

**RIAZ MEHMOOD and another---Petitioners**

**Versus**

**ALTAF HUSSAIN and others---Respondents**

Civil Revisions Nos. 743 and 1225 of 2005 and Criminal Original No.15 of 2009,  
decided on 2nd November, 2010.

**NASIR SAEED SHEIKH, J.**---This judgment will dispose of two connected Civil Revision Petitions No.743 of 2005, 1225 of 2005 and a Crl. Org. No.15-C of 2009 as they are in between the same parties, arise out of one and same litigation and in respect of the same property and common question of law and facts are involved therein.

2. One Ghulam Rasool son of Ibrahim, predecessor-in-interest of the parties in both the civil revisions was the owner of the house constructed upon an area of 5 Marlas 239-3/4 square feet Mohallah Daglaspura near Chowk Ilama Iqbal Road, Faisalabad. A registered Hibanama No.9633 dated 5-7-1987 is attributed to the deceased Ghulam Rasool to have been executed in favour of Muhammad Iqbal and Altaf Hussain respondents. Later on a Mutation No.2193 dated 11-7-1987 was also incorporated in the Revenue Record on the basis of said Hibanama. The other sons Riaz Mehmood, Javed Iqbal, Muhammad Shoab and Riaz Ayyub of the deceased on 26-9-1995 instituted a suit for declaration in the Court of Senior Civil Judge Faisalabad praying that the gift deed attributed to their father Ghulam Rasool in favour of Muhammad Iqbal and Altaf Hussain is illegal, against facts, without notice to the plaintiffs, fraudulent, based upon misrepresentation and result of a secret conspiracy therefore is of no legal effect upon the rights of the plaintiffs and is liable to be cancelled. A permanent injunction was also sought by the said plaintiffs restraining defendants Nos.1 and 2 Muhammad Iqbal and Altaf Hussain from dispossessing the plaintiffs from the house in question and also from transferring the same in any manner to anybody else. The gift deed was requested to be produced in the Court and was prayed to be cancelled. Another suit was instituted by Qayyum Akhtar, Yasmeen Kausar, Naseem Kausar and Ghazala Yasmeen daughters of late Ghulam Rasool on 23-10-1995 before the learned Senior Civil Judge, Faisalabad seeking declaration to the effect that the plaintiffs along with defendant No.7 Shaheen Akhtar were owners in possession of the house in question as the daughters of Ghulam Rasool deceased and that the alleged gift deed dated 5-7-1987 claimed by the defendants Nos.1 and 2 and the later Mutation No.2193 dated 11-7-1987 are illegal, void, ultra vires, malicious, in nature and result of coercion and undue pressure, collusive, fraudulent, got executed during the "marzulmaut" condition of their father and are inoperative against the rights of the plaintiffs. A third suit was instituted on 8-7-1996 by Altaf Hussain son of Ghulam Rasool against his brother Muhammad Iqbal son of Ghulam Rasool for possession through partition of 1-1/2 share of the house in question. All these suits were heard together by the learned Civil Judge, Faisalabad. It is important to note that all the heirs of Ghulam Rasool were impleaded in the first two suits whereas the third suit was only between Altaf Hussain and Muhammad Iqbal both sons of Ghulam Rasool. The suit instituted by Riaz Mehmood and others was resisted by the defendant No.1 Muhammad Iqbal through a written statement dated 3-10-1996 in which the said defendant No.1 Muhammad Iqbal admitted that the subject house is in possession of all the legal heirs of the deceased Ghulam Rasool. However, the tenants in the ground floor shops were paying rent to the defendants Nos.3 to 6 as well as to the defendant No.1 Muhammad Iqbal and that only one shop, a room on the back side and a garage situated in the house in question is in exclusive possession of defendant No.1 whereas an X-ray machine has been

