

IN THE HIGH COURT OF SINDH AT KARACHI

IInd Appeal No.146 of 2017

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

Before: Mr. Justice Nazar Akbar

Appellant : Zahoor Baig, through
Mr. Farrukh Abrar Khan, advocates.

Versus

Respondents : Manzoor Baig, & others

Mr. Liaquat Ali Meo, advocate for
Respondent No.1

Date of hearing : **13.02.2020**

Date of Judgment : **18.05.2020**

JUDGEMENT

NAZAR AKBAR, J. The Appellant through this IInd Appeal has challenged the Judgment dated **08.07.2017** passed by the IIIrd Additional District Judge, Central Karachi, whereby Civil Appeal **No.16/2016** filed by the Appellant was dismissed and judgment dated **30.11.2015** passed by the IIIrd Senior Civil Judge, Central Karachi dismissing Civil Suit **No.1166/2011** filed by the appellant was maintained/upheld.

2. Brief facts of the case are that the Appellant had filed Civil Suit **No.1166/2011** for partition, administration, cancellation of documents, mutation, transfer & permanent injunction against the Respondents/ defendants stating therein that respondents/ defendants No.1 to 3 are real brothers and sisters of plaintiff/ appellant and lawful co-owners/co-sharers of a premises bearing House/ Quarter No.21, Block No.50 (known as 50/21) Sector 11-D,

admeasuring 128 sq.yds situated in New Karachi, North Karachi Township, Karachi and the said property was owned by their deceased father Kazim Baig s/o Mughal Baig vide allotment order Book No.458, Sr.No.41, issued by the office of Rehabilitation Commissioner Karachi Government of Pakistan dated 17.01.1963. It is averred that there is no other legal heirs except plaintiff and defendants No.1 to 3, therefore, the plaintiff/appellant and respondents/ defendants No.1 to 3 are co-owners/shareholders in the suit property by inheritance. In the year **2005**, the plaintiff/appellant was shocked when he came to know that defendant No.1 without any consent, permission and no objection has mutated the suit property in his own name and obtained the letter of transfer/mutation from the office of Resettlement Department of the Respondent/ Defendant No.4 illegally, unlawfully and without any right. Therefore, the plaintiff called all the legal heirs and elders of the family, on which respondent/defendant No.1 promised that he will not dispossess the plaintiff and shall get cancel the mutation from his name and mutate the same in the name of plaintiff/appellant and Respondent/ defendant No.1 as Respondent/ defendant No.2 was not interested in his share in the suit property. It is averred that when Respondent/Defendant No.1 failed to fulfill his promise, the appellant/ plaintiff contacted respondent/defendant No.4 so many times and on **20.6.2011**, Respondent/defendant No.4 issue a letter bearing No.CDGK/DDO/NKT/2011/1602 with direction to resolve the dispute amicably or through the Court of law. On **03.10.2011**, Respondent/defendantNo.1 came along with some gunda type elements and forced the plaintiff/appellant to vacate the suit property but due to intervention of Mohalla people, they could not succeed, therefore, the Appellant filed Civil Suit.

3. On service of summons of the suit, Respondent/defendant No.1 filed written statement wherein it is averred that no cause of action accrued to the appellant/plaintiff to file present suit because being son/legal heir of deceased, he has received his share in the suit property by executing Deed of Relinquishment dated **01.04.1986** in favour of respondent/defendant No.1 and having knowledge regarding execution of Indenture of Lease in favour of respondent/defendant No.1. It is further averred in the written statement that the appellant/ plaintiff has not come with clean hands to this Court, therefore, the suit for the plaintiff is not maintainable under the law, respondent/defendant No.1 also denied all other allegations leveled by the plaintiff/appellant and lastly prayed for the dismissal of the suit.

4. Respondents No.2 & 3 in their joint written statement supported claim of Respondent/Defendant No.1 and admitted execution of Deed of Relinquishment dated **01.04.1986**. The respondent/ defendants No.4 & 5 stated that per their record suit property was allotted to Mr. Kazim Baig son of Mughal Baig vide A/O No.458/41 dated **17.11.1963**, which has subsequently been mutated by inheritance in favour of respondent/defendant No.1 vide T/O No.1053/L dated **03.5.1986**, and lease has also been executed in his name under Regd. No.2084 dated **07.5.1986**. However, Muhammad Baig and Zahoor Baig both sons of Mr. Kazim have lodged objections dated **08.10.2005** and **31.10.2007** and reply has been given.

