

IN THE HIGH COURT OF SINDH AT KARACHI

IInd Appeal No. 91 of 2024

Present

Mr. Justice Muhammad Jaffer Raza

Abdul Quddoos & 2 other..... Appellants.

Versus

Khalid Yousuf Respondent.

Mr. Shahzad Mehmood, Advocate for the Appellants a/w

Mr. Mustafa Mamdani Advocate.

Mr. Faiz Durrani, Advocate for the Respondent.

Dates of Hearing: 14.03.2025, 24.03.2025 & 14.04.2025.

Date of announcement: 14.05.2025

J U D G M E N T

MUHAMMAD JAFFER RAZA – J: The instant Second Appeal has been filed by the Appellants against the conflicting findings of the learned Courts below, impugning the judgment and decree dated 23.09.2023 passed by the learned IX-Additional District Judge Karachi East, whereby the Civil Appeal No.203/2020 filed by the Respondent was allowed and the judgment and decree dated 24.11.2020 passed by the learned I-Senior Civil Judge Karachi East in Civil Suit No.43/2019, whereby the suit filed by the Plaintiff/Respondent was dismissed, was set aside and the suit was decreed.

2. Brief facts of the case are that the Respondent filed the above-mentioned Civil Suit for specific performance of contract, mandatory injunction, recovery of rent, possession and permanent injunction with the following prayers: -

“(a) To direct the Defendants to perform their part of the contract of Sale Dated 15.03.20 le. the booking and

purchase of the apartment bearing No. 603-A on 6th Floor, Elite Residency and Shopping Mall on a Plot of Land bearing NO. SB-33, in Block 13/D/2, situated in Gulshan-e-Iqbal, KDA, Scheme No. 24, Karachi, and execute its sub-lease in favor of the plaintiff.

- (b) To direct the defendants to handover vacant physical possession of the suit apartment to the plaintiff as referred in clause (a) hereinabove.
- (c) To restrain permanently, the defendants their representatives, attorneys and any person acting on their behalf from selling, alienating, transferring or creating a third party interest in the suit apartment as described in prayer clause (a) hereinabove, in any manner.
- (d) To direct the defendants to pay the sum of Rs.15000/- per month as rent of the suit apartment w.e.f. till the possession of the apartment is given by the defendants to the plaintiff.
- (e) Cost of the suit and / or any other relief, which this Hon'ble Court may deem fit and proper in the circumstances of the case may be granted."

3. Learned counsel for the Appellants has argued that the judgment of the learned Trial Court warranted no interference whilst the judgment and decree of the learned Appellate Court ought to be set aside, as the same is result of misreading and non-reading of evidence. He has further argued that certain observations by the learned Appellate Court against the judgment of the learned Trial Court are unwarranted. He has further contended that there was no privity of contract between the parties as the flat in question was booked by the deceased father of the Respondent. Learned counsel has further argued that the prayer of the Respondent in the above-mentioned Civil Appeal was restricted to remand of the case to the learned Trial Court, however, for the reasons best known to the Presiding Officer of the learned Appellate Court, the Impugned judgment was set aside and the above Civil Appeal was allowed vide Impugned judgment and decree. Learned counsel has further stated that his omission to step into the witness box as the Defendant in the suit, cannot be held against him, for the reason that the Respondent i.e. the Plaintiff in the said suit was burdened with proving his case on its own merits. The above noted omission ought not to be construed against the Appellants. He has further maintained that no plea has been

raised on behalf of the Respondent in reference to him being legal heir of his deceased father and neither have other legal heirs been impleaded as party in the said suit. He has therefore prayed that the instant appeal may be allowed and the suit of the Respondent mentioned above may be dismissed.

4. Conversely learned counsel for the Respondent has argued that the instant appeal is barred by limitation as it was filed 17 days after the prescribed period of limitation prescribed under Article 156 of the Limitation Act, 1908(**“Act 1908”**). He has further argued that it is admitted between the parties that a cheque for the amount of Rs.200,000/-, issued by the Respondent was deposited by the Appellant and the deposit of the said cheque established privity of contract between the parties. He has further argued that the contract has been completed and full and final sale consideration has been paid. Despite the above, the flat in question has been cancelled by the Appellants and third-party interest has been created thereon. No notice of such cancellation was ever served on the Respondent. He has further stated that the Respondent worked in USA and the booking form was in the name of his father. In this respect he has further averred that he made the entire payment of the sale consideration whilst he was abroad and the receipts issued by the Appellant only exhibited that there is privity of contract between the parties. He has relied upon Sections 37 and 39 of the Contract Act, 1872 (**“Act 1872”**), which are reproduced as under: -

- “37. *The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law. Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.*
39. *When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.”*

5. Further he has averred, that the Appellants omission to step into the witness box is fatal to their claim and the affidavit-in-evidence filed by the Appellants is a nullity in the eyes of the law as the Appellant was not subjected to

cross examination. He has made an attempt to show from the record that the Appellant was given several chances to appear for his cross examination, but the Appellant failed to do so and hence the version of the Appellant merits no consideration. He has lastly argued that scope of Section 100 C.P.C. is restricted and even though there are conflicting findings of the Courts below, the instant appeal ought to be dismissed with costs.

