JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.F.A.No.39 of 2014
Muhammad Mujtaba Khawaja
Versus
Khawaja Azam Ali and others

Dates of Hearing:	14.03.2023 & 03.04.2023
Appellant by:	Mr. Ali Nawaz Kharal, Advocate.
Respondents by:	Raja Zafar Khaliq Khan, Advocate for respondents No.1 to 6. Mr. Imran Haider Shah, Advocate for respondent No.7.

MIANGUL HASSAN AURANGZEB, J:- Through the instant regular first appeal the appellant, Muhammad Mujtaba Khawaja (**"Mujtaba"**), impugns the judgment and decree dated 03.03.2014 passed by the learned Single Bench of this Court whereby his suit for *"declaration, cancellation of documents, permanent injunction and possession through partition"* filed against the private respondents, who are his siblings and/or their legal heirs, was dismissed.

2. The facts essential for the disposal of the instant appeal are that Khawaja Muhammad Murtaza (**"Murtaza"**) was the owner of House No.6, Street No.4, F-6/3, Islamabad (**"the suit house"**). He died on 03.07.2008.

3. Murtaza was survived by five sons and four daughters. His sons were (i) Mujtaba (appellant / plaintiff), (ii) Khawaja Azam Ali (respondent No.1 / defendant No.1), (iii) Khawaja Muhammad Mustafa (respondent No.2 / defendant No.2), (iv) Khawaja Ibrahim Murtaza (respondent No.3 / defendant No.3), (v) Khawaja Najib Murtaza, who died on 15.05.2010 and is survived by one widow, Mst. Nazmin Murtaza (respondent No.4 / defendant No.4), one son, Alamdar Murtaza (respondent No.5 / defendant No.5) and one daughter, Mst. Zehra Nadin Murtaza (respondent No.6 / defendant No.6). Murtaza's daughters' were (i) Mst. Shahida Kazmi (respondent No.8 / defendant No.8), (ii) Mst. Sajida Nayyar Aabdi

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(respondent No.9 / defendant No.9), (iii) Mst. Nusrat Afzal (respondent No.10 / defendant No.10), and (iv) Mst. Asifa Murtaza (respondent No.11 / defendant No.11).

4. Vide letter dated 04.10.2000 (Exh.DW/2/3) from the Estate Management Directorate of C.D.A., ownership in the suit house was transferred from Murtaza's name to his four sons, excluding Mujtaba. This transfer was made on the basis of Murtaza's statement of an oral gift recorded on 02.10.2000 before the Deputy Director, Estate Management, C.D.A. A memorandum of the oral gift is also said to have been executed on 31.08.2000 by Murtaza in favour of his four sons, excluding Mujtaba.

5. Respondents No.1 to 6 transferred the suit house to Mian Muhammad Aslam (respondent No.7 / defendant No.7) through registered sale deed dated 22.02.2011. At all material times since 22.02.2011, Mian Muhammad Aslam has been in possession of the suit house.

6. Mujtaba's case is that in the first week of March 2011, the appellant came to know that his brothers were transferring the suit house in favour of respondent No.7. Mujtaba is said to have sent an email on 12.03.2011 (Exh.P/2) to the Chairman, Capital Development Authority ("C.D.A."**), informing the latter that the suit house belonged to his father, Murtaza, and was to be shared between his four sons, including Mujtaba, and the legal heirs of Najib Murtaza; that he had come to know that the suit house was being sold to a third party and that he had not given a power of attorney to anyone for its sale. Mujtaba requested the Chairman, C.D.A. to intervene in the matter and keep the matter in abeyance until he appointed an attorney or his brothers agreed to give him his due share in the sale proceeds.**

7. Vide letter dated 08.04.2011 (Exh.P/3), the C.D.A. informed Mujtaba that his request had been examined by the Legal Advisor of the C.D.A., who had advised that Murtaza had, during his lifetime, gifted the suit house to his four sons, excluding him, and that Murtaza had recorded his statement in favour of his four sons,

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excluding Mujtaba, after which the suit house was mutated in their names. Mujtaba was also advised by the C.D.A. to *"seek legal remedy if any from the Court of competent jurisdiction"* since the suit house had already been transferred from Murtaza's name during his lifetime.

