Judgment Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Civil Revision Application No. 184 of 2013

Present :
Mr. Justice Nadeem Akhtar

For Katcha Peshi :

Applicant : Syed Murshad Ali, through Mr. Badar Alam Khan, advocate.

Respondent No.1 : Syed Amjad Ali, through Mr. Muhammad Naseem advocate.

Respondent No.2 : Syed Sarfaraz Ali, through Mr. Muhammad Farooq advocate.

Respondent No.3 : Sub-Registrar T Division-II, Karachi, called absent.

Respondent No.4 : The President, United Bank Limited, through Mr. Muhammad Muzaffar advocate.

Date of hearing : 06.03.2014

J U D G M E N T

NADEEM AKHTAR, J. **–** Through this Civil Revision Application, the applicant has impugned the judgment delivered on 28.08.2013 by the Vth Additional District Judge, Karachi South, in Civil Appeal No.253/2012, whereby the said appeal filed by respondents 1 and 2 was allowed, and the order passed on 19.11.2012 by the learned Vth Senior Civil Judge, Karachi South, rejecting the plaint of Suit No.732/2012 filed by respondents 1 and 2, was set aside.

2. The relevant facts of the case are that the applicant and respondents 1 and 2 are real brothers, and are the real sons of late Syed Sarwar Ali **('the deceased')**, who was the owner of Plot No.59/II, Khayaban-e-Shujaat, Phase V, Defence Housing Authority, Karachi **('the property')**. Through a Deed of Declaration of Oral Gift dated 12.04.1995 **('the gift')**, which was duly registered on the same day with the Sub-Registrar concerned, the property was gifted by the deceased to the applicant. In March 2012, respondent No.1 Syed Amjad Ali filed Suit No.400/2012 before the XIVth Civil Judge, Karachi South, for permanent injunction against four of his brothers ; namely, the present applicant, the present respondent No.2, Syed Feroz Ali and Syed Asghar Ali. In his said Suit No.400/2012, it was pleaded by respondent No.1 that he was in possession of the

property ; and, It was alleged by him that the gift in favour of the applicant was illegal as it was managed by the applicant through cheating, and the applicant was attempting to dispossess him from the property. It is to be noted that no declaration to the above effect was sought by respondent No.1 in his said Suit, nor did he seek cancellation of the gift in favour of the applicant. The applicant filed his written statement in the said Suit, wherein he denied all the assertions and allegations made by respondent No.1 / plaintiff. The applicant also filed an application for rejection of the plaint in the said Suit. On 21.07.2012, respondent No.1 filed an application for withdrawal of his Suit No.400/2012 on the ground that he had decided to file a fresh Suit. The said application was allowed, and Suit No.400/2012 was dismissed on 28.07.2012 as withdrawn.

3. Meanwhile during the pendency of Suit No.400/2012, respondent No.1 along with respondent No.2 filed Suit No.732/2012 on 23.07.2012 before the Vth Senior Civil Judge, Karachi South, against the present applicant, the Sub-Registrar T Division-II, Karachi, and the President United Bank Limited, Karachi, for declaration, cancellation and injunction. In this Suit, it was prayed by respondents 1 and 2 that the deceased be declared as the sole, absolute and exclusive owner of the property ; all surviving legal heirs of the deceased be declared as co-owners of the property having entitlement to collect their due share therefrom ; Nazir be directed to collect the rents of the property from the tenants ; the Sub-Registrar concerned be directed to cancel the gift in favour the applicant ; and, the defendants be restrained from dispossessing respondent No.1 from the property, or from creating any third party interest in respect thereof. The applicant filed his detailed written statement in Suit No.732/2012, wherein all the averments and allegations made by respondents 1 and 2 were denied, and specific preliminary objections were raised that the Suit was barred by limitation as well as under Order II Rules 2 and 3 CPC ; and, Suit No.732/2012 was not maintainable as it was filed during the pendency of Suit No.400/2012. The applicant also filed an application under Order VII Rule 11 CPC for rejection of the plaint of Suit No.732/2012 *inter alia* on the above grounds.

