

Form No: HCJD/C

**JUDGMENT SHEET****IN THE ISLAMABAD HIGH COURT, ISLAMABAD**  
**JUDICIAL DEPARTMENT****Case No: Regular First Appeal No.65 of 2004****Shahida Sultan**  
**Vs.**  
**Hafiz Muhammad Ilyas etc.**Appellants by: Mr. Mohsin Akhtar Kiyani, Advocate.  
Respondents: Mr. Sher Afzal Khan & Zulfiqar Ali  
Abbasi, Advocates.

Date of hearing: 26.02.2015.

**AAMER FAROOQ, J.-** Through this judgment we shall decide the instant Regular First Appeal as well as Civil Revision No.544 of 2005.

The appellants as well as respondent No.1 are the legal heirs of Pir Sultan Ahmed who died on 21.04.2000. The said Pir Sultan Ahmed filed a suit for possession and recovery of compensation/damages against Hafiz Muhammad Ilyas, who was the tenant of late Pir Sultan Ahmed, with respect to shops built on property bearing Plot No.58, INT Center G-8/1, Islamabad (the property) on 03.08.1999. After the demise of aforementioned Pir Sultan Ahmed the appellants and respondent No.1 were impleaded as plaintiffs in the referred suit and became co-plaintiffs. On 20.06.2000 respondent No.1 filed a suit for declaration, permanent and mandatory injunction against the appellants claiming to be the owner of the property on the basis of oral as well as gift deed in her favour by Pir Sultan Ahmed. Both the suits were consolidated on 08.09.2001 and the following issues were framed.

**Consolidated Issues.**

1. Whether the plaint does not disclose a cause of action and is liable to be rejected under Order 7 Rule 11 CPC? OPD.
2. Whether the suit is false and frivolous and the defendants are entitled to erective special costs u/s 35-A of the CPC? OPD.
3. Whether the suit is not maintainable in its present form? OPD.
4. Whether the plaintiff Musarrat Sultan is entitled to the decree for declaration, mandatory injunction and permanent injunction? OPP.
5. Whether the landlord is entitled to the decree for possession through ejectment and permanent injunction? OPD.
6. Whether the landlord is entitled to recover compensation and damages from the tenant, if yes, at what rate, and for what period? OPD.
7. Whether the plaintiff's suit titled "Pir Sultan Ahmed etc. Vs, Muhammad Ilyas, has not cause of action and locus standi to file the suit?

8. Whether the suit titled "Pir Sultan Ahmed etc Vs. Muhammad Ilyas, is not maintainable in its present form?
9. Whether the suit titled "Pir Sultan Ahmed etc, Vs, Muhammad Ilyas" is false and frivolous and vexatious and the defendant is entitled to recover special cost u/s 35-A of CPC
10. Relief.

2. The parties led their oral as well as documentary evidence. In this regard on behalf of respondent No.1 Mirza Sikandar Baig appeared as PW-1, Sultan Sikandar PW-2, Asim Hafeez Bangish PW-3, Sheikh Iftikhar PW-4, Abdul Hafeez Bangash PW-5, Khizar Hayat PW-6 and Musarat Sultana PW-7. Shamshad Ahmed appeared as DW-1, Sheikh Ishfaq Ahmed DW-2, Hafiz Muhammad Ilyas DW-3 and Ishfaq Ahmed DW-4.