8. On 02.07.2011, Mujtaba filed a suit seeking a declaration to the effect that he is the owner of 2/14th share in the suit house. Mujtaba also sought a declaration that the alleged oral gift in favour of his brothers and the registered sale deed dated 22.02.2011 executed by his three brothers and legal heirs of his fourth brother in favour of Mian Muhammad Aslam were *"illegal, against facts, bogus, without authority, without consideration, and ineffective"* on Mujtaba's rights and share in the suit house. Mujtaba sought the cancellation of the alleged oral gift, acknowledgment of the oral gift as well as the registered sale deed dated 22.02.2011. The said suit was contested by respondents No.1 to 3 by filing a joint written statement. Respondents No.4 to 6, who are the legal heirs of Khawaja Najib Murtaza, filed a separate written statement contesting Mujtaba's suit. Mian Muhammad Aslam also filed a contesting written statement.

9. From the divergent pleadings of the contesting parties, the following issues were framed:-

> ***"1. Whether the acknowledgment dated 31-8-2000of the oral gift is illegal, false, and forged without having any legal effect upon the rights of the plaintiff? OPP***
> ***2. Whether the plaintiff is entitled to the decree, as prayed for? OPP***
> ***3. Whether the owner of suit property late Khawaja Muhammad Murtaza was not entitled to transfer the property in favour of defendants No.1, 2 & 3? OPP***
> ***4. Whether the plaintiff is entitled to inherit the property when it is already transferred by his father late Khawaja Muhammad Murtaza in the name of defendant No.1, 2 & 3 during his life time? OPP***
> ***5. Whether the sale deed in favour of defendant No.7 is liable to be cancelled? OPP***
> ***6. Whether the transfer of suit property in the name of defendant No.1, 2 & 3 is the result of forgery & fraud committed by defendants No.1, 2, 3 & 13? OPP***
> ***7. Whether defendant No.7 is bonafide purchaser of suit property? OPD No.7***

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8. *Whether the oral gift deed dated 08-01-2000 made by father of plaintiff in favour of defendants No1 to 3 and the predecessor of defendants No.4 to 6 was made according to law? OPD*
9. *Whether the suit is not maintainable in its present form? OPD*
10. *Whether the plaintiff has no cause of action against the defendants? OPD*
11. *Whether the plaintiff is estopped by his own words and conduct to bring the present suit? OPD*
12. *Whether the suit is time barred? OPD*
13. *Whether the suit is false, frivolous and vexatious? OPD*
14. *Relief."*

10. Mujtaba's wife, Mst. Zahra Imtiaz Khawaja, appeared as his attorney and gave evidence as PW.1. The three documents produced in her evidence were her general power of attorney (Exh.P/1); email dated 12.03.2011 from Mujtaba to the Chairman, C.D.A. (Exh.P/2); and the C.D.A.'s letter dated 08.04.2011 (Exh.P/3). The Joint Sub-Registrar, Islamabad appeared as DW.1 and produced the sale deed dated 22.02.2011 (Exh.DW-1/1). The Estate Management Officer, C.D.A. appeared as DW-2 and produced the acknowledgment for filing the application for transfer (Exh.DW-2/4); personal appearance certificate of donor and donees regarding recording the statement of oral gift (Exh.DW-2/5); indemnity bond executed by the donor (Exh.DW-2/7); indemnity bond executed by the donees (Exh.DW-2/8); no-demand certificate regarding property tax, etc. (Exh.DW-2/9); allotment of residential plot *i.e.* suit property in the name of Khawaja Muhammad Murtaza, (Exh.DW-2/10); NOC in respect of suit house (Exh.DW-2/11); and conveyance deed (Exh.DW-2/12).

