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IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

IIInd Civil Appeal No.S-03 of 2019

Appellants : Sartaj Ahmed Malghani & another, through Mr. Inayatullah G. Morio, Advocate.

Respondents : Ali Hasan & others, through Mr. Atta Hussain Chandio, Advocate for the respondents No.1 to 8.

Mr. Liaquat Ali Shar, Additional Advocate General for the respondents No. 10 to 14

Nemo for the respondent No.9.

Date of Hearing : 16.03.2020

Date of Order : 16.03.2020

ORDER


ZAFAR AHMED RAJPUT, J.- This second civil appeal under section 100, C.P.C. is directed against the judgment and decree dated 07.09.2019 and 11.09.2019 respectively, whereby the learned III-Additional District Judge/MCAC, Shikarpur while dismissing Civil Appeal No.38 of 2019 maintained the judgment and decree dated 15.03.2019 and 19.03.2019 respectively, passed by the learned II-Senior Civil Judge, Shikarpur in F.C. Suit No.156 of 2017, filed by the respondents No.1 to 8 against the appellants and respondents No.9 to 11.

2. Briefly stated, the facts of the case are that the respondents No.1 to 8/plaintiffs filed the aforesaid civil suit against the appellants/defendants No.7 & 6 and respondents No.9 to 14/defendants No.10 and 1 to 5 respectively, for declaration, cancellation of registered sale-deed, entries and permanent injunction, alleging therein that agricultural land bearing S.Nos.649 (05-31 acres) and 644 (04-18 acres) is situated in Deh Sangi,



Tapo Markhiyani, Taluka Garhi Yasin, District Shikarpur; out of which, respondent No.1 and the father of respondents No.2 to 8 owned shares to the extent of 0-17 paisa each in S. No. 649, while rest of 0-66 paisa was owned by the father of appellants and defendants No.8 & 9. (Since Defendants No.8 and 9, namely, Shafique Ahmed and Raja Gul, both sons of Gul Hasan have not been made parties/respondents in the appeal by the appellants; they are herein after referred to as the "said defendants No. 8 & 9"). It was further alleged that the suit land bearing S. No.644 was equally owned by the respondent No.1, the father of respondents No.2 to 8, the father of appellants and said defendants No.8 & 9 and one Nisar Ahmed to the extent of four anna each and such revenue record stood mutated in their names in Deh form VII-B at entry No.174. It was also alleged that the private partition was affected in between the respondent No.1, fathers of respondents No.2 to 8 and appellants and said defendants No.8 & 9. The father of the appellants and said defendants No.8 & 9 handed over the land to the extent of 0-17 paisa share to respondent No.1 from Survey No.644 in lieu of Survey No.649 and similarly he handed over his share in S. No.644 to the father of respondents No.2 to 8 in lieu of S. No.649 and hence, the respondents No.1 to 8 were in lawful possession of the suit land bearing S. No.644 since last more than 40 years. It was also alleged that about a week before filing of the suit, the appellants and the said defendants No.8 & 9 along with respondents No. 12 to 14 came to the land and claimed the ownership over both said survey numbers on the basis of some managed and false documents, denying the title and ownership of respondents No.1 to 8; they tried to dispossess them from the land illegally and forcibly; hence, they approached the respondents No. 13 and 14 and having obtained photocopy of record of rights, they came to know that their share in S. No.649 had been mutated on the basis of false statement of respondent No.1 and father of respondents No.2 to 8 in favour of respondent No.9,

namely, Agha Maseehuddin Khan under entry No.60 dated 07.06.1994 in Deh Form VII-B and thereafter, in favour of father of the appellants and said defendants No.8 & 9 on the basis of Sale Deed, dated 03.12.2013, registered at No.272 and such entry No.54, dated 19.02.2013, was also kept in Deh form VII-B in favour of their father. It was case of the respondents No. 1 to 8 that the respondent No.1 and the father of respondents No.2 to 8 had not made any such statement before the respondent No.13 (*Mukhtiarkar, Revenue Garhi Yasin*) for selling out their shares in S. No.649 to and such fraud was played by the appellants, said defendants No.8 & 9 and respondent No.9. It was further case of the respondents No. 1 to 8 that the appellants and said defendants No.8 & 9 in collusion with respondents No. 13 and 14 got mutated the entries No.60, dated 07.06.1994, and 54, dated 19.02.2014, and Sale Deed dated 03.12.2013, registered at No.272 which are false, bogus and obtained by fraudulent means. It was further case of the respondents No.1 to 8 that since they came to know that the appellants and said defendants No.8 & 9 in collusion with respondent No. 11 to 14 were bent upon to sell out the suit land, they apprehended their dispossession from the suit land hence, cause of action accrued to them to file the civil suit, with following prayers:

