

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Shafi Siddiqui
& Jawad Akbar Sarwana JJ

High Court Appeal No.39 of 2016

Mohammad Qasim and Another

v.

Gulshan-e-Faisal and Four (4) Others

Appellant No.1:	Mohammad Qasim s/o Haji Mohammad;
Appellant No.2:	Mohammad Naeem Arain s/o Mohammad Amin through Agha Ali Durrani, Advocate
Respondent No.1:	Gulshan-e-Faisal Cooperative Housing Society Limited. Nemo.
Respondent No.2:	Abdul Haleem. Nemo through Khalid Daudpota, Advocate
Respondent No.3:	Mrs Najma Bibi. Nemo.
Respondent No.4:	Muhammad Umer s/o Ahmed. Nemo.
Respondent No.5:	Tanzeem Hussain s/o Fida Hussain. Nemo.
Date of hearing:	14.11.2023
Date of decision:	06.02.2024

J U D G M E N T

Jawad A. Sarwana, J.: The Appellant No.1/Defendant No.2 (“Mohammad Qasim” / “MQ”) and Appellant No.2/Defendant No.3 (“Mohammad Naeem Arain” / “MNA”) have challenged the Judgment

dated 14,12.2015 and Decree dated 09.01.2016 of the High Court of Sindh at Karachi in Civil Suit No.1018/2005 filed by Respondent No.2/Plaintiff, Abdul Haleem, against MQ, MNA and three (3) others.

2. The brief facts of Suit No.1018/2005, which the learned Single Judge has discussed in detail in the impugned Judgment, are that a Plot bearing no.38, Block B, measuring 500 sq. yds. Gulshan-e-Faisal Cooperative Housing Society Limited ("GFCH Society"), Bath Island (hereinafter referred to as "the Plot") was sub-leased by GFCH Society vide Registered Sub-lease dated 17.01.1977 to Abdul Haleem (Ex. No."P/2"). Earlier, the Plot was allotted to Abdul Haleem on 09.09.1975 (Ex. No."P/4"), there was an Indenture of Lease dated 04.06.1976 along with Site Plan (Ex.No."P/3"), a possession letter was issued on 10.01.1997 (Ex.No."P/5"), and a certificate of demarcation was issued by GFCH Society on 17.01.1977 (Ex.No."P/6"). All Originals were always available with Abdul Haleem at all times and were also produced by him in evidence. When in July 2005, Abdul Haleem approached GFCH Society about some outstanding dues (and following further investigations on his part), it emerged that the Plot had been sold by Tanzeem Hussain s/o Fida Hussain ("Tanzeem")(Respondent No.5/Defendant No.6) based on a Declaration of Oral Gift to Respondent No.3/Defendant No.4 (Mrs. Najma Bibi) and Respondent No.4/Defendant No.5 (Mohammad Umer s/o Ahmed), who had then sold it to MQ and MNA. Abdul Haleem alleged that the Oral Gift Deed to Tanzeem Hussain dated 01.06.1993 was forged. It was not registered and was merely notarised. He claimed that he had never executed any such Oral Gift Deed in favor of anyone and filed Suit No.1018/2005 against the two Appellants, MQ and MNA, and the above-named Respondent Nos.1 and 3 to 5 / Defendant Nos.1 to 6. Abdul Haleem sought a declaration that he was the legitimate owner of the Plot, a declaration that the oral gift deed was forged, an order that the subsequent registered sale deeds should be cancelled and a permanent injunction for peaceful possession of the Plot.

3. Service of Summons was effected on GHCH Society (Respondent No.1), MQ (Appellant No.1), MNA (Appellant No.2), Najma Bibi (Respondent No.3), deceased Muhammad Umer (who had died on 15.09.2004)(Respondent No.4) and Tanzeem Hussain (Respondent No.5). All the Respondents filed Written Statements in the Suit except for Muhammad Umer and Tanzeem Hussain against whom the suit proceeded ex-parte. Muhammad Umer's name was blotted out from the array of Defendants in Suit No.1018/2005 as he had died before the filing of the suit as per the trial court's Order dated 20.05.2013. MQ and Abdul Haleem gave evidence and were cross-examined, but GFHC Society, Najma Bibi and Tanzeem Hussain neither deposed evidence nor they or their Counsels cross-examined any witness. After recording the evidence and hearing the parties, the learned Single Judge passed Judgment and Decree in favor of Abdul Haleem.