4. By order dated 19.11.2012, the trial Court allowed the application filed by the applicant and rejected the plaint of Suit No.732/2012 on the ground that the said Suit was hopelessly barred by limitation. Being aggrieved with the said order, respondents 1 and 2 filed Civil Appeal No.253/2012 before the Vth Additional District Judge, Karachi South, which was allowed vide impugned judgment, and the order of rejection of the plaint passed by the trial court was set aside. It was held by the appellate court that since respondents 1 and 2 / appellants had challenged the genuineness of the gift and had claimed that it was kept secret

from them by the applicant till the filing of Suit No.400/2012, the trial court ought to have framed an issue on the point of limitation as the same, being a mixed question of law and facts, required evidence.

5. Mr. Badar Alam Khan, learned counsel for the applicant contended that the gift in favour of the applicant was executed by the deceased admittedly on 12.04.1995, which was witnessed by respondent No.1 and Syed Feroz Ali, the real brother of the applicant and respondents 1 and 2, as the Declaration of Oral Gift bears their signatures. He submitted that this fact alone is sufficient to establish that respondent No.1 had full knowledge of the gift since 12.04.1995, but despite such knowledge, he never challenged the gift till 23.07.2012 when he filed Suit No.732/2012. He further submitted that the deceased passed away in February 1997, but respondents 1 and 2, as his legal heirs, did not claim their alleged share in the property till 23.07.2012, that is for more than 15 years. It was urged that since the Suit for cancellation of the gift was filed after more than 17 years of the gift, and after about 15 years from the death of the deceased for the declaration regarding the alleged share in the property, the same was miserably barred under Section 91 of the Limitation Act, 1908, which prescribes a period of three years for seeking such reliefs. It was further urged that the Suit was also barred under Order II Rule 2 CPC as respondent No.1, in his earlier Suit No.400/2012, had omitted to seek the reliefs which were sought by him in his subsequent Suit No.732/2012. It was also urged that in view of the above, the plaint did not disclose any cause of action. The learned counsel argued that the prayers for cancellation of the gift and declaration with regard to the alleged shares in the property could not be granted in view of the above. Regarding the finding of the appellate court about framing of an issue on the point of limitation and recording evidence in respect thereof, the learned counsel submitted that such finding is unsustainable, as respondents 1 and 2 had not disclosed or pleaded in the plaint the date of knowledge of the gift. He argued that no issue on the point of limitation could be framed as the same would have been beyond the pleadings.

6. As to the other reliefs sought by respondents 1 and 2 in their Suit, it was argued by the learned counsel for the applicant that the said other reliefs, being consequential in nature, could not be granted as respondents 1 and 2 were / are not entitled to the main reliefs of declaration and cancellation. In addition to his above submissions, he also contended that except for respondents 1 and 2, no other legal heir of the deceased has ever challenged the gift in favour of the applicant. Some other points were also urged by him, but I am not discussing or considering the same, as they are not relevant in my humble opinion. In the end, the learned counsel submitted that the plaint was rightly rejected by the trial court,

and he prayed that the impugned judgment be set aside. In support of his submissions, learned counsel for the applicant cited and relied upon the cases of (1) *Ilyas Ahmed V/S Muhammad Munir and 10 others*, ***PLD 2012 Sindh 92***, (2) *S. M. Shafi Ahmed Zaidi through legal heirs V/S Malik Hassan Ali Khan (Moin) through legal heirs*, ***2002 SCMR 338***, (3) *Muhammad Akhtar Erc V/S Abdul Hadi Erc*, ***1981 SCMR 878***, (4) *Mir Sahib Jan V/S Janan*, ***2011 SCMR 27***, (5) *Mian Muhammad Akram and others V/S Muhammad Rafi*, ***1989 CLC 15***, (6) *Mst. Mazhar Khanum V/S Sheikh Saleem Ali and 7 others*, ***2004 CLC 799***, (7) *Taj Muhammad Khan through L.Rs and another V/S Mst. Munawar Jan and 2 others*, ***2009 SCMR 593***, (8) *Ghous Bux V/S Muhammad Sulemanj and others*, ***2001 MLD 1159***, (9) *Jamila Khatoon and others V/S Aish Muhammad and others*, ***2011 SCMR 222***, and (10) *Feroz Hussain and others V/S Executive Engineer, Mithrao Division Mirpurkhas and 2 others*, ***2009 CLC 529***.

