

**In the Supreme Court of Bangladesh
High Court Division
(Civil Appellate Jurisdiction)**

First Appeal No. 103 of 2017

with

Transfer Appeal No. 50 of 2019

In the matter of:

Ehsan Ali

..... Defendant No. 1- appellant

Versus

Nasim Ali and others

..... Plaintiffs-respondents

Secretary, Ministry of Works and Housing and
Settlement, Government of the People's
Republic of Bangladesh, Secretariat Building,
Dhaka.

..... Proforma defendant no.2-proforma respondent

Mr. Ahsanul Karim, Senior Advocate with
Mr. Khairul Alam Chowdhury, Advocate with
Mr. Tanveer Hossain Khan, Advocate

.... For the defendant no.1- appellant

Mr. Md. Nurul Amin, Senior Advocate is with
Mr. Khair Ezaz Maswood, Senior Advocate with
Mr. Rafiqul Islam (Hiru), Advocate with
Mr. S. M. Tariqul Islam, Advocate with
Mr. Mohammad Yeasin Chowdhury, Advocate

... For the plaintiffs-respondents no. 1-3

Heard on 24th August, 12th October, 19th

October and 2nd November, 2023

Judgment on 14th December, 2023

Present:

Mr. Justice Md. Mozibur Rahman Miah

And

Mr. Justice Mohi Uddin Shamim

Mohi Uddin Shamim, J.

This First Appeal No.103 of 2017 and Transfer Appeal No. 50 of 2017 at the instance of defendant No.1 - appellant, is directed against the judgment and decree dated 01.12.2016 (decree drawn on 02.01.2017) passed by the Joint District Judge, 3rd Court, Dhaka, arising out of Title Suit No. 206 of 2016, which was heard and disposed of along with Title Suit No. 207 of 2016.

Facts necessary for the disposal of the appeal, in brief, are that the present respondent Nos. 1-3, as plaintiffs, instituted Title Suit No. 43 of 2007 before the learned Joint District Judge, 3rd Court, Dhaka, for a declaration of title and recovery of khas possession by evicting defendant No.1 from the suit land. Subsequently, the suit was renumbered as Title Suit No. 206 of 2016. The appellant, also as plaintiff, instituted Title Suit No. 463 of 2007 before the learned Senior Assistant Judge, 1st Court, Dhaka, for a declaration that the oral gift deeds dated 11.10.2004 and 18.12.2004, along with an affidavit, are void, illegal, and not binding upon him. The Title Suit No. 463 of 2007 was subsequently renumbered as Title Suit No. 207 of 2016.

Respondent no. 1-3 (in Title Suit no. 206 of 2016) as plaintiffs states *inter alia* that the Government of the then East Pakistan was the original owner of the suit property described in the schedule to the plaint. Thereafter, upon an application being filed, the predecessor of the plaintiff, namely Golam Mowla, obtained the suit land through a registered permanent lease deed being Lease Deed No. 6757 dated 29.06.1957. On 19.05.1970, Golam Mowla verbally gifted the said property to his wife, Nasimunnessa Khanam, in accordance with Shariah Law. The plaintiffs' mother received from her husband 01 bigha 08 chhatak of land by gift and also inherited .1215 ajutangsha of land from her father. Thereafter, it was registered and mutated in her name in the Ministry of Housing and Public Works and Revenue Office, respectively. While in possession of the land, she gifted it in three stages among her four sons namely Nasim Ali, Ehsan Ali, Masud Ali, Mahbub Ali and one daughter Fauzia Mowla. In the first stage, she gave 78/1 Agamasi Lane, Dhaka measuring .1215 ajutangsha of land to her second son Ehsan Ali, the defendant no. 1-appellant. In the second stage, she gave to her only daughter Fauzia Mawla 04 katha of land out of 01 bigha 08 chhatak as mentioned in the schedule. In the third stage,

she expressed her intention to gift 16 katha 08 chhatak of land to the plaintiff and, upon obtaining permission from the office of defendant no. 2 under memo 7/L, Dan 2004/1726 on 20.11.2004, she gave 16½ katha of land to her three sons, i.e., the plaintiffs and handed over possession. The plaintiffs received the said property and registered it on their names in the Ministry of Housing and Public Works and the Revenue Department of the Government under Mutation Case No. 1550/2005 on 06.04.2005. In the name of the plaintiffs, Khatian No. 1635, Dag No. 22, mutation was prepared, in which holding no. is 3516. Among the plaintiffs, plaintiff No. 1 currently resides in England and plaintiff No. 3 in America. They retain possession of the property at Dhaka through plaintiff No. 2 and reside in the house situated in the scheduled property whenever plaintiffs No.1 and 3 come to Dhaka. Plaintiff No. 2, who resides at Gulshan-2 in Dhaka, occasionally visits the disputed property to look after and supervise. Defendant No.1, the brother of the plaintiffs, has been living in the suit property since before with the plaintiffs. Although he was gifted the Agamasi Lane property, he lived with his mother on the ground floor of the plaintiffs' house with permission. When the defendant no. 1 was requested to

leave the plaintiffs' property and go to his own house in Agamasi Lane, he refused to do so, prompting the plaintiffs to file the suit for a declaratory decree that they have a 16 anas share, right, title and interest in the suit property and to evict defendant No.1 from the plaintiff's property through the court, declaring that he is an illegal possessor.

The plaintiffs as defendants filed written statement in Title Suit No.207 of 2016, contending inter alia that the said suit cannot be continued in its present form and manner and there is no reason to file the suit as the suit is barred by estoppel, waiver, and acquiescence.

