ORDER SHEET

IN THE HIGH COURT OF SINDH,
CIRCUIT COURT HYDERABAD

R.A. No.154 of 2009

Date of Hearing	:	10.09.2015
Date of Announcement	:	30.09.2015
Applicants	:	Mst. Khair-un-Nisa and others Through Mr. Sikander Ali Kolachi Advocate
Private Respondents	:	Aziz and others are called absent
Official Respondents	:	Government of Sindh and another Through Mr. Anwar H. Ansari State Counsel

J U D G M E N T

***NAZAR AKBAR*, J**.- By this order I intend to dispose of Civil Revision Application against the judgment and decree dated 07.08.2009 and 13.08.2009 in Civil Appeal No.90/2004 whereby District Judge, Sanghar while allowing the appeal set-aside judgment and decree passed by Senior Civil Judge Khipro and dismissed F.C. Suit No.23/2002 filed by the applicants.

2. Succinctly the facts leading to this Revision Application are that the applicants / plaintiffs assailed Gift Statement allegedly made by their father deceased Kevro before the Mukhtiarkar Revenue Khipro in favour of respondents/defendants No.3 to 7 in respect of his agricultural land bearing S.No.07 (7-22), 8 (8-32), 15(4-08) and 16 (6-35) acres admeasuring 27-17 acres situated in Deh Dahroro No.1 Taluka Khipro District Sanghar. Deceased Kevro had two wives namely Mst. Kamali and Bachulan. The applicants and respondent No.3 are offspring of Mst. Kamali while respondents /defendants No.4 to 7 and one daughter namely Mst.Shahnaz are offspring of Mst. Bachulan. Case of the applicants/plaintiffs was that respondents/ defendants No.3 to 7 in collusion with respondent No.2 and his

village staff got transferred the suit land in their favour on the basis of gift statement made by Kevro on **08.10.1992** before respondent No.2 and entry in the revenue record was made on **28.10.1992**. Respondents/ defendants No.3 & 4 after the death of deceased Kevro were looking after the suit land and paying their share of inheritance to the applicants / plaintiffs, however, when they stopped payment of their share, on enquiry it was disclosed to them that the suit land had been gifted by deceased Kevro to the respondents. The further case of the applicants / plaintiffs was that respondents / defendants No.5, 6 and 7 were minors at the time of alleged gift, thus the ingredients of a valid gift were not fulfilled as neither alleged gift was accepted nor possession of the suit land was delivered to the donees/ respondents, who were minors, as such the alleged gift was incompetent, illegal and invalid.

3. Respondents No.3 to 7 contested the suit and filed their written statement while respondents No.1 & 2 were exparte. In their written statement, respondents/defendant No.3 to 7 denied claim of the applicants /plaintiffs and stated that the gift in their favour was legal, proper and in accordance with law. It was further averred in the written statement that the plaintiff Nos. 1, 2 and 3 were given their share by Kevro at the time of their marriage and plaintiff Abdul Ghani was denied his share because of his dis-obedience and misbehavior with the father / land owner.

4. The learned trial court from the pleadings of the parties framed following issues:-

i. Whether deceased Kevro gifted his land to the defendants No.03 to 07 or not?

ii. Whether Abdul Razak, Muhammad Rafique and Riaz were minors on 08.10.1992 when gift statement was recorded?

iii. Whether gift was accepted on behalf of minors or not? If so, what effect?

iv. Whether possession was handed over to the defendants Nos.03 to 07 by deceased or not? If so, what effect?

v. Whether suit land is joint property of the plaintiffs and defendants Nos.03 to 7 and Mst. Shahnaz?

vi. Whether alleged gift is proper, valid, under the Mohammadan Law?

vii. Whether suit is not maintainable under the law?

viii. Whether plaintiffs are entitled to relief claimed?

ix. Whether gift dated 08.10.1992 in favour of defendant No.03 to 07 is legal and valid and according to Mohammadan Law and according to natural justice is valid and legal one?

x. Whether according to the basis of that gift statement by deceased dated 08.10.1992, the deceased Kevro "Aaq" his son Abdul Ghani or not?

xi. Whether according to the said gift statement deceased father and defendants given the share to his four daughters being married in his life time and now they are not entitled to any share?

xii. That who is in possession of the suit land?

xiii. Whether the suit is maintainable or not?

xiv. What should the decree be?

