JUDGMENT SHEET
IN THE HIGH COURT OF SINDH, KARACHI
IInd Appeal No.17 of 2006

Saeed Akhtar & another …… Appellants

Vs.

Zafarullah Khan & others ……. Respondents

Mr. Zia ul Haq Makhdoom, a/w M/s Faisal Aziz, Syeda Zubia Sadaat, Sadiya Masood, Ilsa Amir, Syeda Zainabad Sadaat, Laiba Lalpuria and Fatima Ashfaq, advocate for appellant.

Mr. Taswar Ali Hashmi, advocate for respondent.

Dates of hearing **09.08.2024, 04.09.2024 and 10.09.2024**.
Date of order: **20.09.2024**

JUDGMENT
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MUHAMMAD IQBAL KALHORO J: Respondents, both brothers, filed a civil suit for possession, declaration, cancellation and mesne profits stating that their late father Muhammad Ziaullah Khan was owner of plot/land (uncultivated) bearing No.88-7/12 admeasuring 7-12 acres in Kheva registered at Sr. No.40-A/389, 394 situated in Deh Mehran Tapo Malir Karachi having purchased the same through a registered sale deed executed in September, 1951. Later on the said land was mutated in their father's name in the record of rights. In 1981 their father gifted the said land in favour of them vide registered deed of gift dated 31.08.1981. And by virtue of such gift deed, they became owner of the said plot/land. It is further stated that respondent/plaintiff No.2 has been permanently residing in Lahore; whereas respondent/plaintiff No.1 has been residing in England for last 38 years.

2. The suit property was lying un-utilized and uncultivated since it was gifted to them by their father. They made efforts to bring the said land under cultivation but in vain. In the year 1987, when respondent/plaintiff No.1 visited the suit property, he saw some cattle of appellant No.1 tethered over there. He reported the matter to the police, which removed the cattle from the plot, hence appellant No.1 filed a civil suit No.1220/1987 against plaintiffs and others claiming to have purchased the suit property with possession from an attorney of father of respondents/plaintiffs, appointed through registered power of attorney dated 25.04.1984, defendant No.3 in the suit, namely Muhammad Nazeer on 21.05.1984 through a sale agreement on payment of Rs.800,000/-. The said suit was contested by the respondents and they filed an application u/o VII rule 10 CPC for return of the plaint for want of jurisdiction which application was allowed vide order dated

16.10.1988 against which appellant No.1 filed an application for a review U/s 114 CPC r/w section 151 CPC but that application was dismissed. Against such order, however, appellant No.1 did not prefer any remedy before any court of law.

3. Respondent/plaintiff No.1 thereafter in October, 1998 visited the suit property and found some persons in occupation of part of which with their cattle tethered there. On inquiry, they told plaintiff No.1 that they were tenants of appellant No.1 since September, 1998. It became apparent to plaintiff No.1 that appellant/defendant No.1 had illegally occupied the suit plot taking advantage of absence of plaintiffs, the owner of the property on the spot. It is further stated by the plaintiffs in the plaint that their father had never executed any power of attorney in favour of defendant No.3 Muhammad Nazeer, nor he was competent to enter into a sale agreement with appellants/defendants; that all the documents are forged, fabricated and manipulated to usurp property of the respondents/plaintiffs. It was in that context, the respondents /plaintiffs sought following relief(s):

a) **Judgment and decree for declaration that the deed General Power of Attorney dated 25.04.84 purported to have been executed by Muhammad Ziaullah Khan father of the plaintiffs in favour of Defendant No.3 in respect of suit Plot No.88 is result of fraud and forgery, having not been executed by father of plaintiffs Muhammad Ziaullah Khan nor being entitled to do so after gift of the suit land in favour of plaintiffs made by him and the documents is not effecting any of the plaintiffs rights title and interest over their owned land in Plot No.88, measuring 7 acres 12 ghuntas in Deh Mehran Tappo Malir Karachi and further that all deeds, documents and receipts claimed to have been executed by Defendant No. 3 including those dated 21.5.84 purported to be agreement to sell, power of Attorney by Defendant No.3 in favour of Defendant No.2 and all other documents based further on document dated 25.4.84 and 21.5.84 are baseless illegal, vod abinito result of fraud and fabrication conceived and concocted by defendants interest and in to way whatsoever effect the right, title or interest of the plaintiffs over the plot No.88 aforesaid, nor of any those documents/deeds like dated 25.4.84 and 21.5.84 confer any right on the defendants specially on defendant No.1. further that the plaintiffs are owners of Plot No. 88, measuring 7 acres 12 ghuntas situated in Deh Mehran Tappo Malir Karachi and entitled to its clear possession without any let hindrance by defendants.**