7. In his reply, Mr. Muhammad Naseem, learned counsel for respondent No.1, submitted that the Suit was within time as it was filed within three years from the date of knowledge of the gift. He stated that respondent No.1 came to know about the gift in July 2012 through the written statement filed by the applicant in his Suit No.400/2012, when a copy thereof was received by respondent No.1. On my query, the learned counsel conceded that respondent No.1 never disputed his signature as a witness on the Declaration of Oral Gift, nor did he plead or allege in his Suit No.732/2012 that his signature on the gift was forged. He also conceded that respondents 1 and 2 had not disclosed in the plaint of Suit No.732/2012 about the fact of acquiring knowledge of the gift, or any specific date when, according to them, they came to know about the gift. However, the learned counsel insisted that the matter required evidence, and therefore, the trial court's order of rejection of the plaint was rightly set aside by the appellate court.

8. Mr. Muhammad Farooq, learned counsel for respondent No.2, adopted the arguments advanced by the learned counsel for respondent No.1. He added that Suit No.400/2012, wherein the present respondent No.2 was defendant No.3, was withdrawn by respondent No.1 because new facts about the gift managed by the applicant through fraud and cheating came to the knowledge of respondents 1 and 2. He further contended that it was due to this reason that respondents 1 and 2 decided that respondent No.1 should withdraw his Suit No.400/2012, and both of them should jointly file a fresh Suit. On my query, the learned counsel conceded that the above reason was not specifically stated by respondent No.1 in his application for withdrawal of his Suit No.400/2012. He further conceded that Suit No.400/2012 was dismissed as withdrawn after filing of Suit No.732/2012. Like the learned counsel for respondent No.1, he also conceded that respondents 1 and 2

had not disclosed in the plaint of Suit No.732/2012 about the fact of acquiring knowledge of the gift, or any specific date when, according to them, they came to know about the gift. Despite conceding as noted above, the learned counsel emphatically and repeatedly insisted that the gift was/is fraudulent and void ; the property should be distributed amongst all the legal heirs of the deceased, including respondents 1 and 2 ; and, for such reasons, the impugned judgment should be maintained.

9. Mr. Muhammad Muzaffar, learned counsel for respondent No.4 bank, did not make any submission, and stated that respondent No.4 is not concerned with the private dispute between the applicant and respondents 1 and 2. It is to be noted that he did not claim that the property was lying mortgaged with defendant No.4 bank at the time of the gift, as alleged by respondents 1 and 2.

10. I have heard the learned counsel for the parties and have examined the record with their assistance. It has never been disputed by respondents 1 and 2 that the gift was executed and registered in favour of the applicant on 12.04.1995, and the deceased passed away in February 1997 after execution and registration of the gift. Respondent No.1 has not disputed his signature as a witness on the Declaration of Oral Gift, nor has he ever alleged that his signature thereon was forged. In view of the above admitted position, it can be said with full conviction that respondent No.1 was fully aware of the gift since 12.04.1995. If respondent No.1 had any objection, grievance or claim, he could have easily challenged the gift within three years ending on 11.04.1998. Since he did not do so, the presumption would be that he had willingly accepted the gift in favour of the applicant, or had waived and relinquished all his rights, title and interests in the property, or he voluntarily did not want to challenge the gift. The first Suit (400/2012) was filed by respondent No.1 in March 2012, and the second Suit (732/2012) was filed by him on 23.07.2012. Thereafter, he withdrew Suit No.400/2012 on 28.07.2012. In his first Suit, claiming to be in possession of the property, he had prayed only for injunction. The reliefs of declaration in respect of the property and for cancellation of the gift were sought by respondent No.1 for the first time on 23.07.2012 in his second Suit No.732/2012.

11. The burden to show that Suit No.732/2012 was within time, and the gift came to the knowledge of respondents 1 and 2 for the first time in July 2012 when the applicant filed his written statement in Suit No.400/2012, as claimed in Suit No.732/2012 by respondents 1 and 2, lay heavily on them. However, as observed above, it is an admitted position that they did not disclose in the plaint of Suit No.732/2012 about the fact of acquiring knowledge of the gift, or any specific date

