

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present

Justice Muhammad Ali Mazhar
Justice Aqeel Ahmed Abbasi

C.P.L.A.479-K of 2023

(On appeal from the Order dated 31.01.2023
passed by the High Court of Sindh, Karachi in
M.A.No.83/2022)

Muhammad Dawood

.....Petitioner

Versus

Mst. Sakeena Farooque @ Aziza and
others

...Respondent(s)

For the Petitioner : Mr. Shafqat Ali Shah Masoomi, ASC
Along with Petitioner

For Respondent No.1 : Mr. Asghar Ali, ASC

For Respondent No.2-3 : N.R.

Date of Hearing : 26.03.2025

Judgment

Muhammad Ali Mazhar-J: This Civil Petition for leave to appeal is directed against the judgment and decree dated 31.01.2023 passed by the High Court of Sindh, Karachi, in M.A.No.83 of 2022 whereby the miscellaneous appeal filed by the petitioner was dismissed.

2. According to the facts narrated in the memo of the civil petition, the respondent No.1 filed a Civil Suit for Declaration, Cancellation of Documents, Possession, and Permanent Injunction against the petitioner, wherein she claimed that her mother, Mst. Hoor Bai W/O Noor Muhammad, was the lawful owner of the Quarter No.225, situated at Block-14, Babul Islam Cooperative Housing Society Ltd., (Society) Tarachand Road, Kamari, Karachi. It was further avowed that her parents were permanently settled in England and also died in England. It was further asserted in the plaint that the petitioner was appointed by the respondent No.1 for looking after the affairs of the property in question, but in the year

2002, the petitioner got the suit property transferred in his own name fraudulently with the connivance of the Society. Upon knowing of such transfer, the attorney of the respondent No.1 visited the office of the Society and submitted an application for cancellation, but no action was taken by the Society. The petitioner appeared and filed a written statement with certain legal objections with regard to the maintainability of the civil suit, with the further plea that respondent No.1 is a British National and had renounced her Pakistani Citizenship in 1968. Her real name is Aziza and she is not the daughter of Hoor Bai (deceased) who gifted the suit property *vide* a Deed of Declaration of Oral Gift in favour of the petitioner, and on 15.04.2002, after completion of all formalities, it was transferred in the Society's record. The suit filed by the respondent No.1 was decreed by the Trial Court which was challenged in the High Court but the appeal was also dismissed.

3. The learned counsel for the petitioner argued that the impugned judgment passed by the High Court and the Trial Court are both based on a misreading of evidence which led to a serious miscarriage of justice and prejudiced the rights and entitlement of the petitioner. It was further contended that both the Courts below failed to appreciate that the respondent No.1 had no concern with the suit property, as the original owner, Mst. Hoor Bai, was issueless, and the respondent No.1 also failed to substantiate her relationship with Mst. Hoor Bai, while the said owner, being issueless, gifted the suit property to the petitioner, which stands in his name, and the transfer was duly effected by the Society.

4. The learned counsel for the respondent No.1 argued that the learned Trial Court framed specific issues regarding the factum of gift as well as the relationship of respondent No.1 with the owner of the property, and after appreciating the evidence, the suit filed by the respondent No.1 was decreed, which was affirmed by the High Court. The Trial Court, on the basis of evidence, held that respondent No.1 is the daughter of the real owner of the property; therefore, the alleged gift deed in the name of a stranger, depriving the legal heir of the deceased, has no value in the eyes of law. The petitioner failed to produce the alleged deed of declaration of oral gift to prove that the property was gifted to him by the deceased Mst. Hoor Bai. It was further averred that the concurrent findings

recorded by both the Courts below are based on correct facts and law.

5. Heard the arguments. By the looks of it, the sticking point enmeshed in the lawsuit was a challenge to an action of transfer of the property in question by the Society in the name of the petitioner on the strength of an unregistered indenture of gift. In view of that, the rudiments of the Sindh Co-operative Societies Act, 2020 (Sindh Act No. XXVIII of 2020) ("Act") are quite relevant, which has been enacted to consolidate and amend the law relating to cooperative societies in the Province of Sindh to facilitate the formation and working of co-operative societies for the promotion of thrift, self-help, and mutual aid among agriculturists and other persons with common economic needs, so as to bring about better living, better business, and better methods of production. It is quite significant to mention that, by virtue of Section 119 of the Act, the Cooperative Societies Act, 1925 (Act VII of 1925), has been repealed in its application to the Province of Sindh.