b) **For a direction to the Defendants to deliver up the aforesaid documents /Deeds dated 25.4.84 and 21.5.84 and all other documents resulting from those document to be cancelled by this Hon'ble court.**

c) **Decree for mesne profits from September, 1998 till decree of the suit as prayed above and from decree of the suit compliance of the decree and its terms and conditions by the defendants against their persons and properties at the rate stated above till delivery of possession or at such rate which this Hon'ble Court deems reasonable in favour of the plaintiffs and against the defendants jointly and severally.**

d) **Judgment and Decree for possession of the suit Plot No.88/7-12 measuring 7 acres and 12 ghuntas entered in Khewat of Mukhtiarkar Karachi office at Sr. No.40-A/389, 394 and 4 situated in Deh Mehran Tapo Malir Karachi, in favour of the plaintiffs and against the Defendants, their agents assigns, attorney, employees, servants, tenants, heirs and successors-in-interest;**

e) Judgment and decree for permanent injunction restraining the Defendants, their agents, Employees and servants from interfering with the suit property bearing No.88/7-12 measuring 7 acres and 12 ghuntas entered in Khewat of Mukhtarkar Karachi office at Serial No.40-A/389 and 4 situated in Deh Mehran Tappo Malir Karachi, after delivery of possession of the suit plot to the plaintiffs in compliance of the decree to be passed by this Honourable Court against the Defendants.

f) Any other relief which this Hon'ble Court may deem fit and proper under the circumstances of the case may also be granted.

g) That costs of the suit may also be awarded against the Defendants.

4. After service, the appellants/defendants filed a joint written statement denying the case of the respondents/plaintiffs. Further stating that initially mutation of the suit land was made in favour of father of respondents/plaintiffs but plaintiffs were never put in possession thereof; that father of the respondents/plaintiffs had handed over all the relevant original documents regarding title of the suit land including form VII to appellant/defendant No.1 when he had sold the land to him under a sale agreement dated 21.05.1984 through his attorney and received Rs.8,00,000/-. The said attorney in order to facilitate execution of allied matters/issues regarding transactions had executed a Sub Power of Attorney in favour of father of appellant/defendant No.1, who happened to be defendant/appellant No.2. It is further stated by the appellants in their written statement that gift deed is a false and fabricated document. Respondents/plaintiff's father was a CSP officer and used to sign in English but on the gift deed his signature was not in English, an ample poof of its fabrication.

5. It is further stated that falsehood of the gift deed is further augmented from the fact that since gift deed, 20 years have passed and the land has not been mutated in favour of respondents/plaintiffs. On the other hand the same has been mutated in favour of respondent No.1 in the record of rights. It is further claimed by the appellants/defendants in the written statement that respondent /plaintiff No.2 is permanently residing in London and never visited Pakistan to give a power of attorney to plaintiff No.1 to file the suit against the appellants/defendants. That all the original documents are in possession of appellant No.1 and his name has been mutated in the record of rights. All the title documents of the suit land are in possession of appellants/defendants and entire claim of the respondents/plaintiffs is based on gift deed authenticity of which they have failed to uphold. The record of rights, bearing name of appellant/defendant No.1 in respect of suit property, has not been challenged by the respondents/plaintiffs in any fora is an ample proof that suit was not maintainable.

6. On the pleadings of the parties, following issues were framed by the trial court:-

1. Whether the alleged power of Gift Deed dated 31-08-1981 is forged?

2. Whether the plaintiff No.1 is entitled for the possession of the disputed property?

3. Whether the late Muhammad Ziaullah Khan appointed defendant No.3 as his a attorney vide General Power of Attorney allegedly executed on 25-04-1984 in respect of the suit property or the same is a forged document?

