

**SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**PRESENT:**

**MR. JUSTICE MUSHIR ALAM**  
**MR. JUSTICE SARDAR TARIQ MASOOD**  
**MR. JUSTICE AMIN-UD-DIN KHAN**

*AFR*

**CIVIL APPEAL NO. 1498 OF 2016**

(Appeal from the judgment dated  
28.04.2016 passed by Lahore High Court,  
Lahore in RFA.No. 445 of 2015.)

***Ijaz Bashir Qureshi***

*...Appellants(s)*

***Versus***

***Shams-un-Nisa Qureshi etc.***

*...Respondent(s)*

For the Appellant (s) : Mr. Aamir Iqbal Basharat, ASC.  
Ch. Akhtar Ali, AOR.

For Respondent Nos.2-5 : Mr. Abdul Khaliq Safrani, ASC.

For Respondent No. 6. Mr. Ejaz Jamal, ASC.

Date of Hearing : 31.05.2021

**J U D G M E N T**

**AMIN-UD-DIN KHAN, J.-** Through this appeal filed under Article 185(2)(d)(e) of the Constitution of Islamic Republic of Pakistan, 1973 appellant has challenged the judgment and decree dated 28.4.2016 passed by the learned Division Bench of the Lahore High Court whereby RFA. No. 445 of 2015 filed by the respondents/defendants was allowed.

2. Brief facts of the case are that plaintiff-appellant on 15.6.2009 filed a suit for declaration, mandatory and permanent injunction challenging therein the alienation of his share in the suit property by his mother Mst. Shams-un-Nisa Qureshi/defendant No. 1 through an instrument of gift in favour of her daughter

Mst. Fareeda Bashir, the sister of the plaintiff, on the basis of an irrevocable general power of attorney. The suit was contested. Parties led their evidence. The learned trial court was pleased to decree the suit vide judgment and decree dated 4.3.2015 which was challenged through first appeal before the learned Lahore High Court which was allowed. Hence, this appeal.

3. We have heard the learned counsel for the parties and gone through the record.

4. As per undisputed facts Lt. Col. (Retd.) Bashir Ahmed Qureshi the predecessor of the parties i.e. father of the plaintiff-appellant as well as defendant Nos. 2 to 5 and husband of defendant No. 1 died on 21.4.1984. He left behind the suit property, a residential house bearing No. 136/II-G Block, Model Town, Lahore measuring 2 kanals, which is the suit property, along with other properties in the shape of various plots in Housing Societies at Lahore Cantt and Karachi. All the other properties were sold by the attorney i.e. the widow of the deceased and the proceeds were distributed amongst the legal heirs in accordance with their receivable shares, except the disputed property. Out of 2 kanals, 1 kanal 15 marlas owned by plaintiff, defendant No. 1 and 3 to 5 was transferred in favour of defendant No. 2, who was already having 5 marla as daughter of deceased, vide registered gift deed No. 2439 registered on 14.7.2008. Case of the appellant is that he left the Country for Canada on 2.10.2007 with his family when he acquired Canadian immigration.

5. The only questions before us for determination are whether:- (i) under the General Power of Attorney the attorney himself/herself can transfer the property of principal through gift. (ii) what necessary ingredients should be available for declaring a power

of attorney an irrevocable power of attorney, whether by writing on the caption of a power of attorney irrevocable it becomes an irrevocable power of attorney.

6. First we take the second point that what is the nature of power of attorney Exh.P.2=Exh.D2. The power of attorney by the plaintiff and defendant Nos. 2 to 5 in favour of defendant No. 1, who is their mother, registered on 27.11.1988, is not disputed. What is its nature is to be determined by the Court when it is written irrevocable and further in the power of attorney power to alienate the property through gift is mentioned. There is no dispute with regard to the fact that power of attorney is registered one. Its nature as irrevocable is to be determined by this Court and further the dispute is with regard to transfer of the property of the principal by the attorney even the power to transfer the property through gift is mentioned in the power of attorney. As per the admitted position of the parties, all the properties except the suit property, the mother sold out and distributed the proceeds amongst the legal heirs in accordance with their receivable shares, therefore, it is clear that the power of attorney is not irrevocable in the eye of law as for declaration of a power of attorney as irrevocable is concerned, in the light of judgment of this Court reported as "Mst. Hajran Bibi and others versus Suleman and others" (2003 SCMR 1555) the test is where agent has himself an interest in the property which forms subject matter of the agency, the same cannot be terminated to the prejudice of such interest, in the absence of any express contract. Admittedly, the power of attorney subject matter of this suit was not given for consideration, therefore, it cannot be termed as irrevocable General Power of Attorney. It was simply General Power of Attorney with the powers of transfer the property through sale etc. including through gift. We hold that simply

mentioning in the caption of a power of attorney "Irrevocable" it does not become an irrevocable power of attorney unless it passes the test discussed supra for declaring a power of attorney irrevocable.

