

**IN THE HIGH COURT OF SINDH, KARACHI**

Civil Revision No. 114 of 2012

Mst. Sher Bano.....*Versus*.....Nazir Ahmed another

**ORDER**

Date of hearing : 26<sup>th</sup> February, 2018.  
 Date of Judgment : 25<sup>th</sup> May, 2018.  
 Appellant. : Mr. Sikandar Khan, advocate  
 Respondents : Mr. Saadat Hassan, advocate.

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**Mrs. Kausar Sultana Hussain, J:-** This Civil Revision under Section 115 C.P.C is directed against the judgment dated 28.4.2012 passed by learned IVth Additional District Judge West, Karachi in Civil Appeal No. 39 of 2012, whereby the plaint was rejected in the suit No. 1776 of 2006 under Order VII Rule 11 CPC without considering the judgment and decree dated 29.2.2012, which was passed under the direction of Hon'ble Supreme Court of Pakistan.

2. The concise germane facts forming background to institute instant Civil Revision are that the applicant filed Civil Suit No. 1776 of 2006 against the respondents for declaration and permanent injunction. It was alleged by the applicant that she is in possession of structure, construction standing thereon of residential house alongwith five shops and two rooms on ground floor and one room on first floor on plot No. 790 (corner) situated at Pak Muslim Muhammadi Colony, Shah Jalal Street, Maripur Road, UC-5, Keamari Town, District West, Karachi having purchased it from Mst. Farida Yasmeen W/O Shafi ul Alam, vide sale agreement dated 17.5.2006. It was also alleged that the respondents are trying to dispossess her from the subject property, which constrained her to file the suit. They contested the matter and filed their written statements, wherein they denied the above claim and contended that the applicant got the possession of the said property from respondent No. 1 forcibly. It was contended that respondent No. 1 is the owner of said property having purchased it from Shafi ul Alam, vide sale agreement dated 09.04.2005. It was also contended that in the month of May, 2006 possession of the said property was snatched from the applicant by force. The trial Court after framing as many as 13

issues, recording pro--- contra evidence of the parties, decreed the suit vide judgment and decree dated 29.2.2012. Being aggrieved with the said judgment and decree respondent No. 1 filed civil appeal No. 39 of 2012 before the first appellate court. The learned Additional District judge IVth Karachi West accepted the said appeal and judgment and decree dated 29.2.2012 passed in favour of the applicant were set aside. The applicant being not satisfied with the said judgment has filed Revision petition in hand.

3. The learned counsel for the applicant has contended that the impugned judgment passed by the first appellate court is outcome of erroneous and misappreciation of the facts and circumstances on record. He has much emphasize on the point that impugned judgment is in sheer violation of order XXXI Rule 41 CPC. He has further argued that no point for determination concerning the question involved in the case were framed, which is mandatory requirement under the law. He has further argued that learned first appellate court did not bother to give issue wise findings on the issues discussed by the learned trial Court. He has further argued that learned appellate court did not consider and appreciate the important factors involved in the suit viz; declaration as well as permanent injunction but passed by the impugned judgment in a cursory manner, even the relief of permanent injunction sought in the plaint rendered unattended, which is not the scheme of law, under which, every court is bound to decide every case in the manner that every issue involved, should be considered and resolved. In this connection, he has relied on 1998 CLC 1969 (Lahore), 1999 CLC 62 (Lahore), 2002 CLC 1262 (Peshawar) and 2017 YLR 1470 (Sindh). Lastly, he has argued that the impugned judgment suffers from material illegality, same is not sustainable in the eyes of law, may be set aside and judgment/decree of the learned trial Court which was passed after proper appreciation of evidence may be maintained.