The present appellant as defendant no.1 filed a written statement in Title Suit No.206 of 2016, stating inter alia that the suit property being 01 bigha of land in holding No.315 (Old), Road No.26, Dhanmondi R/A was gifted by Golam Mowla to his wife Nasimunnessa Khanam by oral gift. Nasimunnessa Khanam received the said property and lived there with her sons and daughter. Nasimunnessa with the consent of her sons and her husband Golam Mowla, gave 04 katha of property to her daughter Fauzia Mawla. In 1970 Nasim Ali went to England for higher education and started living there permanently, occasionally coming to Bangladesh. In 1980

Mahbub Ali went to America and another son Masud Ali lives in Gulshan, Dhaka. The defendant always looked after, treated, and cared for his mother, resulting in Nasimunnessa Khanam being satisfied during her lifetime gifted a property at 79/81 Agamasi Lane to defendant No.1 Ehsan Ali. After that, when Nasimunnessa Khanam became physically ill, she made a verbal gift of the suit property measuring 16 katha to her 04 sons and as per the plaint on 25.05.1995, and in support of the said verbal gift, she executed an affidavit before the notary public on 20.06.1995.

Despite the deed of gift dated 20.06.1995, the defendants conspired to deprive the plaintiff of the property of Dhanmondi while the plaintiff was staying outside the country from December 2003 to January 2004. On 11.10.2004, the defendants made fake gift papers in which the gift deed given earlier dated 20.06.1995 is not mentioned. The defendants persuaded his mother to accept the affidavit of said gift deed and filed the application for transfer permission by illegally influencing the Ministry. On 11.10.2004, prior to the affidavit, the defendants filed an application in the name of the ailing mother before the Joint Secretary. The clever defendant concealed the affidavit dated

10.11.2004 and created the 3rd oral deed on 18.12.2004 and based on said deed filed Civil Suit being No.43/2007 for declaration of title and recovery of possession. Without canceling the earlier deed of gift, oral deed of gift was allegedly created on 11.10.2004 and 18.12.2004 without the consent of his mother. Accordingly, the plaintiff filed the Title Suit No.463 of 2007 (renumbered to Title Suit No.207 of 2016) seeking declaration of said gift deeds dated 11.10.2004 and 18.12.2004 as illegal.

The defendant No.2 of Title Suit No.206 of 2016 filed a written statement stating inter alia that Golam Mowla was the allottee of the suit property which was subsequently transferred in the name of his wife Nasimunnessa Khanam vide Office Order No.330/L (2) dated 19.08.1981. Later on, in the name of Nasimunnessa Khanam's daughter Fauzia (Lisa), 04 katha property was transferred to said plot through Ministry of Public Works in Memo No.8/2 of 18/82/280/1 (2) dated 09.05.1983. Since the 0.50 katha property was registered in the name of Nasimunnessa Khanam through Ministry of Housing and Public Works vide Memo No.6/L, 95/511/1(3) dated 09.04.1995, the quantum of land in the said plot is 20.50 katha. After transferring of 04 katha property in the name of Fauzia (Lisa) from said property, remaining

16.50 katha of the said plot was transferred and registered in the names of her 3 sons namely Nasim Ali, Masud Ali and Mahbub Ali vide Ministry of Housing and Public Works Memo No.7/L Dhan/2005/679/1(4), dated 23.03.2005.

On the above pleadings of the parties, the learned Judge of the Trial Court framed the following issues in the suit:

1. Whether the two suits are maintainable in their present form and manner.
2. Whether the suits are barred by limitation.
3. Whether the suits are barred by defect of parties.
4. Whether Nasimunnessa Khanam had verbally gifted the scheduled suit property to the respondents on 18.12.2004 (i.e. the plaintiffs of Title Suit No. 206/2016).
5. Whether the oral gift and affidavit dated 18.12.2004 is illegal and voidable.
6. Whether defendant No. 1 in Title Suit No. 206/2016 is an illegal possessor of the suit property?
7. Whether the plaintiffs in Title Suit No. 206/2016 (i.e. the present respondents) and the plaintiff in suit Title Suit No. 207/2016 (i.e.

the present defendant no. 1-appellant) can obtain a decree of declaration of title along with eviction as prayed for?

During trial of the suit, the plaintiff examined 3 (three) witnesses as PW no.1-3, while the defendants also examined 3 (three) witnesses as DW no.1-3.

The trial Court took both suits together for hearing and disposal and, upon hearing arguments from both sides and perusing the oral and material evidences adduced by the parties, the trial Court by its judgment and decree dated 01.12.2016, decreed Title Suit No.206 of 2016 filed by the present respondent Nos. 1-3 and dismissed Title Suit No.207 of 2016 filed by the defendant no.1-present appellant Ehsan Ali.

Being aggrieved by and dissatisfied with the impugned judgment and decree dated 01.12.2016 passed by the learned Joint District Judge, 3rd Court, Dhaka in Title Suit No.206 of 2016 the defendant No.1, the present appellant, preferred the instant First Appeal before this Court.

The defendant No.1 as appellant also preferred Title Appeal No.45 of 2017 before the learned District Judge, Dhaka challenging the

judgment and decree dated 01.12.2016 passed in Title Suit No.207 of 2016 dismissing the same.

During pendency of the instant First Appeal No.103 of 2017, upon an application under section 24 of the Code of Civil Procedure, the said Title Appeal No.45 of 2017 pending before the learned District Judge, Dhaka has been transferred and tagged with this appeal and renumbered as Transfer Appeal No.50 of 2019 for hearing and disposal analogously with this appeal.

