

**ORDER SHEET**  
**THE HIGH COURT OF SINDH, KARACHI**  
**R.A No.47 of 2023**

Dated: Order with signature of Judge(s)

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**For hearing of CMA No. 3091/2023**  
**For hearing of Main Case**

**Date of Hearing** : 23 May 2023.

**Petitioner** : Muhammad Fareed through Altaf Ahmad Shaikh, Advocate.

**Respondent No.1** : Nemo

**Respondent No. 2** : Inayatullah Khan through Muhammad Tamaz Khan

**Respondent No. 3** : Nemo

**Respondent No. 4** : Nemo

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**ORDER SHEET**  
**THE HIGH COURT OF SINDH, KARACHI**  
**R.A No.48 of 2023**

Dated: Order with signature of Judge(s)

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**For hearing of CMA No. 3094/2023**  
**For hearing of Main Case**

**Date of Hearing** : 23 May 2023.

**Petitioner** : Muhammad Fareed through Altaf Ahmad Shaikh, Advocate.

**Respondent No.1** : Nemo

**Respondent No. 2** : Inayatullah Khan through Muhammad Tamaz Khan

**Respondent No. 3** : Nemo

**Respondent No. 4** : Nemo

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**ORDER**

**MOHAMMAD ABDUR RAHMAN, J.** These two applications have been maintained by the Applicant under Section 115 of the Code of Civil Procedure, 1908 seeking to revise two Judgments and Decrees each dated

13 March 2023 passed by the V<sup>th</sup> Additional District Judge Karachi (West) in Civil Appeal No.243 of 2022 and in Civil Appeal No. 244 of 2023 which respectively upheld a consolidated Judgment and Decree dated 9 May 2022 passed by the XII<sup>th</sup> Senior Civil Judge Karachi (West) in Suit No.319 of 2018 and Suit No. 1070 of 2020.

2. The Applicant had maintained Suit No. 319 of 2018 before the XII<sup>th</sup> Senior Civil Judge Karachi (West) seeking the Specific Performance of an Agreement to Sell dated 7 September 2018 with the Respondent No. 1 and the Respondent No. 2 in respect of a 50% undivided share out of 83.33 square yards in a plot bearing No. LS-24, Eastern Side, Sector 13-D. Organi Town Karachi (hereinafter referred to as the "Said Property") for a sale consideration of Rs. 4,500,000 (Rupees Four Million Five Hundred Thousand). He contends that he had paid a sum of Rs. 1,500,000 (Rupees One Million Five Hundred Thousand) at the time of the execution of the Agreement to Sell and against which possession of the Said Property has been handed over to him.

3. The Applicants contends that plot bearing No. LS-24, Eastern Side, Sector 13-D, Organi Town Karachi admeasuring 166.66 was actually jointly owned by one Amanullah and one Muhammad Hussain each holding a 50% undivided share in that property. The said Amanullah and Muhammad Hussain had informally divided the property so that Amanullah was in possession of the portion of the plot located on the Eastern Side and Muhammad Hussain held the portion of the plot located on the Western Side. The Applicant maintains that after the demise of Amanullah the Said Property was transmitted into the names of the Respondents No. 1 to 4 who are all the legal heirs of Amanullah. He thereafter executed an Agreement of Sale with the Respondent No. 1 and the Respondent No. 2 on 7 September 2018 and at the time of the execution of the Agreement of Sale the Respondent No. 1 and the Respondent No. 2 represented that the other

Respondents would also convey their share in the Said Property to the Applicant at the time of the registration of the Conveyance Deed before the Registrar of Rights and Assurances.

4. The Applicant contends that each of the Respondents appeared before the Registrar of Rights and Assurance to convey the Said Property into the name of the Applicant and on which date they affixed their thumb impressions on the document conveying the Said Property into the name of the Applicants but the document could not be registered as one of the Respondents had not brought their Computerised National Identity Card on that date.

