

IN THE HIGH COURT OF SINDH, KARACHI

IIND APPEAL NO. 20 OF 2011

BEFORE:**MR. JUSTICE ARSHAD HUSSAIN KHAN***Muhammad Azam and another**Vs.**Honourary General Secretary, Jamiat Dehli Punjabi Saudagran*

Appellants: Through Mr. Mukesh K. Sharma Advocate

Respondent: Through M/s. Mehmooda Suleman, and Sh. Abdul Malik, Advocates

Date of Hearing: 14.11.2016, 28.11.2016 and 05.12.2016

Date of Judgment: 23.01.2017

JUDGMENT

ARSHAD HUSSAIN KHAN, J. Through the instant second appeal Appellants/Plaintiffs challenged the concurrent findings of fact of the courts below.

2. The relevant facts leading to the present appeal as averred therein are that the appellants/plaintiffs, being the only surviving legal heirs of Mst. Shahnaz Chaman wife of appellant No.1, who expired on 06.05.2000 at Karachi, filed civil suit bearing No.521 of 2005, in the Court of learned 1st Senior Civil Judge Karachi (East) against the respondent/defendant for declaration, mutation, transfer and permanent injunction in respect of property/house bearing No.286, Sector 31-B, measuring 94 Sq. Yrds. situated at Abdul Khaliq Allahwala Town, Korangi crossing, Karachi [subject property]. It is also averred that the subject property was purchased on installments in the name of deceased Mst. Shahnaz Chaman during her life time from the income of appellant No.1 and the respondent`s society handed over the physical possession of the subject property to the deceased. Further averred that after the death of Mst. Shahnaz Chaman the appellants made several applications / representations, to the respondent society to transfer the subject property in the names of the appellants however, when no reply

received from the respondent society, the appellant, through their advocate, served legal notice to the respondent. Through the said legal notice the appellants also offered to make the payments of balance amount due towards the appellants in respect of subject property but the respondent`s society neither paid any heed to such offer nor even bothered to reply the said legal notice of the appellants. Consequently, the appellants served second legal notice on the respondent`s society and thereafter, appellants came to know that the respondent`s society was contemplating to transfer the subject property in favour of some stranger and they wanted to usurp the property of the deceased illegally and unlawfully and also to dispossess the appellants from the property. The appellants having no other option filed civil Suit No.521/2005 in the Court of learned 1st Senior Civil Judge Karachi (East) against the respondent/defendant. The respondent`s society upon notice of the said case filed its written statement wherein it was stated that the allotment of deceased has been cancelled on 13.07.2003, (after 3 years of her death) and that the suit was not maintainable and the appellants were not entitled to any of reliefs prayed in the suit. It was also stated that the respondent`s society sent several notices to deceased-Mst. Shahnaz Chaman calling upon her to pay the remaining installments of the subject property, but she had failed to pay balance sale consideration, resultantly which the allotment of the subject property in favour of the deceased was cancelled in the year 2003.

3. From the pleading of the parties, following issues were framed by the learned trial court:

- “1. Whether the suit is not maintainable?
2. Whether the suit is under valued?
3. Whether Mst. Shahnaz failed to pay installment to the defendant? If yes, what is its effect?
4. Whether the defendants are illegally transferring the suit property?
5. Whether the plaintiff is co-sharer of the suit property?
6. Whether the defendants are illegally dispossessing the plaintiff from the suit property?
7. Whether the plaintiff is entitled to any relief as prayed?
8. What should the decree be?

4. After recording of oral as well as documentary evidence adduced by the parties, learned trial court vide judgment and decree dated 19.12.2007 and 24.12.2007 respectively dismissed the suit of the appellants/plaintiffs.

5. For the sake of ready reference, relevant portions of the findings of the learned trial court on the above issues are reproduced as under:

In respect of issue No.1 and 2

“Furthermore, it is an admitted fact that the property in question was not mutated in the name of deceased Mst. Shahnaz, there was mere allotment without any lease. Plaintiffs failed to file single document for payment of the installment, they produce receipts which were paid by the deceased Mst. Shahnaz but no other receipt produced by them for payment of dues either by them or deceased in order to prove their claim.

