

## IN THE HIGH COURT OF SINDH AT HYDERABAD

IInd Appeal 81 of 2023 : Nadir Hassan  
vs. Muhammad Shahid Umar

For the appellant : Mr. Muhammad Saleem Hashmi,  
Advocate.

Date/s of hearing : 29.11.2023.

Date of announcement : 29.11.2023.

### ORDER

**Agha Faisal, J.** Briefly stated, F.C. Suit No.773 of 2013 was filed before Senior Civil Judge-VI, Hyderabad for possession and mesne profit. The said suit was dismissed vide judgment dated 28.09.2022. The operative findings are reproduced herein below:

“13. Burden to prove this issue lies upon the plaintiff. The plaintiff has claimed that his mother Mst. Khadija was owner of revenue survey No.23 which was renumbered as C.S.No.4409 Deh. Ghangra Hyderabad, measuring 5-0 acres. She gifted the said land to the plaintiff through gift and thereby plaintiff became owner of the said property. Subsequently, one of the brother of plaintiff Javed Saleem filed FC Suit No.30/2003 and challenged the gift deed. Such suit of Javed Saleem was decreed, consequently the gift in favour of plaintiff was cancelled. The plaintiff preferred first appeal before Honourable Sessions Court which was also dismissed. Subsequently he preferred civil revision before Honourable High Court of Sindh which was also dismissed. During cross examination the plaintiff has admitted that “ *we are total five brothers and sisters i.e. two brothers and three sisters*”. Admittedly, after cancellation of the gift in favour of plaintiff the plaintiff is not exclusive owner of the property and he is co-owner with his rest of the brothers and sisters which have not been added as party in the suit. In view of the above issue answered as negative.

Issue No.2.

14. Burden to prove this issue lies upon the plaintiff. Plaintiff claims the possession of suit property while the defendant claimed that he purchased the suit property from one Mst. Rubina, the wife of Javed Saleem, who is brother of plaintiff. As discussed above in issue No.1 that gift deed of the plaintiff was cancelled in FC Suit No.30/2003 filed by Javed Saleem against the plaintiff. The plaintiff preferred first appeal before Honourable Sessions Court which was also dismissed. Subsequently he preferred civil revision before Honourable High Court of Sindh which was also dismissed. Therefore, after cancellation of the gift in favour of plaintiff, the plaintiff is not exclusive owner of the suit property and he is co-owner with his rest of the brothers and sisters which have not been added as party in the suit. I am of the opinion that the co-sharers were necessary parties in the suit particularly when defendant is claiming possession on the basis of agreement executed by Mst. Rubina wife of Javed Saleem who is one of the co-sharer in the suit property. Accordingly, in view of the above, issue No.2 is answered as negative.

Issue No.03

15. In view of my aforesaid discussion on issues No.1 and 2, the suit of the Plaintiff is dismissed with no order as to costs. Let such decree be prepared within seven days.”

Civil Appeal 259 of 2022 was filed assailing the dismissal, however, the appeal was also dismissed vide judgment dated 29.05.2023. The operative findings are reproduced herein below:

“8. I have minutely gone through the impugned judgment and arguments of the both parties and have not found any single reason for interference in the impugned judgment.

9. The appellant filed suit claiming himself as an owner of suit property and thereafter, he claimed that on the basis of such title, the possession found with defendant may be handed over to him alongwith mesne profit at the rate of Rs.1000/- per month (total Rs.33,000/-).

10. First of all, the trial court has rightly observed that appellant is not exclusive owner of the suit property and he had admitted in his plaint that his title was based upon a gift deed allegedly made by his mother had been cancelled through decree of F.C Suit No.30 of 2003 and subsequently, the appeal against the said judgment was also dismissed and he claimed that his Revision is pending before Honourable High Court.

11. Interestingly, the mala fide of the plaintiff/appellant is evident from the fact that he filed instant suit on 12.11.2013 claiming pendency of Civil Revision before Honourable High court but the said Revision was already dismissed on 06.09.2013 before filing of the suit. Thus, he had filed suit by stating false facts and suppression of real facts as well.

12. The right of possession is only provided to a person who can prove that a certain piece of land belongs to him and the person occupying the same had no legal entitlement for possession. The present suit clearly shows that firstly, appellant is not owner of suit property and even if we admit his second argument that he is also one of the co-sharer, same he should have first pressed for partition so that, he could have found his exact share in the suit property.

13. Now on this point, again there is suppression of the facts by the appellant. Firstly, the perusal of judgment dated 31.10.2007 in F.C Suit No.30 of 2003 clearly provides that the trial court after decreeing the suit of Javed Saleem appointed Nazir as a commissioner for partition of property. Nowhere, the appellant had disclosed that any such partition was made or not. Moreover, the title of defendant/respondent is through Ms. Rubina w/o Javed Saleem who is wife of brother of plaintiff and the R&Ps clearly shows that Javed Saleem had transferred the property situated in C.S No.4410 in year 1999. Thus, the documents of the defendant are even not pertaining to the suit property which is actually C.S No.4409.

14. Thus, on one hand the appellant has no title except a share holder and that too without any demarcation and secondly the defendant had purchased property from Mst. Rubina which does not belong to suit property. Even if it was version of appellant that the defendant was occupying his property i.e. share in Survey No.4409, he has completely failed to prove such point.

15. Thus, on the basis of above discussion, it seems that appellant had miserably failed to prove his case and he had dragged innocent people in the litigation for so many years for which appellant must compensate the defendant. So, I answer point No.1 in "Negative" and by amending the judgment & decree, I also allow cost of the suit to the defendant. The defendant/respondent must file his statement as to cost of suit before trial court which shall be deemed as part & parcel of decree which appellant is bound to pay within 30-days.

Point No.2

16. For what have been discussed above, the appeal in hand is dismissed with no order as to costs. However, the impugned judgment & decree are upheld with slight modification that respondent is entitled for cost of original suit. Let the R&Ps and copy of this judgment be sent to trial court for information."

Learned counsel contends that the evidence was not appreciated properly by the forums below hence the impugned judgments may be set-aside.

Heard and perused. The dismissal of the suit is *prima facie* rested upon detailed deliberation of the evidence and appellate court also appears to have duly considered the pleas and the evidence and found the appellant disentitled to relief. It is incumbent upon a party to prove its assertions in order for its claim to succeed and in the present case the appellant appears to have remained unsuccessful in two consecutive forums.

The narrative recorded in the respective judgments has not been controverted by the counsel and it could not be demonstrated that the findings could not be rested thereupon. Under such circumstances, when the entire narrative was demonstrably borne from the record and not controverted by the appellant, no case was made out to entertain this second appeal.

A second appeal may only lie if a decision is demonstrated to be contrary to the law; a decision having been failed to determine some material issues; and / or a substantial error in the procedure is pointed out. It is categorically observed that none of the aforesaid ingredients have been identified by the learned counsel. In such regard it is also important to advert to section 101 of CPC, which provides that no appeal shall lie except on the grounds mentioned in the Section 100 of CPC. While this Court is cognizant of Order XLI Rule 31 CPC, yet at this stage no case has been set forthwith to entertain the present appeal in view of the reasoning stated above. As a consequence hereof, in *mutatis mutandis* application of Order XLI Rule 11 C.P.C, this appeal is hereby dismissed *in limine* along with pending application. The office is directed to communicate a copy hereof to the appellate court.

Judge