

# HIGH COURT OF SINDH, KARACHI

*II<sup>nd</sup> Appeal No. 37 of 2016*

PRESENT:

**MRS. JUSTICE KAUSAR SULTANA HUSSAIN**

*Mst. Surriya Parween & Others*

**Vs.**

*Moinuddin Siddiqui & Others*

*Appellants:* through Mr. M.S Qureshi Advocate

*Respondent No.1:* through M/s Ghulam Mohiuddin & Chaman Lal, Advocates

*Respondent No.2:* through Mr. Noor Z. Khattak, Advocate

*Respondent No.3&4:* Through Mr. Muhammad Aqil Zaidi, Advocate

*Date of Hearing:* 19.02.2018

*Date of Judgment:* 30.04.2018

## JUDGMENT

**KAUSAR SULTANA HUSSAIN, J.** This II<sup>nd</sup> Appeal is directed against the judgment dated 09.02.2016 passed by III<sup>rd</sup> Additional Sessions Judge, Karachi (West), whereby, Civil Appeal No.65/2014 was allowed and the judgment dated 27.03.2014 and decree dated 29.0.2014 passed by learned Senior Civil Judge-II, Karachi (West) in Civil Suit No.1245 of 2009 were set aside.

2. The facts of the case, relevant for the purpose of disposal of this appeal in brief are that the appellants filed a suit for declaration, cancellation, possession, mense profit and permanent injunction against the respondents in the Court of learned Senior Civil Judge-II Karachi (West). It

was alleged by the appellants that their late father was the allottee and owner of a residential plot of land bearing Plot No.140, Sector 13-A Orangi Township, Karachi, measuring 80 square yards under allotment order dated 15.11.1967 issued by Administrative Officer resettlement Department, Orangi Town, K.D.A, Karachi. It was claimed that due to financial problems their predecessor-in-interest neither could get the said plot leased out, nor constructed the same and expired on 19.05.1994 and his wife Mst. Anwari Begum also passed away on 23.04.1997, leaving behind the appellants as their surviving legal heirs. It was further alleged that in the month of August, 2008 appellant No.3 visited the said plot and found that it was encroached and was under illegal possession of respondent No.2. Subsequently, on enquiry it was disclosed by respondent No.3 that said plot had been leased out in favour of respondent No.1 and later on, it was further transferred in the name of respondent No.2. On the other hand, the respondent No.1/defendant No.1 was declared *exparte*, however, the respondent No.2/defendant No.2 submitted her written statement. The respondent No.3 and 4/defendants No.3 and 4 also filed their written statement jointly. On the pleadings of the parties the trial Court framed as many as six (06) issues. The contesting parties to the suit let their evidence. On the basis of evidence adduced before it, the learned trial Court decreed the suit of the appellants/plaintiffs *vide* judgment dated 27.03.2014 and decree dated 29.03.2014.

3. Being aggrieved with the judgment and decree of trial Court, the respondent No.2/defendant No.2 preferred civil appeal No.65/2014, wherein not only the appellants/plaintiffs made appearance, but also contested respondent No.1/defendant No.1, who remained *exparte* before the trial Court. The appellate Court after hearing the parties set aside the judgment and decree passed by the trial Court and remanded the case to the trial Court with the following conclusion:

*“The point of determination is whether the impugned judgment and decree passed by the learned trial Court are bad in law as well as on facts and has been passed without appreciating the evidence.*

*Heard the learned counsel for the parties and perused the record as well as case laws produced by the counsel for the parties.*

*On 20.01.2016 both parties were present and application was filed by Muhammad Sabir, aliya Bibi and Moin-ud-Din jointly that they may be given time as they are going to compromise outside of the Court and matter was adjourned on 27.01.2016 and both parties were present on the above date, Moin-ud-Din was present and he stated that he is ready to take special oath that he has paid amount of Rs.40,000/- to Abdul Hameed father of Muhammad Sabir and purchased the plot according to law and father of the Sabir Hussain has transferred the suit plot to Moin-ud-Din according to law. On his statement learned counsel of the respondent filed statement with some conditions and other side also raised objection on the special oath with the condition of respondent No.8.*