In view of above circumstances, since the deceased Mst. Shahnaz has no title document except the possession of the suit house, therefore the plaintiffs have no legal character and status. Apart from that the plaintiffs in the suit admitted that the plaintiff No.2 is unsound mind who is not living in the suit house but the plaintiff No.1 has failed to appoint him as guardian ad litem of the plaintiff No.2. The plaintiff in his plaint Para No.1 has written that he purchased the property in question in the name of his wife and in Para No.2 he has written that the property was purchased by deceased Mst. Shahnaz from the income of plaintiff No.1 These two versions make the suit of the plaintiff defective. The plaintiff has failed to make out his prima facie case in his favour. He also failed to prove his legal character by producing the title documents therefore the suit is barred by Section 42 of the Specific Relief Act hence these issues answered accordingly in affirmative.”

Issue No. 3, 4 and 5

“Onus to prove these issues lies upon the shoulder of plaintiff therefore, he has examined himself as well as his supporting witness as PW-2. The plaintiff in his evidence admitted that the suit property was allotted to Mst. Shahnaz, she was died on 6.5.2000 and left behind the plaintiff No.1 and 2 as legal heirs. He further stated that the plaintiff paid installments in respect of property in question during her lifetime and subsequently after her death the plaintiff approached to the General Secretary of Allahwala Town Korangi for the allotment of the property in his name but he refused to issue any title document in his name or any mutation. The defendant informed him that the property in question has been cancelled due to default in payment of monthly installment therefore the plaintiffs are not entitled for any property. The plaintiff in this respect, produced sum receipts which amount paid by the deceased Mst. Shahnaz but after her death, no further installment was paid to the defendant by the plaintiff. The plaintiff produced his supporting witness, who failed to support the version of the plaintiff and stated that he do not know about the allotment and payment of the installment in respect of the property in question.

On the other hand, the defendant vehemently denied and says that the allotment has already been cancelled in the lifetime of deceased Mst. Shahnaz therefore, the plaintiff is not entitled for any mutation.

Burden to prove lies upon the plaintiff but they have failed to shift the burden from their shoulders by producing either documentary evidence or oral therefore these issues answered accordingly as under”

Issue No.6

Onus to prove this issue is also lies upon the plaintiff therefore, plaintiff recorded his statement wherein it is an admitted fact that the plaintiffs are co-sharers of the deceased Mst. Shahnaz in the suit property but admittedly the same is still not mutated in the name of deceased Mst. Shahnaz therefore the question of co-sharers in the property in question does not arise until the same is not mutated in the name of deceased. Since the deceased Mst. Shahnaz is not the owner of the property in question therefore, the plaintiffs cannot be said to have the co-sharers. So far as the question of illegal dispossession is concerned, the plaintiffs have failed to prove illegal dispossession from the defendant as the defendant if have taken any action because of the plaintiffs have no title status and legal character over the property in question. Since the defendant admitted the possession of the plaintiffs therefore, the possession of the property in question would be taken over under due process of law. Hence the question of illegal dispossession does not arise in absence of title or legal character over the property in question of the plaintiffs hence this issue answered accordingly in negative.

Issue No. 7

So far as this issue is concerned since the suit of the plaintiff is not maintainable under the law and the plaintiffs have no legal character over the property in question therefore the plaintiff is not entitled for grant of any relief as claimed in their plaint, hence this issue answered in negative.

Issue No.8

The upshot of foregoing reasons on the above issues, the suit of the plaintiff is hereby dismissed as not maintainable under the law with no order as to cost.

