

THE HIGH COURT OF SINDH AT KARACHI
II-Appeal No.189 of 2022

Date: Order with signature(s) of the Judge(s)

Fresh case

1. For orders on CMA No.6063 /2022(U/ A)
2. For orders on CMA No.5976 /2022(Ex/A)
3. For orders on CMA No.5977 2022
4. For orders on CMA No.5978/2022
5. For hearing of main case

14.10.2022

Mr. Qazi Hafiz-ur-Rehman, advocate for appellant

Salahuddin Panhwar:- Through instant second appeal the appellant has challenged the judgment and decree dated 31.08.2022 passed by V-Additional District Judge, Karachi Central in Civil Appeal No. 171 of 2020 [Muhammad Farhan vs. Muhammad Javed & others] whereby the judgment dated 29.11.2020 of the VIII-Senior Civil Judge, Karachi Central was maintained.

2. Precisely, the relevant facts of the case are that the plaintiff filed suit wherein it is stated that the suit property was initially acquired by the late father of the parties namely Abdul Qayoum son of Muhammad Ishaque who later on transferred the same in favour of his wife i.e. mother of the parties namely Mst. Zaib-un-Nisa by way of gift vide transfer order dated 13.09.201, where the parties were residing. The plaintiff further pleaded that after the death of Mst. Zaib-un-Nisa on 06.04.2014, the possession of the plaintiff over the suit property has continued and has never been discontinued, where the plaintiff is residing with her children as a co-owner and co-sharer against the undivided property left by her late parents. The plaintiff has further pleaded that the defendant No.1 attempted to get signature of plaintiffs on stamp paper, wherein; it was written that the plaintiffs have surrendered their right in the suit property against the sum of Rs.100,000/- in his favour, the plaintiffs not only raised objection but refused to surrender the right over the suit property in favour of defendant No.1. The defendant No.1 being annoyed disclosed that he has already transferred the suit property in his exclusive name and will throw the plaintiffs from the suit property forcibly. The defendant

No.1 illegally and surreptitiously managed and maneuvered bogus transfer order dated 24.08.2010 in his name in collusion with concerned staff of defendant No.14 which was shocking for the plaintiffs and other legal heirs. It was further pleaded that plaintiffs and other legal heirs approached the defendant No.1 and defendant No.14 for withdrawal, cancellation of transfer order of the suit property as neither the late mother of parties intended, consented to transfer the suit property in the exclusive name of defendant No.1 nor she ever informed any of her sons and daughters in this regard. She further pleaded that the suit property was lawfully owned and possessed by her mother till her death in 2014, where-after the suit property devolved upon the legal heirs in accordance with the provision of sharia, the transfer order dated 24.08.2010 is bogus, void, invalid and have no legal effect as the same was got prepared by defendant No.1 without consent of mother of the parties in league and collusion of concerned staff of the defendant No.14 and is required to be declared as void, invalid and bogus.

3. Before going into the merit of the case in hand, I would like to examine the scope of the 2nd Appeal in the matter of concurrent findings of the two courts below.

4. The scope of the 2nd appeal is *narrow* and it could be exercised *only* if findings of fact arrived by Courts below are based upon misreading, non-reading or misinterpretation of the evidence on record. Guidance is taken from the case of the *Akhtar Aziz v. Shabnam Begum* 2019 SCMR 524 wherein scope of *second appeal* stood defined as:-

“14. ... Although in second appeal, ordinarily the High Court is slow to interfere in the concurrent findings of fact recorded by the lower *fora*. This is not an absolute rule. The Courts cannot shut their eyes where the lower *fora* have clearly misread the evidence and came to hasty and illegal conclusions. We have repeatedly observed that if findings of fact arrived by Courts below are found to be based upon misreading, non-reading or misinterpretation of the evidence on record, the High Court can in second appeal reappraise the evidence and disturb the findings which are based on an incorrect interpretation of the relevant law. ...”

