

IN THE HIGH COURT OF SINDH AT KARACHI

IInd Appeal No.21 of 2011

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

Before: Mr. Justice Nazar Akbar

Appellant : Mst. Kishwar Begum, since deceased,
through LRs.
(a) Sharif Ahmed
(b) Mnuir Ahmed
(c) Samina
(d) Shabana
(e) Farhana
Through Mr. Aamir Malik, advocate.

Respondent No.1 : Rasheed Ahmed Qureshi.
Through Mr. Zafar Alam Khan, advocate.

Respondent No.2 : Anwar Abdul Karim.

Respondent No.3 : Abdul Qadir Hakim.

Date of hearing : **25.10.2018**

Date of Judgment : **14.12.2018**

JUDGEMENT

NAZAR AKBAR, J. The appellant through this IInd Appeal has challenged the appellate judgment and decree dated **08.2.2011** and **11.2.2011** passed by Vth Additional District Judge, South Karachi in Civil Appeal No.242/2010 whereby suit No.137/2000 filed by Respondent No.1 was decreed and the judgment and decree dated **31.05.2010** passed by IVth Senior Civil Judge South Karachi dismissing the suit was set aside/reversed.

2. Briefly stated the facts of the case are that Respondent No.1 filed suit for Specific Performance of Contract and Permanent Injunction against Respondent No.2 stating therein that he has entered into a sale contract on **17.3.1999** in respect of building

constructed on Plot No.RS-2/96, situated at Ramswami Quarters, Karachi (subject property) for a total sale consideration of Rs.4,00,000/-. He has paid an amount of Rs.40,000/- to Respondent No.2 as earnest money duly acknowledged by him through a separate receipt and remaining balance sale consideration amounting to Rs.3,60,000/- was payable by him on or before **15.7.1999** to Respondent No.2 directly or through Respondent No.3. Respondent No.2 apart from executing such payment receipt, also executed an authority letter/power of attorney in favour of Respondent No.1 authorizing him to receive rent from the tenants of subject property and he started receiving rent from the tenants of the subject property in the capacity of owner and he had also changed the name of building from "Hawa Bai Building" to "Mukka Manzil". It was also averred that at the time of sale contract, Respondent No.2 informed Respondent No.1 that the subject property stands in the name of his deceased parental grandmother and due to his engagement in business abroad, he could not get the same transferred in his name and he promised that the same will be transferred within the stipulated period i.e **17.5.1999** by executing all necessary transfer documents. Subsequently despite repeated approach by Respondent No.1 through Respondent No.3 to Respondent No.2 to execute transfer documents in his favour after receiving balance sale consideration, Respondent No.2 has not done it on one or the other pretext. Therefore, Respondent No.1 through a public notice informed general public about such sale contract by publishing it in daily newspapers dated **20.5.1999**. Respondent No.1 also served a legal notice dated **31.12.1999** upon Respondent No.2 before filing civil suit for specific performance of contract which was registered as suit No.127/2000.

3. The suit was initially filed against Respondents No.2 and 3, who failed to file their written statement, therefore, suit was decreed *ex parte* by judgment and decree dated **03.5.2000**. Respondent No.1 filed execution application for satisfaction of the said decree and during the execution proceedings, the appellant challenged the judgment and decree under **section 12(2) CPC** and by order dated **12.2.2002** the trial Court set aside the judgment. Respondent No.1 preferred a Civil Revision No.50/2002 against the order dated 12.2.2002 which was dismissed by VII-Additional Sessions Judge on **04.9.2003**. Therefore, the appellant was impleaded as **Defendant No.3** in suit No.137/2000 and on **15.2.2002** she filed her written statement and also filed an application under **Order VII Rule 11 CPC**. The learned trial Court on the said application rejected the plaint of the suit by order dated **14.11.2005**. Respondent No.1 challenged the said rejection of plaint by filing **civil appeal No.146/2005** and the learned I-Additional District Judge, South Karachi by judgment dated **20.5.2008** set aside the order of rejection of plaint and the suit was “*remanded to learned trial Court with directions to **reframe the issues and inter alia an issue with regard to execution of oral gift deed or otherwise***”.

