

JUDGMENT SHEET
HIGH COURT OF SINDH, KARACHI

IInd Appeal No. 71 of 2015

APPELLANT : Through Mr. Adnan Ahmed Advocate
RESPONDENTS : Nemo
DATES OF HEARING : 11.11.2016 and 16.11.2016
DATE OF JUDGMENT : 22.11.2016

JUDGMENT

Muhammad Humayon Khan, J: This second appeal under Section 100CPC is filed against the Judgment dated 15.10.2015 and Decree dated 20.10.2015 passed by the learned IXh Additional District Judge, Karachi-East, in Civil Appeal No.126 of 2013, whereby, the learned Additional District Judge allowed the appeal of the respondent No.1 and set-aside the Judgment and Decree dated 30.03.2013 passed by the learned IXth Senior Civil Judge, Karachi- East, in Suit No. 1004 of 2007.

2. The relevant and material facts of the case for the disposal of this appeal are that the appellant filed suit under Section 8 of the Specific Relief Act for Damages/Compensation, Mense Profit and Permanent Injunction against the respondents in August 2007. The case pleaded in the plaint is that the appellant is the lawful owner of the constructed house bearing Plot No. 32, Sheet No. 29/30, admeasuring 80 square yards, situated at Pak Saddat Colony, Shah Faisal Colony, Karachi (hereinafter referred to as “the suit property”) by virtue of registered sale deed dated 11.03.1997, which was purchased by the appellant from the respondent No.2. It is further pleaded that the suit property was originally allotted to the respondent No.2 in the

year 1986 by the Deputy Commissioner and agreement, deed of ejazatnama and notification were issued in favour of the respondent No.2. It is further pleaded that after getting physical possession from the respondent No.2, the appellant got installation of electricity, Sui gas and water connection and started to pay the bills to the concerned departments every month till April 2007. It is further pleaded that the respondent No.1 is a member of the respondent No.3, who filed Arbitration Case No. 88/2002 before Deputy Registrar, Co-operative Society, against the Society/respondent No.3 and prayed for execution of lease deed in respect of Plot No. 36-F, situated at Saddat Cooperative Housing Society, Shah Faisal Colony, Karachi, which case was decided in favour of the respondent No.1. It is further pleaded that the respondent No.3 preferred Appeal No.29/2002 before District Officer Cooperative Housing Society, who upheld the award in favour of the respondent No.1, against which, the respondent No.3 filed Appeal No. 1434/2003 before Minister of Cooperative Society, which is sub-judice. It is further pleaded that in November 2006 when the bailiff of Civil Court alongwith the respondent No.1 came to take possession of the suit property in Execution No. 12/2003, the appellant filed application under Section 12 (2) CPC in the said execution, which was dismissed by Order dated 09.02.2007. It is further pleaded that the appellant has also filed application under Section 12 (2) CPC before Minister of Karachi Co-operative Society in Appeal No. 1434/2003 on 24.07.2007. It is further pleaded that on 25.07.2007, the respondent No.1 alongwith bailiff and police came at the suit property and took over physical possession though it was pointed out by the wife/attorney of the appellant that the suit property is not the subject matter of the said execution and therefore the appellant filed the instant suit, wherein, the appellant claimed the following reliefs:-

- a. To direct the defendant No.1 to handover physical and peaceful possession of the constructed House bearing Plot No.32 Sheet No.29/30, measuring 80 Square Yards situated at Pak Saddat Colony, Shah Faisal Colony, Karachi to the Plaintiff.
- b. To award damages/compensation of Rs.10 Lacs in favour of the plaintiff and against the defendant No.1 and further direct the defendant No.1 to pay Rs. 10 Lacs to the Plaintiff.
- c. To direct the defendant No.1 to pay mense profit at the rate of Rs. 5,000/- per month from 25/07/2007 till restoration of the possession of the suit property to the plaintiff.
- d. To grant permanent injunction by restraining the defendant No.1, his servants, agents, representative/s or any other on behalf of the defendant No.1 from selling, transferring, gifting and creating any third party interest to the suit property i.e. constructed House bearing Plot No.32, Sheet No.29/30, measuring 80 Square Yards situated at Pak Saddat Colony, Shah Faisal Colony, Karachi.
- e. Cost of the Suit.

AND

- f. Awarding other relief as or deemed fit and proper in the interest of justice and which may be prayed for hereafter.

