

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

R.A No.190 of 2003

Date

Order with signature of Judge

For hearing of Main Case

03.5.2016

M/s.Shabbir Ahmed Awan, & Amiruddin,
advocates for th applicant.

None present for the Respondents.

-.-.-

Nazar Akbar.J- This revision is directed against the appellate judgment and decree dated **14.4.2003** passed by District Judge, Central Karachi (Zafar Ahmed Khan Sherwani) in civil appeal No.69/1999 whereby on appeal by respondent No.1 & 2, against the judgment and decree dated 9.10.1999 in suit No.240/1992 in favour of the applicant by IIIrd Senior civil Judge (Central) Karachi was set aside, and the suit of the applicant was dismissed.

2. Brief facts of this case are that applicant purchased a Plot bearing No.L-150, Sector 5-L, North Karachi measuring 80 sq.yd (hereinafter the suit property) from one Muhammad Yousuf, who was allottee in the record of KDA and it was duly transferred in the name of the appellant by virtue of transfer order by KDA dated **13.4.1991**. The applicant before purchasing of suit property has also issued a public notice published in daily Naw-e-Waqat dated **03.03.1991** and it was followed by a registered lease duly executed by KDA in favour of the appellant on **23.4.1991**. However, after obtaining approved building plan by the KBCA vide letter dated **7.7.1991** when the applicant went to the suit property to raise construction, it was

found in possession of Respondent No.1 and therefore, he filed suit No.240/1992 for declaration and possession against the private respondents. The respondent filed written statement and claimed ownership of the suit property on the basis of photostat copy of an allotment order dated 12.11.1974. Learned trial court from the pleading of the parties framed the following issues.

1. Whether the suit is not maintainable in law?
 2. Whether the Plaintiff has no cause of action to file the suit?
 3. Whether this court has no jurisdiction to entertain this suit?
 4. Whether KDA after observing necessary formalities transferred the suit plot from its previous owner Yousuf Khan in the name of Plaintiff followed by the execution of lease after receiving all the dues and charges?
 5. Whether the Plaintiff after execution of the lease in his favour got the building plan sanction and approved by KBCA No.6?
 6. Whether the Defendant No.1 & 2 have any lawful right/claim over the plot in question when the same is duly and legally leased out by the Defendant No.3 in favour of the Plaintiff?
 7. Whether Defendant No.1 and 2 malafidely forcibly, unlawfully usurp the plot in question and started construction thereon inclusion with the Defendant No.3 KDA?
 8. What should the decree be?
3. The applicant examined himself as Ex.P-4 and produced the following documents.
- i. **Ex.4-B** Copy of daily Newspaper Nawa-e-Waqt Karachi dated 03.03.1991.

- ii. **Ex.4-C** Photostat copy of the allotment order of Niaz Muhammad the original allottee.
- iii. **Ex.4-D** Photostat copy of transfer / mutation order in the name of Yousuf Khan from whom the Plaintiff purchased the suit plot.
- iv. **Ex.4-E** Mutation order dated 13.4.1991 in the name of Plaintiff.
- v. **Ex.4-F** photocopy of challan paid to KDA of Rs.800/-.
- vi. **Ex.4-G** photostat copy of other challan of Rs.2,542/-
- vii. **Ex.4-H** photocopy of challan of lease charges
- viii. **Ex.4-K** photocopy of Indenture of lease between KDA and Plaintiff.
- ix. **Ex.4-K-1** Photocopy of SITE PLAN.
- x. **Ex.4-L** Photocopy of letter issued by the Administrative Officer North Karachi Township KDA.
- xi. **Ex.4-N** Photocopy of application / letter issued by KBCA for construction.
- xii. **Ex.4-O** Legal notice sent by the Plaintiff through his counsel to Defendant No.1 & 2 dated 8.3.1992.

The applicant also examined one witness Muhammad Junaid. Both were duly cross-examined. Respondent No.1 Niaz Muhammad examined himself as **Ex.6** and his son Umer Deen as **Ex.D-6-1** and produced photocopy of his allotment order and closed their side for evidence.

4. Learned trial court on the basis of evidence after hearing the counsel through a comprehensive judgment decided all the issues in favour of the applicants and decreed the suit. However, on appeal by respondents No.1 & 2, the learned District and Judge Central, Karachi ignored each and every issue framed by the trial court and framed only two points for determination of appeal which are as follows:-

1. Whether the plot in question was legally transferred in the name of the Respondent No.1?
2. Whether the appellant No.1 is in illegal possession of the plot in question alongwith construction?
3. What should the order be?

The appellate court set aside the judgment and decree. The applicant / Plaintiff has challenged the appellate decree through this revision. After service of this appeal Mr. M. A. Hashmi advocate filed power on behalf of the private respondents, but he is not attending the case for the last several years, however, his power is intact.

