ORDER SHEET

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Civil Revision Application No. S-15 of 2010

DATE OF HEARING	ORDER WITH SIGNATURE OF JUDGE

1. For orders on office objection.
2. For hearing of CMA No.55/2010.
3. For hearing of main case.

Applicants: **Province of Sindh & others.**

Respondents: **Thakurdas & others.**

Mr. Abdul Hamid Bhurgri, Additional Advocate General for the Applicants.

Nemo for the respondents.

Date of hearing : 10.09.2020.
Date of Order : 25.09.2020.

O R D E R

Through this Civil Revision Application, the Applicants have impugned judgment dated 09.01.2010, passed by IV-Additional District Judge, Dadu, in Civil Appeal No.21/2003, whereby judgment dated 30.11.2002 and decree dated 07.12.2002 passed by Senior Civil Judge, Dadu, in F.C. Suit No.57/1974(Old) / F.C. Suit No.45/1976(New), through which the Suit of private Respondents was dismissed, has been set aside, and resultantly Respondents Suit has been decreed as prayed.

2. Learned Addl. A.G. appearing on behalf of the Applicants has contended that the learned trial Court after going through the entire evidence led by the respondents was pleased to dismiss their Suit as being time-barred and otherwise not maintainable; however, the Appellate Court through its impugned judgment has not only set aside the said judgment but has also decreed the Suit, as prayed; that the respondents had failed to lead any confidence-inspiring evidence and were not entitled for any relief as prayed; that the record clearly established that the purported gift made by the deceased father/respondent No.4 in favour of his sons/grandson/respondents No.1, 2 and 3 was never proved, whereas the Appellate Court has completely misread the evidence and while overturning the decision of the trial Court, has failed to fully appreciate the facts of the case; that in terms of Section

123 of the Transfer of Property Act a gift under the Hindu Law is liable to be registered, whereas admittedly in this case the respondents had claimed that an oral gift was made; that the learned Appellate Court while relying upon the order dated 20.09.1972 passed by the Land Commissioner in the proceedings initiated against respondent No.4, has failed to appreciate that the existence of the Book of Statement and the recording of statement of gift by respondent No.4 was all along disputed, but surprisingly it has been observed that it was so otherwise; that the Suit by respondents No.1, 2 and 3 against their father i.e. respondent No.4, was a collusive Suit to avoid acquisition of land under the Land Reforms Regulations, 1972 / Martial Law Regulation (M.L.R 115), and therefore, a strict view was required to be taken in respect of the alleged gift; that it is not a case under the *Muhammadan Law* wherein if proved at the trial, an oral gift is a valid gift; that even no witnesses in support of such purported oral gift were examined by the Respondents, and therefore, the Appellate order requires interference and is liable to be set aside;. In support of his contentions, he has relied upon the case of *Abdullah v. Abdul Aziz* (**1987 SCMR 1403**) and *Ghulam Zainib v. Said Rasool* (**2004 CLC 33**).

3. None has affected appearance on behalf of the respondents and thereafter vide order dated 31.10.2019 directions were issued for service against them by way of publication in Daily "Jang" and Daily "Kawish", pursuant to which such publication was effected and on 06.08.2020 the service was held good against the contesting respondents.

4. I have heard the learned Addl. A.G. and perused the record.

5. The respondents No.1, 2 and 3 (Plaintiffs) had filed a Suit on 16.7.1994 before the Senior Civil Judge, Dadu against their father, the respondent No.4 (Defendant No.3) and some officials of the Government, for declaration and injunction, seeking the following relief(s):-

> "10. That the plaintiffs pray for judgment and decree as under:
>
> a) That this Honourable Court may be pleased to declare that the plaintiffs are the owners of Suit land by virtue of gift made in their favour by defendant No.3 on 20.02.1967.
>
> b) That this Honourable Court may be pleased to issue an injunction against the defendants thereby restraining them permanently from denying the title of ownership of the plaintiffs as well as from interfering with possession of plaintiffs over Suit land.

c) That the costs of the Suit be borne by the defendants.

d) Any other relief which this Honourable Court may deem fit also be awarded."