5. In order to prove their case, the applicants /plaintiffs examined P.W. Abdul Ghani (Plaintiff No.4) at Ex.51, Ghulam Abbas Tapedar at Ex.52, who produced original gift statement at Ex.53, original form VII at S.No.80 dated 08.10.1992 at Ex.54, Mst. Khair un Nisa (Plaintiff No.1) appeared as witness at Ex.56 and then closed their side. The respondents/defendants examined PW Abdul Razak (defendant No.5) at Ex.62, who produced certified copy of the statement of gift at Ex.63, certified copy of form VII at Ex.64, original copy of affidavit of Abdul Ghani and others at Ex.65, sale deed executed by M/s Abdul Aziz and others in favour of Abdul Ghani at Ex.66, D.W.2 Muhammad Rafique (defendant No.6) at Ex.67 and D.W-3 Khan Muhammad at Ex.68 and then side of the defendants was closed.

6. Learned trial court after hearing the parties, decreed the suit of the applicants/ plaintiffs as prayed with no order as to costs. On appeal preferred by respondents No.4 to 7/defendants, learned District Judge, Sanghar, reversed the findings of the learned trial court, allowed the appeal and dismissed the suit of the applicants. Consequently this Revision was filed by the applicants/ plaintiffs against the findings of the learned District Judge in Civil Appeal No. 90 of 2004.

7. The notices of this Revision Application were served upon respondent Nos. 3 to 7 on 18.8.2010 through bailiff and copy of the same was received by respondent No.5 for self and on behalf of other respondents for 30.8.2010. On 30.8.2010 respondent No.7 appeared in person and made an application

in writing under his signature that time may be allowed to the respondents to engage suitable advocate to appear on their behalf. Such application is available in court file.

8. I have heard learned counsel for the applicant and learned State Counsel. The private respondents have chosen not to pursue this case, however, intimation notices were sent to them for each and every date.

9. The learned counsel for the applicant has contended that the Appellate Court has failed to appreciate the evidence on the point that respondent Nos. 3 to 7 who claimed possession and exclusive ownership on the basis of statement of gift recorded by their father before the Mukhtiarkar Khipro on 8.10.1992 was not proper transfer of the suit land with possession in favour of private respondents in the life time of deceased Kevro. The statement of gift on the face of it was contrary to the basic requirements of gift under the Muhammadan Law. The other contentions of learned counsel for the appellant was that the appellate court while setting aside the well reasoned judgment supported by relevant case law and the provisions of Muhammadan Law failed to appreciate that the statement of gift before the Revenue Authority was not a proper gift to convey the property as the requirement of paras 149 and 150 of Muhammadan Law were not complied with and it was also hit by the provision of paras 155 and 162 of Muhammadan Law.

10. I have carefully examined the record and the judgment of the Appellate Court. The learned District Judge Khipro has framed the following points for determination in appeal.

Point No. 1: Whether deceased Kevro gifted the suit land to the appellants?

Point No.2: Whether the appellant No.1, 3 and 4 were minors on 8.10.1992 at the time of statements of gift in their favour and the gift made by Kevro Khan was according to Muhammadan Law? If so, its effect?

Point No.3: Whether the suit filed by the respondent No.3 to 6 is not maintainable under the law?

Point No.4: What should the order be?

11. The applicants/plaintiffs through F.C. Suit No.23 of 2002 have prayed for partition of the suit land of their father by way of inheritance between themselves and the private respondents / defendants as admittedly both sides were legal heirs of deceased Kevro who died in 1994. The crucial prayer was to :-

> Direct the respondent No.2 to mutate Foti khata Badal in favour of legal heirs of deceased Kevro, and they may be put in possession of their respective share.

12. The official respondents have filed their comments and along with comments they have placed on record statement of gift made by deceased Kevro, the father of the appellants and the private respondents, before the Mukhtiarkar Revenue, Khipro on 08.10.1992. It was produced in evidence by Tapedar P.W-2 at Ex.52. This is the only document which was needed to be examined by the Appellate Court in the light of Muhammadan Law to settle the dispute between the legal heirs of the deceased Kevro. It is reproduced in verbatim as follows with translation in English:-