6. According to Section 73 of the Act, all disputes (other than a dispute regarding disciplinary action taken by the society or its committee against a paid servant of the society and liquidation disputes) shall be tried by the Cooperative Court established under the Section. Consequently, the Government of Sindh, pursuant to the powers conferred under Section 118 of the Act, framed the Sindh Cooperative Societies Rules 2020 ("Rules"). Seeing as the Cooperative Court has been established through a special law for the resolution and decision of disputes, therefore, the classification and categorization of disputes are jotted down under Rule 53, which is, for the ease of convenience, reproduced as under:-

"53. Disputes. (1) If any dispute touching the business of a society other than a dispute regarding disciplinary action taken by the society or its committee against a paid servant of the society arises

(a) between members or past members of the society or persons claiming through a member or past members; or

(b) between members or past members or persons so claiming and any past or present officer, agent or servant of the society; or

(c) between the society or its committee and past or present member of the society; or

(d) between the society or its committee and any past or present officer, agent or servant of the society, or a surety is or is a member of the society or surety of such officer, agent or servant, whether such surety is or is not a member of the society;

(e) between a society authorized under subsection (1) of section 45 and a person who is not a member of a society

It shall be referred to Cooperative Court established under section 117 established by Government with the concurrence of the Chief Justice of the Sindh High Court by notification.

(2) Any party aggrieved by any decision, order or judgment of the Special Court for Cooperatives may within 30 days of the date of such decisions, order or judgment appeal to the High Court of Sindh" [Emphasis supplied].

7. Looking at the canons and edicts of Section 117 of the Act, we catch sight of its rationale, which accentuates that for speedy justice, the Government of Sindh, with the consultation of the Chief Justice of the High Court, shall specify, for each Division, a court of Civil Judge/Assistant Sessions Judge to be a Special Court for Cooperative Societies to try the offences under this Act. Upon the establishment of such Special Courts within the purview of the Act, all cases pending in any court shall be transferred to the Special Court for trial, which shall proceed on a day-to-day basis and decide the case within 120 days. At the same time, Section 99, Chapter X of the Act, enumerates the gist of different offences triable under this Act by the Special Court, while the penalties are provided under Sections 11, 101, and 103 of the same Chapter. Section 104 emphasizes that no Court other than the Special Court for Cooperative Societies shall try offences under this Chapter and disputes referred to it. Though the powers and cognizance of cases by the Special Court are confined to the trial of offences, if we look into it contemporaneously or in sync with Rule 53 of the Rules, cataloguing the genre of disputes, it is quite obvious that such disputes are civil in nature and shall also be referred to the Cooperative Court established by the Sindh Government under Section 117 with the concurrence of the Chief Justice of the Sindh High Court by notification.

8. The close appraisal of Rule 53 divulges that it is more or less consonant with Section 54 the Co-operative Societies Act, 1925 (repealed in its application for the Province of Sindh), wherein a

procedure and remedy of arbitration is provided to settle and resolve the disputes, if any, touching the business of a society (other than a dispute regarding disciplinary action taken by the society or its committee against a paid servant of the society) between members or past members of the society or persons claiming through a member or past member, or between members or past members or persons so claiming and any past or present officer, agent or servant of the society, or between the society or its committee, and any past or present member of the society etcetera. Under the Co-operative Societies Act, 1925 ("1925 Act"), the disputes are to be referred for arbitration to the Registrar (Co-operative) for decision by himself or his nominee, or, if either of the parties so desires, to arbitration of three arbitrators who shall be the Registrar or his nominee and two persons of whom one shall be nominated by each of the parties concerned. Against the Award rendered in the Arbitration proceedings, the remedy of appeal is provided under Section 64, while under Section 64-A, the Provincial Government and the Registrar may call for and examine the record of any inquiry or the proceedings of any officer subordinate to them for the purpose of satisfying themselves as to the legality or propriety of any decision or order passed and as to the regularity of the proceedings of such officer and an order passed in appeal under Section 64 or in revision under Section 64-A by the Provincial Government shall be final and conclusive and shall not be liable to be called in question in any civil or revenue court. The procedure to settle the disputes in the 1925 Act was quite cumbersome, and disputes relating to cooperative societies were procrastinated for an unlimited period of time; from the date of institution of proceedings before the Registrar or his nominee, to the commencement of arbitration proceedings, to the time consumed till delivery of award, and then the decision of appeal and revision. Even execution or implementation of the award upon attaining finality had to be instituted in a civil court. A number of years lapsed in such a prolonged course of action in this pathetic and miserable exercise. After putting the finishing touches through a lengthy journey provided in the statutory hierarchy, ultimately, rather as a last resort, the matter embarked to the High Court and then the Supreme Court. So, the present legislation, made by virtue of the Act, is somewhat admirable, wherein, a direct remedy has

