

JUDGMENT SHEET

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD.**

Civil Revision Application No. 27 of 2006

Applicants: Muhammad Yousuf and others through Mr. Muhammad Idrees Khan Advocate.


Respondents No.2 to 4: Through Mr. Allah Bachayo Soomro, Additional Advocate General Sindh.
Nemo for respondents No.1 and 5.

Date of hearing: 19.05.2023.
Date of Judgment: 19.05.2023

J U D G M E N T

Muhammad Junaid Ghaffar, J.- Through this Civil Revision Application, the Applicants have impugned Judgment dated 07.01.2006, passed by Additional District Judge, Tando Adam, in Civil Appeal No.13 of 2004, whereby, the appeal has been allowed and order dated 25.10.2004 passed by Senior Civil Judge, Tando Adam, in First Class Suit No.07 of 2004, through which the plaint in the suit filed by Respondent No.1 was rejected, has been set-aside.

2. Heard learned counsel for the Applicants and perused the record. Insofar as private respondents No.1 and 5 are concerned, they have been served through publication; but nobody has turned up. It appears that respondent No.1 had filed a suit for declaration, cancellation and injunction wherein the present Applicants filed an application under order VII Rule 11 CPC which was allowed by the learned trial court vide order dated 25.10.2004 and plaint was rejected. However, in appeal, through impugned judgment, the same has been set-aside. It would be advantageous to refer to the prayer clause in the suit which reads as under: -

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- a) Declare that Gift Deed dated 05.08.1986 is valid, genuine and authentic and plaintiff is the absolute and exclusive owner of the suit property and defendant Nos.5 to 11 have no concern of it, it may also be declared that oral Gift Deed dated 29.5.1991 made by the defendant No.4 and three others in favour of the late Shah Muhammad without delivering the possession of the suit property is void, fraud, illegal, bad in law, against principles of natural justice, without jurisdiction and tenable in law and is liable to be cancelled.
 - b) That, this Honourable Court may be pleased to direct defendant No.2 to mutate Khata in favour of the plaintiff in view of gift deed dated 05.08.1986 of the suit property as mentioned in the body of plaint.
 - c) That, this Honourable Court may be pleased to issue permanent injunction against the defendant No.5 to 11 from dispossessing the plaintiff from the suit property i.e. City Survey No.441 (portion) Ward "D", situated at

Joharabad, Tando Adam, and may also be restrained from selling, alienating, gifting, mortgaging, exchanging, leasing, etc. the suit property by themselves or through their agents, servants, helpers and assignees, attorney(s) etc. in any manner whatsoever without adopting due course of law.

- d) Cost of the suit be borne by the defendant Nos.4 to 11.
- e) Any other relief which this Honourable Court deems fit and proper in the circumstances of the case.

3. Perusal of the record reflects that while passing order on the application of the Applicants under Order VII Rule 11 CPC, the learned trial court made various observations which apparently are in relation to the very merits of the case and per settled law, while deciding such an application, such findings are not required to be given as it amounts to giving a judgment on merits without permitting the plaintiff to lead any evidence in support thereof. Accordingly, insofar as these findings of the learned trial court are concerned, I am of the view that they cannot be sustained and the Appellate court was fully justified in setting aside the same.

4. At the same time, there was also one issue regarding the very suit being time barred, and that was also decided in favor of the Applicants, and this has also been set-aside by the Appellate Court. Insofar as the finding in respect of limitation is concerned, that is crucial, and if a case is made out to that effect, then the plaint ought to have been rejected. The finding of the trial court in respect of the objection regarding limitation reads as under:

"The plaintiff in his plaint is seeking to declare that the gift deed dated 05.08.1986 valid, genuine and authentic and to declare that she is exclusive owner of property on the basis of un-registered gift deed dated 05.08.1986 though she was in knowledge that the suit property is still in the name of Rehmatullah and Barkat Ali sons of Rahim Bux which appears from face of documents Annexure "A-I" produced by the plaintiff and its copy was obtained from city survey record on 29.07.1986 then it was for the plaintiff to have file a suit or to have got change the mutation affected in her name in the City Survey record on the basis alleged gift deed dated 05th day of August 1986 but she might be in a knowledge that the gift deed is not on footing, therefore, she remain mum for the period of 18 years and have filed the present suit hopelessly time barred and U/Article 120 and 91 and Section 3 of Limitation Act, and the suit from the face of it is not maintainable, I therefore, find no force in the contention raised by the counsel for plaintiff and law cited by him. It is held in MLD 1996 Karachi page 593(a) that Civil Court was fully competent to consider legal objection on maintainability of the suit and the Civil Court can suo moto reject any plaint U/O 7 Rule 11 C.P.C. It is held in 1992 C.L.C. Karachi page 2282 that Court has power and Jurisdiction to reject plaint even at interlocutory stage of considering grant of temporary injunction.

It is held in 1989 CLC Karachi page 946 that plaint can be rejected for want of legal character and absence of right in property.

It is held in 1997 CLC Lahore P.322 (b) That Limitation starts from the date of accrual of cause of action.

Upshot of the above discussion are that the plaint does not disclose cause of action, the suit of the plaintiff from the face of it is barred by Sec:17, 32, 49 of Registration Act and Section 139, 140 and 149 of Muhammadan Law, Section 42 of Specific Relief Act and Article 120. 91 (sic) Section 3 of

Limitation Act, I therefore while considering the legal objection raised by the defendant No.5 to 11 and case law cited above, allow the application U/O 7 Rule 11 C.P.C. and reject the plaint on the above grounds alone with costs of Rs.5000/- as the plaintiff has filed the present suit on false claim and false footing and un-necessary dragged the defendant No.5 to 11 in facing the frivolous litigation. Application U/O 39 Rule 1 & 2 CPC has become infructuous."

5. Insofar as the Appellate court is concerned, it reflects that it has failed to appreciate the true facts as well as law governing the limitation period for filing of a Suit. Without giving any reasoning, the Appellate court has set-aside this finding by merely observing that this is a mixed question of law as well as facts, hence require evidence. This is not always so inasmuch as if, from the contents of the plaint by itself and the material so placed before the court, it could be seen that the suit is prima facie time barred, then the trial court is bound to reject the plaint. This can be done on an application under Order VII Rule 11 CPC; or even on its own by raising such an objection. In fact, to plead that a plaint cannot be rejected, for the suit being barred by limitation/law, without recording evidence, is to plead against the mandate of law as contained in Order VII Rule 11 of the Code of Civil Procedure, which essentially requires the Court to reject the plaint which appears from its contents to be barred by limitation¹. Per settled law the Courts on the original side while trying a suit as required under section 3 of the Limitation Act are bound to dismiss the suit if it is found to be barred by time notwithstanding that the limitation has not been set up as defense². The trial Court can always give and record its finding as to the suit being time barred. If not, then in each and every case this issue of limitation could only be decided after evidence which is not an appropriate or correct approach. It has been held in numerous judgments that the Law of Limitation is not a mere technicality and that once the limitation expires, a right accrues in favour of the other side by operation of law which cannot lightly be taken away. Reliance can be placed on the cases of *Asad Ali*³; *Ghulam Qadir*⁴; *Abdul Sattar*⁵ and *Muhammad Islam*⁶.

6. Insofar as the present case is concerned, on perusal of the plaint it appears that respondent No.1 sought declaration to the effect that the gift deed dated 5.8.1986, purportedly made by her husband in her favor on his behalf and on behalf of some other co-owners as an attorney was a valid gift and it may further be directed to record mutation in her name. At the same time, she also sought cancellation of a registered gift deed dated

¹ Agha Syed Mushtaque Ali Shah v Mst. Bib Gul Jan (2016 SCMR 910)

² Muhammad Anwar v Essa & Others (PLD 2022 SC 716)

³ (PLD 2020 SC 736)

⁴ (PLD 2016 SC 712)

⁵ (2013 SCMR 911)

⁶ (2011 SCMR 8).

