

IN THE HIGH COURT OF SINDH CIRCUIT COURT HYDERABAD

R.A. No. 59 of 2012

DATE

ORDER WITH SIGNATURE OF JUDGE

1. For hearing of CMA 316/2012.
2. For hearing of main case

16.11.2020

Mr. Suresh Kumar, Advocate for applicants.

Mr. Kamaluddin, Advocate for respondent No.5.

Mr. Khadim Hussain Soomro, Advocate for respondent No.6.

Mr. Allah Bachayo Soomro, A.A.G.

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ORDER

MUHAMMAD SHAFI SIDDIQUI, J. This Revision Application is arising out of judgment dated 24.12.2011 and decree dated 29.12.2011 respectively of the appellate court i.e. District Judge, Shaheed Benazirabad.

The applicants filed a suit for declaration and cancellation in terms of following prayers:-

"a. It be declared that being L.Rs: of late Muhammad Ishaque the plaintiffs are entitled to inherit the suit property according to their respective share under the Muhammadan Law and the mutation of alleged gift in favour of defendant No.5, is liable to cancellation being void and fraudulent.

b. Entries of mutation of suit properties in favour of defendant No.5, be cancelled.

c. Permanent injunction be granted in favour of plaintiff restraining the defendants from transferring assigning or creating encumbrance over the suit property or disposing of the same by any mode in favour of any other person directly or indirectly personally or through agents assigns associates by any means in any manner whatsoever except in due course of law.

d. Cost of the suit be borne by the defendants.

e. Any other relief. "

On presentation of suit, notices were issued and on receipts thereof, written statement was filed and for the first time fact of registered gift, on the basis of which mutation was effected, was revealed upon applicants. Issues were framed and parties recorded their evidence. The applicant who was plaintiff No.7 namely Abdul Salam examined himself and produced documents. He also examined witnesses Muhammad Ayoob and Muhammad Siddique, whereafter applicants / plaintiffs' side was closed.

The respondent as defendant in the suit examined one Jalil Ahmed, Manager of the Bank who also produced attested copy of the Declaration and Confirmation of Oral Gift. DW-2 Muhammad Saleh, Clerk in the office of City Surveyor Officer, Nawabshah who produced statement of Gift, mutation, entry in City Survey Card of Property register, Gift statement, statement of acceptance, City Survey Extract, original Gift statement. DW-3 Muhammad Arshad was also examined.

Defendant No.5 / Respondent was also examined himself and produced affidavit of Muhammad Ishaque Qureshi, paid challans, clearance certificate, property tax challans, Declaration and Confirmation of Oral Gift, four extracts from property register. Muhammad Iqbal was also examined as Ex.78 and Mehboob Illahi, Notary Public as Ex.79, whereafter the side was ultimately closed on 15.04.2009.

The following issues were framed:-

1. Whether suit is not maintainable?

2. Whether plaintiff has no cause of action?

3. Whether plaintiffs and defendant No.5 are joint owners of the suit properties by way of inheritance from late Muhammad Ishaque, their predecessor, and entitled to their respective shares under Mohammedan Law?

4. Whether the transfers and mutations of suit properties to the exclusion of plaintiffs are illegal, fraudulent and void being result of forgery and impersonation and liable to cancellation?

5. Whether the alleged gift of suit property in favour of defendant No.5, is illegal, void and fraudulent, conferring no right and title in favour of defendant No.5, in respect of the suit properties?
6. Whether suit is cause less?
7. Whether plaintiffs is entitled for the relief sought for?
8. What should the decree be?"

On the basis of the analysis of evidence and the pleadings, the trial court decreed the suit of the applicants. The respondents preferred an appeal No.21 of 2010 and on the re-analysis of the evidence and in consideration of the law, the appellate court was pleased to set aside the judgment and decree of the trial court by allowing the appeal and hence this revision application. The scope of which is limited in terms of Section 115 C.P.C.

The primary concern of the applicants, when the suit was filed, was a fraudulent entry of mutation on the basis of oral gift / statement in favour of defendant Abdul Majeed who is respondent No.5 herein. I have perused the pleadings of the parties and in particular of applicant / plaintiff and nowhere in the entire plaint the factum of the registration of gift deed was challenged. It is a case of applicants before the trial court, when a suit was filed, that there should not have been entries of the mutation on the basis of alleged oral gift / statement of their father however, on filing written statement it was revealed to the applicant that it was not only the oral statement or oral declaration of gift but it was supported and implemented by a subsequent registration of gifts. The doubts expressed and extended upon oral statement or oral gift were eroded when registered gifts were produced. The two gifts in respect of City Survey No.859 and 1933 measuring 24.8 sq.yards and 227.7 sq.yards respectively were registered whereas the third property was an extended portion / thalla of one of the shop which was also mutated on the basis of statement of their father. Primarily when the registered gifts were not

challenged, there should not have been an issue No.5 that is, whether the alleged gifts of suit property in favour of respondent No.5 are illegal, void and fraudulent, conferring no right and title in favour of defendant No.5 (respondent No.5) in respect of the suit property.

These registered documents otherwise attached with authenticity of genuineness unless proved otherwise by a person challenging it. However, without prejudice to this, even no challenge was thrown to these registered instruments.

Learned counsel for the applicants was inquired time and again as to whether these registered instruments were challenged in the instant proceedings when he came to know about these facts via written statement, he relied upon Para 4 and 5 of the Plaint that they respondent / defendant No.5 have committed forgery and impersonation and got the property transferred. How and in what way such forgery and impersonation was committed or exercised is still a mystery. In the written statement a simple answer was given that mutation entry, as challenged by the applicants was not an outcome of fraud or misrepresentation but in fact it was an outcome of a valid gift. It is not denied that the original entries were based on the oral declaration of gift which were subsequently registered on 30<sup>th</sup> May 1993. The leading witness Abdul Salam in his examination-in-chief has not challenged the signatures of his father nor he stated that property was illegally and fraudulently transferred and the property was not gifted by his father to respondent No.5 (son) or that it was never registered. It is a fact that he has seen the signatures of his father on the oral statement / Declaration of Gift which were / are available on record. None of these documents were denied on the basis of valid reasoning and then came registered instruments, copies of which are also available at Pages 205 and 311 respectively which registered instruments too were not challenged or denied.

In respect of issue No.5, the appellate court reached conclusion and gave reasons however, in addition to those, it remained a fact that these registered gifts were not challenged specifically in the memo of Plaintiff and more importantly when in the written statement these facts were revealed to the applicants / plaintiffs. The entries thus inserted on the basis of oral gift cannot be considered to be illegal, fraudulent when these facts were subsequently proved by way of registered deeds; unless it would have been challenged first and then proved by the applicants through positive evidence that it was not a registered instrument and the mutation entry on the basis of this invalid, unlawful document is liable to be cancelled. This cumbersome exercise was never undertaken by the applicants. Observation in the judgment reported as BILAL HUSSAIN SHAH and another versus DILAWAR SHAH (PLD 2018 Supreme Court 698) is not applicable in the circumstances of the case as the subject judgment in the referred case came out of a litigation wherein a challenge was made to the legality of the gift deed, on the basis of which the entries were made which is not the case here.

In view of the above facts and circumstances, no case for interference within the frame of section 115, C.P.C. is made out and hence the revision application was dismissed by a short order dated 16.11.2020, for which these are the detailed reasons.

Sd - Muhammad Shafiq Siddiqui  
Judge.