in the name of the petitioner, however, the gift was revoked and respondents No.2 & 3 were requested not to proceed with the transaction. Despite the referred request by respondent No.1, respondent No.3 issued transfer letter for the remaining portion of the property on 29.04.1998. Respondent No.1 filed a suit for declaration and injunction on 20.03.2007 with respect to the property seeking declaration that he is the exclusive owner of the property. The petitioner contested the claim of respondent No.1 and out of the divergent pleadings of the parties, following issues were framed:

ISSUES

1. Whether the plaintiff is owner in possession of the suit property? OPP
2. Whether the transfer letter dated 29.04.1998 issued by defendant No.2 in favour of defendant No.1 is illegal, ultra vires and inoperative on the right of plaintiff? OPP
3. Whether the plaintiff is entitled for a decree as prayed for? OPP
4. Whether the suit is not maintainable in its present form? OPD
5. Whether the plaint is hit by Order VII Rule 11 of C.P.C.? OPD
6. Whether the plaintiff has no cause of action and locus standi to file the suit? OPD
7. Whether the suit of the plaintiff is false and vexatious and is liable to be dismissed? OPD
8. Relief.

3. The parties led their oral as well as documentary evidence. In this behalf respondent No.1 appeared as PW-1, Record Keeper, CDA as PW-2. The original allotment letter in favour of respondent No.1 was exhibited as Exh.P-1, agreement between respondent No.1 and CDA as Exh.P-2, indemnity bond Exh.P-3, second indemnity bond Exh.P-4, certificate of possession Exh.P-5, letter for including the name of petitioner as co-allottee Exh.P-6, letter for transfer of second half of the share Exh.P-7, affidavit of plaintiff regarding the revocation of oral gift Exh.P-8, building plan Exh.P-9, acknowledgement of oral gift Exh.P-10, verification of ownership/allotment Exh.P-11, letter dated 30.10.1988 Exh.P-12, clearance certificate Exh.P-13, completion certificate Exh.P-14, confirmation of transfer of plot in the name of petitioner Exh.P-15, letter of House Building Finance Corporation approving the loan in favour of respondent No.1 Exh.P-16, the original letter of House Building Finance Corporation Exh.P-18 & Exh.P-19, receipt of CDA Exh.P-20, another receipt of payment of tax Exh.P-21, another receipt of income Tax Exh.P-22, another receipt of income tax Exh.P-23, receipt of income tax department Exh.P-24, another receipt of payment of tax Exh.P-25, copy of application filed by the plaintiff before, the office of CDA on 14.01.1998 for the cancellation of oral gift Mark-A. The petitioner appeared as DW-1, Sheikh Muhammad Ishaq DW-2. In documentary evidence general power of attorney executed by the petitioner in favour of respondent No.1 Exh.D-1, acknowledgement of oral gift Exh.D-2, oral gift declaration Exh.D-3, letter of acceptance of general power of attorney Exh.D-4, application of respondent No.1 for transfer of suit house in the name of the petitioner as oral gift Exh.D-5, the statement of the parties before the CDA on 24.07.1997 Exh.D-6, another application of respondent No.1 Exh.D-7, another application dated 25.04.1998 filed by respondent No.1 regarding the settlements of dispute with the petitioner and transfer of suit house in her name Exh.D-8, transfer letter Exh.D-9, another transfer letter Exh.D-10, copy of earlier suit Exh.D-11, copy of order sheet Exh.D-12, copy of F.I.R. Exh.D-13, report under section 173 Cr.P.C. Exh.D-14, and the final order of murder case Exh.D-15.

