IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

Mr. Justice Muhammad Ali Mazhar
Mr. Justice Syed Hasan Azhar Rizvi

Civil Petition No.552-K of 2021 & 1108-K of 2023

[Against the Judgment dated 06.04.2021 passed by the High Court of Sindh in IInd Appeal No.22 of 2009 and Order dated 17.08.2023 passed by High Court of Sindh in C.P.No.D-3343 of 2023]

Syed Masood Ali *...Petitioner(s)*
(both cases)

Versus

Mst. Feroza Begum and another *...Respondent(s)*
(in C.P.No.552-K/2021)

Jamal Uddin Siyal, IIIrd Senior Civil Judge Karachi and another
(in C.P.No.1108-K/2023)

For the Petitioner(s)	:	Mr. Ghulam Rasool Mangi, AOR Mr. Muhammad Imran Shamsi, ASC *(in both cases)*
For the Respondents	:	N.R.
Date of Hearing	:	26.12.2024

JUDGMENT

Syed Hasan Azhar Rizvi, J. This consolidated judgment shall decide both above titled petitions which are directed against the Judgment dated 06.04.2021 **("Impugned Judgment")** passed in IInd Appeal No.22 of 2009 and Order dated 17.08.2023 **("Impugned Order")** passed in C.P.No.D-3343 of 2023 by the High Court of Sindh respectively.

C.P.No.552-K of 2021

2. The succinct facts of the case are that petitioner filed Civil Suit No. 581 of 2004 before the Court of the 1st Senior Civil Judge, Karachi Central, against Respondent No.1, seeking relief in the form of a declaration, cancellation, and permanent injunction concerning a registered gift deed, bearing No. 577 dated 09.02.1991,

relating to House No. 13, Block No. 5, measuring 90 square yards, situated in Liaquatabad, Karachi Central **("disputed property").**

The petitioner's suit was dismissed by the Trial Court through a judgment and decree dated 27.04.2007 and 18.05.2007, respectively. Aggrieved by this decision, the petitioner filed Civil Appeal No. 95 of 2007 before the Court of Additional District Judge V, Karachi Central which was also dismissed affirming the decision of Trial Court vide judgment and decree dated 21.02.2009 and 28.02.2009, respectively.

Dissatisfied with the said decision, the petitioner assailed it by filing IInd Appeal No. 22 of 2009 before the High Court of Sindh, Karachi that too met with the fate of dismissal through the impugned judgment. Hence, the present petition.

3. Learned counsel for the petitioner contends that the impugned judgment is tainted with illegality, as well as misreading and non-reading of the evidence; that physical possession of the disputed property was never handed over to the respondent No.1 by the Donor; that marginal witnesses of the Deed of Declaration & Confirmation of Oral Gift were not produced before the trial court; that the essential elements required for a valid and lawful gift are absent in the present case, thereby necessitating interference with the impugned judgment.

4. We have heard the arguments advanced by the learned counsel for the petitioner and, with his able assistance, examined the material available on the record.

5. Perusal of the record reflects that the disputed property was originally owned by the petitioner's father, Syed Mahmood Ali, who was married to two wives, namely, Mst. Akhtari

Begum (the petitioner's mother) and Mst. Feroza Begum (Respondent No.1). It further transpires from the record that Syed Mahmood Ali (Donor) transferred ownership of the disputed property to Respondent No.1(Donee) through an oral gift pronounced on 09.01.1991 in the presence of witnesses. This oral gift was subsequently confirmed and documented through a registered Deed of Declaration and Confirmation of Oral Gift, bearing No. 577, dated 09.02.1991. The said deed explicitly records the acceptance of the gift by the donee and the delivery of possession of the disputed property to her.

6. Before analyzing the issues, it is crucial to first comprehend the legal framework governing gifts under Muslim law. A gift, or *Hiba*, is defined in *Hedaya* as the donation of a thing from which the donee may derive a benefit. In legal terms, it refers to the immediate and unconditional transfer of property without any consideration or exchange as observed in the case of Babar Anwar v. Muhammad Ashraf and another **[2024 SCMR 734]**. Similarly, *Mulla* defines a hiba or gift as "a transfer of property, made immediately and without any exchange," by one person to another, and accepted by or on behalf of the latter. The *Principles of Mohammedan Law* by D.F Mulla outlines three essential conditions for the validity of a gift under Section 149 thereof which reads as under:-

(i) A clear and unequivocal declaration of the gift by the donor,
(ii) Acceptance of the gift, either express or implied, by or on behalf of the donee, and
(iii) Delivery of possession of the subject matter of the gift by the donor to the donee, as further explained in Section 150.