*From the perusal of the record it appears that learned trial Court has not framed issue about the consideration amount paid by respondent No.8/Moin-ud-Din and transfer the suit plot by the father of Sabir Hussain to Moin-ud-Din according to law, though amended issue on this point has been submitted by advocate for defendant No.2 dated 05.03.2011 lying with the main file of the suit at page#171. This is the main issue which is to be decided by the learned trial Court.*

*In view of the above position the suit is remanded back to the trial Court to frame the above issue and decide the suit afresh according to law.*

*As a result of above discussion appeal filed on behalf of the appellant is allowed with no order as to cost. Office is directed to send R&Ps alongwith this judgment to the trial Court for information and disposal according to law. Both parties and their counsels are directed to appear before the learned Court on 27.02.2016.*

*Announced in open Court.”*

4. Mr. M.S Qureshi, the learned counsel for the appellants has contended that order of remand was absolutely illegal and that the first appellate Court acted contumaciously and contemptuously by violating the statutory provisions and the pronouncements of the superior Courts. It was

stressed that the remand order was a nullity as an absolute requirement of statute was defied. He further submitted that learned appellate Court did not give its findings on the point framed by it for determination. He further submitted that learned appellate Court wrongly came to the conclusion that learned trial Court did not frame the issue about consideration amount paid by respondent No.1 Moin-ud-Din. He has pointed out that no such plea was taken by respondent No.2 in her written statement and on failure to make appearance and file written statement by respondent No.1, he was declared ex-parte. He further submitted that learned appellate Court did not consider the fact that there was no defence whatsoever available on record from the side of the respondent No.1, as firstly, he was declared ex-parte, subsequently, his application under section 12(2) C.P.C was dismissed by the trial Court and lastly he also preferred Civil Revision before the appellate forum against dismissal of his application under section 12(2) C.P.C, which was dismissed as well. He has further submitted that learned appellate Court passed the remand order contrary to the provisions of law and without adverting to the factual position on record, which has been declined by the trial Court after proper appreciation of evidence on record per law.

5. Whereas, the learned counsel appearing on behalf of respondent No.1 argued that the learned appellate Court rightly decided the appeal No.65/2014 by setting aside the judgment and decree dated 29.03.2014, which was wrongly passed by the trial Court in SuitNo.1245/2009. He further contended that the respondent No.1 has purchased the plot in question from the father of appellants, who transferred the said plot in the name of respondent No.1 Moin-ud-Din Siddiqui vide transfer order dated 26.12.1990, issued by the office of Assistant Director Land (Lessee) orange Township Karachi to respondent No.1 and subsequently the respondent No.1 acquired the same by virtue of lease dated 24.01.1991 from respondent

No.3 (KMC, KDA Wing) then he raised construction on said plot and resided over there for about 15 years. Subsequently, he sold out the property in question to respondent No.2 vide registration conveyance deed dated 08.01.2005. The learned counsel has denied the claim of appellants No.1 to 7 and claimed their father's allotment order as fake and managed document. He further argued that the appellants have filed Civil Suit No.1245/2009 after 18 years of transfer of the property in the name of respondent No.1 for declaration, cancellation, possession, mesne profit and permanent injunction against respondent No.1 to 4. Per learned counsel for the respondent No.1. No notice of the said Civil Suit of the appellants/plaintiffs was served upon the respondent No.1 as such they obtained ex-parte judgment and decree in their favour and against the respondent No.1, which was later on challenged by the respondent No.1 by filing an application under section 12(2) of C.P.C for setting aside the said judgment and decree but his application was declined by the trial Court vide order dated 14.02.2015 and later his Revision Application against the said order, was also dismissed by learned III<sup>rd</sup> Additional District Judge Karachi West vide order dated 25.11.2015. The learned counsel for the respondent No.1 has further argued that the property in question was purchased by the respondent No.2 who filed Civil Appeal No.65/2014 for setting aside the judgment and decree dated 27.03.2014 and 29.03.2014 and after hearing the appellate Court has allowed his appeal by setting aside the said judgment and decree. Per learned counsel for the respondent No.1, the appellate Court has rightly concluded the matter by remanding the case back to learned trial Court for deciding the issue of payment of sale consideration by the respondent No.1 to the father of appellants against purchase of property in question. The learned counsel for the respondents prayed for dismissal of present II<sup>nd</sup> Appeal of the appellants.