5. The trial Court from pleading of the parties has framed the following issues.

1. *Whether the suit of the plaintiff for partition, administration, cancellation of documents, mutation/transfer and permanent injunction is maintainable?*
2. *Whether the plaintiff is entitled for his relief in suit property left by his deceased father alongwith other legal heirs / defendants No.1 to 3?*
3. *Whether the transfer/mutation of suit property obtained by the defendant No.1 from the office of the Resettlement Department KDA by way of cheating and fraud is liable to be cancelled?*
4. *Whether the suit property is liable to distribute amongst/between all legal heirs of deceased Kazim Baig s/o (latge) Mughal Baig?*
5. *Whether the Nazir as Administrator is liable to mutate the suit property on the name of all legal heirs of deceased Kazim Baig after cancellation of the documents of the same?*
6. *Whether the Administrator/Nazir is liable to sell out the suit property and distribute the sale consideration amount in between all legal heirs of deceased Kazim Baig?*
7. *Whether the plaintiff is entitled for relief of permanent and temporary injunction against the defendants?*
8. *What should the decree be?*

6. Only appellant led his evidence and examined only himself and none appeared in evidence from Respondent side. The trial Court after hearing the learned counsel for the appellant dismissed the suit by order dated **30.11.2015**. The appellant preferred Civil Appeal **No.16/2016** before the appellate Court. In appeal Respondent No.1 filed written objection and Respondents No.2 and 3 also filed cross objections. The appellate Court dismissed the appeal by judgment dated **08.07.2017** and the findings of the trial Court were maintained/ upheld. The appellant has impugned both the order/judgment herein this IInd Appeal. However, other Respondents

who have filed cross objections have not challenged the appellate order.

7. I have heard the learned counsel for the parties and perused the record. Learned counsel for Respondent No.1 has also filed objection to this IInd Appeal.

8. Learned counsel for the appellant has reiterated the same grounds that the Respondent/defendants have not come forward to cross-examine the plaintiff/appellant and, therefore, the contentions of the appellant should have been accepted by the trial Court, however, he has not answered to the observations of the trial Court as well appellate Court based on several case laws that the plaintiff has gone to the Court and first burden was on him to establish his claim of inheritance in the suit property, subsequently to the transfer in favour of Respondent No.1 through a relinquishment deed bearing even his own signature. In view of the relinquishment deed owned/ accepted/ admitted by all other legal heirs it was not a simple case of inheritance on the death of the owner of the property. In his affidavit-in-evidence the appellant has not even formally denied execution of relinquishment deed by him. The counsel for the Respondents has contended that the suit was hopelessly time barred for cancelation of registered document in favour of Respondent No.1 which was executed by consent of all the legal heirs of deceased father of the parties in **1986**. None of the legal heirs have supported to any of the allegation of the appellant in the plaint. The appellant has suppressed deed of relinquishment executed by all the legal heirs including the appellant way back on **01.4.1986** and following this document, the property has been leased in favour of Respondent No.1. Admittedly the appellant's mere oral statement contrary to the

record cannot be enough to decree the suit. He was required to prove his case through tangible evidence to claim share in the suit property as property of deceased father after having executed relinquishment deed in favour of Respondent No.1 by all the family members.

9. Besides the above, learned counsel for the appellant was unable to appreciate the requirement of **Section 100** of the CPC envisages only three possibilities for entertaining the second appeal against the order of the first appellate Court. The learned counsel when confronted with the requirement of **Section 100** of the CPC, he was unable to point out (i) the impugned decision was contrary to law or to some usage having force of law; (ii) there was failure of the Court to determine the material issues of law or usage having the force of law; and (iii) there was substantial error or defect in the procedure provided in CPC which possibly has produced error or defect in the impugned decision.

10. In view of the above, no case for interference in the judgments of two courts below is made out since there was no illegality or irregularity in the judgments of the Courts below nor the decisions are contrary to law, therefore, instant IInd appeal is dismissed with no order as to costs.

JUDGE

Karachi, Dated:18.05.2020

SM/Ayaz Gul