- i) *To declare that the plaintiffs having right in the suit land being co-owners and co-sharers cannot be denied by the defendants No.6 to 9 and nor by official defendants No.2 to 5 by interfering in their possession and record of rights through fraud and foul means.*
 - ii) *That this Honourable Court may be pleased to cancel the Registered Sale Deed registered at Jariyan No.272 dated 03.12.2013 and entry No.60 dated 07.06.1994 and No.54 dated 19.02.2014 of revenue record in respect of suit land Survey No.649 Deh Sangi, Tapo Markhiyani, Taluka Garhi Yasin, District Shikarpur being false, managed and having been obtained and prepared by fraud and fraudulent means.*
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- iii) *To pass decree by granting permanent injunction restraining the defendants No.2 to 9 from interfering and dispossessing the plaintiffs from the suit land S. No.644 Deh Sangi, Tapo Markhiyani, Taluka Garhi Yasin, District Shikarpur in any manner whatsoever excepting due course of law and/or restrain the defendants No.6 to 9 to sell out the suit land S. No.649 and 644 in any manner to any other person and be further pleased to restrain the defendants No.4 & 5 to effect any mutation in respect of suit land to any other person.*
- iv) *To award costs.*
- v) *To pass any other equitable relief which this Honourable Court deems fit and proper under the circumstances of the case.*

3. On being served, the appellant No.1/defendant No.7 and said defendants No. 8 & 9 instead of contesting the suit by filing their written statement, preferred to file on 10.08.2017 an application under Order VII, rule 11, C.P.C., which was dismissed by the learned trial Court vide order dated 28.11.2017. Even then, they did not bother to file their written statement. Thereafter, the appellants were declared *ex-parte* by the trial Court vide order, dated 22.01.2018. Later, the appellant No.2/defendant No.6 filed an application under Order IX, rule 7, C.P.C. for setting aside the order dated 22.01.2018, which was also dismissed by the learned trial Court vide order, dated 18.10.2018. Against that order, dated 28.11.2017 the appellant No.1 preferred Civil Revision Application No.05/2018 while the appellant No.2 preferred Civil Revision Application No.27 of 2018 against the order dated 18.10.2018, which were heard and dismissed by the learned District Judge, Shikarpur vide consolidated order, dated 04.05.2019, on being infructuous, as meanwhile decree was passed by the learned trial Court.

4. In order to prove their claim, respondent/plaintiff No.1 Ali Hassan Malgani examined himself at Ex.7, he produced CTC of Entry No.174 of Deh form-VII(A) at Exh.7/A. Respondent/plaintiff No.2 Muhammad Malgani



also examined himself at Exh.8. Witness Karim Bux Malgani was examined at Exh.9. Witness Nasir Ali Bhutto (*Tapedar of Tapo Markhiyani*) was examined at Exh.10, he produced authority letter of Mukhtiarkar Garhi Yasin, copy of entry No.174 of year 1984-85 of Village Form-VII-A regarding S.No.649, measuring 05-31 acres, entry No.60 dated 07.06.1994 of Village Form-VII-B in which transfer of suit land has been shown on the basis of statements in favour of respondent No.9 and entry No.54 dated 19.02.2014 of Village Form-VII-B, which shows transfer of the land through Registered Sale Deed in favour of father of appellants and said defendant No. 8 & 9 at Exh.10/A to D. Thereafter, the learned trial Court decreed the suit of the respondents No.1 to 8 vide judgment and decree dated 15.03.2019 and 19.03.2019, the operative part thereof is reproduced herein under:

"In view of my above reasons and untreatable claim of plaintiffs, the suit of plaintiffs is decreed with no order as to costs. Plaintiffs No.1, 2 to 8 are declared to be 0-17 paisa share holder each respectively. The revenue entry No.60, dated 07.06.1994, regarding oral transfer of 01-37 acres out of suit S. No.649 on the basis of statement is declared fraudulent and same is cancelled. The Registered Sale Deed Jariyan No.272 dated 03.12.2013 in favour of defendant No.6 is cancelled and also subsequent entry No.54 dated 19.02.2014 is also cancelled. The copy of this judgment be sent to the worthy Chairman Anti-Corruption Establishment Sindh, Karachi for enquiry and necessary action under intimation to this Court.

