IN THE HIGH COURT OF SINDH AT KARACHI

IInd Appeal No. 18 of 2021

[Asif Baig ……v……Mst. Salma Begum & others]

Date of Hearing	:	12.02.2024
Appellant through	:	Mr. Roomi Iqbal, Advocate.
Respondent through	:	Mr. Khalid Parvez, Advocate for respondents. Mr. Jamshed Qazi, Advocate.

J U D G M E N T

Zulfiqar Ahmad Khan, J:- This Second Appeal moved under Section 100 of the Code of Civil Procedure, 1908 assails concurrent findings of the learned trial Court dated 14.04.2017 as well as those of the first Appellate Court dated 15.12.2020 which are against the appellant.

2. Pithily the facts of the case at hand is that the appellant filed a suit for declaration, cancellation, permanent injunction and damages alleging that his late father purchased the house No.30/15, Sector 11-F, New Karachi ("subject property") though sale agreement dated 16.01.1985 from Barkatullah. It is asserted that the said sale agreement was also witnessed by two witnesses namely Nizamuddin and Muhammad Ismail and as the time went by, his father died on 05.01.1992 and the respondents who were not well-to-do were also allowed to reside in the subject property and has been requesting them for the transfer of the subject property in his name as the original owner namely Barkatullah also died but the respondent surreptitiously got transferred the subject property in their names and deprived him from his property, having seen so, the appellant filed a suit which was dismissed by the learned trial Court vide Judgment dated 14.04.2017 after that the appellant impugned the

said findings of the learned trial Court before the First Appellate Court by filing Civil Appeal No.137 of 2017 but the appeal also met the same result and the said appeal of the appellant was dismissed vide judgment dated 15.12.2020, hence this second appeal against the concurrent findings.

3. Learned counsel for the appellant premised his case on the arguments that the subject property was leased out to the respondents on the basis of possession only and not on the basis of any documents. The subject property was purchased by the father of the appellant through sale agreement which is an admitted fact but the transfer of the same was not made and the said fact was not considered by the learned lower fora. He further submitted that his entire livelihood is on stake and despite paying consideration, he is out of ownership rights, therefore, the concurrent findings be set aside and his suit be decreed as prayed.

4. Respondents rest their claim inter alia on the grounds that the learned trial Court having adduced the evidence of the appellant came to the conclusion that the sale agreement on the basis of which the appellant is claiming to have purchased the subject properties, is forged and fictitious and having perused the entire record produced by the parties, the learned trial Court dismissed the suit of the appellant as well as the learned Appellate Court upheld the judgment and decree of the learned trial Court, therefore, the concurrent findings cannot be set aside.

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. Before proceedings further, it is considered pertinent to comply the requisites of Order XLI Rule 31 C.P.C which provides that the Appellate Court ought to frame points for its determination, nonetheless, so as to meet this statutory edicts, point for determination is formulated as to whether the concurrent findings of the learned lower fora require any interference by this Court?

6. The appellant's entire case was premised on the argument that appellant's father entered into a sell agreement with respondents father for purchasing the subject property, however, the respondents candidly and unequivocally denied to have signed the sale agreement or ever sold out the subject properties. Therefore, the said agreement was required to be proved as mandated by Article 79 of the Qanun-e-Shahadat Order, 1984. If precedent is required for this trite contention, reference may be made to the decision in the case of Nazir Ahmed v Muzaffar Hussain (2008 SCMR 1639) which held, that *in case of denial of execution of document, the party relying on such document must prove its execution in accordance with the modes of proof as laid down in Qanun-e-Shahadat Order, 1984 and the party is required to observe rule of production of best evidence*. The Hon'ble Supreme Court recently in the case of Sheikh Muhammad Muneer v. Mst. Feezan (PLD 2021 S.C. 538) held the similar principle and would

be conducive to reproduce the relevant excerpt which is delineated hereunder:-

> "Where the purported seller denied the execution of the agreement and denied agreeing to sell his/her immoveable property, the said agreement was required to be proved by the party relying on the same as mandated by Art.79 of the Qanun-e-Shahadat, 1984."

7. Perusal of record shows that the alleged sale agreement was produced at the time of recording evidence and the same has been exhibited as Exh. P/2, however, mere exhibiting the agreement is not ipso fact proof of its execution. Furthermore, there was no evidence that the payment of sale consideration of the subject property as mentioned in the sale agreement had ever been paid in the presence of the witnesses. The learned trial Court in its Judgment (*at page 53 & 55*) discussed the testimony of the appellant and it would be pertinent to reproduce the relevant excerpt of the testimony of the appellant which is delineated hereunder:-

> "During the cross examination the plaintiff has admitted that in Exh. P/2, the father's name of Siddique Baig is shown as Majeed Baig. **It is fact that no receipt of payment of sale consideration is annexed with Exh. P/2.** It is fact that both the witnesses shown in the agreement are his inlaws. It is fact that Majeed Baig had died prior to Barkatullah. It is fact that sale agreement is not registered with the Sub Registrar Office. **It is fact that deceased Siddique Baig during his life time had not contacted any office for getting the property registered in his name.** It is fact that the document of allotment order produced by Mst. Salma Begum with her case bears with the photograph of Barkatullah. It is fact that the allotment order produced by him with the plaint does not bear with the photograph of Barkatullah.**It is fact that affidavit of two witnesses is not produced by him.** It is fact that Siddique Baig was nephew of Barkatullah and he was kept by Barkatullah with him as his father hand not come to Pakistan.