been provided from day one to approach directly the Special Court for Cooperatives established to resolve such co-operative societies disputes, with a direct right of appeal against any decision, order or judgment of the Special Court for Cooperatives within 30 to the High Court of Sindh.

9. It is a well settled exposition of law that a right of appeal is a right of entering into a superior court and invoking its aid and interposition to redress the error of the forum below. It is essentially a continuation of the original proceedings, as a vested right of the litigant to avail the remedy of an appeal provided for appraisal and testing the soundness of the decisions and proceedings of the courts below. It is always explicated and elucidated that the right of appeal is not a mere matter of procedure but is a substantive right. While considering matters in appeal, the appellate courts may affirm, modify, reverse, or vacate the decision of lower courts. Fundamentally, the remedy of appeal is elected on the grounds of attack that the court below committed a serious error in the verdict on law and facts, including the plea of misreading or non-reading of evidence led by the parties in support of their contentions. The procedural law sets out to activate the process and course of action through which the lawsuit moves on and the way in which court proceedings are undertaken, it also regulates and oversees the procedures employed. Substantive law, on the other hand, denotes the statutory obligations which relate to the subject matter, proclaims the relevant rights and obligations, and regulates the demeanour of an individual or government. According to Salmond, substantive law determines the conduct and relations of the parties *inter se* in respect of the matter litigated, whereas procedural law regulates the conduct and relations of courts and litigants in respect of the litigation. Substantive law deals with the ends which the administration of justice contemplates, while procedural law deals with the means and instruments by which the ends of administration of justice are to be attained. Substantive law defines the rights, whereas the law of procedure defines the modes and conditions of the application of one to the other; and substantive law relates to the matter outside the courts, whereas procedural law regulates affairs inside the courts [Ref: Judgment authored by one of us in Meeru Khan Vs. Mst. Naheed Aziz Siddiqui and others (PLD 2023 SC 912) &

Additional note in Constitution Petitions No. 6 of 2023 & connected cases (PLJ 2024 SC 114 = 2024 SCP 4)].

10. Why we have pointed out the niceties and distinguishing features of substantive law and procedural law is that, instead of providing right of appeal to the High Court in the Act, which is a substantive right, it is provided in the Rules. Furthermore, the nature/categories of disputes required to be resolved or decided by the Special Court for Cooperatives are also provided in the Rules rather than being defined in the Act with a specific provision to deal with civil disputes, just as offences are properly described in the Act itself without any ambiguity. Moreover, some corrections in the nomenclature of the Act are also required in Section 104 of the Act, which articulates: "(1) No Court other than the Special Court for Cooperative Societies established under section 121 shall try offences under this Chapter and disputes referred to in section 78". The Act ends at Section 119 and there is no Section 121 in the Act. While Section 78 is germane to transfer of property which cannot be sold, and the execution of an order sought to be executed under Sections 81 and 82. Perhaps due to misprinting or inadvertence, instead of Sections 73 and 117, the wrong taxonomies of sections of the Act are printed, which is causing confusion and is open to correction/amendment by the provincial legislatures/Government of Sindh for appropriate rectification.

11. Let us revert to the discord between the parties in the case at hand. The chronicles of the case depict that respondent No.1 filed the lawsuit for entreating Declaration, Cancellation of Documents, Possession, and Permanent Injunction (**Suit**). The judgment of the learned Special Court for Cooperative Societies (**Special Court**) reflects that the civil suit was transferred for trial by the learned District Judge in terms of Notification No. S. JUDL: 4-1/2021 dated 03.08.2021, with partial modification thereof *vide* Notification No. S.JUDL:4-1/2021 dated 09.08.2021.

