

**ORDER SHEET**  
**THE HIGH COURT OF SINDH, KARACHI**  
**IInd Appeal. No. 169 of 2020**

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Dated: Order with signature of Judge(s)

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1. For hearing of CMA No. 4096 of 2021
2. For hearing of Main Case.

Date of Hearing : 9 May 2023, 11 May 2023, 12 May 2023  
and 17 May 2023

Appellant : Bhart Lal represented by Mr. Hamza H.  
Hidayatullah & Ms. Omrazia Nadeem,  
Advocates

Respondents : Muhammad Yousuf Polani the  
Respondent No. 1 represented by Syed  
Ehsan Raza, Advocate

: Yaqoob Polani the Respondent No. 2  
represented by Syed Ehsan Raza,  
Advocate

**ORDER SHEET**  
**THE HIGH COURT OF SINDH, KARACHI**  
**IInd Appeal. No. 170 of 2020**

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Dated: Order with signature of Judge(s)

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1. For hearing of CMA No. 4099 of 2021
2. For hearing of Main Case.

Date of Hearing : 9 May 2023, 11 May 2023, 12 May 2023  
and 17 May 2023

Appellant : Bhart Lal represented by Mr. Hamza H.  
Hidayatullah & Ms. Omrazia Nadeem,  
Advocates

Respondents : Muhammad Yousuf Polani the  
Respondent No. 1 represented by Syed  
Ehsan Raza, Advocate

: Yaqoob Polani the Respondent No. 2  
represented by Syed Ehsan Raza,  
Advocate

**ORDER SHEET**  
**THE HIGH COURT OF SINDH, KARACHI**  
**Civil Revision. No. 19 of 2021**

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Dated: Order with signature of Judge(s)

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1. For hearing of Office Objection
2. For hearing of Main Case.

Date of Hearing : 9 May 2023, 11 May 2023, 12 May 2023  
and 17 May 2023

Appellant : Muhammad Yousuf Polani and Yaqoob  
Polani the Applicants represented by  
Syed Ehsan Raza, Advocate

Respondents : Bhart Lal represented by M/s. Hamza H.  
Hidayatullah & Ms. Omrazia Nadeem,  
Advocates

**J U D G E M E N T**

**MOHAMMAD ABDUR RAHMAN, J:** This Judgement will consider two  
IInd appeals bearing IInd Appeal No. 169 of 2020 and IInd Appeal No. 170  
of 2020 that have been preferred by Mr. Bhart Lal against a Common  
Judgement dated 23 September 2020 and Decrees each dated 23  
September 2020 passed by the IIIrd Additional District & Sessions Judge,  
Karachi (South) in Civil Appeal No. 275 of 2018 and Civil Appeal No. 285  
of 2018 emanating from a Common Judgement dated 31 October 2018  
and Decrees each dated 3 November 2018 passed by the IXth Senior  
Civil Judge, Karachi (South) in Suit No. 79 of 2016 and Suit No. 396 of  
2016 and will also consider an Application under Section 115 of the Code  
of Civil Procedure, 1908 bearing Civil Revision No. 19 of 2021 that has  
been maintained by Muhammad Yousuf Polani and Yaqoob Polani  
seeking to revise the same Judgement and Decree dated 23 September  
2020 passed by the IIIrd Additional District & Sessions Judge, Karachi  
(South) in Civil Appeal No. 285 of 2018 emanating from a Judgement  
dated 31 October 2018 and Decree dated 3 November 2018 passed by  
the IXth Senior Civil Judge, Karachi (South) in Suit No. 79 of 2016.

**A. The Dispute**

2. Muhammad Yousuf Polani and Yaqoob Polani were purportedly the developers of a building known as Ashiana Apartments which was constructed on Plot No. CG-21, Khayaban-e-Jami, Block-9, Karachi Development Authority Scheme No. 5, Karachi. Muhammad Yousuf Polani had through an Agreement of Sale dated 29 July 2010 (hereinafter referred to as the "Agreement of Sale") allotted an apartment bearing Flat No. 810, 8<sup>th</sup> Floor, Ashiana Apartments Block-9, Karachi Development Authority Scheme No. 5, Karachi (hereinafter referred to as the "Said Property") against a sale consideration of Rs.6,800,000 (Rupees Six Million and Eight Hundred Thousand) in favour of Bhart Lal. Bhart Lal paid a sum of Rs.1,000,000 (Rupees One Million) at the time of the execution of the Agreement of Sale to Muhammad Yousuf Polani. It is admitted that the possession of the Said Property had been handed over by Muhammad Yousuf Polani to Bhart Lal on the date of the execution of the Agreement of Sale and who continues to remain in possession of the Said Property.