7. Now comes the question whether in a power of attorney if it is mentioned that the agent can transfer the property through gift, these powers are given to the agent to transfer the property himself or herself through gift, in our view the gift can be made by the owner/principal only. The agent cannot himself or herself transfer the immovable property of principal through gift on the basis of any power of attorney even if the power of attorney contains the powers to transfer the property through gift. These powers can only be used for completion of codal formalities of the gift which must be by the owner/principal himself/herself. The attorney cannot transfer the property of principal himself/herself to anyone through gift and if that transfer is by the attorney himself/herself, that is invalid transfer.

Even in case of transfer of immovable property of principal by attorney in favour of his kith and kin some principles have already been set up by this Court. Reliance can be made upon "Mst. Naila Kausar and another versus Sardar Muhammad Bakhsh and others" (2016 SCMR 1781). Relevant portion of Paragraph No. 7 is being reproduced:-

"It is settled law that an attorney cannot utilize the powers conferred upon him to transfer the property to himself or to his kith and kin without special and specific consent and permission of the principal. It is an equally settled law that the power of attorney cannot be utilized for effecting a gift by the attorney without intentions and directions of the principal to gift the property, which intentions and directions must be proved on record."

We can also get support from the previous judgment of this Court reported as "Muhammad Ashraf and 2 others versus Muhammad

Malik and 2 others" (PLD 2008 Supreme Court 389) wherein it was held:-

"There is no evidence on record to show that the attorney before making the gift in favour of his son-in-law ever obtained the consent and permission of the plaintiffs and sought any approval from the real owner of the property, who even according to the stance of the petitioners are his principals. It is a settled law by now that if an attorney intends to exercise right of sale/gift in his favour or in favour of next of his kin, he/she had to consult the principal before exercising that right. The consistent view of this Court is that if an attorney on the basis of power of attorney, even if "general" purchases the property for himself or for his own benefit, he should firstly obtain the consent and approval of principal after acquainting him with all the material circumstances. Here in the cases of Fida Muhammad v. Pir Muhammad Khan (deceased) through legal heirs and others PLD 1985 SC 341, Mst. Shumal Begum v. Mst. Gulzar Begum and 3 others 1994 SCMR 818 and Nisar Ahmad and others v. Naveed-ud-Din and others 2004 SCMR 619, can be referred, which are fully applicable to the case in hand."

8. It is on the record that no specific permission from the Principal was obtained. It is on the record that after about 20 years of appointment of power of attorney the attorney transferred the share of the plaintiff-appellant through registered gift deed herself in favour of her daughter when appellant was having children and wife, at least his sister the alleged donee is not his legal heir. The relationship between the attorney and the alleged donee is of a mother and daughter and the alleged gift deed is just within one year when the principal left the Country on 2.10.2007 for Canadian immigration whereas gift deed is dated 14.7.2008.

9. Perusal of registered gift deed Exh.P-5/Exh.D-13 shows that the attorney herself has gifted her own share as well as share of the principal except Mst. Fareeda Bashir in whose favour the gift was made, it will be appropriate to quote the original text from the gift deed:-

”لہذا اب من مقررہ نے کوٹھی مزکورہ بالا میں سے اپنا اور اختیار دہندگان کا حصہ رقبہ تعدادی ایک کنال پندرہ مرلے (1k-15m) مسماۃ فریدہ بشیر دختر بشیر احمد قریشی ساکن 136-G ماڈل ٹاؤن لاہور کے نام ہبہ کر دیا ہے“

Meaning thereby the agent is not referring any gift in favour of alleged donee by the Principal. Further from the facts and circumstances that all other legal heirs of Lt. Col.(Retd.) Bashir Ahmed Qureshi appointed their mother the attorney in the year 1988 including the alleged donee through a single document i.e. irrevocable general power of attorney Exh.P.2/Exh.D.2. In this view of the matter, the findings recorded by the learned first appellate court are not sustainable under the law. The attorney was not competent to gift the share of the plaintiff-appellant in the suit property in favour of her daughter.