بيان بخشش پٽن کي

حاضر آيو _ آئون هيٺ صحيح ڪندڙ هرهڪ نالي ڪيوڙو ولد خيرار ذات خير عمر انڪل 55 ورهه ويٺل ڳوٺ پنهنجو ديهه ديورو نمبر 1 تعلقه ڪپرو جو ساڪ سان چوان ٿو ته آئون پنهنجي رضا خوشيءَ سان بنا ڪنهن زير بار ۽ بنا ڪنهن نشي، سالم دماغ جي صورت ۾ هيٺئن موجب آئون پنهنجي زرعي زمين ٽوٽل (17-27) ايڪڙ پنهنجن پنجن (5) پٽن کي جدا جدا بخشش طور ڏيان ٿو، اها بخشش قطعي آهي، ان کان بعد ۾ پي ڪابه زمين انهيءَ ديهه ۾ بچت ڪانه رهندي ۽ سرڪاري ڪابه بقايا يا بئنڪ وغيره رهيل ڪونه آهي، هرڪنهن زير بار کان آزاد آهي. اها زمين جيستائين آئون نالي ڪيوڙو ولد خيرار زنده آهيان تيستائين خود وسائيندو رهندس ۽ آبادي وغيره ڪٽندو رهندس، ڀلون وغيره پريندو رهندس، منهنجي مرڻ بعد هيٺئين موجب آئون پنهنجي جيئري لکي پڙهي بخشش ڪري ڏيئي وڃانٿو ان موجب عمل ٿيڻ گهرجي، هڪ پٽ نالي عبدالغني نافرمان آهي انڪري انکي آئون ڪابه ملڪيت ۾ حصو ڪونه ٿو ڏيان باقي رهيون چار ڏيئرون جيڪي شادي شده آهن پنهنجن وارثن جي گهرن ۾ رهندڙ آهن مونسان گڏ ڪونه آهن هرڪو ڪائٽي پيٽي ڌار آهي، ڏيئرن کي شادي وقت جيڪو مون ڏيڻو هو اهو مون ڏيئي چڪيو آهي هاڻ باقي منهنجي ملڪيت ۾ ٻيو ڪوبه وصّي وارث ڪونه آهي، (5) پنجن پٽن کي بخشش ڪري ڏيانٿو، هاڻ روينيو رڪارڊ ۾ ڦيرگير ڪري منهنجن پٽن جي نالي داخلا ڪرڻ ۾ ايندي ته ان لاءِ مونکي ڪوبه اعتراض نه آهي. منهنجي زنده رهڻ تائين مٿين پٽن کي ڏنل زمين پڻ منهنجي قبضي ۾ رهندي مرڻ بعد انهن کي ملندي.

Sd/- هٹ اکر کیوڑوخیر 485-29-009308	ریاض 5-27	رفیق 1-2 4-8	عبدالرزاق 5-14	عبدالوهاب 2-8	3-12	عزیز 5-20

Sd/- 8.10.92 روبرو مختیارکار کپرو	LTI نشان عبدالوهاب	Sd/- هٹ اکر عبدالرزاق	Sd/- هٹ اکر محمد رفیق	Sd/- هٹ اکر عزیز

STATEMENT OF GIFT TO SONS

> "Present: I, the undersigned namely Kevro son of Khairar by caste Khair aged about 55 years resident of own village Deh Dhoro No.1 Taluka Khipro state on oath that I with my own wish, without any duress or compulsion, without being intoxicated, with conscious mind as described below gift my agricultural land total admeasuring (27-17) acres to my five (05) sons. This gift is final. After this gift there will be no remaining land in the said Deh. There is no government or bank outstanding against the said land and is free from all encumbrances. The said land, as far as I, namely Kevro son of Khairar is alive I will cultivate and pay land revenue etc myself. After my death, in my own life, give in gift and should be acted upon as described below. One son namely Abdul Ghani is disobedient therefore I do not give him share in the property. There remained four daughters who are married, lives in their own houses separately and not living with me. At the time of their marriages whatever I wanted, I had given to them. And no-one else is my nominee or heir in my property. I do hereby gift out to my five (05) sons. I have no objection if the same is entered in the revenue record. As long as I am alive the gifted land to my sons will remain in my possession and after my death will go to them."

13. It appears from the perusal of impugned judgment that the learned District Judge either misread or at all did not read the contents of the gift statement reproduced above. On the face of it, the statement was devoid of any of the ingredients of a valid gift in favour of the private respondents. Admittedly content wise the statement of gift reproduced above was hit by the provisions of Para 155 and 162 of Muhammadan Law. The two para from D.F. Mulla's Principles of Mohammadan Law, Fifth Edition, are reproduced below.

> 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 be establish a bonafide intention to give.

162. Gift in future.- A gift cannot be made of anything to be performed in future [ills. (a) and (b)], nor can it be made to take effect at any future period whether definite [ill. (c)] or indefinite.

(a) - - - - - - - - - - - -
(b) - - - - - - - - - - - -
(c) A executes a deed of gift in favour of B, containing the words "so long as I live, I shall enjoy and possess the properties, and I shall not sell or make gift to anyone, but after my death, you will be the owner." The gift is void, for it is not accompanied by delivery of possession and it is not to operate until after the death of A. *[(1982) 9 Cal. 138; See also (1886) 10 Mad. 196, at p. 199]*

14. Even in his statement of gift before the Mukhtiarkar Revenue, Khipro, the doner has not formally divested himself of the possession rather he continued to be in possession and he has categorically stated that the gift shall be effective on his death. Not only that he continued to bear all taxes and levies payable by him as owner of the property in his own right. He has not stated anywhere in the so-called statement of gift that he "accepts" gift formally on behalf of his minor sons.