6. The present appellants/plaintiffs challenged the above judgment and decree in Civil Appeal bearing No.07 of 2008 before the 1ST Additional District and Sessions judge, Karachi (East), who after hearing the parties, while upholding the judgment and decree of the trial court, dismissed the Civil Appeal vide its Judgment dated 01.11.2010 and the decree prepared on 08.11.2010. Relevant portion of judgment dated 01.11.2010, for the ready reference is reproduced as under:

“It has not been denied that Mst. Shahnaz was allotted House No.286, Sector 31-B, Allahwala Town, Korangi Karachi, measuring 94 square yards, according to certain terms and condition between her and the defendant and the consequent thereof she paid certain installments and the receipts thereof has been produced by the plaintiff's side from Ex.P-1/A to P-1/D but it is contended by the

defendant side that as she failed to deposit the complete installments, therefore, her allotment was cancelled after issuing various notices. The perusal of Ex.P-1/A to P-1/D shows that these are receipts pertaining to the months of October 1994, December 1995, May 1997, August 1995, October 1995, August 1995 and April 1996. The last receipt according to the receipts produced is for the months of May 1997 while the plaintiff has deposed that he had paid last and final installment of Rs.5000/= on 08.12.1999. The receipt of period in between May, 1997 up to December 1999 have not been produced in the evidence, therefore, there is no proof that plaintiff or the deceased Mst. Shahnaz had paid the installments from May, 1997 to December, 1999. The plaintiff has also deposed that his wife Mst. Shahaz, the allottee of the plot had died on 06.05.2000, meaning thereby if the last installment was paid in the month of December, 1999, she would have been alive and completed the installments but in absence of any proof regarding the proof of installments it cannot be believed that either the plaintiff or his deceased wife had completed the installments.

Conversely the defendant side has produced the application by the deceased for the allotment at Ex.D-1/B, surety bound at Ex.D-1/C, the terms and conditions at Ex.D-1/D, the promissory note at Ex.D-1/E, notices issued by the defendants regarding none deposit of the installments dated 17.01.1996, 05.08.1996, reminder dated 05.09.1996, 05.09.1997, 29.10.1997, 14.12.1998, 02.01.1998, reminder dated 16.02.1998, 16.07.1999, 07.10.1999, 17.11.1999, 19.07.2001 and 07.11.2001 from Ex.D-1/F-1 to Ex.D-1/F-12. Thus finally, the defendant has cancelled the allotment of Mst. Shahnaz Chaman on 13.07.2003. In these facts and circumstances, I am of the view that plaintiff has failed to establish that they have completed all the installments regarding the allotment of the plot and there was nothing outstanding against them and the defendant was under obligations to transfer the plot in favour of the legal heirs of Mst. Shahnaz Chaman.

The defendant side has clearly establish that no doubt the plot in question is allotted but the installments were not paid from the month of May, 1997 and onwards up to 13.09.2003, when finally the allotment was cancelled and have also produced certain notices given to the deceased for the payment of the installments defaulted by her and also intimating that in case of non-compliance, the allotment shall stand cancelled in accordance with the terms and conditions agreed between them. The terms and conditions have been produced by the defendant side at Ex.D-1/D, show that total amount of the plot was Rs.1,52,000/= out of which Rs.62,000/- were received in advance, Rs.90,000/= were outstanding, which were to be paid in 72 equal installments of 1250/= per month. The allotment of deceased Shahnaz Chaman was cancelled due to their own negligence for which, the defendant cannot be blamed.”

[Underlining is to add emphasis]

The appellants challenged the said judgment and decree of lower appellate court in the present Second Appeal.

7. Upon notice of the present appeal the respondent filed reply/comments wherein while supporting the Judgments impugned herein, it is stated that the learned trial Court as well as appellate Court

have rightly dismissed the suit and the appeal of the appellants/plaintiffs, and present second appeal has been filed by the appellants only to defeat the ends of justice and to achieve their ulterior motives. It is also averred that the respondent had allotted the subject property to Mst. Shahnaz Chaman (wife of appellant No.1) on her request in the month of August, 1995 for a total sale consideration of Rs.1,52,000/- to be paid in installments of Rs.1250/- per month but she failed to deposit the due installments in spite of repeated requests/demands. Consequently, allotment of subject property was cancelled vide Cancellation No.286/31-B/AKAWT dated 13.07.2003 and after about one year and nine months of cancellation, the appellants filed the above referred Civil Suit. It is also stated that during the pendency of Appeal No.07/2008, the appellant No.1 sold out the subject property to one Muhammad Taqi Nawab son of Muhammad Naqi vide agreement of sale dated 12.03.2009, hence the appellants have no concerned any more with the subject property. Furthermore, the present appeal is not maintainable as appellants have approached this court with unclean hands by suppressing material facts from this court and as such the same is liable to be dismissed.