Mr. Ahsanul Karim, the learned Senior Advocate, along with Mr. Tanveer Hossain Khan, the learned Advocate appearing on behalf of the appellant, takes us through the grounds implanted in the Memo of appeal, the impugned judgment and decree, and the other connected materials on record. He argues that the trial Court committed a serious error of law and fact in decreeing the said suit (Title Suit No.206 of 2016) in favour of the oral gift dated 18.12.2004, where the donor namely Mrs. Nasimunnessa Khanam allegedly declared to gift the schedule land in favor of plaintiff nos.1 to 3. However, in said declaration dated 18.12.2004, there is no statement regarding of who witnessed the actual handing over of the possession of the scheduled

land to plaintiff Nos.1 to 3. Rather, P.W. 3, who witnessed the execution of said alleged declaration dated 18.12.2004, in his deposition stated that the said alleged oral gift happened on 18.04.2004, but the alleged declaration dated 18.12.2004 does not declare any incident on 18.04.2004. Furthermore, the said P.W. 1, who is one of the beneficiaries of said alleged oral gift dated 18.12.2004, in his deposition falsely stated that the appellant was present at the time of execution of said oral gift dated 18.12.2004, in contradiction of the deposition of P.W.3, who in his deposition stated that the appellant was not present at the time of execution of said oral gift dated 18.12.2004. Moreover, the P.W.3 admitted that the appellant has possessed the land in question for all material time, and as such, the actual handing over not being proved, the alleged oral gift dated 18.12.2004 is void and does not have any binding effect upon the appellant. He further submits that the learned Judge of the trial Court acted illegally in failing to weigh the evidence of three P.W.s, especially P.W. 3 who gave deposition for and on behalf of the plaintiff-respondent nos.1 to 3 and is a witness of said alleged oral gift dated 18.12.2004. In his deposition, he stated that one Advocate Sarder took thumb impression and, thereafter, three

witnesses signed in the said alleged oral gift on 18.12.2004, and thereafter said Advocate took them to the Magistrate Court, and the Magistrate asked whether said Mrs. Nasimunnessa Khanam had given the thumb impression, which is an admission that the said Nasimunnessa Khanam never engraved her thumb impression in front of the Magistrate, and the alleged witnesses did not witness said Nasimunnessa engraving her thumb impression in front of themselves.

As such, in effect, there was no declaration of affidavit in front of Magistrate and therefore said alleged declaration of oral gift dated 18.12.2004 is illegal, void, and does not have any binding effect. He next submits that in the instant case, the plaintiff-respondent no. 2, i.e., Masud Ali, filed Title Suit No. 43 of 2007 on behalf of three brothers, namely Nasim Ali, Masud Ali, and Mahbub Ali, exhibiting a power of attorney dated 09.05.2006, which was marked as Ext.1. It shows that only the plaintiff-respondent No.3, namely Mahbub Ali authorized Masud Ali to file and conduct the Title Suit No. 43 of 2007 on his behalf. Masud Ali failed to produce any power of attorney executed by Nasim Ali empowering Masud Ali to file and conduct the said suit on his behalf. The P.W.1, i.e., Masud Ali in his cross-examination admitted

that it is true that he did not submit a power of attorney from Nasim Ali in respect of the disputed land. Therefore, the said suit, so far as Nasim Ali is concerned, has been initiated, conducted, and pursued by an unauthorized person. Nasim Ali, as plaintiff No.1 in said suit, never filed said suit, nor did he authorize anyone to pursue said suit on his behalf. Therefore, the said Nasim Ali is not entitled to have any relief in said the suit. Apart from this, the original Lease Deed No. 6757 dated 29.06.1957 of Plot No. 315/B (Old), Road No. 15/A New, 26 (Old), House 44 Dhanmondi, executed by the then Government in Clause No. 20 provides that, subject to the provision of Clause No. 19, the tenant shall be at liberty to transfer, to sublet, subject to the conditions of these presents, the whole of the demised property subject to the obligation that the transfer shall be registered in the office of such authority as may be appointed by the lessor. Therefore, there is no scope to make any gift of a part of said property. Therefore, if the said decree dated 01.12.2016, so far as it relates to Nasim Ali, is set aside, the decree dated 01.12.2016 in favor of the respondent nos. 2 and 3 cannot be upheld in the instant appeal. Therefore, the said judgment and decree as a whole are liable to be set aside. In connection with his

submission, the learned Advocate for the appellant has referred to a few decisions including the case of *MS. Concord Engineers and Construction Ltd. Vs. The Chief Engineer Road and Highways Department, Government of the People's Republic of Bangladesh*, reported in III ADC 23; the case of *Bangladesh, represented by the Secretary, Ministry of Housing and Public Works and another*, reported in 6 BLC (AD) 85; the case of *Pir Muhammad Farid Jan and others Vs. Colonisation Officer, Sukkur Barrage, Hyderabad and others*, reported in 17 DLR (SC) 181; the case of *Sugrabai and others Vs. Mahomedalli Ahmedalli and another*, reported in AIR (1935) Bombay 34; the case of *Abdul Sattar Ostagar and another Vs. Abu Bakar Ostagar and others*, reported in AIR (1977) Calcutta 132; the case of *Musa Miya and another Vs. Kadar Box and another*, reported in Indian Appeals (Vol-LV) 171.

He finally prays for allowing the appeals.

Mr. Md. Nurul Amin, the learned Senior Advocate appearing on behalf of respondent nos.1-3, takes us through the evidence on record, the impugned judgment and the other materials on record and contends that, according to clause no. 20 of the lease deed no. 6757 dated 29.06.1957 (Exbt.-2), prior written permission is necessary in case

of transfer, so the deed of the defendant Ehsan Ali dated 25.05.1995 is not a gift in the eye of the law. The Clause No.20 of the terms and conditions of the lease deed No.6757 dated 29.06.1957 provides as follows:

“That subject to the provision of clause 19, the Tenant shall be at liberty to transfer or sublet, subject to the condition of these presents, the whole of the demised property subject to the obligation that the transfer shall be registered in the office of such authority as may be appointed by the Lessor, and unless this is done, the Lessor will not be bound to recognize or accept any person as Tenant of the demised property in place of the transferor.

Provided that without prior written sanction of the Lessor, no transfer of a portion of the demised property shall be valid, binding, or effective.”

