ORDER SHEET

IN THE HIGH COURT OF SINDH,

CIRCUIT COURT, HYDERABAD.

R.A. No.47 OF 2003.

Khalid Hussain. . .Versus. .Province of Sindh and others.

Applicant:	Through Mr. Jhamat Jethanand, Advocate.
Respondents No.1 to 3:	Through Mr. Ashfaque Nabi Qazi, Assistant A.G.
Respondents No.4 to 8:	Through Mr. Naimatullah Soomro, Advocate.
Respondent No.5(v):	Through Mr. Rafique Ahmed, Advocate.
Alleged contemnor No.2:	Through Mr. Zaheeruddin Sahito, Advocate.
Alleged contemnor No.4:	Through Mr. Abdul Sattar Kazi, Advocate.
Alleged contemnor:	Through Mr. Bahadur Ali Baloch, Advocate.
Date of hearing:	11.09.2015.
Date of decision:	

O R D E R

NAZAR AKBAR, J: This Revision Application is arising out of dismissal of applicant's F.C. Suit No.305/1989 by the Court of VIth Sr. Civil Judge Hyderabad followed by dismissal of his Civil Appeal No.169/1995, by the Court of Vth Addl. District Judge Hyderabad, thereby maintaining order of Sr. Civil Judge, Hyderabad.

2. Precisely the applicant has sought the following relief through F.C. Suit No.305/1989.

a) That it may be declared that Plaintiff is exclusive owner of suit land bearing Survey No.73 admeasuring 9-09 acres Deh Gujo Taluka City Hyderabad and the Defendant No.4 to 8 have no right, title or interest in the same. It may further be declared that sale deed dated 9.7.1971 the gift deed dated 11.12.1983 and gift statement dated 31.8.1989, are illegal, void and not binding on the Plaintiffs and the order dated 21.8.1989 passed by Defendant No.2, mutations dated 31-8-1989 made by Defendant No.3 in record of rights, are illegal, void, malafide and without jurisdiction and not binding upon the Plaintiff,

b) That permanent injunction be issued restraining the Defendants from acting upon sale deed dated 9.7.1971, the gift-deed dated 11.12.1983, gift-statements dated 31.8.1989, the order dated 21.8.1989 passed by the Defendant No.2 and mutation entries made by Defendant No.3 and in any way from interfering with the possession of the Plaintiff of the suit land and in any way from alienating or raising any construction over the suit land;

c) That cost of the suit be borne by the Defendants;

d) Any other relief this Hon'ble Court deems fit;

3. The applicant in his plaint has averred that on **18.9.1967** Mst. Saeedun Nisa Wd/o Shamsuddin had acquired agricultural land bearing Survey No.73 admeasuring 9-9 acres situated in Deh Gujo Hyderabad (the suit land) an Evacuee Property by way of transfer. The said Mst. Saeedun Nisa on **14.6.1968** transferred the suit land to the applicant by way of gift and after accepting the gift he mortgaged the suit land to the Agricultural Development Bank of Pakistan on **22.6.1968** against loan of Rs.3247/- and the record of rights was mutated accordingly. It was also averred in the plaint that Respondent No.5 filed Suit No.269/1972 against the applicant, Mst. Saeedun Nisa and others for declaration, possession and mesne profits on the basis of sale deed dated **09.07.1971**, executed by Mst. Saeedun Nisa in favour of respondent No.5 in respect of the suit land. The suit was decreed by the learned Joint Civil Judge, Hyderabad by judgment dated **28.12.1978**. The applicant preferred an appeal bearing Civil Appeal No.195/1978 against the aforesaid judgment, which was allowed by the learned IIIrd

Additional District Judge, Hyderabad by judgment dated **02.03.1980**. The Second Appeal No.161/1980 was filed by respondent No.5, which was allowed by this Court on **10.10.1982** and the case was remanded to the learned trial Court for decision on merits. After remand, the plaint was returned to respondent No.5 by learned Ist Extra Joint Civil Judge, Hyderabad by order dated **30.08.1983**, against which, respondent No.5 filed Miscellaneous Appeal No.67/1984, which was dismissed as withdrawn. On **30.05.1985**, respondent No.4 filed Suit No.207/1985 for injunction against the applicant on the basis of gift deed dated **11.12.1983,** allegedly executed by respondent No.5 in his favour for the suit land and during pendency of above suit, respondents No.4 and 5 filed another suit bearing No.67/1988 for perpetual injunction against the applicant and obtained exparte decree on **31.05.1988**. The applicant filed an application for setting aside of exparte decree, which was pending. In the said suit status quo order in respect of alienation and mutation was passed by the Court, which was served upon respondent No.5 and such entry was also made in the record.

