

# IN THE HIGH COURT OF SINDH, KARACHI

## IIInd Appeal No. 121 of 2013

Maulana Shabbir Ahmed Usmani.....Appellant.

*Versus*

Muhammad Sharif Mughal and another.....Respondents.

### **ORDER**

Date of hearing	:	13 <sup>th</sup> March, 2018.
Date of Order	:	13 <sup>th</sup> June, 2018.
Appellant.	:	M/s. Abdul Qadir & Abdul Waheed Kanju, advocates.
Respondent No.1	:	M/s. Syed Jawad Hyder Rizvi & M.K. Shikoh, advocates.

>>>>>>>> <<<<<<<<<<

**Kausar Sultana Hussain, J:-** This Second Appeal under Section 100 C.P.C. is directed against the judgment and decree dated 26.10.2013 and 30.10.2013 respectively passed by learned Vth Additional District Judge, Karachi South, whereby Civil Appeal No. 03 of 2013 was allowed and the Judgment and decree dated 24.12.2012 passed by the learned Vth Senior Civil Judge, Karachi South in Civil Suit No. 140 of 2007 filed by respondent No. 1 was set aside as prayed with no order as to cost.

2. The facts of the case relevant for the purpose of disposal of this appeal, in brief, are that the respondent No. 1 filed a Suit for possession, mesne profit and injunction against the appellant contending therein that he purchased the plot No. G-41/6 along with plot No. G-41/5 with construction, at Manzoor Colony Karachi against sale consideration of Rs. 20,000/- by virtue of Sale Agreement dated 18.12.1980. The respondent No. 1 after acquiring the said plot No. G-41/6 established a religious Educational Trust therein in the name and

style of "IDARA MINHAJUL QURAN WAL SUNNA" on 12.04.1995 and to run the said Madarsah, the respondent No. 1 employed the appellant as Teacher, otherwise appellant had no concern with the property built on the plot No. G-41/6 and/or with Madarsah. During the employment, the appellant became greedy and dishonest and prepared forged sale agreement and filed Civil Suit No. 1063 of 1995 in the Court of learned IInd Senior Civil Judge Karachi South which was dismissed/rejected on 30.05.1996. Thereafter the appellant filed Review Application, which was also dismissed on 18.08.1996 and subsequently Civil Revision No. 17 of 1996 was filed before the Court of learned District & Sessions Judge Karachi South, which was also dismissed on 05.05.1997 and lastly the plaint was rejected vide order dated 10.09.1998. The appellant by misrepresentation and fraud has also got the Trust registered in the same name built on plot No. G-41/5 on 04.04.1995 and by concealing and suppressing real facts filed Civil Suit No. 1000 of 1998, which was dismissed vide judgment and decree dated 30.11.2006, passed by the learned Ist Senior Civil Judge Karachi South. The appellant has admitted in his evidence regarding the ownership of the respondent No. 1 over the suit property/plot No. G-41/6 Manzoor Colony, Karachi thereafter, the respondent No. 1 requested the appellant for vacation of the suit property but of no avail. The appellant has no right, title or interest to retain the possession of the suit property, therefore, the respondent No. 1 is entitled to mesne profit at the rate of Rs. 15000/- per month as the suit property has been detained/occupied by the appellant as unauthorized occupant. The appellant has failed to vacate the suit property, therefore, the respondent No. 1 filed Civil Suit No. 140 of 2007 with the following prayers as under:

- a)** A decree for possession be passed against the defendant/appellant directing him to hand over to the plaintiff/respondent No.1 the actual vacant and physical

possession of plot of land bearing No. G-41/6, New No. MZC-367 Manzoor Colony, Karachi measuring 200 Square Yards with construction thereon on account of un-authorize occupation and use by the defendant/appellant.

**b)** A decree for Rs. 540,000/- being the amount of mesne profit for three years at the rate of Rs. 15000/- per month against the defendant and in favour of the plaintiff/respondent No.1.

**c)** A decree for future mesne profit at the rate of Rs. 15000/- per month from the date of the suit till possession of the plot of land bearing No. G-41/6 New No. MZC-367, Manzoor Colony, Karachi measuring 200 Square Yards with construction thereon is delivered to the plaintiff/respondent No.1 by the defendant/appellant.

**d)** Permanent injunction restraining the defendant/appellant, his agent, servants, employees, assigns, Attorney etc. from parting with or handing over the possession of the plot of land bearing No. G-41/6, New No. MZC-367 Manzoor Colony, Karachi measuring 200 Square Yards with construction thereon in favour of any person except the plaintiff.

