

JUDGMENT SHEET
HIGH COURT OF SINDH, KARACHI
High Court Appeals Nos. 74 & 75 of 2016

Present:- Mr. Justice Munib Akhtar
Mr. Justice Muhammad Humayon Khan

APPELLANT : Mrs. Latifa through Mr. Aziz-ur-Rehman Akhund alongwith Mr. Khalid Shah, Advocates

RESPONDENT : Moiz Abbas through Mr. Muhammad Mushtaq Qadri, Advocate

DATES OF HEARING : 10.05.2017

DATE OF JUDGMENT : 12.05.2017

J U D G M E N T

Muhammad Humayon Khan, J: We intend to decide both the appeals by this Single Judgment as the appeals are filed against the Single Judgment dated 09.02.2016 passed by the learned Single Judge in Suit Nos.429 of 2005 and 115 of 2006, whereby the learned Single Judge decreed Suit No. 429 of 2005 (out of which HCA No.74 of 2016 arises) filed by the Respondent Moiz Abbas against the Appellant for declaration, permanent injunction, possession and mandatory injunction and dismissed Suit No.115 of 2006 (out of which HCA No.75 of 2016 arises) filed by the Appellant Mrs. Latifa against the Respondent for specific performance, cancellation of deed and permanent injunction.

2. The facts of the matter for the disposal of these appeals are that the Respondent filed Suit No.429 of 2005 against the Appellant for declaration, permanent injunction, possession and mesne profit. The case pleaded in the plaint is that the Respondent is the owner of House bearing Plot No.A-167, Block-C, North Nazimabad, Karachi, admeasuring about 208 square yards consisting of ground plus one story (hereinafter referred to as “the suit property”) having purchased the same through sale deed dated 29.02.1981, wherein the Respondent alongwith his family was residing. In 1981, the Respondent left for USA and locked the suit property which was fully furnished and asked his sister Sakina wife of Abbas Abdul Qadir (the other Respondent in HCA No.75 of 2016) to look after the suit property. In November, the Respondent was informed by sister Sakina on telephone that the Appellant by deceitful means entered into the suit property and accordingly the Respondent immediately communicated with the highest authority to eject the Appellant from the suit property but could not get any result. Since the Respondent was in USA, the Appellant took undue advantage of the absence of the Respondent and put pressure on his sister Sakina by various means to grab the suit property. The Respondent rushed to Karachi in March 2004 to safeguard his interest and to get the Appellant ejected from suit property. When the Appellant refused to hand-over possession of the suit property, the Respondent served the Appellant with legal notice in October 2004, which was replied to by the Appellant vide reply dated 30.10.2004, wherein the Appellant set up a false story that there was an oral sale agreement between the Appellant and Sakina, sister of the Respondent though Sakina had no power and authority to enter into any

transaction. In the end, the Respondent prayed for the following reliefs in the said suit:-

- a) To direct the Defendant to hand over the vacant peaceful possession of the suit property bearing No. A-167, Block “C”, North Nazimabad, Karachi to the Plaintiff who by way of title deed is exclusive and legal owner of the suit property.
- b) Injunction be issued against the Defendant restraining from creating third party interest in the property or handing over possession or transferring in any way and in any manner the suit property bearing No. 167, Block “C”, North Nazimabad, Karachi.
- c) Judgment and decree for Rs.14,40,000/- mesne profit for illegal use and occupation with effect from December 2000 till filing of the suit and further mesne profit till the delivery of the possession is given by the Defendant of the suit property to the Plaintiff.
- d) Cost of the suit.
- e) Any other relief or relieves which this Honourable Court may deem fit and proper.

3. In the said Suit No. 429 of 2005, the Appellant filed her written statement wherein it is pleaded that only ground floor was constructed by the Respondent and the Appellant constructed the first floor of the suit property under the authority and consent of Respondent through his sister Mst. Sakina during July 2002 to March 2003 upon payment of Rs.19,50,000/- through cheque dated 02.05.2002 to Mst. Sakina which was encashed by her being sale consideration of the suit property and Mst. Sakina handed over vacant and peaceful possession of the suit property to the Appellant. The Respondent himself visited Pakistan in October 2000 and executed Special

Power of Attorney dated 27.10.2000 in favour of his sister Mst. Sakina. In the end, the Appellant prayed for the dismissal of the said suit.