4. In the year 1984-85, respondent No.4 got entry in Khasra Girdwari as Hari, on which applicant filed an appeal before Assistant Commissioner, Hyderabad, which was allowed on **02.08.1986**. The respondent No.4 filed appeal against the said order, which was dismissed by Additional Deputy Commissioner-I, Hyderabad on **06.02.1988**. On **13.12.1988**, the Additional Deputy Commissioner-I, Hyderabad passed an order requiring respondent No.3 to attest the Entry dated **22.06.1968**. The entry was attested. Thereafter, respondent No.5 filed an appeal against the said order before respondent No.2, in the said appeal respondent No.4 filed an application to be joined as party, but the said appeal was dismissed as withdrawn on **08.07.1986**.

The respondent No.4 again filed appeal before Additional Deputy Commissioner Hyderabad against the aforesaid order passed by the Additional Deputy Commissioner-I, Hyderabad himself. The said appeal was dismissed on **20.07.1987**. Against the said order the respondents No.4 and 5 filed Revision before respondent No.2, which was allowed exparte on **02.07.1988**. Applicant's application for setting aside the said order was dismissed by respondent No.2 on **17.07.1988**. The applicant filed a Constitution Petition No.D-105/1988 which was allowed by this Court on **12.12.1988** and the case was remanded to respondent No.2 for fresh decision. The respondent No.2 on remand passed order dated **21.08.1989,** allowing the Revision filed by respondents No.4 and 5. Thereafter, the applicant filed Suit, No.305/1989 with the prayer reproduced in para-2 above.

5. The respondents No.4, 5, 6 and 7 filed their written statements, in which they admitted the averments regarding various litigation mentioned in the plaint and contended that no valid and legal gift was made by Mst. Saeedun Nisa in favour of applicant and that the applicant had never been in physical possession of the suit land. The entries in favour of applicant were fraudulent. It was contended that Suit No.67/1988 was filed by respondent No.4 only, the Appeal No.67/1984 was withdrawn by fraud and that the order passed by respondent No.2 dated **21.08.1989** was legal and valid. It was claimed that the suit land came is in possession of the respondents at the time of gifts made in their favour.

6. The learned trial Court framed the following issues from the pleadings of the parties:-

1. Whether Mst. Saeedun Nisa gifted suit land on 14.06.1968 in favour of the plaintiff?

2. Whether so call gift between Mst. Saeedun Nisa and plaintiff is false, fabricated and illegal?

3. Whether the plaintiffs were competent to mortgage the suit property? The said mortgage is fraud played by the plaintiff?

4. Whether the plaintiffs have remained in possession of the suit property?

5. Whether the plaintiffs are owners of the suit?

6. Whether the sale deed dated 09.07.1971 executed by Mst. Saeedun Nisa in favour of Mst. Khatija is illegal and void?

7. Whether gift deed dated 11.12.1983 executed by Mst. Khatija in favour of Jawaid Saleem is illegal and void?

8. Whether the gift statement dated 31.08.1989 is illegal and void?

9. Whether orders dated 21.08.1989 passed by the defendant No.2 and mutation dated 28/31.08.1980 made by the defendant No.3 is on record of rights are illegal, void, malafide and without jurisdiction?

10. Whether the defendants Nos.4 to 7 are not owners of the suit property?

11. Whether the suit is not maintainable in law?

12. Whether the Court has no jurisdiction?

13. Whether the suit is false, frivolous and vexatious?

14. Whether the suit is time barred?

15. What should the decree be?

7. The parties led their evidence and after hearing them, the learned trial Court dismissed the suit of the applicant by judgment dated **14.11.1995,** which was challenged by filing Civil Appeal No.**169/1995**, it met with same fate on **30.9.1998**. The applicant filed Revision Application No.**170/1998** against the appellate order which was set aside by this Court by judgment dated **28.1.2002** and appeal was remanded for re-hearing and fresh decision by appellate Court. The Appellate Court again by judgment dated **31.3.2003**, dismissed the appeal. This second Revision No.47 of 2003 was filed on **4.6.2003**. After 12 years and more than 03 months on 19.9.2003. I heard the counsel

for the parties for almost whole day and dismissed this Revision by short order for reasons to be recorded.