8. Learned counsel for the appellants during the course of his arguments, while reiterating the contents of memo of appeal, has urged that learned lower Courts below while passing the impugned judgments and decree have failed to consider the facts and circumstances mentioned in the plaint and evidence available on record. Further urged that the learned lower Courts have also failed to appreciate that the alleged cancellation of allotment of deceased Mst. Shahnaz Chaman vis-à-vis subject property was done in the year 2003 after three year of the death of the deceased who died in the year 2000. Further urged that it was the responsibility of respondent`s society, after coming to know the death of deceased- Mst. Shahnaz Chaman, to issue notices to the legal heirs (appellants) of deceased for payment of balance installments, which the respondent`s society seriously failed. It is also urged that the learned courts below have also failed to appreciate the facts that the notices and letters issued by them demanding the payment of the installments were never issued to the deceased Mst. Shahnaz Chaman during her life time nor after her death to the appellants.

Further urged that the learned courts below have also erred in holding that since the allotment of the subject property had already been cancelled, therefore, the suit was not maintainable. It is also urged that the learned courts below have failed to appreciate that the respondent's society did not submit any acknowledgment of having received their alleged notices either by Mst. Shahnaz Chaman during her life time and / or to the appellants after the death of the deceased.

9. Conversely, learned counsel for the respondent/defendant has vehemently controverted the stance of the appellants in the present appeal. Learned counsel while rebutting the above said arguments has argued that the facts of the appeal have been discussed and evaluated by the learned trial Court and after framing issues, dilating on each issue on the basis of the documentary evidences available on record, had dismissed the suit in favour of respondent/defendant. Further argued that one Abdul Khaliq Allahwala, a well-known business entrepreneur and philanthropist, launched a housing scheme viz. Abdul Khaliq Allahwala Town, in Korangi Township, for the deserving members of the community of Punjabi Saudagran wherein on very nominal price a residential house was being offered to a needy and deserving people on certain terms and conditions. Upon the application of deceased Mst. Shehnaz Chaman a house (subject property) was allotted to deceased Shahanaz Chaman. The said deceased in her application form for acquiring the subject property had given the names of her children namely Muhammad Azhar and Tauseef as her legal heirs. The names of present appellants were not at all mentioned in the said form. It is also argued that at the time of allotment, the deceased also accepted the prescribed terms and conditions of allotment of the subject property, which, inter alia, clearly, states that in the event the applicant fails to pay three consecutive installments, the allotment in favour of the applicant shall be cancelled and in that event the applicant will not be entitled to challenge the said cancellation in any forum and / or court of law. It is also argued that the deceased miserably failed to pay the due installments and consequently the allotment of the subject property in favour of the deceased Mst. Shahnaz Chaman was cancelled. Lastly, argued that present appeal, being frivolous and misconceived is liable to be dismissed with cost.

10. I have heard the arguments advanced by learned counsel for the appellants as well as the respondent and have also perused the record available on file with their assistance.

11. This Second Appeal has been filed under Section 100, CPC. It would be imperative to refer to Sections 100 and 101, C.P.C. and for the sake of ready reference same are reproduced as under:-

"100. Second Appeal.--Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by a Court subordinate to a High Court on any of the following grounds, namely:-

- (a) the decision being contrary to law or usage having the force of law;
- (b) the decision having failed to determine some material issue of law or usage having the force of law;
- (c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

101. Second appeal on no other grounds.---No second appeal shall lie except on the ground mentioned in section 100."

12. It is ex-facie clear from the bare reading of sections 100 and 101, C.P.C. that a Regular Second Appeal is maintainable only on a question of law. The grounds raised in the instant appeal were raised before the learned trial court as well as before the learned first appellate court who after framing proper issues and recording of oral as well as documentary evidence gave exhaustive judgments. Both the learned courts below have unanimously held that the Appellants could not prove his case, however, the respondent/defendant has successfully proved the stance in the case in respect of subject property.