4. The Trial Court dismissed the suit of respondent No.1 to the extent of transfer made by him in the year 1991, however, decreed the claim in his favour with respect to gift, vide judgment and decree dated 15.02.2011. The appeals were filed against the judgment of the Trial Court by the petitioner as well as respondent No.1 which were dismissed vide judgment dated 22.03.2013. Against the decision in appeal civil revisions were preferred by both the parties (C.R. No.76/2013 & C.R. No.119/2013). In both the civil revisions vide judgment dated 19.09.2013 the matter was remanded to the first Appellate Court. After remand, two additional issues were framed and the matter was referred to the Trial Court to give its findings on the same. In this regard the following two additional issues were framed:

ADDITIONAL ISSUES

- A. Whether the suit filed by the plaintiff is barred under Order XXIII Rule 1 of C.P.C.? OPD
- B. Whether suit filed by the plaintiff is barred by limitation under Order XXIII Rule 2 of C.P.C. ?OPD

5. The learned Trial Court recorded the evidence and gave findings on the additional issues and sent back the matter to the Appellate Court. The Appellate Court vide judgment dated 31.05.2014 dismissed both the appeals, against which the abovementioned revision petitions have been preferred.

6. Learned counsel for the petitioner *inter alia* submitted that gift made by respondent No.1 in favour of the petitioner became absolute and could not have been revoked. In support of his contention learned counsel placed reliance on Exh.P-10 which is an acknowledgement of oral gift executed by respondent No.1 at the time of making application, to CDA, for transfer of property in favour of the petitioner. Learned counsel also drew attention of this Court towards evidence of respondent No.1 wherein he acknowledged that he does not have the possession of the property. Learned counsel placed reliance on the case titled *Bahadur Kha v. Mst. Niamat Khatoon and another* (1987 SCMR 1492), *Abdul Karim v. Muhammad Akram* (1995 CLC 130), *Ghulam Ali and two others v. Mst. Ghulam Sarwar Naqvi* (NLR 1990 SCJ 207) and *Daud Khan v. Aurangzeb and others* (PLD 1968 Supreme Court 54). Learned counsel further contended that the suit filed by respondent No.1 is barred by limitation. In this behalf it was submitted that cause of action, if any, accrued in favour of respondent No.1 in the year 1998 when CDA transferred the property in favour of the petitioner, despite the affidavit revoking the gift. In this behalf it was contended that the limitation period in a suit for declaration is covered under Article 120 of the 1st Schedule to Limitation Act, 1908 and the period prescribed therefor is six years. The suit was instituted in the year 2007 after about nine years of the alleged cause of action. It was also submitted by the learned counsel that the suit filed by respondent No.1 was barred under Order XXIII Rule 1

C.P.C. as respondent No.1 had previously filed two suits which were withdrawn unilaterally. In this behalf learned counsel submitted that the second suit was withdrawn on 23.02.2007 in the proceedings before the Additional District Judge, Islamabad in appeal with respect to the interim relief refused to respondent No.1. Learned counsel further submitted that the transaction with respect to transfer of first half of the property became absolute in 1991 and now cannot be undone for no rhyme or reason.

7. Learned counsel for respondent No.1 *inter alia* submitted that the gift could be revoked by respondent No.1 inasmuch as it was in the nature of *Hiba-Bil-Iwaz* and the consideration being that the petitioner shall look after respondent No.1 and on her refusal to do so the same was cancelled/revoked. In support of his contention learned counsel placed reliance on the case titled *Jagat Singh Cholwal and another v. Dungar Singh* (A.I.R. (38) 1951 Allaabad 599 and *Muhammd Aslam Khan and another v. Bashir Khan and others* (PLD 1975 Azad J & K 42). With respect to the transfer regarding first half of the property learned counsel for respondent No.1 submitted that the same was transferred in consideration for loan granted by the petitioner to respondent No.1 for payment of *Diyat* and the same now has been repaid by respondent No.1, therefore, the security in the form of transfer merits reversion. It was further contended that the cause of action accrued to respondent No.1 upon his return from United Kingdom (U.K.) when the petitioner refused to look after respondent No.1 and therefore, he decided to revoke the gift. Learned counsel submitted next that the suits were withdrawn with permission to re-file and therefore, bar provided in Order XXIII C.P.C. is not attracted.

