

ORDER SHEET

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

1. R.A. No.259 of 2011.

2. R.A. No.319 of 2011.

DATE	ORDER WITH SIGNATURE OF JUDGE(S)
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10.04.2018.

Mr. Muhammad Arshad S. Pathan, Advocate for the applicants in R.A. No.259/2011 and for the respondent(s) in R.A. No.319/2011.

Syed Ahsan Ali Shah, Advocate for the applicant in R.A. No.319/2011 and for respondent No.1 in R.A. No.259/2011.

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Zulfiqar Ahmad Khan, J.- These revisions have been filed against the consolidated judgment dated 17.08.2011, passed by the appellate Court in Civil Appeal Nos.346/2010 (Mst. Najma Vs. Muhammad Zubair and another) and 65/2011 (Muhammad Zubair v. Mst. Najma and another), which after going through the consolidated judgment of the trial Court, reached to the conclusion that the trial Court rightly decided the key issues No.4, 5 and 6 and as to the point of its own determination, reached to the conclusion that the trial Court's judgment and decree do not warrant any interference. The above appeals were preferred by both the parties against the consolidated judgment rendered by the trial Court on 13.11.2010, wherein Third Class Suit No.07/2004 as well as Third Class Suit No.09/2004 were decided.

2. The dispute pertains to shop No.7, situated in Sitara Masjid, Azeemul Shan Cloth Market, Hyderabad, (hereinafter referred to as "subject shop"), in respect of which two suits were filed. One by Muhammad Zubair (plaintiff in Third Class Suit No.07/2004) and second by Mst. Najma (plaintiff in Third Class Suit No.09/2004). Issues were framed by the trial Court and the critical issue as to the controversy was "as to who made the payment of Rs.2,50,000/- in respect of the said shop", which was allotted on goodwill to Muhammad Alam, husband of Mst. Najma by the Committee of Sitara Masjid Trust somewhere in the year 1990. As the controversy is that whether the money came from the mother of Zubair who at that time was working with Muhammad

Alam or the money was paid by Muhammad Alam through his own fund, however, through the hands of Muhammad Zubair, who used to deposit sums in the account of Muhammad Alam as being his go getter. To answer this question, the trial Court framed in particular issue No.1 as to whether the mother of plaintiff Muhammad Zubair paid the sum of Rs.2,50,000/- to the husband of Mst. Najma. It was alleged that Zubair who was nephew of Mst. Najma and Muhammad Alam, used to work with Muhammad Alam from his childhood. To support his contention that the money was paid by the mother of Zubair, he deposed himself as well as examined two witnesses namely Abdul Rauf and Muhammad Yaseen, available at pages-551 and 557 of the Court file. On the other hand, Mst. Najma / Muhammad Alam brought forward witnesses of which the material witness was Haji Abdul Sattar, who was the representative of Masjid Trust. In order to bring a complete, independent and analytical view to the matter, after considering the facts with regard to issue of allotting the shop by Sitara Masjid Trust in the name of Muhammad Alam, the trial Court came to the conclusion that no evidence to contrary effect came before it and the issue No.1 as to whether the mother of Zubair made the payment was answered in the negative, notwithstanding, that Zubair had produced original Bank money deposition slip for the account in the name of Muhammad Alam, as well as payment of rent receipts to the Masjid Trust present with Mr. Zubair. After considering all the material evidence as stated above the trial Court held that Zubair has failed to prove his version but at the same time also observed that Mst. Najma was merely a transferee of the subject shop, which was an admitted fact nonetheless, but the trial Court's judgment does not show as to who will continue to have the possession of shop in question notwithstanding that coming to the conclusion the entire sums of Rs.2,50,000/- were held to be paid by Muhammad Alam husband of Mst. Najma, being legitimate transferee of the subject shop after the death of her husband. The appellate Court after considering the judgment of the trial Court by framing key point for determination being "whether the respondent No.2 was Benami / ostensible tenant of shop No.7, tenancy of which was

transferred in the name of respondent No.1 (Mst. Najma)", gave its findings on the said point after going through the record as well as the evidence that the trial Court rightly held that from the oral as well as the documentary evidence available on record, prima facie, it was proved that the subject shop in fact was obtained by Muhammad Alam who was the original tenant of the subject shop and subsequently the same was transferred in his wife's name. The counsel for Mr. Zubair minutely went through all the evidence and various documents put forwarded by Mr. Zubair to show that it was Mr. Zubair whose mother made all the payments and the subject shop remained a Benami property of Mr. Zubair and his mother, who as not being a member of the Committee, were not in a position to apply for the said shop. It is an admitted fact that Mr. Zubair was in possession of the subject shop since 1990. Even if it is admitted that Mr. Zubair was holding the premises independently, any document as to the payment of tax or otherwise was not brought to record. Learned counsel drew Court's attention to a copy of survey made by Income Tax / Wealth Tax Department available on page-461 where under para-7 name of the owner has appeared as Muhammad Zubair, but this being merely a Survey Form does not in my view answer the question. However, the learned counsel referred to page-463, which is a Tax Registration Certificate in the name of Muhammad Zubair, but still it pertains to the year 2003 thus of no help as the controversy arose in 2004 which resulted in filing of these cross suits between the parties when the subject shop was transferred by Muhammad Alam to his wife Mst. Najma as he was getting old. No independent evidence has been brought to the trial Court which could have lead the Courts blow to answer the question that it was Zubair's mother who paid the money for the shop to Masjid Committee or to show independently that his mother was in a position to make such a payment since her husband died in the year 1969 as per the own admission of Mr. Zubair, present in Court. It is also observed that in fact Mr. Zubair failed to bring his mother to the witness box to substantiate the assertion that payment was made by her in the name of Muhammad Alam.

3. The counsel for Mst. Najma submitted that Zubair has been working from his childhood with Muhammad Alam since his father died long ago and when he was young he was allowed to sit in the premises by Muhammad Alam, who was operating another shop in the same market and Zubair used to do small chores including deposit of money in the bank account of Muhammad Alam, as Muhammad Alam was running another shop in the neighbourhood and the instant shop No.7 was used as a godown for the business of Mr. Alam which assertion has not been shattered by any piece of evidence.

4. In my view, the Courts below have considered very eloquently the evidence brought on record, however, even after reaching to the conclusion that Mr. Zubair failed to show that the money was paid by his mother as the shop was rented out to Muhammad Alam who later on transferred the same to his wife the Courts still failed to pass a conclusive judgment as to the possession of the shop No.7 taken away from Mr. Zubair and to be handed over to the wife of Mr. Alam (or her legal heirs) to bring an end to the instant controversy.

5. In the given circumstances, these revisions are disposed of with modification in the orders of the Court below, which primarily are not interfered with on merits, however, with additional that the possession of the subject shop be handed over to Mst. Najma or her legal heirs in strict adherence to the judgments of the Courts below, within the next 15 days.

JUDGE

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