12. Keeping in mind the barebones, that whether the plaintiff (respondent No.1) is the daughter of the donor (owner of the property) and whether the property in question was gifted by donor/owner to the defendant No.1 (petitioner), the learned Special Court, *inter alia*, settled four crucial issues: "2. Whether the plaintiff

is daughter of deceased Hoor Bai wife of Noor Muhammad; 3. Whether the Hoor Bai was owner of the suit property i.e. Quarter No.225, Block-14, BICHS, situated at Tara Chand Road, Kemari, Karachi; 4. Whether Hoor Bai had gifted out the Suit Property to the Defendant No.1; and, 5. Whether Defendant No.1 with collusion of Defendant No.2 got transferred the Suit Property i.e. Quarter No.225, Block-14, BICHS, situated at Tara Chand Road, Kemari, Karachi in his name by illegal means and whether the documents transferring the right of ownership in favour of Defendant No.1 are liable to be cancelled". The parties led evidence on all issues and, after appreciating evidence, the suit was decreed; the judgment and decree were affirmed by the learned High Court.

13. The record reflects that respondent No.1 claims to be the daughter of Mst. Hoor Bai, produced three witnesses in her favour who corroborated that she is indeed the daughter of Mst. Hoor Bai. This shows that the respondent, in order to prove her relationship, discharged the burden of proof as envisaged under Article 117 of the Qanun-e-Shahadat Order, 1984, and nothing was proved to the contrary during the acid test of cross-examination. According to the doctrine of *onus probandi*, the party is obliged to produce trustworthy and satisfactory evidence to substantiate a claim or allegations affirmatively, which the respondent No.1 did in her evidence, and which could not be disproved. As far as the factum of gift is concerned, although the defendant No.1 (petitioner) alleged that the property was gifted to him in 2002 by means of a declaration of oral gift, during cross-examination he candidly admitted that he never produced any document to prove the presence of the donor in Pakistan at the relevant time. The defendant No.1 (petitioner) also failed during trial to establish that the suit property was actually gifted to him by the deceased Mst. Hoor Bai along with the prerequisites of a valid gift under Muhammadan Law. He even failed to prove that possession was delivered to him by the deceased Mst. Hoor Bai by virtue of the gift. Another important aspect that cannot be ruled out is that once the relationship between the deceased owner and the respondent No.1 as mother and daughter was established, it becomes a difficult proposition of law to accept that the property was orally gifted to a stranger, which always requires very strict and cogent proof to establish.

14. If we dwell on Section 122 of the Transfer of Property Act, 1882 (Chapter VII), it defines a "gift" as the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. In tandem, Section 123 explicates that for the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. However, the nitty-gritties of Section 129 provide that nothing in this Chapter (Chapter VII) relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muslim law. Under the Muslim law, the constituents and components of a valid gift are tender, acceptance, and possession of property. It is also obligatory that the donor divest and dissociate himself from the dominion and ownership over the property of the gift and put into words his categorical intention to convey the ownership to the donee distinctly and unambiguously with the delivery of possession of the property and ensure that the donee has secured physical ascendancy over the property to constitute the delivery of possession [Ref: Judgment authored by on us in Abid Hussain Vs. Muhammad Yousaf (**PLD 2022 SC 395 = 2022 SCP 93**)].

15. It is recapitulated that, once the relationship of respondent No.1 and the deceased owner was established in evidence, then seemingly, there was no rhyme or reason on record to explain why the deceased had deprived her own offspring. The reason for gifting the property to a stranger, alleged as *quid pro quo* for personal services rendered by the petitioner, was not established. This view has already been invigorated by one of us in the case of Babar Anwar Vs. Muhammad Ashraf and another (**2024 SCMR 734 = 2024 SCP 128**) and on a similar exposition, the case of Allah Ditta and others Vs. Manak alias Muhammad Siddique and others (**2017 SCMR 402**) is also relevant in which this Court held that it seems unnatural that a person could deprive his own children and dole out property to others.