11. Murtaza's daughters, who were defendants No.8 to 11 in the suit, were proceeded against *ex-parte* but Mst Sajida Nayyar Aabdi / defendant No.9 appeared as DW-3 and identified her signature as a witness on the memorandum of the oral gift (Exh.DW-2/6). She had also deposed that her father, Murtaza, had appeared before the C.D.A. Another daughter of Murtaza, namely Mst. Asifa Murtaza / defendant No.11 appeared as DW-4 and gave evidence which was in support of the oral gift of the suit house made by her father in favour of her four brothers excluding Mujtaba. Khawaja Ibrahim Murtaza /

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defendant No.3 appeared as DW-5; Khawaja Azam Ali / defendant No.1 appeared as DW-6; Khawaja Muhammad Mustafa / defendant No.2 appeared as DW-7; and Mst. Naznin Murtaza / defendant No.4 appeared as DW-8. These witnesses corroborated each other's statements to the effect that an oral gift of the suit house was made by Murtaza in favour of his four sons excluding Mujtaba.

12. Vide judgment and decree dated 03.03.2014, Mujtaba's suit was dismissed by the learned Single Bench of this Court. Mujtaba has assailed the said judgment and decree in the instant appeal.

13. Learned counsel for Mujtaba, after narrating the facts leading to the filing of the instant appeal, submitted that even though the suit house was transferred vide C.D.A.'s letter dated 04.10.2000 in favour of Murtaza's other four sons, who in turn transferred the same vide registered sale deed dated 22.02.2011 in favour of respondent No.7, the suit was not filed until 02.07.2011 because it was only due to the C.D.A.'s letter dated 08.04.2011 that Mujtaba came to know about the transfer of the suit house; that the suit was filed within the limitation period provided by law; that the learned Single Judge erred by not appreciating that the burden was on the donees to prove the execution of a valid gift and that the said burden had not been satisfactorily discharged; that the private defendants in the suit did not prove the factum of the offer and acceptance of the gift as well as the delivery of possession of the immovable property; that all the witnesses produced by the private defendants were interested witnesses and their testimonies lacked independence and credibility; that there is no plausible evidence on the record to justify Mujtaba's exclusion from the gift; that the evidence adduced by the private defendants was contradictory in nature; that the memorandum of the oral gift (Exh.DW-2/6) had not been proved inasmuch as one of the attesting witnesses, Bashir Ahmed, was not produced to give evidence in support of the execution of such gift; that the second attesting witness, Sajida Nayyar Abidi, was a woman and her being a marginal witness of the memorandum of the oral gift was not sufficient to prove its

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execution; that the memorandum of the oral gift had not been proved in accordance with Section 123 of the Transfer of Property Act, 1882 read with Section 17 of the Registration Act, 1908; that at the time of the execution of the alleged gift, the donor was about ninety-five years of age and not in a medically fit condition to execute such a gift; that the donor loved his sons equally and the exclusion of Mujtaba from the gift does not appeal to a prudent mind; that the witnesses produced by the private defendants did not testify as to the date and time of the execution of the oral gift; and that the impugned judgment and decree is not in accordance with the law or facts of the case. Learned counsel for Mujtaba prayed for the appeal to be allowed and for the suit instituted by him to be decreed.

14. On the other hand, learned counsel for respondents No.1 to 6 submitted that the suit house was transferred to respondents No.1 to 6 on the basis of a declaration of an oral gift made by Murtaza in the office of the C.D.A.; that on the basis of such oral gift, the C.D.A. issued letter dated 04.10.2000 whereby the suit house was transferred to respondents No.1 to 6; that a statement of the oral gift (Exh.DW-2/5) made by Murtaza in favour of his four sons, excluding Mujtaba, was recorded in the office of the C.D.A.; that the memorandum of the oral gift (Exh.DW-2/6) was executed as a matter of abundant caution; that it was not on the basis of the said memorandum of the oral gift that the suit house was transferred but on the basis of the oral gift made by Murtaza in the office of the C.D.A.; that the four daughters of Murtaza did not object to the oral gift made by their father in favour of their four brothers excluding Mujtaba; that Mujtaba's sister, Syeda Sajida Nayyar Abidi, who was one of the attesting witnesses of the memorandum of the oral gift, had appeared as DW-3 and deposed that her father had announced his decision about the gift of the suit house in favour of his four sons, excluding Mujtaba; and that the execution of the oral gift by Murtaza in favour of his four sons had adequately been proved during the trial. Learned counsel for respondents No.1 to 6 prayed for the appeal to be dismissed.