13. The contentions raised by learned counsel for the appellants/plaintiffs have been repelled by the counsel for respondent/defendant in his rebuttal. Record of the present case shows that prescribed terms and condition for acquiring the subject property was accepted by the deceased, which clearly states that the total cost of the subject property was Rs.152,000/- out of which Rs.62,000/- was

paid by the deceased to the respondent as advance whereas the remaining amount Rs.90,000/- towards the cost of the subject property was to be paid in 72 equal installments at the rate of Rs.1250/- per month. The deceased pursuant to the said terms had also undertaken to deposit the monthly installments at the office of the respondent. The record also does not show that the appellants have made any payments towards the cost of the subject property after 1997. There is also nothing available on record, which could reflect that the appellants prior to cancellation of the subject property have ever approached to the respondent society for payments of remaining cost of the subject property. Furthermore, at the time of argument of the present case, upon the request of counsel for appellants as well as appellant No.1, who was also present in person, this court had provided opportunity to the appellants to place on record any other documents, except those documents that had already been produced in the evidence before the trial court, which could reflect payments have been made by the appellants towards cost of the subject property after 1997 but the appellants have failed to place on record any document. The appellants have also failed to controvert the fact that name of the appellants were not mentioned by the deceased as her legal heirs in the Form for acquiring the subject property. In the circumstances, the appellants have failed to substantiate the stance in the present appeal and it is found that the learned courts below passed the impugned judgments and decree upon proper evaluation of the evidence available on record. There are concurrent findings of fact- against the appellant/plaintiff.

14. It is well settled law that concurrent findings of facts by the Courts below cannot be disturbed by the High Court in second appeal, unless the Courts below while recording the findings of fact have either misread the evidence or have ignored the material piece of evidence on record from the findings recorded by the two Courts below is perverse. Reference in this regard may be made to the cases of Keramat Ali and another v. Muhammad Yunus Haji and another (PLD 1963 SC 191), Phatana v. Mst. Wasai and another (PLD 1965 SC 134) and Haji Muhammad Din v. Malik Muhammad Abdullah (PLD 1994 SC 291).

15. It is also well established now that this Court while exercising

jurisdiction under section 100, C.P.C. how so erroneous that finding may be, unless such findings have been arrived at by the Courts below either by misreading of evidence on record or by ignoring a material piece of evidence on record or through perverse appreciation of evidence. It is quite obvious that the decision of the courts below is not contrary to law. Learned counsel for appellants could not point out that the courts below while passing impugned judgments have omitted to decide some material issue of law. The question of materiality that is, whether or not an issue is of a material nature, will depend upon whether the ultimate decision of the court of first appeal would have been different, if the omitted issue had been determined by it. Thus, in order to succeed in second appeal on ground (b) of subsection (1) of section 100, C.P.C., an appellant would have to show that the court of first appeal would have reached a different conclusion, had it not failed to decide the issue of law or usage specified in ground (b) above. With regard to ground (c) of subsection (i) of section 100, C.P.C., this provision requires an appellant to show firstly that there has been a substantial error or defect in procedure and secondly that such substantial error could have resulted in an erroneous or defective decision of the case. Learned counsel for the appellant could not point out any substantial error and or any illegality, infirmity or jurisdictional error in the impugned judgments and decrees before this court. In the circumstances, it is found that the instant appeal does not fall within any of the exceptions provided under section 100, C.P.C. Furthermore, the judgments impugned herein are well reasoned and based on the evidence on record, therefore, in my view, the same do not call for any interference by this Court. Hence, the instant Second Appeal being devoid of any force is dismissed.

JUDGE