5. The Applicant contends that from that date onwards, the Respondents have been renegeing on their obligation under the Agreement of Sale dated 7 September 2018 and which compelled him to maintain Suit No. 319 of 2018 before the XII<sup>th</sup> Senior Civil Judge Karachi (West) seeking specific performance on that agreement. The institution of the Rent Case No. 319 of 2018 prompted the Respondents to institute Suit No. 1070 of 2020 before the XII<sup>th</sup> Senior Civil Judge Karachi (West) stating therein that the Agreement of Sale dated 7 September 2018 was forged, the Applicant was a trespasser and sought mense profits from the Applicant on account of his illegal occupation of the Said Property.

6. The XII<sup>th</sup> Senior Civil Judge Karachi (West) consolidated both the Suits and framed the following issues:

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1. *Whether Suit no. 319 of 2018 is not maintainable under the law*
  2. *Whether Suit no. 1070 of 2020 is not maintainable under the law*
  3. *Whether defendants No. 1 to 4 entered into agreement dated 07.09.2017 with plaintiff for sale of suit property & subsequently they put their signatures on draft of sale deed as claimed?*

4. *Whether agreement dated 07.09.2017 is a forged document as claimed*
5. *Whether defendant of Suit No. 1070 of 2020 is in possession of suit property being tenant & plaintiffs of said suit are entitled to the recovery of arrears of rent, if yes, at what rate & for which period.*
6. *Whether plaintiff of suit No. 319 of 2018 is entitled to the relief claimed?*
7. *Whether plaintiff of Suit No. 319 of 108 is entitled to the relief claimed?*
8. *What should the decree be?"*

7. The XII<sup>th</sup> Senior Civil Judge Karachi (West) after permitting both the Applicant and the Respondents to adduce evidence dismissed Suit No. 319 of 2018 and decreed Suit No. 1070 of 2020 holding that:

- (i) Both Suit No. 319 of 2018 and Suit No. 1070 of 2020 were maintainable;
- (ii) that evidence adduced by the Applicant failed to show that either the Agreement of Sale dated 7 September 2018 was entered into as between the Applicant and the Respondent No. 1 and the Respondent No. 2 or that a sum of Rs, 1,500,000 (Rupees One Million Five Hundred Thousand) had been paid by the Applicant to the Respondents pursuant to the purported Agreement of Sale dated 7 September 2018 and hence Specific Performance on the Agreement of Sale could not be ordered;
- (iii) that the Applicant was a trespasser and was liable to pay a sum of Rs, 30,000 per month to the Respondents as mense profits from the date of the filing of Suit No 1070 of 2020.

8. Being aggrieved and dissatisfied by the consolidated Judgement and Decree dated 9 May 2022 passed by the XII<sup>th</sup> Senior Civil Judge Karachi (West) in Suit No.319 of 2018 and Suit No. 1070 of 2020 the

Applicant preferred Civil Appeal No. 243 of 2022 and Civil Appeal No. 244 of 2023 before the Vth Additional District Judge (MCAC) Karachi (West) impugning the Consolidated Judgements and Decrees and who on 13 March 2023 was pleased to dismiss both the appeals holding that:

- (i) the Agreement of Sale dated 7 September 2018 was only executed by the Respondent No. 1 and the Respondent No. 2 who lacked the authority to execute the Agreement of Sale on behalf of the remaining Respondents;
- (ii) the Applicant had failed to prove the Agreement of Sale dated 7 September 2018; and
- (iii) the Applicant was a trespasser.

The Vth Additional District Judge (MCAC) Karachi (West) was on the basis of the above findings pleased to dismiss Civil Appeal No. 243 of 2023 on merit and contended that as there was a consolidated judgement Civil Appeal No. 244 of 2023 was not maintainable as the Applicant should have only preferred one appeal.