4. Subsequently, the Appellant filed Suit No.115 of 2006 against the Respondent and her sister Mst. Sakina (but it was contested only by the Respondent) for specific performance, cancellation of deed and permanent injunction. The case pleaded in the plaint is that the Respondent was the owner of single storied house (the suit property). In October 2000, the Respondent came to Pakistan and negotiated for sale of the suit property with the Appellant through her brother Asghar Ali. Consequently, an oral agreement for sale of the suit property was arrived between the Respondent and the Appellant through her brother Asghar Ali for total sale consideration of Rs.20,00,000/- and the Appellant paid to the Respondent the sum of Rs.50,000/- in cash as earnest money and balance sale consideration of Rs.19,50,000/- was agreed to be paid to the sister of the Respondent Mst. Sakina at the time of execution of sale deed. Since the Respondent was to go back to USA urgently, he executed a Special Power of Attorney dated 27.10.2000 in favour of his sister Mst. Sakina for his properties in Pakistan and promised to send General Power of Attorney from USA in the name of his sister to finalize the sale transaction and to execute the Deed of Conveyance in favour of the Appellant. In pursuance of the said oral sale agreement, Mst. Sakina received from the Appellant the total balance sale consideration of Rs.19,50,000/- through cheque No.10457852 dated 02.05.2002 issued in favour of Mst. Sakina, who encashed the said cheque. With a view to secure the Appellant towards payment of the balance sale consideration, Mst. Sakina being the attorney of the Respondent executed a

Tenancy Agreement dated 02.05.2002, wherein, Mst. Sakina acknowledged the receipt of Rs.19,50,000/-. Since the Respondent failed to send the power of attorney in favour of his sister authorizing her to execute the sale deed in favour of the Appellant, the Appellant pressed Mst. Sakina to hand over physical possession of the suit property with permission to carry out necessary repairs and renovation of the ground floor and to construct first floor. Consequently, Mst. Sakina handed over physical and vacant possession of the suit property to the Appellant, who thereafter engaged M/s. A.A. Associates, building contractors, to carry out renovation work of the ground floor and to construct first floor, who started the work in July 2002 and completed in March 2003 and the Appellant paid the total bill of Rs.19,81,408/- to the said contractor. On account of additional construction, the Excise and Taxation Department reassessed the GARV of the suit property. Since the occupation of the suit property, the Appellant has been paying property tax, water and conservancy tax, electricity bills, gas bills and telephone bills. In spite of repeated requests and reminders, the Respondent failed to execute the necessary deed of conveyance in respect of the suit property in favour of the Appellant. In the end, the Appellant prayed for the following reliefs in the said suit:-

- a) That is be declared that by payment of the sum of Rs.50,000/- in cash to the Defendant No.1 in October 2000, and payment of Rs.19,50,000/- to the Defendant No.2 towards sale consideration on 02.05.2002 by the Plaintiff and after incurring expenses approx. Rs.20,00,000/- on the renovation and construction of the first floor of the house in question after taking over vacant possession of the house in question and authority given by the Defendants to construct first floor, the Plaintiff is the lawful

owner of the property in question consisting of ground and first floor of the house bearing plot No. A-167, Block- 'C', measuring approx. 208 sq. yds. and situated in Saifee Cooperative Housing Society Ltd., North Nazimabad, Karachi.

- b) For Specific Performance of the Oral Agreement of Sale dated October 2000 entered into by and between the Plaintiff and the Defendants Nos.1 & 2 for sale of the house in question by executing a Deed of Conveyance of the suit property in the name of the Plaintiff abovenamed. In default, the Nazir of this Hon'ble Court be authorized and directed to execute the necessary Deed of Conveyance of the suit property in favour of the Plaintiff.
- c) For cancellation of the Tenancy Agreement dated 2.05.2002 executed by the Defendant No.2 as attorney of the Defendant No.1 with the Plaintiff.
- d) For Permanent Injunction restraining the defendants above named from taking any action for ejectment of Plaintiff from the suit property by themselves or through their subordinates and persons working for and under them and/or disturbing the vacant and peaceful possession of the suit property by the Plaintiff.
- e) Any other relief, which under the circumstances of the case, this Hon'ble Court may deem fit and proper.
- f) Cost of the suit be also awarded in favour of the Plaintiff against the defendants above-named.

