

IN THE HIGH COURT OF SINDH AT KARACHI

IInd Appeal No. 74 of 2018

Present

Mr. Justice Muhammad Jaffer Raza

Brig (Rtd.) Raja Muhammad Saleem Khan..... Appellant.

Versus

Mrs. Nabeela Azam Respondent.

Khawaja Naveed Ahmed, Advocate for the Appellant.

Mr. Salman Javed Mirza, Advocate for the Respondent.

Dates of Hearing: 24.03.2025 & 18.04.2025.

Date of announcement: 28.04.2025

J U D G M E N T

MUHAMMAD JAFFER RAZA – J: The instant second appeal has been filed under Section 100 CPC impugning the Judgment and decree dated 28.02.2018 in Civil Appeal No.176/2016. Brief facts of the case are as follows:

2. Suit No.646/2003 was filed by the Appellant with the following prayers: -

“(a) For Judgment & decree directing the Defendant and all persons claiming through and/or under the Defendant to hand over and deliver vacant physical possession the Property to the Plaintiff and for a decree for payment of Rs.720,000/- as mesne profits for unauthorized and wrongful use and occupation of the Property by the Defendant for the period 09.02.1992 up to the date of institution of the suit and a further sum of Rs.15,000/= per month as mesne profits from the date of institution of this suit till recovery of possession of the Property.

(b) For costs.

(c) For any other relief that this Honourable Court may deem fit and proper in the circumstances of the case.

3. The said suit was dismissed vide Judgment dated 09.11.2016. Thereafter, the above-mentioned Civil Appeal was filed, which was also dismissed vide Impugned Judgment dated 28.02.2018. Learned counsel for the Appellant has impugned the concurrent findings of the learned Courts below.

4. Learned counsel for the Appellant has argued that agreement to sell was executed between the parties on 11.05.1988 and the possession of the subject property was handed over to the Respondent, however, the agreement to sell could not be materialized into transfer of the property in favour of the Respondent due to the fact that NOC from GHQ was not issued. Learned counsel has stated that the contract can be classified as a “contingent contract” under Section 31 of the Contract Act 1872 (**“Contract Act”**) as the transfer was contingent upon the grant of NOC. Learned counsel has further contended that the Appellant made efforts to obtain the NOC from GHQ but the said efforts proved to be unproductive. Thereafter, the Appellant vide notice of cancellation dated 09.02.1992 informed the Respondent that contingency mentioned above could not be fulfilled. Subsequently, the Appellant filed a suit in the year 1998 bearing Suit No.679/1998 (new number 646/2003). Learned counsel has further conceded to the proposition that the policy regarding issuance of NOC was subsequently changed. However, in this regard he has stated that the policy was changed many years after the above cancellation notice was sent and received by the Respondent. He has maintained that the Respondent is enjoying possession of the subject property without any payment of rent or title documents in her favour. Learned counsel has stated that another suit bearing No.743/1992 was filed by the Respondent seeking specific performance of the above mentioned sale agreement. The said suit was dismissed for non-prosecution therefore the Respondent has no claim over the subject property. Lastly, he has argued that the Respondent in an effort to create hurdles in the instant second appeal according to learned

counsel for the Respondent, has filed suit No.1371/2021 with the following prayer:

“(i) Possession of the property.

(ii) mesne profits in the sum of Rs.10,000/= per month from the Defendant for unauthorized and wrongful use and occupation of the property for the period 09.02.1992 up to the date of institution of the suit and a sum of Rs.15,000/- per month as mesne profits from the date of institution of this suit until rec overy of possession of the property.”

