ORDER SHEET IN THE HIGH COURT OF SINDH, KARACHI

II-Appeal No. 74 of 2023

Date Order with signature of Judge

1. For hearing of CMA No. 2385 of 2023

- 2. For hearing of CMA No. 2386 of 2023
- 3. For hearing of main case

12th September 2023

Ms. Afsheen Aman, advocate for appellant

SalahuddinPanhwar,J:-Precisely relevant facts for disposal of instant II-Appeal are that the appellant filed Civil Suit No.796/2021 against respondents, wherein it was stated that a residential property bearing House No.342, measuring about 120 Sq. Yards with construction thereon, situated at Moinabad, Future Colony Road, Landhi, Karachi was in possession Muhammad Abbas, the father of the appellant and Respondent No.7, since the year 1960 (hereinafter called the "suit property"); that Muhammad Abbas died on 29.11.2001 in the suit property; that after his death, the appellant and other legal heirs become coowners of the property; that during life time, Muhammad Jilani, the one of the legal heir had taken some loan from the Respondent No.1 and given his portion to him till clearance of loan, but unfortunately, without returning the loan, Muhammad Jilani expired; that thereafter appellant and other legal heirs approached to the Respondent No.1 to vacate the premises as they were ready to return the loan of Muhammad Jilani, but Respondent No.1 refused to do so. It is further stated that daughter of deceased filed suit for inheritance share in the suit property against her brothers and Respondent No.1; that the appellant has paid the inheritance share to one sister namely Mst. Rasool Bi wife of Shaikh Iqbal Ahmed; that the Respondent No.7 entered into an agreement to sell with the Respondent No.1, in respect of suit property on 14.12.2020, without permission/consent of other legal heirs; that appellant came to know about the said Sale Agreement, when he received summons from the court of learned Senior Civil Judge-II, Malir Karachi in Civil Suit No.46 of 2021; that appellant further came to know that the Respondent has also occupied his portion and filed suit for possession of portion of Ghulam Saqlain, one of the legal heir of deceased; that Civil Suit No.46/2021 has been dismissed under Order VII Rule 11 of CPC by order dated: 22.04.2021. Lastly, it is submitted that when appellant demanded to Respondent No.1 to 6 to vacate and handover the possession of his portion, they have issued threats of dire consequences.

- 2. Admittedly, suit of the appellant was proceeded exparte; affidavit-in-exparte proof was submitted along with certain documents; the right of cross-examination was given to the respondents/defendants, who have chosen to remain absent before this Court despite publication. Learned trial Court failed to refer any portion of evidence produced by the appellant or title documents. In a similar fashion, the appellate Court, while deciding appeal, relied upon the judgment of the trial Court. Needless to mention that the appellate court was required to pass independent order by examining all the relevant documents and evidence but that procedure was not undertaken by the appellate court, which is against the maxim of "Accumniobserventia non-estrecedenum" (if a thing is required to be done in a particular manner, it has to be done in that manner, if not, would be unwarranted under the law).
- 3. Accordingly, instant appeal is allowed. The judgments passed by the trial court as well as the appellate court are set aside and the case is remanded back to the trial court. The plaintiff would be at liberty to call any witness for his evidence. With regard to proof of ownership, further, if any, the trial Court shall decide the lis on merits while considering the evidence available on record, coupled with admitted documents. Trial Court would be competent to pass direction with regard to demarcation if appellant files an application. However, under the doctrine of lis pendence no third party interest shall be created and this protection will remain only for one month and the trial court shall decide the fate within two months.

JUDGE

SAJID