4. Whether defendant No.1 is a bonafide purchaser of the suit property and if not so whether the defendant No.1 is a trespasser over the suit property and is liable to be evicted from the suit property?

5. Whether the plaintiffs are entitled to claim mesne profits from defendants at the rate of Rs.500/- per day for the period from September, 1998, till defendant No.1 vacates and deliver the possession of the suit property to the plaintiffs?

6. What should the decree be?

7. Record reflects that after framing of issues, an affidavit in evidence was filed by respondent/plaintiff No.1 through attorney Zulfiqar Ali Bhatti, alongwith power of attorney in his favour, a copy of Form VII, cancellation of general power of attorney executed by father of plaintiffs in favour of Nazeer Ahmed, deed of gift. However, from other side /appellants, after filing written statement, since disappeared, their side was closed and the case was posted for arguments vide case diary dated 25.09.2004. The case diaries thereafter reflect that on one pretext or the other, the case was being adjourned until 24.12.2004 when the suit was decreed. The said judgment dated 24.12.2004 and decree drawn on 20.01.2005 were challenged by the appellants/defendants in Civil Appeal No.29/2005 but did not succeed and the same was dismissed vide judgment dated 31.03.2006, hence this second appeal.

8. Learned counsel for appellants/defendants at the very outset has argued that in this case the evidence of plaintiffs' attorney has not been recorded, the case diary dated 10.09.2004 of the trial court simply reflect that affidavit in evidence was filed by plaintiff's counsel which was placed on record; that attorney of the respondents/plaintiffs never came into witness box to give evidence and produce affidavit in evidence; that written statements of appellants was on record and therefore, even in the case their side was closed and they were declared exparte, the cross examination should have been marked Nill by marking their absence on having been declared exparte; that placing on record affidavit in evidence by respondent's attorney does not amount to evidence in terms of Article 113 of Qanoon-e-Shahadat Order, 1984 (Order, 1984); that at no point, examination in chief of plaintiff's attorney was recorded; that at no time original documents were

presented in the court or produced in evidence; that without any explanation to the absence of original documents, the copies of the documents were placed on record alongwith affidavit in evidence; that there is no endorsement or details of documents as required by law; that documents attached with affidavit in evidence do not bear signature of learned presiding Officer to show that same were produced and exhibited according to law; that trial was conducted in violation of mandatory requirement of Article 33 of the Order, 1984. He lastly submitted that since the case has been decreed on the basis of no evidence, it may be remanded to the trial court for a fresh decision within certain time . He has relied upon 2016 CLC 1372 (Sindh), 2007 MLD 355 Kar, 2023 CLC 1107, 2018 YLD 1262 Lahore, 1998 CLC 989 Karachi, 2004 YLR 1999 Kar, 2003 YLR 2052 Lahore, 1999 YLR 292 Kar, 1988 CLC 969 Kar, 1987 CLC 792, Lahore, PLD 1971 Daccca 309, PLD 2020 SC 401, 2020 YLR 578, 2007 PLC 64, PLD 2018 SC 189 and PLD 2015 Sindh 326.

9. However, his arguments have been rebutted by learned counsel for respondents/plaintiffs. He has drawn my attention to the impugned judgment and submits that in both the judgments it is clearly mentioned that plaintiff's attorney had appeared in the court and filed affidavit in evidence alongwith other documents. He states that original documents were produced in court but returned after having been seen; that if the court has not recorded such fact or made any endorsement on the documents, its benefit cannot be given to the appellants/defendants who even failed to appear before the trial court to contest the matter; that the respondents are even otherwise legal heirs of Muhammad Ziaullah Khan, the original owner of the suit property, who had subsequently gifted the same to them in the year 1981 before the alleged sale agreement executed on 21.05.1984 by his so called attorney in favour of the appellant No.1/defendant No.1. According to him, the attorney of the respondents/plaintiffs had appeared in the court as a witness and was examined by the court, this fact is evident from the impugned judgments which indicate that attorney of the respondents/plaintiffs had appeared and produced the documents. He has relied upon the case law reported as 1986 SCMR 1814, PLD 1955 Federal Court 38, 1988 SCMR 72, PLD 1963 SC 191, PLD 1964 SC 143, 2004 SCMR 1798, PLD 1994 Lahore 399, AIR 1933 Sindh 379, 2000 SCMR 1647, 1991 SCMR 2300, PLD 1987 SC (AJ & K), 1877, PLD 1997 Karachi 292, and PLD 1975 Lahore 1170.

