

ORDER SHEET

**IN THE HIGH COURT OF SINDH CIRCUIT COURT HYDERABAD**

C.P. No.D — 370 of 2014.

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DATE	ORDER WITH SIGNATURE OF JUDGE
<b><u>14.01.2020.</u></b>	

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FOR HEARING OF M.A. 2300/2014.  
FOR HEARING OF MAIN CASE.

Mr. Jagdish R. Mullani Advocate for the petitioner.  
MsNasimAbbassi Advocate for respondent No.4(i).  
Mr. JhamatJethanand Advocate for respondents No.4(ii) to (v).  
Mr. Allah BachayoSoomro, Additional Advocate General Sindh.

Brief facts of the case are that one Pir Naban Shah son of Haji Shamsuddin was a khatedar of an agricultural land bearing S. No.60.1-A and others admeasuring an area 53-34 in Deh Rajpari Taluka Tando Allahyar now Jhando Mari. Undisputedly he gifted the subject property to his daughter Mst. "BibiNazBibi" [as described in the title and revenue record].Such entry undisputedly entered in the revenue record as entry No.30 available as annexure 'B,on 18.10.1975 on the basis of oral statement when at the relevant time the petitioner was minor and respondent No.4 being natural guardian/ fathergifted the property orally and remained in possession on behalf of the petitioner along with her. In the year 2012 (after 37 years of entry) an application for declaring the alleged gift as being null and void was filed by the father/predecessor-in-interest of respondents No.4(i) to (v). (Respondent No.4(i) being real brother and 4(ii) to 4(v) step brothers of petitioner). Respondent No.4(i) however supported the case of petitioner. The application is available at page 27. The application was heard by Additional Deputy Commissioner without notice to the petitioner and the gift was declared to be of no legal effect, being not completed on the issue of possession and the Mukhtiarkar Revenue Taluka Jhando Mari was directed to comply with the orders and correct the revenue record accordingly. Since the petitioner was not heard, nor even notices were issued, she filed this petition in the month of February 2014 challenging the authority and jurisdiction of the Additional Deputy Commissioner / Respondent No.2to adjudicate issue of gift, who passed the impugned order on 20.07.2012.

We have heard the learned counsel and perused the material available on record.

The above facts whereby the revenue entry in the name of petitioner was inserted in the year 1975 on the basis of an oral gift / statement was not disputed. It is also not disputed that the application was filed by the predecessor

of respondent No.4 (i) to (v) while he was 78 years old and only 04 months before his sad demise while he was living with respondents 4(ii) to (v), step brothers of petitioner. Petitioner and respondent 4(i) are real brother and sisters whereas respondent 4(ii) to (v) are step brothers. Respondent No.4(i) supported the case of petitioner. Though we are not considering this aspect of the matter whether or not respondent's father was on death bed since he filed the application at the age of 78 while he was with respondent No.4(ii) to (v) who were represented by Mr. Jhamat yet there are enough material to adjudge the impugned order as being void ab-initio. It is also not disputed that after about 37 years of the gift and the revenue entry, the application for the cancellation of the revenue entry and for declaration regarding the gift having been revoked was sought. The only reason considered by the respondent No.2 for revoking / cancelling the oral gift is that the gift was not completed in view of possession being with the Donor.

In this regard para-155 of the Mohammadan Law is relevant which provides that no transfer of possession is required in the case of a gift by a father to his minor child or by a guardian to his ward. All that is necessary is to establish his bonafide intention to give.

Para-155 is reproduced as under:-

**155. Gift to a minor by father or other guardian.** – No transfer of possession is required in the case of a gift by a father to his minor child or by a guardian to his ward. All that is necessary is to establish a bonafide intention to give.

Para-167 of the Mohammadan Law relates to revocation of gifts. It enables the Donor to revoke a gift at any time before delivery of possession. The reason is that without possession a gift is not completed.

Para-167 is of general nature and the exception available in para-155 would not be affected by the subsequent para.

167(2) further provides that subject to provisions of sub-section (4) of para 167, a gift may be revoked even after delivery of possession except in the following cases:-

- (a) . . . . .
- (b) when the donee is related to the donor within the prohibited degrees;
- (c) . . . . .
- (d) . . . . .
- (e) . . . . .
- (f) . . . . .
- (g) . . . . .
- (h) . . . . .