9. Mr. Altaf Ahmad Shaikh entered appearance on behalf of the Applicant and reiterated the facts and contended that there was a material irregularity in the two Judgments and Decrees each dated 13 March 2023 passed by the V<sup>th</sup> Additional District Judge Karachi (West) in Civil Appeal No.243 of 2022 and in Civil Appeal No. 244 of 2023 which respectively upheld a consolidated Judgment and Decree dated 9 May 2022 passed by the XII<sup>th</sup> Senior Civil Judge Karachi (West) in Suit No.319 of 2018 and Suit No. 1070 of 2020 inasmuch as both the courts misapplied the evidence that had been adduced. He stated that on the evidence the Agreement of Sale has been proved as had the payment of the amount to the Respondents

and as such on their reneging on the obligations under the Agreement to Sell dated 7 September 2018, he is entitled to seek specific performance on that agreement. He did not rely on any case law in support his contentions.

10. Muhammad Tamaz Khan entered appearance on behalf of the Respondent No. 2 and contended that there was no illegibility or irregularity in the two Judgments and Decrees each dated 13 March 2023 passed by the V<sup>th</sup> Additional District Judge Karachi (West) in Civil Appeal No.243 of 2022 and in Civil Appeal No. 244 of 2023 or in the consolidated Judgment and Decree dated 9 May 2022 passed by the XII<sup>th</sup> Senior Civil Judge Karachi (West) in Suit No.319 of 2018 and Suit No. 1070 of 2020 and that these two applications were liable to be dismissed. He did not rely on any case law in support his contentions.

11. I have heard both the counsel for the Applicant and the Counsel for the Respondent and have perused the record. It is clear that the Agreement of Sale dated 7 September 2018, that the Applicant is seeking enforce, has been denied by the Respondents. Under Article 117 of the Qanun e Shahdat Order, 1984 it has been clarified that:

“ ... 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 exist.*

*(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.”*

As such prima facie the obligation is on the Appellants to prove both the existence of the Agreement of Sale dated 7 September 2018. Regarding

the manner in which a document is to be proved Article 79 of the Qanun e Shahdat Order, 1984 has clarified that:

“ ... 79. **Proof of execution of document required by law to be attested:**

***If a document is required by law to be attested**, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of given Evidence.*

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

(Emphasis is added)

This section may be read in conjunction with the provisions of Article 17 of the Qanun e Shahdat Order, 1984.

“ ... **17. Competence and number of witnesses:**

*(1) The competence of a person to testify, and the number of witnesses required in any case shall be determined in accordance with the injunctions of Islam as laid down in the Holy Qur'an and Sunnah:*

*(2) Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law,*

*(a) In matters **pertaining to financial or future obligations**, if reduced to writing, the instrument shall be attested by two men, or one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly; and*

*(b) In all other matters, the Court may accept, or act on the testimony of one man or one woman or such other evidence as the circumstances of the case may warrant.”*

(Emphasis is added)

12. Clearly the Agreement of Sale dated 7 September 2018 is a document that “pertain to financial and future obligations” and which having been reduced to writing need to be proved by either two men or one man and two women. I have perused the Agreement of Sale dated 7 September 2018 and note it was witnessed by three witnesses namely Saeed Alam, Muhammad Waheed and Muhammad Rasheed Qureshi. The statements of each of the witnesses are contradictory as while each of the witnesses

admit to attesting the Agreement of Sale dated 7 September 2018, when probed as to the amounts paid by the Applicant to the Respondents, they as compared to the version of the Applicant, each gave different versions as to who all were present at the time when payment was purportedly made. On this basis, the XII<sup>th</sup> Senior Civil Judge Karachi (West) in his consolidated Judgment and Decree dated 9 May 2022 passed in Suit No.319 of 2018 and Suit No. 1070 of 2020 had stated that their evidence to attesting the witnesses was doubtful and to which I am inclined to agree.

