

## IN THE HIGH COURT OF SINDH, KARACHI

**Revision Application No.172 of 2006**  
**Revision Application No.173 of 2006**  
**Revision Application No.174 of 2006**

Present: **Mr. Justice Nazar Akbar**

Applicants	:	Masood Ali Khan Through Mr. M.S. Qureshi, Advocate
Respondent No.1	:	Zahid Ali Khan deceased through LRs
Respondent No.2	:	Mrs. Parveen Zahid both respondents through M/s. Masood Anwar Ausaf & Abdul Majeed Shaghil, Advocates.
Date of hearing	:	<b>22.09.2016</b>
Date of Decision	:	<b>14.11.2016</b>

### **JUDGMENT**

**NAZAR AKBAR J:-** By this common judgment I intend to dispose of three Revision Applications bearing Civil Revision Nos.172/2006, 173/2006 and 174/2006 filed by applicant (Masood Ali Khan) against the consolidated judgment in Civil Appeal No.64, 65 and 66 of 2002 passed by the learned IV<sup>th</sup> Additional District Judge, Central, Karachi whereby the judgment and decree in favour of the applicant in Suit Nos.603/1991, 662/1991 and the dismissal of suit No. 845/1991 filed by respondent No.2 were reversed and the appeals were allowed.

1. Briefly, Respondent No.2 on **25.7.1991** filed Suit No.845/1991 against the applicant for Specific Performance of the Contract of sale dated **30.07.1988** in respect of Flat No.E-11, Gulberg Square, Block-6, Federal B Area, Karachi, (the suit property). Respondent No.2 is wife of respondent No.1 and they were already living in the suit property as respondent No.1 was tenant since 1983 at the rate of Rs.400/- per month.

2. The applicant on **16.9.1991** filed suit No.603/1991 for Cancellation of Sale Agreement dated **30.7.1988** between the applicant and respondent No.2 and the applicant on **05.10.1991** also filed Suit No.662 of 1991 for recovery of Rs.21,600/- as arrear of rent from respondent No.1. In both the suits the respondents filed their written statement on **27.5.1992** and **30.11.1991** respectively. The applicant on **08.7.1992** filed his written statement in suit No.845/1991.

3. The learned trial Court from the pleadings of the parties framed the following consolidated issues:-

1. Which suit is not maintainable under the law?
  2. Which suit is under valued?
  3. Whether Masood Ali Plaintiff agree to sell the suit property to Mst. Parveen Zahid Khan for a sum of Rs.1,05,000/- out of which she paid a sum of Rs.42,000/- as part payment?
  4. Whether Mst. Parveen Zahid Khan was delivered the possession of the suit property as part performance and the balance amount was to be paid at the time of registration of sale deed and completing all the necessary documents as per sale agreement dated 30.07.1988?
  5. Whether Masood Ali Khan is entitled for the possession and arrears of rent from Zahid Ali Khan after handing over the premises in suit to Mst. Parveen Zahid Khan on or about 30.07.1988? has no concern with the suit premises after selling out the same to Mst. Parveen Zahid Khan?
  6. Whether Masood Ali Khan has no concern with the suit premises after selling out the same to Mst. Parveen Zahid Khan?
  7. Whether Mst. Parveen Zahid Khan is entitled for specific performance as per sale agreement dated 30.07.1988?
  8. Whether the defendant No.2 is liable to pay 40% as Clause 5 of agreement executed between the parties?
  9. What should the decree be?
4. The trial Court on the basis of categorical refusal of respondent No.1 on behalf of respondent No.2 ( his wife) that they

were not prepared to purchase the suit flat on the ground that according to them the lease deed in favour of the applicant was forged document, dismissed the suit for specific performance (suit No.845/1991). Consequently the suit No.603/1991 for cancellation of sale agreement for which respondents have refused performance was decreed and suit No.662/1991 for recovery of rent on the basis of admission of respondent No.1 that he has not paid rent since July 1987 was also decreed. The appellant preferred three appeals which were consolidated and the appellate Court reversed the findings of the trial court by a consolidated judgment. The applicant has preferred these three separate Revisions.

