

**JUDGMENT SHEET**  
**ISLAMABAD HIGH COURT, ISLAMABAD,**  
**JUDICIAL DEPARTMENT**

**RSA No.04/2014**

Muhammad Younas

*versus*

Mst. Karam Jan & 2 others

Appellant by: Mr. Numan Munir Paracha, Advocate.

Respondent No.1 by: Syed Mujtaba Haider Sherazi, Advocate.

**Date of Hearing: 01.11.2019.**

**MOHSIN AKHTAR KAYANI, J:** Through this regular second appeal, the appellant has called in question concurrent findings of the Courts below, whereby the suit of Respondent No.1 was decreed by learned Civil Judge (West), Islamabad vide impugned judgment and decree dated 26.03.2012 and appeal thereof filed by the present appellant has been dismissed by learned Additional District Judge (West), Islamabad vide impugned judgment and decree dated 03.02.2014.

2. Brief facts referred in the instant appeal are that Mst. Karam Jan/Respondent No.1 filed a suit for declaration, cancellation of gift deed dated 22.05.1989 and permanent injunction against her real brother namely Muhammad Yousaf/appellant, who allegedly got executed a gift deed in his favour regarding land measuring 40 Kanals & 05 Marla, situated in Village Shah Allah Ditta, Islamabad few days back from the demise of their father i.e. Dost Muhammad, who suffered cancer. The suit was contested by the appellant by submission of written statement and the learned trial Court pursuant to framing of issues and recording of evidence decreed the suit in favour of plaintiff/respondent No.1 vide impugned judgment and decree dated 26.03.2012. The appellant feeling aggrieved thereof preferred an appeal, which was dismissed by the learned first Appellate Court vide impugned judgment and decree dated 03.02.2014. Hence, the instant appeal.

3. Learned counsel for appellant contends that the impugned judgments and decrees of both the Courts below are against the law and suffer from misreading and non-reading of evidence; that the gift deed in question was validly executed by the predecessor-in-interest of the contesting parties with his free will and in presence of witnesses, whereafter physical possession was handed over to the appellant; that the both the Courts below have not merely misunderstood the concept of "*Marz-ul-Mout*", but have also ignored the law declared by the superior Courts and passed the impugned judgments and decrees, which are liable to be set-aside.

4. Conversely, learned counsel for respondent No.1 opposed the instant appeal by contending that the appellant got executed the alleged gift deed in his favour few days back the demise of their father, who was hospitalized and was not in a stable mental condition to execute any document; that both the Courts below have rightly appreciated the evidence together with the law on the subject and passed the impugned judgments and decrees, therefore, the instant appeal may be dismissed.

5. I have heard the arguments and gone through the record.

6. Perusal of record reveals that Mst. Karam Jan/respondent No.1 filed suit for declaration, cancellation of gift deed and permanent injunction, challenging therein gift deed dated 22.5.1989 on the basis whereof, appellant Muhammad Younas, her real brother, claims that their predecessor in interest Dost Muhammad (father) transferred the property measuring approximately 40 Kanals and 5 Marlas in different Khasras situated in Mouza Shah Allah Ditta, Islamabad by way of registered gift deed Exh.P.7 registered with Joint Sub-Registrar, Islamabad at serial No.676, dated 22.5.1989. The suit was contested by the appellant, who filed written statement, whereby he took specific plea that the gift deed was executed in presence of witnesses by his father with his free will and consent and possession was delivered whereas late father was mentally and

physically fit person at the time of execution of gift deed. The plea taken by the appellant in his written statement is reproduced as under:-

*"Para No.3 as stated is incorrect, hence denied. However, it is further clarified that the predecessor-in-interest of the parties during his life time has property accommodated the plaintiff in the shape of land produce out of agricultural land and money in the shape of cash and he was mentally and physically a healthy person and when the answering defendant has got retirement from Pakistan Army and constructed his residential houses in Rawalpindi, then the said predecessor-in-interest of the parties with his free will and consent had shifted from his native village and remained living with the answering defendant till his death and during this period, the answering defendant always cares his whims and wishes including routine medical check-ups and he was also hospitalized by the answering defendant.*