8. Learned counsel for the applicant Mr. Jhamat Jethanand has opened his arguments by referring to admission order of this revision application dated 23.6.2003 which shows that the original judgment of Vth ADJ in Civil Appeal No.169/1995 was set aside by order dated 05.9.1998 in an earlier Civil Revision Application No.170/1998 and the case was remanded to the Appellate Court for afresh decision. He has again asserted the same proposition that the order of Appellate Court does not fulfill the requirement of Order XLI Rule 30 CPC and the directions contained in the remand order were not followed as through the fresh judgment the learned Appellate Court was required not merely to refer the case law in the order but the ratio of the cited judgment should have also been mentioned therein and therefore, he wants that this case be remanded again to the Appellate Court after twelve years to examine the case law which he had relied upon and mention the ratio of each case law in the fresh judgment.

9. Learned counsel for applicant has also vehemently stressed on the admission of respondent regarding the previous litigation between the parties and attempted to invoke **Order II Rule 2 CPC** read with **Section 11** of CPC and argued that the Defendants were estopped from raising the plea in defense which were taken by them in their plaints in the earlier litigation and therefore, the suit should have been decreed straightaway. He has contended that dismissal of earlier Civil Appeal No.93/1978 and dismissal of Suit No.207/1985, and Suit No.67/1988 filed by Respondents operates as resjudicata against the Respondents.

10. He has referred to the **Standing Order No.17(6)** of the Land Revenue Department and asserted that an oral transaction of land and rights in the land can be accepted for the purpose of entries in the Record of Rights and therefore, by virtue of Gift Statement (Exh.94) property stood transferred lawfully in favour of the applicant and the Courts below have failed to follow the Standing Order No.17(6) of the Revenue Department. He has further contended that the Record of Rights has shown mortgage of the suit land with Agricultural Development Bank by the applicant/Plaintiff and the Court has not taken into accounts the documents showing entry of mortgage dated 5.9.1968 (Exh.98). He has also contended that Defendants No.4 & 5 during pendency of different litigation between the period from 1972 to 1985 had illegally transferred the suit land first to respondent No.4 by respondent No.5 and then to respondent Nos.6 & 7. All these transactions are hit by the rule of lis pendens under **section 52** of the Transfer of Property Act, 1882. In support of his various contentions he has relied upon the following case law;

a) On the point that lower Appellate Court has violated earlier order of remand to the Appellate Court:-

i.	PLD 1989 SC 568	Nasir Abbas v. Mansoor Haider Shah
ii.	1996 SCMR 669	Syed Iftikhar-ud-Din Haider Gardezi & 9 others v.Central Bank of India, Ltd., and 2 others
iii.	2004 CLC 950	Abdur Razzaq..vs..Sabar Khan

b) On the point of setting aside concurrent finding of Courts on misreading of evidence

i.	2010 SCMR 1630	Sultan Muhammad and another v. Muhammad Qasim and others
ii.	PLD 1989 SC 568	Nasir Abbas v. Mansoor Haider Shah

iii. 1986 SCMR 1950 Sarfraz Khan v. Federation of Pakistan

c) On the question of resjudicata.

i. PLD 2003 Lahore 48 Niaz Ahmed Khan v. Kishwar Begum and 19 others

ii. PLD 1971 SC 376 Haji Ghulam Rasool & others v. The Chief Administrator of Auqaf, West Pakistan

iii. 1999 MLD 1148 Amanat Ali v. Abdul Haque and 27 others

iv. 1993 MLD 2138 Muhammad Yousaf and 3 others v. Mst.Zubeda Begum and another

v. PLD 1983 Pesh. 100 Mir Zaman v. Mst. Begum Jan and 11 others

d) On **Section 52** of Transfer of Property Act, 1882 as according to him transaction amongst the respondents were during the pendency of suits No.269/1972, 207/1985 and suit No.67 of 1988, and the gift between Defendants No.5 to 4 was without possession.

i. 1998 SCMR 858 Mian Tahir Shah and another v. Additional District Judge, Swabi and others

ii. PLD 1993 Lah. 245 Muhammad Yousaf v. Abdul Majid

e) On the point that the suit was not time barred as the mutation entry of applicant was cancelled on 21.8.1989.

i. PLD 1994 SC 242 Haji Jan Muhammad v. Provincial Water Board, Balochistan, Quetta

ii. PLD 1993 Lah. 254 Allah Bakhsh and another v. Ghulam Janat and 6 others

11. Mr. Naimatullah Soomro, learned counsel for the Respondents No.4 to 8 has contended that this Revision Application is directed against second time dismissal of Civil Appeal No.169/1995 filed by the applicant. The earlier judgment of dismissal of same Civil Appeal dated **3.9.1998** was equally comprehensively judgment. However, it was

remanded to the Appellate Court in Civil Revision Application No.170/1998 and the contention of the applicant that on remand the Lower Appellate Court has failed to mention the case law cited by the applicant is factually incorrect as no case law was cited and even otherwise this Court can examine the case law, which if at all, has been left unexamined by the lower Appellate Court while deciding this Revision Application instead of technical set aside of the comprehensive impugned judgment maintaining the dismissal of the suit of the applicant and decide the controversy once for all.

