

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

IInd Appeal No. 92 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 second appeal under Section 100 C.P.C is directed against the judgment and decree dated 19.7.2012 and 21.7.2012 respectively passed by learned IIIrd Additional Sessions Judge West, Karachi in Civil Appeal No. 88 of 2012 coupled with 24.5.2012 passed on application under Section 144 & 151 CPC by the learned Senior Civil Judge-1 West, Karachi in Civil Suit No. 1776 of 2006.

2. The appellant filed Civil Suit No. 1776 of 2006 against the respondents for declaration and permanent injunction. It was alleged by the appellant 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, Kalpana Chowk, 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 appellant 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 the possession of the said property was snatched by the appellant by force, hence she is not entitled to any relief.

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 dispossess by the respondent No. 1 on 23.8.2009, thereafter, the learned trial Court declared respondent No. 1 as contemnor on 12.08.2010, 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 eventuality 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 to any relief, in this regard, he has relied on PLD 1053 Dacca 207. It has next argued that no consideration was paid 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 IVth Additional District Judge Karachi West in Civil Appeal No. 39 of 2012. Lastly, he has argued that the impugned judgment/decrees/orders are misconceived and out come of misconception, 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 was reversed by the first appellate court, as such, no illegality is appearing in the judgment/decrees/orders impugned in this second appeal.

8. Submission put forward by the learned counsels for the parties have been 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 have that instant appeal revolves around the relief as embodied in section 144 CPC. It reads as follows.

Section 144.—(1) Where and in so far as a decree is varied or reversed the Court of first instance shall on the application of any party entitled to any benefit by way of restitution or otherwise cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree of such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of cost and for the payment of interested damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section(1).

9. A bare reading of the above provisions indicates that this embodies the principle that nobody shall be prejudice 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 of 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 reinstatement is applicable or attracted where the applicant fulfills the following conditions.

- (a) The reinstatement must be in respect of the decree which had been varied or reversed.
- (b) The party applying for reinstatement must be entitled to benefit under the reversal decree.
- (c) The relief must be properly consequential 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. Sadina Bano V/s Abdul Jabbar and others (PLD 1953 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 former, 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 parted with the possession of subject property and such matter was taken 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 said 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 carried out 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 on record 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 subject 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 precondition 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 first 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