*Para No.5 is incorrect, hence denied. However, it is further submitted that when the copy of record of rights regarding the share of the predecessor-in-interest of the parties has been got by the said predecessor from the Patwari of the concerned revenue estate for the execution of the hibba deed in favour of the answering defendant regarding the share of the property of the predecessor-in-interest, then the plaintiff has approached the revenue authorities/then Tehsildar, Islamabad and submitted an application for non-sanctioning of the said hibba deed with the version that the plaintiff is also the legal heir of the said predecessor-in-interest, hence on the very first day the said Revenue Officer/Tehsildar, Islamabad, did not sanction the said hibba deed and subsequently some respectable of the concerned vicinity including the ex-Chairman Union Council Shah Allah Ditta, has also intervened the matter and requested the predecessor-in-interest of the parties not to transfer the whole share in favour of defendant No.1 but the donor had flatly refused to accept the claim of the plaintiff with the version that he had already accommodated the plaintiff during his life in the shape of land, money as well as produce/out-come of agricultural land, then subsequently on the next visit the Tehsildar/Sub Registrar, Islamabad had sanctioned the hibba deed No.673 dated 22-5-1989 in presence of the marginal witnesses after due care and scrutiny of the matter and as this fact was very well within the knowledge of the plaintiff including the whole vicinity/village and the present plaintiff kept mum through-out this whole period and now when the CDA has chalked out a programme for the acquisition of the land, then the plaintiff has become greedy and in order to get compensation, he has filed the instant suit against the answering defendant in order to blackmail and pressurize him to get some ulterior motives, for which she has absolutely no legal or moral right to do so."*

Trial Court framed the issues, whereby respondent No.1/deed holder/Karam Jan appeared through her special attorney Mukhtar Hussain as P.W.1 and sworn affidavit of evidence Exh.P.1 and reiterated stance that the deceased Dost Muhammad was patient of cancer and in his last stage he was mentally

incapacitated to do lawful act and he was hospitalized in Christian Missionary Hospital by the appellant, who tried to get transferred the property in his name, upon which respondent No.1 submitted application and the matter was stopped at that stage, however, when CDA started acquisition of the property, the gift deed was revealed. The tentative age referred by P.W.1 of late Dost Muhammad was more than 100 years and the gift deed was allegedly got executed with fraud and mis-representation in order to deprive respondent No.1 from her lawful share.

7. During the course of cross-examination, it has been acknowledged by P.W.1 (special attorney) that her mother submitted application to Tehsildar Islamabad in the year 1989 with the contention that her father was not in conducive state of physical and mental health and as such any transfer of suit land depriving her from her share may not be allowed. At that time revenue officer ensured her mother that transfer will not be effected.

8. Respondent No.1 produced Aksar Khan as P.W.2, who is from the same community and *brotherhood* (برادری), who confirmed that late Dost Muhammad remained admitted in Christian Hospital, who was suffering from cancer. P.W.3 Shakhawat Hussain has also stated through Exh.P.4 that the deceased was patient of cancer and remained in hospital, whose mental condition was not up to the mark. Similar statement was also given by Muhammad Safdar/P.W.4. Both the witnesses are from same clan but nothing against was achieved by the appellant side. Zulfiqar Khan Moharrer appeared as P.W.5 from office of Joint Sub-Registrar, Islamabad, who produced record of gift deed executed in favour of appellant by late Dost Muhammad registered at serial No.676, dated 22.05.89 and confirmed signatures of late Dost Muhammad from the register and copy of the same has been placed on record as Exh.P.6. The pages of the register have been submitted as Exh.P.7, whereby he stated on oath that "nothing is recorded in these entries about mental or

physical condition of late Dost Muhammad executant. The executant himself got it registered in the office. That Dost Muhammad himself visited the office." During the course of cross-examination, he acknowledged that the signatures and ID cards of the marginal witnesses are available on record as Exh.P.6, however, he stated that only one thumb impression of a marginal witness is available on record as Exh.P.7.

9. Respondent No.1 produced last witness Jabran Rafique, Office Manager, Saint Joseph Hospital, who has brought the record of entry of admission of Dost Muhammad dated 13.03.1990 referred as Exh.P.8 and discharge certificate Exh.P.9 and identified signatures of sister Rufin Gul. During cross-examination, he acknowledged that no other record is available except record of Exh.P.8 and there is no record, which could show that the disease of the patient suffering from, however, he stated that there are rare occasions, on which the patient was allowed or to leave the hospital except on Eid or death of relative and record Exh.P.8 does not contain any signatures or stamp, which have been prepared in routine.

10. On the other hand, appellant appeared as D.W.1 and acknowledged the following facts:-

- (i) *My father admitted in hospital was suffering from skin disease and admitted in March, 1989.*
- (ii) *The witnesses of gift were Tajamal Hussain Shah, Mir Afzal and Ghulam Murtaza Shah.*
- (iii) *Gift deed Exh.P.7 bears his signatures Exh.P.7/1.*
- (iv) *At the time of Hibba, sister was in her house.*
- (v) *The father was taken to Registrar Officer for registration of gift deed on 21.05.1989 by the appellant when execution was not made due to hue and cry of different people in Registrar Office.*
- (vi) *Application was filed by the respondents to Chaudhry Muhammad Ali Tehsildar, Islamabad to the effect that she is daughter of Dost Muhammad and she may be given her rights.*

