JUDGMENT SHEET

IN THE HIGH COURT OF SINDH, KARACHI

Date	Order with signature of Judge

Present: **Mr. Justice Muhammad Iqbal Kalhoro**
Mr. Justice Adnan ul Karim Memon

HIGH COURT APPEAL NO.387 OF 2018

Pak Maniar Investment Ltd.
Through its Directors & another .... Appellant.

Vs.

Salehbhoy (late) s/o Tayyab Ali
Since dead through his legal heirs
Mrs. Batool Salehbhoy & others .... Respondents.

Date of hearing: **24.01.2023, 07.02.2023, 14.02.2023, 17.02.2023 and 24.02.2023**.
Date of Judgment: **10.03.2023**.

Khawaja Shams ul Islam, advocate for appellant
Respondent No.1(c) Saifuddin Salehbhoy in person.

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MUHAMMAD IQBAL KALHORO J: Appellant No.1 is a private Limited Company and appellant no.2 is its sister concern. They have challenged a judgment dated 07.08.2018 and preliminary decree drawn on 03.09.2018 by learned Single Jude of this court in Suit No.1600 of 2001 re Salehbhoy (late) through his legal heirs Vs. Pak Maniar investment Ltd.

2. Very briefly put, late Salehbhoy, the plaintiff, filed the above civil suit for declaration, injunction, cancellation of documents, possession and mesne profits stating that he was owner of plot/land bearing S.Nos.647,653 to 658, 581 and 582, Deh Thano Tapo Malir, Taluka and District Karachi East. A portion thereof was acquired in 1969 by the Government from him for the purpose of extension of Security Printing Press building and he was compensated vide letter No.LA/7733/69 dated 30.07.1969.

3. On 25.03.1978 the plaintiff who is respondent no.1 is this appeal and defendant No.1/appellant no.1 executed a Deed of Partnership and a Sale Agreement for establishing a housing scheme named as “Moinabad III” over the suit land on certain terms and conditions. To facilitate appellant no.1 to carry out purpose of partnership deed, the plaintiff also executed a registered General power of Attorney in his favour. After execution of such documents, the parties came to be in joint possession of the suit land where, for the purpose of establishing the housing scheme, appellant no.1 was to undertake development work.

4. Then, after mutation in favour of the plaintiff, necessary permission for the housing scheme was accorded to the parties by Malir Cantonment Board within jurisdiction of which the suit land was situated. Then appellant no.1 vide letter dated 13.03.1983 informed Additional Commissioner that one of the amenity plot of housing scheme had been occupied without any authority by a land grabber namely Muhammad Ramzan Katiar, who filed a Suit No.1182/1983 in which Managing Director of appellant no.1 appeared as party and acted also as attorney of plaintiff.

5. In 1986, appellant no.1/defendant No.1 filed a Suit No.865/1986 in this court against the plaintiff and others which fact the latter came to know only after receiving notices of CMAs No.596/1992 and 860/1992. The plaintiff also came to know afterwards that through a compromise application jointly filed by appellants in suit no. 310/86 they had succeeded to obtain a fraudulent collusive comprise decree in their favour in respect of the suit land. Latter on in suit no.865/1986, the parties compromised and the appellants admitted claim of the plaintiff over the suit land, surrendered the rights over it in his favour, and withdrew the suit.

6. Appellant no.1 then abandoned development work over the suit land and thus failed to perform his part of the agreements qua establishing a housing scheme over the land. In November, 2001, plaintiff received summons issued in Suit No.1635/2000 filed by the appellant no.2/defendant no.4 claiming that it had purchased the suit land from appellant no.1on 04.04.1995. From pleadings of the said suit, the plaintiff for the first time came to know that appellant no.1 had fraudulently leased out the entire suit land in the name of M/s Humair Associates, a sister concern of M/s Pak Maniar Investment Limited, by misusing the power of attorney given to him

i.e. appellant no.1 (a) by the plaintiff. He committed breach of terms of deed of partnership by abandoning the housing scheme Moinabad No.III and fraudulently transferred the suit land to appellant no.2/defendant no.4. The plaintiff has lastly pleaded that he has become entitled to the reversion of all rights, title and interest in the suit land which he held before the execution of partnership deed and agreement of sale, and has prayed for following reliefs.

a) Declaration that defendant No.1 has abandoned the housing scheme Moinabad No.III was to be established on the suit land in terms of the partnership deed.

