

Judgment Sheet

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Civil Revision Application No. 57 of 2020

Applicant : Tehreek Jadeed Anjuman Ahmedia,
through Mr. Ayatullah Khuwaja Advocate.

Respondents 1 & 2 : Muhammad Ishaque & Ashfaq Ali
Through M/S Ihsan Ali Arif and
Nazim Khokhar Advocates.

Official respondents 3 to 5 : Mukhtiarkar Revenue Kunri, Sub-Registrar
Taluka Samaro and Government of Sindh
through Secretary Revenue,
through Mr. Allah Bachayo Soomro,
Additional Advocate General Sindh.

Date of hearing : 13.03.2023.

J U D G M E N T

NADEEM AKHTAR, J. – F.C. Suit No.247/2015 (new Suit No.109/2016) filed by respondent No.1 against the applicant and respondents 2 to 5 for declaration, cancellation and permanent injunction was decreed by the trial court vide judgment dated 30.07.2019 and decree dated 31.07.2019 ; and, Civil Appeal No.32/2019 filed by the applicant against the said decree was dismissed by the appellate court vide judgment dated 22.01.2020 and decree dated 27.01.2020. Through this Revision Application filed by the applicant under Section 151 CPC, he has impugned the concurrent findings of the learned courts below.

2. Relevant facts of the case are that originally F.C. Suit No.24/2015 was filed by respondent No.1 against the applicant and one Rasheed seeking a declaration that he was the owner of agricultural land bearing Survey No.116/1,2,3, measuring 12-00 acres, in Deh Hedo Taluka Kunri, District Umerkot, Sindh, (**'suit property'**). Subsequently, he sought withdrawal of the said Suit with permission to file a fresh one. The Suit was allowed to be withdrawn by the trial court with the observation that there was no necessity to grant permission to file a fresh Suit which could be filed by him if the law so permits. Thereafter, F.C. Suit No.247/2015 (new Suit No.109/2016) was filed by respondent No.1 (**'plaintiff'**) against the applicant, respondents No.2 and official respondents 3, 4 and 5. , seeking a declaration that the alleged gift of the suit property by him in favour of his son / respondent No.2 (**'alleged donee'**) and subsequent sale thereof through a registered sale deed by the alleged done to the applicant were fraudulent and illegal.

3. Before the trial court, the case of the plaintiff was that he was the owner of the suit property ; during the period 2004 to 2009, he was confined in jail in connection with a murder case and was released from jail in the year 2009 ; during his said confinement, the suit property was leased by the alleged donee in favour of the applicant till March 2014 ; the possession of the suit property was handed over to him on 16.03.2015 and since then its possession was with him ; on 20.03.2015, the applicant and alleged donee tried to dispossess him from the suit property with the help of police, but he refused to vacate the same ; in view of the above, he filed F.C. Suit No.24/2015 wherein the applicant filed counter affidavit to his stay application stating that he had purchased the suit property from the alleged donee through a registered sale deed ; along with his counter affidavit, the applicant also filed the village form entry showing gift of the suit property by the plaintiff in favour of the alleged donee ; he then went to the offices of the Mukhtiarkar and Sub-Registrar concerned to state that on the date of execution of the alleged gift, he was confined in jail, but they did not take any action ; he also confronted the alleged donee regarding the alleged gift who stated that he was not the owner of the suit property ; and, the alleged gift and registered sale deed were bogus, illegal and illegal.

4. The applicant filed his written statement before the trial court claiming to have purchased the suit property from the alleged donee to whom, according to the applicant, the suit property was gifted by his father / the plaintiff. Official respondent No.4 / Sub-Registrar concerned also filed his written statement. Whereas, the alleged donee and official respondents 3 and 5 did not appear before the trial Court nor did they file their written statement, and consequently the Suit proceeded ex-parte against them vide order 24.11.2016 passed by the trial court. In view of the divergent pleadings of the plaintiff and the applicant / defendant No.1, following issues were settled by the trial court :-

- “1. *Whether suit is not maintainable ?*
2. *Whether plaintiffs has no cause of action ?*
3. *Whether plaintiff was confined in jail in a murder case from 2004 to 2009, if yes, what would be its effect ?*
4. *Whether defendant No.2 leased out Survey No.116/1,2,3 an area of 12 acres to the defendant No.1 up to March 2014, of which possession was handed over to plaintiff on 16.03.2015 after expiry of lease period ?*
5. *Whether gift by plaintiff in favour of defendant No.2 is fraudulent, managed and bogus ?*

