

*Order Sheet***IN THE HIGH COURT OF SINDH, KARACHI**

IInd Appeal No. 84 of 2023

[Mst. Baharat Korai and another v. Muhammad Younis]

Appellant	Through Mr. Muhammad Ahmed Laghari Advocate.
Respondent No.1	Through Mian Ashfaq Ahmed, Advocate
Respondents 2 & 3	Through Syed Arshad Hussain Naqvi, AAG Sindh
Date of Hearing & Order	13.03.2025

ARSHAD HUSSAIN KHAN, J. The appellant through instant second appeal has challenged the concurrent findings of the two courts below and sought the relief as follows:

- a) To admit this IInd Appeal for regular hearing;
- b) To Call for the Records and Proceedings of Civil Appeal No. 205/2021 from the Court of VII Additional District Judge Malir at Karachi, and Civil Suit No. 330/2016 from the Court of 1st Senior Civil Judge Malir at Karachi and after perusal thereof as well as hearing of the parties to set aside the impugned Judgment and Decree passed by the learned trial court as well as the Judgment and Decree dated 10-03-2023 passed by the learned appellate court and to remand the case back to the learned trial court with the directions to adjudicate and try the matter and decide the same on merits.
- c) To dismiss the Suit No. 330/2016 filed by the Respondent No. 1 as not maintainable in the eyes of Law.
- d) To suspend the operation of the impugned Judgment and Decree dated 13-12-2021 passed by the 1st Senior Civil Judge Malir at Karachi, in the Civil Suit No. 330/2016 till the final disposal of the instant appeal, because the Respondent No.1 and their agents are trying to dispossess the Appellants from the suit property.
- e) To grant the permanent injunction in favour of the Appellants and against the Respondent No.1, thereby restraining them, their agents, workers, employees, and/or anybody else working/acting for and on behalf of the Respondents from attempting to dispossess the Appellant from the suit property viz. House No. D-27, KESC No. 3455, Street No. 02, Block-D, Bhittaiabad District Malir, Karachi, and or creating their own or any third party interest till the final disposal of the appeal.
- f) Any other relief, which this Honorable Court may deem fit and proper be granted with the cost.

2. Briefly the facts of the case are that the respondent / plaintiff claims to be the owner of the property bearing house No.D-27, KESC No.3455, Street No.02, Block-D, Bhittaiabad, District Malir, Karachi [suit

property]. He contracted marriage with appellant No.1/defendant No.1 on 06.09.1990, however, after some time the said marriage could not last long and dissolved upon pronouncement of divorce by respondent No.1 on 31.12.2013. The respondent No.1 after contracting second marriage started residing in the suit property, which is owned by the respondent No.1. Subsequently, the appellants along with others dispossessed the respondent No.1 from the suit property. Consequently, the respondent No.1 after having failed to get the possession back filed civil suit No.330/2016, before Ist. Sr. Civil Judge Karachi [Malir] for **Possession**, with the following prayers:

- a) To restore the possession of the Plaintiff of suit property i.e House No.D-27, KESC No.3455, Street No.2, Block-D Bhittaiabad, District Malir, Karachi.
- b) Any other relief or relives which this Honourable Court deem fit and proper under the circumstances of the case.
- c) Saddle the cost of the suit.

Upon notice of the aforesaid suit the appellants / defendants filed their joint written statement and while denying the allegations of the plaint claimed the ownership of the suit property by virtue of *Hiba/Gift*, allegedly executed by respondent No.1.

The trial court after framing of the issues and recording of the evidence as well as hearing of learned counsel for the parties, **decreed the suit of the plaintiff as prayed with no order as to costs**. The aforesaid judgment and decree of the trial court were assailed before Additional District Judge-VII, Karachi [Malir] in Civil Appeal No.205 of 2021, which was dismissed; the judgment and the decree of the trial court were maintained, vide order of the appellate court dated **10.03.2023**. The appellant has challenged the above concurrent findings in the present appeal.