6. Respondent No.4 (father) in his written statement admitted the claim of respondents No.1, 2 and 3 in respect of purported gift made by him, whereas the concerned Mukhtiarkar, Mehar / Applicant No.4 denied the claim of the plaintiffs by arguing that it is a collusive Suit to avoid the operation of Land Reform Regulations. Initially, plaint in the Suit was rejected under Order VII, Rule 11, CPC on 09.05.1981 being barred under Section 42 of the Specific Relief Act, which was challenged in Appeal and the said order was set aside and at the same time the respondents No.1, 2 and 3 were declared as owners of the Suit land on the basis of the gift in question. Thereafter, the said order was impugned in Civil Revision Application No.10/1994 before this Court and vide order dated 20.12.1999 the Appellate order dated 26.11.1984 was set aside and the matter was remanded to the Senior Civil Judge for deciding the same on merits. It further appears that thereafter an Application was also filed by respondents No.1, 2 and 3 under Order VI, Rule 17, CPC for amendment and an Application under Order I, Rule 10, CPC for joining the EDO Revenue, Dadu. Such Applications were allowed and on the basis of the pleadings the following issues were settled by the trial Court: -

1. Whether the Suit is maintainable under the law?

2. Whether the Suit is under-valued and plaintiffs are liable to pay Court fee under section 7(4)(A) (Sindh Amendment) Court Fees Act on the market value of the Suit land?

3. Whether the jurisdiction of this Court is barred by section 26 of Martial Law Regulation, 115 of 1972?

4. Whether Suit is barred by law of Limitation?

5. Whether Suit is barred under the provisions of Land Reforms Regulation, 1972 (MLR of 1972) and section 42 and other provisions of Specific Relief Act?

6. Whether deceased Hondomal during his lifetime orally gifted the Suit land to plaintiffs and had given statement before Mukhtiarkar Mehar, if so, what was/is its effect?

7. Whether defendant No.3 Hondomal had delivered the possession to the plaintiffs?

8. Whether the alleged oral gift was shame and malafide transaction in order to avoid the consequences of provisions of Martial Law Regulation, 115 of 1972?

9. Whether said gift was hit by section 123 of transfer of property act and section 17(1)(A) of the Registration Act?

10. Whether the provisions of Section 123 of Transfer of Property Act and section 17(1)(A) of the Registration Act will not hit the oral gift made by Hondomal the defendant No.3 for the purpose of determination of gift under the provisions of MLR 115 of 1972?

11. Whether plaintiffs had applied by a written Application for mutation of khata in respect of Suit property in the Revenue record within time as provided u/s 42 of Land Revenue Act to the defendants Nos.2 and 4, and they had refused to affect the mutation of the Suit land in the names of plaintiffs in the Revenue Record illegally, malafidely and with ulterior motives?

12. Whether plaintiffs and defendant No.3 had made Application, appeal or Revision, against said refusal by defendant No.2 and 4 of mutation of khata in the name of plaintiff within time, if no, what is its effect?

13. Whether defendant No.2 has failed to decide the matter after remand order dated 5.12.1978 passed by Federal Land Commission, if so, what is its effect?

14. Whether land commission authorities have no jurisdiction to determine holding of defendants Nos.3 after 23.3.1990?

15. Whether plaintiffs are entitled to grant of relief as claimed?

16. What should the decree be?

7. The learned trial Court after a threadbare examination of the evidence led by the parties went on to hold that the Suit was time-barred as well as not maintainable and the plaintiffs were not entitled for the relief so claimed and the Suit was dismissed. The said order was impugned in Civil Appeal No.21/2003 and the Appellate Court vide impugned judgment dated 09.01.2010 has set aside the order of the trial Court and has decreed the Suit of respondents No.1, 2 and 3, as prayed. The learned Appellate Court settled the following points for determination under Order 41 Rule 33 CPC for deciding the appeal: -

I) Whether Hoondomal had made the gift statement dated 20.02.1967, if so its effect?

II) Whether the Land Commission authorities failed to decide the factum of gift by Hoondomal, if so its effect?

III) Whether the Land Commission authorities had no jurisdiction to decide the bonafides of gift dated 20.02.1967?

IV) Whether the Land Commission authorities have no jurisdiction to determine the holding of the defendant No.3, after 23.03.1990?

V) Whether Suit is time barred or barred under any law?

8. Insofar as the finding of the Appellate Court in respect of point No.1 is concerned, reliance was placed on an order of the Land Commissioner dated 20.09.1972 for coming to the conclusion that a valid gift was made as claimed and so also on such basis the Suit was also no barred by limitation. However, on a bare perusal of such finding read with the order of the Land Commissioner, it appears that the learned Appellate Court has entirely misread the said order and the evidence led in this regard. The said order of the Land Commissioner was an outcome of some proceedings initiated against Respondent No.4, the deceased father of the Plaintiffs in Suit / Respondents No.1 to 3, who according to the case before the Land Commissioner had failed to disclose various land(s) (Suit Land included) in his declaration as required to be filed by him after promulgation of the Land Reforms Regulations, 1972. He was confronted, to which his stance was that he had gifted these properties to his sons and grandson. It is in this context that the said order of Land Commissioner was passed. The Land Commissioner's order dated 20.09.1972 was produced by defendant No.4 as Ex.D/7/2 in the trial, and a portion of it has been reproduced in the impugned judgment in the following terms:-