10. Learned counsel for respondent Nos. 2 to 5 has relied upon the judgments reported as “Combind Investment (Pvt) Ltd. versus Wali Bhai and others” (PLD 2016 Supreme Court 730), “Abdul Razaq versus Abdul Ghaffar and others” (2020 SCMR 202), “Muhammad Aslam and others versus Absar Fatima and others” (2011 CLC 1521), “Chief Engineer, Irrigation Department, N.W.F.P. Peshawar and 2 others versus Mazhar Hussain and 2 others” (PLD 2004 Supreme Court 682), “Mst. Nur Jehan Begum through Legal Representatives versus Syed Mujtaba Ali Naqvi” (1991 SCMR 2300) and “Mrs. Zakia Hussain and another versus Syed Farooq Hussain and another” (PLD 2020 Supreme Court 401) to argue that evidence beyond the scope of pleadings if produced cannot be looked into and further the pleadings could not be considered as evidence in the suit on behalf of a party when not supported through evidence. Further that the facts narrated in examination-in-chief, not cross-examined

part of that statement would be deemed to have been accepted by the other side or the witness not cross-examined on the material points and further the transfer by the attorney having irrevocable power of attorney and the value of the statement of a witness not fully conversant with the facts of the case. There is no cavil to the judgments and the points pressed by the learned counsel for the respondents, in this case when the challenge was made by the plaintiff-appellant the respondent No. 2 being the beneficiary was bound to prove the gift of the share in the suit property by the plaintiff-appellant himself and completion of codal formalities of the transfer of the gifted property by the agent i.e. the power of attorney holder on the instructions of the principal the alleged donee miserably failed to prove the gift of the suit property. Even the donee has not claimed the gift of the share of the suit property by the plaintiff-appellant.

11. Some principles have been laid down by this Court with regard to gift by the agent on the basis of power of attorney on behalf of the principal. We can consider an earlier judgment of this Court reported as "Haji Faqir Muhammad and others versus Pir Muhammad and another" (1997 SCMR 1811). In Paragraph No. 7 of the judgment a portion from an earlier judgment of this Court reported as "Mst. Shumal Begum v. Mst. Gulzar Begum and 3 others" 1994 SCMR 818 has been referred, same is reproduced:-

"The sentiments which were the consideration for gift in the present suit must be established to have come from the donor. Gifts are voluntarily and gratuitous in the present suit transfer from the donor to the donees. The essential of these transactions are, the capacity of donor, intention of donor to make gift, complete delivery of the gifted property to the donee and acceptance of gift by donee. In order to establish a valid gift of the property by the donor in favour of the donee where gift, is made through a person authorized by the donor, the intention of donor to make the gift must be established in clear terms. In such a case the authority given by the donor in favour of another person to make a gift of his property besides containing the power to make the gift must also clearly specify the property and the donee in the case."

12. The resume of the discussion is that power of attorney Exh.P.2=Exh.D2 was not irrevocable power of attorney in the eye of law. Defendant No. 2 had not claimed the gift of the suit property by the principal rather she claims gift by the attorney of the share of the plaintiff-appellant. Admittedly, the principal has never given specific power of attorney for gift of the specific property in favour of respondent No. 2, therefore, on the basis of the power of attorney Exh.P.2, copy of which is Exh.D.2, which was given 20 years earlier to the transaction to the mother of all the legal heirs of Lt. Col. Bashir Ahmad Qureshi i.e. widow of the deceased namely Mst. Shams-un-Nisa Qureshi/defendant No. 1 whereas the impugned gift deed is of the year 2007 i.e. about 20 years after the registered power of attorney in favour of the agent and that too the agent has gifted the property on her own and all the principal owners herself in favour of her daughter, therefore, the gift as the appellant has challenged is invalid at least to his extent and declared as such.

13. In view of the above discussion, this appeal is allowed and the judgment and decree passed by the learned High Court are set aside and that of the learned trial court are restored.

**JUDGE**

**JUDGE**

ANNOUNCED IN OPEN COURT ON 11/06/2021 **JUDGE**

**JUDGE** ————

Islamabad,  
Mazhar Javed Bhatti