4. Conversely, the learned counsel for respondent No. 1 has strongly refuted the above contentions and supported the findings of the learned appellate court. He has submitted that no illegality committed by the learned first appellate court and passed lawful judgment while pointing to the concluding observations of the impugned

judgment, learned counsel has contended that the observations and findings made therein is lawful as suit filed by the applicant on the basis of unregistered sale agreement is not maintainable rightly under Section 42 of Specific Relief Act, rightly held so by the learned appellate court. He has further argued that no lawful ground or reason has been forwarded by the applicant for interference into the impugned judgment, hence instant Civil Revision is liable to be dismissed.

5. I have heard the learned counsel for the parties at length and perused the record. On evaluation of impugned judgment, it appears at the face of it, having been passed without following the proper procedure of law and first appellate court dealt the appeal in a very cursory manner. The legislature has entrusted a very important duty to the first appellate court. It is for that, court to decide factually all questions of facts on which the disposal of the suit might depend and the learned appellate court should not easily agree with the trial Court simply because it was not inclined to take much trouble over the case. If the appellate court itself does not examine the facts and evidence and does not even mention the point which the case raises, it will be failing in its duty. In the case in hand, neither issue wise findings were given by the learned first appellate court nor points for determination as mentioned under Rule 31 of Order XLI CPC were set out and decision given thereon. The learned appellate court traveled contrary to the very wisdom of the said proviso of law, under which it was required that proper points in dispute to be set fort determination and under obligation to decide all the issues. In the prevailing circumstances the impugned judgment is not sustainable, while saying so reference is made on the case of Executive Engineer, C & W Mansehra and others V/s Muhammad Nasim Khan & others (2002 CLC 427), Mst. Aisha V/s Mst. Fatima and others (1991 CLC 1499) and Muhammad Mustaqeem through his L.Rs V/s Abdul Haleem through his (L.Rs) (1992 CLC 435).

6. Besides, I feel it necessary to deal with what has been observed in the impugned judgment by the learned appellate court and same is reproduce for ready reference.

“In my view in these circumstances and documents available on record the learned trial Judge has wasted the precious time of the court and parties. It was proper for the learned trial court that after receiving of the evidence of the parties from which it is crystal clear that the title documents produced by the Plaintiff/Respondent do not confer any legal title upon him, according to the section 42 of Specific Relief Act and therefore instead of further proceeding with the case, the plaint should have been rejected under Order 7 Rule 11 CPC with direction to the parties to file a suit for Specific Performance of Contract. I have also considered the issues and findings thereon and evidence by the parties which of no legal effect and no suit or decree can be entertained on the basis of such findings, I therefore set aside the judgment dated 29.2.2012 and reject the plaint under Order 7 Rule 11 CPC with direction to the parties to file a suit for Specific Performance of Contract to show of legal character for acquiring the possession of the suit property. The appeal is hereby allowed. However, the parties are left to bear their own costs. The appellant also can approach to the Civil Court for possession under section 144 CPC. The appeal is hereby allowed. Parties to bear own costs.”

7. On examination of above findings in the light of material available on record, it appears that learned appellate court while dealing and disposing the appeal remained confirmed to the sole point that applicant sought declaration of her title on the basis of unregistered sale agreement, which did not confer any legal title upon her; plaint is hit by section 42 of Specific Relief Act and she ought to have filed a suit for Specific Performance, finally rejected the plaint under Order VII Rule 11 CPC. It is noted that applicant filed suit No. 1776 of 2006 not only for declaration of her title on the basis of sale agreement but also for protection to the possession which she had derived on the basis of such agreement.

As per claim of the applicant, she purchased the subject property from Mst. Fareeda Yasmeen W/O Shafi ul Alam by virtue of sale agreement dated 17.05.2006 and after paying sale consideration also received the possession thereof from the latter. On the other hand, the respondent No. 1 also claimed himself to be the purchaser of the same subject property from Shafi ul Alam under the sale agreement dated 09.04.2005 and also claimed to have got the possession from the sellers.

