

IN THE HIGH COURT OF SINDH, KARACHI

IIND APPEAL NO. 89 OF 2016

PRESENT:

MR. JUSTICE ARSHAD HUSSAIN KHAN

Naseem Akhtar Vs. Abdul Rehman Khan

Appellant : Naseem Akhtar
through Mr. Asif Ali Pirzada, Advocate.

Respondent : Abdul Rehman Khan, in person.

Date of Hearing: 07.11.2016

Date of
Judgment: 14.11.2016

JUDGMENT

ARSHAD HUSSAIN KHAN, J. The appellant through the instant second appeal has challenged the concurrent findings of the court below and sought relief as follows:-

“ It is prayed that this Honourable Court may be pleased to call for the R&Ps. of Civil Appeal No.133/2012 from IInd Additional District Judge Central at Karachi and C.S. No.443/2009 and of the personal of the same and hearing the appellant judgment and decree dated: 23-05-20016 passed by the IInd Additional District Judge at Karachi central in C.A. No.133/2012 and judgment and decree dated 23.05.2016 passed by the IInd Sr. Civil Judge Central at Karachi may be set aside and dismiss / reject civil suit No.443/2009. Cost of the proceeding may also be awarded.”

2. Brief facts leading to the filing of instant appeal as averred therein are that respondent/plaintiff filed a civil suit bearing No. 443 of 2009 for specific performance, possession, mense profit and injunction, inter alia, against the appellant/defendant before the learned Court of IInd Senior Civil Judge Karachi (Central) wherein it was pleaded that one Muhammad Ayub (defendant No.1 in the suit) being the lawful registered attorney of allottee namely Abdul Majeed son of Abdul Hameed agreed to sell the plot bearing No.LS-11 measuring 40 Sq. Yds. situated at Sector 5-

C/2, North Karachi Township Karachi (subject property) vide sale agreement dated 11.10.2008 against the total sale consideration of Rs.17,00,000/= and the said sale transaction was to be completed within three months after the execution of the sale agreement. It was also pleaded in the said suit that out of total sale consideration, the said Muhammad Ayub received part payment of Rs.12,00,000/- through cash, pay-orders and cheques on different occasions under valid receipts whereas the remaining sale consideration was to be paid at the time of handing over possession of the subject property. It was also mentioned in the suit that at the time of signing of sale agreement two shops were constructed on the subject property out of which one shop measuring 8 x 30 sq. ft. was in possession of one Abdul Hameed (defendant No.2 in the suit) as tenant and another half portion of shop measuring 4 x 30 sq. ft. was illegally occupied by appellant (defendant No.3 in the suit) and it was agreed between the parties that after transfer of the subject property till 31.12.2008 Muhammad Ayub shall handover the peaceful vacant possession of subject property measuring 40 sq. yds. plot to the respondent/plaintiff. It was also pleaded that Muhammad Ayub after receiving the above mentioned part payment appeared before the concerned officer of KDA and recorded his statement for transferring and conveying the subject property in favour of the respondent/plaintiff in the relevant record who after completing all legal formalities transferred the subject property in the name of respondent/plaintiff on 30.12.2008. After transfer of the subject property in the name of respondent/plaintiff, Muhammad Ayub being the attorney handed over all the original relevant documents/title of the subject property to the respondent. After transfer of the subject property the respondent/plaintiff offered Muhammad Ayub (defendant No.1 in the suit) to receive the balance sale consideration of Rs.500,000/- upon handing over the physical possession of the subject property but Muhammad Ayub failed to deliver the physical possession of the subject property

and express his inability to perform the remaining part of his contractual obligation on the pretext that his tenant namely Abdul Hameed (defendant No.2 in the suit) had occupied the subject property and were not willing to vacate it. It was also pleaded that the respondent being lawful and bonafide purchaser of the subject property transferred in his name he is entitled to receive the peaceful vacant possession of the subject property from the defendants. In the said suit it was alleged that the appellant (defendant No.3 in the suit) and Abdul Hameed (defendant No.2 in the suit) are not only occupying the suit property and reluctant to vacate the same but are also extending threats of dire consequences and further they would handover physical possession of the subject property to any third person and are also demanding huge amount from the respondent for vacating the subject property. It was also pleaded that the defendants are possessing the subject property enjoying its occupation to the great monetary loss, inconvenience and dismay of the respondent/plaintiff for which he claimed mense profit at the rate of Rs.10,000/- per month against defendants jointly and severally from the month of January 2009 till the vacant and physical possession of the subject property.

