

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
IInd Appeal No.116 of 2024

Date	Order with Signature of Judge
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Mst. Shamsbad and othersAppellants

Versus

Abdullah Khokbar and anotherRespondent No.1s

Date of hearing :29.05.2025

Date of announcement of order :29.05.2025

M/s. Sawan Meghwar & Pervaiz Ahmed Bhatti, Advocates for the Appellants.
Mr. Mursleen Khan, Advocate for the Respondent No.1.
Ms. Deebea Ali Jaffri, AAG.

J U D G M E N T

1. Instant IInd Appeal has been preferred by the Appellants against the Impugned judgment and decree dated 29.09.2024 and 05.03.2024 respectively, passed by the VII-Additional District Judge, Karachi South, in Civil Appeal No.147 of 2023. The above-mentioned Civil Appeal emanated from the judgment and decree dated 11.10.2023 passed in Civil Suit No.239/2020, which was filed by the Respondent No.1 for declaration, possession, cancellation of sale deed, recovery of lease deed and mesne profits and permanent injunction with the following prayers: -

- “A) Declaration to the effect that the Plaintiff is lawful owner/ lessee of suit Property ie. House on plot No. 139-D/3 Sheet No.K7-B, (old No. 1407), measuring 90 Square yards, situated in Agra Taj Colony, Karachi and the Defendants No.1 to 3 have no concern with it and they got Sale deed dated 28.8.2019 in favour of defendant No.1 and 2 regarding 45 Sq. yds. of suit property by fraud and misrepresentation which is null & void and liable to be cancelled.
- B) To cancel the Sale deed dated 28.8.2019 caused to be executed from the plaintiff by the defendants No.1 to 3 in name of defendant No.1 & 2 in the office of Sub-Registrar (defendant No.4) in respect of half Portion i.e. 45 Square yards of suit

Property House on plot No 139-D/3 Sheet No K7-B, (old No. 1407), measuring 90 Square yards, situated in Agra Taj Colony, Karachi as this document was executed from plaintiff by fraud/misrepresentation and Defendant No.4 may be directed to cancel it in his office record as well.

C) A Decree of Possession directing the Defendant No. 1 &2 or any other person or persons occupying on their behalf to vacate suit Property/House on plot No. 139-D/3 Sheet No.K7-B, (old No.1407), measuring 90 Square yards, situated in Agra Taj Colony, Karachi and hand over the physical possession of the same to the plaintiff and also to pay the mesne profits of the same @ Rs. 10,000/-p.m. since 28.8.2019 till realization of the possession.

D) To direct the defendants No.1 to 3 to return the Original Lease deed of plaintiff in respect of his Suit Property, which was obtained from him by them by fraud.

E) A Permanent injunction, thereby restraining Defendants, their men, agents, officials, representatives, or any other person or persons, acting on their behalf or under their authority, not to sell, transfer, mutate, or create any third party interest in the suit Property / House on plot No.139-D/3 Sheet No.K7-B, (old No.1407), measuring 90 Square yards, situated in Agra Taj Colony, Karachi in any manner without due course of law,

F) Costs of this suit;

G) Any other / further relief which this Hon'ble Court may deem fit and proper;”

2. The above noted suit filed by the Respondent No.1 was decreed vide judgment dated 11.10.2023. Thereafter, the present Appellants filed the above noted Civil Appeal, which was dismissed vide Impugned judgment and decree mentioned above. Learned counsel for the Appellants has therefore impugned the concurrent findings of the Courts below.

3. Learned counsel for the Appellants has contended that earlier the suit was filed on behalf of Respondent No.1 bearing Suit No.239/2020 pertaining to the sale deed executed by Respondent No.1 in favour of the Appellants No.1 & 2, being unmarried sisters of the said Respondent. Learned counsel has further stated that said sale deed was duly registered under the relevant provisions of the Registration Act, 1908, and the suit was filed only 6 months after the sale deed was registered in favour of the Appellants identified above. He has further contended that there is a presumption of genuineness attracted to a registered

instrument, which has not been appreciated by the Courts below. He has averred that in reference to prove the execution of his Sale Deed he produced the attesting witnesses of the said instrument, namely, Zafar and Haris, who appeared before the learned trial Court and recorded their respective testimony in favour of the above Appellants. He has further argued that the issue was wrongly framed by the trial Court, consequently the burden was placed entirely on the above noted Appellants. Therefore, both the orders of the Courts below require interference of this Court and the suit as framed, is liable to be dismissed.

4. Conversely, learned counsel for the Respondent No.1 has stated that the execution of the above noted Sale Deed was a result of fraud and misrepresentation. He has not denied the visiting of the office of the Registrar; however, he has denied the execution of the Sale Deed in question. He has categorically stated that he was misrepresented by his own family members and due to his advanced age, he could not comprehend the said fraud being perpetrated on him. He has further contended that the Registrar in the instant case was made a party, however, he was proceeded against ex-parte as he did not make appearance before the learned trial Court. He has also pointed out that certain discrepancies in registration of the Sale Deed, which according to him, reflect that the Sale Deed was result of fraud and misrepresentation. He has further argued that there are concurrent findings of the Courts below, which require no interference of this Court under Section 100 CPC.

