

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

IIInd Appeal No.198 of 2020

Date Order with Signature of the Judge

Hearing/priority case.

1. For order on office objection as at "A".
2. For hearing of CMA No.5019 of 2020.
3. For hearing of main case.

Heard on : 21st October, 2021.

Date of Decision : 21st October, 2021.

For Appellant : Mr. Khan Zaman, Advocate.

For Respondent No.1 : Mr. Imran Ahmed, Advocate.

For Respondents No.2-3 : Syed Arshad Hussain Naqvi, A.A.G, Sindh

J U D G M E N T

Kausar Sultana Hussain, J. :- This second appeal under Section 100 C.P.C is directed against the Judgment and Decree dated 04.11.2020 and 09.11.2020, respectively passed by the learned Vth Additional District Judge/Model Civil Appellate Court, Karachi West in Civil Appeal No. 218 of 2019 filed by the Appellant/Defendant against the Judgment & Decree dated 31.07.2019 passed by the learned Senior Civil Judge-II, Karachi West in Civil Suit No. 175 of 2007, whereby, the Appeal of the Appellant/Defendant was dismissed, hence this IIInd Appeal.

2. Necessary facts, in brief, forming background of instant appeal are that Respondent No.1/Plaintiff had filed a Civil Suit No.175 of 2007 against Appellant/Defendant for Declaration, Possession, Mesne profit, Recovery of Damages and Permanent Injunction. It was alleged that he purchased a Plot No.A-439, Sector 10, Bismillah Colony,

Orangi Town, Karachi measuring 100 square yards (hereinafter referred as suit property) from one Jahan Badshah son of Khan Badshah by virtue of registered sale deed executed on 15.04.2003. After purchasing the suit property, he raised construction and spent a considerable amount on it. After completion of construction work, the Appellant/Defendant threatened the Respondent/Plaintiff to vacate the suit property immediately without any cause and reason and subsequently in the month of July 2004, the Appellant/Defendant alongwith some mobsters and heavy machinery entered in his house and after dispossessing him and his family members from there, bulldozed his house, as such he sustained loss of Rs.2,50,000/-. Appellant/Defendant has illegally occupied the suit property after damaging the construction over it, as such, he suffered great hardship at the hands of the Appellant/Defendant and got mental agony, torture, feeling uneasiness and has become patient of Hypertension and spent a considerable amount on his medical treatment; he also claimed damages in respect of defamation amounting to Rs.5,00,000/- from the Appellant/Defendant and mesne profit @ 5000/- per month since July,2004 till January 2007 and the future mesne profit at the same rate.

3. The Appellant/Defendant contested the matter, filed written statement, wherein he denied all the allegations levelled against him. It is further stated that Respondent No.1/Plaintiff had purchased the suit property from one Jahan Badshah son of Khan Badshah alias Hanif by misrepresentation and had obtained the lease /sale deed by way of fraud for which the Appellant/Defendant has already filed a

suit for cancellation of said sale deed before the concerned trial Court bearing suit No. 394 of 2007. The Appellant/Defendant alongwith his family is living in the suit property since long and the constructions thereon alongwith electricity and gas connection has been got installed by the Appellant/Defendant from his own expenses. Jahan Badshah alias Hanif is the brother of the Appellant/Defendant's wife Nasim Jehan and he on 03.06.1999 approached him and obtained loan of Rs.39,000/- and subsequently Rs. 50,000/- and against such loan, the said Jahan Badshah mortgaged the suit property to him through written Iqrarnama and promised him that in future he would sell the suit property to Appellant/Defendant and till such time he will have right to use the suit property without any sort of charges and also permitted him to construct the house and reside therein.