5. The appellants preferred Civil Appeal No.38 of 2019 against the said judgment and decree before the learned District Judge, Shikarpur, which was heard and dismissed by the learned III-Additional District Judge/Model Civil Appellate Court, Shikarpur vide judgment and decree dated 07.09.2019 and 11.09.2019 respectively. It is thereafter the appellants have preferred this second appeal against the concurrent findings of the Courts below.

6. I have heard the learned Counsel for the appellants, respondents and learned Addl. A.G. Sindh as well as have perused the material available on record.

7. By virtue of Section 101, C.P.C., a second appeal lies only on grounds covered by Section 100, C.P.C. and not otherwise. As per terms of Section 100 (*ibid*) the prerequisites for filing second appeal are; that decision of Courts below is contrary to law; that decision is contrary to usage having force of law; Courts below have failed to determine some material issue of law; and there has been failure to determine material issue of usage having force of law. Therefore, second appeal is permissible in the following cases:-

- i. When the decision is against the law.
- ii. Some material of law has been left undecided.
- iii. Some substantial error, or procedural and jurisdictional defect has occurred, that resulted in error and defect in the decision on merits.

But where there is nothing to show that decision given by Courts below was contrary to law or any usage having the force of law or there had been failure of Courts below to determine issue of law or issue of usage, the appeal is not maintainable.

8. At very outset, the learned Counsel for the appellants failed to point out any substantial error, procedural defect, any misreading and non-reading of evidence or any misconceiving of fact or commission of any jurisdictional error by the learned Courts below.

9. Since the appellants/defendants failed to file their written statements within stipulated period and even after availing number of opportunities, the learned trial Court on 22.01.2018 and 15.09.2018 passed the order for ex-parte proceedings. Perusal of record shows that the respondents/

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plaintiff No.1 & 2, namely, Ali Hassan Malgani (Exh.7) and Muhammad Malgani (Exh.8) reiterated the contents of plaint in their depositions. Witness Nasir Ali Bhutto (*Tapedar of Tapo Markhiyani*) (Exh.10) produced the authority letter of Mukhtiarcar Garhi Yasin (Exh.10/A), copy of entry No.174 of year 1984-85 of Village Form-VII-A regarding S.No.649, measuring 05-31 acres Exh.10/B, entry No.60 dated 07.06.1994 of Village Form VII-B through which suit land was transferred on the basis of statements in favour of respondent No.9 (Exh.10/C) and entry No.54 dated 19.02.2014 of Village Form-VII-B, which shows transfer of the land through Registered Sale Deed in favour of father of the appellants and said defendant No. 8 & 9 (Exh.10/D). Perusal of the record also shows that the respondent No.9, (*Aga Maseehuddin Khan*) filed his affidavit on oath before the trial Court and the trial Court found the same as an admission of fraudulent transfer of the land in S. No. 649 to the extent of 01-37 acres which was made in his favour on fabricated and forged oral statement of respondents No. 1 and father of respondents No, 2 to 8/ plaintiffs.

10. It may be noted that the appellants/defendants on failure in filing written statements had been ordered to proceed against ex-parte but even on the later stage they did not join proceedings in terms of Order 9, rule 7 C.P.C. and also abandoned to cross-examine the respondents/plaintiffs No. 1 and 2 and to lead evidence. It has been held by this Court in the case of *Abdul Lateef Khan and another v. Gul Rehman and 2 others* (1993 MLD 643) that the plaintiffs' depositions in absence of rebuttal is sufficient proof for the claim of plaintiffs.

11. In view of above discussion, as no case is made out on the ground of any substantial error, procedural defect, any misreading and non-reading of evidence or any misconceiving of fact or commission of any

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jurisdictional error, the impugned judgments of Courts below do not call for any interference or exercise of discretion on any point of law in the case of concurrent findings. Accordingly, this Second Appeal is dismissed along with listed applications.

12. These are the reasons of my short order, announced by me in open Court on 16.03.2020.


JUDGE 17/03/2020

Qazi Tahir PA*