29.5.1991 again executed by her husband in a similar manner in favor of the Applicants. Along with this, cancellation of mutation in their name was also sought. The case as set up by respondent No.1 was that defendant No.4/respondent No.5 who was her husband was not on good terms with her and it was she, who constructed the house in question with her own means and being illiterate and 'pardah nasheen', whereas, despite a gift dated 5.8.1986 in her favor by her husband, she could not get the same mutated in her favour. As to accrual of cause of action, she has only stated that a month back she got knowledge about the claim of the Applicants as she was asked to vacate the house in her possession. This was a bald statement as to the cause of action inasmuch as the suit was being filed in 2004 for seeking cancellation of a gift deed executed in 1991. At the same time, it was also pointless insofar as her declaratory relief in respect of purported gift dated 5.8.1986 was concerned. Therefore, it was incumbent upon her to explain in detail as to the entire events leading to her, filing a Suit for declaration and cancellation beyond the stipulated limitation period. Needless to mention that, a plaintiff who wants to avail the benefit of any provision of The Limitation Act, must assert the commission of such fraud by the defendant, in the plaint, and should also give the particulars thereof, and the date of knowledge, as required under Rule 4 of Order VI of the Code of Civil Procedure 1908⁷. Mere assertion that it only came into her knowledge a month back would not suffice, when the deed was executed by her own husband and a collusive suit between Respondent No.1 and 5 cannot be ruled out on such an averment itself. In fact, this appears to have been done purposely, to avoid the objection regarding limitation. On the face of it the suit seeking cancellation of a gift deed executed in 1991 filed in 2004 was time barred; hence, the trial court was fully justified in rejecting the plaint on this ground. In terms of Article 91⁸ of the Limitation Act, 1908 to seek cancellation or setting aside of an instrument not otherwise provided for, the limitation period is 3 years when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him or her; however, even for that it has to be explained as to what took so long to file a suit after the limitation period. The Suit was even time barred in terms of an extended limitation of 6 years under Article 120 *ibid*. In the instant matter, admittedly the suit in question was filed by respondent No.1 after 18 years of the execution of the gift deed. And this was done without explaining as to why it took such a long period to challenge a gift admittedly executed by her husband. As to the strained

⁷ Mst. Rabia Gula v Muhammad Jan (2022 SCMR 1009); Naeem Finance Ltd v. Bashir Ahmad PLD 1971 SC 8; Izzat Bakhsh v. Nazir Ahmad 1976 SCMR 508; Faizum v. Nander Khan 2006 SCMR 1931; Bashir Ahmed v. Muhammad Hussain PLD 2019 SC 504.

⁸ First Schedule (under Section 3)

relations with the husband nothing had been stated in any terms that would justify the reasoning that she was unaware of any such gift deed. It has also gone unexplained as to why the husband / Respondent No.5 never ever objected to, or challenged the said Gift deed. In the plaint nowhere did the respondent No.1 assert that her husband, the purported donor, who remained alive after sanction of the gift mutation, was not aware of the gift mutation and thus could not challenge the same by himself. This omission on the part of the respondent, to my mind, was crucial and in fact, defeats the very legal basis upon which she could have saved her claim from the bar of limitation⁹. It has also gone unexplained that why after the purported gift by the husband way back in 1986 in favor of Respondent No.1, no further action including mutation and transfer in her name was initiated. This all leads to an inference, that once it was decided to challenge it, the limitation had already expired; and therefore, it was the wife of Respondent No.5 who became Plaintiff pleading ignorance about the gift deed and her alleged strained relations with her husband / Respondent No.5.

7. In view of herein above facts and circumstances of this case, I am of the considered view that insofar as the impugned judgment is concerned, (*barring finding in respect of whether the suit was time barred or not*) it is in accordance with law as the learned trial court could not have given a blanket observation in respect of disputed facts. However, as to the limitation issue, the Appellate court had fallen in error and in fact failed to give any justifiable reason for upsetting the finding of the trial court in respect of the issue as to the suit being time barred or not.

8. Accordingly, this Civil Revision Application is **allowed** by setting aside the impugned judgment of the Appellate court dated 07.01.2006 to the extent of the issue of limitation, whereas, it is upheld in respect of the remaining findings and as a consequence thereof the judgment of the trial court dated 25.10.2004 is maintained, however, only to the extent of limitation and it is held that the suit of respondent No.1 was time barred and therefore, the plaint was rightly rejected under order VII Rule 11 CPC as being barred in law.


JUDGE

A.

⁹ Mst. Rabia Gula v Muhammad Jan (2022 SCMR 1009)