The fulfillment of these conditions renders the gift complete and legally valid. Needless to mention that gift can be made orally and

requires no registration, even writing is not necessary to the validity of the gift made regarding immovable property.

7. In the instant case, the first condition stands satisfied, as the perusal of the gift deed (Exh.P.1) unequivocally reflects a clear declaration of the gift by the donor in favor of the donee. The explicit language of the gift deed leaves no room for doubt as to the donor's intention to transfer ownership of the property in question.

8. As far as acceptance is concerned, a perusal of the deed of confirmation clearly indicates that the gift was accepted by the donee. The relevant portion of the deed is reproduced hereinafter for reference:

> *"I, Mst. Feroza Begum W/O Mahmood Ali, Muslim, Adult,R/o 5/13, Liaquatabad, Karachi, had accepted the gift, in respect of Quarter No.5/13, measuring 90 Sq.Yds.situated at Liaquatabad, Karachi, gifted to me by my husband Mahmood Ali S/O Mehboob Ali, in pursuance of Oral Gift dated 9-1-91 in accordance with the principles of Mohammadan Law in presence of witnesses mentioned above and from date of Oral Gift I am enjoying the possessory rights in with all rights, titles and interest in the said property without any interruption or domination by the Donor or any body claiming through or under him and I have all legal rights, title and interest in the said property..."*

This unequivocal acceptance by the donee satisfies the second condition for a valid gift.

9. As far as delivery of possession is concerned, Section 150 of *Principles of Mohammadan Law* stipulates that the donor must deliver such possession as the subject matter of the gift is capable of being possessed. In this regard reference may be made to the case of Abid Hussain and others v. Muhammad Yousaf and others **[PLD 2022 SC 395]** wherein this court has held that:-

> *"... Islamic law does not make any distinction between moveable and immoveable property with regard to the conception of hiba, rather any property may be gifted by any person having ownership and dominion over the property intended to be gifted on fulfilling requisite formalities. It is also obligatory that the donor divest and dissociate himself downrightly from the dominion and ownership over the property of gift and put into words his categorical intention to convey the ownership to the donee distinctly and unambiguously with delivery of possession of property and ensure that done has secured physical ascendency over the property in order to constitute the delivery of possession."*
>
> **[Emphasis added]**

10. Section 152 of the *Principles of Mohammadan Law* elaborates on the manner in which delivery of possession is to be effected in the cases of immovable property. Sub-section (3) of Section 152 specifically addresses situations where both the donor and the donee are residing in the subject property at the time the gift is made. It clarifies that in such circumstances, physical departure by the donor or formal entry by the donee is not required. Instead, the gift is considered complete upon an overt act by the donor indicating an intention to transfer possession and divest control over the property. The question that arises, therefore, is what may constitute such an overt act. A relevant example of such an overt act is found in the Indian case titled Syed Md. Saleem Hashmi vs. Syed Abdul Fateh and ors **[AIR 1972 Patna 279]** where the donor and donee resided together in a house, the court held that the donor's act of handing over the property papers to the donee was a valid overt act, satisfying the requisite condition for delivery of possession, thereby fulfilling the necessary requirement for completing the gift.

11. Section 153 of the *Principles of Mohammadan Law* is particularly relevant to the facts of this case, as the donor was the husband, and the donee was his wife. A conjoint reading of Sections 152(3) and 153 clearly establishes that formal delivery of possession is not required when the donor is the husband and the donee is his wife, and both were residing together in the property at the time of the gift's declaration and creation. In such instances, the existing shared possession satisfies the requirement of delivery of possession, provided the donor has clearly divested himself of ownership and control over the property.

12. It is also well settled that in the case of a gift of immovable property by the husband to the wife, the fact that the husband continues to live in the house gifted or to receive the rents after the date of gift, will not invalidate the gift, the presumption being that the rents are collected by the husband as a rent collector on behalf of the wife and not on his own accord.