12. On merit he has also referred to Deh Form-VII (Exh.116) and argued that by **14.6.1968** the suit land was not transferred to the original owner, Mst. Saeedun Nisa because the said Entry No.288 dated **14.6.1968** was by the Supervising Tapedar and it matured into her ownership on **7.6.1970** when the Settlement Commissioner endorsed the said Revenue Entry under his signature and therefore, on **14.6.1968** Mst. Saeedun Nisa was not even owner of the suit land to alienate the same by way of gift to Khalid Hussain. He has also contended that a mere statement of gift on the same day of formal entry before Revenue Authority is not enough to claim transfer of ownership by way of gift as a valid and proper transfer. He has also referred to Standing Order 17(6) of the Revenue Department and pointed out that learned counsel for the applicant has not read the whole Standing Order 17(6) which is reproduced below;

Standing Order 17

Record of Rights

……

> (6) Oral transactions of land and rights in land are admitted for the purposes of entries in the Record of rights if the parties given written statements of agreement.

It has been rightly contended by Mr. Soomro learned counsel for Respondents that even in oral transaction of land for the purpose of Record of Rights, it needs to be followed by “written statement of agreement”. He has read evidence of applicant available at page 409 and a detailed cross-examination and pointed out that gift statement (Exh.94) shows donee as nephew of donor namely Saeedun Nisa though it is not a fact and the said Saeedun Nisa in her lifetime has made a complaint against the applicant on which an enquiry was conducted by Revenue Authorities. The proceeding of enquiry were produced as Exh.191 and Ex.192. In inquiry, witness of the applicant S.M Hassan was examined on **14.6.1971** by Settlement Mukhtiarkar, Hyderabad and it was established that Saeedun Nisa has not gifted or made any statement before Mukhtiarkar in respect of alleged gift in favour of the applicant. Even statement of Saeedun Nisa was also recorded on **18.5.1971** before Mukhtiarkar Hyderabad during the inquiry which was produced as Exh.192. She was cross-examined by Khalid Hussain during the said enquiry and her evidence was not shakened. Therefore, she had rightly sold out the suit land on **9.7.1971** to Mst. Khatija and on the basis of said sale deed the name of Mst. Khatija was entered in the Revenue Record on **30.7.1971**.

13. Learned counsel for the respondents has contended that burden of proof was on the applicant to prove execution of gift statement (Exh.94) but he failed to discharge the same. Solitary statement of PW-1 (the applicant) was not sufficient compliance **of Article 117 and 118** of Qanun-e-Shahadat Order, 1984 since no one corroborated his statement and in cross examination his stand was badly shaken. He has

extensively referred to evidence of the applicant and pointed out his admissions which are reproduced below:-

> "It is correct to say that originally Mst.Saeedunnisa was owner of the suit property. She was not relative of my father. I was present when the suit property was gifted to my father Khalid Hussain. It was in writing. It is correct to say that said gift deed was not written on stamp paper"……..
> ……..……..……..……..……..……
> "I was not present in the Office of the Mukhtiarkar when the gift was reduced into writing in favour of Khalid Hussain. At that time witnesses were present, but I do not remember the name of witnesses except S.M. Hassan". …….
> ……..……..……..……..……..……
> All the statements are whatever mention in Exh:94 it is therein. These statements were recorded in the house of my grandfather namely Ahmed Hassan. Mukhtiarkar has come in our house. I do not know the reason why Mukhtiarkar has recorded the statements in our home instead of in his office.
> ……..……..……..……..……..……
> I see Exh:114, and say this document was attested later on. On **22.6.68**, the mutation was effected in favour of my father and it was attested on **13.12.1983**. I do not know the reason for delay of attestation of mutation record. It is correct to say that suit property was transferred to Mst. Saeedun-Nisa on **14.6.1968**. I do not know if this transfer was confirmed on **07.6.70**. ……..……..……..……..……
> ……..……..……..……..……..……
> I do not know if subsequently Mst. Saeedun Nisa had made complaint to the Mukhtiarkar for not gifted the suit property to Khalid Hussain. I do not know if Mukhtiarkar has inspected the site where statement of Mst. Saeedun Nisa was recorded by him. ……
> ……..……..……..……..……..……
> Vol: says that the Defendant No.3 has mutated the record in favour of Defendant No.4 & 5, during the stay order. I was at Pakistan when the Khatta was cancelled. I cannot say if as per statement of Mst. Saeedun Nisa and enquiry made by the Mukhtiarkar the gift was declared as forged, and the Khatta of Mst. Saeedun Nisa remained intact. I know that on **9.7.71**, Mst. Saeedun Nisa has sold the suit property to Mst. Khatija and on the basis of said sale deed the name of Mst. Khatija was mutated in the revenue record on **30.7.71**. I do not know if my father has challenged the mutation dated **30.7.71**, or myself. …….
> ……..……..……..……..……..……
> It is correct to say that Mst. Khatija has gifted the suit property to Jawed Salim on **11.12.1983**, and mutation of Khatta was effected in his name……..
> ……..……..……..……..……..……
> It is correct to say that my father had filed application before A.D.C-I on **31.01.1983**, to confirm the pending entry in the name of Khalid Hussain. The entry was pending in favour of my father since **22.6.1968**, and we have challenged the said entry before the ADC-I, vide application dated **31.10.1983**,…
> ……..……..……..……..……..……
> Presently there is no cultivation on the suit property previously it was cultivated from 1960, upto 1991. My