5. I have heard the learned counsels for the respective parties and perused the record. More particularly, I have perused the judgment of the learned trial Court and the issues framed vide order dated 29.05.2021. The said issues need no reproduction for the sake of brevity. However, it is specifically noted that the crux of the matter was codified in issues No.5 & 6. The same are reproduced below: -

“5. Whether the signature of plaintiff were obtained by defendants No.1, 2 and 3 with false pretext and then obtained his original lease deed for showing it before some officers in connection with the execution of certain tenancy/rent agreements?

6. Whether on 28.08.2019 the defendants No.1, 2 and 3 brought the plaintiff in office of defendant No.4 with false pretend and by

fraud and misrepresentation obtained his sign/T.I. on a sale deed?”

6. I have perused the finding on issue No.5 & 6 in which the burden has been placed on the present Appellants, who were the defendants in the above noted suit. It is specifically held that it is trite law that the burden of proof under Article 117 of the Qanoon-e-Shahadat Order, 1984 (**“Order”**) is on the party who wishes to assert a fact. Moreover, the test for burden of proof has been laid down very clearly under Article 118 of the Order. The test as laid down is that if no evidence is given on either side, whoever case would fail the burden is said to be on that party. Application of the test to the facts of the present case, would reveal that burden ought to have been placed on Respondent No.1. Therefore, it is specifically held that the learned trial Court incorrectly and disproportionately placed the burden of proof of the above noted issues on the present Appellants.

7. Further, a specific allegation was made in reference to fraud and misrepresentation, which was also noted specifically in issue No.6 and agitated by the Respondent No.1 in paragraph No.8 of his plaint. Perusal of the finding on the said issue would reveal that there was no adjudication on fraud and misrepresentation by the learned trial Court. The burden of issue No.5 as noted above was incorrectly placed on the Appellants No.1 & 2.

8. It is further held, that the criteria for fraud and misrepresentation and subsequent cancellation under Section 39 of the Specific Relief Act is high and the burden of the same can only fall on the party, who wishes to assert the same. The present case the party seeking cancellation and alleging fraud and misrepresentation was Respondent No.1 on whom the learned trial Court placed no burden whatsoever. Instant suit was decreed in favour of the present Respondent No.1, primarily for the reason that the present Appellants could not prove any sale consideration pursuant to the Sale Deed mentioned above. In essence it is held that the learned trial Court erroneously placed the burden on the present Appellants and inevitably rendered a finding which is not sustainable in law. Thereafter, the learned Appellate Court without deeply examining the

misplaced burden of the learned trial Court went on to concur with the findings of the learned Trial Court without any regard or reference to the provisions of Order VI Rule 4 CPC. The said provision is reproduced below: -

“4. Particulars to be given where necessary- In all cases which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items of necessary) shall be stated in the pleading.”

9. Relying on the provision noted above the Hon’ble Supreme Court in the case of **Aamir Afzal and another Versus S. Akmal (deceased) through L.Rs. and 2 others**¹ expounded the onus of proving fraud in the following words: -

“In the opinion of the High Court, the onus of proving the execution of the Memorandum was on the appellants and they had failed in discharging such onus. It is noted that rule 4 of order VI of the C.P.C. explicitly provides that in all cases in which the party pleading relies, inter alia, on fraud, shall state in the pleadings particulars with dates and items if necessary. It is settled law that the parties are required to plead all facts that may constitute a cause of action for any relief or in defence, as the case may be. A party which alleges a fact has to prove the same and the ingredients of fraud have to be narrated and stated by giving particulars thereof. It is settled law that fraud must be specifically alleged and its particulars unequivocally stated. This Court has consistently held that general allegations, however strong the words may be, are insufficient to constitute an assertion of fraud and that vague allegations in a plaint are not enough.”

10. A similar view was taken in the case of **Taj Muhammad Khan through L.Rs. and another Versus Mst. Munawar Jan and 2 others**² wherein it was held as under: -

“6. The petitioners had challenged the mutations taking a specific stance that the transactions were based on fraud, misrepresentation. Order VI, rule 4, of the Code of Civil Procedure provides that & in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items necessary) shall be stated in the pleadings; The plaintiffs/petitioners in paragraph No.6 of the plaint had specifically taken the plea of fraud, misrepresentation, fabrication but

¹ 2024 S C M R 1649

² 2009 S C M R 598

have neither mentioned the ingredients of fraud nor led any evidence to prove as to how the defendants/respondents committed fraud with them.”

11. The present adjudication will be incomplete without reference to Article 79 of the Order. The said provision requires the proof of a document required by law to be attested by bringing two attesting witnesses, at least. The scheme of the said Article envisages that the requirement of the attesting witnesses is lifted in cases where the document is registered. However, the said requirement is not dispensed with in cases where a registered instrument is “*specifically denied*”. Without referring to the said requirement, suffice it to say that the present Appellants produced the two attesting witnesses who as noted above, gave testimony in favour of the said Appellants.

12. The scope of Section 100 has been expounded in several judgements. For the present purposes I am placing reliance on 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 came 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)

13. The instant appeal falls within the narrow parameters outlined above. Accordingly, instant 2nd Appeal is allowed. The Impugned judgment and decree are set-aside. Consequently, Suit of the Respondent No.1 stands dismissed with no

³ 2019 S C M R 524

order as to cost. The status quo prevailing at the time of filing of the Suit shall be restored within thirty (30) days from today.

JUDGE

Nadeem