5. I have heard the learned counsel for the applicant and the respondents and perused record very minutely.

6. Learned counsel for the applicant has contended that the conclusion drawn by the appellate court by referring to the documents was out of context and perverse since the appellate court has substituted its views on the issue decided by the trial court without commenting that the evidence examined and discussed by the trial court was not relevant or it was contrary to the record. Learned appellate court ignored the evidence on which the trial Court has relied in its judgment to conclude that the respondents were not prepared to purchase the suit property and reversed the decree of dismissal of suit for specific performance. He has also contended that while reversing the findings of trial Court in suit No.662/1991 for recovery of arrears of rent against Respondent No.1, the learned appellate Court has not offered any reasoning and ignored admission of respondent No.1 that he has not paid rent at the rate of Rs.400/- per month from July, 1987 whereas agreement of sale is dated July 1988. In rebuttal, learned counsel for the respondents has supported the appellate judgment but has not

been able to refer to any piece of evidence except the one mentioned in the impugned judgment for setting aside a well-reasoned judgment of the trial court. To a question from the court that what has been done by the respondent to complete the sale, his innocent reply after 28 years was that even today the respondents are ready to perform their part of the contract without realizing that their willingness has never been practically manifested since 1988 and in witness box his client has categorically refused to purchase the property on **21.02.2002** when he was cross-examined by the counsel for the applicant.

7. The perusal of the record and evidence shows that husband of respondent No.2/the plaintiff in suit No.845/1991 has entered in the suit property with his wife and children as a tenant which fact was even admitted by the respondents in their written statement to **suit No.603/1991**. In para No.6 of written statement the respondents admitted as follows:-

6. *“As regards para-1 of the plaint, it is submitted that prior to the Agreement to Sell dated 30.7.1988 the defendant No.1 was the tenant of the Plaintiff but thereafter the Plaintiff has handed over the possession of the said premises to the defendant No.2 being the Vendee as per Agreement to Sell dated 30.7.1988 and this fact has been admitted by the Plaintiff in a legal notice dated 29.10.1990.”*

The same Respondent No.1/Defendant No.1 appeared as witness for self and respondent No.2/ Defendant No.2 being her husband and attorney and in his cross-examination on the point of possession of the suit property he categorically admitted as follows:-

*“At the time the defendant was the owner of the suit property and I was tenant of the suit property at the rate of Rs.400/- per month the rent of the suit property. **It is correct that I had paid rent till July, 1987. It is correct that I had not paid the rent to the defendant as tenant due to the sale agreement.**”*

In his admission even the arrears of rent and rate of rent of the suit property claimed by the applicant in his suit No.662/1991 for recovery of rent was accepted by him.

8. The dishonest behaviour of the respondents/plaintiff of suit No.845/1991 and her husband is evident from the following facts on record and evidence of Respondent himself:-

- i) In the plaint the respondent claimed that the applicant has been responsible for the delay since the property documents were not supplied by the applicant for preparation of sale-deed and in written statement applicant denied and in evidence on oath he stated that original lease-deed was handed over to respondent No.1 to verify it. In his cross-examination, the respondent denied the suggestion that the original lease deed of the property was not handed over to him for verification in the following terms:-

*“It is incorrect to suggest that I had obtained the original lease deed of suit property from the defendant for verification of the taxes. It is incorrect to suggest that the original lease deed was not returned by me to the defendant.”*

The record shows that on **21.4.1991** he himself has filed an application under Section 151 CPC and placed on record 11 documents which included original indenture of lease between KDA and the applicant. The original lease is available in R&P even today.

- ii) Then applicant stated on oath that photocopy was handed over to him and even then he did not prepare the sale deed and admitted as follows:-

*“The defendant had provided me the photocopy of the duplicate of the suit property Lease-deed. After obtaining the photocopy of lease-deed I had not prepared the Sale Deed regarding the suit property. The sale deed was not prepared due to the verification and clearance of documents.-----*

*-----.*  
*It is correct that KDA had not given me in writing regard the Lease Deed of the defendant is forged, but they verbally informed me that the document is forged one. It is correct that the lease deed is a forged document on account of lease deed is forged, therefore, the sale deed is not executed.*

*-----.*  
*I am not prepared to purchase the suit property on account only the lease deed in favour of defendant. It is correct that I have not got prepared the sale deed because the lease deed in favour of defendant is forged document and NOC is not issued by the concerned department in the favour of defendant is forged that is why I am not ready to prepare the sale deed-----.”*

I am unable to appreciate that why the above piece of evidence was overlooked by the appellate court while reversing the decree of dismissal of suit No.845/1991.