**e)** Any other relief(s) which this Hon'ble Court may deem fit and proper may be awarded.

3. The appellant/defendant contested the matter by filing his written statement, wherein at the very outset challenged the maintainability of the suit and also denied that the respondent No. 1/plaintiff had purchased the suit property. The respondent No. 1 prepared forged sale agreement dated 18.12.1980. The appellant further denied to be the employee of respondent No. 1. The appellant claims that he is Chairman of the Madarsah prior the registration of Trust. The appellant has admitted to have filed Civil Suit No. 1000 of 1998 and the decision of said suit was challenged before the appellate court. The appellant/defendant further denied in his written statement that he never promised for vacating the suit property and submitted

that he is lawfully in possession of suit property by way of exchanging of his own plot No. G-41/7 with the respondent No. 1. Lastly, the appellant/defendant asserted in the written statement that the respondent No. 1/plaintiff is not entitled for any relief claimed in the suit, hence the same is liable to be dismissed.

4. Out of the pleadings of the parties, the learned trial Court framed the following issues for determination:-

1. Whether the suit is maintainable under the law?
2. Whether the plaintiff's suit is barred under the law of misjoinder and non-joinder of the parties?
3. Whether the suit is barred under the principle of Estoppels and waiver?
4. Whether the plaintiff purchased the suit property against the sale consideration of Rs. 20,000/- by virtue of Sale Agreement dated 18.12.1980?
5. Whether the plaintiff after acquiring plot No. G-41/6, Manzoor Colony, Karachi established a religious education trust in the name of Idara-e-Minhajul Quran Wul Sunna on 12<sup>th</sup> April, 1995?
6. Whether the plaintiff employed the defendant as Teacher in the said Idara-e-Minhajul Quran Wul Sunna?
7. Whether the parties have remained under litigation of the disputed property, if so what its effect?
8. Whether the defendant by misrepresentation and fraud has got his trust registered in the same name of the property built on plot of land bearing No. G-41/5, Manzoor Colony, Karachi which is liable to be cancelled?
9. Whether the defendant is illegally and unlawfully trespassed on the plot of land bearing No. G-41/5, Manzoor Colony, Karachi?
10. Whether the plaintiff is entitled for possession of the suit property?
11. Whether the plaintiff is entitled to claim of mesne profit, if so on what terms?
12. What should the decree be?

5. Thereafter the respondent No. 1/plaintiff examined himself by filing his Affidavit-in-evidence as Exh/P and produced certain documents as Exh. P/1 to P/69. The respondent No. 1/plaintiff also got two witnesses examined namely Ameer Afsar and Haji Mohammad Nawaz in his support. On the other hand, the appellant/defendant also led his evidence by filing his affidavit-in-evidence as Exh. D/1 and produced documents as Exh. D/2 to D/12. He also got two witnesses examined namely Nazeer Ahmed and Mohammad Akram in his support and closed his side. All of aforesaid witnesses were duly cross-examined by the learned counsel for the rivalry.

6. Thereafter, the learned trial Court passed the impugned judgment, wherein while answering issue No. 1 in negative, left issues No. 2 to 9 as redundant and concluding issues No. 10 to 12, dismissed the suit of respondent No. 1/plaintiff vide judgment dated 24.12.2012.

7. The respondent No. 1/plaintiff has assailed the said judgment and decree dated 24.12.2012 before the learned District Judge Karachi South, who alternately transferred the said appeal to learned Vth Additional District Judge Karachi South. The appellant/defendant and respondent No. 1/plaintiff have contested the said appeal.

8. Learned counsel for the appellant has contended that impugned judgment and decree of the learned appellate court are absolutely illegal, contumacious and arbitrary so much so outcome of violation of statutory provisions and the pronouncements of the superior courts. During course of arguments learned counsel for appellant entirely emphasized on the point of maintainability of the

respondent's suit as according to him the respondent has filed suit for possession of the said property coupled with the prayer of mesne profit, but he has not sought relief for declaration under Section 42 of the Specific Relief Act, therefore, the learned trial Court has rightly dismissed the suit of the respondent but the learned appellate court failed to apply its judicial mind and failed to appreciate that Section 42 of the Specific Relief Act clearly provides that, if any person, entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny his title to such character or right. The learned counsel for the appellant has further contended that appellant being owner of plot No. 41/G-7 Manzoor Colony exchanged/transferred the same with plot No. 41/G-6 of the respondent but thereafter respondent turned dishonest, for which the appellant has filed a suit No. 1000 of 1998 against the respondent for declaration and permanent injunction but his said case was dismissed even up to Hon'ble Supreme Court. The learned counsel for the appellant has relied upon the following case laws in support of his contention.

