

ORDER SHEET  
IN THE HIGH COURT OF SINDH,  
CIRCUIT COURT, HYDERABAD.

2<sup>nd</sup> Appeal No.03 of 2007

DATE ORDER WITH SIGNATURE OF JUDGE

10.11.2014.

Mr. Arbab Ali Hakro, Advocate for applicants  
M/s Sundardas & Muhammad Mansoor Mir, Advocate for  
respondents  
Mr. Ashfaque Nabi Kazi, Assistant A.G.

**SALAHUDDIN PANHWAR, J.** Through instant 2<sup>nd</sup> Appeal the appellants have assailed the judgment and decree dated 14<sup>th</sup> December, 2006 and 20<sup>th</sup> December, 2006 respectively passed by Additional District, Shahdadpur whereby appeal of respondent No.1 was allowed and in consequence thereof judgment and decree dated 08.01.2006 and 03.02.2006 respectively recorded by trial Court Judge in FC, Suit No.85/1998 "Re-Abdullah V. Mst. Bhagul ) were set-aside.

2. A brief reference of the facts is that plaintiff / respondent No.1 filed the suit for '**Declaration, Specific Performance of Contract & Permanent Injunction**' whereby he claimed to have purchased the suit land through written sale agreement dated 23.12.1997 from defendant No.1/appellant for total sale consideration of Rs.30,00,000/- (Thirty lacs); out of that Rs.27,28,500/- were paid while remaining amount was to be paid on 28.11.1998 before Sub-Registrar. It is further case of plaintiff / respondent No.1 that defendants No.2 and 3 were leased out the land through registered deed by appellant / defendant No.1 who attempted to

  /

take possession from plaintiff / respondent No.1; it was also alleged that during pendency of suit defendant No.1/ appellant made gift in favour of minor defendants / respondents No.4 to 9.

3. The defendants, including appellants contested the matter and filed written statement.

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

1. Whether defendant No.1 not entered into sale agreement of suit land with the plaintiff?
2. Whether the total sale consideration amount i.e Rs.30,00,000/- and plaintiff paid Rs.27,28,500/- to defendant No.1?
3. Whether defendant No.1 has failed to perform his part of contract?
4. Whether defendant No.1 leased out registered agreement to defendant No.2 and 3 is illegal & void, who is in possession of suit land?
5. Whether suit land was gifted in favour of defendant No.4 to 9 and defendant No.10 transferred during the pendency of present suit?
6. Whether plaintiff has no cause of action to file present suit?
7. Whether plaintiff is entitled for the relief claimed?
8. What should the decree be?

5. The respective parties lead their evidence and at culmination of trial, the learned trial Court Judge dismissed the suit of the plaintiff. Such Judgment and decree was assailed by respondent No.1 / plaintiff in Civil Appeal No.5/2006 which was made over to the Addl. District Judge, Shahdadpur who, having heard the respective parties, allowed the appeal of the respondent No.1 / plaintiff.

 11/11/14



6. During hearing of instant appeal, this court invited the counsel for respective parties towards the Issue (s) framed by the learned trial court Judge in particularly the Issue No.1, which was framed as:

***Whether defendant No.1 not entered into sale agreement of suit land with the plaintiff?***

and manner in which the learned trial court Judge appreciated and discussed the same. At the same time the counsel were also made aware of the fact that learned appellate Court discussed the Issue No.1 but worded it as:

***Whether defendant No.1 got [not] entered into sale agreement of suit land with the plaintiff?***

Counsel for the respective parties, on having been put on notice, agreed that matter requires to be remanded to the learned Trial Court for appraisal and discussion on the Issue (s) in particularly on Issue No.1.

