

IN THE HIGH COURT OF SINDH AT KARACHI

IIInd Appeal No. 132 of 2019

[Muhammad Feroz ud Din Hilaliv..... Nadir & others]

Date of Hearing : 27.01.2023
Appellant through : Mr. Muhammad Nazim Khokhar,
Advocate.
Respondents through : Mr. Muhammad Aziz Khan, Advocate.

J U D G M E N T

Zulfiqar Ahmad Khan, J:- This Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (“CPC”) assails the concurrent findings of the learned trial Court dated 17.04.2017 as well as first Appellate Court dated 13.04.2019.

2. The crux of the stance of the appellant as taken by him in the plaint is that he is owner of property bearing No.RB3/252/26, Strechan Road, opposite NED University, Pakistan Chowk, Karachi (“subject property”) and in the month of December, 2006 the respondents illegally occupied a portion of the subject property and since then that they have not vacated it. It is alleged by him that a complaint under the provisions of Illegal Dispossession Act, 2005 was preferred by him against the respondents which was however dismissed by the learned District Judge vide order dated 22.10.2010, thereafter, appellant filed the subject suit before the learned trial Court which was also dismissed vide judgment dated 17.04.2017, after that, the said judgment was impugned by the appellant before the learned First Appellate Court by filing Civil Appeal No.84/2017 which appeal was also dismissed vide Judgment dated 13.04.2019,

and the appellant is before this Court under the provisions of Section 100 CPC being a Second Appeal against the concurrent findings.

3. Learned counsel for the appellant premised his case on the argument that the best course to decide any lis is to let parties lead their respective evidence and produce the material before the Court but learned trial Court as well as First Appellate failed to confer this opportunity to the appellant and proceeded against the appellant who has vested rights in the subject property, therefore, the concurrent findings of the courts below be set aside. He lastly contended that appeal is a continuation of suit and this Court is fully competent to decide the lis preferred by the appellant.

4. In contra, learned counsel for the respondents argued that ample opportunities were afforded to the appellant to adduce evidence before the learned trial Court but he always remained absent and this can be verified from the record too. The learned trial Court as well as Appellate Court having examined the record and proceedings dismissed the lis preferred by the appellant with speaking orders.

5. I have heard the respective learned counsel and have also considered the record to which my surveillance was solicited. It is considered pertinent to initiate this deliberation by referring to the settled law in such regard. To start with, it is common knowledge that right to file Second Appeal provided under section 100 of CPC, which can be set into motion only when the decision is contrary to law; failure to determine some material issue of law, and substantial error or defect in the procedure provided by the Code or law. The anxiety of the appellant's counsel is that the learned trial Court on

the basis of provisions of Order XVII Rule 3 CPC proceeded to decide the lis and failed to record any evidence. Order XVII, Rule 3 CPC contemplates that when any party fails to produce evidence, the Court may notwithstanding such default, proceed to “decide” the suit forthwith. The word “decision” is judicially meant as determination in accordance with evidence before the Court. It is settled law that the learned Senior Civil Judge being a trial Court is the fact finding authority and the purpose of appellate jurisdiction is to reappraise and reevaluate the judgments and orders passed by the lower forum, in order to examine whether any error has been committed by the lower court on the facts and/or law, and it also requires the appreciation of evidence led by the parties for applying its weightage in the final verdict. It is, however, the province of the Appellate Court to re-weigh the evidence or make an attempt to judge the credibility of witnesses, but it is the Trial Court which is in a special position to judge the trustworthiness and credibility of witnesses, and normally the Appellate Court gives due deference to the findings based on evidence and does not overturn such findings unless it is on the face of it erroneous or imprecise. The learned Appellate Court having examined the entire record and proceedings made available to it as well as having gone through the verdict of learned trial Court went on to hold as under:-

“5.From the perusal of record, it is reappraised that the appellant has filed a suit for declaration and possession as well as compensation and mesne profit on the subject property against the respondent on the ground that he retains valid mutation in his name in 1973 in respect of subject property, but the copy of the copy of the judgment as well as memo of present appeal is completely devoid of any document which could have been filed before trial Court or before this Court to substantiate the same. Moreover the appellant/plaintiff had himself admitted vide his plaint that his claim of being illegally dispossessed from the subject property was rejected by

the competent Court of law. Moreover, it is a settled principle of law that in order to seek declaration it is only necessary for the plaintiff to show that he has some legal character or some right to property and that his opponent is either denying or is interested in denying such legal character or title. Section 42 of Specific Relief Act would attract to a case where plaintiff approached the court for the safeguard of his right to legal character or property but where right of his own legal character or property is not proved the section could not be invoked. The word "legal character or status denotes a character or status conferred by law upon individuals not shared by the generality of the community but only those individuals. From the reappraisal of record it is observed that not a single documents has been produced before the trial Court or before this Court to substantiate the same.

7.....In the present case none of the supporting material, since had been brought on record, hence the learned trial Court, in my humble view, had rightly dismissed the suit of the appellant/plaintiff as such in the absence of the same, proceeding further with the evidence of defendant would have been a futile exercise and putting the defendant under undue obligation. For the reason hereinabove discussed I do not find any reason to interfere in the impugned judgment which has been passed in accordance with law and is hereby upheld. The appeal is hereby dismissed.

[Emphasis supplied]

6. It is gleaned from appraisal of the foregoing that the learned Appellate Court examined the record and proceedings and came to the just conclusion. The fact that proceedings initiated by the appellant under the provisions of Illegal Dispossession Act, 2005 were dismissed and appellant was not found to have been dispossessed by the respondent by the competent Court of law were also considered. It further unfurls that the appellant failed to establish his case by producing any evidence in the shape of documents either before the learned trial Court or before the learned First Appellate, hence the concurrent findings were rightly given against the appellant. Even during the arguments, this Court kept on asking the appellant's counsel to show any evidence that he wishes to produce. All he replied was through making reference to pages 239-241 which are copies of some hand written records. When the Court inquired the

counsel to read the text or provide any primary documents on the basis of which these illegible entries are made, the learned counsel had no plausible answers. In my humble view, both the judgments are well jacketed in law and it has been held time and again by the Apex Court that findings concurrently recorded by the courts below are not to be disturbed until and unless a case of non-reading or misreading of evidence is made out or gross illegality is shown to have been committed¹ which are not the cases at hand.

7. In view of the rationale and deliberation delineated above, the Second Appeal at hand is dismissed alongwith the applications.

Karachi
Dated:27.01.2023

JUDGE

Aadil Arab

¹ Farhan Farooq v. Salma Mahmood (2022 YLR 638), Muhammad Lehasab Khan v. Mst. Aqeel un Nisa (2001 SCMR 338), Mrs. Samina Zaheer Abbas v. Hassan S. Akhtar (2014 YLR 2331), Syed Shariq Zafar v. Federation of Pakistan & others (2016 PLC (C.S) 1069).