3. The respondent No.1 filed his written statement, wherein, the respondent No.1 raised legal objections regarding jurisdiction of Court and maintainability of suit. The respondent No.1 pleaded that in fact the appellant was in possession of Plot No. F-36, Sadaat Cooperative Housing Society Limited, Karachi, which is the exclusive property of the respondent No.1. It is further pleaded that the appellant has fabricated and manipulated the sale deed and all other documents with malafide intention and ulterior motives. It is further pleaded that the possession was legally taken from the appellant in execution application through writ of possession. It is further pleaded that the appellant handed over possession of Plot No. F-36, Sadaat Cooperative

Housing Society Limited, Karachi, to the respondent No.1 without any agitation, which is at present in the possession of the respondent No.1. It is further pleaded that the plot No. shown as suit property by the appellant is fictitious and fake just to make the matter disputed for his ulterior motive. In the end, the respondent No.1 prayed for the dismissal of the instant suit.

4. The respondent No.2 filed his written statement, wherein, the respondent No.2 raised legal objection regarding maintainability of suit. The respondent No.2 admitted that the suit property was originally allotted to him and he subsequently sold the same to the appellant, who is presently the real and lawful owner of the suit property. However, the respondent No.2 pleaded that the respondents Nos.1 and 3 are in collusion and manipulated fake and frivolous record of the suit property. In the end, the respondent No.2 prayed that the instant suit may be decreed in favour of the appellant.

5. The respondent No.3 was duly served but failed to file written statement.

6. The learned Senior Civil Judge framed the following issues:-

- i) Whether suit of that plaintiff is not maintainable?
- ii) Whether the Plot No.32, Pak Sadaat Colony, Shah Faisal Colony, Karachi and Plot No.36-F, of Saadat Co-operative Society Limited Shah Faisal Colony are the same or different property?
- iii) Whether the suit plot is property of Saadat Co-operative Society?
- iv) Whether the defendant No.1 has obtained illegal possession to the suit property through Court bailiff on wrong pointation showing himself is the owner of the suit property?

- v) Whether the instant suit after ABN award No.88/02 and appeal thereon and execution and dismissal of application under Section 12 (2) CPC is maintainable when no appeal against dismissal order has been filed by the plaintiff?
- vi) Whether the plaintiff is entitled for damages of Rs.10,00,000/- from the defendant No.1?
- vii) Whether the plaintiff is entitled for payment of mense profit at the rate of Rs.5000/- P.M. from 25 July 2007 till restoration of the possession.
- viii) What should the Judgment and Decree be?

7. During the pendency of the instant suit, the appellant died and his legal heirs were brought on record.

8. At the stage of evidence, four witnesses were examined by the appellant's side and documentary evidence was also produced. On the other hand, the respondent No.1 examined his attorney and produced documentary evidence. Whereas, the respondent No.2 examined himself only. However, the respondent No.3 did not examine any witness.

9. The learned Senior Civil Judge by his Judgment dated 30.03.2013 decreed the instant suit as prayed in favour of the appellant.

10. Against the aforesaid Judgment, the respondent No.1 filed Civil Appeal No. 126 of 2013, which was allowed by the learned Additional District Judge vide Judgment dated 15.10.2015. Consequently, the instant suit of the appellant was dismissed.

11. Against the aforesaid Judgment dated 15.10.2015, the appellant has filed this second appeal under Section 100 CPC.

12. I have heard the learned counsel for the appellant and perused the material available on the record.

13. The learned counsel for the appellant contended that the learned Additional District Judge has misinterpreted the provisions of Section 47 and Order 21 Rule 103 CPC while allowing the appeal of the respondent No.1 and dismissing the instant suit of the appellant. He further submitted that the learned Additional District Judge has not given findings on other issues which were decided by the learned Senior Civil Judge in favour of the appellant. He next contended that the instant suit is maintainable under Section 8 of the Specific Relief Act. In support of his arguments, the learned counsel for the appellant relied upon the following case-laws:-

- i) Dada Jinappa Vagiani Vs. Yesu and others (AIR 1923 Bombay 450);
- ii) T.H. Ismail Hussain Vs. T.S. Haji Moosa & Co. and others (AIR 1930 Madras 538);
- iii) Bholanath Bondopadhyay Vs. Banarsilal Saraf and others (AIR 1961 Assam 79);
- iv) Mohiuddin Molla Vs. The Province of East Pakistan and others (PLD 1962 Supreme Court 119);
- v) Amiabai Vs. Ibrahim and 4 others (PLD 1992 Karachi 270);
- vi) Allah Ditta Vs. Muhammad Umar etc. (PLJ 2010 Lahore 266);
- vii) Mst. Niaz Bibi through L.Rs. Vs. Ghulam Mustafa and others (PLD 2011 Supreme Court 520);
- viii) Sakhi Muhammad through Legal Representative and others Vs. Ashraf Ali and 3 others (PLJ 2012 Lahore 652).