5. Conversely, learned counsel for the Respondent has argued that the instant appeal has been filed against concurrent findings of the learned Courts below and the same require no interference. Learned counsel has further stated that the scope of Section 100 CPC is very circumscribed and this Court cannot reexamine and reappraise the exercise which has already been conducted by the Courts below. Learned counsel has further argued that only a suit for possession was filed by the Appellant and cancellation of the said agreement to sell was not sought, presumably for the reason that period of limitation for seeking cancellation had expired. Therefore, the Appellant was left with no option but to file suit for possession. The said suit, according to the learned counsel for the Respondent, is groundless for the reason that no prayer for cancellation of sale agreement has been made and the Respondent is enjoying possession of the subject property pursuant to the sale agreement mentioned above. He has further argued that suit No.1371/2021 is still pending adjudication and during the pendency of the above-mentioned suit the question regarding possession of the Appellant does not arise. It is further argued that 95% of the sale consideration has already been paid. Learned counsel for the Respondent has stated that the Respondent is willing to pay the remaining 5% sale consideration in order for the Appellant to execute the necessary title documents in her favour after adjustment of inflation. He has further averred that time was not the essence of the contract and there is no

impediment in executing title documents in favour of the Appellant. Lastly, he has argued that under Section 53-A of the Transfer of Property Act, 1882 (“Act”) his possession cannot be disturbed. Learned counsel has relied upon the following judgments: -

- *Sharif Ahmed Qureshi v Wing Cdr. (R) Mazhar Mirza and 7 others*¹
- *Syed Hakeem Shah (Deceased) through LRs and others v Muhammad Idrees and others*²
- *Sardar Arshid Hussain and others v Mst. Zenat Un Nisa and another*³
- *Muhammad Nawaz Magsi v Haji Illahi Bux and others*⁴
- *Fazla v Mehr Din and 2 others*⁵
- *Hikmat Khan v Shamsur Rehman*⁶
- *Mst. Farha Zafar v Major (R) Wasim Pasha Tajammul and others*⁷
- *Samiul Haq v Dr. Maqbool Hussain Butt and others*⁸

6. In compliance of the mandatory provisions of Order XLI Rule 31 CPC as expounded in the case of *Meer Gul vs. Raja Zafar Mehmood through legal heirs and others*⁹, points for determination are set out as follows:

1. Whether the suit for possession bearing No.646/2003 could have been decreed in the favour of the Appellant and in the absence of the prayer made for cancellation of agreement to sell?
2. Whether the possession can be retained by the Respondent under Section 53-A of the Transfer of Property Act, 1882?

¹ 2022 YLR 572 [Sindh]

² 2017 SCMR 316

³ 2017 SCMR 608

⁴ 2010 CLC 407 [Karachi]

⁵ 1997 SCMR 837

⁶ 1993 SCMR 428

⁷ Suit No.1763 of 2014

⁸ 2001 SCMR 1053

⁹ 2024 SCMR 1496

3. Whether the Impugned Judgment(s) and decree(s) require any interference?

7. I have heard the learned counsel and perused the record. The above-mentioned points for determination are answered as follows:

POINT NO.1.

8. It is admitted between the parties that the sale agreement was executed on 11.05.1988 and thereafter no transfer had taken place in favour of the Respondent. Counsel for the Appellant has admitted to the receipt of approximately 95% of the sale consideration, however, he has most vehemently argued that this was a contingent contract and he is entitled for the possession of the subject property for the reason that the said contingency was not met. I have asked the learned counsel specifically why he has not sought cancellation of the above-mentioned sale agreement. The learned counsel in this regard has stated that his client at the time of filing the above suit had presumed that the notice for cancellation was sufficient for the said purpose and therefore there was no need for filing suit for cancellation under Section 39 of the Specific Relief Act, 1877. I agree with the contention of the learned counsel for the Respondent that the possession being sought by the Appellant is without any ground or justification as the said possession cannot be granted in the absence of a prayer for cancellation. Valuable rights in favour of the Respondent have already accrued for the reason that significant percentage of the sale consideration has already been paid to the Appellant. At this juncture it will be imperative to examine terms 1 and 4 of the agreement to sell which read as follows: -

“(1) That the vendor is the owner of the said Apartment seized and possessed of the same having acquired the same as aforesaid and is otherwise fully competent to sell and alienate the same in favour of the vendee.