13. This has been recognized by this court time and again in various cases. Reference may be made to the case of Mst. Kaneez Bibi and another v. Sher Muhammad and 2 others **[PLD 1991 SC 466]** wherein it has been categorically ruled that:-

> *"The delivery of possession in cases like when the husband is the donor for a wife living with him, when the father is the donor for a daughter and/or a minor living with him, strict proof by donee of transfer of physical possession, and in other type of cases, is not insisted upon. In the case of gift of immoveable property by such close relations of the female as are mentioned above, once mutation of names have been proved the natural presumption arising from the relationship existing between donor and the donee, the donor's subsequent acts with reference to the property would be deemed to have been done on behalf of donee and not his own behalf."*

This principle was also reaffirmed in the case of Riaz Ullah Khan v. Asghar Ali *and 2 others* **[2004 SCMR 1701]** wherein this Court observed that in the case of a gift made to a wife or a ward, the delivery of possession is immaterial. This principle establishes that the requirement of possession, typically essential for the validity of a gift, does not apply in such circumstances, where the donee is a wife or a ward.

14. In the present case, perusal of the Deed of Declaration & Confirmation of Oral Gift indicates that the donor had divested himself of all property rights as reproduced below:-

> *"That at the time of pronouncement of Oral Gift the Declarant/Donor has handed over the physical possession of the said property to the Donee Mst. Feroza Begum and she has taken over the possession.*
> *3. That from the day of pronouncement of Oral Gift the Donee is in possession of aforesaid Quarter, the Gifted property and that the Declarant/Donor has divested himself completely from the domination of the subject gift..."*

15. The recital, as provided above, clearly demonstrates the donor's intention to divest him of all control over the subject matter of the gift. This act fulfills the necessary requirement of intention to transfer possession and divest control as there is no evidence on the record to suggest that the donor undertook any action indicating an intention to withhold possession of the gift. In this regard reference may also be made to the foreign jurisdictions, i.e. in the case of Nawab Mirza Mohammad Sadiq Ali Khan and Ors v. Nawab Fakr Jahan Begam *and Ors* **[AIR-1932-PC-13]** the Privy Council reaffirmed the view expressed in *Ameeroonnisa Khatoon v. Abedoonisa Khatoon* [(1875)L.R. 2 I.A. 87], where it was held that under Mohammedan Law, a genuine and bona fide intention to make a gift is sufficient to validate the gift, even in the absence of a change of possession. In such cases, the property is treated as being held by the donor on behalf of the donee. The Privy Council applied this principle to a gift made by a husband to his wife, despite no change of possession or mutation of title during the husband's lifetime, even though the property was susceptible to physical delivery. It was further held that Mohammedan Law does not require an actual vacation by the husband or a separate taking of possession by the wife; rather, the husband's declaration, along with the handing over of the deed, is sufficient to effect the transfer of possession.

16. In the present case, the gift deed includes a recital confirming that possession of the property has been delivered to the donee. This recital serves as an admission binding on the donor and those claiming under him. In case of Ismail and others v. Idrish and others **[AIR-1974-Patna 54]** it was observed that where a deed of gift contains a clear recital stating that the donor has

divested all his interest in the gifted property and placed the donee in possession, treating the donee as the full owner, the gift is valid and binding on the donor's heirs. The fact that one of the donor's heirs, who disputes the validity of the gift, is subsequently found in possession of the gifted property does not undermine the completeness or validity of the gift.

17. Similar principle was laid down by this Court in the case of Abrar Ahmed and another v. Irshad Ahmed **[PLD 2014 Supreme Court 331]** wherein it has been held that the appellants could not claim any rights in the property during the lifetime of their father who was acknowledged as the owner. The appellants had no standing to challenge the validity of the gift on the grounds of non-delivery of possession, merely because they might have inherited the property as legal heirs upon his death. At the time of the gift, the appellants' possession, at best, was that of a licensee, and a licensee cannot challenge the validity of a gift based on possession, especially when they had no enforceable right or interest in the property. The appellants, being either licensees or prospective heirs, were, in essence, strangers to the gift. Furthermore, under Mohammadan Law, the concept of *spes successionis* (the mere hope or expectation of inheriting) is not recognized, meaning a presumptive heir has no rights in the property of the deceased until his death occurs. Therefore, the appellants, as potential heirs, could not challenge the validity of the gift made by their father. The donor, having made the gift voluntarily, affirmed it during his lifetime, and never questioned its validity before his death, leaving his successors (legal heirs) without standing to dispute the gift's validity.*(Paragraph 2 of the Abrar Case supra)*

18. In light of the above discussion, it can safely be concluded that all requisite elements for a valid and legally enforceable gift/*Hiba* are satisfied in the present case.