3. The terms of the Agreement of Sale that are material to the dispute are as under:

" ... 3. That the remaining balance amount of Rs. 5,800,000/- (Rupees Five Million Eight Hundred Thousand only) will be paid by the Vendee to the Vendor WITHIN THIRTY FIVE (35) DAYS from the date of signing of this Agreement of Sale.

4. That at the time of receiving full and final payment, i.e. WITHIN THIRTY FIVE (35) DAYS from the date of signing of this Agreement of Sale, **the Vendor will execute property TRANSFER DOCUMENTS in respect of the "Said Property" in favour of the Vendee** or his nominee(s) before the concerned Builder's Office, Karachi, as well as hand over vacant physical peaceful possession of the "SAID PROPERTY" along with all ORIGINAL relevant documents of the "SAID PROPERTY" to the Vendee.

5. That in case the Vendee fails to pay the balance amount within the stipulated period i.e. WITHIN THIRTY FIVE (35) DAYS from the date of signing of this Agreement of Sale, the part payment amount of Rs.1,000,000/- (Rupees One Million Only) will be forfeited by the Vendor and thus the DEAL will become automatically null and void. Similarly, if the Vendor fails to finalize the said transaction or fails to handover the vacant physical peaceful possession of the said property within the stipulated period i.e. WITHIN THIRTY FIVE (35) DAYS from the date of signing of this Agreement of Sale, then the Vendor will have to pay DOUBLE of PART PAYMENT to the Vendee i.e.

Rs,2,000,000/- (Rupees Two, Million' Only) and thus the DEAL will become automatically null and void.

6. That the Vendor does hereby agree to grant, sell, assign convey and otherwise transfer the full rights to the "Said Property" to the aforesaid . Vendee free from all sorts of claims, liens, ceases, demands, taxes, encumbrances and burdens of whatsoever nature.

7. That the Vendor hereby covenants and assures the Vendee that he is the full and absolute owner of the Said Property and none else has any right or interest in the Said Property, he has all the rights and title with full authority top sell the Said Property and that he has not prior to this date of these presents done, made, committed, caused or knowingly suffered to be done any such things or deeds whereby or by reason of impaired or that the Said Property is not charged, encumbered or prejudicially effected in any way...

9. That the Vendor shall indemnify and keep the Vendee indemnified for all costs, charges, liabilities and expenses and all losses and deterrents suffered by the Vendee owing to any defect in title and any actions suits, demands and claims preferred by any person against or in respect of the Said Property hereby agreed to be conveyed and transferred to the Vendee."

(Emphasis is added)

From the above terms it is apparent that:

- (i) as per clause-3 of the Agreement of Sale, Bhart Lal was obliged to pay the balance sale consideration amounting to Rs.5,800,000/- (Rupees Five Million and Eight Hundred Thousand) to Muhammad Yousuf Polani within a period of 35 days from the date of signing of the Agreement of Sale i.e. by 1 September 2010;
- (ii) the payment of the balance sale consideration amounting to Rs.5,800,000 (Rupees Five Million and Eight Hundred Thousand), as clarified in clasue-4 of the Agreement of Sale, had to be done at the time when "Transfer Documents" i.e. a Sub-Lease Deed for the Said Property was executed and registered by Muhammad Yousuf Polani in favour of Bhart Lal;
- (iii) Clause 5 of the Agreement of Sale contains reciprocal penalty clause whereby:

- (a) in the event that Bhart Lal failed to pay the balance sale consideration of Rs. 5,800,000 (Rupees Five Million and Eight Hundred Thousand) on 1 September 2010 **when** Muhammad Yousuf Polani was ready to register the Sub-Lease Deed for the Said Property in favour of Bhart Lal, the advance of Rs.1,000,000 (Rupees One) Million would stand forfeited and the Agreement of Sale was to be treated as null and void.
- (b) in the event that Muhammad Yousuf Polani failed to either register the Sub-Lease Deed for the Said Property **and** failed to hand over possession of the Said Property in favour of Bhart Lal on 1 September, he would be liable to pay Bhart Lal a sum of Rs. 2,000,000 (Rupees Two Million) as a penalty and the Agreement of Sale was to be treated as null and void.
- (iv) as per clause 7 of the Agreement of Sale, Muhammad Yousuf Polani gave a representation that he was the owner of the Said Property and as per clause 9 of the Agreement of Sale he indemnified Bhart Lal for