(4) That as part performance of this agreement the vendor has handed over vacant possession of the said apartment to the vendee.”

9. It is evident from the bare perusal of the terms reproduced above that the Appellant parted with possession of the subject property pursuant to the agreement to sell and at this stage cannot make a claim for possession of the same, unless the above-mentioned agreement is cancelled by a court of competent jurisdiction. Therefore, I hold that the suit of the Appellant was rightly dismissed by the learned Courts below and in this regard no case for interference has been made out.

POINT NO.2.

10. Prior to delineating on this point, it would be relevant to reproduce Section 53-A of the Act, as follows: -

“[53-A.Part performance.— Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof or the transferee, being already in possession continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.]”

11. It has already been noted above that the Appellant parted with the possession of the subject property pursuant clause 4 of the agreement to sell. Evidence has also been led to substantiate the possession and the same is also not denied by the Appellant. It is a well settled principle of law that possession of a property in part performance of a contract can only be used as a shield

and not as a weapon of offense¹⁰. In the instant suit the Respondent has correctly invoked the provisions of Section 53-A of the Act to safeguard his possession and the same offers the Respondent a complete defense against the suit filed by the Appellant. It was held in the case of **Hikmat Khan** (supra) as under: -

*“There can be no cavil with the proposition that an unregistered document if it is compulsorily registrable under the Registration Act, cannot create title. However, section 53A of the Transfer of Property Act, which is an exception, confers right on a person, who is holding possession of the property under an unregistered written document which required compulsory registration, to protect his possession against the vendor and all persons acting through or under him. It is true that section 53A of the Transfer of Property Act cannot be utilized by a person in possession of immovable property under an unregistered document which is compulsorily registrable under the Registration Act, as an weapon of offence to assert his title over the property but it is undoubtedly a complete defence in answer to a claim of possession by the vendor or any other person claiming through or under him. The case of *Habibur Rehman v. Mst. Wahdania* (PLD 1984 SC 424) referred by the learned Single Judge in the impugned judgment is quite distinguishable. In that case the appellant who claimed to have acquired the title in respect of an immovable property under an unregistered document which was compulsorily registrable under the Registration Act, had sought declaration in a suit with regard to his title to the property. It was in these circumstances that this Court observed in the above case that the appellant could not claim title to the property on the basis of an unregistered document on the strength of section*

53A of the Transfer of Property Act.

*In the case before us, the appellant had pressed into service the equitable provisions of section 53A of the Transfer of Property Act in his defence to protect his possession over the suit property which he admittedly acquired on the basis of the unregistered deed executed by the previous owner in his favour before the alleged execution of the registered sale deed in favour of respondent. In these circumstances, the following principles laid down by this Court in the case of *Taj Muhammad v. Yar Muhammad Khan* 1992 SCMR 1265 were attracted:*

‘Section 53A of the Transfer of Property Act enunciates equitable principle to protect the rights of such purchasers who have entered into agreement and in pursuance thereof obtained the possession of the immovable property and have further either performed their part of the agreement or are agreeable to perform the same. In such circumstances, mere nonregistration of a deed which requires registration under section 17 of the Registration Act, will not deprive him of the benefit which he

¹⁰ Syed Athar Hussain Shah versus Haji Muhammad Riaz 2022 SCMR 778

is entitled to protect by virtue of section 53-A of the Transfer of Property Act. It is true that section 53-A does not confer or create any right but it provides a defence to a transferee to protect his possession’.” (Emphasis added)

12. The judgement in the case of **Syed Hakeem Shah** (supra), illuminating further the concept of possession under the above-noted provision, cited with approval the judgment in the case of **Muhammad Nawaz Magsi v. Illahi Bux**¹¹ wherein it was held as under: -