b) Declare that as a result of abandonment of the housing scheme Moinabad No.III, the suit land has reverted back to the plaintiff in its original position and the deed of partnership dated 25.03.1978 the agreement of sale dated 25.03.1978 and the power of attorney dated 10.10.1979 are of no legal effect and are liable to be cancelled and ordered to be delivered up.

c) Declaration that defendant No.2 and 3 have no right, title or interest in the suit land bearing S.No.647, 653 to 658, 581 and 582, Deh Thano Tapo Malir Taluka and District Karachi East.

d) Declare that the lease deed dated 13.03.1995 (Annexure P/6), conveyance deed dated 04.04.1995 (Annexure P/4) and mutation in the records of rights, Mukhtiarkar dated 18.05.1995, 27.03.1995 (annexures P/5 & P/7) and lease deeds dated 25.09.1996, 15.05.1997, 10.12.1997, 27.07.1998 and 25.10.1999 (Annexure R, R/1, R/3 and R/4) of Plots No.72, 154, 15, 34 and 11 are void abinitio and liable to be cancelled.

e) Declare that defendants No.1 and 4 to 9 or any other person claiming under them is in unauthorized possession of the suit land bearing S.Nos.582, 654, 655 and 656, Deh Thano Tapo Malir Karachi.

f) Direct the defendants No.1 and 4 to 9 or any other person claiming under them to handover vacant physical possession of the suit land bearing S.Nos.582, 654, 655 and 656 to the plaintiff.

g) Judgment and Decree to be passed for Rs.15000/- per day as mesne profits for use and occupation of the plaintiff's land'.

h) Judgment and Decree to be passed for Rs.500,00,000/- (Rupees fifty million only) as damages caused to the plaintiff due to fraud, acts and omissions of defendant No.1.

i) Grant permanent injunction restraining the defendants, their men, agents, servants, employees and/or any other persons claiming under them from selling, raising construction alienating, transferring mutating and creating any third party interest and getting installations of water, sewerage, gas, electricity and telephone line connections in the said land bearing S.Nos.582, 654, 655, and 656 Deh Thano Tapo Malir Model Colony Police station in the city Karachi East.

j) Any other relief and/or relives under circumstances of the case deemed fit and proper be granted to the plaintiff and

k) Costs of the suit.

7. The appellants/defendants No.1 and 4 jointly filed written statement denying claim of the plaintiff/respondent on the ground that he having sold out the suit land cannot claim to be the owner thereof. On 25.03.1978 the plaintiff had entered into sale agreement with appellant no.1 in respect of his un-acquired land situated in S.Nos. 647, 653, 655, 654, 656, 651, 658, 582 and 581 situated in Deh Thano Tapo Malir Taluka and District Karachi east at the rate of Rs.17/- per Sq. yd. It was acknowledged in the said agreement that the suit land was under dispute with other claimants and that the plaintiff was required to clear/prove his title by providing village form Vii and other documents to the satisfaction of defendant No.1.

8. After execution of agreement, appellant no.1 assisted the plaintiff in clearing his title, completion of documents and mutation of land in his favour. Some of the land was under encroachment while there were also some claimants over the land. Appellant No.1 made huge payments to the encroachers to get the land vacated and also to the claimants, which payments were adjusted towards the sale consideration. It was agreed at the time of agreement that appellant no.1 shall make payment of balance sale-consideration of the said land to the plaintiff out of sale proceeds of the project "Moinabad III" and thereafter the profits/loss were to be shared.

9. Later on, appellant No.1 called upon the plaintiff to execute sale deed/conveyance deed in his favour but with no response. Subsequently with mutual consent of the parties partnership was abandoned and appellant no.1 was directed to transfer its project "Moinabad III" to its sister concern, appellant no.2/defendant no.4. Per appellant no.1, since the partnership is revoked, the plaintiff has no right, title or interest in the project "Moinabad III" pertaining to appellant no.2 nor any clause of said partnership deed could be relied upon by the plaintiff. Plaintiff has received entire sale consideration of the suit land in deviation of the procedure mentioned in the sale agreement, hence the suit was liable to be dismissed. The defendant No.2 also denied claim of the plaintiff.

10. From the pleadings of the parties, following issues were settled:-

1. Whether there existed partnership agreement between the plaintiff and defendants?

2. Whether the partnership was rescinded by the defendants after payment of consideration in connection with the housing scheme Moinabad No.3?
3. Whether the housing scheme was abandoned as claimed by the plaintiff and if so, what its effect?
4. Whether the defendants No.2 & 3 have any right, title and interest in the suit land?
5. Relief?

11. The parties produced their respective evidence in support of their claim. Learned Single Judge after hearing the parties decreed the suit vide impugned judgment and preliminary decree in terms thereof, which has been impugned in this appeal.