That the gift dated 18.12.2004 in favor of the respondents, namely Nasim Ali, Masud Ali, and Mahmud Ali, was executed by Nasimunnessa Khanam with the prior written permission of the Ministry of Housing and Works. He next submits that, in this case, the moot question is whether the deed of the plaintiffs in Title Suit No. 206 of 2016 is valid or not. The defendant's plea is that since no delivery of possession is given to the plaintiffs, so the deed is not valid in the eye

of the law. The defendant Ehsan Ali in his written statement in Title Suit No. 206 of 2016 and the plaint in Title Suit No. 207 of 2016 admitted that in the absence of the defendant Ehsan Ali, the plaintiffs came to the Dhanmondi house and induced mother Nasimunnessa to put LTI in the fraudulent affidavit and also in a petition before the Ministry of Housing & Public Works and thereby exercised undue influence. So, it is admitted that at the time of the gift, the plaintiffs were in the suit property. Besides, the P.W-1 and P.W-3 also supported the case of the plaintiffs that at the time of the gift, the plaintiffs were present at the Dhanmondi House. Sub-section 3 of section 152 of Mulla's Mohammedan Law reads as follows:

"Where the donor and the donee both reside in the property - No physical departure or formal entry is necessary in the case of a gift of immovable property in which the donor and the donee are both residing at the time of the gift".

He further submits that the Gift may be completed by actual delivery of physical possession or by constructive possession. Constructive possession means the application for mutation, completion of mutation, and payment of rent, the last record of rights.

In this connection, the learned Senior Advocate for the respondent nos. 1-3 has referred to a decision in the case of *Abdur Razzak vs. Rabeya Khatun*, reported in 34 DLR 309, wherein their lordship's held that,

"..... that the possession of a donee could be affected either by actual possession or by constructive possession which constructive possession could be evidenced by the mutation of the records of rights in the name of the donee are in complete accord with the view I have taken hereinbefore."

Besides, the learned Advocate also referred to another decision in the case of *Abdul Rahim vs. Sk. Abdul Zabar and others*, reported in AIR 2010 Supreme Court 211, wherein their lordship's held that;

"For effecting a valid gift, the delivery of constructive possession of the property to the donee would serve the purpose. Even a gift of a property in possession of a trespasser is permissible in law provided the donor either obtains and gives possession of the property to the donee or does all that he can to put it within the power of the donee to obtain possession."

Their Lordship's also held to the effect that;

"Constructive possession of the suit premises must be held to have been handed over by the donor as he had himself prayed for mutation of Razak's name in

the revenue record.In a case of this nature, thus, the transfer of constructive possession would sub-serve the requirements of law." Moreover, their Lordship's also held that: *"Thus, possession can be shown not only by acts of enjoyment of the land itself but also by ascertaining as to in whom the actual control of the thing is to be attributed or the advantage of possession is to be credited, even though some other person is in apparent occupation of the land. In one case, it would be actual possession and in the other case, it would be constructive possession."*

In that case, handing over of the deed of gift coupled with the declaration made in the document was held to be sufficient for constituting a valid gift.

In this case, after completion of the gift, the respondents applied to the Ministry for mutating their names (marked- X) and the Ministry mutated their names after maintaining all necessary lawful formalities and after mutation, the said oral gift supported by affidavit dated 18.12.2004 has been acted upon; all those are the proof of the ownership and possession of the respondents. The utility bills are also being paid by the respondents in their names which is also admitted by the appellant. He also submits that, admittedly the suit land is a leasehold property and the owner of the property is the Ministry of

National Housing & Public Works and it appears from Exbt-4 that on 20.11.2004 the Ministry of National Housing & Works gave prior permission to transfer the suit property in favor of the plaintiffs and Nasimunnesa made transfer in the form of gift upon the plaintiffs on 18.12.2004 (Exbt-5). The permission letter (Exbt-6) was not challenged by the defendant and if it is found that exhibit-4 is genuine then the defendant has no right to challenge the gift dated 18.12.2004. Only mother Nasimunnesa can challenge the gift dated 18.12.2004 because section 167(3) of the Mulla's Mohammedan Law provides that;

"A gift may be revoked by the donor, but not by his heirs after his death"

He also submits that, if there is a conflict between oral evidence and documentary evidence, then the documentary evidence will prevail over the oral evidence as per section 92 of the Evidence Act. The learned Senior Advocate has referred to decisions in respect of gift which is in the case of *Bangladesh, represented by the Secretary, Ministry of Housing and Public Works and another Vs. Shirley Anny Ansari*, reported in 52 DLR (AD) 180, wherein their lordship's held that;

“Acceptance-where the property is not capable of physical possession the acceptance may be shown by mutating name in the office records, municipal papers and also with the revenue authority.”

He has also referred to a few decisions in connection with his submission which are in the case of *Md. Fazlur Rahman and others vs. Mrs. Bani Rahman and others*, reported in 39 DLR (HCD)339 and in the case of *Haji Kari Abdur Rahman Vs. Abdur Rahim Gazi*, reported in 35 DLR (1983) 132.

He further submits that, the defendant appellant Ehsan Ali stated in his written statement as well as in the cross-examination that the plaintiffs-Respondents namely Nasim Ali, Masood Ali and Mehboob Ali fraudulently prepared the affidavit dated 18.12.2004 in support of the Oral gift by taking thumb impression of the mother of the Plaintiffs - Respondents Nasimunnesa Khanam and possession was delivered on the same day in favor of the plaintiffs respondents in absence of the defendant Ehsan Ali, by which it is crystal clear that all the plaintiffs-respondents were present in the residential house of the suit property. Moreover, the defendant admitted that the said affidavit dated 18.12.2004 was executed in support of the oral gift made by the mother

of the Plaintiffs-Respondents fraudulently, but the defendant has miserably failed to prove the said oral gift as fraudulent. He also submits that the plaintiff-appellant of the Transfer Appeal No. 50 of 2019, corresponding to the Title Appeal No. 45 of 2017, Ehsan Ali, completely failed to prove the oral gift supported by the affidavit dated 20.06.1995 and the family settlement supported by the affidavit dated 30.06.1995 by calling the witnesses of said affidavits. Instead, 2 (Two) witnesses, D.W. 2 and D.W. 3 gave hearsay deposition, knowing nothing about said affidavits dated 20.06.1995 and 30.06.1995, respectively. Moreover, it is admitted by the plaintiff-appellant Ehsan Ali in his evidence that utility bills of electricity, holding tax, government rent, etc., are paid by the Defendants-Respondents namely Nasim Ali and others and the suit property is managed by their men, thus the learned trial Court below was quite justified in dismissing the suit of the Plaintiff-Appellant Ehsan Ali and that the Plaintiffs-Respondents have been able to prove their case by adducing both oral and documentary evidences and the learned Judge of the trial Court has rightly decreed the suit.