> "The book of statement in this respect maintained by the village staff was also seen by me and inspected by the Advocate of the declarant". (*Hence the existence of book of statement and the recording of statement of gift by Hoondomal in the said book is not in dispute.)"*

9. On a bare perusal of the same, as reproduced in the Appellate order, it appears to give an impression that this is part of the order of the Land Commissioner completely; however, it is no so. The last three lines (*under brackets in italics*) as above is in fact the finding of the Appellate Court, but has been reproduced in the Appellate order in a manner, so as to give an impression that it was the finding of the Land Commissioner. In fact, the said order of the Land Commissioner ought to have been read in totality as against the last three or four lines in paragraph-4 of the said order, which led the Appellate Court to arrive at a conclusion, not supported by the record of the case. Paragraphs-3 and 4 of the said order of the Land Commissioner dated 20.09.1972 is relevant and has to be read in its entirety which is as under: -

"3/- On confrontation, the declarant stated that he had gifted these areas to his Sons Adialdas and Thakurdas and Grandson Murlidas by way of statement before the Mukhtiarkar, Mehar on 20.02.1967. As such this alienation according to the declarant did not require to be disclosed in the declaration. On verification of the Revenue Record, I found that there was no statement to this effect in the Book of Statement. Even all other record connected with mutations, recovery of land revenue etc. etc. did not show any transaction to prove the claim of the declarant. The declarant merely stated that he had a simple copy of the statement in his possession. He had been no true copy of this statement. He was called upon to prove the claim, but he failed to state anything more than that he was in possession of a simple copy of the statement executed before the Mukhtiarkar. In the circumstances, I find the declarant has no proof at all in this respect and I hereby order that the above land shall be prosecuted for filing wrong declaration.

4/- The book of statement in this respect maintained by the village staff was also seen by me and inspected by the advocate of the declarant. It was pointed out that the book had been tampered with. This might have been arranged by the declarant himself to gain support to his point of view that the statement was recorded by the Mukhtiarkar concerned which had been later on removed to cause harm to his interest. The Deputy Land Commissioner should probe the matter and take action against the village staff responsible for this and place them under suspension."

10. Perusal of this important document relied upon by the learned Appellate Court in deciding point No.1 in favour of respondents reflects that the declarant (respondent No.4) stated that he had gifted the land in question to his sons / grandson (respondents No.1, 2 and 3) by way of statement of gift before the Mukhtiarkar, Mehar on 20.02.1967 and therefore, since the property stood alienated, it was not required to be disclosed in the declaration filed pursuant to MLR-115. The Land Commissioner went on to hold that on verification of the revenue record, I find that there was no record of such gift statement in the Book of Statement. According to him, even all other record connected with the mutations, recovery of land revenue etc. etc. did not show any transaction to prove claim of the declarant, whereas the declarant merely stated that he had a simple copy of the statement in his possession and he was called upon to prove the claim, but he failed to state anything more than that he was in possession of a simple copy of the statement executed purportedly before the Mukhtiarkar. He then went on to hold that in the circumstances I find that the declarant has no proof at all in this respect and I hereby order that the above said land should be prosecuted for filing wrong declaration. Thereafter, in the concluding paragraph-4 he has observed that the Book of Statement in this respect maintained by the village staff was also seen and inspected by the advocate for the declarant and it was pointed out that the book had been tampered with, which might have been

arranged by the declarant himself to get support to his point of view that the statement was recorded by the Mukhtiarkar concerned, which had been later-on removed to cause harm to his interest. Finally, the Deputy Land Commissioner was directed to probe the matter and take action against the village staff responsible for this and place them under suspension.