3. In the documentary evidence gift deed was produced as Ex.P-1, certificate of stamp vendor Ex.P-2, allotment letter of CDA Ex.P-3, permission to occupy by CDA Ex.P-4, lease agreement Ex.P-5 & 6. The appellants produced letter dated 12.06.1999 as Ex.D-1, bank statement Ex.D-1/1 & 1/2, summon analysis report Ex.D-1/3, transfer letter Ex.D-2/1, agreement Ex.D-2/2, general power of attorney Ex.D-1/1 & 1/2. Receipts of rent were exhibited as Ex.D-2 to 10, general power of attorney Ex.D-11 & 12, death certificate Ex.D-13, succession certificate Ex.D-14, attested copy of revision before Additional District Judge Ex.D-15, copy of judgment dated 08.02.2002 Ex.D-16, application for review Ex.D-17, copy of order dated 11.03.2003 Ex.D-18, legal notice and its reply Ex.D-19 & 20, copy of lease agreement Ex.D-21, receipts of rent Ex.D-22 to 65. The Trial Court vide judgment and decree dated 26.01.2004 decreed both the suits. In this regard respondent No.1 was declared to be the owner of the property and in respect of the suit for possession, the possession was ordered to be given to respondent No.1. Hafiz Muhammad Ilyas (tenant) filed an appeal (Appeal No.40/2004) and the appellants also assailed the judgment by filing an appeal with respect to possession before the District Judge (Appeal No.73/2004) and assailed the judgment and decree with respect to declaration in favour of respondent No.1 through the instant appeal. The District Judge dismissed both the appeals filed by Hafiz Muhammad Ilyas as well as the appellants against which civil revision has been filed by the appellants (Civil Revision No.544/2005).

4. Learned counsel for the appellants *inert alia* submitted that the learned Additional District Judge while dismissing the appeal with respect to possession has solely based the judgment on the fact that respondent No.1 has been declared as owner of the property and no independent finding was given. It was further contended that respondent No.1 was not able to prove

the gift in her favour and findings of the Trial Court are against the law and facts. In this regard learned counsel pointed out that in the suit for possession filed by late Pir Sultan Ahmed, he expressly alleged that he is the owner of the property. Learned counsel submitted next that till his death rent was received by the deceased and he treated the property in his ownership; that the only witnesses to the oral gift are PWs-1 & 2 and both are related to respondent No.1. Learned counsel further submitted that even in the statement of witnesses no specific words have been used to show that the property was gifted by the deceased in favour of respondent No.1 and that the same was accepted by her; that the transfer of possession also is not borne out from the evidence inasmuch as the witnesses with respect to the receipt of the rent have not deposed specifically that the rent since 1992 was being received by respondent No.1. In this behalf learned counsel for the appellants submitted that PWs-3 & 5 are indirect witnesses with respect to the fact of gift. In so far as the gift deed is concerned, learned counsel for the appellants submitted that under the law gift deed is required to be registered and since the document in question i.e. Ex.P-1 is not a registered instrument therefore, the same cannot be regarded as a valid gift deed. It was further pointed out that the endorsement at the back of Ex.P-1 shows that the stamp paper was purchased for an affidavit.

5. Learned counsel for respondent No.1 defended the impugned judgment and decree and submitted that there was a valid gift in favour of respondent No.1. He further submitted that Ex.P-1 is not a gift deed but is a memorandum of gift which does not require registration. Learned counsel for respondent No.1 submitted that PWs-1 & 2 categorically deposed that the gift was made in their presence and that possession of the property was transferred by the statement of the deceased that henceforth the rent shall be received by respondent No.1. Learned counsel further submitted that in cross-examination no question was asked about the validity of gift, therefore, the statement made by the referred witnesses in examination in chief remained untarnished and the gift is proved. It was further submitted that in the Islamic law a gift is valid if two witnesses depose about it and in the instant case PWs-1 & 2 are the witnesses to the gift, hence the same is valid.

6. The controversy revolves around the fact whether Pir Sultan Ahmed deceased made a valid gift in favour of respondent No.1. The claim as set out by respondent No.1 in her suit filed against the present appellants was that an oral gift was made by the deceased with respect to the property in her favour on 06.09.1992 in the presence of Mirza Sikandar Baig, Sultan Sikandar, Mirza Rehman Baig, Shakil Ahmed and Mrs. Riffat Ali and the said oral gift

