JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

CIVIL REVISION NO.196 OF 2019

&

REGULAR FIRST APPEAL NO. 713 OF 2021

RAZIA BEGUM & 3 OTHERS

Vs

AQEEL AHMAD SHEIKH & 5 OTHERS

Petitioners/Appellants by	**:**	**Hafiz Arfat Ahmad Ch. Advocate in both the cases.**
Respondents by	**:**	**Respondent No.1 in person in both the cases.** **Mr. Abdul Rauf Qureshi, Advocate, for Respondent No. 3 in both the cases.** **Mr. Iqbal Hassan, Advocate for Respondent No. 6 in both the cases.**
Date of hearing	**:**	**27.02.2025**

MUHAMMAD AZAM KHAN, J.

1. By this single judgment, I intend to dispose of Civil Revision No.196/2019 filed against the order dated 09.02.2019 **("Impugned Order")** and Regular First Appeal No.713/2021 filed against the Order & Decree dated 05.05.2021 **("Impugned Order & Decree")** both passed by the learned Civil Judge, Islamabad (West) **("Trial Court")** in Suit for Partition, Separate Possession, Rendition of Accounts, Recovery of Profit and Permanent Injunction **("Suit")** filed by the Respondent No.1/Plaintiff.

2. Both the above-mentioned cases i.e. the Civil Revision and Regular First Appeal, have been filed by the Petitioners/Appellants against the Impugned Order (through which their applications under Order I, Rule 10 of the Code of Civil Procedure, 1908 ("CPC") were dismissed) and the Impugned Judgment & Decree (through which the learned Trial Court passed a preliminary decree in the Suit filed by the Respondent No.1/Plaintiff), respectively.

3. The brief facts of the case in hand are that on 11.05.2016, the Respondent No. 1/Plaintiff filed the Suit contending therein that he and the Respondents Nos. 2 to 5/Defendants Nos. 1 to 4 are real brothers, who are joint owners of Plots Nos. 40, 41 & 42 **("Suit Plots")** located in Industrial Area, Sector I-9, Islamabad. The Suit Plots Nos. 40 & 41 are one unit and Suit Plot No. 42 is a separate unit. The Suit Plots Nos. 40 & 41 are measuring 200x250 Sq. Ft., whereas, Suit Plot No. 42 is measuring 100x250 Sq. Ft. They are owners of equal shares in the Suit Plots and there is a joint business of Marble Tiles which is being run on Suit Plots Nos. 40 & 41, whereas, the Suit Plot No. 42 is rented out. According to the Respondent No. 1/Plaintiff, the Suit Plots were given to him as well as to the Respondents No. 2 to 5/Defendants Nos. 1 to 4 by their father in his life time in the year 2004 and thereafter Suit Plots Nos. 40 & 41 were transferred in the names of the Respondent No. 1/Plaintiff and the Respondents No. 2 to 5/Defendants Nos. 1 to 4 by the Respondent No.6 [Capital Development Authority **("CDA")**] vide Transfer Letter No.CDA/DEM-38(376)IM/72/4061 dated 13.09.2004 and Suit Plot No. 42 was transferred vide Transfer Letter No.CDA/DEM-38(376-A)/IM/72/4235 dated 24.09.2004. The Respondent No.1/Plaintiff further contended that at the time of transfer, there were two businesses already running on the suit properties which were also gifted out by the father to the Respondent No.1/Plaintiff and the Respondents Nos. 3 to 5/Defendants Nos. 2 to 4, while the Respondent No. 2/Defendant No. 1 was given handsome amount for his independent business who started his business of sale of new and used computers as well as computer accessories in the name & style of "M/S Pakistan Business Machine" in Blue Area, Islamabad. As such, the Respondent No. 1/Plaintiff and the Respondents Nos. 2 to 5/Defendants Nos. 1 to 4 stood partners/co-owners of equal shares in the Suit Plots and business being run therein. The Respondent No. 1/Plaintiff and the Respondents Nos. 2 to 5/Defendants Nos. 1 to 4 stood partners of equal shares in the marble and weighing scale business exclusively. It was settled between the parties that the marble business would be controlled by the Respondents No. 4 & 5/Defendants Nos. 3 & 4, whereas, the business of weighing scale would be controlled by the Respondent No. 1/Plaintiff and the Respondent No. 3/Defendant No. 2. For the purpose of smooth running of both the businesses, it was mutually decided by the parties that Suit Plots Nos. 40 & 41 will be demarcated by 3/5 (for marble

