

THE HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD

Ind Appeal No. 46 of 2020

[Muhammad Amin versus Muhammad Nawaz]

Appellant : Muhammad Amin son of Fakir
Muhammad Soomro through M/s.
Muhammad Suleman Unar and Asad
Ali Jatoi, Advocates.

Respondent : Muhammad Nawaz son of Fakir
Muhammad Soomro through his
Attorney; Muhammad Alam Soomro.

Date of hearing : 01-11-2021.

ORDER

Adnan Iqbal Chaudhry J. - This Second Appeal under section 100 CPC is against concurrent judgments, passed by the 2nd Senior Civil Judge, Hyderabad on 01-07-2019 in F.C. Suit No. 57/2016, and then maintained in Civil Appeal No. 151/2019 by the 8th Additional District Judge, Hyderabad on 22-09-2020, decreeing the suit filed by the Respondent against the Appellant for possession and mesne profits.

2. The Appellant [Amin] and the Respondent [Nawaz] are brothers. The property of which possession was decreed in favor of Nawaz is the upper floor of a building constructed *inter alia* on (i) C.S. No. 462, measuring 51 square yards, and (ii) C.S. No. 457, measuring 23-65 square yards, situated in Ward-A, Tano Wali Muhammad, UC No. 2, Taluka City, District Hyderabad [suit property].

3. Nawaz claimed that part of the suit property (C.S. No. 462) had been gifted to him by his late father [Fakir] orally in 1972 alongside similar gifts made by his father of other survey numbers to their mother and 5 of his other children, but excluding Amin and one other son; that the statement of such gift was recorded before the City Survey Officer, Hyderabad on 20-07-1972, duly entered in the record of rights; that the other part of the suit property (C.S. No. 457,

measuring 23-65 sq. yds) was purchased by him from his sister in 2005 by a registered sale deed, duly entered in the record of rights. It was pleaded by Nawaz that in the year 2001 he shifted to Canada; that his father passed away on 21-12-2005; that in 2005, his Attorney and brother Alam, permitted Amin to temporarily reside at the suit property; that when Nawaz asked Amin to vacate the suit property as he intended to shift back to Hyderabad, Amin refused to do so and then filed F.C. Suit No. 65/2009.

4. F.C. Suit No. 65/2009, re-numbered as F.C. Suit No. 93/2009, was filed by Amin against his siblings to challenge the gifts of immovable properties made by his father in 1972 to Amin's mother and to Amin's siblings to the exclusion of Amin. Such challenge was also against the gift of the suit property (of F.C. Suit No. 57/2016) made to Nawaz. Amin contended that the alleged gifts were fabricated along with the record of rights; that the underlying properties continued to vest in his father; and thus he was entitled to his inherited share in said properties by way of partition. He prayed for a declaration that the entries in the record of rights on the basis of such gifts were forgeries; for cancellation of the sale deeds that were subsequently made by his siblings to transfer the gifted properties *inter se*; and for an injunction that entries in the record of rights be restored to the name of his father.

5. By judgment dated 29-11-2016, the 1st Senior Civil Judge, Hyderabad dismissed all prayers made by Amin in F.C. Suit No. 93/2009 (old F.C. Suit No. 65/2009), except the prayer for partition to the extent of that property which stood in the name of the mother of the parties at the time she passed away (CS No. 458/2). Against the dismissal of his other prayers in F.C. Suit No. 93/2009 (old F.C. Suit No. 65/2009), Amin filed Civil Appeal No. 08/2017 which was dismissed. His Second Appeal No. 18/2018 was also dismissed by the High Court by judgment dated 12-04-2018.

6. In the meanwhile, Nawaz had filed F.C. Suit No. 57/2016 (subject suit) against Amin for possession of the suit property and for mesne profits. As stated first above, that suit was decreed by the Courts below; hence this Second Appeal. It appears that after the dismissal of Amin's Civil Appeal, a writ of possession was issued on 05-10-2020 in the Execution Application filed by Nawaz, which was implemented pursuant to order dated 11-12-2020 by delivering possession of the suit property to Nawaz.

7. Learned counsel for the Appellant submitted that the General Power of Attorney relied upon by the Attorney, Alam, to file Suit No. 57/2016 on behalf of his brother, Nawaz, was not produced by him on examination-in-chief, rather it was exhibited by the trial court later when it was filed by Alam under cover of a statement. Per learned counsel, the effect is that it was not proved that the subject suit was filed by an authorized person. His other submission was that the evidence with regards to the making of the gift was misread. Those are the only two points that the learned counsel for the Appellant could muster, and thus the only two points required to be examined for determination of this appeal.

8. Heard the learned counsel and perused the record.

9. It is not disputed that at the time of filing suit, the Attorney Alam, had annexed with the plaint a General Power of Attorney executed by his brother, the plaintiff Nawaz, attested at the Consulate of Pakistan at Vancouver, Canada. Apparently, for such reason Alam's authority to file the subject suit on behalf of Nawaz was not questioned by Amin in his written statement. Thus, there arose no issue between the parties on Alam's authority to file suit and none was so framed. A separate Special Power of Attorney was then produced by Alam as Exhibit 42/A, authorizing him to lead evidence on behalf of Nawaz. Therefore, the General Power of Attorney that was annexed with the plaint for the purposes of instituting the suit was not relevant evidence, and nothing turned on its non-production at the time of examination-in-chief or on its subsequent production.

10. The impugned judgments and decrees awarding possession and mesne profits in respect of the suit property to Nawaz were passed on the basis of his ownership to the suit property. For part of the suit property (C.S. No. 462) that title came to vest in him on the statement of gift made by his father before the City Survey Officer, Hyderabad on 20-07-1972, duly entered in the record of rights; and for the other part (C.S. No. 457, measuring 23-65 sq. yds.), by a registered sale deed executed by his sister in 2005, duly entered in the record of rights. It is to be noted that as regards the gift relied upon by Nawaz from his father, it was not that he alone was a beneficiary of the father's gift, but that similar gifts were made by his father of his other survey numbers to his spouse (mother of the parties) and to 5 of his children *albeit* excluding Amin and one other son.

11. Nawaz's title to the suit property was directly in issue in F.C. Suit No. 93/2009 (old F.C. Suit No. 65/2009) whereby Amin had challenged the gifts made by his father to his siblings and the subsequent transfer of property between those siblings, which included the gift and sale deed of the suit property in favor of Nawaz. That issue in F.C. Suit No. 93/2009 was decided in favor of Nawaz and against Amin after recording evidence and after that gift and sale deed were duly proved by Nawaz, which finding was also maintained by the High Court in Second Appeal No. 18/2018. The evidence of F.C. Suit No. 93/2009 and the judgment passed therein was produced as evidence in F.C. Suit No. 57/2016 (subject suit). Since that judgment was between the same parties, it was evidence of Nawaz's ownership of the suit property also for F.C. Suit No. 57/2016.

12. In view of the foregoing, the Appellant has not been able to demonstrate that the impugned judgments are contrary to law or erroneous. Resultantly, this appeal is dismissed along with pending applications.

JUDGE

Dated: 30-06-2022