“ ... *all costs, charges, liabilities and expenses and all losses and detriments suffered by the Vendee owing to any defect in title and any actions suits, demands and claims preferred by any person against or in respect of the Said Property hereby agreed to be conveyed and transferred to the Vendee.*”

4. According to Muhammad Yousuf Polani, Bhart Lal did not comply with his obligations within time and on 7 October 2015 Muhammad Yousuf Polani issued Bhart Lal a legal notice alleging that:

- (i) the sale consideration for the purchase of the Said Property was Rs. 6,700,000 (Rupees Six Million Seven Hundred Thousand);

- (ii) the value of the Said Property had increased to Rs. 13,000,000 (Rupees Thirteen Million); and
- (iii) that he was entitled to:
  - (a) the balance sale consideration of Rs. 5,300,000 (Rupees Five Million Three Hundred Thousand),
  - (b) the differential between the value of the Said Property and the purchase price indicated in the Agreement of Sale which according to him amounted to Rs. 6,700,000 (Rupees Six Million Seven Hundred Thousand), and
  - (c) a sum equivalent to 25% of the value of the Said Property i.e. Rs. 3,250,000 (Rupees Three Million Two Hundred and Fifty Thousand) as a penalty.

5. Bhart Lal replied to the legal notice stating that:

- (i) The sale consideration as per the Agreement of Sale was Rs. 6,800,000 (Rupees Six Million Eight Hundred Thousand) and a part payment of Rs. 1,000,000 had been made by him leaving the balance sale consideration at Rs. 5,800,000 (Rupees Five Million Eight Hundred Thousand);
- (ii) despite repeatedly approaching Muhammad Yousuf Polani for the execution of the Deed of Sub-Lease for the Said Property, this had not been forthcoming as there was an internal dispute as between the partners of the project each of whom were representing themselves as being the owners of the Said Property;
- (iii) that the balance sale consideration was payable against a Deed of Sub-Lease being executed by the Appellant in favour of Bhart Lal, both of which were obligations were

reciprocal and which were to be complied by each party to the Agreement of Sale within 35 days of the Agreement of Sale; however as Muhammad Yousuf Polani was not in a position to execute the Deed of Sub-Lease within 35 days, the obligation on the part of Bhart Lal did not arise within that time period;

- (iv) that Bhart Lal was ready and willing to perform his obligation to pay the balance sale consideration as against the execution of the Deed of Sub-Lease.

## **B. The Litigation**

### **(i) Suit No.79 fo 2016 – The Polani’s Suit**

6. Muhammad Yousuf Polani and Yaqoob Polani maintained Suit No. 79 of 2016 before the IInd Senior Civil Judge Karachi (South) seeking specific performance of the Agreement of Sale with damages, mense profits for the interim usage of the Said Property and in the alternative if specific performance could not be granted, then to cancel the Agreement of Sale and to direct Bhart Lal to hand over possession of the Said Property to Muhammad Yousuf Polani and Yaqoob Polani. The prayer clause of Suit No. 79 of 2016 is as under:

- “ ... (a) To direct the defendant to pay the balance sale consideration of Rs.58,00,000/= to the plaintiff.
- (b) To direct the ‘defendant to pay the damages of Rs.32,50,000/= as well as differential amount of Rs.67,00,000/= on account of price high of suit property for breach of terms and condition of agreement of sale dated 29.07.2010.
- (c) To direct the defendant to pay the Rs.50,000/= as use and occupation charges of demise premises till restoration of possession or entire payment.
- (d) In alternate the agreement may be pleased treated as cancelled with further direction to hand over vacant physical possession to the plaintiff from the defendant from whosoever in possession of demise premises i.e. apartment bearing No.810, -8<sup>th</sup> Floor in the project known as “Ashiana Apartment” situated in Block-9, KDA Scheme No.5, Clifton, Karachi.