167(3) provides that a gift may be revoked by the donor, but not by his heirs after his death. It is the donor's law that will apply to a revocation and not of the donee. Sub-section (4) of para-167 is also reproduced as under:-

(4) Once possession is delivered, nothing short of a decree of the Court is sufficient to revoke the gift. Neither a declaration of revocation by the donor nor even the institution of a suit for resuming the gift is sufficient to revoke the gift. Until a **decree** is passed, the donee is entitled to use and dispose of the subject of the gift.

Thus on principle the general provisions of para-167 of the Mohammadan Law would not be applicable yet the subject para167(2) saved the donee insofar as the issue of possession is concerned being in relation within prohibited degree. Para-155 of the Mohammadan Law however is independent and only malafides could have been a paramount consideration to trigger para-155 which could only be probed through evidence before a competent court which would exercise its jurisdiction in this regard. Besides the possession of an open plot is always deemed to be with title holder.

This is a simple application for the revocation of the gift deed available at page 27 though supported by a statement and is neither a revision which could enable the Collector / Additional Deputy Commissioner in terms of section 164(3) to have taken cognizance nor otherwise jurisdiction vests upon him and that too in case cognizance is taken, should have been referred to the Commissioner for passing appropriate orders. This is an attempt to assume jurisdiction which is not available to him under the law. Under no stretch of imagination the Additional Deputy Commissioner / Collector could have revoked the gift and the consequential entry in the revenue record, which was admittedly lawful entry on the basis of oral gift (which is not denied by Mr. Jhamat learned counsel for the respondents), could have been cancelled and that too without notice. In the instant matter, not only the gift was revoked by the Additional Deputy Commissioner / Collector but even the lawful consequential entry in the name of petitioner was ordered to be cancelled without even issuing notice of such application to the petitioner which amounts to condemning the petitioner unheard and in serious violation of Article 10-A of the Constitution of Islamic Republic of Pakistan.

Since the impugned order is void ab-initio, there is no question of filing an appeal under the revenue hierarchy in terms of section 161 of the Land Revenue Act 1967. Reliance is placed on the case of Abdul Aziz v. City District Government Karachi reported in **2005 YLR 163** and Collector of Customs (Valuation) v. Karachi Bulk Storage and Terminal Ltd. reported in **2007 SCMR 1357**. Insofar as the deemed possession of the minor is concerned reliance is placed on the cases of Hamida Bibi v. Wali Muhammad (**1999 MLD 1687**), Kaniz

Bibi v. Sher Muhammad (PLD 1991 466) and Abdul Majeed Khan v. Ms. Maheen Begum (2014 SCMR 1524).

As far as the case law cited by Mr. Jhamat are concerned all the cases are distinguishable on facts as well as law. In the case of MUMTAZ AHMED v. ASSISTANT COMMISSIONER PLD 1990 S.C. 1195, there was no such questions as raised in the instant proceedings that the Additional Deputy Commissioner had no jurisdiction to declare the validity of a gift and / or its revocation followed by its consequential effect of rectifying the entry. Similarly in the case of ADMINISTRATOR THAL DEVELOPMENT v. ALI MUHAMMAD 2012 SCMR 730, the question of domain and jurisdiction of Additional Deputy Commissioner was not under discussion. The jurisdiction of the appellate or revisional forum would have arrived only if the jurisdiction would have been exercised under the law and not otherwise. The distinction, however, as to the jurisdiction as exercised by the Additional Deputy Commissioner was described more elaborately in the case of ABDUL MUJEEB KHAN v. Ms. MAHEEN BEGUM reported in 2014 SCMR 1524. The relevant paras are reproduced as under:-

6. *Admittedly the appellants had called in question the gift mutation by virtue whereof title of mutated land owned by Mst. Sandoor Bibi had been transferred to respondent No. 1, as such it exclusively fell within the plenary jurisdiction of Civil Court and the High Court has rightly held so as under:--*