3. The said suit was resisted by the defendants including the present appellant, and filed their written statement and denied the allegations levelled by the respondent/Plaintiff and stated therein that the suit property measuring 40 sq. yds. is situated at Sector 5-C/2, North Karachi township Karachi and is owned and occupied by Abdul Hameed (defendant No.2 in the suit) by virtue of title documents issued. Whereupon two shops are built up one measuring 120 Square Feet and another 240 square feet, out of them shop measuring 120 square feet is in possession of the appellant/defendant No.3. They have admitted that one shop admeasuring 240 square feet was sold to the respondent/plaintiff against sale consideration Rs.17,00,000/- out which 12,00,000/-

were paid while the remaining sale consideration of Rs.5,00,000/- were not paid but the respondent/plaintiff managed false and fabricated documents on which he applied for mutation and succeeded to transfer the whole plot admeasuring 40 Square yards instead of 240 square feet. It was also stated that physical status of the shops were not in knowledge of the respondent/plaintiff at the time of execution of the sale agreement but malafidely and intentionally mentioned 40 square yards instead of 240 square feet in sale agreement. Further stated that respondent/plaintiff without making full and final payment applied for transfer of property in his name which act is fraudulent and illegal. It was also stated that respondent/plaintiff managed some documents for completion of transfer process with malafide intention to grab remaining sale consideration Rs.500,000/- which was to be paid on account of one shop measuring 240 square feet but the respondent/plaintiff succeeded to transfer whole property for which they shall file proper suit for cancellation of mutation. It was also stated that the respondent/plaintiff is not entitled for any relief for possession or mense profit as he managed false documents by way of impersonating and managing to obtain transfer order of whole plot therefore, he has no cause of action and his suit is liable to be dismissed.

4. From the pleadings of the parties, following issues were framed by the learned trial court:

1. Whether the suit is maintainable as framed?
2. Whether the defendant No.1 has failed to fulfill his part of obligation as per sale agreement ?
3. Whether the plaintiff is entitled for possession of the suit property being a lawful owner/transfree?
4. Whether the defendant No.1 failed to deliver vacant possession of the suit property and defendant No.2 & 3 unlawfully occupied the suit property?
5. Whether the plaintiff is entitled to claim mense profit from the defendants?
6. Whether the plaintiff is entitled for the relief claimed?
7. What should the decree be?"

5. After recording of oral as well as documentary evidence

adduced by the parties, learned trial court vide judgment and decree dated 14.07.2012 decreed the suit of the respondent-plaintiff. The findings of the learned trial court on the above issues, relevant portions whereof, for the sake of convenience, are reproduced as under:

In respect of issue No.1

“From the appraisal of the evidence of both the parties it is apparent that the plaintiff has not sought any relief against the CDGK/KDA and sought relief of possession and mense profit as defendant No.1 failed to fulfill his part of contractual obligations as per sale agreement executed between the defendant No.1 and the plaintiff and defendant No.2 and 3 are in illegal occupation of shops constructed on the suit property. Moreover, the defendants have admitted the sale transaction between the plaintiff and defendant No.1, however, disputed the area of the suit property.

In the above factual position I am of the view that the suit is maintainable under the law. Hence issue No.1 answered in affirmative.”

Issue No.2, 3 and 4

“It may be pointed out here that the defendant No.1 during cross examination has stated that he sold out suit property to the plaintiff in total consideration of 17,00,000/- out of which he received Rs.12,00,000/- as part payment from the plaintiff. The defendant also admitted the execution of sale agreement which is available on record as Exh.P/1 and also admitted that handwriting in the sale agreement/Exh. P/1 is his. The defendant No.1 also admitted the contents of clause 1 of Exh. P/1. He also admitted the contents of Exh.P/15 and Exh.P/16, which shows the area of plot as 40 Sq. yards. However, the defendant No.1 denied that he sold out the entire suit property admeasuring 40 Sq. yards as per agreement dated 11.10.2008 to the plaintiff. He admitted that as per sale agreement he had to deliver the vacant possession of the suit property to the plaintiff on 31.12.2008 and voluntarily replied that the plaintiff refused to obtain the possession and was demanding an additional area of 4 x 8 sq.ft.