affixed in the ground floor of the house in question which is being operated by the plaintiff Javed Iqbal and that the plaintiff No.3 Muhammad Shoaib is also practising in the ground floor lobby of the house in question. The said defendant No.1 in his written statement further narrated in paragraph No.2 of the written statement on facts that the defendant No.2 Altaf Hussain is not at all in possession of any portion of the house in question. The defendant No.1 further claim that the gift deed has been validly executed by the deceased Ghulam Rasool and that it bears the thumb impression of the deceased which was got in the presence of a local commission. The defendant No.1 Muhammad Iqbal further admitted in his written statement that at the time of execution of the gift deed the defendant No.2 Altaf Hussain was aged 16 years and was a minor. The defendant No.2 Altaf Hussain submitted a separate written statement dated 7-11-1995 and contended that a gift has been validly executed by his father Ghulam Rasool in the presence of a local commission appointed by the order of the Sub-Registrar. The defendant No.2 further contended that the defendant No.1 is in collusion with the other plaintiffs in the suit proceedings and that defendant No.2 is in possession of his own share of the house in question and that the suit has been instituted in order to harass the said defendant. The defendants Nos.3 to 6, the daughters submitted their joint written statement and claimed that they are the daughters of Ghulam Rasool deceased and are entitled to have 5/17 share as owner in the house in question and that they are receiving the rent to the extent of their share of ownership. It was further contended that the deceased was paralyzed and was suffering from "marzulmaut" and he did not appear before the Registrar himself and in order to conceal his sickness the proceedings of the local commission were manufactured for the registration of the gift deed. Rest of the contentions raised in the plaint were admitted by the said defendants Nos.3 to 6 and they contended that they have no objection to the decreeing of the suit as prayed for. The suit instituted by Altaf Hussain against his brother Muhammad Iqbal was also contested by the defendant Muhammad Iqbal through submission of his written statement dated 15-4-1997. In preliminary objection of the said written statement, the defendant Muhammad Iqbal contended that at the time of gift deed the plaintiff Altaf Hussain was a minor and no guardian on his behalf was appointed. It was further contended in preliminary objection No.2 that the possession was also not delivered to Altaf Hussain nor did he accept the gift therefore no right in the subject property was created in his favour on the basis of the gift deed. It is important to note that in para No.3 of the written statement the defendant Muhammad Iqbal reiterated that all the brothers and sisters are in possession of the subject property. However he is in possession of the subject property as the donee of the same in his own right. The suit instituted by Altaf Hussain was thus prayed to be dismissed.

2. On the basis of the pleadings of the parties, the learned Civil Judge framed the following consolidated issues:--

**ISSUES:**

- (1) Whether the plaintiff is entitled to the decree of separate possession through partition on the grounds mentioned in the plaint? OPP
- (2) Whether the plaintiffs are owner of the disputed property as legal heirs of Ghulam Rasool deceased and impugned gift deed No.9633 dated 5-7-1987 and Mutation No.21932 dated 11-7-1987 in favour of defendants Nos.1 and 2 are against law and fact, result of fraud and forgery and is liable to set aside and the plaintiffs are entitled to the relief claimed for? OPP
- (3) Whether the plaintiffs are owners of the disputed property as legal heirs of Ghulam Rasool deceased and impugned gift deed No.5-2-1987 and Mutation No 2132 dated 11-7-1987 in favour of the defendants Nos.1 and 2 are against law and facts, result of fraud and forgery and is liable to set aside and the plaintiffs are entitled to the relief claimed for? OPP

- (4) Whether the suit is bad for non-joinder of necessary parties? OPD
- (5) Whether the plaintiff has no cause of action to file the suit? OPD
- (6) Whether the suit is incorrectly valued for the purpose of court-fee and jurisdiction? OPD
- (7) What is the effect of preliminary objection No.2 of the written statement? OPD
- (8) Whether the suit is time barred? OPD-1 of other suit.
- (9) Whether the suit is mala fide, frivolous and collusive one and defendant No 2 is entitled to get special cost under section 35-A of C.P.C.? OPD-2 of other suit.
- (10) Whether the plaintiffs are estopped to file this suit by their words and conduct? OPD of other suit.
- (11) Relief.

