

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE QAZI FAEZ ISA, CJ
MR. JUSTICE MUHAMMAD ALI MAZHAR
MS. JUSTICE MUSARRAT HILALI

CIVIL PETITION NO.5972 OF 2021

(Against the Judgment dated 17.09.2021
passed by the Lahore High Court,
Rawalpindi Bench in Civil Revision No. 115-
D/2021)

Babar AnwarPetitioner

VERSUS

Muhammad Ashraf and another ...Respondents

For the Petitioner: Mian Muhammad Yasin, ASC

For Respondents: Not Represented

Date of Hearing: 24.01.2024

JUDGMENT

Muhammad Ali Mazhar, J. This Civil Petition is brought to challenge the judgment dated 17.09.2021, passed by Lahore High Court, Rawalpindi Bench, in Civil Revision No.115-D/2021, by means of which the civil revision was dismissed.

2. The compendium of facts of the case are that respondent No.1 had filed a suit for declaration and cancellation of a registered gift deed dated 24.09.2011. The sequence of events is that the property in question was originally owned by his father, who gifted it to the respondent No.1 *vide* gift deed No.100 dated 10.01.1978, and also handed over its possession. Thereafter, respondent No.1 raised construction on the land and on 01.03.2006, he also executed a power of attorney in the name of his father for administration and supervision of the property, but the said attorney gifted the property in question to petitioner *vide* gift deed dated 24.09.2011. It was further

stated in the plaint that the said attorney (the father of respondent No.1), due to his old age and cardiac issues, was also not in a proper frame of mind. Therefore, the gift deed was the result of connivance and disingenuousness. The learned Trial Court, after recording evidence, decreed the suit *vide* judgment and decree dated 20.02.2020. The petitioner filed an appeal before the learned District Judge, but *vide* judgment and decree dated 04.02.2021, the appeal was dismissed, thereafter, the petitioner filed Civil Revision No.115-D/2021 in the Lahore High Court, Rawalpindi Bench, which was also dismissed *vide* impugned judgment dated 17.09.2021.

3. The learned counsel for the petitioner argued that a valid registered gift deed was on record but all the courts below misread the evidence. It was further contended that the concerned Sub-Registrar appeared before the learned Trial Court and his evidence was also recorded, wherein he verified the contents of the registered documents. An important piece of evidence of D.W.1 was also ignored, who remained as a tenant on the property in question and depositing rent into the bank account of the petitioner from 2012 till September 2015. He further argued that the petitioner is a permanent resident of United Kingdom and in his absence, respondent No.1 forcibly took over possession of the property for which the petitioner had already initiated criminal proceedings against respondent No.1. It was further averred that in the power of attorney, the principal had authorized his attorney to gift out the property; hence, there was no need to ask for any consent or permission of the principal for conferring the gift.

4. Heard the arguments. Incontrovertibly, the property in question was gifted to the petitioner through the general attorney of respondent No.1. Neither is anything reflected from the record that the general attorney obtained permission or consent from his principal for transferring the property in question by means of gift to the petitioner, nor was it ever pleaded that the earlier gift was revoked for any reasons. All the more so, the petitioner pleaded in his defense that he purchased the property in question against valuable consideration, but at the same time, he was also claiming the property as a lawful donee. Both pleas are mutually destructive if considered in juxtaposition. If it was a case of gift, then the plea of sale was misleading and erroneous, and if the property was purchased against

valuable consideration, then there was no logical reason for the execution of a gift deed rather than a conveyance deed to unveil a straightforward sale transaction. As far as the proof of possession of respondent No.1 is concerned, it clearly transpires from the documents exhibited in the Trial Court that though the petitioner's special attorney averred that at the time of transfer of property, possession was also delivered, but subsequently, it was snatched by respondent No.1 which assertion was belied and in support of thereof, the respondent No.1 produced copies of Form P.T.I as Exh.P7 to Exh.P10, a bunch of electricity bills as Exh.P12, and a bunch of sui gas bills as Exh.P13 to corroborate and substantiate the factum of possession. The petitioner filed a complaint under Section 3 of the Illegal Dispossession Act, 2005 against respondent No.1 and his special attorney, but the Trial Court acquitted them *vide* judgment dated 13.03.2019, which was upheld by the Lahore High Court *vide* order dated 09.12.2019.