5. In another case of *Anwar Textile Mills Ltd. v. Pakistan Telecommunication Company Limited* reported as 2013 SCMR 1570, it is held that;

“Thus, by reading of this provision, it is apparent that the High Court will be justified to interfere with the decision

of the lower Courts when it is contrary to law or failed to determine material issue of law or commits substantial error or defect in the procedure, which may have resulted in error or defect in the decision of the case on merits.”

6. The above legal position, prima facie, makes it clear and obvious that to succeed in second appeal, the appellant must establish that concurrent findings of two courts below were/are result of their failure in determining the material issue or that conclusions, so drawn, were/are contrary to settled principles of law.

7. Heard learned counsel for the appellant.

8. In the instant case, the main contention of the appellant's is that his mother transferred the house, where appellant is living jointly with respondent No.1 by depriving other legal heirs including sons and daughters. Admittedly, the appellant failed to produce any document in shape of evidence and gift deed may be obtained in his favour.

9. At this juncture, adjudication made by the learned appellate court could be relevant to reproduced as under:-

“ISSUE NO.1.

The burden of the immediate issue was upon the plaintiff side, who have produced ample evidence with regard to their respective cause of action seeking relief of declaration, cancellation, administration and permanent injunction. The suit, as filed is neither time barred nor their (there) appears any legal infirmity or any bar under any law. The subject matter in the entire suit pertains to the sharia shares of the plaintiffs engaging the law of inheritance for administration to which no limitation runs though limitation has not been taken as ground, moreover, the suit is also falls within the statutory period of limitation for declaration and cancellation. In the absence of the contrary and for the reasons recorded against the preceding issue for disposal of the suit on merit, the immediate issue is hereby disposed of in affirmative.

ISSUE NOS.2 & 3

Since both the issues with regard to entitlement of shares of plaintiffs and cancellation of exclusive transfer in favour of defendant No.1 are interconnected, hence are discussed altogether.

The burden respecting both of the under discussion issues was mainly upon the plaintiff to prove their entitlement regarding their inherited share and against the cancellation of mutation order. The plaintiff in this respect filed her affidavit in evidence, where she has deposed that the suit property was initially acquired by the late father of the parties namely Abdul Ayum son of Muhammad Ishaque who later on transferred the same in favour of his wife i.e.

mother of the parties namely Mst. Zaib-un-Nisa by way of gift vide transfer order dated 13.09.201, where the parties were residing. The plaintiff further deposed that after the death of Mst. Zaib-un-Nisa on 06.04.2014 the possession of the plaintiff over the suit property is continues and has never been discontinued, where the plaintiff is residing with her children as a co-owner and co-sharer against the undivided property left by her late parents. The plaintiff deposed that the defendant No.1 attempted to get signature of plaintiffs on stamp paper, wherein it was written that the plaintiffs have surrendered their right in the suit property against the sum of Rs.100,000/- in his favour, where the plaintiffs not only raised the objection but refused to surrender the right over the suit property in favour of defendant No.1 got angry and disclosed that he has transferred the suit property in his exclusive name and will throw the plaintiffs from the suit property forcibly, illegally and malafidely. The plaintiffs deposed that the defendant No.1 illegally, unlawfully, malafidely and surreptitiously managed and maneuvered bogus transfer order dated 24.08.2010 in his exclusive name in collusion of concerned staff of defendant No.14 which was shocking news for the plaintiffs and other legal heirs of the deceased. The plaintiff further deposed that plaintiffs and other legal heirs approached the defendant No.1 and defendant No.14 for withdrawal, cancellation of transfer order as neither the late mother of parties over intended, consented to transfer the suit property in the exclusive name of defendant No.1 nor she ever informed any of her sons daughters in this respect. She further deposed that the suit property was lawfully owned and possessed by her mother till her death in 2014 whereafter the suit property devolved upon the legal heirs in accordance with the provision of sharia, the transfer order dated 24.08.2010 is bogus, void and invalid have no legal effect as the same was got prepared by defendant No.1 without consent and free will of mother of the parties in league and collusion of concerned staff of the defendant No.14 and is required to be declared as void, invalid and bogus.