**(ii) Suit No.396 of 207 – Bhart Lal's Suit**

7. The institution of Suit No.79 of 2016 compelled Bhart Lal to also maintain Suit No. 396 of 2016 also before the Court of IInd Senior Civil Judge, Karachi (South) where he also sought specific performance of the Agreement of Sale. Bhart Lal maintained that specific performance may be ordered by the Court directing that a Deed of Sub-Lease may be issued in his favour by Muhammad Yousuf Polani and at which time he would pay the balance sale consideration to Muhammad Yousf Polani. The prayer clause in Suit No.396 of 2016 is as follows:

- “ ...
- (a) Directing the Defendant for execution of transferred documents/ Registration of Sale Deed in favour of the Plaintiff in respect of Suit Property viz. Apartment/Flat No. 810 8 Floor, Ashiana Apartment CG-21:Block-9, Clifton, and Karachi.
  - (b) In case failure Defendant to execute the transfer documents/ Register the Sale Deed in favour of the Plaintiff the same is directed to be done by some other persons appointed by this Honorable Court.
  - (c) Grant Permanent Injunction restraining the Defendant from interfering in the peaceful possession, use and enjoyment of the suit property and further restraining from alienating, transferring, disposing of the suit property except the Plaintiff to any other person directly or indirectly in any manner whatsoever.

**(iii) The Judgement of the IXth Senior Civil Judge, Karachi (South)**

8. The matter proceeded before the IXth Senior Civil Judge, Karachi (South) who framed the following issue:

- “ ...
- (i) Whether the suit No.79/2016 & 396/2016 filed by the Plaintiffs are not maintainable and barred by any provisions law?
  - (ii) Whether the suit No.396/2016 filed by plaintiff is barred by the law of Limitation Act?
  - (iii) Whether plaintiff No.2 in suit No.79/2016 is incompetent person to file suit against defendant?
  - (iv) Whether the defendant No.2 was the real owner of the suit property at the time of sale agreement and sale agreement was executed with his consent?
  - (v) Whether the time was the essence of contract as per terms of agreement of sale?



(vi) *Whether vendee contacted and approached to vendor for receiving remaining balance sale consideration amount from him within 35 days as per terms of agreement?*

(vii) *Whether there were 4 partners of Aashiana project and each one was claiming to be owner and forbade the vendee to pay the remaining sale consideration amount to vendor/any partner.*

(viii) *Whether vendee was ready and willing to pay the remaining sale consideration amount to vendor with stipulated time?*

(ix) *Whether it was vendor or vendee who breached the terms of agreement of sale?"*

(x) *Whether the vendee is in illegal possession of suit property?*

(xi) *Whether the vendor is entitled for restoration of possession of the suit property?*

(xii) *Whether the vendor is entitled to claim damages of Rs.3,250,000/-,Rs. 50,000/- per month as rent and differentiate amount of Rs.6,700,000/from vendee?*

(xiii) *Whether the plaintiffs are entitled for any relief claimed?*

(xiv) *What should the decree be?"*

9. After recording evidence, the IXth Senior Civil Judge, Karachi (South) (who was seized of the matter pursuant to an administrative order dated 29 July 2016 transferring Suit No. 79 of 2016 and Suit No. 396 of 2016 to that Court) held that:

- (i) Both suit bearing No. 79 of 2016 and 396 of 2016 to the extent that they were seeking specific performance of the Agreement of Sale are barred under sections 7, 41 and 54 of the Transfer of Property Act, 1882 and also under sections 56 and 25A of the Specific Relief Act, 1877 as the purported owners of the Said Property i.e. Muhammad Yousuf Polani and Yaqoob Polani were not able to demonstrate that they have proper title to the Said Property as:
  - (a) Muhammad Yousuf Polani and Yaqoob Polani lacked the capacity to sell the Said Property; and
  - (b) as Bhart Lal had acquired title from someone whose title was deficient specific performance could not be granted on the Agreement of Sale.

- (ii) That as possession of the Said Property was admittedly handed over to Bhart Lal by Muhammad Yousuf Polani and which possession is not legally in his possession the same should be handed over to Muhammad Yousuf Polani and Yaqoob Polani.