6. I have heard learned counsel for the parties and perused the record. Order 41, Rule 31 C.P.C. mandates an appellate court to determine points for determination, the decision on those points, and the reasons for the decision. The said principle was also expounded in the case of *Meer Gul vs. Raja Zafar Mahmood through legal heirs and others*¹. The points for determination are set out below: -

1. **Whether the instant appeal is barred by the law of limitation?**
2. **Whether there was any privity of contract between the parties?**
3. **Whether the Impugned judgment and decree suffer from infirmity and are liable to be set aside?**

7. My findings with reasons on the above points for determination are as follows: -

POINT NO:1.

8. The burden of this question lies primarily on the Respondent. The Respondent in this respect has stated that the Impugned judgment was passed on 23.09.2023 and the instant appeal was presented on 10.01.2024. In this respect learned counsel for the Respondent has stated that the instant appeal was preferred after the prescribed period of 90 days under Article 156 of the Act 1908. Therefore, the instant appeal was barred by 17 days.

9. Conversely learned counsel for the Appellants has stated that he applied for certified copy of the Impugned judgment and decree on 25.09.2023, cost of which was estimated on 29.09.2023. The copy was ready and supplied on 05.10.2023, therefore in that respect he has stated that only two days may be deducted after

¹ 2024 SCMR 1496

computation of time from 05.10.2023. He has further stated that the Court's Winter Vacations commenced from 25th December 2023 by which time, 85 days had passed and the instant appeal was presented on the first working day i.e. opening day of the Courts after vacations i.e. 10.01.2024, hence the instant appeal is not time barred.

10. I have examined the stamp of certified copy on the Impugned judgment and decree and agree with the contentions of the learned counsel for the Appellants. It is evident from the bare perusal of the above-mentioned Impugned judgment and decree that by 25.12.2023 85 days had lapsed and the appeal was presented on the first opening day of the Court after vacations. Therefore, I hold that the instant appeal is within time and point No.1 is answered in the Negative.

POINT NO:2.

11. The crux of the matter is encapsulated in the instant point for determination. I shall endeavor to examine whether there was privity of contract between the respective parties. The finding on this point will render all other controversies between the parties redundant.

12. I have heard the respective learned counsels and also perused the judgments of the Courts below. I have examined the receipts exhibited before the trial Court and the same bear the name of Muhammad Yousuf Shaheen, however, name of the Respondent/Plaintiff is written on certain receipts by hand. Further the admission of the Plaintiff during his cross-examination pertaining to the fact that he has not booked the flat in his name and booked it in the name of his father, is fatal to his claim. The relevant part of the cross examination of the Respondent is reproduced below: -

"It is correct that the suit flat is not booked in my name but voluntary says it was booked in the name of my father with the defendant. It is correct that I have not produced Power of Attorney of my father before filing this suit voluntary says the suit flat has been transferred in my name therefore I have filed this suit. It is correct that the receipts in respect to suit flat were issued in the name of my father voluntary says I was abroad and I used to send money to my father and he would pay the same therefore receipts were been issued initially in his name but after my arrival the suit flat were transferred in my name and later the receipts were also issued in my name. I

see the receipt the Exh-P/31, It is correct that the floor No 3 is mentioned therein voluntary says that the flat No. 606 is cited in said receipt but due to mistake the defendant has mentioned 3rd floor therein It is correct that I have not got corrected the 3rd floor into 6th floor in said receipt. It is correct that there is no sale agreement executed at between me and defendants. Voluntary says the defendants had issued allocation letter in my favor. It is incorrect that the defendants cancelled the allocation of suit flat of my father because we had not paid the total sale consideration to the defendants. Voluntary says we had paid total sale consideration to the defendants. It is incorrect that I have manipulated the receipts by overwriting in my name which were issued in the name of my father. It is incorrect that I am not entitled to suit flat. It is incorrect that I have filed this suit with malafide. It is incorrect that the suit flat is not possession of the defendants and they have transferred to third party. It is incorrect that I am deposing falsely.”(Emphasis added)

13. Further Plaintiff's witness namely Muhammad Ayaz stepped into the witness box and made certain admissions detrimental to the case of the Respondent. The said cross examination is reproduced below: -