when, according to them, they came to know about the gift. On the contrary, in paragraph 15 of the plaint, respondents 1 and 2 had categorically admitted that the cause of action had accrued to them for the first time when the gift was executed and registered on 12.04.1995. In the same paragraph, they had stated in an extremely vague manner that the gift was **"***kept secret until it was submitted before the court***"**. The fact regarding acquiring knowledge about the gift or the date of knowledge, were not pleaded at all by them in the plaint. It is to be noted that nothing about recurrence or continuance of the alleged cause of action was pleaded by respondents 1 and 2 between 12.04.1995 till July 2012, when, according to them, the gift came to their knowledge through Suit No.400/2012. If the contention of respondents 1 and 2 is accepted, even then the prescribed period of limitation had expired on 11.04.1998, that is 14 years prior to the alleged time of disclosure of the gift, as the execution and registration of the gift on 12.04.1995 and the respondent No.1's signature thereon, are admittedly not disputed. It is also to be noted that respondents 1 and 2 had not filed any application in their Suit for condonation of such long and unexplained delay. Moreover, as respondent No.1 admittedly never disputed his signature on the gift, the contention that the gift was kept secret and respondents 1 and 2 came to know about the same through Suit No.400/2012, appears to be clearly inconsistent, contradictory and self-destructive. It is also an admitted position that after the death of the deceased in February 1997, respondents 1 and 2 kept quiet for 15 long years and did not assert their alleged right, claim or share in the property, nor did they initiate any proceedings in respect thereof. The important aspects of the case highlighted above were not appreciated in their true perspective by the learned appellate court. In view of the above facts and admitted position, I have no hesitation in holding that the Suit was miserably barred by limitation, as it was filed after more than 17 years of the admitted execution and registration of the gift, and after about 15 years of the admitted passing away of the deceased.

12. Order II Rule 2 CPC provides that every Suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action ; 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 ; and, a person entitled to more than one reliefs in respect of the same cause of action may sue for all or any of such reliefs, but if he omits to sue for all such reliefs, except with the leave of the Court, he shall not afterwards sue for any relief so omitted. As I have already held that respondent No.1, being a witness of the gift, was fully aware of the gift since 12.04.1995, he was obliged to include his entire purported claim in his first Suit (400/2012) filed in March 2012.

However, the said Suit was filed by him only for injunction, and the reliefs for declaration in respect of his alleged share in the property as a legal heir of the deceased and for cancellation of the gift, were sought by him in his second Suit (732/2012) along with respondent No.2 during the pendency of Suit No.400/2012. In view of the specific bar contained in Order II Rule 2 CPC, subsequent Suit No.732/2012 was barred. Same principle was applicable to respondent No.2 also, as he was defendant No.3 in respondent No.1's first Suit (400/2012). If respondent No.2 had any claim or cause of action against the applicant, he ought to have filed an application in Suit No.400/2012 for transposing him as plaintiff No.2. It is, therefore, held that Suit No.732/2012 filed by respondents 1 and 2 was barred under Order II Rule 2 CPC in relation to both of them.

13. Regarding the ground urged by the learned counsel for the applicant that the plaint of Suit No.732/2012 did not disclose any cause of action, I may refer to the cases of *Abdul Rehman V/S Sher Zaman and another*, ***2004 CLC 1340 (Supreme Court, AJ&K)***, and *Abdul Rehman V/S Wahid Bakhsh and 9 others*, ***PLD 1977 Lahore 1243***, wherein the term **'**cause of action**'** has been extensively discussed and defined. It was held that it refers to every fact which if traversed, it will become necessary for the plaintiff to prove in order to support his right ; it refers to the ground on the basis of which the plaintiff asks for a favourable judgment ; it means the whole of material facts which are necessary for the plaintiff to allege and prove, and in order to succeed ; it does not mean that if a constituent of cause of action is in existence, the claim can succeed ; the totality of the facts must co-exist, and if anything is lacking, the claim would be incompetent ; and, a part of cause of action is included in the whole cause of action, but the whole can never be equal to the part of it.

14. It is well-settled that the party seeking relief must have a cause of action not only when the transaction or the alleged act is done, but also at the time of the institution of the Suit ; and, the plaintiff is required to show that not only a right has been infringed in a manner to entitle him to a relief, but also that when he approached the Court, the right to seek relief for such infringement was in existence. Since I have already held that respondent No.1, being a witness to the gift, was fully aware of the gift since 12.04.1995 and respondents 1 and 2 never asserted or claimed their alleged right in the property after the death of the deceased in February 1997, and also that Suit No.732/2012 was miserably barred by limitation, respondents 1 and 2 had no cause of action to file the said Suit against the applicant. This being the position, respondents 1 and 2 could not prove their alleged claim in their Suit against the applicant, and could not succeed in the said Suit. In this context, reliance is placed on *Pakistan*

Agricultural Storage and Services Corporation LTD. V/S Mian Abdul Latif and others, ***PLD 2008 Supreme Court 371***, wherein it was held by the Hon'ble Supreme Court that the term **'**cause of action**'** represents all the requisites and facts which are necessary for the plaintiff to prove before he can succeed in a Suit.