Now, if this entire order is read, one fails to understand as to how the learned Appellate Court has come to a definite conclusion that "*the factum of gift having been admitted by both donor Hoondomal and the donees need to be proved [sic] under Article 113 of the Qanoon-e-Shahdat Order particularly after 23.03.1990*" and further that "*it is established from the evidence that Handoomal had recorded his statement of gift before Mukhtiarkar, Mehar in favour of the plaintiffs which statement is legal, valid and binding under Standing Order No.17 by Commissioner of Sindh*" . This entire finding has come from nowhere, seems imaginary and is an act of complete misreading and non-reading of the evidence and the material placed before the Appellate Court and led by the parties in their respective evidence. The Appellate Court has also observed that as per evidence of Nizamuddin Ex.D/7 and order of Land Commissioner the book of statement was kept and "*had the defendant No.4 produced the said book which was seen by the Land Commissioner in 1972 the factum of gift would have been proved*". Firstly, it may be observed that the learned Appellate Court has itself observed that the factum of gift *would have been proved*; hence, presumption would be that it was never proved. Without prejudice, it is not for the Defendant to bring on record documents to prove the assertion of a plaintiff. The plaintiff was required to call and summon the witness if any, and the record so relied upon. It cannot be held that since the Book of Statement was there in 1972; hence, it proves the making of gift. In fact, the Land Commissioner had conclusively held that no such gift was ever recorded as contended and the Book of Statement was tampered with, whereas, the Respondents / Plaintiffs kept sleeping on their rights (elaborative discussion to this effect to follow), and therefore, the Appellate Court has miserably failed to appreciate the facts and law and has erred in recording its finding that the factum of gift stands proved. Its conclusive finding in favour of respondents No.1, 2 and 3 is not based on any supportive evidence, rather it amounts to misreading the evidence as reproduced hereinabove and as a consequence thereof cannot be sustained.

11. The other legal point involved in this case was of the very maintainability of the Suit as well as the fact that whether it was time-barred or not. Issue Nos.1 and 4 were relevant issues, and the learned trial Court after taking into consideration the entire evidence as well as the case law, went on to conclude that the Suit was also barred under Specific Relief Act and the Land Revenue Act and so also was time-barred. The Appellate Court determined point No.(V) for this purposes and came to the following conclusion.

> That ownership of plaintiffs for the first time was disputed in 1972 which is clear from the order of Land Commissioner dated 20.08.1972 at Ex.D-7/2. Suit is filed on 16.07.1974. That in spite of injunction granted by learned trial Court on 28.10.1974 the Land Commission authorities proceeded with the matter and passed orders till 26.06.1999. Copies of which are produced by defendants at Ex.D-7/7, 8, 9, 10 and 11. The decision of learned trial Court on issue No. 4 holding the suit as time is result of misreading and liable to be reversed. The statement of gift recorded under Standing Order 17 para-6 did not require registration. The provision of section 123 T.P. Act and Para -256(2) Hindu Law by Mulla are not applicable to the case of the plaintiffs. Learned trial Court has illegally applied the said provisions and relied upon the decisions which are not applicable to the facts of the case.

This Court is more concerned about the issue of limitation, as if it is so, then the finding on the other legal as well as factual issues would be of without any consequence. The plaintiffs' own case according to the pleadings was that the gift of the Suit property was made by their father (since deceased) on ***20.02.1967*** and since then, they claim to be the owners of the Suit land on the basis of such gift. It is their further case that they approached the revenue authorities for mutation of the *khata* in their names, but it was declined. The respondents/plaintiffs have not been able to prove in the evidence that as to when such request of recording the effect of the gift was made by them and refused by the concerned revenue authorities. In terms of Section 42 of the then Land Revenue Act, (as was applicable at the relevant time as now s.42 for the province of Sindh is differently worded-see-PLD 1981 Sindh Statutes-63), if a party acquires a right by way of a gift in any immovable property, then the owner has to report such acquisition or ownership within three months from the date of such acquisition by way of gift with the concerned authorities, and after following the procedure as provided therein, in terms of sub-section (10) of s.42 ibid, if within three months of a report of the acquisition of a right under subsection (1) or subsection (2), or the recording by the *patwari* of an entry in the *Roznamcha* under subsection (3) respecting the acquisition of any right,

