

Judgment sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Present  
Mr. Justice Muhammad Jaffer Raza

**II<sup>nd</sup> Appeal No. 204 of 2023**

Najmul Haq ..... Appellant.

Versus

Faisal ..... Respondent.

**II<sup>nd</sup> Appeal No. 205 of 2023**

Najmul Haq ..... Appellant.

Versus

Faisal ..... Respondent.

Mr. Naeem Akhtar, Advocate for the Appellant.  
None for the Respondent.

Dates of hearing : 17.04.2025 & 06.05.2025  
Date of announcement: 04.08.2025.

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

**MUHAMMAD JAFFER RAZA – J:** By the instant judgment, both the above noted Second Appeals shall be adjudicated. Both the Appeals have been filed against the consolidated judgment and decree dated 25.07.2023. The details of the litigation between the respective parties is tabulated as under:-

Suit No. with parties name and date of judgment	Appeal No. with parties name and date of judgment	Prayer clauses in the suit
865/2018 (Najmul Haq versus Faisal) for declaration, possession, mesne profit and permanent injunction. The suit was decided vide judgment dated 12.03.2022 whereby the suit was decreed to the extent of prayer clauses (a), (b) and (d).	84/2022 (Faisal versus Najmul Haq & another)  91/2022 (Najmul Haq versus Faisal)  Both the appeals were decided vide consolidated judgment dated 25.07.2023	(a) Decree thereby declaring the Plaintiff is owner of the suit Property bearing House No.90 situated at Sector 36/F, Landhi No. 5, Karachi. (b) Direct to the Defendant or any other person to handover peaceful vacant possession of the suit Property bearing House Ho.90 situated at Sector 36/P, Landhi No. 5, Karachi to the Plaintiff. (c) To direct the Defendant to pay meane profit at the rate of Rs.21, 000/- per month wax with effect from the month of December 2017. (d) To pass permanent injunction against the Defendant or anybody acting on his behalf not to create third party interest in the suit Property bearing House No.90 situated at Sector 36/F, Landhi No.5, Karachi and not to sell alienate transfer, gift, mortgage or alienate the suit Proper illegally, unlawfully, unauthorizedly till the pendency of this suit.

		(e) Cost of the suit; (f) Any other relief or reliefs as this Hon'ble Court may deem think, fit and proper in view of the circumstances of the case.
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2. It is contended by the learned counsel for the Appellant that his suit was earlier decreed in terms of prayer clauses (a), (b) and (d) and prayer clause for mesne profit (prayer clause “c”) was declined by the learned Trial Court. He has further averred that a registered lease deed dated 02.01.1986 has been executed in his favour and he is the owner of the subject property in question and the same is unlawfully occupied by the Respondent. He has further argued that he has obtained a loan from the National Bank of Pakistan in which the said house was pledged as security. The lease deed mentioned above was verified from the office of the concerned Registrar by the learned Appellate Court. He has argued that the Respondent was adopted by his family members who were issueless and was only permitted to occupy the subject property merely as a tenant. Given the relationship between the parties he was allowed to live in the subject property as a tenant, however no tenancy agreement was executed. He has further contended that the appeal preferred by him, ought to have been allowed and mesne profit should have been granted to him. He has further averred that even if the Appellate Court was not inclined to grant mesne profit to the Appellant, his suit was correctly decreed in terms of prayer clauses (a), (b) and (d) by the learned Trial court. Consequently, he has argued that he is entitled for the possession of the subject property. For the sake of clarity it is stated that there are conflicting findings of the courts below in respect of prayer clauses (a), (b) and (d) against which the present Appellant has preferred the appeals under adjudication.
3. The instant Appeals were presented on 24.08.2023. Thereafter, repeated notices were issued to the Respondent, who on all but one date, affected appearance. The matter was, in the absence of any representative on behalf of the Respondent, heard on 17.04.2025 and 06.05.2025.
4. Order XLI, Rule 31 C.P.C. mandates an appellate court to determine points for determination, the decision on those points, and the reasons for the decision. The said principle was also expounded in the case of Meer Gul vs. Raja Zafar

**Mehmood through legal heirs and others**<sup>1</sup>. The points for determination are set out below: -

1. **Whether the Appellant is the owner and entitled for possession of the subject property?**
2. **Whether the Appellant is entitled to mesne profit?**
3. **Whether the Impugned judgment requires interference of this Court?**

5. I have heard the learned counsel for the Appellant and perused the record with his able assistance. The findings on the points for determination are as follows:-