19. With regard to the petitioner's assertion that the Donor's signatures were forged due to the donor's illness, which allegedly rendered it impossible for him to sign the deed, the learned High Court has rightly dealt with this argument in the impugned judgment, as reproduced below:-

> "9.It is further observed that the said Declaration of oral gift executed by the Donor stood proved through attestation of registered deed and endorsement thereupon by the Sub-Registrar, which has got presumption of truth. It is further noted that the appellants have failed to produce any document regarding illness of their father at the relevant time and even since 1991 when such Deed was registered, the appellants did not make any claim over the disputed property or even in the year 1999, when their father expired. The appellant No. 2 during her cross-examination has admitted that in the year 2000, she came to know about the transfer of disputed property in the name of the respondent No.1, but even then the suit was filed in the year 2004, after the lapse of four years. If the appellants were aggrieved of such transfer through gift then it was obligatory upon them to have challenged the same as soon as they acquired knowledge about the same but it is matter of record that they (appellants) from their own conduct and attitude proved otherwise. When query made to the learned counsel for the appellants to explain that as to what were the circumstances which compelled the appellants to remain calm for such a long a period of four years, he had no answer."

20. Turning to petitioner's contention that the marginal witnesses of the Deed of Declaration and Confirmation of Oral Gift were not produced before the learned Trial Court, suffice is to state that neither the writing nor the registration of a Deed of Declaration and Confirmation of Oral Gift is an essential requirement for the validity of a lawful gift under the law. It has been rightly observed by the learned High Court that Respondent No. 1 has established that the document was duly executed and that the essential ingredients for the creation of a valid gift, including offer, acceptance, and delivery of possession, were

fulfilled. Conversely, the petitioners have failed to discharge their burden of proving otherwise.

21. Thus, High Court has elaborately and comprehensively considered all aspects of the matter, legal as well as factual. Normally, this Court does not interfere in the concurrent findings unless those are perverse, arbitrary, fanciful or capricious which, in our candid view, is not the position in the instant case.

22. In view thereof, we find the impugned judgment to be well-reasoned. Neither any misreading and non-reading nor any infirmity or illegality has been noticed on the record which could make a basis to take a contra view. Learned counsel for the petitioner has failed to make out a case for interference.

C.P.1108-K of 2023

23. In this case petitioner invoked the constitutional jurisdiction of the High Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, seeking an inquiry against the learned Senior Civil Judge who had rendered a decision against him in Civil Suit No. 227/2009 in favour of petitioner's step mother namely Mst. Feroza Begum (Respondent No.1 in C.P.552-K of 2021).

24. The present case arises from Suit No. 227 of 2009, instituted by Mst. Feroza Begum for Declaration, Possession, Mesne Profits, and Permanent Injunction against the petitioner and his brother, Masroor Ali, concerning the second and third floors of the disputed building, allegedly occupied by them. The suit was decreed in favor of Mst. Feroza Begum by the IIIrd Senior Civil Judge, Karachi Central, through a judgment and decree dated 25.01.2023 and 30.01.2023.

25. Aggrieved by the said decision, the petitioner invoked the constitutional jurisdiction of the High Court, raising objections

on factual grounds. However, the petitioner failed to implead Mst. Feroza Begum as a necessary party and instead sought to implead the presiding judge of the learned trial court, requesting an inquiry against him. The petitioner contended that the learned trial court should not have announced the decision in the suit since a leave to appeal arising out of IInd Appeal No.22 of 2009 filed by the petitioner concerning the same disputed property, was pending before the Supreme Court.

26. It is pertinent to note that the parties in both suits were identical, and the subject property was the same, with the sole exception that Mst. Feroza Begum was the plaintiff and the petitioner was the defendant in Suit No. 227 of 2009, whereas the petitioner was the plaintiff and Mst. Feroza Begum was the defendant in Suit No. 581 of 2004.