14.**The above is entire evidence of plaintiff of the leading suit in support of his version, which clearly shows that plaintiff is claiming the property on two counts viz (1) on the count of being legal heir of late Barkatullah and (2) on the count of being purchased by his father from the Barkatullah by way of sale consideration through agreement of sale dated 16.01.1985**

15. As far as first ground of heirship and inheritance of property is concerned, the plaintiff though claimed in his plaint as well as affidavit in evidence that his father Siddique Baig was son of BArkatullah, but during the cross examination he himself has belied his version by deposing that the father's name of Siddique Baig was Majeed Baig and not Barkatullah, and that Sidduqie Baig was newphe of Barkatullah, which clearly shows that the father of plaitnfif was not real son of late Barkatullah.

16. **As far as the other count viz purchase of property by way of sale agreement by Siddique Baig from late Barkatullah is concerned, the evidence brought on record shows that the plaintiff has failed to examine the two martigal witnesses of the sale agreement in support of his version. He has also failed to examine the scriber of the agreement and also the Notary Public who attested the agreement in support of his version. According to Article 17 and 79 of the Qanun0e0Shahadat it is requirement of law that no document can be proved until and untless its two attesting witnesses are examined before the Court in support of the document. The perusal of record further reveals that since the year 1985 there is nothing on record that the father of plaintiff during his life time would have taken any efforts to get the sale deed registered in his favour, nor even after his death the plaintiff had issued any notice etc., till filing of the present suit to the legal heirs of late Barkatullah for execution of sale deed in his favour in performance of the agreement, but he has filed the present suit for declaration without firstly getting the specific performance is beyond the scope of Section 42 of the Specific Relief Act."**

8. It is gleaned from appraisal of the foregoing that the evidence brought on record shows that the appellant has failed to examine the two marginal witnesses of the sale agreement in support of his

version and he also failed to examine the scriber of the agreement and also the Notary Public who attested the agreement in support of his version. It further unfurls that since the year 1985 there is nothing on record that the father of appellant during his life time would have taken any efforts to get the sale deed registered in his favour, nor even after his death the appellant issued any notice etc. It is further gleaned from appraisal of the foregoing that the appellant admitted during the course of cross-examination that neither any payment receipt was produced by him with Exh. P/2 which is an agreement to sell nor the witnesses ever produced by him before the trial Court to strengthen his version. Object of producing witnesses under Art.79 of the Qanun-e-Shahadat, 1984 is twofold, i.e. firstly, to make the document usable and admissible as evidence and secondly, to prove the execution of document. It is an admitted position that Court should not accept blindfold presence of the attesting witnesses as proof of the existence and execution of the contested documents.

9. Furthermore, he further admitted that even the Notary public who attested the said agreement was ever produced by him. A scribe may be an attesting witness provided the agreement itself mentions/nominates him as such. In the case of Tassaduq Hussain v Muhammad Din (PLD 2011 S.C. 241) the Hon'ble Supreme Court had held that:

> "Therefore, in my considered view a scribe of a document can only be a competent witness in terms of Article 17 and 79 of the Qanun-e-Shahadat Order, 1984 if he has fixed his signature as an attesting witness of the document and not otherwise; his signing the document in the capacity of a writer does not fulfill and meet the mandatory requirement of attestation by him separately, however, he may be examined by the concerned party for the corroboration of the evidence of the

> marginal witnesses, or in the eventuality those are conceived by Article 79 itself not as a substitute."

10. To state that the appellant was an attesting witness is contrary to the contents of the said agreement. The question of the requisite number of witnesses to prove the execution of a document and the role of a scribe may also be considered from the perspective of Article 17 of the Qanun-eShahadat, which is reproduced hereunder:

> 17. Competence and number of witnesses. (1) The competence of a person to testify, and the number of witnesses required in any case shall be determined in accordance with the injunctions of Islam as laid down in the Holy Qur'an and Sunnah:
>
> (2) Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law, -
>
> > (a) in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men or one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly; and
> >
> > (b) in all other matters, the Court may accept, or act on the testimony of one man or one woman or such other evidence as the circumstances of the case may warrant.

11. It is well settled that the Trial Court (Senior Civil Judge) was the fact finding authority and the learned trial Court framed approximately 9 issues which were answered against the appellant. The First Appellate Court have also examined the record and proceedings. 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 the province of the Appellate Court to re-weigh the evidence or make an attempt to judge the credibility of witnesses. The learned First Appellate Court having examined the entire record and proceedings made available to it went on dismiss the First Appeal filed by the appellant and held that appellant herein failed to establish the execution of the sale agreement and payments of the sale consideration.

12. To me, the concurrent findings are based upon the correct appreciation of law as well as on fact. When the findings are based on mis-reading or non-reading of evidence, and in case the order of the lower fora is found to be arbitrary, perverse, or in violation of law or evidence, This Court while exercising jurisdiction under Section 100 C.P.C. can exercise its jurisdiction as a corrective measure. If the error is so glaring and patent that it may not be acceptable, then in such an eventuality the High Court can interfere when the finding is based on insufficient evidence, misreading of evidence, non-consideration of material evidence, erroneous assumption of fact, patent errors of law, consideration of inadmissible evidence, excess or abuse of jurisdiction, arbitrary exercise of power and where an unreasonable view on evidence has been taken. No such avenues are open in this case as both the judgments are well jacketed in law. It has been held time and again by the Apex Court that findings concurrently recorded by the courts below cannot 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 committed.[1]

13. In light of the above discussion, the instant IInd Appeal is dismissed alongwith pending applications.

Karachi
Dated:12.02.2024

JUDGE

Aadil Arab

[1] Farhan Farooq v. Salma Mahmood (2022 YLR 638), Muhammad Lehrasab 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).