6. *Whether defendant No.1 purchased the suit land from defendant No.2 through registered sale deed of which possession was handed over to the defendant No.1 ?*
7. *Whether defendant No.1 is a bonafide purchaser of the suit land through registered sale deed from its owner i.e. defendant No.2 having paid sale consideration through registered sale deed before Sub-Registrar ?*
8. *Whether the plaintiff is entitled for the relief as prayed ?*
9. *What should the order be ?”*

5. As the plaintiff Muhammad Ishaque passed away during pendency of the Suit, his legal heirs were substituted in his place as plaintiffs who examined plaintiff / respondent No.1(d) Raja Pir Muhammad and one Madad Ali as their witnesses. The applicant / defendant No.1 examined its attorney, one marginal witness of the impugned gift, Assistant Superintendent Central Prison Hyderabad and the Tappeddar concerned. After evaluating the evidence led by the said parties, the first two issues regarding maintainability of the Suit and the cause of action pleaded therein were decided by the trial court in favour of the plaintiff by holding that his Suit was within time as the impugned registered sale deed came to his knowledge during pendency of his earlier Suit No.24/2015 through the counter affidavit filed therein by the applicant stating that he had purchased the suit property from the alleged donee through the said sale deed ; and, the cause of action for filing the Suit was clearly mentioned in the plaint. Regarding issue No.3, it was observed by the trial court that it was an admitted position that the plaintiff was confined in Central Prison Hyderabad from 2004 to 2009. Issue No.4 was decided by the trial court in the negative by holding that the plaintiff could not prove that the suit property was leased by the alleged donee to the applicant.

6. The main issues viz. issue Nos.5 and 6 regarding the impugned gift and registered sale deed were decided by the trial court in the negative by holding that (a) the applicant could not prove the alleged gift of the suit property by the plaintiff in favour of the alleged donee as only one marginal witness of the alleged gift was examined by him and the second marginal witness was not examined, nor was any plausible explanation offered by him for not examining the second marginal witness ; (b) the applicant had examined the Assistant Superintendent Central Prison Hyderabad who had produced the extract of the 'in-and-out' register (*Roznamcha*) wherein the names of only the Mukhtiarkar and Tapeddar concerned were mentioned and the names of the two attesting witnesses of the impugned gift were not mentioned, although it was the case of the applicant that the plaintiff

had given a statement regarding making of the impugned gift before the Mukhtiarkar concerned in the presence of the said two witnesses at the Central Prison Hyderabad which statement was written by the Tapeddar concerned ; (c) according to the statement of the Tapeddar concerned, who was examined by the applicant as his witness, he went to the Central Prison Hyderabad on the relevant date along with the Mukhtiarkar concerned when the Superintendent Jail had called the plaintiff in his office and he (Tapeddar) had recorded the statement of the plaintiff and had obtained his signature thereon, but the statement of the Tapeddar was silent with regard to obtaining signatures of the two attesting witnesses of the alleged gift ; and, (d) since the applicant could not prove the impugned gift in favour of the alleged donee, the impugned registered sale deed allegedly executed by the alleged donee in favour of the applicant was null and void. In view of the above findings, the Suit of plaintiff was decreed by the trial court as prayed for by him.

7. The appellate court concurred with the findings of the trial court and dismissed the appeal filed by the applicant by further holding that (a) the alleged donee of the impugned gift, being the beneficiary thereof, was duty-bound to appear before the trial court to prove the impugned gift in his favour, but he did not do so ; (b) the alleged donee also did not appear before the appellate Court ; (c) not only the names of the attesting witnesses of the impugned gift were missing in the 'in-and-out' register, but the name of the alleged donee was also missing therein ; (d) in the absence of the alleged donee, the alleged gift in his favour was neither valid nor could it be proven as he was required under the law to accept the alleged gift ; and, (e) as the basic transaction viz. the impugned gift could not be proven, the superstructure built thereon vide impugned registered sale deed had to collapse. The applications filed by the applicant in his appeal under Order XLI Rule 27 CPC for producing additional evidence and under Articles 59 and 84 of the Qanun-e-Shahadat Order 1984 seeking verification of the signatures and thumb impression appearing in the impugned gift deed, were dismissed by the appellate court in view of the findings summarized above.