*"4. .... Besides, the question of validity or otherwise of a gift is not the domain of the revenue hierarchy but it is the exclusive jurisdiction of Civil Court to dilate upon according to law. The question with respect to the validity of gift is essentially an intricate question of title which cannot be decided without recording of pro and contra evidence."*

*Moreover, the disputed questions of fact cannot be entertained by Revenue hierarchy, therefore, the High Court while exercising its constitutional jurisdiction has set aside impugned orders passed by respondents Nos. 2 - 4 as the same were passed without jurisdiction, illegal, having no lawful authority to adjudicate and determine the question of title which fell within the exclusive jurisdiction of the Civil Court, as such of no legal effect.*

7. *In the above perspective, we are of the considered opinion that the High Court has arrived at a right and just conclusion by accepting the writ petition and setting aside the orders passed by Revenue hierarchy being without jurisdiction. It is also a settled principle that where any orders or judgments passed by any Court or authority who has no jurisdiction or are barred to exercise such jurisdiction, such orders or judgments are deemed to have been passed illegally and in such circumstances the High Courts are justified in exercising its constitutional jurisdiction to rectify the same, thus, in the instant case the High Court has rightly exercised its Constitutional jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. In this regard, reliance can be placed upon the cases of Noor Muhammad, Lambardar v. Member (Revenue), Board of Revenue, Punjab,*

*Lahore and others (2003 SCMR 708) and Haji Noorwar Jan v. Senior Member, Board of Revenue, N.W.F.P. Peshawar and 4 others (PLD 1991 SC 131), the relevant portions therefrom are reproduced herein below:--*

*"8. ....It was further observed by this Court that any error on the part of Board of Revenue in understanding the law, in applying it or in laying down the law can and must be corrected in the Constitutional jurisdiction. If it is left uncorrected, it will result in subverting the rule of law,....."*

In so far as the presumed possession of the minor and / or daughter are concerned the detailed discussion was made in the case of Mst. KANEEZ v. SHER MUHAMMAD reported in PLD 1991 SC 466.

*"The respondents' suit was decreed on the ground that despite the entry in the mutation aforequoted having evidenced the transfer of the possession there was no cogent evidence produced by the donee (appellant No.1) to show that physical possession had been transferred to her. Khasra Girdawari and Jamabandi entry produced from the respondents' side were noticed as supporting the said conclusion. The plethora of case-law on the question of the delivery of possession in cases like the present one: when the husband is the donor for a wife living with him, when the father is the donor for a daughter and/or a minor living with him or a father-in-law for a daughter-in-law and/or her husband living with him, was not at all noticed. It may be straightaway remarked that in such Re cases strict proof by the donee of transfer of physical possession, as in other type of cases, is not insisted upon. To cite only one example the Privy Council three quarters of a century ago in the case of Ma Mai and another v. Kallandar Ammal A AIR 1927 Privy Council 22 had observed that in the case of gift of immovable property by such a close relation of the female as are mentioned above, once mutation of names has been proved the natural presumption arising from the relationship existing between the donor and the donee, the donor's subsequent acts with reference to the property would be deemed to have been done on behalf of the donee and not on his own behalf. This fine of authority is so woven in a chain which is very rarely broken. The obvious*

*consensus has to be followed and" adopted in this case also; there is absolutely no reason for departure. Whatever Atta Muhammad, the father-in-law of Mst. Kaneez Bibi did either for cultivation of the gifted land or for collecting the share/produce from the tenants or even changing the tenants would be presumed as acts done or steps taken on behalf of the donee, daughter-in-law. In extremely rare cases where the donee lady is a very active member of the society, may be an urbanized educated one, managing her affairs effectively herself the position might be different; but there is nothing in this case to suggest such a position of the donee and/or her conduct. From the appearance of the parties also the above supposition gets strengthened, although it is not necessary as a proof."*

Another case law, which is relevant under the present facts and circumstances is of PLD 1972 SC 279, which provides that when initial order itself was without jurisdiction, question of alternate remedy would lose significance.

Thus in view of above discussion, the petitioner has made out a case for interference and consequently we allowed this petition vide short order dated 14.01.2020 and above are the reasons for the same.

Dated:

JUDGE

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