business) and 2/5 (for weighing scale), as such, a metal fence was erected a long ago. During the life time of father of the Respondent No. 1/Plaintiff, there was no dispute between the parties and all the matters were going on smoothly, but soon after demise of the father on 03.10.2013, the Respondents Nos. 2, 4 & 5/Defendants Nos. 1, 3 & 4 started embezzlement in proceeds of the marble business in connivance with each other. The Respondent No. 2/Defendant No. 1 had no concern whatsoever either in the marble business or in the weighing scale business. They also stopped to maintain register of accounts. The Respondent No. 1/Plaintiff further contended in the plaint that all the partners used to take their share from the business of marble around Rs. 50,000/- per month and around Rs. 12,000/- from the business of weighing scale. In this way, every partner used to take Rs. 60,000/- to Rs. 65,000/- per month from both the businesses. The Respondent No. 1/Plaintiff and the Respondent No. 3/Defendant No. 2 were regularly paying the proportionate income to the Respondents Nos. 4 & 5/Defendants Nos. 3 & 4, but after death of their father, the Respondents Nos. 4 & 5/Defendants Nos. 3 & 4 started paying only Rs. 10,000/- per month to the Respondent No. 1/Plaintiff and the Respondent No. 3/Defendant No. 2. The Respondent No. 1/Plaintiff and the Respondent No. 3/Defendant No. 2 whenever demanded register of accounts, the Respondents Nos. 4 & 5/Defendants Nos. 3 & 4 denied to show the register. Since the demise of their father, the Respondent No. 1/Plaintiff was receiving his 1/5th share in rent and in “weighing scale” business as noted above, whereas, the Respondents Nos. 4 & 5/Defendants Nos. 3 & 4 were paying Rs. 10,000/- approximately to the Respondent No. 1/Plaintiff and Rs.10,000/- to the Respondent No. 3/Defendant No. 2 on the pretext that the business is running in loss. The Respondent No. 1/Plaintiff asked the Respondents Nos. 4 & 5/Defendants Nos. 3 & 4 to show register of accounts regarding business of marble and distribute/pay balance profit to the Respondent No. 1/Plaintiff and the Respondent No. 3/Defendant No. 2 according to the maintained account. The Petitioner No. 1/Plaintiff also asked Respondents Nos. 4 & 5/Defendants Nos. 3 & 4 to hand over separate possession of his share in Suit Plots but they kept on delaying the matter on one pretext or the other, rather the Respondents Nos. 2, 4 & 5/Defendants Nos. 1, 3 and 4 in connivance with each other, tried to unearth the partition erected between 2/5 share and 3/5 share in order to grab and dispossess the Respondent No. 1/Plaintiff and the Respondent