4. The learned Counsel for MQ and MNA contended that the trial court did not appreciate that (i) the oral gift deed was genuine, (ii) GFHC Society effected mutation in favor of Tanzeem Hussain on 30.05.1997, and (iii) Tanzeem Hussain had paid a sum of Rs.64,340 which included Rs.36,640 towards non-utilization fees paid on 30.05.1997. He argued that the trial court failed to consider these crucial pieces of evidence set out in the Written Statement filed by GFHC Society. He urged that the chain of title was complete, starting from the allotment to the Oral Gift Deed to the subsequent Sale Deeds, which were all registered, and nothing was brought on record through evidence to dislodge MQ and MNA's assertions and their right and title in the said Plot. Finally, the issues framed and settled by the trial court which required consideration in the context of evidence brought on record were not decided by the learned Single Judge, as he gave no cogent reasoning based on the material brought on record when deciding issue nos.1 to 3. Therefore, the Counsel submitted that the impugned Judgment and Decree were liable to be set aside and HCA No.39 of 2016 should be granted.

5. The learned Counsel for Abdul Haleem/Plaintiff (Respondent No.2) argued that MQ and MNA have failed to raise any valid ground to

challenge the impugned Judgment and Decree. Neither GFHC Society stepped into the witness box nor Tanzeem Hussain, the alleged beneficiary of the oral gift deed, came forward to defend Suit No.1018/2005. He submitted that the appeal is liable to be dismissed.

6. We have heard the learned Counsels, reviewed the record as available in the Appeal and read the Impugned Judgment and Decree.

7. The learned Single Judge has addressed all the points raised in the appeal filed by MQ and MNA. The arguments advanced in relation to the oral gift deed, while they may be valid arguments, are, in fact, reduced to a cypher when the Appellants (Defendant Nos.2 and 3) produced no evidence in support of the same. For example, Tanzeem Hussain never filed any Written Statement. Notwithstanding that the proceedings against Tanzeem Hussain were declared ex-parte, even then, MQ and MNA could have called him as their Witness, which they chose not to. The Officers of GFHC Society did not give evidence. It is a trite principle of law that a Written Statement cannot be believed until its assertions are subjected to cross-examination. In the present case, while GFHC Society filed its Written Statement, no officer stepped into the witness box and deposed in support of the assertions made and defence raised in the society's written statement. The Commissioner for Recording Evidence, Mr, M. Ali Hakro, also filed a Reference in Court to compel the attendance of the Administrator of GFHC Society to produce the original record. However, the Reference was taken on record on 11.09.2012, and there appears to be no further proceeding in this regard from any of the parties, including the Appellants, MQ and MNA, to compel the attendance of the Administrator of GFHC Society. It would have been in the Appellants' interest to have the Court summon the Officers of the GFHC Society, but no such efforts were made. The learned Single Judge has discussed in detail the missing evidence required to prove the oral gift deed and the consequence of no evidence thereto. We agree with his findings with regard to the lack of proof of the oral gift deed in the present case.

8. We accept the submissions of the learned Counsel for MQ and MNA that the Sale Deeds may well have been duly registered, however, the fact remains that if there is no foundation (viz. no oral gift deed), then the entire superstructure (the duly registered sale deeds) falls. Thus, MQ and MNA had to prove the entire chain of transactions, starting from the oral gift deed onwards, to succeed in their defence. It was not good enough to show that the sale deeds were genuine without proving the genuineness of the oral gift deed which they miserably failed to do.

9. We agree with the learned Counsel for MQ and MNA's contentions that the learned Single Judge did not offer any reasoning in deciding issue nos. 1 to 3, but then, as Counsel himself has pointed out to us the issue nos. 1 to 3 was decided by the Court, as a matter of law, earlier vide the trial court's Orders dated 25.10.2010 while dismissing CMA No.7789/2006 for rejection of the Plaint. The application was purely on point of law and decided as such. No evidence was brought on record, and the Counsel for the Appellants has not shown us any evidence that would require a fresh legal analysis. If no evidence were introduced or pointed out that would merit a review of the earlier reasoning, then no fruitful exercise would serve to re-examine the same issues. This would not have been efficient, and the learned Single Judge thus rightly did not do so. We agree with his assessment that if MQ and MNA were truly aggrieved by the Order dated 25.10.2010, they should have preferred an appeal against the said Order. Additionally, we may add here that the learned Counsel for the Appellants also contended that Muhammad Umar, one of the Defendants whom Abdul Haleem had sued, had died on 15.09.2004, whereas the Suit was filed on 22.08.2005. Counsel pleaded, yet again, that the lis had abated. The trial court's Order dated 20.05.2013 decided this aspect of the case. Yet again, no appeal was preferred against the same; hence, it cannot be re-agitated through this appeal.

10. We do not find that the learned Single Judge has fallen into any error or passed the impugned Judgement and Decree contrary to law.

11. In view of the above, the impugned Judgment dated 14.12.2015 and Decree dated 09.01.2016 are proper and based on facts and law. They do not suffer from any illegality that calls for interference. Accordingly, this Appeal is dismissed, and the impugned Judgement and Decree are hereby confirmed.

12. The parties are left to bear their own costs.

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Announced by us on 06.02.2024.

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