13. It is also to be noted that the Agreement of Sale dated 7 September 2018 was not executed by all the Respondents and was only actually executed by two of the Respondents and the remaining respondents were said to have orally agreed to such contentions. Keeping in mind that the witnesses to that oral agreement have all given contradictory statements as to who was present to agree to such an oral agreement adds credence to the finding in the consolidated Judgment and Decree dated 9 May 2022 passed by the XII<sup>th</sup> Senior Civil Judge Karachi (West) in Suit No.319 of 2018 and Suit No. 1070 of 2020 that the witnesses evidence was doubtful.

14. The evidence of the attesting witnesses to the Agreement of Sale dated 7 September 2018 being doubtful, is further thrown in doubt as the Appellant has altogether failed to indicate as to how the consideration was paid by him to the Respondents. His witnesses also having denied being present when the said consideration was purportedly paid can only lead to the conclusion that no evidence has been adduced of the payment of the consideration by the Applicant to the Respondent and which also negates the veracity of the Agreement of Sale dated 7 September 2018.

15. For the foregoing reasons , I am of the opinion that the Appellant have failed to discharge his burden under Article 117 of the Qanun e Shahdat Order 1984 and therefore cannot therefore seek specific performance on the Agreement of Sale dated 7 September 2018 and on



which basis alone specific performance must be refused and this application fails.

16. Having held that the Applicant is not entitled to Specific Performance and noting that the Applicant continues to be in possession of the Said Property, it remains for me to consider as to in what capacity the Applicant continues to occupy the Said Property and as to whether the Respondents are entitled to mense profits on the basis of the status of the Applicant in the Said Property. In this regard the contention of the Respondents is that the Applicant was their tenant. The Applicant denies his status as a tenant and states that he has been in possession of the Said Property since 2013 and has never paid any rent to the Respondents. Such a statement to my mind is enough to establish that the Applicant is a trespasser and therefore liable to pay mense profits to the Respondents. The findings of the XII<sup>th</sup> Senior Civil Judge Karachi (West) in his consolidated Judgment and Decree dated 9 May 2022 passed in Suit No.319 of 2018 and Suit No. 1070 of 2020 that the Applicant was in fact a trespasser and liable to pay mense profits is correct and with which I am also inclined to agree.

17. While parting with this Judgement I note that the Judgment and Decree 13 March 2023 passed by the V<sup>th</sup> Additional District Judge Karachi (West) in Civil Appeal No. 244 of 2023 dismissed that appeal, but the findings that were given by that Court on the appeal were not properly premised. The V<sup>th</sup> Additional District Judge Karachi (West) in Civil Appeal No. 244 of 2023 took the view that as the Judgment dated 9 May 2022 passed by the XII<sup>th</sup> Senior Civil Judge Karachi (West) in Suit No.319 of 2018 and Suit No. 1070 of 2020 was a consolidated judgement, no occasion occurred to the Applicant to file two separate Civil Appeals. I am however not able to subscribe to this view. While the Judgement passed by the XII<sup>th</sup> Senior Civil Judge Karachi (West) in Suit No.319 of 2018 and Suit No. 1070 of 2020 were clearly consolidated, the decrees that were passed by passed

by the XII<sup>th</sup> Senior Civil Judge Karachi (West) in Suit No.319 of 2018 and Suit No. 1070 of 2020 were clearly different and both had to be assailed. The Applicant was clearly in his right to maintain two separate appeals as against the Decrees passed by the XII<sup>th</sup> Senior Civil Judge Karachi (West) in Suit No.319 of 2018 and Suit No. 1070 of 2020.

18. For the foregoing reasons I am of the opinion that there is no illegality or infirmity with the Judgment and Decree dated 9 May 2022 passed by the XII<sup>th</sup> Senior Civil Judge Karachi (West) in Suit No.319 of 2018 and Suit No. 1070 of 2020 which are both upheld along with the findings in the Judgment and Decree each dated 13 March 2023 passed by the V<sup>th</sup> Additional District Judge Karachi (West) in Civil Appeal No.243 of 2022 and in Civil Appeal No. 244 of 2023. These Revision Applications therefore being misconceived are dismissed, however, with no order as to costs.

JUDGE

Karachi dated 22 August 2023.