4. Out of the pleadings of the parties, the learned trial court framed the following issues:-

1. Whether the plaintiff is lawful owner and purchaser of suit property, if yes, what is its effect?
2. Whether the defendant has any title documents in respect of his claim of ownership in regard the suit property, if yes, what is its effect?
3. Whether the defendant illegally and unlawfully occupying the possession of the suit plot after damaging the construction over the suit plot of plaintiff and sustained loss to the plaintiff to the tune of Rs.2,50,000/-, if yes, what is its effect?
4. Whether the plaintiff is entitled to receive damages from the defendant in respect of defamation amounting to Rs.5,00,000/-, if yes, what is its effect.
5. Whether the plaintiff is entitled to receive mesne profit @ Rs.5000/- per month from the defendant since July

2004 till April 2007 as well as future mesne profit at the same rate, if yes, what is its effect?

6. What should the decree be?
 7. Whether the suit plot has been got mortgaged by the Vendor in favour of the defendant much prior to the execution of sale deed?
 8. Whether the title in favour of the plaintiff is defective and obtained by way of fraud?
5. The Respondent/Plaintiff in order to prove his case examined himself as PW-1 at Ex.P/1 and also produced original documents in support of his alleged ownership i.e. Sale deed dated 15.04.2003 (P/1-AA) lease deed dated 28.10.1998 (P/1-AB) and Search Certificate issued by the District Registrar Karachi, Sub-Registrar Central Record City Court, Karachi dated 10.10.2012 (P/1-AC).
6. On the other hand the Appellant/Defendant has also examined himself as DW-1 (D/1) through filing his affidavit in evidence (D/1-A) and produced Iqarnama dated 03.06.1999 (D/1-B), SSGC Bills for the months of September and October, 2006 (D/1-C and D/1-D) and Electricity Bills for the month of December, 2006 and October, 2018 (D/1-E & D/1-F).
7. The Chronological history of the case shows that in first round of litigation the suit of the Respondent No.1/Plaintiff was Decreed by the learned trial Court, vide Judgment and Decree dated 09.10.2010 and the learned Appellate Court while deciding Civil Appeal No. 237 of 2019 filed by the Appellant/Defendant remanded back the matter to the trial Court after setting aside the Judgment and Decree of trial Court dated 09.10.2010 with directions to dispose of the suit of the Respondent/Plaintiff according to law.

8. In second round of litigation the learned trial Court had recorded the cross-examination of the Respondent No.1/Plaintiff, evidence of Appellant/Defendant and his two witnesses. The learned trial Court then after hearing both the side had dismissed the suit of the Respondent/Plaintiff on merits vide Judgment and Decree dated 17.01.2013. The Respondent/Plaintiff then approached the learned appellate Court by filing Civil Appeal No. 38 of 2013 before the learned Additional District Judge, XIth Karachi West. The learned appellate Court had set aside the Judgment and Decree of the learned trial Court dated 17.01.2013 and once again the matter was remanded back to the learned trial Court vide Judgment dated 26.02.2018 with direction to provide opportunity to the parties to produce their witnesses for recording their evidence and so also the evidence of the Sub-Registrar concerned as Court Witness and the documents of the property in question be also got verified from concerned department.

9. In third round of litigation the learned trial Court recorded the evidence of the Sub-Registrar Orangi Town namely Zulfiqar Ali Lakho (Exh. C/1) as Court Witness, who had produced the verification report and letter of verification of the Microfilming Unit, Board of Revenue, Sindh, Karachi (Exh. C/1-A & B). After hearing arguments of both the side the learned trial Court had decreed the Suit of the Respondent No.1/Plaintiff vide Judgment & Decree dated 31.07.2019. The Appellant/Defendant has filed a Civil Appeal No. 218 of 2019 against the said Judgment & Decree dated 31.07.2019 before the learned Vth Additional District Judge (MCAC), Karachi West, who after hearing arguments of both the side had dismissed the said Appeal of the

Appellant/Defendant vide judgment dated 04.11.2020 and maintained the Judgment & Decree of the learned trial Court dated 31.07.2019.