employees were cultivating the said land. I cannot give the names of the employees as they were on daily wages.

14. He has lastly contended that order of Additional Commissioner Hyderabad dated **21.8.1989** was appealable under **Section 161** Sindh Land Revenue Act, 1967, then under **Section 164** by way of Revision Application within 90 days of passing of the order and the jurisdiction of civil court was barred under **Section 172** of the Sindh Land Revenue Act, 1967 at least until the entire remedy available under revenue laws was exhausted by the applicant. On different propositions advanced by learned counsel for respondent No.4 to 8 and adopted by counsel for the other respondents, the counsel has relied on the following case law.

a. On burden of proof.

i.	PLD 1985 Karachi 431	National Bank of Pakistan..Vs..Mst. Hajra Bai and 2 others.
ii.	PLD 1994 Karachi 106	Muhammad Subhan and another v. Mst. Bilquis Begum through Legal Heirs
iii.	CLC 1995 631	M/s.National Bottlers (Pvt.) Ltd.,.v. Additional Secretary, Federation of Pakistan and 2 others
iv.	CLC 1995 1173	Auqaf Department v. Javed Shuja and others

b. On proof of execution of gift.

i.	1994 MLD 467	Rashid Ahmed and others v. Sardar Bibi and others
ii.	2001 SCMR 1156	Nasrullah Khan..Vs..Rasul Bibi

c. On concurrent findings

i.	PLD 1983 SC 53	Kanwal Nain and 3 others v. Fateh Khan and others
ii.	1992 SCMR 786	Jam Pari..Vs..Muhammad Abdullah

iii.	PLD 1994 SC 291	Haji Muhammad Din v. Malik Muhammad Abdullah
iv.	1997 SCMR 1139	Abdul Hakeem v. Habibullah and 11 others
v.	2000 SCMR 431	Anwar Zaman and 5 others v. Bahadur Sher and others

d. On the point of compliance of Order XLI Rule 31 CPC.

i.	1982 SCMR 542	Mst. Roshi and others v. Mst. Fateh and others
ii.	2004 SCMR 877	Mst. Zaitoon Bibi v. Dilawar Muhammad through Legal Heirs

15. I have heard learned counsel and examined the case law cited at the bar and perused the record.

16. The first contention raised by the learned counsel for the applicant that the lower appellate court has not discussed the case law in the impugned judgment and therefore failed to follow the direction of the remand order dated 21.1.2002 in Civil Revision No.107/1998 is misconceived. I have gone through the judgment, I believe this is no ground for hitting the judgment of lower Appellate Court since the High Court in Revision Application itself can examine the case law on which the learned counsel wants to rely with reference to the evidence, the facts available on record and discussed by the Courts below. In any case it is not the requirement of **Order XLI Rule 23, 24 & 25** of Civil Procedure Code 1908. The Revision is not against the order of dismissal of appeal on preliminary point nor it is a case of insufficient evidence on record. By now it is settled law that the Appellate Court must refrain from lightly remanding the case and particularly when the Appellate Court itself has enough material available to examine whatever issues were raised or grounds were

taken by the parties before the Lower Courts to settle the dispute between them once for all. Mr.Jhamat Jethanand and Mr.Naimatullah Soomro, counsel for the appellant and the respondents respectively, have extensively referred to R&P of trial Court and none of them have complained about anything which could not be examined by this Court in revisional jurisdiction and remand the case to the lower Appellate Court to first comment on it, that too, after 12 years to examine the same and re-write the judgment on merit.