27. Record reveals that as IInd Appeal No. 22 of 2009, arising out of Civil Suit No. 581 of 2004 and pertaining to the same property, filed by the petitioner, was pending adjudication before the High Court therefore learned trial court stayed the proceedings in Suit No. 227 of 2009. Dissatisfied with the stay order, Mst. Feroza Begum filed Civil Revision No. 07 of 2011 before the learned 1st Additional District and Sessions Judge, Karachi Central, which was allowed in the following terms:

> "Perusal of the impugned order reveals that the suit under revision is at the stage for evidence of plaintiff's witness and same is not for judgment so court below is required to record the evidence of parties if situation demands thereby court below deem it necessary at the time of judgments may wait for the decision of appeal No.22/2009 filed by the respondent before Honourable High Court of Sindh at Karachi."

28. In compliance therewith, the learned trial court vide order dated 28.07.2012, proceeded with the matter and stayed the announcement of decision on merits until decision of High Court. The defendants filed their written statements, the learned trial

court framed the issues, and the evidence of both parties was duly recorded. However, the pronouncement of the judgment was deferred pending the decision of the High Court. After the High Court rendered its judgment dated 06.04.2021, Mst. Feroza Begum filed an application before trial Court for the reopening of the suit and the announcement of the decision. Consequently, the trial court resumed the proceedings, and after considering the evidence and hearing the parties, the suit was decided on its merits.

29. Perusal of the material available on the record indicates that the suit proceeded in the normal course. The defendants *(petitioner in the present case)* filed their written statement, issues were framed, evidence adduced by both parties was recorded, and a final decision was rendered on its merits after the decision of High Court in the same matter. It is important to note that the announcement of decision in the suit was kept in abeyance for more than 10 years i.e. from 28.07.2012 to 25.01.2023. Therefore, the contention of the learned counsel for the petitioner that the learned trial court should have stayed the announcement of the decision until the announcement of Supreme Court's decision is misconceived and was rightly addressed by the learned trial court in paragraph 34 of its judgment, as reproduced below:

> 34. I have heard the learned counsel for the defendant No.1. He argued that He has filed civil petition for leave to appeal No.552-K/2021 before unravel supreme court against the judgment dated 6th April 2021 up the Honorable High Court of Sindh whereby the 2nd appeal no.22 of 2009 preferred by defendant number one against the plaintiff was dismissed. He submitted that the judgment may not be pronounced till final disposal of the civil petition for leave to appeal. Keeping in view the above submissions it is matter of record that there is no stay or restraining order of the Honorable Supreme Court against the instant suit, moreover, the instant suit was kept in abeyance vide order dated 28th July 2012 till decision of the 2nd appeal no 22/2009 before the High Court of Sindh which is already decided. In the circumstances, I see no reason to keep the instant civil suit pending."

30. It is a well-settled principle of law that where an alternative and efficacious remedy is available under the ordinary legal framework, constitutional jurisdiction cannot be invoked to bypass the statutory mechanisms in place. Constitutional jurisdiction is not intended to substitute the ordinary remedies provided under the law.

31. Dissatisfaction with a judicial decision alone cannot serve as a valid basis for invoking this Court's extraordinary jurisdiction. The independence of the judiciary is a cornerstone of the legal system, ensuring that judicial officers are safeguarded by law for decisions made in the exercise of their judicial functions. Furthermore, the issue of whether a decision in the said suit may or may not have been rendered during the pendency of a similar matter before the Supreme Court is a legal question that can be adequately addressed by the appellate court. Therefore, directly raising allegations against the learned presiding Judge of the trial court is entirely unwarranted. Allowing constitutional petitions of this nature would undermine the autonomy of the judiciary and erode public confidence in the judicial process.

32. Moreover, it is evident from the record that the petitioner had already availed the statutory remedy of appeal available under the law by filing Civil Appeal No. 40/2023 before the appellate court, thereby challenging the judgment in accordance with the prescribed legal procedure. The High Court, in dismissing the constitutional petition, rightly observed that:-

> *"2. Grievance of the petitioner revolves around judgment dated 30.01.2023 passed by the trial court in Civil Suit No.227/2009 and per petitioner said judgment has been assailed by him in Civil Appeal No.40/2023.*
>
> *In wake of above, we do not find any force in the instant petition, which is accordingly dismissed a/w listed matters."*

33. In view of the foregoing, no interference is warranted with the impugned judgment dated 06.04.2021 and impugned order dated 17.08.2023 passed by the High Court. Accordingly, both these petitions, being devoid of merits, are dismissed and leave is refused.

JUDGE

JUDGE

Karachi
26.12.2024
APPROVED FOR REPORTING
Paras Zafar, LC*