10. The Appellant/Defendant being aggrieved preferred present Second Appeal No. 198 of 2020 against the impugned Judgment & Decree of the learned Appellate Court as well as the learned trial Court dated 04.11.2020 and 31.07.2019 respectively with the prayer to set aside the impugned Judgments & Decrees of both the Courts below and dismiss the suit of the Respondent/Plaintiff.

11. I have heard the learned Counsel for the parties and also have gone through the entire record of the case, which described a long history of litigation consisting upon three rounds between the parties with regard to the controversy over the ownership of the property in question.

12. The learned Counsel for the Appellant/Defendant while questioning the impugned Judgments & Decrees passed by the learned trial Court and Appellate Court emphasized on the point that the learned appellate Court concerned is not justified in passing the impugned Judgment, committed flagrant illegality and did not take into consideration that the impugned Judgment & Decree are not in accordance with law and facts of the case. He further submitted that the learned trial Court as well as Appellate Court have failed to consider that the Respondent No.1/Plaintiff, who produced the Lease Deed & Sale Deed of the suit property could not produce the executant of said Sale Deed namely Jahan Badshah and its witnesses Javeed Awan and Ms. Yasmin Anjum for recording their evidence

before the learned trial Court as such failed to prove the alleged execution of the Sale Deed in his favour as stipulated in Article 78 & 79 of the Qanun-e-Shahadat Order, 1984. The learned Counsel for the Appellant/Defendant further extended his arguments that both the Courts below have failed to consider that the Respondent No.1/Plaintiff had produced fake and bogus Sale Deed dated 05.04.2003 before the learned trial Court, obtained by him by way of fraud with collusion of some officials by mentioning old NIC number of the Executant Jahan Badshah son of Khan Badshah in such Sale Deed, while in 2000 NADRA had issued Computerized Identity Cards. Per learned counsel for the Appellant/Defendant both the Courts below have failed to consider that in Search Certificate dated 15.09.2006 issued by Sub-Registrar, Central, City Court, Karachi w.e.f. 28.10.1998 to 31.12.1999 the name of Jahan Badshah is still in existence, while the Respondent No.1/Plaintiff claims that Sale Deed dated 05.04.2003 has been executed in his name, which clearly shows that Sale Deed in question is fake and bogus and obtained by way of fraud. He further argued that the Respondent/Plaintiff during his cross examination had made some admissions before the trial Court but both the Courts below did not consider the same while deciding the matter pending before them, hence the impugned judgments and decrees may be set aside and Suit of the Respondent/Plaintiff may be dismissed.

13. On the contrary the learned counsel appearing on behalf of the Respondent/Plaintiff has supported the impugned Judgments and Decrees passed by both the Courts below and submitted that the

learned Appellate Court as well as the learned trial Court have considered all the relevant facts and laws while deciding the matter and passed detailed Judgments with comprehensive discussion and logical reasonings. He further submitted that the Appellant/Defendant could not bring any authentic documents in support of his claim of ownership of the house in question and also failed to justify his possession over there. He pointed out that unregistered Iqrarnama dated 03.06.1999 and few utility bills produced by the Appellant/Defendant in order to prove his alleged ownership infact has no legal sanctity and value in the eye of law. Per learned counsel, the Respondent/Plaintiff has possessed original Sale Deed of the house in question duly registered in his name, executed by the previous owner in his favour and after transfer of the property in his favour the previous owner Jahan Badshah himself has never come forward to deny the execution of said Sale Deed at any forum even original Lease Deed of the suit house is also with the Respondent/Plaintiff, therefore, the Article 78 & 79 of Qanun-e-Shahadat Order, 1984 are not applicable in this matter. He further argued that since the Appellant/Defendant has possessed no legal document in his favour, which could prove him as owner of the suit property, hence he has no legal right, reasons or character to challenge the Registered document i.e. Sale Deed executed by the previous owner Jahan Badshah in his favour. He prayed for dismissal of appeal of the Appellant/Defendant being devoid in law.