3. The parties produced their respective oral as well as documentary evidence. The learned Civil Judge dismissed the suit of the sisters Mst. Qayyum Akhtar etc. and that of Riaz Mehmood etc. vide judgment and decree dated 28-3-2002 whereas the suit instituted by Altaf Hussain was decreed in his favour and a preliminary decree was passed vide judgment and decree dated 28-3-2002. The contesting parties Muhammad Shoaib, Riaz Mehmood, Mudassar Akhtar, Riaz Ayyub, Yasmeen Kausar, Naseem Kausar and Ghazala Yasmeen preferred an appeal against the judgment and decree dated 28-3-2002 whereas Riaz Mehmood, Javed Iqbal, Shoaib and Riaz Ayyub preferred a separate appeal against the judgment and decree of the trial Court and Qayyum Akhtar, Yasmeen Kausar, Naseem Akhtar and Ghazala Yasmeen preferred a third appeal against the judgment and decree dated 28-3-2002 of the trial Court. All these appeals were heard together by the learned Additional District Judge, Faisalabad. It is important to note that the four sisters i.e. Qayyum Akhtar, Yasmeen Kausar, Naseem Akhtar and Ghazala Yasmeen withdrew their appeal vide order dated 18-5-2004 on the basis of a compromise recorded by the learned Additional District Judge, Faisalabad and the appeal instituted by them was dismissed vide order dated 18-5-2004. The learned Additional District Judge vide judgment and decree dated 3-2-2005 dismissed the appeals titled Shoaib v. Altaf Hussain and Riaz Mehmood v. Muhammad Iqbal and the preliminary decree passed in the partition suit instituted by Altaf Hussain was upheld by the learned Additional District Judge. These two civil revisions have been instituted against the judgment and decree passed by the learned two Courts below.

4. The arguments of the parties have been addressed.

5. It is contended on behalf of the petitioners of two civil revisions that the execution of the gift-deed Exh.D2 has not been proved by the production of the two marginal witnesses. The learned counsel elaborated that only one marginal witness Muhammad Sarwar has been produced whereas the other witness Ghulam Farid was not produced by the respondents Nos.1 and 2. It is further contended that the local commission who was appointed to get the thumb impression of Ghulam Rasool upon the gift deed although appeared as DW-8 but he did not prove the contents of the gift deed and also the intention of the said Ghulam Rasool of making a valid gift. It is next contended that plain reading of Exh.D2 gift deed points out that the gift was only accepted by Muhammad Iqbal and there is no proof of the acceptance of the gift by Altaf Hussain donee who was a minor at that time. It is next contended that the subject property claimed to have been gifted is admittedly in the joint possession of all the legal heirs of Ghulam Rasool and the delivery of possession to the alleged donees was neither made nor is claimed nor proved. The learned counsel further contended that Ghulam Rasool, the executant of the gift deed was not identified by

the marginal witnesses of the gift without which the execution of the gift deed cannot be held to be proved. Reliance was placed on Mst.Rehmat Bibi and 6 others v. Bahadar Khan (2006 CLC 659) and Faqir Sain alias Muhammad Sain and another v. Ahmad Din and others (2008 SCMR 1062). It is further contended that the gift deed claimed by the respondents Nos.1 and 2 in their favour is a fraudulent document and was got prepared in order to deprive the other legal heirs of Ghulam Rasool from their legitimate right of inheritance in the subject property. The scribe of the gift-deed was not produced by the respondent Nos.1 and 2. The learned counsel finally concluded that fraud vitiates the entire transaction and no bar of limitation arises in the matter.

6. Conversely, the learned counsel for respondent No.1 Muhammad Iqbal has argued that Ghulam Rasool executant predecessor-in-interest of the parties was duly identified by himself before the local commission and the local commission who appeared before the trial Court was not cross-examined on this aspect of the matter. The learned counsel for Muhammad Iqbal further contended that although Altaf Hussain donee has not accepted the gift but the gift on his behalf was accepted by Muhammad Iqbal donee and the acceptance by Muhammad Iqbal shall be deemed to have been made on behalf of Altaf minor as well. The learned counsel argued that the entry made in the gift-deed ( ) indicates the acceptance of the gift on behalf of the donee as well. It is next contended that where the donor and donee are in joint possession of the property, delivery of possession is not necessary and any overt act of delivery of possession to the donee is sufficient compliance for a valid gift. Reference was made to section 152(3) of Muhammadan Law by D.F. Mulla. The learned counsel thus argued that a valid gift has been made and proved in favour of the respondent Muhammad Iqbal.