He also submits that P.W-3 Tauhid Hasan Kibria testified for the plaintiff to prove the gift declaration of the plaintiff dated 18.12.2004. He is witness No. 2 of the affidavit (Exhibit-5) dated 18.12.2004. He testified in support of said oral gift and proved the transfer of possession of the property gifted by the plaintiffs' mother to the plaintiffs and proved the execution of said affidavit before the Magistrate. In other words, Nasimunnessa's three sons and the plaintiffs have been able to prove the oral gift and in that regard the affidavit dated 18.12.2004 is reliable but the defendant has not been able to prove any contradiction in the cross-examination.

In view of the above facts and circumstances of the case, the learned advocate finally prays for dismissing the appeal.

In view of the above claim and counterclaim of the parties, now, let us consider the oral evidence on record.

P.W-1, Masud Ali, stated in his deposition that he will testify for the plaintiffs and he has been given power of attorney by others which were marked as Ext. 1. He also stated in his deposition that the principal defendant (Ehsan Ali) is his brother and the property in question belonged to the Government of East Pakistan then it was

transferred to his father on 29.06.1957 under Lease Deed No. 6757 which was marked as Exbt. 2. Thereafter, on 19.05.1970 gifted the suit property to their mother. He filed a tax return which was marked as Ext. 3. He also stated in his deposition that his mother got 20 katha 8 chatak at Dhanmondi from her husband and 0.1215 acres of land by inheritance. Subsequently, his mother gifted the land in three stages, in the first phase 0.15 acres of land at Agamasi Lane was gifted to defendant Ehsan Ali, in the second phase, 4 katha of Dhanmondi property was gifted to her daughter Fauzia Mawla. Thereafter, having obtained permission on 20.11.2004, and later on 18.12.2004 having sworn an affidavit in support of the gift before the 1st Class Magistrate (marked Exbt. 4 and 5) the mother gifted the remaining 16 katha and 8 chhatak to the present plaintiffs. Thereafter, they were mutated as owners and registered with the Ministry of Land and submitted one DCR, 1 copy tax receipt regarding mutation which was marked as Ext. 6 series. He also stated in his deposition that before the case i.e. lastly on 08.05.2006, he asked the defendant to go to Agamasi Lane, thereafter on 05.12.2006 he again asked through relatives and lastly on

28.02.2007 Ehsan Ali was told to leave in writing by registered post which was marked as Exbt. 7.

He further states that - it is not true that his mother did not give them the property. It is not true that they got gifts by exerting illegal influence and getting permission from the Ministry of Housing and Public Works. In cross-examination, he stated that his brother Nasim Ali is the plaintiff no.1 and their mother has been ill since 1989 while living in this house and their mother was also ill when she gifted the disputed land on 18.12.2004.

P.W. 2, Md. Nazrul Islam, stated in his deposition that he was working as an Administrative Officer in the Ministry of Housing and Public Works. As per the summons of the Court, he has submitted the photocopies of the file of 315/B Dhanmondi R/A totaling 243 pages which was marked as Exbt. 8. In cross-examination, he stated that he has heard that there is dispute between the four brothers. He doesn't know about order no. 95/96 and he also doesn't know about Note No. 95, Letter No. 108.

PW - 3 Tauhid Hasan Kibria stated in his deposition that he knows the disputed land and the parties and also the mother of the

plaintiff and defendants. After the verbal gift on 20.04.2004 and at the time of verbal gift he was present there. Apart from him, Md. Masud Ali, Shahid Imam Chowdhury, sister of Masud Ali, the mother Nasimunness and Advocate Haider were also present.

He further states that he used to call Nasimunnessa as mother or aunt. On 18.11.2004 four affidavits were made. Nasimunnessa swore the four affidavits and they were the witnesses and the thumb impression of Nasimunnessa was recorded and one copy was given to the Ministry of Works and rest three copies were given to three sons.

On 18.12.2004, on the declaration of gift, he put his signature which was marked as Exbt.-8. On that date three more declaration of gifts were made, wherein he was the witness and also recorded the thumb impression of Nasimunnessa. On the very date, four verbal gifts were made and Nasimunnessa gave thumb impression each and every gift in front of him.

In cross-examination, he stated that he was working with Ehsan Ali and Masud Ali. In 1997 he was the employee of Ehsan Ali and Masud Ali. On 18.12.2004 he witnessed the declaration of gift. In 2003, he recorded the deed of gift of the property of Agamasi Lane in favour

of Ehsan Ali. On 25.10.2004 he recorded the said deed in favour of Nasim Ali and three others, it was related to the dispute of Dhanmondi house of 16½ katha. The donor, the donee, and the witnesses were present none other than the three. The sister of the donee was also present. He also stated that he doesn't know whether the sister of the donee was a witness in the deed. On 18.12.2004 the gift of the gift deed was made and on that day the sister of Masud Ali was present. She lived on the second floor of the gifted building. She is still on the second floor of the gifted property and her nickname is Lisa. He also stated that Ehsan Ali was present at the time of the deed of gift but he did not sign the deed of gift. He also stated that he doesn't know if Ehsan Ali was in Bangladesh when the gift was made. At present, he is also in the gifted property. In 1997, whether Masud Ali was in the gifted house. The donor is still present in the gifted property. Masud Ali lives at Gulshan, Mahbub Ali lives in USA and Nasim Ali lives in England.