- (vii) *Tehsildar asked his late father that why he is not giving his share to his daughter, to which father replied that he has given her rights.*
- (viii) *Total land which was transferred by late Dost Muhammad is 40 Kanals 5 Marals, which was acquired by CDA in the year 2008 at the rate of Rs.8,35,000/- per Kanal.*
- (ix) *Father of the appellant was at the age of 100 years when he died.*
- (x) *My sister was looking after my father throughout his life.*
- (xi) *My father did not give anything to my mother after selling the land.*
- (xii) *My father remained in hospital for six months.*
- (xiii) *My father did not die due disease rather it was natural death and he died in hospital.*
- (xiv) *My father was admitted in hospital when he executed gift deed.*
- (xv) *I got permission from hospital authorities through written application, which was addressed to doctor incharge and he permitted in writing.*
- (xvi) *I have not proof of permission by the authorities.*
- (xvii) *I did not show permission to the Registrar and told him orally.*
- (xviii) *The fact of admission of his father in the hospital was not mentioned in the gift deed.*
- (xix) *I moved the application on 22.5.1989 to get permission to take him out of hospital.*
- (xx) *I do not have proof of application dated 22.5. 1989.*
- (xxi) *My father verified execution of gift deed while being in vehicle outside office of the Registrar where Registrar himself came.*
- (xxii) *I told Tehsildar that my father was ill, upon which the Tehsildar came out while we were carrying my father to the office, he had stick with him, witnesses were not present, where the deed was executed.*

11. Ghulam Murtaza appeared as D.W.2, who acknowledged that his signatures are not present on Exh.P.7 nor he put any signatures on any document relating to gift deed. He also acknowledged that daughter of Dost Muhammad

and her son came to Tehsildar office and moved application, upon which proceedings were adjourned to 22.5.1989 and he was not present on 22.5.1989 at the time of execution of Exh.P.7.

12. The appellant has produced Faqeer Muhammad as D.W.3, who was not witness of execution and registration of the deed and acknowledged that Dost Muhammad was admitted in the hospital in 1989.

13. In view of above referred evidence of the parties, learned Trial Court has decided issue No.5 regarding execution of gift deed whereupon the onus has been placed upon appellant/defendant being beneficiary as well as issue No.7, in which the gift deed has been alleged to have been got executed under manipulation and fraud. Learned Trial Court in view of above evidence decided issue No.7 in favour of plaintiff/respondent No.1 and also decided issue No.5 against the appellant. The primary question before this Court is as to whether the gift deed Exh.P.7 has been executed without disclosing to the Registrar regarding hospitalization of late Dost Muhammad father of appellant and respondent No.1. The answer is no as Sub-Registrar endorsement is silent to that effect and P.W.5 Zulfiqar Khan Moharrer has acknowledged in his examination in chief that "nothing is recorded in these entries about the mental or physical condition of Dost Muhammad executant."

14. This aspect if placed in juxtaposition with testimony of P.W.6 Jabran Rafique, Office Manager, St. Joseph Hospice Cantt. Road Westridge, Rawalpindi, who has produced Exh.P.8 and Exh.P.9 regarding hospitalization details of Dost Muhammad, no other proof has been brought on record that late Dost Muhammad was in the hospital, when gift deed Exh.P.7 was executed. Even the appellant himself acknowledged the same in his cross-examination, however, he failed to justify any permission of the doctor to discharge his onus that permission was granted by the doctor to record the factum of gift deed in his favour. In such type of situation, the basic question of record is execution of gift,

which was made during Marz-ul-Mout, which can be considered in the light of judgments reported as PLD 1997 SC 308 (Mst. Saleem Akhtar etc vs. Muhammad Ashraf) & 2006 CLC 819 (Abdul Majeed vs. Abdur Rasheed and 3 others),

wherein the following principles have been highlighted:-

- “(a) *Was the donor suffering at the time of gift from a disease, which was the immediate cause of his death or the nature of disease was such that it reasonably engendered in him apprehension of death and that illness had incapacitated him from following normal pursuits of life.*
- (b) *The donor was under compulsion due to his death illness in which he could not understand the nature of transaction.”*
- (c) *The person challenging the gift on the ground of Marz-ul-Mout has to establish that the deceased was on death bed or was of indisposed mind at the time of making gift or execution of deed.”*

15. The minimum requirement of such type of gift has to be seen in the light/nature of the disease, which leads to death of a person in future and from the evidence recorded by the parties. The imminent occurrence of death is visible from record and the evidence. Even otherwise, late Dost Muhammad died after attaining the age of 100 years, which is admitted by both the parties in evidence and it is not proved by the appellant, beneficiary of the gift deed Exh.P.7 that late Dost Muhammad was mentally capable of understanding the very nature of the execution of the gift deed. Even Mahommedan Law in terms of Article 139 authorizes every Mahommedan of sound mind that he/she may dispose of his property by gift. The concept of gift of Marz-ul-Mout has been highlighted in PLD 1960 West Pakistan Lahore 300 (Shamshad Ali Shah and others vs. Syed Hassan Shah and others) and 2006 CLC 819 (Abdul Majeed vs. Abdur Rashid), wherein it was settled that:-