7. The learned counsel for the respondent Altaf Hussain has adopted the arguments of the learned counsel for Muhammad Iqbal respondent and further added that the delivery of subject property by father to a minor son does not suffer from any invalidity because the donee Altaf Hussain was minor and could not have accepted the gift. He has placed reliance to Chief Land Commissioner and another v. Maula Dad and others (1978 SCMR 264), Taus Khan v. Muhammad Shoaib 2002 MLD 651 and Rasheed Hussain Malik and another v. Mst. Hanifa Bai and others (2000 MLD 1729). It is further contended that there are concurrent findings of facts recorded by the two Courts below to the effect that the gift has been validly made and the delivery of the possession has also taken place to the donees and that the necessary condition of acceptance of the gift has been performed by both the donees. The learned counsel further contended that a registered document is a public notice to all the world and the limitation to challenge it runs from the date of its registration and not from the knowledge. The learned counsel concluded that Muhammad Iqbal and Altaf Hussain have been receiving the rent, therefore, it was a sufficient proof of the knowledge of the gift by the petitioners. The learned counsel in this respect relied upon section 155 of the Muhammadan Law by D.F. Mulla.

8. I have considered the arguments of the learned counsel for the parties and have gone through the record of this case.

9. The two courts below while dismissing the suit of the petitioners of the Civil Revisions have not considered the contents of the pleadings and the established facts of record available on the file with a judicial mind. The defendant No.1 Muhammad Iqbal in his written statement submitted to the suit instituted by the petitioner has not specifically stated as to when Ghulam Rasool the deceased father of the parties made a declaration of his not intention to make gift in favour of his two sons Muhammad Iqbal and Altaf Hussain. For the first time defendant No.1 Muhammad Iqbal made a disclosure of this fact when he appeared as DW-11 during the evidence. The first few lines of his examination in chief are relevant which are reproduced below:--

This story put forward by the defendant No.1 at the time of recording of his evidence is neither in his written statement nor is put to the plaintiffs or their witnesses and has been raised for the first time at the time of recording of his evidence.

10. It is important to note that Altaf Hussain the other donee who appeared as P.W.1. before the Trial Court did not at all claim making of the gift on 4-7-1987 by his father Ghulam Rasool in favour of his brother Muhammad Iqbal and the said Altaf Hussain rather he stated as P.W.1. that the father Ghulam Rasool made the gift on 5-7-1987. It is settled principle of civil litigation that none of the parties to the suit can produce evidence contrary to the facts stated in the pleadings. Another important factor which has been completely overlooked by the two courts below is that Altaf Hussain while appearing as P.W.1 in his examination in chief stated that at the time of the making of gift by his father on 5-7-1987 he was a minor aged about 15 years 7 months and 20 days therefore the gift was accepted on his behalf by his brother Muhammad Iqbal. His brother Muhammad Iqbal did not take up the plea of having accepted the gift on behalf of his brother Altaf Hussain in his written statement. The respondent No.1 Muhammad Iqbal further stated in his written statement that his brother Altaf Hussain was not in possession of any portion of the house in question. The other donee Altaf Hussain who appeared as P.W.1. also admitted in his cross-examination that he is not in possession of any portion of the house in question and that all the brothers and sisters are in joint possession of the same. The donee Altaf Hussain who has instituted the suit for partition against his brother Muhammad Iqbal has not based his claim on the gift deed Exh.D2 nor has alleged in the suit any gift in his favour by the father Ghulam Rasool deceased of the said property. The defendant No.1 Muhammad Iqbal while appearing as DW-11 also admitted that the father of the parties had National Identity Card.

11. It is admitted by all the parties that their father Ghulam Rasool was paralyzed before the alleged making of gift and in a previous suit pending in the court titled as Ghulam Rasool v. Farooq Ahmed before the Senior Civil Judge Faisalabad and a certified copy of which is Exh.D3 a Local Commission was appointed by the Senior Civil Judge vide order dated 18-12-1985 for recording statement of Ghulam Rasool through a local commission as he was paralyzed and could not move about and was also suffering from illness. This fact renders the physical and mental capacity of the donor to make the gift highly doubtful. It was for the beneficiaries to prove that their father Ghulam Rasool was in mentally fit condition, had an independent advice available to him and that he has made a valid offer of gift which has been accepted by both the donees. The document Exh.D1 does not contain the NIC number of the donor Ghulam Rasool. The donee Muhammad Iqbal alone claimed that he accepted the alleged gift but no date is mentioned below his signature on the document Exh.D2 by Muhammad Iqbal.