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15. Learned counsel for respondent No.7 submitted that after the suit house was transferred vide C.D.A.'s letter dated 04.10.2000 (Exh.DW-2/3) in favour of Murtaza's four sons, excluding Mujtaba, they sold the same to respondent No.7 through registered sale deed dated 22.02.2011 (Exh.DW-1/1); that on the basis of the said registered sale deed, the suit house was transferred to respondent No.7 through C.D.A.'s letter dated 08.04.2011 (Exh.DW-2/1); that C.D.A., vide letter dated 03.02.2012 (Exh.DW-7/1), allowed respondent No.7's application for the approval of building plans for the suit house; and that respondent No.7 is a *bonafide* purchaser of the suit house without any notice of the dispute between Mujtaba and his brothers. Learned counsel for respondent No.7 also prayed for the appeal to be dismissed.

16. We have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant appeal have been set out in sufficient detail in paragraphs 2 to 12 above and need not be recapitulated.

17. The suit house was allotted to Murtaza vide allotment letter dated 21.05.1964 (Exh.DW-2/10) from the C.D.A. Vide letter dated 04.10.2000 (Exh.DW-2/3), the ownership in the suit house was transferred to Murtaza's four sons, excluding Mujtaba.

18. Mujtaba had called into question the change of ownership of the suit house from his father to his four brothers. Letter dated 04.10.2000 (Exh.DW-2/3) from the Estate Management Directorate of C.D.A. shows that the change of ownership of the suit house was made on the basis of the memorandum of the oral gift dated 31.08.2000. The said letter dated 04.10.2000 was addressed to Murtaza.

19. It is essential to bear in mind that Mujtaba is claiming his right of inheritance in the suit house. I say this because in paragraph 10 of the suit, it is pleaded that Mujtaba is the owner of 2/14th share in the suit house whereas his four sisters (defendants No.8 to 11) are owners of 1/14th share each. In order to claim this right of

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inheritance Mujtaba, in his suit, has pleaded that the acknowledgment of the oral gift dated 31.08.2000 is *"illegal, false and forged"* and has no bearing on Mujtaba's legal rights. The edifice of Mujtaba's case is that his father was at an advanced age and not in a position to distinguish good from bad, and therefore could not have gifted the suit house to his four sons by excluding him.

20. There is ample evidence on the record to show that Murtaza had appeared before the C.D.A. and had executed a statement of an oral gift (Exh.DW-2/5) to the effect that on 30.09.2000 he had gifted the suit house to his four sons, *i.e.* Khawaja Muhammad Mustafa, Khawaja Azam Ali, Najeeb Murtaza and Ibrahim Murtaza. The said statement also bears the signatures of the four donees. This statement was recorded in the presence of the Deputy Director, Estate Management, C.D.A., who has noted on the said declaration that the statements of the donor and the donees were recorded in his presence. It was none other than Murtaza who had applied to the C.D.A. for the transfer of the suit house in favour of his four sons, excluding Mujtaba. This application was accompanied by (i) pay order of Rs.2,000/-, (ii) statement of the donor, (iii) memorandum of gift, (iv) copies of CNICs of the donor and donees, and (v) indemnity bond. The record produced by the Estate Management Officer, C.D.A. before the learned Trial Court included the said documents.

21. Even though Mujtaba's sisters (respondents No.8 to 11) had been proceeded against *ex-parte* by the learned Trial Court, Syeda Sajida Nayyar Abidi (respondent No.9) had appeared as DW-3 and deposed *inter alia* that her father had announced his decision to gift the suit house to his four sons, excluding Mujtaba, and that she and her three sisters had not been made beneficiaries of the gift. She had also deposed that she and her sisters as well as Mujtaba had already been compensated. She also identified her signature as well as that of her father, Murtaza, on the memorandum of the oral gift (Exh.DW-2/6). She also deposed that she had accompanied her father to the offices of the C.D.A. where the transfer of the suit

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house had taken place in favour of her four brothers, who had also attended the offices of the C.D.A. She had also deposed that her father had made a statement of the oral gift at the C.D.A. in her presence. Respondent No.9's testimony could not be shaken in her cross-examination and she had remained steadfast on her testimony that her father had gifted the suit house to her four brothers, excluding Mujtaba.