3. Learned counsel for the appellant, inter alia, has contended that the impugned judgments and decrees are not sustainable in the eye of law as the same are based on misreading, non-reading and without applying judicial mind. That both the courts below have badly failed to ascertain the facts and circumstances of the case and passed the judgments in hasty manner. Further contended that the suit property was gifted by respondent No.1 to appellant No.1 in presence of the whole family but due to uncertain situations appellant No.1 could not get registered the said *Hiba/Gift* in her

name. Subsequently, respondent No.1 became dishonest and filed civil suit and obtained the impugned judgments and decrees, which are liable to be set aside being arbitrary and unwarranted by law.

4. On the other hand, learned counsel for respondent No.1 while reiterating the contents of the Objections filed on behalf of respondent No.1 has contended that both the courts below after going through the entire material and evidence coupled with documentary evidence, available on the record as well as by discussing the entire evidence adduced by the parties in great detail, passed the judgments and decrees, which are perfect in all respect as such do not call for any interference by this Court in the present IInd appeal.

5. Heard learned counsel for the parties and perused the material available on the record.

Precisely, the case of the appellants is based on the *Hiba/Gift* allegedly executed by respondent No.1, however, she has failed to produce confidence inspiring evidence before the trial court to prove the said *Hiba/Gift* of the suit property in her favour.

It is a settled principle of law that a gift must be proved through clear, unambiguous, and convincing evidence, including proof of (i) offer, (ii) acceptance, and (iii) delivery of possession, as required under law. Mere assertion without cogent evidence does not establish a legal gift. Besides, *Hiba/Gift* exhibited in the evidence is an unregistered document, which is not admissible in the evidence.

From perusal of the judgments impugned in the present proceedings, it appears that both the courts below thoroughly examined the evidence and reached a concurrent conclusion that respondent No. 1 is the lawful owner of the suit property whereas the appellants failed to prove the said *Hiba/Gift* in her favour.

6. This is a Second Appeal, which has been filed under Section 100 C.P.C. Under Section 100 of the Code of Civil Procedure 1908 CPC a second appeal to the High Court lies only on any of the following grounds: (a) the decision being contrary to law or usage having the force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law; and (c) a substantial error or defect in the procedure

provided by CPC or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon merits. However, in the instant matter, none of the aforesaid grounds is involved. Besides above, on this point, the Hon'ble Supreme Court of Pakistan in the case of *Zafar Iqbal and others v. Naseer Ahmed and others* [2022 SCMR 2006] while interpreting the scope and ambit of section 100 of the CPC has observed as follows :

“The scope of second appeal is thus restricted and limited to these grounds, as section 101 expressly mandates that no second appeal shall lie except on the grounds mentioned in section 100. But we have noticed that notwithstanding such clear provisions on the scope of second appeal, sometimes the High Courts deal with and decide second appeals as if those were first appeals; they thus assume and exercise a jurisdiction which the High Courts do not possess, and thereby also contribute for unjustified prolongation of litigation process which is already choked with high pendency of cases”.

7. It is also well settled law that concurrent findings of facts by the courts below cannot be disturbed by the High Court in the second appeal, unless the courts below while recording the findings of fact have either misread the evidence or have ignored the material piece of evidence¹. Besides, the concurrent findings of fact recorded by the two courts below are entitled to deference and cannot be interfered with in the absence of any legal infirmity, jurisdictional error, or misreading of evidence. Learned counsel for the appellants have failed to point out any such material irregularity. Accordingly, in view of the above discussion, this second appeal is **dismissed** being devoid of any merit.

JUDGE

*Jamil**

¹ *Keramat Ali and another v. Muhammad Yunus Haji and another* (PLD 1963 SC 191), *Phatana v. Mst. Wasai and another* (PLD 1965 SC 134) and *Haji Muhammad Din v. Malik Muhammad Abdullah* (PLD 1994 SC 291).