no order is made by the Revenue Officer under subsection (6), he shall report the cause of delay to the Collector in the prescribed manner. On an overall perusal of the relevant provision it appears that if within three months of the report of making of such gift no order is passed by the concerned revenue officer, then it amounts to refusal on the part of the revenue authorities to accept such acquisition by way of gift and from that date onwards the limitation starts running. If the case of respondents No.4 was to the effect that it was refused, then he in his lifetime ought to have taken recourse to the legal remedy either by way of an appeal under Section 161 of the Land Revenue Act or by way of a Civil Suit under Section 9, CPC. In this matter, Respondents have filed their Suit on 18.07.1974 and counting from 19.05.1967 i.e. after 03 months from the date of the purported gift, the Suit was beyond limitation of 06 years as provided under Article 120 of the Limitation Act as correctly observed by the learned Trial Court. The provisions of Section 3 and 9 of the Limitation Act, are mandatory in nature and if a Suit is instituted after the period of limitation, it shall subject to the provisions of section 4 to 25 of ibid must be dismissed notwithstanding that limitation is not set-up as a defence. Section 9 of the Limitation Act, 1908 is founded on the general principle that when once limitation has commenced to run it will continue to do so unless it is stopped by virtue of any express statutory provisions[1]. The learned Appellate Court has overturned the finding of the trial Court in this regard by counting the limitation from the date of the order of the Land Commissioner and other proceedings initiated pursuant to MLR-115, which is an incorrect approach. Those proceedings were commenced on non-filing of declarations by the land owners as required under the Land Reforms Regulations and in those proceedings the respondent No.4. while confronted as to non-declaration of the Suit land, came up with a plea that he did not declare the land in question in his declaration, as he had already gifted the same to his sons / grandson i.e. respondents No.1, 2 and 3. The limitation in this case has to run from the original date of cause of action and could not be enlarged on the basis of some adversarial proceedings against Respondent No.4, which had no direct nexus with the purported statement of gift made by respondent No.4 and the denial of the concerned Mukhtiarkar to record such statement, as alleged. Moreover, the cause of action in respect of the order of Land

[1] Siraj Din and others v Khursid Begum and others (2007 SCMR 1792)

Commissioner, as to being correct or otherwise, was an independent cause, and had to be impugned on that cause only in accordance with law; however, under no circumstances it could be presumed to be an order of refusal of recording the gift statement in the record of rights by the concerned Mukhtiarkar. Neither the Land Commissioner in those proceedings was adjudicating the authenticity of the alleged gift viz a viz non recording of the same as a mutation entry in the record of rights; nor could such observations be deemed to be an order under s.42 of the Land Revenue Act, against which it could be presumed that limitation would start running from the date of such order of the Land Commissioner. In fact, admittedly, the Respondents never challenged the order of Land Commissioner in this very Suit or otherwise. In view of such position, I am of the view that the Suit of respondents No.1, 2 and 3/plaintiffs was hopelessly time-barred and such limitation was never condoned nor it could have been, and therefore, the Appellate Court has seriously erred in deciding this issue in favour of respondents No.1, 2 and 3 by setting aside the judgment of the trial Court.

12. It is also noted with concern that the entire case of respondents No.1, 2 and 3 as well as respondent No.4 was premised on an oral gift and recording of such statement purportedly made before the concerned Mukhtiarkar. In such matters the onus is much stronger upon the party who claims some right on the basis of an oral statement. Admittedly, no witness was produced to assert or prove any such oral declaration. It also needs to be appreciated that the effect of such oral gift made on 20.02.1967 was that the land in question would go outside the purview of the Land Reforms Regulations / MLR-115. In that case, this oral declaration was required to be construed with a strict view as it would have benefitted respondent No.4 by exclusion of his land from the purview of the said Ordinance, being less than 150 acres. There appears a motive on the part of Respondents No.1 to 3 along with Respondent No.4 to file a collusive Suit wherein initially they had failed to join the necessary parties in the Suit, and in fact, made an attempt to seek judgment and decree on the basis of admission by the donor in favour of the donees. The case as pleaded by these Respondents, in fact, required them to jointly file a Suit or initiate proceedings being on the same page, against the purported refusal of the concerned officials to record their transfer of gift statement; instead an attempt was made to get a decision on the basis

of consent amongst themselves. Since it has come on record that no such statement of gift was ever produced, therefore, no question could have arisen for recording the same in the Book of Statement, and therefore, the attempt made by respondent No.4 to get the land excluded in connivance with respondents No.1, 2 and 3 appears to be *mala fide* on the basis of available record. In such circumstances, the learned trial Court was fully justified in dismissing the Suit of respondents No.1, 2 and 3. However, unfortunately the Appellate Court without appreciating the entire facts as well as the evidence available on record, has not only overruled and set aside the said judgment and decree of dismissal; but has even gone to the extent of decreeing it as prayed, with which this Court is unable to agree.

13. In view of hereinabove facts and circumstances of this case, the order of the Appellate Court appears to be a case of non-reading and misreading of the evidence and requires interference justifiably by this Court under Section 115, CPC under its Civil Revisional jurisdiction and by doing so, the impugned judgment and decree dated 09.01.2010 is set aside and the judgment dated 30.11.2002 and decree dated 07.12.2002 of the learned trial Court is restored, whereby the Suit of respondents No.1, 2 and 3 was dismissed.

14. Civil Revision Application is allowed in the above terms.

Dated: 25.09.2020

JUDGE
25.9.2020

Qazi Tahir PA/*