8. The examination of plaint shows that it has been alleged by respondent No.1 that cause of action accrued to him in the year 2004, however, no basis has been provided for accrual of cause of action in 2004. First half of the property was transferred in 1991 and the remaining portion of the property was gifted and the referred gift was, allegedly, revoked in 1998. The present suit was filed by respondent No.1 on 20.03.2007. He had filed earlier suit on 23.01.2004 and subsequently on 01.06.2005, however, for the purpose of limitation the suit filed in 2007 shall be taken into account and since the same was filed after lapse of six years from the earlier gift or transfer of first half of the property, therefore, the suit of respondent No.1 is barred by limitation.

9. Respondent No.1 in the suit has alleged that the gift was in the nature of *Hiba-Bil-Iwaz* and since the consideration for the same i.e. look after of respondent No.1 was not provided by the petitioner, therefore, the same was revoked. The referred stance of respondent No.1 is negated by Exh.P-10 i.e. acknowledgment of oral gift. In the said document the reason/consideration for the

gift is love and affection with the petitioner and it also provides that possession of the property has been transferred by the donor in favour of the donee. The execution of the said document has not been denied by respondent No.1 and infact he produced the said acknowledgement in his evidence. It is established principle of law that contents of a document cannot be negated/challenged through oral testimony. In this behalf the case law relied upon by the petitioner is instructive. In 1987 SCMR 1492 *supra* the Hon'ble Supreme Court of Pakistan relying upon Muhomedan Law by D.F. Mulla, observed that when donor and donee are related within the prohibited degree, the gift made cannot be revoked. In case of *Daud Khan v. Aurangzeb and others* (PLD 1968 Supreme Court 54) the Hon'ble Supreme Court of Pakistan relying upon D.F. Mulla as well as Amir Ali, V. I, P.122 observed that a gift in favour of a relation within prohibitory degree cannot be retracted. The Hon'ble Supreme Court of Pakistan further observed as follows:

"In this state of the law the learned Judges properly resorted to Qiyas and concluded that as the reason why a gift to a kinsman within the prohibitory degree cannot be resumed is that "the object of the gift is to increase the ties of affinity which is thereby obtained" the term prohibited degree should be construed as (قربت دار) otherwise the best part of the relations within the prohibited degree will be excluded from the benefit or irrevocability, as result neither based on reason nor on commonsense. There was also no logic in extending the benefit to a mother-in-law, but withholding it from a mother."

10. Learned counsel for respondent No.1 placed reliance on PLD 1975 Azad J & K 42 *supra* to argue that the transaction was *Hiba-bashart-ul-iwaz* and could be retracted. As observed above, Exh.P-10 does not make the transaction as *Hiba-bashart-ul-iwaz* rather, is an absolute gift in favour of the petitioner which became absolute as the conditions prescribed for the oral gift under the Islamic Law were duly complied with inasmuch as declaration of gift was made which was accepted by the donee and the possession was also transferred. This transaction was also effected in the record of CDA.

11. The second suit filed by respondent No.1 was withdrawn on 23.02.2007 in appeal filed against refusal of interim relief which makes the withdrawal and the consent given by the learned counsel for the petitioner questionable as the scope of the referred appeal was limited and therefore, withdrawal of the suit could not have taken effect therein.

12. The findings given by the Trial Court as well as the Appellate Court on the question of gift are based on misreading of the relevant evidence inasmuch as both the Courts below have failed to take into account the contents of Exh.P-10 and transfer of the property on the basis thereof, therefore, the jurisdiction has been exercised by them with material irregularity and is not sustainable. Even the

findings given by the Courts below on the question of limitation are also not in consonance with the law. The findings of the Court with respect to the transfer of first half of the property in 1991 are unexceptionable and therefore, there is no jurisdictional error in the same.

13. In view of above, the instant civil revision is accepted and the judgment and decree passed by the Appellate Court with respect to the second half of the property pertaining to gift of respondent No.1 in favour of the petitioner is set aside. Civil Revision No.256/2014 is hereby dismissed. Resultantly, the suit of respondent No.1 with respect to the property stands dismissed.

(AAMER FAROOQ)
JUDGE

Announced in open Court on the 11th day of June 2015.

Approved for Reporting

JUDGE

M. Naved
27/6/15