During cross examination the plaintiff admitted that prior to this suit the defendant No.1 filed one suit against her for possession. She admitted that title documents are not in her possession. The plaintiff admitted that her father in law gifted out the suit property in favour of his wife who was her mother-in-law. The plaintiff on the suggestion of learned counsel for defendant No.1 that none of the defendants have filed written statement except the aforementioned formal question neither the cross examination was conducted to prove that the plaintiffs are not entitled for their sharia share being the co-owner / co-sharer nor the learned counsel for the defendant made any suggestion that the transfer mutation order in the exclusive name of defendant No.1 was legal and during the life time of late mother of the parties.

In order to segregate grain from the chaff I have perused the affidavit in evidence of defendant No.1 who is the only contesting defendant and beneficiary of entire divided property. The defendant in his affidavit in evidence and that too on oath deposed that the suit property was transferred in his name by his late mother during his life time and the plaintiffs thereafter, are residing as mere licensee and were given shelter in a portion of

house. The defendant No.1 deposed that upon the wish of deceased mother the share of defendants i.e. defendant No.7, 8, 9, 10, 12, 13 and plaintiff No.2 was paid at the rate of Rs.25000/- each who thereafter executed Iqarnama and therefore, he became the bonafide owner of the suit property.

During cross examination the defendant No.1 went on admitting that the suit property was owned by his mother. The plaintiffs are residing in the same property till date. Except mutation no other title document is in his possession. No any witness has been nominated to record evidence that in his presence the property was gifted in his favour. He further admitted that he has not produced any witness who could say that in his presence the possession was handed over to him. The defendant No.1 admitted that he has not filed any statement of his mother recorded before KDA. He further admitted that the cash amount in the year 2017 was paid to the sisters as their shares. He further admitted that no any witness has been produced to prove that the plaintiffs were aware regarding the transfer of property in his name nor have produced any document to show that the plaintiff No.1 was allowed to reside in the sit property on humanitarian ground being owned by him. The defendant No.1 admitted that it is not mentioned in the affidavit in evidence as to when, where and before whom the declaration of gift deed was made in his favour. He admitted that no proof regarding payment of share of plaintiff No.1 and 2 has been produced and the suit for possession fled against the plaintiff was also dismissed. He further admitted that no specific reason has been mentioned in his affidavit in evidence as to why the late mother gifted suit property in his favour. The defendant No.1 also admitted that he has not mentioned specifically any services rendered by him to his late mother and in lieu thereof she gifted the suit property to him.

It is crystal clear that the subject suit property was originally owned by the father of the combating parties, who during his life time gifted the same to his wife i.e. the mother of the parties to the *lis*. The claim of defendant No.1 with regard to the exclusive mutation of the suit property in his favour during the life time of his mother in the year 2010 has neither been substantiated, corroborated by the defendant No.1 nor any material evidence upto the satisfaction of this court has been produced. No gift deed been produced nor any single marginal witnesses has been brought before this court or even engaged by the plaintiff in the list of witnesses. No such application was in this respect filed to summon any material witness to support the version of the plaintiff. No statement allegedly recorded before KDA has been produced nor any officer nor the plaintiff has bothered to point out a single official to be called upon either as his own witness in support of his own case and contentions. Apparently the mutation order dated 24.08.2010 issued by defendant No.14 seems collusive and under clouds by disinheriting the other legal heirs in the absence of any declaration of gift either made in writing or orally by the late mother of the parties. I further place my reliance to the case of Muhammad Sarwar Vs. Mumtaz Bibi 2020 SCMR 276.

(a) Gift---

(b) -----Oral gift ---Essential ingredients----Proof -----Brother (petitioner) attempting to disinherit his sisters (respondents) through an alleged oral gift deed made by their father ----petitioner failed to mention the date, time and place of the alleged gift. Further, he omitted to mention the names of witnesses in whose presence his father allegedly gifted the property in his favour and disinherited his sisters----Likewise, there was no mention of acceptance of the gift in presence of witnesses in the written statement as required by law ----Gift mutation as well as the alleged oral gift were fictitious and the result of fraud ----Petition for leave to appeal was dismissed and leave was refused .