“Section 53-A of Transfer of Property Act in itself creates a right in favour of a transferee to retain possession. Such right comes into existence when transferor puts the transferee in possession in part performance of the contract. The right created by section 53-A in favour of the transferee in possession could be termed as an equitable title which he holds in the property. Hence where a transferee is enjoying possession of a property pursuant to an agreement to sell and such right is threatened by the transferor or a person claiming under him or even by a stranger then the transferee becomes entitled to defend his existing right in a Court of law. While defending so it matters not whether he goes to the Court as a plaintiff or is sued as a defendant. Normally suit is filed against the transferee in possession either by the transferor or a person claiming under him which threatens the transferee his enjoyment of possession. Faced with such a situation, the transferee in possession defends his possession by virtue of section 53-A of the Transfer of Property Act.” (Emphasis added)

13. In light of the dicta laid down in the judgments cited above it is held that the under equitable principles the Respondent is entitled to retain her possession. In the given circumstances her possession is a complete defense to the suit filed by the Appellant which was rightly dismissed by the courts below.

POINT NO.3.

14. The limited parameters of Section 100 CPC are well known and were expounded recently by the Honorable Supreme Court in the case of **Zafar Iqbal and others Versus Naseer Ahmed and others**¹² wherein it was held as under: -

¹¹ 2010 CLC 407

¹² 2022 SCMR 2006

“8. At the very outset, we observe that the High Court hearing a second appeal, in the present case, has re-read and re appraised the evidence of the parties in the way a first appellate court does, without realizing the distinction between the scope of the first appeal and the second appeal. Under section 100 of the Code of Civil Procedure, 1908 ("C.P.C."), 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 C.P.C. 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. 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.

9. No doubt, the expression "law" used in the phrase "the decision being contrary to law" in the ground (a) mentioned in section 100 of the C.P.C. is not confined to "statutory law" only, but also includes the "principles of law" enunciated by the constitutional courts, which have the binding force of law under Articles 189 and 201 of the Constitution of the Islamic Republic of Pakistan 1973. And, it is an elementary principle of law that a court is to make a decision on an issue of fact on the basis of legally relevant and admissible evidence available on record of the case, which principle is also incorporated in the statutory law, that is, the first proviso to Article 161 of the Qanun-e-Shahadat Order 1984. The said proviso states in unequivocal terms that a judgment must be based upon facts declared by the Qanun-e- Shahadat Order to be relevant and duly proved.

10. The decision of a court is, therefore, considered "contrary to law" when it is made by ignoring the relevant and duly proved facts, or by considering the irrelevant or not duly proved facts. The expressions "relevant evidence" and "admissible evidence" are often used interchangeably, in legal parlance, with "relevant facts" and "duly proved facts" respectively, and a decision is said to be "contrary to law" and is open to examination by the High Courts in second appeal when: (i) it is based no evidence, or (ii) it is based on irrelevant or inadmissible evidence, or (iii) it is based on non-reading or misreading of the relevant and admissible evidence. A decision on an issue of fact that is based on correct reading of relevant and admissible evidence cannot be termed to be "contrary to law"; therefore, it is immune from scrutiny in second appeal. A High Court cannot, in such case, enter into the exercise of re-reading and re-appraisal of evidence, in second appeal, and reverse the findings of facts of the first appellate court, much less the concurrent findings of facts reached by the trial court as well as the first appellate court. It has, in second appeal, no jurisdiction to go

into the question relating to weightage to be attached to the statements of witnesses, or believing or disbelieving their testimony, or reversing the findings of the courts below just because the other view can also be formed on the basis of evidence available on record of the case.”
(Emphasis added)

15. The learned counsel for the Appellant has failed to identity any substantial error in the Impugned Judgement. In light of what has been held above no case for interference in the Impugned Judgment(s) and decree(s) is made out. Accordingly, the instant appeal is dismissed with no order as to costs.

Office to prepare such decree in the above terms.

J U D G E

Nadeem Qureshi “PA”