14. I have carefully gone through the above-noted case-laws referred to by the learned counsel for the appellant and came to the conclusion that none of them is applicable to the facts and circumstances of this case.

15. The cases of Dada Jinappa Vagiani Vs. Yesu and others (AIR 1923 Bombay 450), T.H. Ismail Hussain Vs. T.S. Haji Moosa & Co. and others (AIR 1930 Madras 538), Allah Ditta Vs. Muhammad Umar etc. (PLJ 2010 Lahore 266), Mst. Niaz Bibi through L.Rs. Vs. Ghulam Mustafa and others (PLD 2011 Supreme Court 520) and Sakhi Muhammad through Legal Representative and others Vs. Ashraf Ali and 3 others (PLJ 2012 Lahore 652) relate to Section 47 CPC only on different footing and in none of the said case, the provisions of Order 21 Rules 99, 100, 101 and 103 CPC were involved. Accordingly, all these reported cases are not applicable to the facts and circumstances of the instant case.

16. The cases of Bholanath Bondopadhyay Vs. Banarsilal Saraf and others (AIR 1961 Assam 79) and Mohiuddin Molla Vs. The Province of East Pakistan and others (PLD 1962 Supreme Court 119) relate to Order 21 Rules 100 and 103 CPC, which are not applicable for the simple reason that at that time, Rule 103 of Order 21 was entirely different, which reads as follows:-

“Any party not being a judgment-debtor against whom an order is made under rule 98, rule 99 or rule 101 **may institute a suit to establish the right which he claims to the present possession of the property**; but, subject to the result of such suit (if any), the order shall be conclusive”

This Rule 103 was substituted by Law Reforms Ordinance, 1972 and the new Rule 103 reads as under:-

“All questions arising as to title, right or interest in, or possession of, immoveable property between an applicant under rule 97 and the opposite-party, or between an applicant under rule 100 and the opposite party, shall be adjudicated upon and determined by the Court, and no separate suit shall lie for the determination of any such matter.”

In view of the above referred old Rule 103 and new Rule 103, it is clear that under the old Rule 103, a separate suit was maintainable but under the new Rule 103, separate suit is not maintainable but the only remedy for the appellant was to move an application under Order 21 Rule 100 CPC, which was not moved by the appellant in the execution application.

17. The case of *Amiabai Vs. Ibrahim and 4 others* (PLD 1992 Karachi 270) is on entirely different facts and circumstances and therefore not applicable to the instant case.

18. In view of the above discussion, I came to the conclusion that the instant suit was barred under Order 21 Rule 103 CPC and it was rightly dismissed by the learned Additional District Judge.

19. Apart from this, even the instant suit was not maintainable under Sections 8 and 9 of the Specific Relief Act. Section 8 of the Specific Relief Act provides that:-

“A person entitled to the possession of specific immoveable property may recover it in the manner prescribed by the Code of Civil Procedure.”

According to Section 8 of the Specific Relief Act, the appellant was required to recover the possession in the manner provided under Order 21 Rule 100

CPC and not in any other manner. Hence, the instant suit, in view of this provision of law, was also not maintainable.

20. Section 9 of the Specific Relief Act provides that:

“If any person is dispossessed without his consent of immovable property **otherwise than in due course of law**, he or any person claiming through him may, by suit recover possession thereof, notwithstanding any other title that may be set up in such suit.”

In view of the above referred provisions of law, admittedly, the appellant was not dispossessed without due course of law but dispossessed in execution proceedings. Accordingly, the instant suit was not maintainable even under Section 9 of the Specific Relief Act.

21. The learned counsel for the appellant has not been able to satisfy me that the instant suit is maintainable under any provision of law.

22. In view of the above discussion, this second appeal alongwith listed application is dismissed in limine.

J U D G E