**POINT No.1.**

6. It is apparent that the lease deed dated 02.01.1986 was executed in the name of the Appellant. The said lease deed was exhibited by the Appellant along with other documents, most notably Mortgage Deed dated 17.01.1989 and verification report by Sub-Registrar Landhi Town. I agree with the finding of the learned Trial Court that after stepping into the witness box and exhibiting the documents noted above, the burden thereafter shifted on the Respondent. In this respect, certain admissions made by the Respondent during his cross examination, proved fatal to his claim. The same are reproduced as under:-

*“It is correct to suggest that lease documents in respect of suit property still existed in the name of plaintiff....It is correct to suggest that neither I issued legal notice to the plaintiff nor I filed any suit for cancellation of the lease against the plaintiff since the death of deceased Ameer-ul-Haq....It is correct to suggest that I have not produce any documentary evidence to show that deceased Ameer-ul-Haq had sold out the gold articles in order to purchase the suit property....It is correct to suggest that deceased Ameer-ul-Haq had not filed any case against the plaintiff regarding the suit property since execution of General Power of Attorney Dated 23.04.1984.”*

7. It is apparent from the excerpt of the cross examination reproduced above that the Respondent has made no efforts to seek cancellation of the registered lease deed in favour of the Plaintiff. Further, admittedly no such efforts were initiated by his father Ameer-ul-Haq during his lifetime against the Appellant. In that regard it is held that the Respondent failed to discharge the burden which shifted on to him,

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<sup>1</sup> 2024 SCMR 1496

as noted above. Further, the plea taken by the Appellant in respect of his ownership was not shaken by the Respondent during the cross examination and in that respect it is held that the Appellant discharged the burden entirely. Consequently, point No.1 is answered in the affirmative.

**POINT No.2.**

8. It has already been noted above that the prayer of the Appellant vis-a-vis mesne profit was declined by the learned Trial Court. In answering the instant point of determination this aspect of the Appellant's claim shall be examined. The test for granting mesne has already been broken down by me in the case of **Najmuddin through his legal heirs & others Versus Mst. Zaitoon Alavi and others**<sup>2</sup> in the following words:-

*“18. The test for grant of mesne profits can be broken down as follows: -*

- a. The person seeking mesne profit has to first establish entitlement and/or ownership of the property;*
- b. Thereafter, the person seeking mesne profit has to establish wrongful possession by the person against whom a decree of mesne profit is sought.*

*19. It is well established that once the court records a finding that the Defendant was in unauthorised possession or that it was the Defendant who was instrumental in depriving the Plaintiff of the lawful enjoyment of his property, he would be liable to pay mesne profits.”*

9. It has already been held in answering point of determination No.1 that the Appellant has established his entitlement/ownership of the subject property. The question therefore remains if the Appellant satisfies the second part of the test reproduced above. In that respect, it is held that the failure of the Respondent to effectively cross examine the Appellant in respect of the claim of mesne profit proved to be fatal. The Appellant in his affidavit in evidence, more particularly in paragraph numbers 6-8, has very clearly spelt out his claim. No specific question regarding the same has been posed to the Appellant during cross examination. Conversely, the counsel for the Appellant posed repeated question to the Respondent regarding his wrongful possession and the repetitive attempts of the

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<sup>2</sup> Suit No. 1548 of 2006. Judgment dated 24.02.2025.

Appellants to get the suit property vacated. In light of the same, it is held that both the courts below erred in rendering their respective finding in relation to granting mesne profit. The instant point of determination is answered in the affirmative. Consequently, prayer clause (c) of the suit is granted as prayed.

**POINT No.3.**

10. I have examined the Impugned judgment of the learned Appellate Court and hold that the learned Appellate Court has erred in setting aside the otherwise well-reasoned judgment of the learned Trial Court. Bare perusal of the Impugned judgment reflects that the learned Appellate Court has rendered its findings on what can only be classified as presumptions.

11. Perusal of the evidence recorded will reflect that no evidence was led by either party regarding the “common practice” in the city of Karachi to evade/save government taxes. Further, the finding of the learned Appellate Court in regards to the father of the Respondent owning half of the suit property is unfounded and beyond the scope of the suit which was preferred by the Appellant. Needless to mention that no counter claim or suit was ever preferred by the Respondent to enable the learned Appellate Court to render the noted finding. The learned Appellate Court has further erred in holding that the suit property was jointly purchased by the Appellant and father of the Respondent from the “joint sources” of their grandfather. No evidence in this respect was ever led during trial and in that respect, the finding rendered is misconceived and unsubstantiated. Lastly, the Appellate Court has incorrectly held that the Appellant by his “acquiescence” in allowing the Respondent to reside at the subject property, has “waived” his ownership rights on the same.

12. In light of what has been held above the Impugned Judgment is set aside and the judgment and decree passed by the learned Trial Court is upheld. The suit of the Appellant is decreed in terms of prayer clause (a), (b) (c) & (d). Office to prepare decree accordingly.

J U D G E