8. The main contention of the applicant in this suit is that the respondent No. 1 and 2 are trying to dispossess her from the subject property which constrained her to file the aforesaid suit, on the contrary, the latter alleged that the applicant got the possession of the subject property from the respondent No. 1 forcibly. As per settled proposition of law that agreement to sale does not confer any title or ownership right and a suit for declaration on the basis of unregistered agreement to sale is not maintainable. Yet considering the facts involved into the matter, referred above, it appears that both the applicants as well as respondent No. 1 have set forth their claim of ownership over the subject property on the basis of unregistered agreement to sale, meaning thereby both the parties have no legal character for the purpose of maintaining a suit for declaration. However, the learned appellate court did not apply its judicial mind to the relief (s) sought in the suit. Apart from the relief of declaration, the applicant had also sought the relief of Permanent Injunction for the protection of her possession over the subject property. In this regard, guidance has been taken from the case of Muzzafar Khan V/s Sanchi Khan and others (2007 SCMR 181) wherein the Hon'ble apex court, has held that on the basis of agreement to sale, a decree of declaration of ownership of property cannot be passed, except a decree for protection of possession. Likewise, in the case of Muhammad Ismail and others V/s Bashir Ahmed and others (2005 SCMR 1079), the Hon'ble apex court, it was held that section 53-A of Transfer of Property Act 1882, provides protection to a person holding the property under an incomplete transaction of sale. In another case of Jamal Din @ Muhammad Jamal V/s Mst. Mehmooda Begum (2002 CLC 361 Lahore), it was held that on the basis of agreement to sale, a party can defend his possession delivered under agreement to sale under 53-A of Transfer of Property Act, 1882, but cannot press such agreement as sword. It may be observed that this not a case against the seller, in fact both the applicant as well as respondent No. 1 are contesting to each other being purchasers of the same subject property coupled with the claim of having possession. Prima facie the sale agreement produced on record by the applicant depicts delivery of possession of subject property, on the other hand, the copy of sale agreement brought on record by the respondent No. 1 reflects that the possession of the subject property was not delivered to him at the time of execution thereof. It is

also noted that during the course of proceedings, the learned trial court had carried out an inspection of subject property and as per Nazir's report dated 06.12.2006, available on record the possession was found with the applicant and on the basis whereof the status quo order was passed in the favour of the applicant by the learned trial Court. In view of above proposition of law, ipso facto the point of possession was also one of the main factor needed to be considered and thrashed out by the learned appellate court which could only be done on framing proper points for determination, not did so.

9. For the reasons, recorded above, the impugned judgment delivered by the first appellate court appears to be hasty and slipshod manner referred above, therefore same is set aside by allowing this Revision, with no order as to costs.

In the result, the appeal would be deemed pending before the learned first appellate court, who shall decide the same in accordance with law.

J U D G E

3. The facts gave rise to instant appeal are that the learned trial Court during the course of proceedings, got inspected the site and on the basis of Nazir's report dated 06.12.2006, granted status-quo, vide order dated 08.12.2006, later on, the appellant was dispossessed by the respondent No. 1 on 23.8.2009, thereafter, the learned trial Court declared respondent No. 1 as contemnor on 08.12.2010, who challenged such order by filing C.M.A. No. 20 of 2010, which was dismissed on 24.12.2010. The respondent No. 1 also preferred Civil Revision No. 07 of 2011, which was allowed by the High Court of Sindh on 03.05.2011. Subsequently, the appellant preferred leave to appeal before Hon'ble Supreme Court of Pakistan and the apex Court disposed off Civil Appeal No. 139-K of 2011, with the following observation :-

“We have into consideration arguments advanced by the learned counsel for the appellant as well as the respondents and disposed off the listed appeal in the above terms and direct the concerned trial Court to decide the said on or before 01.03.2012 and in case the suit is decreed then to restore the possession immediately in favour of appellant.”