1. PLD 2001 SC 213 (b),
2. 2005 SCMR 1872 (a),
3. 2010 SCMR 1630 (f), relevant pages 1658 & 1659,
4. PLD 2001 SC 213 (a),
5. PLD 2001 SC 158 (c),
6. 2010 CLC 350 (b),
7. 2010 SCMR 1925 (b),
8. 2007 SCMR 181(b),
9. NLR 1989 UC 575(a),
10. PLD 1965 SC 698(f), PLD 1970 Baghdad-ul-Jadid 5(c)
11. PLD 1977 SC 28(a) at 34.

9. Conversely, the learned counsel for the respondent has argued that the appellant has never sought relief of declaration in respect of the suit property on the contrary he has admitted ownership of the respondent during his cross examination by replying in affirmative that the documents of the property in respect of plot No. G-41/6 are in the name of Muhammad Sharif Mughal

(respondent). The appellant further admitted in his same cross that the plot No. G-41/5 and G-41/6 were purchased by Muhammad Sharif (respondent) through sale agreement dated 11.12.1980 and the bills of electricity and gas are being issued in the name of respondent/plaintiff. The learned counsel has argued that the appellant has filed a suit No. 1000 of 1998 against the respondent in respect of suit property but his case was dismissed by the learned trial Court on 30.11.2006, his Civil Appeal No. 239 of 2006 was also dismissed by the learned appellate court, vide judgment and decree dated 24.05.2008, then IInd Appeal No. 25 of 2008 filed by him was also dismissed, vide judgment and decree dated 18.02.2010 and lastly the Hon'ble Supreme Court of Pakistan has also dismissed the Civil Appeal No. 88-K of 2010. The learned counsel for the respondent has supported the judgment passed by the learned appellate court in his favour. He has relied upon the following case laws in support of his contention.

1. 2005 CLC 83.
2. 2013 CLC 191.
3. PLD-2014 SC 380.
4. 2005 SCMR 1872.
5. 1997 CLC 176.
6. 2006 YLR 2386.
7. 2014 MLD 1016.
8. 2015 CLC 1687.
9. 2015 YLR 1875.
10. 2009 SCMR 759.
11. 2008 SCMR 454.
12. PLD 2012 SC (AJK) 13.
13. 2006 CLC 482.
14. 2012 YLR 2949.
15. 2014 CLC 1685.
16. 1991 SCMR 2063.
17. PLD 2004 SC 682.
18. 2015 CLC 1711.

10. After hearing the arguments and perusal of record, I am of the very clear view that the learned trial court in spite of recording evidence of both the sides did not bother to consider it and kept itself constrained to the extent of only one issue related with the

maintainability of the suit of the respondent/plaintiff. The trial court while deciding the case should discuss all the issues on merits. While going through the evidence of the parties it has been revealed the learned trial court did not consider the previous round of litigation between the same parties wherein the appellant had sought relief in his suit No. 1000 of 1998 that the appellant (plaintiff in suit No. 1000 of 1998) is the owner of plot No. 41/G-6 Manzoor Colony, Karachi having got the same exchanged with the respondent (defendant in said suit No. 1000 of 1998) against property No. 41/G-7 Manzoor Colony Karachi. The appellant could not succeed to prove his claim up to Hon'ble Supreme Court for the reasons that he could not produce any document in this regard before court(s); on the contrary in the suit filed by the respondent against the appellant, he himself admitted the ownership of the respondent Muhammad Sharif Mughal. Since the claim of ownership of the appellant in respect of his ownership of suit property No. 41/G-6 had already been declined by the courts up to Hon'ble Supreme Court hence seeking declaration in this regard while filing present civil suit by the respondent was unnecessary and unwarranted as discussed by the learned trial court and on the sole ground he has dismissed the suit of the respondent. The learned appellate court, however, gone through the evidence of the witnesses of both the sides recorded by the learned trial court and discussed the same in its judgment by putting much emphasis on the point of admissions made by the appellant in his cross examination. The respondent has also produced his documents related with his claim of ownership i.e P.T.I. issued by the Excise and Taxation Department.

11. Since, the appellant has admitted the ownership of the respondent during leading his evidence, therefore, the question of

ownership of the suit property has finely been settled between the parties. On the contrary the respondent has failed to prove his claim of exchanged/transferred of his property with the property in question belong to the respondent, up to Hon'ble Supreme Court, hence, I do not find any illegality, infirmity in the judgment and decree of the appellate court, thus, the findings of the learned appellate court on this account required no interference. The present appeal is therefore dismissed.

**J U D G E**

Faheem/PA