No. 3/Defendant No. 2 from their valuable property. On 10.05.2016, the Respondent No. 2/Defendant No. 1 attacked the Respondent No. 1/Plaintiff with hatchet, used abusive language and made vulgar insults. Due to the loud commotion, a large number of people gathered, and upon seeing them, the Respondent No. 2/Defendant No. 1 threatened the Respondent No. 1/Plaintiff, stating that if the metal partition wall was not removed by 11.5.2016, he would kill the Respondent No. 1/Plaintiff. At that moment, the Respondents Nos. 4 & 5/Defendants No. 3 & 4 supported the Respondent No. 2/Defendant No. 1 and also verbally abused the Respondent No. 1/Plaintiff in front of witnesses Ghulam Mujtaba and Muhammad Tariq Mehmood. The Respondent No. 1/Plaintiff has serious apprehensions that the Respondents Nos. 4 & 5/Defendants Nos. 3 & 4 in connivance with the Respondent No. 2/Defendant No. 1 would grab the property of the Respondent No. 1/Plaintiff and the Respondent No. 3/ Defendant No. 2 and shall not pay balance and proper profit to them out of marble business, nor they would hand over separate possession of the Suit Plots.

4. After issuance of notices, the Respondents No. 2 to 5/Defendants Nos. 1 to 4 contested the suit by filling their written statements and out of divergent pleadings of the parties, the learned Trial Court framed issues vide Order dated 13.05.2017 and matter was fixed for evidence of the Respondent No.1/Plaintiff. On 12.09.2017, present Petitioners/Appellants No. 1 & 3 filed an Application under Order I, Rule 10, CPC for impleadment of their names in the panel of defendants, whereupon on 20.09.2017, the Respondents Nos. 2, 4 & 5/Defendants Nos. 1, 3 & 4 made a statement that they had no objection upon acceptance of said application. On the same date, the Respondent No. 1/Plaintiff moved an application seeking direction for personal appearance of the Petitioners/Appellants Nos. 1 & 3 before the learned Trial Court on the ground that application under Order I, Rule 10, CPC was never filed by the Petitioners/Appellants Nos. 1 & 3 with their free will, therefore, he prayed that Petitioners/Appellants Nos. 1 & 3 be examined before the learned Trial Court to ascertain the fact whether the application seeking impleadment was filed with their free will and consent or not? The said application was allowed vide Order dated 04.07.2018 and Petitioners/Appellants Nos. 1 & 3 were directed to appear in person before the learned Trial Court. On 18.09.2018, the

Petitioners/Appellants Nos.1 & 3 appeared before the learned Trial Court and stated that they have filed Application under Order I, Rule 10, CPC without any pressure. On 20.11.2018, Petitioners/Appellants Nos. 2 & 4 [Waseema Jamil and Bushra Shaheen] also moved an application seeking their impleadment in the panel of defendants, however, the learned Trial Court vide the Impugned Order dismissed both the applications filed by the Petitioners/Appellants and thereafter the learned Trial Court preliminary decreed the Respondent No. 1/Plaintiff's Suit filed by the Respondent No.1/Plaintiff vide the Impugned Judgment & Decree thereby determining the shares of the parties to the Suit. In addition to that, the learned Trial Court also appointed a Local Commission to submit a report containing answers to following questions:-

(i) Whether the Suit Plots are partitionable?

(ii) If the Suit Plots are partitionable, what should be the mode of partition?

(iii) If the Suit Plots are not partitionable then ascertain the market value of the suit plots.

5. Being aggrieved of the Impugned Order and Judgment and Decree, the Petitioners/Appellants have filed instant Civil Revision as well as Regular First Appeal.

6. The learned counsel for the Petitioners/Appellants argued that the learned Trial Court ignored this aspect of the matter that the Petitioners/Appellants have already approached the learned Trial Court for their impleadment in the Suit and the order of the learned Trial Court whereby the Petitioners/Appellants' applications under Order I, Rule 10, CPC were declined, have been challenged in Civil Revision No.196/2019 before this Court; that the facts pertaining to the aforementioned order and pendency of Civil Revision were highlighted during proceedings before the learned Trial Court and same were duly recorded in the Impugned Order, but unfortunately, instead of exercising restraint, the learned Trial Court proceeded to pass a preliminary decree thereby creating a complication of serious nature besides adding burden on the docket of this Court in the shape of Appeal in hand; that the learned Trial Court instead of passing a decree in the Suit, should have waited for culmination of the proceedings pertaining to the Civil Revision No.196/2019, which was pending before this Court; that the question pertaining to the impleadment of the