4. On trial of Suit, after the setting aside of order of rejection of plaint, the trial Court on **02.8.2008** framed the following issues:-

1. *Whether the suit as framed is maintainable under the law?*
2. *Whether Mst. Hawa Bai gifted the suit property to her grand son namely Anwar Abdul Karim, the defendant No.1 due to her love and affection?*
3. *Whether the defendant No.1 orally sold out the ‘suit property’ to the plaintiff for consideration of Rs.4,00,000/- and received*

Rs.40,000/- as earnest money and had executed such receipt in presence of witnesses?

4. *Whether the defendant No.3 has any interest, right or title in the said property?*
5. *Whether the plaintiff is entitled to the relief as prayer for?*
6. *That should the decree be?*

5. Plaintiff **Rasheed Ahmed Qureshi** examined himself as PW-1 at Ex:P/1 and has produced original statement-cum-affidavit executed by defendant No.1 (Respondent No.2) as Ex:P/2, **original** receipt of Embassy as Ex:P/3, **original** Declaration of oral gift deed dated **30.5.1972** executed by Mst. Hawa Bai in favour of defendant No.1 as Ex:P/4, **certified** true copies of case diaries of Sessions Case No.1168/1997, FIR **No.60/1997**, P.S Risala U/S 324 PPC as Ex:P/5, **original** counter foil of receipt dated 29.4.1999 of rent paid by appellant as Ex:P/6, sale receipt dated 17.3.1999 of Rs.40,000/- as Ex:P/7, copy of letter dated 25.11.2000 issued by Assistant Commissioner Karachi as Ex:P/8, copy of pay order dated 12.11.2000 of **Rs.97,012/-** as Ex:P/9, copy of paid voucher of property tax for the year 1998-1999 as Ex:P/10, passport of the plaintiff as Ex:P/11. In support of his case, plaintiff has also examined one Muhammad Ibrahim as PW-2 at Ex-P/12 and his counsel closed the side of plaintiff's evidence vide is statement at Ex-P/13. By that time the evidence was recorded for the first time in the suit, defendant No.3/appellant has died and, therefore, **Sharif Ahmed**, one of the legal heir of deceased defendant No.3 has examined himself as DW-1 at Ex:P/14. He produced sale agreement dated 11.7.1998, sale receipt of Rs.1,00,000/- dated 11.7.1998 as Ex:P/15 to P/17 and power of attorney dated 16.7.1998 purported to have been executed by Mst. Rabia Bai and her two other sisters, the alleged daughters of Mst.

Hawa Bai in favour of deceased defendant Mst. Kishwar and his son Sharif Ahmed in respect of the sale of subject property. Since these documents Ex:15 to Ex:17 were produced by the witness without the prior permission and leave of the Court, therefore, the learned advocate for the plaintiff/Respondent No.1 had seriously objected its production and such objection was duly recorded and the Court ordered that said legal objection would be decided at final stage of this case. The learned advocate for appellant after examining DW-1, Sharif Ahmed closed his side vide statement at Ex:18.

6. The trial Court on the basis of evidence, after hearing learned counsel decreed the suit of the plaintiff/Respondent No.1 by judgment dated **29.5.2009**. The present appellant/defendant No.3 preferred **appeal No.133/209** against the said judgment and decree and the learned appellate Court again by judgment dated **10.11.2009** proposed two additional issues and remanded the matter to trial Court to decide the matter afresh after adducing evidence on the proposed issues. Therefore, the trial Court on remand by order dated **10.11.2009** again re-framed the issues as under:-

1. *Whether the suit as framed is maintainable under the law?*
2. *Whether Mst. Hawa Bai gifted the suit property to her grand son namely Anwar Abdul Karim, the defendant No.1 due to her love and affection?*
3. *Whether the defendant No.1 orally sold out the 'suit property' to the plaintiff for consideration of Rs.4,00,000/- and received Rs.40,000/- as earnest money and had executed such receipt in presence of witnesses?*
4. *Whether the plaintiff is entitled to the Specific performance of the contract as per prayer clause of the pleadings?*