It may be further pointed out that defendant has not produced any documentary proof regarding bifurcation of suit property and selling shop of the suit property to defendant No.2. The sale agreement has not been denied or disputed by the defendants. However, they disputed the area of the suit property but in presence of admission of the defendant No.1 regarding filing of the sale agreement in his handwriting which belied the version of the defendant No.1 that he only sold one shop admeasuring 240 Sq.ft.

From the appraisal of the evidence of both the parties it is apparent that the plaintiff had purchased the suit property from the defendant No.1 as sale agreement Exh. P/1 dated 11th October 2008. The plaintiff is claiming that the defendant No.1 has not delivered the possession of the suit property as per measurement mentioned in Exh.P/1. The defendants have claimed that the defendant No.1 only sold shop admeasuring 240 Sq.ft. to the plaintiff but they have failed

to produce documentary and oral evidence in this respect. It is an admitted position that the defendant No.1 has not delivered the possession of the suit property to the plaintiff. Besides that the plaintiff got transferred the suit property in his name vide mutation letter dated 20.12.2008 therefore, in my opinion, the dispute regarding measurement of the property as 240 Sq.ft is not genuine as the defendants have miserably failed to prove their version through documentary and oral evidence.

In view of the above discussion and in the light of documentary proof I am of the opinion that the defendant No.1 had sold the suit property measuring 40 Sq.yards to the plaintiff vide sale agreement dated 11.10.2008 and the defendant No.1 had failed to hand over vacant possession of the suit property to the plaintiff. Therefore, in such circumstances, issues No.2, 3 & 4 answered accordingly in affirmative.”

In respect of issues No. 5 & 6

“As discussed in supra issues that the plaintiff has proved his case regarding purchase of suit property by producing documentary evidence hence he becomes lawful and bona fide owner of the suit property. Whereas the defendants have admitted the execution of the sale agreement but at the same breath taken plea that the defendant No.1 only sold shop admeasuring 240 Sq.ft though the defendants have failed to produce any documentary and oral evidence in this regard. The defendant No.1 during cross examination stated that he is ready to give possession of 8 x30 to the plaintiff and asserted that the rental value of such area would be 4000/- per month but he could not guess the rental value of shop 4 x30.

From the appraisal of the evidence of the parties it is apparent that the defendants are enjoying the possession of the suit property and avoiding to deliver the vacant possession of the same to the plaintiff on the pretext that only shop of 240 Sq.ft. sold to the plaintiff although the defendants have failed to prove their version.

In view of above discussion and in the absence of documentary proof I am of the humble opinion that the defendants are avoiding to deliver portion in their possession and enjoying the occupation without any title over the suit property hence they are jointly and severally liable to pay mense profit at the rate of Rs.4000/- per month to the plaintiff till handing over the vacant and physical possession of the suit property to the plaintiff. The issues No.5 & 6 answered accordingly in favour of the plaintiff.”

6. The present appellant challenged the above judgment and decree in Civil Appeal bearing No. 133 of 2012 before the learned court of IInd Additional District and Sessions judge, Karachi Central, who after hearing the parties, while upholding the judgment and decree of the trial court, dismissed the Civil Appeal vide its Judgment dated 23.05.2016 and the decree prepared on 24.05.2016. The appellant challenged the said judgment and decree of civil appellate court in the present Second Appeal.

7. The record of the present case does not reflect that notice to the respondent/plaintiff was issued in the present case. However, at the time of hearing the respondent in person was present along with his rebuttal to the appeal in writing, which was taken on record and copies whereof was supplied to the learned counsel for the appellant, who after going through the said rebuttal has shown his readiness to proceed with the case. The respondent was also willing to proceed with the matter. Whereafter with the consent of parties the present appeal has been heard.