was reduced into writing in the form of gift deed on 07.09.1992. It was further alleged in the plaint that constructive possession of the property was handed over and since the same was on lease, therefore, respondent No.1 received the rent. During the course of trial in order to substantiate her claim respondent No.1 produced Mirza Sikandar Baig as PW-1 and Sultan Sikandar as PW-2 being the witnesses to the gift. The first witness deposed that on 06.09.1992 the oral gift was declared in the presence of Abdur Rehman Baig as well as Hafiz Bangash and the same was accepted by the donee and the possession was delivered in a way that the rent of the property shall be received by the donee herself. The second witness to the gift namely Sultan Sikandar (PW-2) supported the statement of PW-1 however, expressed that he is not aware regarding the arrangement to the receipt of rent by respondent No.1. Asim Hafiz Bangash (PW-3) deposed to the effect that when Pir Sultan Ahmed deceased and respondent No.1 were proceeding to England in July 1999, Pir Sultan Ahmed directed him to receive the rent and give the same to respondent No.1. Abdul Hafiz Bangash (PW-5) did not depose that he is the witness to the gift however, gave evidence to the effect that in his presence late Pir Sultan Ahmed asked his son to receive rent from the tenant and give the same to respondent No.1. Respondent No.1 appeared as PW-7 and affirmed that the gift was pronounced in her favour and accepted by her and that the documents of the property were handed over to her and subsequently a gift deed was prepared and the rent received by Pir Sultan Ahmed was handed over to her. Respondent No.1 in support of her claim has relied upon Ex.P1 (gift deed) in her favour which has been mentioned in the plaint as gift deed.

7. Under Islamic law oral gift is permissible and has three elements to it namely declaration of gift by the donor in favour of the donee, acceptance of the gift by the donee and transfer of possession by the donor in favour of the donee. There is no requirement of law for reducing oral gift into writing. The gift deed dated 07.09.1992, relied upon by respondent No.1 as a document witnessing the transfer of property by late Pir Sultan Ahmed in favour of respondent No.1, is of no value inasmuch as if the same is taken as gift deed it was required to be registered under section 17 of the Registration Act, 1908 and the consequence of non-registration of a compulsorily registerable document is that the same has no legal effect under section 49 of the Registration Act, 1908; the document has not been proved in accordance with the provisions of Qanun-e-Shahdat Order, 1984 inasmuch as the witnesses to the document did not enter the witness box to prove the same in accordance with provisions of Qanun-e-Shahdat Order, 1984. In the present

case the marginal witnesses of Ex.P-1 did not enter the witness box in order to prove the document, therefore, Ex.P-1 has no evidentiary value and cannot be relied upon even if it is taken as memorandum of gift and not a gift deed. In the case titled *Amjad Ikram v. Asiya Kausar* (2015SCMR 1) the Hon'ble Supreme Court of Pakistan held that it is a settled principle of law that it is the duty and obligation of the beneficiary of a transaction or a document to prove the same.

8. The onus to prove the gift was on respondent No.1 which she sought to discharge by adducing the abovementioned witnesses. It is an established principle of law that the burden of proof where an oral gift is alleged is heavy and requires cogent evidence to establish that the same was made by the donor in favour of the donee. In this behalf reliance is placed on the case titled *Aurangzeb through L.Rs. and others v. Muhammad Jaffar and another* (2007 SCMR 236) wherein the Hon'ble Supreme Court of Pakistan observed as follows:

*"It is a settled law qua the transaction of sale or gift, that it is the duty of the beneficiary and a heavy onus lay on the beneficiary to prove by convincing evidence satisfying the judicial conscience of the Court that the transaction shown to be a gift was executed by the donor in favour of the donee."*

In the case titled *Liaqat Ali v. Province of Punjab and others* (2005 YLR2529) the Hon'ble Lahore High Court observed that there should be satisfactory evidence that the donor did infact part with possession of the subject matter either physically or constructively and the factum of gift should be proved through cogent evidence and the same would be null and void when circumstances and evidence on record show that no gift ever was made by the donor and the transaction was concocted. Similar view was taken by the Hon'ble Lahore High Court in case titled *Syed Ali Abbas v. Province of Punjab* (2005 YLR 1342).

9. The above position of law was reaffirmed by the Hon'ble Supreme Court of Pakistan in case titled *Noor Muhammad and others v. Azmat-e-Bibi* (2012 SCMR 1373) and it was observed that onus lay on the beneficiary to prove that it was a *bona fide* transaction. In case titled *Rab Nawaz v. Ghulam Rasool* (2014 SCMR 1181) the Hon'ble Supreme Court of Pakistan reiterated the referred position of law and held that, where a gift was challenged the burden of proof lay on the donee to prove that all essentials of the gift were fulfilled.