15. Besides the above, the District Judge failed to appreciate that the gift was not in favour of minors alone. Admittedly two donees namely Abdul Aziz and Abdul Wahab (Respondent Nos. 3 & 4) were major and even these major donees were not handed over possession of their specific piece of land mentioned in the statement of gift. *Bona fide* intention of doner of gift as contemplated in Para 155 of the Muhammadan Law was also not established when in the statement of gift itself the doner stated that he does not want to give share from his property to his daughters because he has given whatever he wanted to give to them at the time of their marriage and also because they are living separately in their homes.

باقي رهيون چار ڌيئرون جيڪي شادي شده آهن پنهنجن وارثن جي گهرن ۾ رهندڙ آهن مونسان گڏ ڪونه آهن هرڪو ڪائٽي پيئٽي ڌار آهي، ڌيئرن کي شادي وقت جيڪو مون ڏيڻو هو اهو مون ڏيئي ڇڏيو آهي هاڻ باقي منهنجي ملڪيت ۾ ٻيو ڪوبه وصّي وارث ڪونه آهي.

There remained four daughters who are married, lives in their own houses separately and not living with me. At the time of

> their marriages whatever I wanted, I gave them; now there is no any sharer in my property.

The reason to exclude Abdul Ghani from inheritance given in the statement of gift was that he is not obedient.

> هک پٽ نالي عبدالغني نافرمان آهي انڪري انکي آئون ڪابه ملڪيت ۾ حصو ڪونه ٿو ڏيان

> "One son namely Abdul Ghani is disobedient therefore I do not give him share in the property".

Aforementioned contents of the statement of gift were more than enough to hold that the property was not gifted by the doner to donees for his love and affection but it was done to deprive the plaintiffs from their entitlement as legal heirs of Kevro on his death in defiance of the Divine Law ordained by God. Precisely, the three daughters and one son who were born from the wedlock of deceased owner with Mst. Kamali were denied their share from inheritance and the donees who were born from his wedlock with Mst. Bachlan were given their own share and the share of plaintiffs, therefore, the gift was devoid of "bona fide intention" on the part of Kevro (the donor) and at the same time it was to take effect on the death of Kevro (Para 155 & 162, illustration (c) of Muhammadan Law). The future gift is not permissible under the law and particularly in the case in hand the language of the gift was such that it was a kind of "will" of the doner that after his death the share by way of inheritance should not be given to the otherwise lawful sharers in accordance with Shariah practiced by the doner.

16. The learned Appellate Court in view of the above failed to read out the evidence the documents available before the court in its true perspective. Learned Appellate Court instead of examining the findings of the Trial Court on all the four points for determination in appeal reversed the same without commenting on the merits and reasoning and findings of the Trial Court. The three points for determination in appeal were recasting on issues framed by the trial court and decided in the light of the evidence. The observation of the Appellate court with reference to Para 155 of Muhammadan Law was only about possession in respect of gift from father to his minors but the court failed to appreciate that in the same Para 155 of Muhammadan Law the "bonafide intention" of grant of gift was to be established from the

circumstances, which obviously as discussed above and also discussed by the Trial Court was missing. The appellate Court was misled by the fact that one of the appellant namely Abdul Ghani had purchased two acres of land in 1994 from respondent Nos. 3 and 4. Any sale / purchase of property by one of lawful sharer from the other sharer would not defeat the divine divide of estate of deceased under Muhammadan Law nor it could stop the same legal heir and others to seek distribution of estate of deceased in accordance with Shariah followed by their ancestor, therefore, the Appellate court not only misread the evidence but also failed to appreciate the impact of the law. In view of the above circumstances the impugned order is suffering from factual and legal lacuna. Consequently, the respondent No.2 is directed to enter the name of applicants / plaintiffs in the revenue record to the extent of their share according to Muhammadan Law by way of inheritance in the original 27-17 acres of land of deceased Kevro along with respondent Nos. 3 to 7 and also share of Mst. Shahnaz who was not party in the proceedings but admittedly she is also one of the legal heirs of deceased Kevro. Her share should also be mentioned in the revenue record.

17. The upshot of the above discussion is that the impugned appellate judgment is set-aside and the judgment and decree of the court of Senior Civil Judge, Khipro in F.C. Suit No. 23 of 2002 is restored.

18. The revision application is allowed, however, the parties to bear their own costs.

JUDGE

Karar/-