Petitioners/Appellants is yet to be determined by this Court in Civil Revision No.196/2019, the Impugned Order and Decree passed meanwhile has direct implication on the claims/rights of the Petitioners/Appellants as they, along with Respondent No. 1/Plaintiff and the Respondents Nos. 2 to 5/Defendants Nos. 1 to 4, are undeniably the legal heirs of the predecessor-in-interest of the parties namely Sheikh Jamil Ahmad, therefore, without first hearing the Petitioners/Appellants, no final order/decree could have been passed; that this Court has already restrained the learned Trial Court vide Order dated 26.02.2020 from passing final judgment/decree in the pending Civil Suit; that the purpose of issuing the said injunctive order, *inter alia* was to avoid multiplicity of proceedings but the spirit of the said order was unfortunately not appreciated by the learned Trial Court while passing the Impugned Order and Decree; that the injunctive Order dated 26.02.2020 still holds the field as the same has never been altered/recalled/amended by this Court; that on 20.05.2019, this Court while taking up CM. No.02/2019 in C.R. No.196/2019 stayed the proceedings before the learned Trial Court and this order was slightly modified on a subsequent date by this Court on the request of learned counsel for the Respondent No. 3/Defendant No. 2 that *"the proceedings before trial Court may continue, however, no final judgment and decree shall be passed"*; that the substance of the Impugned Order and Decree indicates that it is final in nature for all practical purposes as far as the claims/rights of the Petitioners/Appellants are concerned; that expressions used in the Impugned Order give an impression as if there is no other claimant of the Suit Plots; that the learned Trial Court, instead of waiting for the disposal of Civil Revision No.196/2019, has preempted to pass an order that conclusively holds that the Suit Plots only belong to the male members of family (Respondent No 1/Plaintiff and the Respondents Nos. 2 to 5/Defendants Nos. 1 to 4); that the tone and tenor of the Impugned Order and Decree and conclusive and definite expressions used therein leave absolutely no doubt that the Impugned Order and Decree is final in nature; that a preliminary decree can be passed only where there is no opposing voice/counter claim, this is not the situation in the case at hand; that the Petitioners/Appellants are entitled to receive shares out of the Suit Plots and in order to get their shares, they are making their utmost efforts to join the proceedings pending before the learned Trial Court which fact was duly recorded in the Impugned Order, but despite discussing the

details of impleadment applications and pendency of Civil Revision No.196/2019, the learned Trial Court proceeded to pass the Impugned Order and Decree; that the Impugned Order and Decree passed by the learned Trial Court lacks the characteristics of a "preliminary decree" and by all means, it is a final decree; that it is by now a settled proposition that the preliminary decree only declares the uncontroversial rights and obligations of the parties leaving other matters (in which the parties are at variance) to be determined in subsequent proceedings which *inter alia* involves recording of evidence; that the preliminary decree is invariably passed based on the undisputed facts; that the Impugned Order and Decree cannot be termed as a "preliminary decree" as it has all the traits of a final decree and it could not have been passed without hearing the Petitioners/Appellants and without recording of evidence; that the learned Trial Court, while declining the applications for impleadment observed in Para No. 5 of the Impugned Order that *"the transfer on the basis of said gift was made in September, 2004 by the CDA that since 2004 to the filing of the suit in the year 2016, the applicants never filed any suit for recovery of their shares"*, such observation is completely unjustified inasmuch father of the contesting parties passed away on 03.10.2013 and it was after his demise that the Respondent No.1/Plaintiff and the Respondents Nos. 2 to 5/Defendants Nos. 1 to 4 started refusing to make any payments to the Appellants/Petitioners; that when the predecessor-in-interest of the parties was alive, the private respondents never refused to make payments to the Petitioners/Appellants according to their respective shares so there was no occasion for the Petitioners/Appellants to file a suit for recovery; that immediately after filing of impleadment application by the Petitioners/Appellants Nos. 1 & 3, the Respondent No. 1/Plaintiff filed an application seeking direction for their personal appearance which application was allowed and the Petitioners/Appellants No. 1 & 3 put appearance before the learned Trial Court and submitted in clear words that they filed the above said application without any pressure; that this statement, quite surprisingly, was subsequently ignored by the learned Trial Court while passing the Impugned Order; that the applications were filed by the Petitioners/Appellants for the reason that their valuable rights were involved, and it was/is not something done at the behest of someone else; that when the learned Trial Court through recording of statements of the Petitioners/Appellants, had satisfied itself that the