10. In the present case PW-1 made a statement about the declaration of gift, its acceptance and the fact that the deceased Pir Sultan Ahmed made a

statement that the rent would be received by respondent No.1, however, the second witness did not depose anything about the transfer of possession i.e. receipt of rent by respondent No.1. Moreover, all the persons alleged in the plaint to have been present at the time of gift were not produced as witnesses. PW-5 namely Hafiz Bangash who was alleged to have been present did not say anything about witnessing the gift transaction. Likewise, Mrs. Riffat Ali also was not produced as witness to the transaction of the gift. The subsequent dealing of the property by late Pir Sultan Ahmed also casts doubt on the factum of gift inasmuch as after 1992 two lease agreements were executed i.e. on 10.10.1993 and in the year 1995, both the agreements were signed by late Pir Sultan Ahmed as the owner of the property. Moreover, the rent receipts exhibited in the Trial Court have been signed by the deceased Pir Sultan Ahmed. It was only for few months that Asim Hafiz Bangash PW-3 was authorized to receive rent from the tenant and deposed that he gave the collected rent to respondent No.1. There is no evidence that for the rest of the period the rent, received by Pir Sultan Ahmed with respect to which he also executed rent receipts, was given to respondent No.1. No application or intimation was made to Capital Development Authority (CDA) to mutate/transfer the property in the record of the referred Organization in favour of respondent No.1. Infact as per agreement dated 07.07.1980 executed between Pir Sultan Ahmed and CDA it was clearly mentioned in clause-16 that the property can only be transferred *inter alia* by way of gift only with the previous consent of CDA.

11. Respondent No.1 has placed reliance on the case titled *Maulvi Abdullah and others v. Abdul Aziz and others* (1987 SCMR 1403) to substantiate his argument that a gift by Muslim would be complete even if there is no writing and for its validity would depend upon: 1, declaration of gift by the donor; 2, acceptance of gift expressly or impliedly by or on behalf of donee and 3, delivery of possession of the subject matter by the donor to the donee. There is no cavil to the above judgment by the Hon'ble Supreme Court of Pakistan, however, the *sine qua non* for a valid oral gift is the proof of all abovementioned elements by the beneficiary of the gift. The argument by learned counsel for respondent No.1 that since no question was put in cross-examination to PWs-1 & 2 regarding the fact of gift means that the deposition by the referred witnesses about the gift has gone unchallenged and therefore, the gift has been proved, is not tenable. As observed above, that the testimony of two direct witnesses of the alleged gift transaction does not substantiate all the three elements of the oral gift. Furthermore, even subsequent dealing of the property by late Pir Sultan Ahmed also does not

support the claim of respondent No.1. Moreover, in the Book "Outlines of Muslim Personal Law" by Imran Ahsan Kan Nayazee; First edition, it has been stated that where subject matter of the gift is a House in occupation of tenant (s), it cannot be subject matter of a gift unless the tenant (s) agree that they are holding the House on behalf of the donee and agree to pay the rent to donee. In the instant case the tenant has not deposed to the effect that he was paying rent to respondent No.1 and that he was the tenant under respondent No.1, rather after the alleged gift the tenancy agreement (s) were executed by Pir Sultan Ahmed and rent receipts were signed by him as well.

12. In view of foregoing discussion we are not convinced that respondent No.1 was able to prove gift in her favour.

13. In so far as the suit for possession filed by Pir Sultan Ahmed is concerned, the same is decreed in favour of the appellants as well as respondent No.1 and the referred parties as legal heirs of Pir Sultan Ahmed (deceased) are the joint owners of the property.

14. In view of above, the present appeal as well as civil revision are allowed with the result that the suit filed by respondent No.1 is dismissed and the suit filed by Pir Sultan Ahmed vis-à-vis the possession of the property remains decreed, however, the decree is modified to the extent that the appellants and respondent No.1 are entitled to possession of the property in question. There is ~~no~~ order as to costs.

(ATHAR MINALLAH)  
JUDGE

(AAMER FAROOQ)  
JUDGE

Announced in open Court on the 23<sup>rd</sup> day of April 2015.

JUDGE

JUDGE

Approved for reporting

Blue slip added  
\*M. Naveed\*