5. In the said Suit No.115 of 2006, the Respondent filed his written statement, wherein it is pleaded that the Respondent neither executed any sale agreement through brother of the Appellant nor received any part payment nor he executed any power of attorney in favour of his sister Mst. Sakina to dispose off the property. The Appellant is a trespasser and

fabricated a story only with the intention to file the instant suit in as much as Mst. Sakina was never authorized to sell the suit property and it appears that there is collusion between the Appellant and Mst. Sakina and they have played fraud with the Respondent. The Respondent never made any promise to send power of attorney in favour of his sister Mst. Sakina and in the absence of such authority Mst. Sakina was not authorized to hand over the possession of the suit property to the Appellant, who started illegal construction and therefore Saify Co-operative Housing Society Limited issued notice dated 06.06.2001 in the name of the Respondent for gross violation of rules and regulations of SBCA and the society. The Respondent has not received any payment from the Appellant in respect of the suit property and if any payment is made to Mst. Sakina, the Appellant should claim the same from Mst. Sakina. In the end, the Respondent prayed for the dismissal of the said suit.

6. By Order dated 21.05.2007, the said suits were consolidated and it was ordered that Suit No. 429 of 2005 shall be the leading suit.

7. Subsequently, the following consolidated issues were framed on 29.05.2005:-

- 1) Whether the plaintiff house is in illegal possession of the defendant? If so what its effect?
- 2) Whether Special Power of Attorney executed in favour of Mst.Sakina sister of the plaintiff contains any provision of sale in respect of suit property? If not, its effect?
- 3) Whether the plaintiff ever entered into any oral sale agreements in respect of suit property with the defendant. If not, its effect?

- 4) Whether the defendant was authorized to make any further construction over the suit property? If so what is its effect?
- 5) Whether the defendant and Mst. Sakina, the sister of the plaintiff are in league with each other to defraud the plaintiff from his property?
- 6) Whether plaintiff received from defendant a sum of Rs.50,000/- in cash as earnest money and the balance sale consideration of Rs.19,50,000/- was agreed to be paid to Mst.Sakina Abbas (defendant No.2 in suit No. 115/2006) at the time of execution of sale deed? If yes, its effect?
- 7) Whether plaintiff promised to send General Power of Attorney from USA authorizing his sister to execute the sale deed? If yes, its effect?
- 8) What is the effect of acknowledgment, if any, of Rs.19,50,000/- by Mst.Sakina through formal Tenancy Agreement dated 2nd May, 2002?
- 9) Whether defendant is ranked trespasser and Plaintiff is entitled to possession of suit property consisting of ground and first floor and mesne profits as claimed?
- 10) What should the decree be?

8. At the trial, the Respondent examined himself and two witnesses namely (i) Aun Gain son of Tahir Ali Gain and (ii) Murtaza Ali son of Fakhruddin Abbas and produced documentary evidence. On the other hand, the Appellant examined her brother and attorney Asghar Ali son of Fida Ali and four witnesses namely (i) Muhammad Ayub Ali son of Muhammad Ishaque Ali, (ii) Tayab Ali Tayabi son of Yahya Bhai, (iii) Tahir Lanewala

son of Yousuf Ali and (iv) Babar Rafique Mughal son of Muhammad Rafique Mughal and produced documentary evidence.

9. The learned Single Judge by Judgment dated 09.02.2016 decreed Suit No. 429 of 2005 filed by the Respondent against the Appellant and dismissed Suit No. 115 of 2016 filed by the Appellant against the Respondent. Against this judgment, the Appellant has filed the instant appeals.

10. We have heard the learned counsel for the parties and perused the material available on the record.

11. Learned counsel for the Appellant contended that the learned Single Judge has misread the entire evidence and has failed to appreciate the evidence in proper context. He further contended that the payment of Rs.19,50,000/- had been proved but the learned Judge had not considered this aspect of the matter. He further contended that the evidence of the Appellant's attorney was corroborated by independent witnesses and none of them were cross-examined on their material evidence. He finally contended that the learned Single Judge has not disclosed cogent reasons and failed to decide issues properly.

12. On the other hand, the learned counsel for the Respondent supported the Judgment of the learned Single Judge and contended that the learned Judge has considered the pleadings and evidence properly and rightly decided both the suits.