(iv) **The Judgment of the Illrd Additional District Judge Karachi (South)**

10. Bhart Lal filed two appeals as against the Common Judgement dated Common Judgement dated 31 October 2018 and Decrees dated 3 November 2018 passed by the IXth Senior Civil Judge, Karachi (South) in Suit No. 79 of 2016 and Suit No. 396 of 2016 bearing Civil Appeal No. 275 of 2018 and Civil Appeal No 285 of 2018 before the Illrd Additional District & Sessions Judge, Karachi (South). By a common Judgement dated 23 September 2020 and Decrees each dated 23 September 2020 passed by the Illrd Additional District & Sessions Judge, Karachi (South) in Civil Appeal No. 275 of 2018 and Civil Appeal No. 285 of 2018 the Illrd Additional District & Sessions Judge, Karachi (South) dismissed both the Appeals holding that:

- (i) as both Muhammad Yousuf Polani and Yaqboob Polani had admitted that they did not hold proper title to the Said Property at the time of the execution of the Agreement of Sale and as Bhanrt Lal had also admitted that he did not inquire into the title of the Said Property prior to entering into the Agreement of Sale, specific performance could not be ordered on that agreement;
- (ii) That the Agreement of Sale was to be deemed to be null and void and the parties were to be put into their respective possessions as at the date of the Agreement of Sale i.e.

possession of the Said Property was to be restored to the Muhammad Yousuf Polani and Yaqoob Polani and a sum of Rs, 1,000,000 was to be returned by them to Bhart Lal.

**C. The Appeals and the Application for Revision**

**(i) Arguments for the Appellants**

11. Mr. Hamza H. Hidayatullah advanced arguments on behalf of the Appellant. He contended that the issue a regarding the ownership of the Said Property was actually never framed by the Court and requested that the provisions of Order XLI Rule 25 and Rule 33 of the Code of Civil Procedure, 1908 be followed and called for the remand of the case to the trial count to try this issue and thereafter to send the matter back to this court, after recording evidence on that issue, for adjudication. He relied on a decision of the Supreme Court of Pakistan reported as **North-West Frontier Province Government, Peshawar through Collector Abbotabad vs. Abdul Ghaffor Khan through Legal heirs**<sup>1</sup> wherein it was held that:

“ ... Order XLI, C.P.C., governs the institution and hearing of the appeals. Its rule 25 lays down: if the court from whose decree the appeal is filed, is found to have omitted to frame or try any issue, or to determine any question of fact, the Appellate Court is vested with the power to formulate the issue and give a direction to the trial Court to record additional evidence and forward the same along with its findings to the Appellate Court. The latter after obtaining objections from both sides, can adjudicate upon the controversy. The need to give such a direction to the trial Court may genuinely arise if the trial Court’s finding is not found safe or some additional facts having a strong bearing on the merits of the case, which has gone unnoticed by the trial Court, are unearthed before the Appellate Court. It is correct that order XLI, Rule 25 C.P.C., upon its terms is not applicable to the situation in hand, but the underlying principle and the procedure envisaged thereby regulating the way, for ascertaining the truth as to the factual aspect of the case, with reference to the evidence on the record. With necessary adoption, not forbidden by the law can well be applied to the instant case.”

He then referred to Order 1 Rule 9 of the Code of Civil Procedure, 1908 and stated that it was incumbent on the IXth Senior Civil Judge Karachi

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<sup>1</sup> PLD 1993 SC 417

(South) to have impleaded the owners of the Said Property as a party and which the Court, having failed to do, made it incumbent on this Court to remand the matter for such a purpose and to allow evidence to be led as in respect of the ownership of the Said Property. He next placed reliance Section 8 of the Specific Relief Act, 1877 and Section 53 A of the Specific Relief Act, 1877 to state that as he had paid part consideration for the Said Property he should be treated as having acquired rights under Section 53 A of the Transfer of Property Act, 1882. Having acquired such rights he pressed that the court had incorrectly directed that Bhart Lal should hand over possession to the Muhammad Yousuf Polani and Yaqoob Polani. In this regard he relied on four decisions of the Supreme Court of Pakistan reported as **Mst. Resham Bibi vs. Lal Din**<sup>2</sup>, **Taj Wali Shah vs. Bakhti Zaman**,<sup>3</sup> **Muhammad Yousaf vs. Munawar Hussain**<sup>4</sup> and **Syed Hakeem Shah (Deceased) through LR and others vs. Muhammad Idrees**<sup>5</sup> to support his contentions. He also stated that while admittedly Muhammad Yousuf Polani and Yaqoob Polani were not the owners of the Said Property they could not be put back into possession of the Said Property. In this regard he relied on a decision of the Supreme Court of Pakistan reported as **Taj Wali Shah vs. Bakhti Zaman**<sup>6</sup> wherein it has been clarified that a person in possession has a vested right to remain in possession and which right could not be taken away unless the challenge to his possession was made by a person who showed proper or better title through transfer or inheritance. He stated that on the basis of this decision as it had come on record that neither Muhammad Yousuf Polani nor Yaqoob Polani had proper title, they could not be put into the possession of the Said Property. He finally relied on Section 23 and Sub-Section (b) of Section 18 of the Specific Relief Act, 1877 and stated that as Muhammad Yousuf Polani had imperfect title to