12. We have heard the counsel for the parties and perused the record. Learned counsel for the appellant has argued that impugned judgment and preliminary decree are bad in law and facts; learned single judge has not appreciated the evidence on record; has not considered the documents exhibited by the parties in evidence; has erred in holding that burden of proof to substantiate the issues lies upon the appellants; has completely failed to evaluate the evidentiary value of assertions made by the appellants; has failed to note that respondent/plaintiffs had sold out the suit land to the appellants in the year 1978 and had received entire sale consideration at the rate of Rs.17 per sq. yards; has entirely failed to appreciate that appellants had paid money to the encroachers for vacating the land and he had helped the plaintiff in mutation of the land in his name. The partnership deed was subsequently revoked and thus the plaintiff has no right to make any claim thereunder through the suit; the suit land had already been transferred to the sister concern of appellant no.1 with whom the plaintiff had no concern nor between them there existed any agreement. He has relied upon the following case law to support his case. **2004 SCMR 361, 2004 MLD 361, 2005 YLR 1748, 2014 MLD 1786, 2015 PLD S.C.212, 2016 PLD S.C.214. 2015 SCMR 1698, 2021 SCMR 642, 2022 SCMR 933 and 2022 CLC 1203.**

13. Respondent no. 1(a) has argued the case himself and respondent No.1 (b), his sister, Mrs. Farzana Moiz, has adopted his argument by making a statement dated 07.02.2023. He has mainly submitted that appellants played fraud with them by illegally occupying the land after they failed to develop the land for a housing project agreed between them. The appellants themselves and through their proxies and protégés dragged them in civil ligation in various

courts. He has next stated that partnership deed was never revoked nor the same has been proved by the appellants in the evidence; sale agreement, partnership deed and general power of attorney are mutually dependent upon and relevant to each other and cannot be read or considered in isolation or independent of each other. Apart from oral submissions, the parties filed written synopsis in support of their respective cases, which we have read along with the case law relied upon by them.

14. In order to resolve the controversy between the parties and decide the appeal in hand, we tend to adopt the aforesaid issues as points for determination. First point is a question about existence or otherwise of partnership agreement between the parties. None of the parties in their respective evidences has denied or disputed it. Both the parties concede, in evidence, that late Salehbhoy, the plaintiff, was owner of the suit land situated in Deh Thano Tapo Malir, Taluka and District Karachi East. He executed a deed of partnership and a sale agreement with and in favour of appellant no.1 on 25.03.1978 for establishing a housing scheme named as “Moinabad III” over the suit plot. The sale agreement and partnership deed both clearly envisage agreement of the parties to introduce a housing project/land development scheme titled as Moinabad III over the suit land on joint venture basis.

15. Further contents and paras of the Partnership Deed vividly reveal that in fact the housing project was the joint venture to be undertaken by both the parties after fulfilling their respective obligations thereunder. This document further evinces that after all the payments on development of the land, the cost of the land, et al, the profit or loss arises out of sale of the plots so developed was to be shared between the patties at 45% each whereas 10% was to go to one Gulzar Ali, the alleged encroacher who had filed a suit against the parties. However, he has not signed the agreement and according to the evidence of plaintiff/respondent he was made a party in the agreement at the instance of appellant no.1. In fact, the claim of appellant no.1 that he had revoked the Partnership Deed by serving a letter of revocation upon the plaintiff – although no tangible evidence has been brought on record by appellant no.1 in this respect -- and had transferred the suit land in favour of appellant no.2/defendant no.4, the sister concern, is sufficient admission on his part to prove that there existed a partnership agreement between

the plaintiff / respondent and appellant no.1., and accordingly Partnership Deed was executed by them.

16. The second point to be determined is that whether the partnership was rescinded by appellant no.1 after payment of consideration in connection with the housing scheme Moinabad III. Heavy burden is upon appellant no.1 to prove this issue: revocation and rescission of the partnership agreement and payment of consideration of the land and profits accruing on the housing project to the plaintiff/respondent. We have seen the evidence and are of a humble view that appellant has miserably failed to discharge his burden satisfactorily. The reasons are: in evidence, appellant no.1 has admitted that he has not produced any document showing that parties with mutual consent had agreed to revoke the partnership agreement. Regarding service of notice of revocation upon plaintiff/respondent, he has admitted that it was not served through postal service; and has failed to explain as to how then it was served upon the plaintiff / respondent. He has further admitted that the fact of revocation was not mentioned by him in suit no.865/1986 earlier filed by him by saying that it is correct that no application or deed of revocation of partnership was filed by Pak Maniar in their above suit. He has further admitted that it is correct that we never acted upon the contents of notice ex. D/12.