13. The points for determination in these appeals are:

- i) Whether the learned Single Judge has rightly dismissed Suit No. 115 of 2006 filed by the Appellant for specific performance, cancellation of deed and permanent injunction against the Respondent?
- ii) Whether the learned Single Judge has rightly decreed Suit No. 429 of 2005 filed by the Respondent for declaration, permanent injunction, possession and mandatory injunction against the Appellant?

14. Since both the above-referred points for determination are interconnected, the same are hereby dealt with together. To determine the above-referred points, it is necessary to examine the pleadings and evidence both oral as well as documentary and the judgment of the learned Single Judge.

15. We have to first discuss Suit No. 115 of 2006 filed by the Appellant for specific performance, cancellation of deed and permanent injunction against the respondent.

16. The controversy started from the legal notice of the Respondent in the month of October 2004 served upon the Appellant, wherein the Respondent treated the Appellant as a trespasser and claimed vacant possession of the suit property and mesne profit. This legal notice has been admitted by the Appellant, who replied the same vide reply dated 30.10.2004, wherein the Appellant pleaded the following specific defence that:-

- a) On 02.05.2002, a deal between the Appellant and the Respondent has been reached to finalization which was continuing for the couple of months. The sale price was settled at Rs.19,50,000/-

through real sister and duly constituted attorney of the Respondent Mst. Sakina, who after receiving consent and permission of the Respondent through different mode of communications and also confirmed acknowledgment receipt thereof, the Respondent further promised that the entire sale consideration has since been received by him through his sister;

- b) Since the power of attorney in favour of the sister of the Respondent does not contain the power of sale, the Respondent suggested the Appellant to pay the entire sale consideration of the suit property to his sister Sakina through cheque and/or pay order, therefore the Appellant paid the sum of Rs.19,50,000/- through cheque dated 02.05.2002 in favour of Mst. Sakina, sister of the Respondent;
- c) Since the Appellant in order to secure her huge amount needed an acknowledgment receipt from the Respondent, who suggested that till the time he executed a general power of attorney containing power of sale in favour of his sister, a rent agreement may be reduced into writing whereby acknowledgement of Rs.19,50,000/- would be shown as security deposit and monthly rent as Rs.5,000/-, which the Appellant did not require to pay as per clause-5 of the rent agreement;
- d) Attorney of the Respondent after receiving the entire sale consideration, handed over peaceful and vacant possession of the suit property to the Appellant in presence of witnesses;
- e) When the Respondent came to Pakistan, the Appellant with the help of her brother Asghar Bhai, relations and common family friends approached him on different occasions and meetings were held and the Respondent always promised to execute sale deed in favour of the Appellant.

17. Upon receipt of the above referred reply from the Appellant, the Respondent on 01.03.2005, filed Suit No. 429 of 2005 against the Appellant for declaration, permanent injunction, possession and mesne profit. In the plaint, the Respondent pleaded that the Appellant had set-up a false story regarding agreement of sale between the Appellant and Mst. Sakina, sister of the Respondent, who had no power or authority to enter into such transaction. In the said suit, the Appellant filed her written statement; wherein, the Appellant pleaded that:-

- a) The Respondent was the owner of the suit property consisting of ground floor only and the first floor was constructed by the Appellant under the authority and consent of the Respondent through his sister Mst. Sakina during July 2002 to March 2003 after Mst. Sakina received the sum of Rs.19,50,000/- through cheque dated 02.05.2002 towards sale consideration of the suit property and the vacant and peaceful possession of the suit property was handed over by Mst. Sakina to the Appellant;
- b) The Respondent visited Pakistan in October 2000 and executed Special Power of Attorney dated 27.10.2000 in favour of his sister Mst. Sakina to manage his properties in Karachi including the suit property.