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<sup>2</sup> 1999 SCMR 2325

<sup>3</sup> 2019 SCMR 84

<sup>4</sup> 2000 SCMR 204

<sup>5</sup> 2017 SCMR 316

<sup>6</sup> 2019 SCMR 84

the Said Property under Sub-Section (b) of Section 18 of the Specific Relief Act, 1877 the matter should be remanded to the trial court and he should, under Order 1 Rule 9 of the Code of Civil Procedure, 1908, be given the right to implead the other owners of the Said Property and thereafter seek his right to specific performance against all the co-owners.

***(ii) Arguments for the Respondents***

12. Mr. Syed Ehsan Raza appeared for Muhammad Yousuf Polani and Yaqoob Polani and began his submissions by stating that what Bhart Lal could not get directly he is attempting to get indirectly and which cannot be allowed. He relied on a division bench decision of this court reported as **Miss Ufera Memon vs. Lquat University of Medical and Health Sciences (LUMAS) Jamshoro through Registrar**<sup>7</sup> to support this contention. He stated that it cannot be correct that 13 years after the execution of the Agreement of Sale, the matter should now be remanded. He then referred to Section 99 of the Code of Civil Procedure, 1908 which states that:

“ ... *No Decree shall be reversed or substantially varied, not shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in a proceedings in the suit **not affecting the merits of the case** or the jurisdiction of the court.*”

(Emphasis is added)

and contended that the suit was for specific performance and the issue of the ownership of the Said Property was not an issue affecting the merits of the case to permit the matter to be remanded to the trial court. He stated that as Bhart Lal had taken possession of the Said Property it mandated that he pay the balance sale consideration and as he had not paid the balance sale consideration Bhart Lal's *lis* should be dismissed. He next relied on Sub-Section (g) of Section 21 of the Specific Relief Act, 1877 to state that as the Agreement of Sale seemed to have a “continuous duty that exceeded a period of three years it could not be specifically enforced.

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<sup>7</sup> PLD 2011 Khi 400

He finally relied on two decisions reported as **Abdul Wahab Zaki vs. Yousaf Hussain Khan and 5 others**<sup>8</sup> to advance the proposition that possession of a property should be restored to the person from whom it had been illegally taken and **Rashid Ahmed vs. Friends Match Works**<sup>9</sup> to advance the proposition that the right to seek Specific Performance in terms of Section 53 A of the Transfer of Property Act, 1882 can only be available if the entire sale consideration had been paid and prayed that Appeals should be dismissed. In respect of his Application seeking to revise the Judgement and Decree each dated 23 September 2020 passed by the IIIrd Additional District & Sessions Judge, Karachi (South) in Civil Appeal No. 285 of 2018 he stated that as Bhart Lal had remained in possession for 13 years he was not only entitled to take possession but was also entitled to mense profits for the period of Bhart Lal's possession and which he had been incorrectly denied to him by the IIIrd Additional District & Sessions Judge, Karachi (South) in Civil Appeal No. 285 of 2018.

**(iii) The Points for Determination**

13. I have heard the Counsel for Bhart Lal and the Counsel for Muhammad Yousuf Polani and Yaqoob Polani and have perused the record. The points for determination in these two Appeals and the Application for Revision is:

- As to whether the provisions of Order XLI Rule 25 of the Code of Civil procedure, 1908 can be invoked to adduce evidence and settle issues so as determine the real issues as between Bhart Lal, Muhamamd Yousuf Polani and

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<sup>8</sup> 1988 PCrLJ 1507

<sup>9</sup> PLD 1989 SC 503

Yaqoob Polani in Suit No. 79 of 2016 and Suit No. 396 of  
2016

14. It is rare that suits are filed by both a vendor and a vendee each seeking specific performance of the same agreement for the sale and the purchase of the same immovable property. It is even rarer that such suits are maintained when there is no dispute, as between the vendor and the vendee as to the execution of the Agreement of Sale on which they are seeking Specific Performance. While one would have imagined such a suit to have been decreed on admissions, it is apparent from the record that no less than fourteen issues had been framed for determination by the Court in Suit No. 79 of 2016 and Suit No. 396 of 2016.