17. The case law relied upon by the learned counsel on the question of violation of judgment in Civil Revision Application No.107/1998 and the provisions of Order XLI Rule 31 CPC are not relevant in the case in hand. **PLD 1989 SC 568, 1996 SCMR 669** and **2004 CLC 950** all are on the point that if evidence on record has not been fully considered by the Appellate Courts below it would mean that **Order XLI Rule 31** CPC is not complied with and Courts are required to give issue-wise findings on the point for determination. There is no cavil to these propositions from the three judgments but in the case in hand learned counsel for the Applicant has not pointed out single piece of material evidence which ought to have been examined by the two Courts below and has not been examined. The counsel for the Respondent has extensively referred to the evidence though it should have been done by the counsel for the applicant to point out misreading of evidence. Both the Courts below have examined the relevant documents particularly the statement of gift Exh.94 which was the basic document to claim ownership of the suit land by the applicant by way of gift. The other documents produced by the parties in support of their claim have also been examined by the Court below and to name a few of the Exhibits which were relevant for the controversy between the parties including evidence of S.M Hussain before the Settlement Mukhtiarkar City Hyderabad on **14.6.1971** as Exh.191, the statement of Mst. Saeedun Nisa before the Settlement Mukhtiarkar City

Hyderabad during the inquiry as Exh.192 and the revenue receipts as Exh.118, 118/1 to 118/9 for deciding the issue before the trial Court. Learned Counsel for the applicant has not been able to point out that reading and examination of these exhibits for the purposes of determination of issue between the parties was not relevant or there was any particular documents on record which could have been examined by lower Court, therefore, the three citations mentioned above and relied upon by the counsel have no bearing on this case. It has rightly been pointed out by the counsel for the Respondents that Appellate Court has sufficiently complied with requirement of Order XLI Rule 31 CPC since the Appellate Court has again affirmed finding of the lower Court. Learned counsel for the Respondent has relied on **1982 SCMR 542** and **2004 SCMR 877**. The Lower Appellate Court has specifically raised point for determination and decided the same one by one. The applicant has failed to prove the execution of gift by Mst. Saeedun Nisa in favour of the applicant. No attesting witness was produced. As quoted by me in the earlier part of the judgment, the evidence of applicant was devoid of any weight in terms of Qanun-e-Shahadat Order, 1984. He was not able to even disclose the names of witnesses before whom the gift statement (Ex.94) was made by Mst.Saeedun Nisa in favour of the applicant. He has even admitted that Mukhtiarkar had recorded such statement in the house of his grandfather. Since both the lower Courts have decided the issues extensively referring to the evidence on record in affirmative, it was sufficient compliance of the requirement of Order XLI Rule 31 CPC as held in 1982 SCMR 542 and 2004 SCMR 855.

18. The second contention of the learned counsel for the applicant is that the admission of previous litigation by respondents constitutes resjudicata as defined under **Section 11 CPC**. He has also repeatedly referring to the Plaint and written statement to claim benefit of **Order II Rule 2 CPC**. It is indeed strange argument on behalf of the applicant / plaintiff. The provisions of **Section 11** and **Order II Rule 2** CPC are reproduced below:-

> **Section 11.** *Res judicata.* No Court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under who they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.
>
> **Order-II Rule 2**
>
> 2. Suit to include the whole claim. (1) Every suit shall include the whole of the claim which the Plaintiff is entitled to make in respect of the cause of action, but a Plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.
>
> (2) Relinquishment of part of claim. Where a Plaintiff omits to sue in respect of or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
>
> (3) Omission to sue for one of several reliefs. A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

If we accept that these provisions are applicable in the instant case, then we would also accept that all the issues raised by the applicant in his plaint had already been decided by different Court of law between the same parties. In such an eventuality it is the applicant / Plaintiff who should suffer. Each and every case law relied upon by the learned counsel for the applicant namely **(i)** PLD 2003 Lahore 48, (Niaz Ahmed Khan ..Vs.. Kishwar Begum and 19 others) and **(ii)** PLD 1971 SC 376 (Haji Ghulam Rasool and others..Vs..The Chief Administrator of Auqaf, West Pakistan); the consensus of the Courts is that the plaint has to be rejected. In the case in hand learned counsel for the applicant/Plaintiff wants a decree by invoking the above provisions. The very fact that the applicant/Plaintiff has approached the Court for seeking the declaration of ownership of the suit land in his favour and a negative declaration about the title of Respondents by itself is enough to appreciate that his title was not clear and any dispute about his title to suit land has not been decided in his favour. Interestingly enough in his plaint he has avoided to seek any judicial pronouncement on his title documents. In prayer clause (a) the

applicant has **not** sought any declaration from the Court about his own title document, namely gift statement dated 14.06.1968 (Exh.94). However, he has prayed to adjudge title documents of Respondents as **void**. If at all any Court has already adjudged, the sale-deed dated **09.7.1971** and gift deed dated **11.12.1983** as illegal or unlawful, then why another suit for same prayer. And if by any definition / interpretation of previous litigation, it has been done, then the remedy was execution of such judgment and not yet another declaration to the same effect. Therefore, the contention of the learned counsel to apply the above provisions for a decree in his favour and against the Respondents / Defendants is misconceived.