17. In addition, a perusal of the Partnership Deed indicates that neither party was vested with any power to unilaterally rescind or revoke it. It is specifically provided in clause 11 thereof that no party would be entitled to retire form this joint venture except with the consent of other party. Further, clause 16 provides for that in case of any dispute or difference between the parties the matter shall be refereed to arbitration and that any decision of the arbitrators so appointed shall be final and binding upon the parties. In terms of this clause if appellant no.1 had any difference of opinion over any matter envisaged in the Partnership Deed, he could have resorted to arbitration proceedings to resolve the same and proceed further. It did not lie within his power to revoke the same individually and infringe or deprive the plaintiff/respondent of his rights over the suit land.

18. Then, we have already observed that the Partnership Deed, Sale Agreement and Power of Attorney are not independent of each other and are rather interdependent, intertwined and inter-

supportive. The sale agreement specifically envisages that the parties have agreed to introduce a housing project/land development scheme over the land. It outlines a staggering payment schedule of sale consideration, and lastly summarizes that balance amount of 50% of the sale consideration shall be paid to the vendor/plaintiff on completion of the said scheme. And only on satisfaction of such condition, the vendor/plaintiff shall execute the registered deed in favor of the purchaser/appellantno.1. To that effect, appellant no.1 in evidence has made an admission that it is correct that 50pc of the remaining sale consideration was to be paid to Saleh Bhoy after completion of Housing Project from the gross sale of the Housing Project.

19. It was not available, in above circumstances, to either party to assume individual authority of cancelling the partnership agreement and continue with the sale agreement or vice versa. Both the agreements, as stated above, were intertwined. Revocation or rescission of one was bound to result in cancellation of the other. Sale of the land was subject to continuation of partnership agreement and partnership was dependent upon the sale of the land. Both the documents unambiguously enclose bilateral opinion of both the parties to undertake a housing project/land development scheme jointly and share the profits accordingly. It seems that only in such backdrop, token price of Rs.17 per sq. yard each as sale price and price for development work, to be carried out by appellant no.1, was fixed. However, it was done with an understating, as informed in arguments, that the parties ultimately would reap the profits at the rate of 45pc each from selling of the housing project. It is so obvious that had there been no such agreement by way of the Partnership Deed between the parties for conjointly undertaking the housing project, there would have been no materialization of agreement to sell the suit land by plaintiff/respondent to appellant no.1.

20. Therefore, the claim of appellant no.1, which he has in fact miserably failed to establish by leading confidence inspiring evidence, that he had rescinded partnership between him and the plaintiff after making entire payment pertaining to sale consideration and profits — that shall be at the rate of 45pc -- is not only self-contradictory but also destructive of his own privilege over the suit land. For, in such eventuality, along with the partnership deed, the sale agreement, and the general power of attorney shall also

stand cancelled. Because clause 4 of the power of attorney document clearly demonstrates that power to sell, transfer, assign, mortgage or lease the suit land or any part thereof by appellant no.1 on behalf of the plaintiff/respondent was strictly dependent upon carrying on development work over the suit land by him and carving out open plots first on the site. Meaning thereby, the power of appellant no.1 to alienate the suit land or any part thereof through sale or by any other means envisaged in the general power of attorney was to be conferred on him only when the land was developed by him into a housing project. So if the land was not developed and was still in the rudimentary condition, appellant no.1 had no authority or power to transfer, sell or alienate it in any manner.

21. And if the land was developed, there was no need for transferring it to respondent.2 for such purpose. But, even in such case, appellant no.1 was still bound -- on development of the land -- by the sale agreements to share profits at 45pc with the plaintiff. Appellant no.1's authority to sell was always from the beginning subject to his sharing 45pc of profits from such sale with the plaintiff/respondent. Needless to urge, it was not accorded to it by the plaintiff for its own benefit and to be used against him in the shape of transfer of the land to a third party before actualization of 45pc profits in his favor. . It is clear that in no case, appellant no.1 had authority to transfer the suit land to appellant no.2 / defendant no.4 before performing his part outlined in the agreements. In terms of the agreements, the disposal of the land by appellant no.1 even after its development was not absolute nor independent of rights of the plaintiff/respondent over the land, namely, 45pc share in the profits over the sale of plots.