6. The learned counsel appearing on behalf of respondent No.2 has fully supported the arguments advanced by the learned counsel for the respondent No.1 and prayed for dismissal of present II<sup>nd</sup> Appeal. Per learned counsel for respondent No.2 the learned appellate Court has rightly allowed the appeal of respondents by setting aside the judgment and decree of learned trial Court.

7. Submissions put forward by the parties have been considered, the judgment passed by the Courts below have been examined in perspective of the law laid down by the superior Courts including the citations referred by the learned counsels for the appellants/plaintiffs.

8. The perusal of the judgment passed by the trial Court adequately reveals that the trial Court has decided the case on merits after discussing the entire evidence available on record. Each issue was discussed and findings were recorded thereon. The first appellate Court without touching the factual controversy decided by the trial Court dilated upon the requirement of probing into an additional issue concerning payment of alleged Rs.40,000/- made by respondent No.1/defendant No.1. It is stated that respondent No. 1/defendant No.1 who was declared ex-parte by the trial court after pronouncement of judgment by the trial court had moved an application under section 12 (2) CPC, which was heard and dismissed by the trial court vide order dated 14.02.2015. The respondent No.1/defendant No. assailed such order through Civil Revision No. 14 of 2015, which was heard by the same first appellate court and finally it met the same result of dismissal vide order dated 25.11.2015. It is observed that the first appellate Court travelled contrary to position on record and failed to consider that there was no defence whatsoever on record from respondent No.1/defendant No.1 having been failed to file written statement and declared ex-parte by the trial Court. It is also matter of record

that respondent No.2/defendant No.2 who was alleged to have purchased subject property from respondent No.1/defendant No.1 did not raise the plea with regard to payment of Rs. 40,000/- to the father of appellant/plaintiff by respondent No.1/defendant No.1. Even such contention was not taken by the respondent No.1/defendant No.1 in his application under section 12 (2) CPC, available on record. Admittedly it was not the case of either party that the evidence recorded in the case was insufficient or inclusive to justify or necessitate remand of case.

9. In the attending circumstances, the order of remand, at the face of it, is against the provision of Order XLI, Rule 23 CPC, it militates against the stipulation contend in Rule 24, and has been passed in flagrant violation of the principles of law settled by the superior Court. It is now well settled preposition of law that remand of case is not a routine matter, it should be adopted only when compelling circumstances exist, as it results in unnecessary procrastination of proceedings. The apex Court in number of cases held that remand of a case can only be ordered when it becomes absolutely necessary and inevitable in vies of insufficient or inconclusive evidence on record. Reliance is placed on the rulings of apex Court reported in 2005 SCMR 152 & PLD 2004 SC 10.

10. Tested on the touchstone of the principles of laws elucidated by the apex Court, it will be seen that the order of remand passed by the appellate Court was perfunctory and perverse and was unwarranted in the circumstances of the case. Since the entire evidence on record was available, which was sufficient for the appellate Court to pronounce judgment on merits as the grievances of the respondent No.2/defendant No.2 (appellant in Civil Appeal No.65/2014) were relating to the findings of the trial Court. The first appellate Court was required to decide the appeal on merits, the order of remand was manifestly contrary to law.

11. Needless to observe that in view of the position, the first appellate court has not assessed and evaluated the evidence at all, therefore, it will be inappropriate, if not wholly illegal to decide the controversy in second appeal, as it will essentially require reappraisal, re-appreciation and reevaluation of evidence, which in the circumstances, would be beyond the scope of section 100 CPC.

12. The order of remand passed by the first appellate Court being illegal and in violation of law is set aside. Consequently, Civil Appeal No. 65/2014 shall be deemed to be pending before the III<sup>rd</sup> Additional Sessions Judge, Karachi West. He is directed to hear the parties and dispose of the appeal on merits, strictly in accordance with law, as expeditiously as possible, preferably within a period of 60 days from the date of receipt of this order. Orders accordingly.

Dated: 30.04.2018

*JUDGE*