8. Learned counsel for the appellant/defendant, inter alia, contended that the impugned judgments and decrees passed by both the learned courts below are against the facts and law. Learned counsel contended that the courts below have failed to consider the fact that the appellant is running his shop since last 20 / 25 years at the same place without any hindrance from any corner. Further contended that the subject property was regularized on 13.09.2008 by KDA and at the time of its allotment the shop of the appellant was divided into two plots bearing Nos.LS-11 and LS-12. Further contended that the plots were allotted to the persons who owned/having possession of the big portion for the plot i.e. 8 x 30 feet of the shop and it was mutually agreed between the parties that the allottees of the plot will adjust and will give the ownership of the plot of the area i.e. 4x30 feet in possession of the holder that area. Further contended that at the time of allotment/regularization the present appellant was in possession of the portion measuring 4x30 of the subject property and other portion of his shop admeasuring 4x30 sq. ft. was in Plot No.LS-12, Sector 5-C/2, North Karachi township, Karachi. Further contended that when appellant approached to the KDA for allotment of his shop in his name, the authorities refused to do the same as it was against the policy of the department to bifurcate the small plots into portions. Further contended that there is not only the shop of the appellant divided into two portions in that area but

all plots regularized by the KDA in that area having same position. Further contended that as regards the subject property is concerned one Abdul Majeed was the owner of the big portion of the plot i.e. 8' x 30', therefore, the subject property was allotted to him. Further contended that similarly, the Plot No.LS-12 was allotted to one Muhammad Muslim wherein another portion admeasuring 4x30 feet of the appellant's shop is situated in Plot No.LS-12 and said Muhammad Muslim gave power of attorney of the said portion of the Plot i.e. 4x30 sq. ft. Further contended that on 19.05.2008 said Abdul Majeed entered into a sale agreement with defendant No.1 and sold out his portion to the defendant No.1, the agreement clearly shows that the defendant No.1 purchased only the portion of the plot admeasuring 8x30 (240 sq. ft.) thereafter he got published the publication in daily Aman dated 20.05.2008, wherein this fact was clearly mentioned that he purchased only the portion of the plot admeasuring 8x30 (240 sq. yard). Further argued that this fact was also admitted by the defendant No.1, during his cross-examination that he had purchased 240 sq. yds. from Abdul Majeed and this fact was neither denied by the plaintiff nor any suggestion against such facts was given by the advocate for the respondent. Further contended that said Abdul Majeed also entered into a sale agreement on 15.05.2008 in respect of portion of the plot admeasuring 4x30 (120 sq. yards) to the appellant, in order to avoid any misunderstanding and ambiguity in future. Thereafter, an agreement was also executed between Muhammad Ayub (defendant No.1) and the appellant wherein Muhammad Ayub admitted the ownership of the appellant over the said portion (4x30 feet) of the subject property. It is also contended that the trial Court has failed to appreciate that Muhammad Ayub purchased only the portion i.e. 8x30 (240 sq. ft.) of the subject property from Abdul Majeed and he is only entitled to sell the said portion only and further the property which he does not own cannot sell to anyone. It is also contended that said Abdul Majeed

had filed a Civil Suit No.279/2011 for cancellation of documents, prior to filing the suit of the respondent which is pending adjudication before the learned 1st Senior Civil Judge Central. Further contended that the respondent/plaintiff did not implead said Abdul Majeed who was the original allottee of the subject property as party in the proceedings before the trial court. Further contended that trial Court did not allow to defendant No.2 to give his evidence and to come in witness box for cross examination, hence his evidence was not considered by the learned trial Court. It is also contended that the plaintiff with malafide intentions and ulterior motive got transferred/mutated the whole plot i.e. LS-11 in his name illegally. Per learned counsel, the learned trial Judge has totally ignored this fact that a party who is the purchaser of one portion of the plot cannot sell the other portion of the plot. Per learned counsel, the impugned judgment and decree are illegal, full of infirmities and material irregularities based on conjectures and surmises and contrary to the fact and law both. Lastly contended that the judgment and decree passed by the trial Court in a mechanical manner without application of his judicial mind and as such the same are liable to be set aside.