It is not true that he is bound to do all the work under the instructions of Masud Ali. He put his signature on various documents not on the instructions of Masud Ali but their mother called him to sign the documents.

It is not true that on 18.12.2004 the deed of declaration of gift is fabricated and ante dated. It is also not true that at the time of the gift Nasimunnessa was seriously ill or not fit enough to donate. He does not know if Nasimunnessa evicted Ehsan Ali from disputed property. He also does not know whether Lisa's son lives on the property.

It is not true that the possession of disputed land was not given to Masud Ali and others or the gift was not effective. He does not know who the owner of North 316/B of 16½ katha. The gifted land of 16 ½ katha is demarcated in South Road, in East 315 C and in West 315 (A). It is not true that it is not the demarcation of 16½.

It is not true that he does not know the gifted property or because of this he has given the wrong demarcation. It is also not true that he has given false testimony under the influence of Masud Ali as an employee.

D. W. 1, Ehsan Ali, stated in his deposition that the disputed land was situated at 315 B Old Dhanmondi, Road No. 26 (Old) Dhanmondi Residential Area. The total assets of the holding are 20 katha 8 chhatak and their property was 16 katha 8 chhatak. This property building was a two storied building, garden, and garage. In ¼ of his part is 4 katha 2

chhatak. The original owner of the disputed property was his father, namely Golam Mowla and he used to live in 16 katha 8 chhatak. In 1970 his elder brother Nasim Ali went to England and his other two brothers Masud Ali and Mahbub Ali also moved abroad. He, his son and mother lived on the second floor of the building. In 1983, Agamasi Lane Property Holding No. 79/81 was gifted by his mother and in 1995 the disputed land was verbally gifted to all four brothers, subsequently on 20.06.1995 the gift was notarized which was marked as Exbt. 'Ka' series with objection. On 30.06.1995 in the family agreement, we acknowledge the other share in their gift including sister's share. All signed the agreement on 30.06.1995 which was marked as Exbt. 'Kha'. He put his signature in the family agreement letter on 30.06.1995 which was marked as Exbt. Kha-1. Other parties signed before him and he recognized their signatures. Fauzia Mawla is his sister and he knows her signature which is marked as Exbt. 'Ga'. He also stated that he knows his mother's signature which is marked as Exbt. 'Gha' with objection.

D. W. 2, Md. Shamsuddin Bhuiyan, stated in his deposition that he knows the plaintiff, the defendant and the disputed property. The

previous owner of the plaintiff's property was the plaintiff's father Golam Mawla, who he heard, had verbally gifted the property to his wife Nasimunnessa, and later Nasimunnessa had gifted 04 katha to her daughter Fauzia Mawla Lisa, and 16 katha to her 4 sons namely Nasim Ali, Ehsan Ali, Masud Ali and Mahbub Ali. Abul Hasan Chowdhury and Sultan Ahmed were present at the time of the oral gift; he knows the signature of Sultan Ahmed which is exhibited as Exbt. 'B'.

In cross-examination, he stated that he does not know the Dag & Khatian of the property but he knows the quantum of the land of gift of 04 katha property to Fauzia Mawla Lisa.

In 1995 he has heard from Ehsan Ali and Masud Ali that Nasimunnessa has gifted the property to her four sons. At the end of that year, he heard about the oral gift. In 1995 he was working in the Tax Department, Dhaka. Ehsan Ali and Masud Ali voluntarily told him about the said gift that the property of the plaintiffs and defendants was divided among themselves. In 1995 he heard from Abul Hasan Chowdhury but he did not remember the date.

It is not true that he did not hear about the transfer of the above property from Mr. Ehsan Ali, Mr. Masud, Mr. Sultan Ahmed, and Abul Hasan.

DW - 3, Md. Muzammel Haque stated in his deposition that he knows the plaintiff and also the defendants. The quantum of property claimed in the suit is 20 katha 08 chhatak. The claim of the defendant is 16 ana. On 20.06.1995, the mother of the plaintiff-defendants gifted a total of 16.5 katha to four sons through an affidavit. He also stated that on 30.06.1995 a family settlement was made between the said four brothers.

In cross-examination, he stated that he doesn't know about CS, SA, R.S Khatian and Dag of the disputed property. He was the moharar of advocate Taukeer and advocate Taukeer used to conduct this case on behalf of the defendant.

It is not true that he does not know the deed property and he has given false evidence on behalf of Ehsan Ali.

We have heard the learned Advocates and perused the pleadings of the parties and the evidence on record and also gone through the

grounds taken in the appeals as well as the judgment passed by the Court below.

At the outset, the learned Trial Court below took up issues of Nasimunnesa's oral gift and the validity of the supporting affidavit of declaration of gift. Besides considering the oral evidence as described above, the learned Court found that Nasimunnesa had applied to the Ministry of Housing and Public Works on 01.04.2004 firstly for permission to transfer the suit property in the name of her three sons, Nasim Ali, Masud Ali and Mahbub Ali (Exbt-8), and on 10.10.04 she swore an affidavit in this regard; however, since she had not received the necessary permission from the Ministry as yet, she swore another affidavit on 18.12.2004 after receiving the necessary permission on 20.11.2004 (Exbt. - 4 & 5), thereby gifting the suit property to the aforementioned 3 (Three) sons (i.e. the present respondents). In this regard, the Ministry of Housing on 23.03.2005 (Exbt-8) provided mutation permission. PW-2, being a Government Officer from the Ministry exhibited the office file (Exbt-Y), from which it was found that there was a local investigation by Ministry Officers based on Nasimunnesa's application, and based on the same, on 19.08.2004

transfer permission was granted, and the aforementioned mutation permission was also granted based on Nasimunnesa's application. The said mutation permission was opposed by the present defendant no.1/appellant Ehsan Ali, and the matter was disposed of at the Ministry through an official hearing in presence of all parties, resulting in upholding of the mutation permission, and in pursuance of the same, the AC Land Office opened the Mutation Khatian no.1635, Plot no. 221, Jote no. 3516 in the name of the respondents. Dhaka City Jarip was later prepared in their name, and they have been paying Electricity, WASA bills, and City Corporation tax in their names, and this was also admitted by the DW-1 Ehsan Ali (i.e. the present defendant no.1-appellant) during his cross examination on 25.03.2015.