18. Earlier to filing above-referred written statement, the Appellant on 30.04.2005 filed suit (ultimately numbered as Suit No.115 of 2006) against the Respondent and his sister Mst. Sakina for specific performance, cancellation of deed and permanent injunction, wherein, the Appellant pleaded that:-

- a) In October 2000, the Respondent came to Pakistan and negotiated for sale of the suit property with the Appellant through her brother

Asghar Ali. Consequently, an oral agreement for sale of the suit property was arrived between the Respondent and the Appellant through her brother Asghar Ali for total sale consideration of Rs.20,00,000/- and the Appellant paid to the Respondent the sum of Rs.50,000/- in cash as earnest money and the balance sale consideration of Rs.19,50,000/- was agreed to be paid to Mst. Sakina, sister of the Respondent, at the time of execution of sale deed;

- b) Since the Respondent was to go back to USA urgently, he executed Special Power of Attorney dated 27.10.2000 in favour of his sister Mst. Sakina and promised to send general power of attorney from USA authorizing her sister Sakina to execute the sale deed in favour of the Appellant;
- c) In pursuance of the oral sale agreement, Mst. Sakina received from the Appellant the total balance sale consideration of Rs. 19,50,000/- through cheque dated 02.05.2002 issued in favour of Mst. Sakina, who encashed the said cheque;
- d) To secure the Appellant towards payment of the sale consideration, Mst. Sakina as attorney of the Respondent executed tenancy agreement dated 02.05.2002, which was not meant for use by either of the parties but in the said agreement, Mst. Sakina acknowledged the receipt of Rs. 19,50,000/-;
- e) Since the Respondent failed to send the power of attorney in favour of his sister Mst. Sakina authorizing her to execute sale deed, the Appellant pressed Mst. Sakina to hand over physical possession of the suit property and also to authorize her to carry out necessary repairs and renovations on the ground floor and to construct first floor also. Consequently, Mst. Sakina handed over physical and vacant possession of the suit property to the Appellant;
- f) In spite of the repeated requests and reminders, the Respondent and his sister Mst. Sakina have failed to execute the necessary deed of conveyance in respect of the suit property in favour of the Appellant.

19. In the said Suit No. 115 of 2006, the Respondent filed his written statement on 18.04.2006, wherein, it was pleaded that:-

- a) Neither any sale agreement through the alleged brother of the Appellant was made nor any part payment had been ever received, furthermore, no any power of attorney is/was executed in favour of Mst. Sakina to dispose the property. The Appellant had fabricated story to legalize her illegal possession;
- b) Mst. Sakina was never authorized to sell the suit property and it appeared that there was collusion between the Appellant and Mst. Sakina, who played a fraud with the Respondent;
- c) The Respondent never made any promise to send power of attorney in favour of Mst. Sakina;
- d) The alleged payment claimed by the Appellant was neither made to the Respondent nor received by him as such the Appellant may claim such amount from Mst. Sakina and hand over possession of the suit property to the Respondent.

20. The Respondent though in his evidence has denied the oral sale agreement and receipt of any amount towards sale consideration but his entire evidence was shaken in his cross-examination, wherein, he made certain admissions, out of which some important admissions are reproduced as under:-

- i) At the time of purchase, the suit property had only one floor and voluntarily stated that there was partial construction of walls on the roof;
- ii) When he went to America in 1981, the subject house was in possession of his brother;

- iii) In November 2000, the subject house was vacant;
- iv) In July 2000, he came to Pakistan and remained till end of October 2000;
- v) Exhibit "P/6" (Special Power of Attorney) pertains to the suit property;
- vi) No judicial proceedings were taken by him or his sister during the construction being made by Mst. Latifa at the subject premises;
- vii) Since occupation, he has not paid any taxes or amounts of utilities of the subject premises;
- viii) Mst. Sakina is alive and present at Karachi and he shall try to produce her as his witness;
- ix) He has not given any notice to his sister for cancellation of power of attorney;
- x) He had not completed the construction and voluntarily stated that only partial construction was made by him.

21. Apart from this, the Respondent has not denied the specific questions put to him in his cross-examination but he showed his ignorance and stated that:-

- i) He does not know whether his sister Mst. Sakina received a sum of Rs 19,50,000/- from Mst. Latifa towards balance sale consideration through a cheque drawn on Habib Bank Limited;
- ii) He does not know that his sister had given possession of the subject premises on receipt of Rs.19,50,000/-;
- iii) He does not know that the building plan of the premises was only of ground floor.

This part of evidence of the Respondent ex-facie shows that the Respondent has not denied that his sister Mst. Sakina has not received the sum of

Rs.19,50,000/- from Mst. Latifa towards balance sale consideration through a cheque drawn on Habib Bank Limited and handed over possession of the subject premises upon receipt of Rs.19,50,000/-. Accordingly, it is safe to conclude that the Respondent has accepted receipt of Rs.19,50,000/- by sister Mst. Sakina from the Appellant towards balance sale consideration and handing over possession of the subject premises by Mst. Sakina to the Appellant.