9. Conversely, the respondent/plaintiff, has vehemently controverted the stance of the appellant in the present appeal, through his rebuttal to appeal in writing. In the said rebuttal in writing, the respondent besides reiterating and repeating the evidence which has already been discussed in the impugned judgments and decree of the courts below, has stated that the facts of the appeal have been discussed and evaluated by the learned trial Court and after framing issues, dilating on each issue on the basis of the documentary evidences available on record, had decreed the suit in favour of respondent/plaintiff. It is also stated that Abdul Majeed Son of Abdul Hameed sold out the entire subject property admeasuring 40 sq. yds. (12x30 sq. ft.) to Muhammad Ayub (defendant No.1 of the suit) and duly executed

a General Power of Attorney in favour of Muhammad Ayub on 19.05.2008 wherein the area of the subject property is clearly mentioned as 40 sq. yds. It is also stated that Abdul Majeed had executed the General Power of Attorney dated 19.05.2008 a day before the publication i.e. 20.05.2008. Therefore, the assertion of the appellant is misleading and fabricated that Abdul Majeed had sold only a portion of 8x30 sq. ft. to Muhammad Ayub (defendant No.1). Furthermore, Abdul Hameed (father of Abdul Majeed) had signed General Power of Attorney executed in favour of Muhammad Ayub as a witness. It is also stated that during cross-examination Muhammad Ayub had admitted the execution of General Power of Attorney dated 19.05.2008 between him and Abdul Majeed wherein the area of the suit property has been clearly mentioned as 40 sq. yds. Muhammad Ayub has also admitted in his cross examination that he had executed sale agreement with the respondent/plaintiff on 11.10.2008 and the blanks of the sale agreement was filled-in by him in his own handwriting. The said fact is also discussed in the judgments impugned in the present proceedings. It is also stated that suit bearing No. 279 of 2011 filed by one Abdul Majeed has been dismissed under order VII rule 11 CPC on 13.09.2012 and further the appeal bearing No.122 of 2012 filed against the said dismissal order was also dismissed on 30.09.2014. The respondent through his rebuttal also placed on record the orders of said cases. It is also stated that impleading Abdul Majeed as a party in the trial case is irrelevant as he was the allottee of the subject property and he had sold the entire subject property to Muhammad Ayub by way of General Power of Attorney in favour of Muhammad Ayub on 19.05.2008. Subsequently, Muhammad Ayub sold the entire suit property to the respondent and had received an amount of Rs.12,00,000/= towards total sale consideration of Rs.17,00,000/= of the subject property. The balance of Rs.5,00,000/= was agreed to be paid to Muhammad Ayub, upon handing over the vacant possession of the subject property to the present respondent but he

failed to do so and causing great inconvenience and loss to the respondent as Abdul Hameed (defendant No.2 in the suit) and appellant are enjoying illegal occupation over the subject property. At the time of sale agreement between Muhammad Ayub and respondent/plaintiff, Abdul Hameed (father of Abdul Majeed) was in occupation over an area of 8x30 sq. ft. of the suit property, therefore, Abdul Hameed was made the party in the suit instead of his son Abdul Majeed. It is further stated that the learned trial Court had afforded ample opportunities to all the defendants including defendant No.2 Abdul Hameed in suit, to appear before the trial Court and record their evidence. Summon/notice dated 1.7.2009 were issued by learned trial Court are on record. Upon non-appearance of the defendants including defendant No.2, the learned trial Court had published the notice in daily Nawa-e-Waqt dated 21.07.2009 whereby all the defendants including defendant No.2 Abdul Hameed were directed to appear before the court and the same is on record of the Court. It is on record that Abdul Hameed had himself avoided to appear before the trial Court despite issuing of notices/summons and subsequent publication by the trial Court. It is stated that Abdul Hameed (defendant No.2) had also filed Civil Appeal No.122/2012 before appellate Court against the decree and judgment dated 14.07.2012 passed in Suit No.443/2009 but it was only to gain time and prolong illegal occupation over the suit property. Upon non-compliance of Court's directions and non-appearance on the fixed dates of hearing, the appellate Court had summarily dismissed the said appeal through judgment dated 30.09.2014. It is also stated that Muhammad Ayub, upon having received the substantial part sale consideration, appeared before the concerned officer of the KDA, and recorded his statement for transferring and conveying the subject property in favour of respondent/plaintiff in the relevant record of the KDA, who after completing and fulfilling all legal formalities transferred the subject property in the name of present respondent on 20.12.2008, KDA Challan dated 03.12.2008, Site

Plan of above property, publication and last transfer order and General Power of Attorney registered No.1143 are on record. Furthermore, Muhammad Ayub, after the transfer of the subject property also handed over all the original documents which are also in possession of the respondent/plaintiff. Further stated that the respondent/plaintiff being lawful and bonafide purchaser of the subject property, which has also been transferred/mutated in his name, is entitled to receive/take over the peaceful vacant possession of the subject property from the appellant/defendants. It is also prayed that present appeal is liable to be dismissed with cost.