14. After hearing arguments and perusal of the entire record and relevant laws, I am of the view that the instant Second Appeal filed

under Section 100 of C.P.C by the Appellant/Defendant against the impugned Judgment and Decree of the learned first appellate Court dated 04.11.2020 and 09.11.2020 respectively requires some legal consideration as Section 100 of C.P.C clarify that Second Appeal shall lie against the impugned decision of first appellate Court, if it is contrary to law or the impugned decision failed to determine some material issue of law or a substantial error or defect in the procedure provided by the C.P.C and any other law for the time being in force, which possibly affect the decision of the case on merits.

15. In instant Second Appeal the substantial plea of the Appellant/Defendant is that the learned trial Court as well as appellate Court have not considered the facts of the case available on record i.e. the executant of alleged Sale Deed (produced by the Respondent/Plaintiff) and its witnesses did not come in witness box to lead their evidence in support of Respondent's version as such he remained fail to prove the Sale Deed in accordance with Article 78 & 79 of Qanun-e-Shahadat Order, 1984 and besides this the Respondent/Plaintiff admitted some material facts during his cross-examination but both Courts below did not consider the same while deciding the matter. By virtue of Section 101 C.P.C a Second Appeal does not lie except on the grounds mentioned in Section 100 C.P.C. From perusal of the grounds mentioned in Section 100 C.P.C, a Second Appeal does not lie on the ground of an error on question of facts, therefore, here I would discuss only the error of law and procedural defect in the decision, if any.

16. Now the question arises that in pursuance of Section 100 C.P.C what kind of defect we may treat as error in the procedure. Law provides the following substantial errors or defects in the procedure which may possibly produce an error or defect in the decision of the case on the merits:-

- o. Omission to frame proper issue, or to try a material issue
- o. Failure to record the evidence of witnesses in the manner prescribed.
- o. Misjoinder, or non-joinder of parties.
- o. Disposing of appeal after the death of a party without impleading the legal representatives as parties.
- o. A finding arrived at after wrongly placing onus of proof.
- o. Where the judgment is not written in accordance with Order 41 rule 31, except where the error does not affect the merits.
- o. Error or defect in the admissibility of evidence, or improper rejection of evidence.

17. The learned counsel for the Appellant/Defendant has pointed out legal error in the impugned judgment of the Appellate Court with regard to defect in the procedure which was ignored by the learned Appellate Court while deciding the matter is that the Respondent/Plaintiff has not led the evidence of the executant of the Sale Deed and its witnesses in order to prove his claim as provided in Article 78 & 79 of Qanun-e-Shahadat Order, 1984. I would like to reproduce here Article 78 & 79 as under:-

78. Proof of signature and handwriting of person alleged to have signed or written document produced: If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

79. Proof of execution of document required by law to be attested: If a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses or

least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of given Evidence.

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

18. Bare reading of Article 78 of the Qanun-e-Shahadat it make clear that if a document is alleged to be signed or to have written wholly or in part the person, the signature or the writing of so much of the document as was to be and that person's handwriting. In instant matter, record shows that the Sale Deed registered in the name of the Respondent/Plaintiff by one Jahan Badshah had been challenged by the Appellant/Defendant in his Written Statement. In para 2 of his Written Statement first of all the Appellant/Defendant admitted that the suit property was purchased by the Respondent/Plaintiff from Jahan Badshah, further he stated that the Respondent/Plaintiff obtained the Lease/Sale Deed by way of fraud for which the Appellant/Defendant had already filed a suit for its cancellation before the Court being Suit No. 394 of 2007. The Appellant/Defendant did not elaborate in his Written Statement that as to how alleged fraud had been committed by the Respondent/Plaintiff with the said Jahan Badshah for obtaining Sale Deed of the house in question. The Appellant/Defendant while cross examining the Respondent/Plaintiff did not suggest about the alleged fraud in executing Sale Deed in his favour except to suggest him that Sale Deed was not executed before Registrar and it is manipulated document, which suggestion was denied by the Respondent/Plaintiff.