10. I have heard the parties and perused material available on record including the R & Ps of the case and taken guidance from the above case law. Nowhere from the record it is established that attorney of the respondents/plaintiffs had appeared in the witness box and was examined as a witness during which he

produced affidavit in evidence and other documents as claimed by learned counsel in defence. Mere filing of affidavit in evidence in the court without producing it in evidence would not make affidavit-in-evidence to be the evidence under the provisions of the Order, 1984 and to be considered as such. It appears that the trial court was influenced by the simple fact of affidavit-in-evidence having been placed on record by the counsel of the respondents/plaintiffs and decreed the suit without looking into merits of the case. Such findings of the trial court confirmed by appellate court are erroneous in that they are affected only by the fact that the appellants/respondents had failed to pursue the case and examined themselves in the court to prove their case. The record reflects that the case proceeded exparte, and except filing the written statement, the appellants failed to lead any evidence in their support. But, be that as it may, the trial court without examining the respondents/plaintiffs on oath and without looking into merits of the relevant record indicating name of a person in whose favour the suit plot was mutated subsequently, decreed the suit.

11. It goes without saying that evidence is recorded by making a statement on oath by the party before the court which is called examination-in-chief of the witness. It is subject to cross-examination, if any, and once cross examination is completed or declared Nill for whatever reason, such statement recorded by the court becomes oral evidence. In the cases where some ambiguity comes on record in examination-in-chief, re-examination is conducted with permission of the court to clarify that ambiguity. It shall be noted however that the re-examiantion is also subject to cross examination. Whereas, the document produced in the court during examination in chief and duly exhibited is called documentary evidence. Even in cross examination, the document can be produced and exhibited, is a settled proposition of law.

12. Mere filing of an affidavit-in-evidence in the court is not production of evidence in terms of above explanation. The case diary dated 10.09.2004 indicates that affidavit-in-evidence of the attorney of the respondents/plaintiffs was brought on record by the counsel, however the said case diary does not show presence of attorney of the respondents/plaintiffs on the same date before the court. The contention of learned counsel for respondents/plaintiffs that plaintiff's attorney was examined by the court is not borne out of any record. A perusal of R & Ps does not reflect that respondents/plaintiff's attorney had ever come in the witness box to record his examination-in-chief and produce his affidavit-in-evidence. The entire record is silent on that score or that after recording of examination in chief, whether an opportunity of cross-examination to other side, already declared exparte, was given and marked as Nill or not.

13. Mere tendering of a document with affidavit-in-evidence which is not produced in evidence does not mean that valid documentary evidence has been produced by the party. Both the courts below while deciding the case got influenced merely by absence of the appellants/defendants in the course of trial and decreed the suit without examining merits of the case and relevant record. It is apparent that both the courts below did not apply their judicial mind by exercising powers conferred upon them to decide the controversy between the parties in accordance with law. It is settled that even in exparte proceedings, it is not necessary that the judgment should always be in favour of the plaintiff(s) in arbitrary manner, irrespective of merit of claim of the plaintiff(s). The parties approaching the court have to succeed on merits of their own case and not on the weakness of the other side is a well settled proposition of law.

14. As stated above, the record is completely silent regarding appearance of respondents/plaintiff's attorney in the court and leading oral evidence under oath in support of his claim and producing /exhibiting affidavit in evidence and other documents. The silence of the record qua appearance of the respondents/plaintiff's attorney in the witness box would make the case to be case of no evidence. This legal aspect of the case was completely overlooked by both the courts below while deciding the suit in favour of the respondents/plaintiffs. Further, the record does not favour the contention that the documents were produced in evidence and were exhibited. In absence of such scenario, the trial court and appellate court by looking at the documents, which were not produced in evidence and thus could not be read as evidence, committed error by deciding the case in favour of the respondents.