22. Another sister of Mujtaba, Asifa Murtaza (respondent No.11) had appeared as DW.4 and had deposed that her father had gifted properties to his daughters, including her, and that a large amount of cash had been given by him to Mujtaba. Respondent No.11, who is a Professor of Pediatrics and had remained a BPS-21 officer serving as Consultant Physician and Head of the Department of Pediatrics, had deposed that she had lived with her father who had stated that he would gift the suit house to his four sons, excluding Mujtaba. In her cross-examination, she deposed that she had not challenged the gift made by her father as she had already been compensated. She also deposed that it was incorrect to suggest that her father was mentally or physically unfit in the year 2000 when he made the gift.

23. True, the onus of proof is on the beneficiary of the gift deed to prove its execution and also to prove that all the essentials of a valid gift (i.e. offer, acceptance and delivery of possession) had been fulfilled, but it ought to be borne in mind that for the sectoral areas of the Islamabad Capital Territory, the transfer letter issued by the C.D.A. has the status of a title document. In order for an oral gift to be implemented in that for a transfer of a property to be effected on the basis of the oral gift, the C.D.A. requires the donor to appear before the C.D.A. and make a statement / declaration of the oral gift which also needs to be accepted by the donees in the presence of the officials of the C.D.A. In the case at hand, such a declaration (Exh.DW-2/5) was made by Murtaza and it was also accepted by his four sons (i.e. the donees), excluding Mujtaba. The said declaration (Exh.DW-2/5) bears the signatures of the donor as well as the donees. It also carries an endorsement by the officials of the C.D.A.

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that the statement had been made by the donor in their presence. It is on the basis of the said declaration that the C.D.A. issued transfer letter dated 04.10.2000 (Exh.DW-2/3). As mentioned above, this transfer letter has the status of a title document and has sanctity attached to it.

24. Mujtaba, in his suit, had alleged *"connivance"* between his four brothers and the staff of the C.D.A. He had also alleged that the documents used for the transfer of ownership of the suit house from his father to his four brothers were *"forged and fabricated."* Perusal of the evidence recorded by the learned Trial Court shows that Mujtaba was not able to prove connivance between his four brothers and the staff of the C.D.A or that any of the documents on the basis of which the transfer of the suit house had taken place were forged or fabricated.

25. As regards the memorandum of the oral gift (Exh.DW.2/6), the transfer of the suit house had not taken place on the basis of the said memorandum only but also on the basis of Murtaza's declaration of the oral gift recorded by the C.D.A. According to the contents of the said memorandum, the oral gift was made by Murtaza on the occasion of Eid-ul-Fitr on 08.01.2000, which is prior to the declaration of the oral gift made by Murtaza before the C.D.A. on 02.10.2000. The said memorandum is in the nature of an acknowledgment of an oral gift made on 08.01.2000 which was reiterated or re-declared by Murtaza before the C.D.A. on 02.10.2000. In the case of Saadia Vs. Gul Bibi (2016 SCMR 662), it has been held as follows:-

> ***"14. Indeed, if a document in the form of memorandum of gift has been executed between the parties (donor and donee) as an acknowledgment of past transaction of oral gift, its non-registration will not have much bearing as regards its authenticity or validity, but the other important thing is the proof of fulfillment of three conditions of a valid gift "offer", "acceptance" and "delivery of possession".***

Law to the said effect has also been laid in the judgments reported as Bilal Hussain Shah Vs. Dilawar Shah (PLD 2018 SC 698), Abdul Ghaffar Vs. Ghulam Jan (PLD 1975 Peshawar 12), Shafqat

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Parveen Vs. Iftikhar Amjad (2012 SCMR 1602), Nighat Waheed Vs. Arif Latif (2023 CLC 593), Daran Bibi Vs. Muhammad Akbar (2019 CLC 859), Muhammad Mukhtar Vs. Zubaida (2017 CLC 1731) and Abdul Hameed Vs. Abdul Ghafoor (2011 MLD 1836).

26. In view of the above, we do not find any legal infirmity in the impugned judgment and decree dated 03.03.2014 passed by the learned Single Bench of this Court. Consequently, the instant appeal is dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

(ARBAB MUHAMMAD TAHIR)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 27.06.2023

(JUDGE) **(JUDGE)**

Qamar Khan* ***APPROVED FOR REPORTING***

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