22. Evidence of the Respondent's witness Aungain son of Tahirgain was shaken in his cross-examination, wherein, he stated that:-

- i) Moiz Abbas (the Respondent) came to Pakistan in the year 2000;
- ii) Brother of Moiz Abbas was in occupation of premises when he left for America;
- iii) Partial construction in the form of room at the first floor was present at the subject premises;
- iv) He has no knowledge of any sale agreement but he was informed about the communication between Moiz Abbas and his sister by Moiz himself;
- v) Moiz Abbas left for America thereafter in November or December 2000;
- vi) He made no efforts in respect of illegal occupation and voluntarily stated that the matter was being looked after by the sister;
- vii) It is not in his knowledge as to what actions were taken by sister Mst. Sakina in this regard;
- viii) He is aware that the first floor was completed in the year 2002;

- ix) Moiz Abbas had not given any instructions to him for taking any action in this regard;
- x) He does not know that Mst. Latifa got the construction completed for first floor;
- xi) Moiz Abbas did not come to Pakistan to complete first floor in the year 2002;
- xii) Mst. Latifa is residing in the subject premises and she is making payment for the utilities except taxes to which he is not aware.

This witness of the Respondent has not denied oral sale agreement but showed his lack of knowledge. Apart from this, this witness has admitted that the Respondent did not come to Pakistan to complete first floor in the year 2002 and then showed his lack of knowledge that the Appellant got the construction completed for first floor. In overall, the evidence of this witness does not support the case of the Respondent.

23. Evidence of the Respondent's another witness Murtaza Ali son of Fakhruddin Abbas was also shaken in his cross-examination, wherein, he stated that:-

- i) Moiz Abbas came to Pakistan in the year 2000 and remained here for some 5-6 months;
- ii) During the absence of Moiz Abbas, his paternal uncle Saifuddin was residing in the said premises and Mst. Sakina used to reside with him;
- iii) Moiz Abbas gave a power of attorney to his sister Mst. Sakina;
- iv) Not in his knowledge that power of attorney or question of sale was present when power of attorney was given;

- v) Illegal occupation was made in the year 2002 and Moiz Abbas came to Pakistan in the year 2004;
- vi) Not in his knowledge that Mst. Sakina had received Rs. 19,50,000/- as sale consideration for the suit property from Mst. Latifa;
- vii) Moiz Abbas had not got the property constructed completed;
- viii) Construction was completed by Mst. Latifia;
- ix) Mst. Latifa is making payments of the taxes and the utility bills for the suit property.

This witness of the Respondent has not denied receipt of Rs.19,50,000/- as sale consideration by Mst. Sakina, sister of the Respondent, from the Appellant but showed his lack of knowledge. Apart from this, this witness has admitted that the Respondent had not completed the construction of the suit property and admitted that the construction was completed by the Appellant and further admitted that the Appellant is making payments of the taxes and utility bills of the suit property. In overall, the evidence of this witness also does not support the case of the Respondent.

24. Apart from this, the Respondent did not examine his sister Mst. Sakina though he stated in his cross-examination that “he shall try” and in these circumstances, the Respondent was bound to examine his sister Mst. Sakina, whose evidence was material which would throw light on the issue in controversy. Accordingly, under Article 129 (g) of the Qanun-e-Shahadat, we can draw adverse inference against the Respondent that if the said evidence had been produced, it would have gone against the Respondent.

25. The Appellant herself did not appear to give evidence in the matter and she examined her brother and attorney Asghar Ali, whose evidence remained unshaken in his cross-examination and he was not cross-examined at all on his material evidence deposed in paragraphs 6, 9, 10, 11, 12, 13 and 14 of his Affidavit-in-Evidence regarding:-

