

IN THE HIGH COURT OF SINDH AT KARACHI

High Court Appeal No. 399 of 2022

PRESENT:

Mr. Justice Aqeel Ahmed Abbasi
Justice Mrs. Kausar Sultana Hussain.

FRESH CASE

1. For orders on CMA No. 3962/2022.
2. For hearing of Main Case.

30.11.2022.

Mr. Haroon Shah, advocate for the appellant.

ORDER

1. Through instant High Court Appeal, the appellant has impugned the order dated 19.10.2022 passed by learned Single Judge in Suit No. 1567 of 2015 [*Re: Babrak Khan v. Muhammad Hashim Khan & others*], whereby, according to learned counsel for the appellant, CMA No. 10078/2020 filed by the appellant under Order VII Rule 11 CPC seeking rejection of plaint in the above suit, has been dismissed.

2. Learned counsel for the appellant after having read out the impugned order passed by the learned Single Judge, has submitted that while dismissing the application [CMA No. 10078/2020] filed by the appellant under Order VII Rule 11 CPC seeking rejection of plaint, the learned Single Judge has not examined the admitted facts relating to title of subject property and also failed to appreciate the legal grounds agitated by the appellant, including validity of the gift relied upon by the respondent, as according to learned counsel, the possession of the suit property was never delivered by the grand-father of respondent No.1 to

respondent No.2. According to learned counsel, the ground of limitation involved in the instant case has also not been properly appreciated, as the declaration and cancellation of the registered gift deed executed on 27.09.1992 has been sought by filing the suit, which is barred by law under Article 91 of the Limitation Act, 1908, which according to learned counsel, provides that cancellation of registered document can be sought within three years, whereas, in the instant case, suit was filed in the year 2015, much beyond the period of limitation. According to learned counsel, the impugned order is liable to be set-aside and the plaint in the aforesaid suit may be rejected under Order VII Rule 11 CPC.

3. We have heard the learned counsel for the appellant, perused the record and the impugned order passed by the learned Single Judge on CMA No. 10078/2020. Since the impugned order contains the arguments and grounds raised by the appellant, therefore, it will be appropriate if the relevant portion of impugned order is reproduced hereunder for the purposes of clarity with regard to facts of the case and the grounds agitated by the appellant before the learned Single Judge for the purposes of rejection of plaint under order VII Rule 11 CPC, the same reads as follows:-

“1. By this application, the defendant No.1 seeks rejection of the plaint under Order VII Rule 11 CPC.

The case of the Plaintiff as set-up in the plaint is as follows: that the Plaintiff's grand-father had gifted the suit property to the plaintiff's father (Defendant No.2) by way of a gift deed dated 07.11.1989; that, thereafter, the Plaintiff's father (Defendant No.2) gifted the suit property to the Plaintiff by way of a registered gift deed dated 09-05-2013; that when the Plaintiff sought mutation of the suit property, he discovered that there existed another registered gift deed dated 27-09-1992 of the suit property, said to have been executed by

the Plaintiff's grand-father in favour of the Defendant No.1 (the Plaintiff's uncle); hence this suit for cancellation of the gift deed of the Defendant No.1.

The first ground taken by learned counsel for the Defendant No.1 for rejection of the plaint is that the gift deeds relied upon by the Plaintiff are void as possession of the suit property was never delivered by the Plaintiff's grandfather to the Defendant No.2 or to the Plaintiff, and which has always been with the Defendant No.1. The second ground urged is that the suit for cancellation of the gift deed dated 27-09-1992 is time-barred.

In para 3 of the plaint, the plaintiff has averred that on execution of the gift deed dated 09-05-2013, he was put in possession of the suit property by his father, the Defendant No.2. Therefore, the contention of the Defendant No.1 that the gift of the suit property was not valid for want of delivery of possession, is a question of fact requiring evidence. Since the Defendants are brothers inter se and rely on an exclusive gift of the same property from their father, evidence will also be required to determine which gift will prevail.

As regards the ground that the relief for cancellation is time barred, learned counsel for the Defendant No.1 submits that time would start to run from the execution of the gift deed dated 27-09-1992 which is sought to be cancelled. However, that is a misconception. Article 91 of the Limitation Act, 1908, stipulates that for the relief for cancellation the limitation of 3 years would start to run "when the facts entitling the Plaintiff to have the instrument cancelled or set-aside became known to him". The Plaintiff has averred that he came to know the gift deed dated 27-09-1992 after the suit property was gifted to him under gift deed dated 09-05-2013 and when he applied for mutation in 2014. The suit having been filed in 2015, is therefore within limitation.

Both grounds urged for rejection of the plaint having been found to be misconceived, the application for rejection of the plaint [CMA No. 10078/2020] is dismissed.”

4. From perusal of the impugned order and the averments made by the appellant in the application [CMA No. 10078/2020], it appears that the appellant has mainly pressed two grounds, for seeking rejection of plaint under Order VII Rule 11 CPC. Firstly, the ground that the registered gift deed relied upon by the respondent No.1 is void as possession of the suit property, according to respondent No.1, was never delivered by the donor/grand-father of respondent No.2 or to the respondent No.1 and secondly, cancellation of registered gift deed dated 27.09.1992 sought through subject suit beyond the period of three years as provided under Article 91 of the Limitation Act, 1908, which is barred by law for the purposes of limitation, have been dealt with elaborately by the learned Single Judge in the impugned order, by holding that the issue relating to validity of registered gift deed for want of delivery of possession, is a question of fact, which requires evidence. Similarly, as regards the ground pressed by the appellant relating to limitation, the learned Single Judge has been further pleased to hold that under the facts and circumstances of the case and keeping in view the provision of Article 91 of the Limitation Act, 1908, it is clear that for the purposes of seeking cancellation of a registered document, period of limitation is three years, which will start to run “when the facts entitling the plaintiff to have the instrument cancelled or set-aside became known to him”, whereas, according to learned Single Judge, since the respondent No.1 has submitted that he came to know about gift deed dated 27.09.1992, after the suit property was gifted to him under gift deed dated 09.05.2015 and when he applied for mutation in

the year 2014 and the suit has been filed in the year 2015, therefore, the same is within time.

5. Prima face, both the above grounds agitated by the appellant, seeking rejection of plaint under Order VII Rule 11 CPC are based on the factual scrutiny and the evidence is to be recorded in this regard, therefore, the learned Single Judge has rightly dismissed the application filed by the appellant under Order VII Rule 11 CPC [CMA No. 10078/2020] seeking rejection of plaint without recording of evidence, therefore, we are not inclined to interfere in the impugned order passed by the learned Single Judge in the aforesaid suit.

6. Learned counsel for the appellant while confronted with hereinabove factual and legal position as emerged in the instant case, was required to point out any factual error or any legal infirmity in the impugned order passed by the learned Single Judge, however, he could not submit any reasonable explanation, nor could convince this Court to interfere with the impugned order passed by the learned Single Judge in the aforesaid suit.

7. Accordingly, instant High Court Appeal being devoid of any merits was dismissed alongwith listed application vide our short order dated 30.11.2022 and above are the reasons for such short order.

JUDGE

JUDGE

A.S.