5. *Whether the gift deed dated 30.05.1972 is valid document and enforceable in law in present shape?*

6. *That should the decree be?*

7. On second time remand only Respondent No.1/plaintiff adduced evidence as **Ex:23** and reiterated his earlier evidence through fresh Affidavit-in-evidence. He was again cross-examined by counsel for the appellant/defendant No.3 and the appellant instead of filing fresh evidence as directed by appellate Court to **adduce evidence of the parties** in second remand order dated **10.11.2009**. Not only this, the appellant whose evidence in the suit was already on record made statement that defendant No.3 adopted the evidence recorded in application under **Section 12(2) CPC** as if there was no evidence in suit from the appellant.

8. This time the trial Court on the same evidence without looking into the claim of appellant and/or her evidence reversed its earlier findings and dismissed the suit of Respondent No.1/plaintiff by judgment and decree dated **31.5.2010**. Respondent No.1 filed Civil **Appeal No.242/2010** before the V-Additional District and Sessions Judge, South Karachi which was allowed by judgment and decree dated **08.2.2011** and **11.2.2011** and the suit of Respondent No.1 was again decreed as prayed. The last judgment and decree of appellate Court is impugned herein this IInd Appeal.

9. I have heard learned counsel for the appellant and Respondent No.1 and perused the record.

10. In the light of arguments of learned counsel for the appellant, I have noticed from the record that the appellant had filed application under **Section 12(2) CPC** to set aside the initial exparte judgment in

suit No.137/2000 by claiming that she is owner of the subject property on the basis of an agreement of sale dated **11.7.1998** with Mst. Hajra Bai and Rabia Bai, legal heirs of Hawa Bai coupled with a power of attorney executed by them in favour of **Sharif Ahmed**, her son to manage and receive the rent of the entire property. She has also claimed that the said legal heirs have received the entire sale consideration and her son has also approached the relevant authorities for transfer of the property first in the name of said Hajra Bibi and Rabia Bibi and then in her own name. Appellant's application under **Section 12(2) CPC** was allowed and she was impleaded as defendant No.3 in suit No.137/2000. She filed her written statement which is available at page-225 annexure "M". The perusal of her written statement shows that after setting aside of judgment she has given up her claim on the subject property on the basis of sale agreement and power of attorney in favour of her son. She did not even mention in the written statement that Mst. Hawa Bai was survived by three daughters and that she has purchased it. Nor she made a counter prayer for declaration of ownership of the suit property on the ground that she has already paid the entire sale consideration and her son Sharif Ahmed is lawful attorney of the legal heirs of (late) Hawa Bai. Record further shows that till date, the appellant has not filed any independent proceedings for seeking declaration of ownership of the suit property even against the heirs or whoever from whom she in her application under **Section 12(2) CPC** has claimed to have entered into an agreement to sell the subject property.

11. Learned counsel for the appellant has attempted to refer to the evidence recorded during the proceedings under **Section 12(2) CPC** which obviously is of no consequence since proceedings under

Section 12(2) CPC are independent wherein substantial claims of the parties are not decided. That is why only the judgment and decree were set aside and the suit was not dismissed. The first burden of proof was on the appellant to show her entitlement to the subject property. Learned counsel for the appellant has avoided to read evidence of the appellant recorded at the trial in suit No.137/2000 through **Sharif Ahmed** as one of the legal heirs of deceased appellant who was also said to be attorney of the seller for enjoying the subject property on the basis of sale agreement dated **11.7.1998**. No other witness was examined by the appellant in suit in support of her claim. Learned counsel for the appellant has repeated all his contentions which he has advanced before the appellate Court as well as in his written arguments before the trial Court which are also available at page-379 annexure "Y". Learned counsel for the appellant has no answer to the reasoning advanced by the learned appellate Court particularly on issue No.5 that the gift deed dated **30.5.1972** was not hit by the provisions of **Section 123** of the Transfer of Property Act, 1882 and Registration Act, 1908 because as held by the appellate Court on the basis of several case-laws that these provisions are not applicable on Mohammadan gifts in terms of **Section 149** of **Muhammadan Law**. The appellate court has reproduced **Section 149** of Mohammadan Law in its findings on the validity of Gift in favour of Respondent No.2. The original gift deed of 1972 has been produced and it is even available on the Court file as I have myself seen it in the R&Ps. The Respondent has also produced other original material documents which include his traveling documents from Karachi to South Africa to obtain original gift deed from the grandson of the owner Hawa Bai/Respondent No.2