- iii) The agreement of sale does not say that from the date of the sale agreement, respondent No.1 would cease to be tenant.
- iv) Respondent No.2 who is wife of respondent No.1 at the request of her husband entered into an agreement of sale on **30.7.1988** with the applicant when admittedly respondent No.1 was defaulter in payment of rent for almost 13 months from July 1987 to July 1988 and he stopped payment of future rent on the ground of agreement of sale with his wife, respondent No.2. His admissions are reproduced in para-7 above.
- v) The Respondents have not only stopped payment of rent but they had never been willing to complete the sale by payment of balance sale consideration and they are

living in the suit property since 1983 and without paying single penny towards rent since July 1987.

9. The reversal of the findings by the appellate court in all the three suits was result of misreading and non-reading of evidence reproduced above also and the documents discussed in the impugned appellate judgment were not relevant to form any opinion against the applicant on the sole point for determination formulated by the appellate Court that “Whether the appellant (the respondent herein) is responsible for the non-performance of the sale agreement dated 30.7.1987?”. The appellate Court has totally ignored the cross-examination in which the respondent has admitted that he was tenant and defaulter in payment of rent and he was not prepared to purchase the suit property. Irrespective of the evidence referred by the learned appellate court in the impugned judgment was relevant or not to fix the liability of non-performance of the contract, the appellate court judgment in the face of admission of the plaintiff/ respondents in cross examination that they were not ready to purchase the suit property was perverse and reflects adversely on legal acumen of the learned Additional Sessions Judge. The appellate court did not examine the piece of evidence reproduced by the trial court in its finding on issue No.7 i.e whether Mst. Parveen Zahid Khan is entitled for specific performance as per sale agreement dated 30.07.1988. After the evidence reproduced in the judgment by the trial court, the trial court was not supposed to insist that the specific performance should be done by an unwilling party to the contract, unfortunately the said party to the contract was the plaintiff herself.

10. The other most perverse and worst part of the impugned appellate judgment is that the learned Judge **Mrs. Shamim A. Sadduzai** while reversing the decree of dismissal of suit for specific

performance of a contract, has not directed the respondent to pay or deposit the admitted balance sale consideration with the Nazir of the court within any specified duration of time with the condition that non-deposit of balance sale consideration within time would mean dismissal of suit for specific performance of contract. Nor the learned Judge directed the Nazir of Court to execute the sale in favour of the respondent subject to deposit of sale consideration. Consequently for the last 28 years the respondents are enjoying the benefit of the perverse judgment. The appellate decree in view of perversity of the findings cannot even otherwise be executed.

11. The crux of the above discussion is that all the three Revisions are allowed with cost throughout and the impugned orders in Appeal No.64, 65 and 66 of 2002 passed by the appellate Court are set aside. In the given facts and circumstances of the case to meet the ends of justice, the judgments and decrees of the trial Court are modified as follows:-

- i) **Suit No.845/1991** filed by respondent No.2 is dismissed with directions to her to handover peaceful vacant possession of the suit property i.e Flat No.E-11, Gulberg Square, Block-6, Federal B Area, Karachi to the applicant within thirty (30) days and in case of non-compliance, once the execution is filed, the executing Court should issue writ of possession with permission to the Nazir of District Court (Central) Karachi to break open the lock, if found locked, and also obtain police aid, if resisted by anyone, to get the premises vacated for handing over to the applicant.
- ii) **Suit No.603/1991** is decreed with cost by default and the agreement of sale dated **30.07.1988** between the applicant and respondent No.2 stands cancelled.



- iii) **Suit No.662/1991** for recovery of Rs.21,600/-, in view of the admission of respondent No.1 that he has not paid rent since July, 1987 to the applicant, is decreed with 10% simple mark-up from **05.10.1991** the date of filing of the suit till the realization.

The office is directed to prepare decrees in above terms in accordance with law within seven days without fail.

**J U D G E**

Karachi,  
Dated: 14.11.2016.

Ayaz Gul