*“gift through registered deed by father in favour of one legal heir and depriving others, the onus is upon the beneficiary that father was on death bed or was indisposed at the time of making gift or execution of the gift.”*



16. Similarly, the initial burden to prove the gift was on donee that gift was made in his favour. Reliance is placed upon 2000 CLC 623 (Manzoor Hussain vs. Muhammad Siddique) and even he is under obligation to prove the basic ingredients of the gift i.e offer and acceptance by the donor and donee and delivery of possession as held in 2002 CLC 1865 (Muhammad Sarwar vs. Jahangir Ahmed) and 2006 CLC 929 (Nabi Bakhsh Khan Ghauri vs. Mst. Sakina Begum). It is also obligation of the donee/beneficiary to justify the preferential gift made by the donor/late father, who has gifted all of his property in favour of one legal heir and as to why the other legal heirs have been excluded. Reliance is placed upon PLD 2006 SC 15 (Mst. Nusrat Zohra vs. Mst. Azhra Bibi and others). Although it is exclusive powers of Muslim donor to alienate property by way of gift during life time subject to one condition that he should be in good state of health and gift should be made without coercion. Reliance is placed upon 1994 SCMR 1870 (Muhammad Bashir vs. Allah Ditta).

17. In view of above, the appellant has failed to discharge the onus required in such type of cases in terms of Article 117 of Qanun-e-Shahadat Order, 1984 and when he has failed to discharge onus in terms of Articles 118 and 119 of Qanun-Shahadat Order, 1984 adverse inference is drawn especially in this case when the appellant has not produced two witnesses of gift deed in his favour nor he is able to produce permission through which he has transported his father from the hospital for execution of gift deed Exh.P.7 and even the hospital condition and certificate was not produced before the Registrar, who has registered the gift deed, therefore, the primary onus was not discharged by the appellant himself despite that he was beneficiary. Moreover, no witness of execution of gift deed has been produced before the Court by the appellant to prove the execution before the witnesses. Even D.W.2 & D.W.3 have not stated before the Court that gift deed/Exh.P.7 was executed before them and late Dost Muhammad had signed the same in their presence. Both are not witness of

Exh.P.7. All these facts have rightly been appreciated by the Courts below in concurrent manner, whereas learned counsel for the appellant has been confronted to highlight these grounds through which his case falls within the parameters and requirement of section 100 CPC i.e. question of law, which have not been addressed by the Courts below, whereby the only ground raised by the appellant is the question and concept of Marz-ul-Mout in Para-D of the grounds of appeal and misreading of evidence although learned counsel for the appellant has been confronted through memo of the appeal of R.F.A, in which the appellant has not raised any question qua Marz-ul-Mout, therefore, in such type of situation when the very execution of gift deed of land during Marz-ul-Mout of donor was in question, the nature of illness has to be considered within the special knowledge of person, who being beneficiary has to justify and prove that the donor was not under apprehension of death and that illness had not incapacitated the donor from following normal pursuits of life. Reliance is placed upon PLD 1964 SC 143 (Shamshad Ali Shah vs. Hassan Shah), wherein following principles have been laid down:-

*“(i) Was the donor suffering at the time of the gift from a disease which was immediate cause of his death?*

*(ii) Was the disease of such a nature or character as to induce in the person suffering the belief that death would be caused thereby, or to engender in him the apprehension of death?*

*(iii) Was the illness such as to incapacitate him from the pursuit of his ordinary avocations a circumstance which might create in the mind of the sufferer an apprehension of death?*

*(iv) Had the illness continued for such a length of time as to remove or lessen the apprehension of immediate fatality or to accustom the sufferer to the malady?”*

18. While considering the above principles of Marz-ul-Mout, the essential factum of Marz-ul-Mout was established and the onus to prove due execution of gift deed was upon the appellant, who has not discharged the said onus in any manner. The donor was under apprehension of death and in such situation the

due execution of gift deed dated 22.5.1989 cannot be considered valid in favour of the appellant by applying the principles highlighted in PLD 1997 SC 308 (Mst. Saleem Akhtar and others vs. Muhammad Ashraf and others).

19. In view of above discussion, the appellant has failed to point out question of law in terms of section 100 CPC, which has not been addressed by the Courts below. The facts and law have properly been appreciated by the Courts below. The instant R.S.A bears no merits, therefore, the same is dismissed.

(MOHSIN AKHTAR KAKANI)  
JUDGE

Announced in open Court on 29.11.2019.

JUDGE

R. Anjam.