It appears that no further challenge was brought against the said mutation permission by the defendant no.1-appellant or against any of the proof of constructive possession listed above before any forum, and from his own admission, the defendant no.1-appellant Ehsan Ali appears to have accepted the same.

Submissions have been made by learned counsels representing both parties, for and against the validity of the oral gift, the

discrepancies in witness statements, and legality of the property transfer under the lease conditions.

As summarized above, the learned counsel for appellant raised questions about the credibility and consistency of witness testimonies regarding the oral gift. Specifically, he pointed out the contradictions in the statements of witnesses PW - 1 and PW - 3 about the presence of the appellant during the execution of the oral gift. He argued that there was no proper evidence of the actual handing over of possession of the property, which is a crucial element in establishing the validity of an oral gift. He further argued that the legal requirements for transferring property, as stipulated in the original lease agreement, were not met, thus questioning the legality of the oral gift. It was also contended that Masud Ali, did not have proper authorization (i.e., a power of attorney from Nasim Ali) to file and conduct the suit, challenging the legal standing of the plaintiffs.

The learned counsel for the respondents argued that the oral gift and the supporting affidavits were valid. He emphasized that the possession of the property was effectively and admittedly transferred to the plaintiffs, both in actual and constructive terms. He argued that the

gift was executed with prior written permission from the Ministry of Housing and Works, fulfilling the necessary legal formalities for property transfer.

With regards to the matter of authorization, it is not a correct contention that lacking of authorization from one of the respondents when filing the suit will automatically disentitle the said respondent from any relief in the said suit, the Judgment and Decree passed in this regard, insofar as it is based on proper judicial examination of the evidence on record and testimonies of the witnesses, cannot be set aside solely based on that ground. Moreover, the gift in question, has apparently been made in the name of all 3(three) respondents-brothers; hence, even a single brother (any one of the respondents) can bring or defend any suit pertaining to the validity of the said gift.

With regards to the gift of land under Muslim Shariah, it has been argued by both parties that a gift of land requires offer by donor, acceptance by donee and delivery of possession, which is the accepted position of law in this regard.

However, learned counsel for the appellant has challenged the gift on 2 (Two) counts, i.e. he has challenged the fact that offer was

made by the donor has not been proved, and delivery of possession was not proved.

With regards to offer by the donor, the learned counsel for the appellant has challenged the discrepancies in the testimony of P.W.3 who offered conflicting testimony with regards to the actual date of transfer. However, as discussed further below, the intention of the Donor Nasimunnessa became amply clear from the other testimonies, deeds and documents exhibited and proved by the respondents.

In the matter of delivery of possession, it appears to be the accepted position of law that delivery of possession can be actual or constructive, and constructive possession can be proved by mutation and other record of rights such as utility bills (34 DLR Page 309, Paragraph 10), and in case where the donor and donee both reside on the same property, no physical departure or formal entry is necessary in case of a gift of immovable property. (Section 152, sub-section 3 of Mulla's Mohammedan Law).

The mutation and record of rights in the name of the respondents, as also admitted by the defendant no. 1-appellant has already been discussed above, hence constructive possession admittedly

exists in favour of the respondents. Moreover, the defendant no.1- appellant Ehsan Ali in his written statement in Title Suit no.206 of 2016 and plaint in Title Suit no. 207 of 2016 has admitted that in his absence, his respondent brothers came to the suit property and induced their mother Nasimunnessa to put her left thumb impression on a fraudulently affidavit and also in an application before the Ministry of Housing and Public Works. Hence, apparently actual presence of the respondents at the suit property is also admitted by the appellant at the time of the gift. The PW-1 and PW-3 also testified that the respondents were present at the suit property at the time of the gift.

Hence the issue of whether a gift under Muslim Shariah existed by the donor Nasimunnessa in favour of the plaintiffs-respondents was rightly resolved by the Trial Court below in favour of the plaintiffs-respondents.

With regards to the allegation of fraudulent inducement, the laws regarding burden of proof is well settled to the effect that whoever makes an allegation or assertion is to prove the same; however, the defendant no. 1- appellant led no evidence with regards to proving the fraudulent nature of the declaration before Magistrate of the First Class

dated 18.12.2004. It was open to the defendant no. 1-appellant to lead various evidence in this regard to prove the allegation of fraud, but no such evidence was led, no prayers for discovery or production nor summons of relevant persons were filed by the defendant no. 1-appellant; hence the irrefutable conclusion is that the defendant no. 1-appellant has failed to prove his allegation of fraud or fraudulent inducement.

A strong case has been made by the defendant no.1-appellant with regards to the fact that it was unnatural for the donor Nasimunnessa to use thumb impression in place of signature in the declaration of gift made in favour of the respondents. However, it was rightly found by the Court below that the transfer of Agamasi Lane property to the defendant no. 1-appellant Ehsan Ali on 2003 was also made through use of thumb impression, and given her admittedly deteriorating health, there is nothing unnatural in a thumb impression being used on the 2004 declaration of gift, and hence the said argument naturally falls through.

The appellant's counsel has also made a strong case for transfer permission from the Ministry of Housing and Public Works not

existing in favour of the transfer by Nasimunnessa to her 3 (Three) sons, namely - Nasim Ali, Masud Ali and Mahbub Ali - at the time the gift was made.