4. After such directions the learned trial Court proceeded the matter, decided the same on merits by decreeing the suit in the favour of appellant, vide judgment and decree dated 29.2.2012 on the basis whereof the possession of subject property was restored to the appellant. The respondent No. 1 also preferred Civil Appeal No. 39 of 2012 against the said judgment and decree, which was allowed and set aside the judgment dated 29.2.2012 passed in Civil Suit No. 1776 of 2006. On said eventually the respondent No. 1 moved an application under Section 144 & 151 CPC for restitution of possession of suit property and the learned trial Court after hearing both the parties, allowed the same, vide order dated 24.5.2012 observing as follows. :-

“I have carefully considered the arguments advanced by the learned counsel for both the parties and have minutely gone through the record and proceedings of the suit which shows that the civil suit No. 1776 of 2006, after hearing of both the parties was decreed on 29.2.2012, and as per direction of the Hon'ble Supreme Court of Pakistan dated 01.12.2011, in Civil Appeal No. 139-K of 2011, this Court issued writ of possession of suit property in favour of the plaintiff and as per bailiff report 50% possession of the suit property

was delivered to the plaintiff. It is also an admitted fact that the defendant preferred an appeal and the Hon'ble IVth Additional District Judge Karachi West, set aside the judgment and decree, with the directions to both the parties to file suit for Specific Performance of Contract.

Admittedly the decree passed by this Court on 29.2.2012, has been set aside by the Hon'ble IVth Additional District Judge West, Karachi, as such there is no original decree passed by this Court intact, hence I see force in the arguments advanced by learned counsel for the defendant No. 1, and allow the application in hand as prayed, let writ of possession in respect of 50% property handed over by bailiff to the plaintiff be issued in favour of the defendant No. 1."

5. The appellant challenged the aforesaid order in Civil Appeal No. 88 of 2012, however, the same was dismissed by the learned Additional District Judge-III Karachi West, vide judgment and decree dated 19.7.2012 and 21.07.2012.

6. The learned counsel for the appellant while highlighting the brief history of the case, referred above, has mainly argued that learned trial Court as well as first appellate court did not appreciate that the possession of subject property was obtained by the respondent No. 1 in violation of the status quo order passed in the matter and as per law trespasser or contemnor are not entitled for any relief, in this regard, he has relied on PLD 1053 Dhakka 207. It has next argued that no consideration was passed to the effect that the appellant's Civil Revision No. 114 of 2012 is pending before this Court, whereby she has already challenged the judgment dated 28.4.2014 passed by the learned Additional District Judge Karachi West in Civil Appeal No. 39 of 2012. Lastly, he has argued that the impugned judgment/decree/order are misconceived and set come of misconceive, liable to be reversed.

7. In rebuttal learned counsel for respondent No. 1 has vehemently opposed the contention so raised by the appellant counsel and supported the findings of the learned appellant as well as the trial Court. He has submitted that the Hon'ble Supreme Court of Pakistan, while disposing Civil Appeal No.



139-K of 2011 categorically observed that in case the suit is decreed, the appellant would be entitled for restoration of possession. Mainly, it was contended by the learned counsel that since the decree passed in favour of appellant is reserved by the first appellate court, as such, no illegality is appearing in the judgment/decreed/order impugned in this second appeal.

8. Submission put forward by the learned counsels for the parties have considered, the impugned judgment/decreed/order passed by the Courts below have been minutely perused in the prospective of relevant provisions of law.

It may be observed that instant appeal revolves around the relief as embodied in section 144 CPC. It reads as follows.

Section 144

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Sub-section (1)..

Sub-Section (2)..

9. Above reading of the above provisions indicates that this embodies the principle that nobody shall be prejudiced by the act of the court. That the foremost duty of the court is, to take care that the act of the court does not cause injury to the suitor and when such injury is found by the court on the event of variation or reversal of the decree, it is a duty of that court to undo the wrong and reinstate the wronged party to the position to which it is entitled. In short, principle of restitution is applicable or attracted where the applicant fulfills the following conditions.