The Appellant/Defendant even did not put any suggestion before the Respondent/Plaintiff in his cross about signature of the Jahan Badshah on Sale Deed as forged one and about his hand writing. While leading his evidence the Appellant/Defendant has produced Iqarnama as Exh. D/1-B in support of his claim of ownership of the suit property. The said unregistered Iqarnama cannot be treated as authentic document of ownership and at the most the said Iqarnama could have been helpful to the Appellant/Defendant for recovery of the money allegedly borrowed by Jahan Badshah from him. According to the Appellant/Defendant the said Jahan Badshah promised him that in future he would sale the suit property to him, if he fails to return his money. On the contrary, the Respondent/Plaintiff has possessed a registered document i.e. Lease Deed in the name of Jahan Badshah and Sale Deed duly executed by him in favour of Respondent/Plaintiff. The Court witness Sub-Registrar Orangi Town, Karachi West while leading his evidence verified both the documents of the Respondent/Plaintiff i.e. Lease Deed and Sale Deed (Exh. P/1 AB & Exh. P/L AA) respectively) by producing verification report (C/1-A) and letter of verification of Micro Filming Unit, Board of Revenue Sindh, Karachi (Exh. C/1-B). In instant matter the Appellant/Defendant is neither purchaser nor seller of the suit property but as per claim of the Respondent/Plaintiff he trespassed his property and dispossessed him from his own house. The record shows that the Appellant/Defendant himself admitted that Jahan Badshah, who is his brother in law is not in his contact and as per promise he has not executed Sale Deed in his favour, hence his claim

of ownership and possession over the suit property become questionable and I did not find any favourable situation which could clear his own Status and prove his locus standi to claim himself as owner so also his statement that the Respondent/Plaintiff had obtained Sale Deed through misrepresentation and fraud seems unreasonable. In the entire situation the Appellant/Defendant may be treated as third person, who has no claim to the extent of the Respondent/Plaintiff with regard to property in question, however, if he has any claim against Jahan Badshah he has an opportunity to approach the Court concerned for redressal of his grievance against him but in instant matter he hardly could get any benefit. It is well settled law that, if the execution of the registered Sale Deed is denied by the executant/vendor or his legal heirs, then the onus to prove the registered Sale Deed shifted to the vendee/beneficiary, who is obligated to verify the bargain and payment of money regarding the property by producing sufficient evidence as provided under Article 78 of Qanun-e-Shahadat Order, 1984, but where the third person challenges the validity of any registered document or transfer or transaction of the property, the onus shifts upon the beneficiary only when third person can bring on record concrete, complete, solid and convincing evidence to prove his contention, otherwise, if he fails to produce some considerable evidence, no question of shifting of onus to establish upon the beneficiary applies in that eventuality.

19. Proviso of Article 79 of Qanun-e-Shahadat Order, 1984 provides that it is not necessary to call an attested witness in proof of a registered instrument except a Will, unless its execution is

denied. In instant matter the executant of Registered Sale Deed has not come forward to challenge it by filing declaratory suit against the Respondent/Plaintiff in any Court of law, hence proviso of Article 79 of Qanun-e-Shahadat Order, 1984 would apply in this case.

20. I have minutely gone through the record as well as the findings recorded by the two Courts below, the findings match with the evidence. In this case one thing is to be kept in mind that owner the principal has not challenged the Sale Deed transfer of the property.

21. In view of the facts referred to herein above, I am of the view that the impugned Judgment and Decree dated 04.11.2020 and 09.11.2020, respectively passed by the learned Vth Additional District Judge/Model Civil Appellate Court, Karachi West in Civil Appeal No. 218 of 2019 does not suffer from any legal or factual error, hence, does not require any interference by this Court, accordingly, instant second appeal is dismissed alongwith all pending applications with no order as to cost.

J U D G E