(c) Gift-----

----- Essential ingredients ---Onus of proof----Onus to establish the factum and ingredients of the gift was on the beneficiary who claimed such gift and which was denied or challenged by the other legal heirs.

(e) Gift----

-----Oral gift----Mutation ---Proof where the validity of a gift mutation was challenged, it was incumbent upon the beneficiary to not only prove the validity and legality of the gift mutation by producing all relevant evidence but it was also necessary that gift itself be proved through cogent and reliable evidence.

I further place my reliance upon the case of Riaz Ahmed Vs. Mst. Bakhshai through her legal heirs 2010 YLR 1410 Lahore.

(c) West Pakistan Land Revenue Act (XVII of 1967)-----

---S.42.---Mutation ----Scope---Exclusion of daughters ----Effect--- Mutations are not instrument of title and the same also do not form part of record of right Mutation are sanctioned only for fiscal purpose with a view to keep record straight---Mutation which has been sanctioned to the exclusion of daughter carries no sanctity in law and the same is nothing but a waste paper running counter to Shariah by which Muslim right holders are governed.

For the reasons recorded herein in respect of both under discussion issues the same are hereby decided and disposed of in affirmative."

10. In addition to above findings of the appellate Court, needless to mention here that Code of Civil Procedure does not provide as to whom the burden to prove would rests but it is the Qanun-e-Shahadat Order, 1984 which provides a complete mechanism of burden of proof. Part III, Chapter IX of the Order *ibid* provides a complete mechanism of burden of proof. The first two articles of the Order *ibid* i.e. Article 117 and Article 118, clearly, provides that as to on whom the burden would rest in particular question of law and fact. Since it is the defendant No.1 who is

claiming the gift of the subject property, thus it was the defendant No.1 upon whom the burden of proof lies. It is needless to add here that it is by now settled principle of law that it is the duty and obligation of the beneficiary to prove the same. There can be no denial to another well-established principle of law that mere possession over a property would not vest title but claimant would always require in establishing title independently and a failure thereof would affect adversely to the beneficiary.

11. In this case, the findings of the appellate Court that; *“the claim of defendant No.1 with regard to the exclusive mutation of the suit property in his favour during the life time of his mother in the year 2010 has neither been substantiated, corroborated by the defendant No.1 nor any material evidence upto the satisfaction of this court has been produced. No gift deed been produced nor any single marginal witnesses has been brought before this court or even engaged by the plaintiff in the list of witnesses. No such application was in this respect filed to summon any material witness to support the version of the plaintiff. No statement allegedly recorded before KDA has been produced nor any officer nor the plaintiff has bothered to point out a single official to be called upon either as his own witness in support of his own case and contentions. Apparently the mutation order dated 24.08.2010 issued by defendant No.14 seems collusive and under clouds by disinheriting the other legal heirs in the absence of any declaration of gift either made in writing or orally by the late mother of the parties”* is based on proper appraisal of the evidence available on record, hence need no interference.

12. Question of fact recorded by two courts below concurrently being same is not contrary to evidence, which cannot be disturbed by this court. Besides, in cases of inheritance *onus of potentiates* is always upon the beneficiaries, which the respondent No.1 has failed to discharge with regard to the gift in accordance with the provisions of Article 117 and 118 of Qanun-e-Shahadat Order, 1984. Not only this but the defendant No.1 has also failed to prove his contention with regard to the gift in accordance with the Articles 17 and 79 of Qanun-e-Shahadat Order, 1984, hence the findings of the appellate Court needs no interference.

13. Perusal of above, reflects that appellant failed to demonstrate before both the courts below that he has any document(s), which shows

that property which was admittedly in the name of mother was transferred in favour of the appellant in accordance with law. With regard to plea that there is transfer and mutation, the record reflects his name as owner. Suffice to say that mere entry in record of rights does not create any legal character or title and transfer of property was mandatory and under what circumstances and by what procedure that property was transferred/mutated in favour of the appellant is lacking here.

14. In view of above position, it is manifest that both the Court(s) below have exercised the jurisdiction vested in them properly, which need no interference of this Court Accordingly, present appeal is dismissed along with listed applications in limine.

JUDGE

*Rafiq/PA”