8. I have heard learned counsel for the parties at length and have also examined the material available on record with their assistance. The admitted position that has emerged from the record is that the plaintiff was confined in Central Prison Hyderabad during the period 2004 to 2009 and the impugned gift dated 03.05.2008 in favour of the alleged donee was allegedly executed during his confinement in prison. In fact, due to this very reason, the applicant had examined the Assistant Superintendent Central Prison

Hyderabad and the Tappeddar concerned as his witnesses to prove that the plaintiff had made and executed the impugned gift during his confinement in prison. It is well-settled that if the gift is challenged by the donor then the burden to prove its genuineness shifts upon its beneficiary / donee. In the instant case, the plaintiff had categorically challenged the gift on the specific ground that it was bogus, collusive and illegal as he was confined in prison at the relevant time and had not made or executed the same ; and, to prove his claim, his legal heirs had examined one of the legal heirs and another person as their witnesses. Thereafter, the donee was required under the law to discharge his burden by proving the plaintiff wrong, however, he remained absent throughout the proceedings despite publication of summons in newspaper. Thus, the evidence produced by the plaintiff remained unchallenged and un-rebutted to the extent of the donee.

9. In the absence of the donee and upon his failure to controvert the claim of the plaintiff and/or to produce his own evidence, the applicant attempted to prove the impugned gift and the impugned sale deed executed and registered in his favour in pursuance thereof. Had the applicant succeeded in proving the above, the absence and said failure of the donee would have become inconsequential. It may be noted that the applicant was admittedly not a party or witness to the impugned gift. Be that as it may, the evidence produced by him regarding the making and execution of the impugned gift by the plaintiff was not sufficient to discharge the heavy burden of proving the same. Admittedly, the applicant did not examine both the marginal witnesses of the impugned gift as required under Article 79 of the Qanoon-e-Shahadat Order 1984 and he also did not even attempt to justify the absence of one of the said witnesses. It is also an admitted position that the 'in-and-out' register (*Roznamcha*) produced by the applicant's witness Assistant Superintendent Central Prison Hyderabad did not contain the names of the two attesting witnesses of the impugned gift despite the applicant's claim that the plaintiff had given a statement regarding the impugned gift before the Mukhtiarkar concerned in the presence of two witnesses at the Central Prison Hyderabad which statement was written by the Tappeddar concerned. Even the deposition of the Tappeddar, who was also examined by the applicant as his witness, confirmed the absence of the two attesting witnesses of the impugned gift. The Tappeddar had deposed that he went to the Central Prison Hyderabad on the relevant date along with the Mukhtiarkar concerned when the Superintendent Jail had called the plaintiff in his office and he (Tappeddar) had recorded the statement of the plaintiff and had obtained his signature thereon. However, his said statement was silent with regard to obtaining signatures of the two attesting witnesses of the

impugned gift. Needless to say, under Article 79 ibid the impugned gift could not be proved in the absence of its two attesting witnesses. Thus, the applicant's own evidence did not prove the making and/or execution of the impugned gift by the plaintiff, and the findings to this effect by both the learned courts below appear to be correct.

10.

(d) since the applicant could not prove the impugned gift in favour of the alleged donee, the impugned registered sale deed allegedly executed by the alleged donee in favour of the applicant was null and void. In view of the above findings, the Suit of plaintiff was decreed by the trial court as prayed for by him.

- The appellate court concurred with the findings of the trial court and dismissed the appeal filed by the applicant by further holding that (a) the alleged donee of the impugned gift, being the beneficiary thereof, was duty-bound to appear before the trial court to prove the impugned gift in his favour, but he did not do so ; (b) the alleged donee also did not appear before the appellate Court ; (c) not only the names of the attesting witnesses of the impugned gift were missing in the 'in-and-out' register, but the name of the alleged donee was also missing therein ; (d) in the absence of the alleged donee, the alleged gift in his favour was neither valid nor could it be proven as he was required under the law to accept the alleged gift ; and, (e) as the basic transaction viz. the impugned gift could not be proven, the superstructure built thereon vide impugned registered sale deed had to collapse.

Aurangzeb through L.Rs. and others V/S Muhammad Jaffar and another (2007 SCMR 236),

It is settled law that in the transaction of sale and gift, it is the duty of the beneficiary and a heavy onus lay on the beneficiary to prove by convincing evidence and satisfying the judicial conscience of the Court that the transaction shown to be a gift was executed by the donor in favour of the donee.

In its revisional jurisdiction, High Court is not supposed to interfere in concurrent findings of the Courts below unless it is established that such findings were without jurisdiction or the Courts below committed illegality or material irregularity resulting into miscarriage of justice.