15. Amongst these issues, an issue as to whether Muhammad Yousuf Polani was in fact the owner of the Said Property at the time when he executed the Agreement of Sale had also been settled. I have perused the evidence that was led in Suit No. 79 of 2016 and Suit No. 396 of 2016 by both Mr. Muhammad Yousuf Polani and Mr. Bhart Lal in Suit No. 79 of 2016 and Suit No. 396 of 2016 to show as to whether Mr. Muhammad Yousuf Polani was in fact the owner of the Said Property. Surprisingly not one document indicating title as to either Plot No. CG-21, Khayaban-e-Jami, Block-9, Karachi Development Authority Scheme No. 5, Karachi or the Said Property has been adduced in evidence. The issue having been settled, it was open to Mr. Bhart Lal to summon as witnesses the relevant officers of the Karachi Development Authority or the relevant officers of the Registrar of Rights and Assurance to prove the title of either Plot No. CG-21, Khayaban-e-Jami, Block-9, Karachi Development Authority Scheme No. 5, Karachi or the Said Property. In the event that Plot No. CG-21, Khayaban-e-Jami, Block-9, Karachi Development Authority Scheme No. 5, Karachi had been made subject to a registered partnership, the registrar of Joint Stock Companies could have been

summoned so as to confirm the names of the partners and also to confirm as to whether or not Plot No. CG-21, Khayaban-e-Jami, Block-9, Karachi Development Authority Scheme No. 5, Karachi was part of the partnership stock or not. This right was not clearly not availed by Mr. Bhart Lal.

16. It is apparent that realising that the evidence on this issue is lacking Mr. Hamza H. Hidayatullah had relied on Order XLI Rule 25 and Rule 33 of the Code of Civil Procedure, 1908 to advance a proposition that as an issue regarding the ownership of the Said Property was never actually framed by the Court I should settle such an issue and remand the case to the trial court to lead evidence adjudicate on this issue and which should thereafter be sent back to this court, for adjudication. Order XLI Rule 25 and Rule 33 of the Code of Civil Procedure, 1908 read as under:

“ ... 25. Where the court from whose decree the appeal is preferred has *omitted to frame or try any issue*, or to *determine any question of fact which appears to the Appellate Court essential to the right decision of the suit upon the merits* the Appellate Court may if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred and in such case shall direct such Court to take the additional evidence required.

And such court shall proceed to try such issues, and shall return the evidence to the appellate Court together with its findings thereon and the reasons therefor...

33. The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties although such respondents or parties may not have filed any appeal or objection:

Provided that the Appellate Court shall not make any order under section 35-A in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.”

(Emphasis is added)

While Mr. Hamza H. Hidayatullah has placed reliance on the decision reported as *North-West Frontier Province Government, Peshawar*



**through Collector Abbotabad vs. Abdul Ghaffor Khan through Legal**

**heirs**,<sup>10</sup> a clear summation of the law has been made in the decision reported as **Muhamamd Dervaish Al-Gilani vs. Muhammad Sharif**<sup>11</sup>

wherein the Supreme Court of Pakistan held that:

“ ... *The principles for remand of the case to the lower Court for deciding on merits or retrial are well-settled. This power should not be exercised lightly but sufficient care should be taken in remanding the case. The Court should examine the evidence and if it comes to the conclusion that is it not sufficient to pronounce the judgment or decide the issues between the parties, it can remand the case or may itself record the evidence and decide it. But of on record there is adequate and sufficient evidence on which the decision can be made, the remand would not be justified.*”

17. It seems that while Bhart Lal, Muhammad Yousuf Polani and Yaqoob Polani were focused on the issue of whether specific performance of the sale of the Said Property would be ordered, each of them presumed that title to the Said Property was not disputed and therefore ignored to adduce evidence on this issue. It is also apparent, that for this reason, t Muhammad Yousuf Polani and Yaqoob Polani have maintained Civil Revision Application No. 19 of 2021 and in which one of the grounds that they have raised in that application is:

“ ... 2. *That admittedly the learned Judge has supported the issue No. 1 in favour of the applicant and declared issues No. 2 to 9 as redundant for the reason that the application who files Suit No. 79/2016 was allegedly incompetent is incorrect impression for the reasons that the property was lease and lease deed was awaited by the builder where applicant has all original documents of the demise flat hence any doubt regarding the title is not logical...*”

18. While Bhart Lal, Muhammad Yousuf Polani and Yaqoob Polani had premised the evidence on the presumption of the ownership of the Said Property vesting in Muhammad Yousuf Polani and Yaqoob Polani the IXth Senior Civil Judge Karachi (South) correctly premised the case on the title of Muhammad Yousuf Polani to the Said Property and having come to the conclusion that there wasn't sufficient evidence to establish the title of

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<sup>10</sup> PLD 1993 SC 417

<sup>11</sup> 1997 SCMR 524

Muhammad Yousuf Polani to the Said Property has decided this issue in Suit No. 79 of 2016 and Suit No. 396 of 2016 and had premised the finding on the other issues on this issue. There clearly being insufficient evidence on the record to pronounce the judgment and to decide the issues between the parties on the record to adjudicate as to the title of Muhammad Yousuf Polani to the Said Property, as admitted by both Bhart Lal and Muhammad Yousuf Polani, I do consider that this is proper case to exercise my powers under Order XLI Rule 25 of the Code of Civil Procedure, 1908 to remand the matter to the IXth Senior Civil Judge Karachi South to allow to adduce evidence on the following issue:

“ ... (iv) Whether the defendant No.2 was the real owner of the suit property at the time of sale agreement and sale agreement was executed with his consent?”

and thereafter to return the evidence to this Court together with its findings thereon and the reasons therefor.

19. In addition to the above, I do believe that one further issue needs to be considered and which was not contemplated by the IXth Senior Civil Judge Karachi (South). It is be noticed that Muhammad Yousuf Polani has in clause 7 of the Agreement of Sale given an indemnity to Bhart Lal as towards his title to the Said Property and which goes to the extent to:

“ ... keep the Vendee indemnified for all costs, charges, liabilities and expenses and all losses and determents suffered by the Vendee owing to any defect in title and any actions suits, demands and claims preferred by any person against or in respect of the Said Property hereby agreed to be conveyed and transferred to the Vendee.”

In the event that a finding is given that Muhammad Yousuf Polani title to the Said Property is deficient Bhart Lal right to be indemnified to the extent of all losses that are occurred by him on account of Muhammad Yousuf Polani improper title to the Said Property would need to be determined.

The enforcement of such a term being part of the Agreement of Sale would come within the scope of Suit No. 396 of 2016 and which issue would be determined in terms of Section 19 of the Specific Relief Act, 1877. I therefore deem it appropriate to frame a further issue as follows:

“ ... *If the title of Muhammad Yousuf Polani to the Said Property is found deficient then is Bhart Lal entitled, under clause 9 of the Agreement of Sale, to claim to be indemnified by Muhammad Yousuf Polani to the extent of the losses suffered by him and what should such compensation be?*

20. For the foregoing reasons, I am of the opinion that this is proper case to exercise my powers under Order XLI Rule 25 of the Code of Civil Procedure, 1908 to remand the matter to the IXth Senior Civil Judge Karachi (South) to try the following issues:

“ ... (i) *Whether the defendant No.2 was the real owner of the suit property at the time of sale agreement and sale agreement was executed with his consent?*

(ii) *If the title of Muhammad Yousuf Polani to the Said Property is found deficient then is Bhart Lal entitled, under clause 9 of the Agreement of Sale, to claim to be indemnified by Muhammad Yousuf Polani to the extent of the losses suffered by him and what should such compensation be?”*

and to return the evidence to this Court together with its findings thereon and the reasons therefor within a period of two months from the date of this Judgment whereafter IInd Appeal No. 169 of 2020 and IInd Appeal No. 170 of 2020 and Civil Revision 19 of 2021 will be heard and decided. The Office is directed to forthwith return the Record and Proceedings of Civil Appeal No. 275 of 2018 and Civil Appeal No. 285 of 2018 to the Court of the IIIrd Additional District & Sessions Judge, Karachi (South) and of Suit No. 79 of 2016 and Suit No. 396 of 2016 to the IXth Senior Civil Judge, Karachi (South).

JUDGE

Karachi dated 16 August 2023