19. The next contention raised by the learned counsel for the applicant is that the transaction between Respondents No.4 & 5 and 6 & 7 are hit by provisions of **Section 52** of the Transfer of Property Act, 1882 are equally misconceived. The Plaintiff has not filed any suit against the respondents nor obtained any restraining orders against the respondents to deal with the suit land. In fact the first ever suit filed by the Plaintiff was instituted by him in 1989 and by that time all the transactions had been concluded. The number of various litigations referred to by the applicant in his plaint clearly suggests that all such suits and proceedings were filed by the respondents were in the nature of injunctions against the applicant/Plaintiff. However, the applicant never filed any suit to assail registered sale deed **07.9.1971** despite the fact that the applicant claimed ownership of the suit land by virtue of statement of gift dated 14.6.1968 (Exh.94) by the same Saeedun Nisa who has sold suit land by registered sale to respondent No.5 in 1971. Therefore, if the said transaction was adverse to the interest of applicant/Plaintiff, he should have straightaway challenged it when it came to his notice in 1972 through plaint of Suit No.269/1972. He had acquired knowledge of existence of sale deed dated 9.7.1971 in respect

of suit land in favour of Respondent No.5 in 1972 as he had contested the Suit No.267/1972. However, he did not challenge the said sale deed until 1989. Similarly he was also party to Suit No.207/1985 for injunction on the basis of gift deed dated 11.12.1983 but he did not challenge even the said gift until 1989 when he filed the present Suit on **07.9.1989**. In view of the above peculiar facts and knowledge of all the transactions, the protection of **Section 52** of the Transfer of Property Act, 1882 was not available to the applicant/Plaintiff.

Another aspect of his arguments for the benefit of **Section 52** ibid is that the Counsel has not even mentioned that there was an amendment in Sindh Laws in 1939 whereby **Section 52** of the Transfer of Property Act, 1882 and **Section 18** of the Registration Act, 1908 were amended. The Counsel for the applicant when relying on the effect of **Section 52** of the Transfer of Property Act, 1882 he had read and referred to un-amended **Section 52** ibid which is not applicable in his case. The un-amended Section 52 ibid and Sindh Amendment of 1939 as printed in 13th edition of Transfer of Property, Act published by Legal Research Centre in 2013 are reproduced below:-

> **52. Transfer of property pending suit relating thereto.** During the pendency in any court having authority in Pakistan or established beyond the limits of Pakistan by the Federal Government of any suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the property **"** cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.
>
> **SIND AMENDMENT.**
>
> Section 52 shall be renumbered a sub-section (1) of the section; and
>
> (i) in sub-section (1) so renumbered after the word "question", the words and figures "if a notice of the pendency of such suit or proceeding is registered under section 18 of the Indian Registration Act, 1908", and after

the word “property” where it occurs for the second time the words “after the notice is so registered”, shall be inserted; and

(ii) after the said sub-section (1) so renumbered the following shall be inserted, namely:-

“(2) Every notice of pendency of a suit or a proceeding referred to in sub-section (1) shall contain the following particulars, namely:-

(a) the name and address of the owner of immovable property or other person whose right to the immoveable property is in question;

(b) the description of the immoveable property the right to which is in question;

(c) the Court in which the suit or proceeding is pending;

(d) the nature and title of the suit or proceeding; and

(e) the date on which the suit or proceeding was instituted.”