7. On having come across with such a position, significant to add here that framing of the Issues is not a mere formality but it is the stage through which the Court has to bring all the controversies between parties in shape of questions whereby putting parties onto specific and clear notice of their liabilities to discharge their respective burden. It should not be the whims and wishes of the parties in formation of Issues but it should be formed in such words that it must not only give a complete notice to parties that on whom the burden would rest and it should also decide a material disputed question of fact or law. The Order 14(3) of the Code,

being material, is reproduced hereunder:-

*[Handwritten signature]*  
11/11/14

*[Handwritten signature]*

*(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.*

8. It is germane to state that Civil Procedure Code does not explain as to whom the burden would rest but the Court (s) should always be conscious that it is the Qanun-e-Shahdat Order 1984 which provides a complete mechanism in this respect per Part-III Chapter-IX under title '*of the Burden of Proof*'. This Chapter starts with Article 117 which reads as:-

**117. Burden of proof. (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exists.**

**(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person;**

The Article 118 further explains that:

**118. On whom burden of proof lies.** The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

The above article(s) are very much clear in explaining that on whom the onus of proof would rest in respect of a particular question of law and fact. This legal position was entirely ignored by the learned trial Court Judge while framing the Issue No.1 and responding the same. For clarity the issue and opening of discussion is reproduced hereunder:-

**Whether the defendant No.1 not entered into sale agreement of suit land with the plaintiff?**

ISSUE NO.1.

*Handwritten signature and date: 11/11/19*

*Handwritten signature*



"Burden of this issue lies upon the defendant No.1 to prove it...."

9. Since it was the plaintiff who was insisting the Court to believe that it was the defendant No.1 who entered into a sale agreement with him (plaintiff) hence the burden to prove this issue should have been upon the plaintiff and not upon the defendant No.1. The learned trial Court Judge appears to have been stuck in '**wording**' (negative formation of issue) which, in no way, would change the legal position with regard to '**burden of proof upon party who asserts a particular fact and insists the Court to give judgment thereon**'. Thus, such approach on part of the learned trial Court Judge cannot be approved particularly when this may result in letting a party to come with a plea that he / she was not on proper notice regarding '**burden of proof**'.

10. Having said so, it would be pertinent to examine the mistake, committed by the learned appellate Court while responding the Issue No.1, framed by the learned Trial court Judge. The appellate Court has no legal right to discuss the 'issues' , framed by Trial Court by bringing any change thereon. The Appellate Court can competently pass judgment which should be within spirit of Rule 31 of Order 41 which consists on:-

- a) *the points for determination;*
- b) *the decision thereon;*
- c) *the reasons for the decision; and*
- d) *where the decree appealed from is reversed or varied, the relief to which the appellant is entitled*

The above provision does give the discretion to the appellate Court to '**frame points for determination**' but the Code, no where, permits the appellate Court to bring change in framed issues while discussing the

same at appellate stage. Per Rule 24 of the Order 41 of the Code the appellate Court may resettle the issue(s) but resettling of the issues at appellate stage cannot be equated with discussing the already framed issues by causing change in such issues without notice to parties or reference to relevant rule. The Rule 25 of the Order 41 of the Code does permit the appellate Court to frame issue (s) but such course would require the appellate Court to refer the matter to trial Court for taking additional evidence and findings thereon. This is so for simple reason that '**issues**' always require parties an opportunity of hearing and leading their respective evidence in proof or disproof thereof.

11. The learned appellate Court discussed the issue No.1 by substituting the word '**not**' with '**got**' which materially changed the meaning thereof. This course, so adopted by the learned appellate Court, also is not within prescribed procedure hence the same cannot be approved as the law is clear on the principle that '**things should be done as demanded by the procedure and not otherwise**'.

12. In view of above position, it is manifest that both the Court (s) below have not exercised the jurisdiction vested in them properly. Therefore, it would be in all fairness to remand the case back to learned trial Court for re-framing the Issue (s) strictly in accordance with law and to decide the same on merits. After framing of the Issues, if the parties agreed to legality of the already led evidence, then the Court shall proceed accordingly else the trial Court shall proceed as per procedure. While parting, I would like to add that since matter pertains to year 1998 therefore, the learned trial Court Judge shall decide the matter expeditiously preferably within a

11/11/14

period of three (03) months and no adjournment be allowed except on genuine ground. The parties are also expected to extend their cooperation for such purpose.

These are the reasons of the short order dated 28.10.2014 whereby appeal was disposed of.

Sd/- SALAMUDDIN P ANHWAR,  
JUDGE. 10.11.2014.

~~RECEIVED TO BE FILED~~  
~~11/11/14~~