10. I have heard the arguments advanced by learned counsel for the appellant as well as the respondent in person and have also perused the record available on file with their assistance.

11. This Second Regular Appeal has been filed under Section 100, CPC. It would be imperative to refer the Sections 100 and 101, C.P.C. and for the sake of ready reference same are reproduced as under:-

"100. Second Appeal.--Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by a Court subordinate to a High Court on any of the following grounds, namely:-

- (a) the decision being contrary to law or usage having the force of law;
- (b) the decision having failed to determine some material issue of law or usage having the force of law;
- (c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

101. Second appeal on no other grounds.---No second appeal shall lie except on the ground mentioned in section 100."

12. It is ex-facie clear from the bare reading of sections 100 and 101, C.P.C. that a Regular Second Appeal is maintainable only on

a question of law. The grounds raised in the instant appeal were raised before the learned trial court as well as before the learned first appellate court who after framing proper issues and recording of oral as well as documentary evidence gave exhaustive judgments. Both the learned courts below have unanimously held that the Appellant could not prove his case, however, the respondent-plaintiff has successfully proved the his ownership over the subject property.

13. The contentions of the learned counsel for the appellant/defendant have been repelled through the rebuttal in writing filed by the respondent-plaintiff. Furthermore, upon the query of the court, the learned counsel very candidly admitted that the appellant did not file any proceedings against the respondent/plaintiff and or any one else before any court of law, in respect his right, interest and title over the subject property, hence the assertion of the appellant is misconceived and frivolous. The learned courts below passed the impugned judgments and decree upon admission of the defendants including the appellant. There are concurrent findings of fact- against the appellant/defendants.

14. It is well settled law that concurrent findings of facts by the Courts below cannot be disturbed by the High Court in second appeal, unless the Courts below while recording the findings of fact have either misread the evidence or have ignored the material piece of evidence on record from the findings recorded by the two Courts below is perverse. Reference in this regard may be made to the cases of Keramat Ali and another v. Muhammad Yunus Haji and another (PLD 1963 SC 191), Phatana v. Mst. Wasai and another (PLD 1965 SC 134) and Haji Muhammad Din v. Malik Muhammad Abdullah (PLD 1994 SC 291).

15. The High Court while exercising jurisdiction under section 100, C.P.C. How so erroneous that finding may be, unless such

findings have been arrived at by the Courts below either by misreading of evidence on record, by ignoring a material piece of evidence on record or through perverse appreciation of evidence. It is quite obvious that the decisions of the courts below are neither contrary to law nor the usage having the force of law. Learned counsel for appellant could not point out that the courts below while passing impugned judgments have omitted to decide some material issue of law or usage having the force of law. The question of materiality that is, whether or not an issue is of a material nature, will depend upon whether the ultimate decision of the court of first appeal would have been different, if the omitted issue had been determined by it. Thus, in order to succeed in second appeal on ground (b) of subsection (1) of section 100, C.P.C., an appellant would have to show that the court of first appeal would have reached a different conclusion, had it not failed to decide the issue of law or usage specified in ground (b) above. With regard to ground (c) of subsection (i) of section 100, C.P.C., this provision requires an appellant to show firstly that there has been a substantial error or defect in procedure and secondly that such substantial error could have resulted in an erroneous or defective decision of the case. Learned counsel for the appellant could not point out any substantial error and or any illegality, infirmity or jurisdictional error in the impugned judgments and decrees before this court. In the circumstances, it is found that the instant appeal does not fall within any of the exceptions provided under section 100, C.P.C. Furthermore, the judgments impugned herein are well reasoned and based on the evidence on record, therefore, in my view, the same do not call for any interference by this Court. Hence, the instant Regular Second Appeal being devoid of any force is dismissed.

JUDGE