5. Presenting a gift, whether grand or tiny, is an act of kindness and compassion, and between the parents and children, it is somewhat out of love and affection. According to Hedaya, "Hiba," in its literal sense, signifies the donation of a thing from which the donee may derive a benefit; in the language of the law it means a transfer of property, made immediately, and without any exchange. While according to Ameer Ali, "A hiba, pure and simple, is the voluntary transfer, without consideration, of some specific property (whether existing in substance or as a chose in action)". According to Mulla, "A hiba or gift is "a transfer of property, made immediately and without any exchange," by one person to another, and accepted by or on behalf of the latter". Whereas according to Fyzee, "Hiba" is the immediate and unqualified transfer of the corpus of the property without any return". According to Sir Abdul Raheem, "the Muhammadan law defines hiba or a simple gift inter vivos as a transfer of a determinate property without an exchange". A similar definition is provided by Baillie, "Gift", as it is defined in law, is the conferring of a right of property in something specific, without an exchange". Similarly, according to Sahih Muslim, "A Hiba is defined as the transfer of possession of property, movable and immovable, from one person to the other willingly and without reward". The donor should be *compos mentis*, meaning thereby a person who is of

sound mind and has the mental capacity to understand the legal implications of his act of making a gift, and he must be of age and the owner of the property intended to be gifted; the thing gifted should be in existence at the time of making hiba; the thing gifted should be such that benefitting from it is lawful under the Shariat; the donor must be free from any coercion/duress or undue influence while making a gift; the thing gifted should come into the possession of the donee himself or through his representative/guardian for an effective hiba. 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 donee has secured physical ascendancy over the property to constitute the delivery of possession [Ref: Abid Hussain and others Vs Muhammad Yousaf and others (PLD 2022 SC 395)]

6. One more important aspect that cannot be lost sight of is that respondent No.1 has two sons and four daughters, and seemingly, there was no rhyme or reason on record to divulge why respondent No.1 deprived his own offspring, and conveyed his attorney to gift the property to the petitioner. A gift emanates from love and affection and sometime it is *quid pro quo* personal services rendered by the donee to the donor. Consideration like love or affection in the matter of alienation must proceed from the original and real owner of the property in relation to the donee; such an element if springing out from a delegatee or agent, could not be supplanted on the principal, not being the donor himself. Nothing is presented on record through cogent evidence that the attorney ever asked for the permission or consent of his principal to gift the property in question to the petitioner; therefore, such a gift was not validated by the courts below in three concurrent judgments. The attorney or agent may gift the property on express permission and instructions of his principal. A similar proposition was also dealt with by this Court in the following dictums: -

1. Jamil Akhtar and others Vs Las Baba and others (PLD 2003 SC 494). It was held that it is a settled principle of law that whenever a general attorney transfers the property of his principal in his even name or in the name of his close fiduciary relations, he has to take special permission from the principal.

2. Muhammad Ashraf and 2 others Vs Muhammad Malik and others (PLD 2008 SC 389). 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 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.

3. Mst. Naila Kausar and another Vs Sardar Muhammad Bakhsh and others (2016 SCMR 1781). 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. There is also no specific written permission by Mst. Fatima Jan to Appellant No.2, Sardar Muhammad Aslam to gift the property to Appellant No.1 his daughter.

4. Allah Ditta and others Vs Manak alias Muhammad Siddique and others (2017 SCMR 402). The Court noted that the relationship inter se the alleged donor and the petitioners is of uncle and nephew(s). The consideration for the gift as alleged by the respondent, that he has been looking after the alleged donor has not been proved on the record. It seems unnatural that a person could deprive his own children and dole out the property to others, may be nephews. The alleged donor had his own children, besides the mutation of transfer of immovable property is only a manifestation of the oral transaction and it does not carry any presumption of correctness, particularly in the circumstances when it has been assailed by the person affected by the same.

7. The jurisdiction vested in the High Court under Section 115 of the Code of Civil Procedure, 1908 ("C.P.C.") is to satisfy and reassure that the order is within its jurisdiction and the Court below has not acted illegally or in breach of some provision of law, or with material irregularity, or by committing some error of procedure in the course of the trial which affected the ultimate decision. Furthermore, the High Court has very limited jurisdiction to interfere in the concurrent conclusions arrived at by the courts below while exercising power under Section 115, C.P.C. Here the concurrent findings of the three

courts below on a question of fact neither based on any misreading or non-reading of evidence nor suffering from any illegality or material irregularity affecting the merits of the case.

8. In our considered analysis, the judgment passed by the High Court does not suffer from any misreading or non-reading of evidence nor from any other illegality and/or irregularity. For the reasons to be recorded later, this Civil Petition was dismissed and leave was refused by our short order dated 24.01.2024. Above are the reasons in the aid of our short order.

Chief Justice

Judge

Judge

Islamabad
24th January, 2024
Khalid
Approved for reporting.