- i) meeting on 25.10.2000 in respect of sale of the suit property between the Respondent, attorney of the Appellant and two independent witnesses Tahir Lanewala son of Yousuf and Tayyab Ali Tayyebi son of Yahya Bhai, wherein, sale price was settled at Rs.20,00,000/- and payment of earnest money of Rs.50,000/- to the Respondent in presence of the said two independent witnesses;
- ii) In pursuance of oral sale agreement, Mst. Sakina, sister of the Respondent received from the Appellant balance sale consideration of Rs.19,50,000/- through cheque No.10457852 dated 02.05.2002 drawn on Habib Bank Limited, Kehkashan Branch, Clifton, Karachi, which was encashed by her;
- iii) Mst. Sakina, sister of the Respondent handed over physical and vacant possession of the suit property to the Appellant in the presence of the said two independent witnesses;
- iv) After obtaining possession, the Appellant through a building contractor M/s. A.A. Associates carried out necessary repairs/renovations of the ground floor and also constructed new first floor and the Appellant spent about Rs.19,81,408/-;
- v) Since the occupation of the suit property, the Appellant has all along been paying property tax, water and conservancy charges, gas charges, electricity charges and telephone bills.

26. It is a well settled principle of law that the statement of a witness which is material to the controversy of the case particularly when it states his

case and the same is not challenged by the other side directly or indirectly, then such unchallenged statement should be given full credit and usually accepted as true unless displaced by reliable, cogent and clear evidence. Reliance can be placed upon the case of *Mst. Nur Jehan Begum through Legal Representatives v. Syed Mujtaba Ali Naqvi* 1991 SCMR 2300.

27. Apart from this, the evidence of Appellant's attorney Asghar Ali was fully corroborated by four independent witnesses namely (i) Muhammad Ayub Ali son of Muhammad Ishaque Ali, (ii) Tayab Ali Tayabi son of Yahya Bhai, (iii) Tahir Lanewala son of Yousuf Ali and (iv) Babar Rafique Mughal son of Muhammad Rafique Mughal. The evidence of all these four independent witnesses remained un-shaken in their cross-examination.

28. There is another important aspect of the matter that the Appellant produced letter dated 25 Shaban, 1423 (01.11.2002) as Exhibit "D/25-I" and its English translation as Exhibit "D/25-II" respectively to show that the Appellant's attorney approached the Aamil of North Nazimabad, who in turn addressed a letter to Aamil appointed for Houston USA. This letter has neither been challenged by the Respondent nor any question regarding this letter was put in cross-examination to the Appellant's attorney.

29. Be that as it may, it is not a version that inspires confidence that the Appellant trespassed in the suit property in the year 2000 and the Respondent took no action for more than four years. Apart from this, it is unbelievable that the Appellant took the suit premises on rent upon payment of handsome amount of Rs.19,50,000/- as security deposit and also raised construction of entire first floor by spending about Rs.19,00,000/-. However, it can be presumed that the tenancy agreement was nothing but it was

executed with the only intention to save the Appellant and in proof of payment of Rs.19,50,000/- as Mst. Sakina at the relevant time was authorized to execute tenancy agreement on behalf of the Respondent. We fail to understand that what was the logic for not taking any prompt action by the Respondent against the Appellant during the long period of four years, when according to Respondent the Appellant was trespasser and started to raise allegedly illegal construction upon the suit property. Even otherwise, the case of the Respondent proved to be false in view of the entire evidence, which we have already discussed in the preceding paragraphs.

30. In view of the pleadings and evidence oral as well as documentary on record, we have come to the conclusion that the Appellant has proved her case for specific performance of oral sale agreement, payment of sale consideration and handing over peaceful and vacant possession of the suit property by Mst. Sakina, sister of the Respondent to the Appellant by evidence of independent witnesses more particularly two witnesses namely (i) Tahir Lanewala son of Yousuf and (ii) Tayyab Ali Tayyebi son of Yahya Bhai. Hence, the Appellant has proved her case for specific performance of oral sale agreement against the Respondent. Whereas, the Respondent has failed to prove his case that the Appellant is in illegal possession.

31. We have carefully gone through the findings recorded by the learned Single Judge but with due respect we do not agree with him as his findings are based upon misreading of pleadings, evidence oral as well as documentary as discussed above by us. Accordingly, our findings are that the learned Single Judge has with respect erred when he dismissed Suit No.115 of 2006 and equally erred when he decreed Suit No. 429 of 2005.

32. In view of the above discussion, both the instant appeals are allowed with no order as to costs. The Judgment and Decree of the learned Single Judge is hereby set-aside. Consequently, Suit No.115 of 2006 is decreed as prayed and Suit No. 429 of 2005 is dismissed.

JUDGE

JUDGE