15. Rule 11 of Order VII CPC provides that the plaint **"**shall**"** be rejected in any of the four eventualities mentioned therein, including where the plaint does not disclose a cause of action, or where from the statement made in the plaint, the Suit appears to be barred by any law. The Hon'ble Supreme Court was pleased to hold in the case of *Raja Ali Shan V/S Messrs Essem Hotel Limited and others*, ***2007 SCMR 741***, that it is the duty of the Court to reject the plaint if, on a perusal thereof, it appears that the Suit is incompetent ; and, the Court is not only empowered but under an obligation to reject the plaint, even without any application from a party, if the same is hit by any of the clauses mentioned under Rule 11 of Order VII CPC. In *Pakistan Agricultural Storage and Services Corporation LTD. V/S Mian Abdul Latif and others*, ***PLD 2008 Supreme Court 371***, it was held by the Hon'ble Supreme Court that the object of Rule 11 of Order VII CPC is primarily to save the parties from rigors of frivolous litigation at the very inception of the proceedings, and if the Court on the basis of averments made in the plaint and documents available, comes to the conclusion that even if all the allegations made in the plaint are proved, the plaintiff would not be entitled to the relief claimed, the Court would be justified in rejecting the plaint in exercise of powers available under Rule 11 of Order VII CPC.

16. I have already held that the Suit No.732/2012 filed by respondents 1 and 2 was miserably barred by limitation, and under Order II Rule 2 CPC, and respondents 1 and 2 had no cause of action to file the said Suit against the applicant. In view of such findings and also in view of the law laid down by the Hon'ble Supreme Court, the plaint was rightly rejected by the learned trial court on the ground of limitation. In fact, the trial court ought to have rejected the plaint on the aforementioned other two grounds as well. The appellate court committed a serious error in law not only by setting aside the order of rejection of the plaint on the ground of limitation, but also by not rejecting the plaint on the said other two grounds.

17. In *Karim Bakhsh through L.Rs and others V/S Jindwadda Shah and others*, ***2005 SCMR 1518***, it was held by the Hon'ble Supreme Court that when findings of two courts below were at variance, the High Court was justified in appreciating the evidence to arrive at the conclusion as to which of the decisions was in accord

with the evidence on record. In *Abdul Rashid V/S Muhammad Yasin and another*, ***2010 SCMR 1871***, the Hon'ble Supreme Court was pleased to hold that where two courts below, while giving their findings on question of law, had committed material irregularity or acted to read evidence on point which resulted in miscarriage of justice, High Court had the occasion to re-examine the question and to give its findings on that question in exercise of revisional jurisdiction, and High Court was obliged to interfere in the findings recorded by the courts below while exercising power under Section 115 C.P.C.

18. In addition to the above authorities, it is a well-established principle that if the findings of the two courts are at variance, the conflict would be seen to assess the comparative merits of such findings in the light of the facts of the case and reasons in support of two different findings given by two courts on a question of fact ; and if findings of the appellate court are not supported by evidence on record and the same are found to be without logical reasons or are found arbitrary or capricious, same can be interfered with in Revision. After giving due consideration to the submissions made by the learned counsel and examining and evaluating the material on record with their able assistance, I am of the considered opinion that this is clearly a case of misreading, non-reading and ignoring the material on record by the appellate court ; and, the findings of the trial court were in accord with the material on record, and those of the appellate court were contrary to the admitted facts and the material on record. The impugned judgment is contrary to the law laid down by the Superior Courts, and thus, not being sustainable in law, is liable to be set aside.

Foregoing are the reasons of the short order announced by me on 06.03.2014, whereby the impugned judgment was set aside, and this Civil Revision Application was allowed with costs of Rs.10,000/- (Rupees ten thousand only) payable by respondents 1 and 2 each to the applicant.

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