applications filed by them were genuine and involved precious rights of female members of the family, the proper course left for the learned Trial Court then was to allow the impleadment applications; that superior Courts have consistently held that the parties should be given fair opportunity to prove their cases before the Courts of law and their matters should not be decided by the Courts through summary proceedings; and that the Petitioners/Appellants being legal heirs of the predecessor-in-interest of the contesting parties are necessary parties in the Suit filed by the Respondent No. 1/Plaintiff and without their presence, no effective adjudication could have taken place. Lastly, the learned counsel requested that the Impugned Order as well as the Impugned Order and Decree passed by the learned Trial Court may be set-aside, and applications filed by the Petitioners/Appellants under Order I, Rule 10, CPC may be accepted.

7. The Respondent No.1 appearing in person and the learned counsel for the Respondent No. 3 contended that the learned Trial Court has rightly passed the Impugned Order as well as the Impugned Order and Decree which need no interference by this Court; that both the Impugned Order as well as the Impugned Order and Decree are well reasoned and have been passed keeping in view the evidence available on the record; that there is no illegality or irregularity in the Impugned Order as well as the Impugned Order and Decree; that the interim stay granted by this Court in titled Civil Revision was regarding the final judgment and decree and the learned Trial Court was justified in granting the preliminary decree as the final decree has yet to be passed. Finally, it is prayed that the titled Civil Revision and the Appeal may be dismissed.

8. There is no one in attendance on behalf of the Respondents Nos. 2, 4 and 5 in both the titled cases therefore, the said Respondents are proceeded against ex-parte.

9. The learned counsel for the parties heard and record perused with their able assistance.

10. The predecessor-in-interest of the parties namely Sheikh Jameel Ahmad was the owner of the Suit Plots, who gifted those plots among his five sons i.e. Respondent No. 1/Plaintiff and the Respondents Nos. 2 to 5/Defendants Nos. 1 to 4 in the year 2004. The Suit Plots Nos. 40 & 41 were then transferred on their

names by the Respondent No. 6 vide Transfer Letter No.CDA/DEM-38(376)IM/72/4061 dated 13.09.2004 and Suit Plot No. 42 was transferred vide Transfer Letter No.CDA/DEM-38(376-A)/IM/72/4235 dated 24.09.2004. The predecessor-in-interest of the parties died on 03.10.2013, and the Petitioners/Appellants failed to challenge the said gift by their father before any forum or Court of law. On 11.05.2016, the Respondent No. 1/Plaintiff filed the Suit against his brothers, i.e. the Respondents Nos. 2 to 5/Defendants Nos. 1 to 4. During the pendency of the Suit, the Petitioners/Appellants submitted applications for impleadment under Order I, Rule 10, CPC, arguing that they were necessary parties. Their claim was based on the fact that when the predecessor-in-interest of the parties was about to execute a gift in favor of Respondent No. 1/Plaintiff and Respondents Nos. 2 to 5/Defendants Nos. 1 to 4, a promise was made to them regarding the payment of their shares. Those applications were dismissed by the learned Trial Court vide the Impugned Order on 09.02.2019 on the ground ***"That the transfer on the basis of said gift deed was made in September, 2004 by the CDA. That since 2004 to filing of this suit in year 2016, the applicants never filed any suit for recovery of their shares. That when all the documents have been written down then the question is that why the shares of the sisters/applicants have not been mentioned. Hence, to my view there is nothing on the record to show that any commitment for payment of shares of the applicants have been made during the life time of their predecessor-in-interest and neither any question has been raised during his life time. Therefore, I do not agree with the contention raised by the applicants, hence, they are not proper and necessary parties to the suit."*** After the dismissal of their applications, the case proceeded and impugned preliminary decree was passed by the learned Trial Court on 05.05.2021. The Respondent No. 1/Plaintiff during the proceedings before this Court stated that the Suit in which the preliminary decree was issued, has been withdrawn.