16. In the case of Muhammad Ejaz and 2 others Vs. Mst. Khalida Awan and another (**2010 SCM R 342**), this Court held that a valid gift can be effected orally if the prerequisites are complied with. In

this case, the plaintiff claimed ownership of the suit house on the basis of an unregistered gift deed. This Court further held that the onus was on the plaintiff to prove the gift deed in all three facets, i.e., declaration of gift by the donor, acceptance of gift by the donee, and delivery of possession of the corpus of gift. No valid gift of property could be made in the absence of these three essential ingredients. Failure of the plaintiff to prove the twin requirement of acceptance of gift and delivery of possession was fatal to her claim. In the same case, Justice Jawwad S. Khawaja (as he then was), while concurring in the conclusion, contributed an additional note and opined that where a donee claims transfer of immovable property by way of gift through an instrument purporting to transfer rights *in praesenti*, the instrument is compulsorily registrable under Section 17 of the Registration Act, 1908. Failing registration, the provisions of section 49 of the Registration Act come into play and, as a consequence, the document does not operate to create any right, title or interest, whether vested or contingent in the property. His lordship further observed that the law laid down in Umar Bibi Vs. Bashir Ahmad (1997 SCMR 154) and Maulvi Abdullah and others Vs. Abdul Aziz and others (1987 SCMR 1403) is to the effect that even if the donor executes and registers a gift deed in favour of the donee, the gift under Islamic Law is only effective if all three essential elements of a gift, viz., declaration by the donor, acceptance by the donee, and delivery of possession, are proved. These precedents do not hold that a written instrument conveying a gift does not require registration. In the case of Umar Bibi (*supra*), the gift was oral and the suit was declaratory. In the case of Maulvi Abdullah (*supra*), likewise, the gift was oral but was subsequently recorded in a memorandum of gift. Such a memorandum, being a record of the earlier oral gift, cannot be equated with a gift deed, which is meant to be the instrument conveying title to the donee. Whereas in the case of Allah Diwaya Vs. Ghulam Fatima (PLD 2008 SC 73), this Court held that it would be a futile exercise to examine whether the gift was registered or not, for the simple reason that its execution could not be proved. There is, however, no cavil to the proposition that the gift deed was compulsorily registerable under Section 17 of the Registration Act and, without registration, the title of the property could not have been conferred upon. The dictum laid down in

Maulvi Abdullah's case (*supra*) cannot be applied to this case as the facts are distinguishable.

17. In line with Clause (6) of Section 2 (Definitions Clause) of the Registration Act, "immovable property" includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries, or any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops, nor grass. According to the most signification Section 17 of the said Act, a comprehensive list of documents/indentures is reckoned for compulsory registration, including instruments of gift of immovable property. While under Section 49 of the said Act, it is stipulated that no document required to be registered under this Act, or under any earlier law providing for or relating to registration of documents, shall operate to create, declare, assign, limit, or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, to or in immoveable property, or confer any power to adopt, unless it has been registered. In fact, the registration of documents creates pre-appointed evidence in favour of the parties/beneficiaries, which is entered in the public record through registration of the document, and indeed the very rationale behind this process is to give notice to the world that such a document has been executed, which not only prevents fraud, deception, and forgery, but also safeguards the interests of those dealing with the property or entering into a transaction related to the property by ensuring a clear and transparent record of ownership, thereby avoiding future disputes. Despite the fact that an oral gift under Islamic Law is not required to be compulsory registered under the Registration Act within the exactitudes of Sections 123 and 129 of the Transfer of Property Act, the relaxation of non-registration or the optional nature of such registration does not absolve the donee/parties from strictly proving the factum of gift or the declaration of an oral gift under challenge. Here, neither did the petitioner succeed in proving the indenture of declaration of the oral gift nor was there an attempt made to register the gift to avoid any future claim or dispute, and nor was it proved to have been executed by the deceased who was living abroad; and when she came and reduced the oral declaration

into writing, no witnesses were produced who satisfactorily corroborated the presence of the alleged donor in Pakistan. Regardless of all such incongruities and misdeeds, the Society transferred the property in the name of the petitioner in their record which was rightly rendered null and void.

18. In wake of the above discussion, we do not find any illegality or perversity in the impugned judgment and decree passed by the learned Trial Court and the learned High Court. This Civil Petition is dismissed and leave is refused.

19. Office is directed to transmit the copy of this judgment to the Secretary Law & Parliamentary Affairs, Government of Sindh, and Advocate General Sindh, for inviting attention to paragraph 10 of this judgment.

Judge

Judge

Karachi
26.03.2025
Khalid
Approved for reporting