“It is incorrect that I have not associated with the plaintiff to the office of defendant. It is correct that I was not with the plaintiff at the time of booking of suit flat. It is correct that no payment has been made between the parties in my presence. It is correct that all the receipt produced by the plaintiff except the receipt at Exh- P/31 the name of the father of plaintiff is lined/cut and over it the name of the plaintiff is mentioned. I do not know whether in receipt at Exh- P/31 3rd floor is mentioned. It is correct that the suit flat was allotted in the name of father of the plaintiff and such allotment has been cancelled. It is incorrect that the allotment was cancelled due to non-payment of sale consideration voluntary says that the suit flat was transferred in the name of plaintiff and the plaintiff has paid total sale consideration to the defendant. It is correct that I have deposed on the asking of plaintiff. It is incorrect that I deposed falsely.”
(Emphasis added)

14. I agree with the contentions of learned counsel for the Appellants that the party approaching the Court has to stand on his own legs and the burden is on the said Plaintiff to discharge the same. In this respect he placed reliance in the case of **Sultan Muhammad and another v. Muhammad Qasim and others**², wherein it was held as follows: -

“The above observations against Respondent No.1 are in line with the well recognized legal principle about the discharge of burden of proof that a party approaching the Court of law for grant of relief has to discharge its own burden and has to stand on its own legs to success, and no benefit of any weaknesses in the case of opposite party can be availed by him.”

² 2010 SCMR 1630

15. It is apparent from the perusal of the record that no Power of Attorney has been executed by the father of the Respondent in his favour. Further, the above-mentioned suit was not filed by the Respondent in his capacity as the legal heir of his deceased father.

16. The burden to prove the “*transfer*” in the name of the Respondent was squarely on the Respondent and such burden, it is held, was not discharged. The Respondent also made an attempt to improve/alter his case during the cross examination. The assertion regarding his work abroad and transfer of funds, does not find any mention in the plaint filed by the Respondent.

17. In that respect, it is held, that the Appellate Court has erred in its findings by setting aside the judgement of the Trial Court which is otherwise a speaking and well-reasoned judgment. The “*common practice*” referred to by the learned Presiding Officer of the Appellate Court in paragraph No.12 of the Impugned judgment is not a judicially noticeable fact in terms of Articles 111 and 112 of Qanoon-e-Shahadat Order, 1984. The “*common sense*” which the learned Appellate Court refers in the said paragraph has no legal or factual basis. Further, the learned Appellate Court has referred to “*sufficient evidence*” without referring to even an iota of evidence in paragraph 16 of the Impugned judgment. Additionally, the observation in the said paragraph regarding remand of the suit as prayed for and the observation that it would prejudice the interest of the Respondent, is unwarranted. The principle of the cause of action surviving in favour of the deceased is well founded, however, the same was not pleaded by the Respondent. Neither did the Plaintiff file the suit claiming that he was the benami owner of the subject flat.

18. In the same vein, it is imperative to note that in paragraph number 16 of the Impugned judgment the learned Appellate Court has held that the Respondent ought to have a filed suit, seeking a declaration that he was the owner of the subject flat. Thereafter, learned Appellate Court has allowed the appeal and decreed the suit of the Respondent as prayed. Therefore, it is held in reply to point No.2

that there was no privity of contract between the parties and hence the point is answered in Negative.

POINT NO.3.

15. I am mindful of scope of Section 100 C.P.C. The principles pertaining to the said section have been expounded in several judgments of the Hon'ble Supreme Court and it is held that the instant appeal falls well within the narrow scope outlined by the Hon'ble Supreme Court in the case of **Sheikh Akhtar Aziz Versus Mst. Shabnam Begum and others**³ wherein it was held as under: -

“14. As far as the argument of the learned counsel for the appellant that the learned High Court had travelled beyond the parameters of section 100, C.P.C., the same in the facts and circumstances of the case has been found by us to be totally misconceived. Although in second appeal, ordinarily the High Court is slow to interfere in the concurrent findings of fact recorded by the lower fora. This is not an absolute rule. The Courts cannot shut their eyes where the lower fora have clearly misread the evidence and come to hasty and illegal conclusions. We have repeatedly observed that if findings of fact arrived by Courts below are found to be based upon misreading, non-reading or misinterpretation of the evidence on record, the High Court can in second appeal reappraise the evidence and disturb the findings 52019 SCMR 524 9 which are based on an incorrect interpretation of the relevant law. We have examined the record and found that the issues have not properly been determined by the lower fora and there are material and substantial errors and defects in the reasoning and conclusions drawn by the trial as well as the first appellate Court which materially affected the outcome of the case on merit. The High Court was therefore, in our opinion, quite justified in interfering with this matter and correcting the errors of the lower fora in order to do complete justice.” (Emphasis added)

16. The learned counsel for the Appellant has successfully made out a case for interference. For the foregoing reasons the instant appeal is allowed. The Impugned judgment and decree is set aside and consequently the suit of the Respondent stands dismissed with no order as to costs. The pending application(s) are disposed of accordingly.

J U D G E

Nadeem Qureshi “PA”

³2019 S C M R 524