22. Further, learned single judge, while replying to this issue has rightly observed that an area of 37,268 sq. yards is involved in this case, the amount of Rs.5,25,000/- paid by appellant no.1 at the rate of Rs.17 per sq. yard, and admitted by the plaintiff/respondent to have received, covers cost of an area of 30,882 sq. yards only. There is still a cost of 6,385 sq. yards plus the arrears on account of 45pc share in the profits in the housing project which are still unaccounted for. The claim of appellant no.1 in evidence in such circumstances that he had rescinded the partnership agreement with the plaintiff/respondent after paying the entire sale consideration and profits so accrued is not factually correct. There is no evidence on record to support such claim of appellant no.1.

23. Apart from afore said amount, the plaintiff / respondent 1 (c) in his evidence has admitted to have received only Rs.100000/- from appellant no.1. But, as is recorded in evidence, it was paid on account of cost of settlement of suit no.865/1986 instituted by appellant no.1 against plaintiff/respondents and was adjusted in accordance with partnership agreement. We therefore find no illegality in the reasoning of learned single judge in replying this issue in negative and uphold his findings on the same.

24. The third issue/point for determination has posed a question that whether the housing scheme was abandoned as claimed by the plaintiff and, if so, what is its effect. It is clear that burden to prove this issue lies upon the plaintiff/respondent. However, his burden has greatly been relieved and shifted by admission of appellant no. 1 himself in evidence that he transferred the project to appellant no.2, the sister concern having the same members/directors. But his claim, in evidence, is that he had done so on having paid the entire sale consideration to the plaintiff/respondent. We have already concluded in preceding discussion over point no.2 that there is no record of appellant having paid the sale consideration of entire suit land to the plaintiff/respondent; and his share in the profits at the rate of 45pc accrued on the sale of plots is totally unaccounted for. No evidence has been led by appellants that he has paid the same ever to the plaintiff/respondent.

25. In the wake of which, and by keeping in view the discussion over point no.2, it is easy to see the partnership agreement was intact when such transfer, from appellant no.1 to appellant no.2, took place. Now in terms thereof, if the land was fully developed and ready for sale, 45pc of the amount earned or to be earned by appellant no.1 on each plot or a house was to be paid first to the plaintiff / respondent before appellant no.1 could use the general power of attorney for effecting such transfer. Without complying first the terms and conditions of the both the sale and partnership agreements, appellant no.1 was not authorized to wield his power under general power of attorney and cause such transfer in favour of a sister concern having same members/directors and beneficiaries. Such unauthorized transfer by appellant no.1 to appellant no.2, in our humble view, was nothing but a smokescreen invented to hoodwink the plaintiff / respondent and deprive him of his rights over the suit land.

26. It is to be noted further that earlier before this suit appellant no.1 had filed a suit 865/1986 for specific performance against the plaintiff/respondent seeking performance of his part in the two agreements: sale agreement and partnership agreement but before the said suit could bear the fruit and be concluded, it was withdrawn rendering the parties back to the same position as is drawn in the said agreements qua their rights over the suit land. Indeed, in such eventuality, the question which perturbs the mind and beggars the belief is that under what authority and logic appellant no.1 could have legally transferred the land in favour of appellant no.2. And if he did so, would it not be considered as abandonment of the project on his part in violation of both the agreements plus general power of attorney that clearly provides for authority of appellant no.1 to do so but only in the wake of development of the land, carving open plots out of it, paying 50pc remaining consideration to the plaintiff as per clause 5 of the sale agreement, and paying the profits of sale of the land to the plaintiff at 45pc each plot.

27. The effect of abandonment of the housing project is mentioned in clause 16 of the sale agreement itself that in case the proposed housing project/land development scheme is abandoned for whatever human or natural reasons the agreement shall stand annulled/cancelled from the date of such abandonment of the project. Appellant no.1 in evidence has also admitted that it is correct that it was decided that if the housing scheme is not launched due to any reason, the agreement of sale shall stand cancelled from the date of such abandonment of the project. The consequence of which is that if the sale agreement is cancelled, the subsequent documents, namely, Partnership Deed and general power of attorney, interdependent and intertwined as they are, also stand cancelled.

28. The last issue is that whether defendants no.2 and 3 have any right, title and interest in the suit land. The record shows that they did not lead any evidence to establish the same, nor have filed any appeal against the impugned judgment and decree. The learned single judge has replied the issue in negative, and we also for want of evidence in this respect reply the point in negative. In view of foregoing discussion, we see no illegality in the impugned judgment and decree passed by the learned single judge of this court. Consequently the appeal in hand is dismissed with costs.

JUDGE

JUDGE