From the evidence on record, it appears that the chronology of events pertaining to the said gift of land, unfolded as Nasimunnessa filed application before Ministry of Housing for granting permission to transfer the suit land on 01.04.2004. On 09.08.2004 Nasimunnessa requested the Ministry to stay the process of granting transfer permission. On 19.10.2004 Nasimunnessa made an oral gift in favour of her three sons (the respondents. On 19.10.2004, Ministry of Housing granted permission to transfer the suit Land. On 18.12.2004 Nasimunnessa swore a declaration through an affidavit before 1st Class Magistrate in support of her gift and on 20.12.2004 The respondent brothers, namely Nasim Ali, Masud Ali and Mahbub Ali filed joint application before the Ministry of Housing for mutation of their names, which, as discussed above was allowed, contested by the appellant, and then upheld on contest by the Ministry.

It appears to be the appellant's contention that since the oral gift was made in favour of the respondents prior to issuance of transfer

permission, by the Ministry of Housing, the gift was not valid due to lacking of proper permission to transfer from the lessor. However, breaching of a condition of the lease deed, i.e. obtaining permission before transferring the property – even should it render the lease deed voidable, no step was taken by the Ministry of Housing to declare the lease void. Rather, the Ministry of Housing issued subsequent transfer permission after conducting due investigation of Donor Nasimunnessa's intention to transfer, and thereafter affirmed the transfer through issuance of the said transfer permission, thereby upholding the validity of the transfer. Moreover, another affidavit was sworn before 1st Class Magistrate subsequent to issuance of transfer permission- in support of the said transfer, and as such, the gift of land cannot be challenged on the ground of lacking of transfer permission.

In support of his contention, the defendant no.1-appellant had also exhibited an affidavit before Notary Public dated 20.06.1995 (Exbt. 'Ka') in support of an oral gift of the entire suit property in the name of all 4 (Four) brothers i.e. both the defendant no. 1- appellant as well as the respondents, namely – Ehsan Ali, Nasim Ali, Masud Ali and Mahbub Ali. Moreover, the defendant no.1-appellant also exhibited a

Family Settlement Deed dated 30.06.1995 (Exbt. Kha-Ga) with regards to all four sons possessing one side of the property and her daughter Fauzia Mawla being on the other side of the property.

However, admittedly, the said transfer never had the required permission from the Ministry of Housing and Public Works before or after the execution of the affidavit, and the trial Court below on examination of the affidavit dated 20.06.1995 found no conclusive statement regarding transfer of possession, and majority of the signatures did not possess dates under them, and the defendant no. 1-appellant also filed a suit in this regard and withdrew the same as admitted by D.W.1 on his testimony dated 19.03.2015, hence, the said purported transfer has no validity in the eye of law.

Moreover, no testimony or witnesses were adduced in support of the Family Settlement Deed dated 30.06.1995 (Exbt. Kha-Ga), and the learned Trial Court found that the deed suffered from similar defects as the purported affidavit with majority signature being undated, and hence rightly decided that the said deed also has no validity in the eye of law.

The witnesses led by the defendant no.1-appellant other than himself, i.e. D.W.2 and D.W.3 were found by the learned trial court below to be hearsay witnesses, where one of them (D.W.2) admitted in his cross examination that he had heard of the matter and was giving testimony based on what he had heard, and D.W.3 was also found to be a hearsay witness and also an employee of the defendant no. 1-appellant and both were rightly found to be unreliable witnesses by the learned court below.

On the other hand, with regards to the Title Suit no. 207 of 2016 filed by the present defendant no. 1- appellant as plaintiff, the learned Court below found that the suit was filed without possessing any title to the suit land, and the necessary parties including Ministry of Housing and Public Works were not impleaded, and further that a declaration of title simpliciter was not proper cause of action for the defendant no. 1-appellant.

Upon perusing the prayer, it is found that the defendant no. 1-appellant's prayer in the Title Suit no. 207 of 2016 stated as follows-

“(a) That a decree be passed declaring the alleged oral gifts allegedly confirmed by swearing affidavit before the Magistrate 1st Class, Dhaka

dated 19.10.2005 and the alleged oral gift dated 18.12.2004 as void, illegal, collusive, concocted, fraudulent, mala fide and of no legal effect.”

However, it appears that the defendant no.1-appellant, as plaintiff in the Title Suit no.207 of 2016 never prayed for declaration of his title or legal character which would then allow him to obtain a declaration that the oral gifts were void, but without claiming declaration of his title or legal character with regards to the suit land, the defendant no. 1-appellant cannot directly pray for cancellation of the deed which is a settled provision of law as enunciated in the case of Md. Fazlur Rahman and others vs. Mrs. Bani Rahman and others, reported in 39 DLR (1987), Page 339, where it was stated as follows-

“.... in order to obtain a decree to the effect that the decree was void the person seeking such a relief has to prove his title to the suit property. Unless he can prove his title to the suit property he cannot have the luxury of having a decree declared in his favour.”

Based on which, it may be concluded that the defendant no. 1-appellant's Title Suit no. 207 of 2016 was not maintainable at the outset.

Based on the aforementioned discussion, it appears that the gift of land by Nasimunnessa in favour of the respondent brothers, namely - Nasim Ali, Masud Ali and Mahbub Ali is valid and hence 16 Anas of right title and interest was validly declared by the learned Court below in favour of the said respondents; conversely the defendant no. 1- appellant having stayed on in the said suit property even after being asked to leave by the respondents is nothing more than an illegal occupant, and hence the learned court below rightly decided that he should be evicted from the suit property by due process of law.

Therefore, the Judgment and Decree dated 01.12.2016 (decree drawn on 02.01.2017) passed by the Joint District Judge, 3rd Court, Dhaka pertaining to Title Suit No. 206 of 2016, which was heard and disposed of alongside Title Suit No. 207 of 2016 is hereby upheld and the instant appeal is hereby dismissed.

Accordingly, the Transfer Appeal No.50 of 2019 is also dismissed.

There will be no order as to costs.

Communicate this judgment to the Court concerned at once.

Send down the lower Court records forthwith.

Md. Mozibur Rahman Miah, J

I agree.