11. The learned Trial Court has rightly dismissed the applications of the Petitioners/Appellants under Order I, Rule 10, CPC on the basis of well-reasoned justification mentioned in the Impugned Order that the Petitioners/Appellants have not challenged/claimed their shares during the lift time of the predecessor-in-interest of the parties from 2004 till his death on 03.10.2013. There are three

essential ingredients of Gift i.e. (i) offer by the donor, (ii) acceptance by the donee, and (iii) the delivery of possession. Reliance in this regard is placed on the judgment of august Supreme Court of Pakistan in the matter of *Hayat Muhammad through LRs…vs…Muhammad Riaz* reported as **2023 SCMR 2012**, wherein august Supreme Court has held as under:-

> *"3. "Gift" is defined in section 138 of the Muhammadan Law as: "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." The prerequisites of a valid gift are: (i) offer by the donor; (ii) its acceptance by the donee; and (iii) the delivery of possession. A valid gift comes into existence as soon as the three ingredients are completed. Under Muhammadan Law, any Muslim can make a valid gift of movable or immovable property orally, however, it may be reduced into writing as proof. The record suggests that upon the oral gift, the mutation in question was effected by the predecessor in the name of the respondent. As discussed above, that in the earlier suit for possession through right of pre-emption filed by the predecessor's niece against the respondent, the predecessor appeared before the court and made a statement under oath, acknowledging that he gifted the disputed property to the respondent and thereafter transferred it to the name of the respondent in the revenue record through the mutation in question. A copy of the said statement given by the predecessor was produced as evidence in the present proceedings, which remained unchallenged, therefore, it is strong proof of an oral gift, followed by the disputed mutation. His statement in the said litigation before the competent court of law proves his bona fide intention, free will, and consent and thereby, confirms the execution of a valid gift and acceptance of the mutation in question in the previous litigation. The said revenue record reflects that the predecessor himself appeared before the revenue authorities and signed the mutation in question in presence of the revenue authorities and the witnesses. The declaration of gift by the donor gathers strength by the civil transaction between him and the respondent with regard to transfer of the property through the mutation in question. Under such circumstances, the predecessor cannot resile from his deeds, hence, is estopped to challenge the validity of the gift on any ground."*

12. All three essential ingredients of a valid gift have been duly fulfilled. The necessary steps for the transfer of the Suit Plots were completed, and as a result, the Respondent No. 6/CDA successfully transferred ownership of the Suit Plots to the Respondent No. 1/Plaintiff and the Respondents Nos. 2 to 5/Defendants Nos. 1 to 4. As such, it has become a past and closed transaction, which has its legal binding upon the parties and cannot be altered or undone.

13. In light of the above discussion, this Court is of the view that the titled Civil Revision as well as the Appeal are not competent. The learned counsel for the Petitioners/Appellants has failed to point out any illegality or irregularity in the Impugned Order as well as the Impugned Order and Decree which as such need no interference by this Court. Hence, both titled Civil Revision as well as the Appeal are hereby ***dismissed*** with no order as to costs.

(MUHAMMAD AZAM KHAN)
JUDGE

Announced in the Open Court on _____ day of March, 2025.

JUDGE

//Mehboob//