Rab Nawaz and others V/S Ghulam Rasul (2014 SCMR 1181),

Wali Muhammad Khan and another V/S Mst. Amina and others (2018 SCMR 2080),

Mst. Kalsoom Begum V/S Peran Ditta and others (2022 SCMR 1352)

In *Faqir Ali and others V/S Sakina Bibi and others (PLD 2022 S.C. 85)*, the Hon'ble Supreme Court was pleased to hold that it has repeatedly been held that beneficiary of a document is not only bound to prove execution of the document but also to prove the gift by producing cogent and reliable evidence that the three necessary requirements of a valid gift viz. offer, acceptance and delivery of possession have been fulfilled, to the satisfaction of the Court.

It is trite that a gift in order to be valid and binding on the parties must fulfill three conditions viz. (a) declaration of a gift by the donor, (b) acceptance of gift by the donee, and (c) delivery of possession of corpus. A valid gift can also be effective orally if all the above prerequisites are complied with and proved through valid and cogent evidence. A written instrument is not a requirement under the Mohammadan law nor is the same compulsorily registerable under the provisions of the Registration Act, 1908. However, strict compliance of the above mandatory conditions is required and registration of the document is of no help if any of the said conditions are not satisfied.

In view of the fact that the plaintiff had challenged the gift and the mutation thereof on the ground of fraud and collusion, the Suit filed by him could not be deemed to be barred by time. It is settled law that where fraud and collusion are alleged and established, the question of limitation does not and cannot help the beneficiary of such fraud and collusion ; and, fraud vitiates even the most solemn transactions and any transaction that is based upon fraud is void and notwithstanding the bar of limitation, Courts would not act as helpless by stands and allow a fraud to perpetuate.

Alamdar Hussain V/S Nazir Hussain and others, 2004 PSC 815.

Second appeal and revision – Concurrent judgments of courts below – Jurisdiction of High Court to set aside the same – Not an absolute rule that such judgments could never be interfered with by High Court even though found to be based on gross misreading, non-reading or misconception of evidence available on record – Laying down such a law would have the effect of setting the provisions of Sections 100 and 115 C.P.C. at naught.

Muhammad Sami V/S Additional District Judge, Sargodha and 2 others, 2007 SCMR 621.

While exercising constitutional or revisional jurisdiction, High Court can reappraise and reevaluate the entire evidence only when finding is based on insufficient evidence, misreading of evidence, non-consideration of material evidence, erroneous assumption of facts and patent errors of law.

Khair Muhammd and others V/S Nawab Bibi and others, 2008 SCMR 515.

Three courts, including the High Court, had recorded concurrent findings of fact – Leave was refused by the Supreme Court.

Alamgir Khan through L.Rs V/S Haji Abdul Sattar Khan and others, 2009 SCMR 54.

Concurrent finding of facts arrived at by the courts below did not suffer from misreading or non-reading of evidence nor there was any jurisdictional error in the judgments of the courts below – Revision was not maintainable – Supreme Court would not normally go beyond concurrent findings of facts recorded by courts below unless it is shown that the findings are perverse, patently against evidence, or so improbable that acceptance thereof would tantamount to perpetuating a grave miscarriage of justice – Burden lies heavily on the petitioner to show that concurrent findings of facts recorded by the courts below are not sustainable.

Khan Muhammad V/S Muhammadin, 2010 SCMR 1351.

While exercising power under Article 185 of the Constitution, Supreme Court declined to interfere in concurrent conclusions arrived at by the courts below.

Noor Muhammad and others V/S Mst. Azmat-e-Bibi, 2012 SCMR 1373.

Jurisdiction of High Court under Section 115 C.P.C. was narrower, and concurrent findings of fact could not be disturbed in revisional jurisdiction unless courts below while recording findings of facts had either misread the evidence, or had ignored any material piece of evidence, or those were perverse and reflected some jurisdictional error.

The Suit was decreed by the trial Court as prayed for by respondent No.1, and the appeal filed by the applicant was dismissed by the appellate Court. It is an admitted position that respondent No.1 was confined in jail during 2004 to 2009, and the Suits were filed by him in the year 2015. One of the grounds urged on behalf of the applicant is that both the Suits filed by respondent No.1 were barred by limitation as he was fully aware of the gift and the registered sale deed not only after his release from the prison in the year 2009, but also during his confinement in jail. Surprisingly, no issue on the question of limitation was settled by the trial Court and a general issue regarding the maintainability of the Suit was settled which was decided in the affirmative by holding that the Suit was maintainable. Perusal of the impugned judgment of the trial Court shows that the question of maintainability was decided mainly due to the reason that the first Suit filed by respondent No.1 had already been dismissed as withdrawn. Learned counsel for the parties are directed to assist the Court on the question of limitation i.e. whether the Suit filed by respondent No.1 was within time or not ?

J U D G E

D:\Court Work\Judgments Single