12. The making of a valid gift is dependent upon three essential requirements as are enumerated in section 149 of the book of Muhammadan Law by D.F. Mulla:--

- (1) A declaration of gift by donor.
- (2) The acceptance of gift by the donee.
- (3) Delivery of the possession of the subject property of the gift by the donor to the donee.

13. In a reported judgment Siraj Din v. Mst. Jamilan and another (PLD 1997 Lahore 633) it is laid down that when the making of a gift have been claimed by a legal heir to the exclusion of others then the three ingredients of declaration of the gift, its acceptance by the donee and cession of his physical domain even the subject

property by the donor must be proved through unambiguous and even impeachable evidence by the beneficiary/donee of such a gift. The donee of the gift had to discharge his onus by producing trustworthy proof that the donor had made the gift in his favour. All the elements of a valid gift in favour of defendants Nos.1 and 2 by their father Ghulam Rasool are not proved in the instant case by confidence inspiring evidence; even the reading of the document Exh.D2 does not make out a clear and an express intention of the donor to make the gift of the subject property in favour of defendants Nos.1 and 2. The father of the parties was suffering from serious sickness and was paralyzed and his thumb impression was obtained through appointment of a local commission which local commission has appeared as DW-8 Liaqat Ali Johar who has admitted in his cross-examination that the document Exh.D2 was not signed by the two witnesses Ghulam Farid and Muhammad Sarwar in his presence nor did they appear before him when he went to get the thumb impression of Ghulam Rasool on Exh.D2 on 5-7-1987. No independent person identified Ghulam Rasool at the time of alleged obtaining of his thumb impression by the local commission DW-8 upon the document Exh.D2. Only one of the marginal witnesses Muhammad Sarwar appeared as DW-9 but his presence at the time of obtaining the thumb impression of Ghulam Rasool deceased has been excluded by the said DW-8. Muhammad Sarwar was the brother of other witness Ghulam Farid who was an Advocate and who had died and was not produced to prove the document Exh.D2.

14. There was no reason for Muhammad Sarwar who was neither a relative of Ghulam Rasool nor of any of the parties to be present to sign the document Exh.D2. Further the document Exh.D2 does not bear the NIC number of the deceased Ghulam Rasool under his thumb mark. Thus the very making of the gift by Ghulam Rasool father of the parties in favour of defendants Nos. 1 and 2, Muhammad Iqbal and Altaf Hussain is highly doubtful and not proved in a confidence inspiring manner. The delivery of possession by Ghulam Rasool of the subject property exclusively to the defendants Muhammad Iqbal and Altaf Hussain is not established as well. Admittedly all the legal heirs of the deceased Ghulam Rasool are in joint possession of the same and Altaf Hussain donee has not even claimed to be in possession over any portion of the subject property nor had accepted the alleged gift in his favour. The defendant Muhammad Iqbal although claimed to have accepted the gift by signing the document Exh.D2 but it does not bear any date under his signature. He cooked up a new story in his examination-in-chief that the deceased Ghulam Rasool made the declaration of the gift on 4-7-1987 in his house which story is neither in the pleadings/written statement of the defendants nor is put to the plaintiff or their witnesses.

15. In view of all the above circumstances the claim of the defendants Nos.1 and 2 of having been the lawful beneficiaries of a lawful gift have been made in their favour is not at all proved. The suit instituted by the respondents Riaz Mehmood etc. deserve to be decreed and the gift deed dated 5-7-1987 and Mutation No.2193 dated 11-7-1987 are liable to be set aside.

16. The suit instituted by Altaf Hussain seeking partition of the subject property in his favour of the subject house to the exclusion of other legal heirs is liable to be dismissed. The Civil Revision No.743 of 2005 and Civil Revision 1225 of 2005 are accordingly accepted and the impugned judgments and decrees dated 28-3-2002 and 3-2-2005 respectively passed by the two courts below are set aside with no orders as to costs.

17. The Criminal Original No.15 of 2009 in Civil Revision No.1225 of 2005 has no merits and substance is therefore dismissed.

M.H./R-19/L

Order accordingly.