19. The effect of Sindh Amendment in Section 52 of the Transfer of Property Act, 1882 reproduced above is that for its application in the Province of Sindh, the Section 52 ibid in terms “Transfer of Property and the Registration (Sindh Amendment) Act, 1939 (XIV of 1939), followed by omission of the word “Indian” by the Sindh Laws (Adoption, Revision Appeal and Declaration) Ordinance, 1955 (Sindh 5 of 1955) S-4 (w.e.f. 30th May, 1951) S.2, is to be read as under:-

> **Section 52. Transfer of property pending suit relating thereto. (I)** During the pendency in any court having authority in Pakistan or established beyond the limits of Pakistan by the Federal Government of any suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, **“if a notice of the pendency of such suit or proceeding is registered under section 18 of the Pakistan Registration Act, 1908”**, the property “**after the notice is so registered**”, **“** cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.
>
> (2) Every notice of pendency of a suit or a proceeding referred to in sub-section (1) shall contain the following particulars, namely:-

(a) the name and address of the owner of immovable property or other person whose right to the immoveable property is in question;

(b) the description of the immoveable property the right to which is in question;

(c) the Court in which the suit or proceeding is pending;

(d) the nature and title of the suit or proceeding; and

(e) the date on which the suit or proceeding was instituted."

It is further necessary to mention that by Sindh Act No.XIV of 1939, amendment in **Sections 18 and 28** of Act XVI of 1908 (Registration Act, 1908) were incorporated. The Amendment in **Section 18** is reproduced below:-

3. In the Registration Act, 1908:-

(I) in section 18—

(i) the word "and" after clause (e) shall be deleted; and

(ii) after clause (e) the following shall be inserted, namely:-

"(ee) notices of pending suits or proceedings referred to in Section 52 of the Transfer of Property Act, 1882; and

(2) in section 28 for the brackets, letters and word "(b) and (c)" the brackets, letters and word "(b), (c) and (ee)" shall be substituted.

20. The learned counsel for the applicant and even counsel for the Respondent had totally ignored provisions of **Section 52** of the Transfer of Property Act, 19882 as applicable in the Province of Sindh. It is admitted position that no notice of pendency of any proceeding in the past and even about the present Suit No.305/1999 was ever registered with the Sub-Registrar concerned by the applicant/Plaintiff and therefore, contention of the learned counsel that the transaction between the respondents inter-se were violative of **Section 52** of the Transfer of Property Act, 1882 had no legal basis. The case law relied upon by the counsel for the applicant dealing with the provisions of **Section 52** of the Transfer of Property Act, 1882 is not relevant in his case since it does not deal with the said provisions as it is applicable in the Province of Sindh, **1998 SCMR 857** is about property situated

in NWFP (now KPK) and **PLD 1993 Lahore 245** deals with the property situated in Punjab and obviously the **Section 52** of the Transfer of Property Act, 1882 as applicable in the Province of Sindh was not under discussion in the said rulings and therefore, these case laws are irrelevant in view of the Sindh Amendment to **Section 52** of the Transfer of Property Act, 1882.

21. Contention of the learned counsel for the Respondent that the petitioner was never in possession or he was not in possession of the suit land at least at the time of filing of the suit had been held so by the two Courts below. The Applicant/Plaintiff in his plaint has given an impression that he had been in possession of the suit land as appears from the prayer clause in which he has sought restraining orders against the Respondents to the effect that they should not interfere in the possession of the Plaintiff. Had it been true, the Plaintiff should have not allowed the trial Court to frame Issue No.4, which reads as follow:-

4. Whether the Plaintiff remains in possession of the suit property?

Respondent No.4 in para-5 of his written statement has categorically stated that the Plaintiff had never been in possession of the suit land. The two Court below on the factual issue of possession of suit land after a detailed discussion of evidence have answered it against the applicant/Plaintiff. The burden was on the applicant/Plaintiff, Plaintiff while in possession never sought assistance of the Court to establish his prima face possession by asking the Court for inspection of the suit land. The applicant/Plaintiff has also not produced any evidence of being in possession of the suit land. Admittedly applicant/Plaintiff had failed to produce even his ***Hari*** in order to establish his possession through *Hari.* He was unable to give even names of ***Haris*** who were cultivating for him thus the suit filed for declaration of ownership in 1989 without seeking relief of possession of suit land was not maintainable under the proviso of **Section 42** of the Specific Relief Act, 1877. It is worth mentioning here that if we believe that he was in possession at the time of

filing of the suit before the first judgment against him in Suit No.305/1989, and he was dispossessed during the proceedings, he should have sought at least amendment in the plaint for recovery of possession. Neither the plaint was sought to be amended nor even in appeal the appellant has attacked the findings of trial Court on issue No.4 in any of the grounds of appeal. No efforts were made to claim repossession pending the appeal. Therefore, the findings on issue No.4 are sufficient to dismiss this revision application as on account of failure of the applicant/Plaintiff to seek possession alongwith prayer for declaration of ownership the suit ought to have been dismissed as back as in 1989 without recording of evidence.

The upshot of the above discussion is that this revision application has no merit. It was dismissed by a short order and the above are the reasons for the same.

JUDGE