5. Learned counsel for the applicant has contended that the lower appellate court in hardly 15 lines of findings decided the first point in affirmative and in one sentence decided about point No.2 that the applicant/respondent has failed to prove it. The lower appellate court by ignoring the facts, evidence and findings of trial court has violated the mandatory provision of **Order XLI Rule 31 CPC**. The appellate judgment is contrary to record, evidence and the issue decided by the Trial Court. He has further contended that both the point for determination raised by the appellate court were on the face of it out of the pleadings of the parties. It was not the case of private respondents in their written statement that the allotment of the applicant was illegal nor the respondents have filed any suit seeking declaration of ownership of suit property. He vehemently contended that the respondents despite knowledge of existence of duly registered lease in respect of the suit

property have not filed suit for cancellation of registered lease. He has also contended that the allotment order was merged in Registered lease and title document of immoveable property is Registered lease which still hold the field. He vehemently contended that while reversing the well reasoned judgment, the appellate court failed to appreciate that the respondents as against the Registered lease deed have relied only on a photostat copy of allotment order, which was not even admissible in evidence. He has relied on the cases of Nasir Abbas ..Vs.. Manzoor Haider Shah (**PLD 1989 S.C 568**) and Gul Rehman ..Vs.. Gul Nawaz Khan (**2009 SCMR 589**).

6. I have perused the appellate court's impugned judgments and found that it does not refer to any evidence or any of the documents produced by the parties in the trial court. The learned appellate Court without declaring that the issues framed by the trial court were not proper, in the impugned judgment framed fresh the point for determination. The record does not show that even parties were asked to assist the appellate court on the said point for determination. It is settled principle of law that the appellate court is not supposed to act as a court of original jurisdiction and it is duty of the appellate court to examine the judgment of the trial court in accordance with law and give clear cut reasoning on each and every issue raised and decided by the trial court and comment whether it was in accordance with law or not before upholding it or setting it

aside. The Hon'ble Supreme Court in the case of Nasir Abbas (supra) at page No.568 has held as under:-

It is settled that if the evidence on the record has not been fully weighed and considered, that does not fulfill the requirements of O.41, R.31, and is liable to be set aside on revision. See Mathra Dass and others ..Vs.. Muharram Din and others (AIR 1915 Lah. 242). It is also settled that if the lower Court, misreads the evidence on record and fails to take notice of a vital fact appearing therein, comes to an erroneous conclusion, it would be deemed to have acted with material irregularity and its decision is open to revision by the High Court. See Dwarika v. Bagawati (A.I.R 1939 Rangoon 413) and Fut chong v. Maung Po Cho (A.I.R 1929 Rangoon 145).

Similarly in the other case law relied by learned counsel, the Hon'ble Supreme Court in 2009 SCMR 589 at page 593 has observed that;

If the lower Appellate Court does not examine the facts and the evidence for itself and does not even mention the points which the case raises, it will be certainly failing in its duty". In the instant case, a bare perusal of the judgment of the first appellate Court clearly reflects that it has not given due attention to the available evidence on record. Three important statements of witnesses i.e. Daulat Khan P.W.2, Gul Nawaz Khan, Plaintiff, P.W.3 and his son Muhammad Nisar P.W.4 are available on record and the appellate Court should have thrashed statements of these three important witnesses and then should have come to a definite conclusion. The judgment of the appellate Court in hand is not a judgment in its true sense and it is even admitted by the High Court that the first appellate Court has followed the path least resistant. The appellate Court should have applied Order XLI, rule 31, C.P.C. in stricto sensu as it has got ample powers under Order XLI, rules 32 and 33, C.P.C.

7. The powers of appellate Court as defined in the Superior Courts judgment while interpreting the provision of Order XLI

Rule 31 CPC have not been exercised by the lower appellate court as is apparent from the impugned appellate judgment.

8. In view of the above facts, it is indeed very unfortunate that after **13 years** this case cannot be finally decided as I am not supposed to act as Appellate Court and the power of Revisional Court are very limited. In this context I may again refer to the case of Gul Rehman (supra) and quote the following observation from page 593;

We have heard learned counsel for the parties at length and have also gone through the available record. Revision and appeal are admittedly two different fields. Appeal is the continuation of original suit and the appellate Court has got ample power to thrash out the entire evidence and to scrutinize the available documents in the light of arguments advanced by the respective parties. On the other hand, scope of revision is limited to some illegality, material irregularity or jurisdictional defect in the impugned judgment. A bare perusal of section 115, C.P.C. clearly shows that scope of revision is limited to the above points.

Therefore, I have no option except to remand the appeal to the court of District Judge (Central) Karachi for decision afresh on civil appeal No.96/1999 after due notice to the parties. The District Judge (Central) is directed to ensure that after due adherence to the requirement of Court motion notices to the parties in case of absence of either side, the appeal should not be decided by any short cut. This observation was imperative as the respondent's counsel is absent for the last several years and the applicant's counsel has stated at the bar that even applicant is also not in touch with him for more than two years.

The appellate Court should examine the Record and Proceedings and decide it on merit and merit alone.

Before parting with this judgment, I must mention here that I have seen original document of applicant which were filed with this Revision and the same are still on court record. These documents include original Indenture of lease, therefore office is directed to keep this file in safe custody till the applicant approaches to seek return of original documents.

JUDGE

SM