- (a) The restitution must be in respect of the decree which had been varied or reversed.
- (b) The party applying for restitution must be entitled to benefit under the reversal decree.
- (c) The relief must be properly consignment on reversal and variation of decree and is not opposed to any other principle of equity.

While deriving above opinion, guidance has been taken from the reported case of Mst. Sadira Bano V/s Abdul Jabbar and others (PLD 1954 Dacca 207), Barkat Ali V/s Addl. District Judge Faisalabad and others (2001 MLD 1044 Lahore), Nazar Muhammad and others V/s Muhammad Azam and others (PLD 2013 Lahore 264).

10. On examination of record of case in hand in juxtaposition with the principle of reinstatement and its pre-condition, it is revealed that appellant filed suit No. 1776 of 2006 against the respondent, which was decreed in favour of the \_\_\_\_\_, later on, such decree was set aside by the appellate court in Civil Appeal No. 39 of 2012, preferred by the respondent No. 1 to which the very appellant filed Civil Revision Application No. 114 of 2012 before this Court. It is noted that during the proceedings before the learned trial Court, the respondent No. 1 pointed to the possession of subject property and such matter was sent up to the level of Hon'ble apex court and finally it was observed by the Hon'ble Court while disposing of civil appeal No. 139-K of 2011 that in case the suit is decreed the possession to be restored to the appellate immediately. On the eve of decree of suit in favour of appellant by the learned trial Court, the possession was restored to her, however, subsequently, civil appeal No. 39 of 2012 preferred by the respondent No. 1 against the judgment and decree of the trial Court was allowed while setting aside the judgment and decree earlier passed in favour of the appellant. On the basis whereof, the respondent No. 1 sought restitution of possession, which was delivered to the appellant in the outfit of the said decree, such application was allowed and the appeal against such order was also dismissed by the learned appellate court. I may say that the order as to restoration of possession firstly in favour of the appellant were correct in the time and observation of the Hon'ble Supreme Court of Pakistan, enumerated supra, whereas the possession of subject property was admittedly parted by the respondent No. 1 during the pendency of the suit duly verified on record. Nothing has been brought by the respondent No. 1 that possession which was lying with the appellant at the time of institution of suit No. 1776 of 2006 has been declared illegal by any competent court of law; even, the first appellate court while setting aside the decree in favour of the appellant passed by the learned trial Court, did not declare her status over the subject property as

illegal, and advised to file a suit for specific performance. No decree whatsoever in respect of subject property existed in favour of the respondent No. 1 even such reversal of decree did not give any sought of declaration to him concerning the said property. It is worthwhile to observe here that reversal of decree passed in favour of appellant, nonetheless, position of the parties still the same as it was at the time of institution of the suit and respondent No. 1 how has applied for reinstatement did not get any benefit under the reversing decree, which is one of the case recondition for such a relief. As such, the trial Court as well as first appellate court while passing the impugned order/judgment did not construe the very wisdom of section 144 of CPC and erred in interpreting the directions of Hon'ble apex court giving while disposing civil appeal No. 139-K of 2011.

11. It would not be out of place to mention here that appellant also challenged the very judgment passed in Civil Appeal No. 39 of 2012 before this Court through Civil Revision No. 114 of 2012. The Civil Revision file by the appellant has been accepted by this court and the judgment passed by the learned first appellate court in Civil Appeal No. 39 of 2012 has been set aside with the directions that the said appeal would be deemed pending before the learned trial appellate Court, who shall decide the same in accordance with law.

12. For the reasons, recorded above, instant appeal stands allowed. Consequently the impugned judgment and decree dated 19.7.2012 and 21.7.2012 respectively passed by the learned IIIrd Additional District Judge Karachi (West) in Civil Appeal No. 88 of 2012 order dated 24.5.2012 passed on application under Section 144 and 151 CPC by the learned Senior Civil Judge-1, Karachi West in Civil Suit No. 1776 of 2006 are hereby set aside. There is no order as to cost.

J U D G E