15. As per ratio of judgment reported as 2018 YLR 1262, if a person does not face rigorous of cross examination, he cannot be referenced as a witness. If a person submits his affidavit in evidence but does not appear before the court for cross-examination he would not be treated as a witness in the court. This court while deciding case of Muhammad Abid Vs. Mst. Nasreen Yousif and another 2004 YLR 1999 has held that affidavit in evidence is of no legal value and consequence if its deponent does not make himself available for cross-examination, the party against whom affidavit is produced is entitled to have deponent to be in witness box and cross examine him. If deponent fails to submit to cross examination, an affidavit in such circumstances loses its force as probative piece of evidence and cannot be relied upon. It is held in the case of Nazir Ahmed Vs. District Council through Chairman District Council Sargodha (2003 YLR 2052 that evidence recorded by the trial court without oath is irrelevant and is not admissible in evidence.

16. Further, it is settled proposition of law that in absence of any specific order to the effect that exparte proof should be given by way of affidavit, affidavit of plaintiff will have no evidentiary value. Even in the cases in which the respondents are declared exparte, it is obligatory upon the plaintiff to come into witness box to support averments of the plaint and produce the affidavit in evidence. This ratio finds support in the case of Noor Hussain Vs. Muhammad Taj (2003 CLC 1721) decided by this court. Then, this court in the case of Muhammad Suleman Vs. Habib Bank Ltd. Hyderabad & others (1988 CLC 969) has held that where the case was fixed for exparte proof, affidavit in exparte proof filed by respondent bank in absence of any express order of the court in that respect could not be accepted as evidence and trial court would not be justified for passing decree on the basis of such affidavit. Further in the case of Rehmatullah Vs. Tufail Hussain & others (1987 PLC 792), it has been held that plaintiffs reliance on evidence led through affidavit could be of no avail to him particularly when there was no order of trial court to lead such evidence as envisaged under Order XIX rule 1 CPC.

17. A holistic survey of above case laws and discussion so for held in this judgment above would indicate that it was necessary for attorney of the respondents/plaintiffs to make himself available in the witness box to lead his evidence under oath. In the course of such evidence, he was required to produce affidavit in evidence and the documents he wanted to rely upon. The record bears testimony to the effect that this procedure was not followed by the trial court. The trial court did not pass any specific order directing the attorney of the respondents/plaintiffs to file affidavit-in-evidence or examine him under oath and record his examination in chief subject to cross-examination if any. In absence of other side, it was more obligatory upon the court to take care of every bit of procedure for making a fair decision. The failure is not only on the part of the court but plaintiff's attorney is equally guilty by not making himself available in the court for recording evidence under oath. The affidavit in evidence, merely brought on record by the counsel, would not be deemed production of evidence is settled principle of law, evident from above mentioned case law.

18. In addition, both the courts below failed to examine merits of the case of respondents/plaintiffs and simply accepted whatever was pleaded by them in the plaint and decreed the suit. Even it did not cross minds of both the courts to take into the account a bizarre fact that as to why despite lapse of so many years since gift deed, the respondents/plaintiffs had failed to get mutation of the suit property recorded in their favour and why in the record of rights the name of the appellant No.1 was mutated. I have gone through the R & Ps and have found a

half torn page of Form VII at page 271 reflecting name of appellant No.1/defendant No.1 as transferee of the suit property against consideration of Rs.800,000/-.

19. All these questions were to be (and need to be) replied by the learned courts below to decide the controversy once and for all, instead of taking hasty decision in favour of respondents/plaintiffs and leaving the controversy simmering between the parties.

20. In the given facts and circumstances, both the impugned judgments are set-aside in the interest of justice, the case is remanded back to the trial court with directions to frame issues afresh on the pleadings of the parties, allow them to lead evidence afresh and decide the case within a period of four months without fail after receiving a copy of this judgment and R& Ps.

The appeal stands disposed of in the above terms alongwith pending application.

Judge

A.K.