as an original title document. Therefore, I could not find any force in the contentions of learned counsel for the appellant.

12. However, before concluding, I must mention a few glaring irregularities in the second remand order dated **10.11.2009** in **Civil Appeal No.133/2009** whereby a well-reasoned judgment and decree dated **29.5.2009** and **30.5.2009** respectively was set aside and following the spirit of said wrong order the trial Court by order dated **31.10.2010** dismissed the suit, which was later set aside in Civil Appeal **No.242/210** by the appellate Court and impugned in the instant second appeal. In fact for invoking the provision of **Section 12(2) CPC** the applicant (appellant herein) was required to fall within the category of a person/plaintiff who in terms of **Sub-Section (1)** of **Section 12 CPC** was precluded from instituting (further) a suit in respect of **“any particular cause of action”**. The appellant was not precluded from filing his own separate suit on the basis of documents which he showed to trial Court to set aside the initial judgment and decree. And, if at all, **“no separate suit”** in terms of **Sub-section (2)** of **Section 12, CPC** was possible, then once the judgment and decree was set-aside and he was impleaded in the suit, he was placed at par with the plaintiff because for setting aside a decree the Court was prima-facie agreed to his contention that he, too, had similar **“cause of action”** and he is also entitled for a decree in respect of subject property in his favour on the same or similar “cause of action” against the same defendant. Therefore, the first burden was on the appellant who has obtained an order of setting aside a decree under **Section 12(2) CPC** to establish that he had a better title/right than that of the plaintiff in respect of the subject matter for which a **“particular cause of action”** has arose to the plaintiff, who had obtained an exparte decree or otherwise a decree which he (the

appellant) got set aside to protect his/her own right or interest in the subject matter. In view of this legal and factual position the trial Court, amongst others, has framed issue No.4 for the appellant/defendant No.3 to prove her right and interest in the subject property on the basis of which an earlier decree was set aside to give her a fair chance to establish her case before the Court. Issue No.4 was:-

“Whether the Defendant No.3 (appellant herein) has any interest, right and title in the suit property?”.

13. The suit was again decreed on **29.5.2009** in favour of respondent No.1/plaintiff as the appellant/defendant No.3 had failed to discharge burden of issue No.4 on her and also for the reason that she has failed to rebut evidence of Respondent No.1/plaintiff on the other issues. However, in **appeal No.133/2009** in the second remand order dated **10.11.2010**, Additional District and Sessions Judge, **Mr. Zameer Ahmed Tunyo** declared that the said issue No.4 reproduced above was formal and he scored it off and proposed two additional issues. This remand order needs to be reproduced below:-

“In the fitness of things I find it appropriate to frame two additional issues which are necessary and material issues and relating to the controversy of litigation.

- (i) Whether Respondent No.1 is entitled for specific performance of contract?*
- (ii) Whether gift deed dated **30.5.1972** is valid document and enforceable in law in present shape?.*

*Both these issues be listed as issue No.4 and 5 of the list of issues. **The (earlier) issues No.4 and 5 being formal are scored off**. The trial Court is directed to adduce evidence of the parties on these issues and record its judgment afresh in the light of all these issues.*

The judgment of trial Court is set aside and the case is remanded back in the above terms and the appeal is allowed with no order as to cost”

It is pertinent to observe here that in my humble view the above remand order dated **10.11.2010** was an excuse to set aside otherwise a well-reasoned judgment on merit. None of the **two** additional issues proposed by the appellate Court were fresh issues. The proposed additional issue No.1 was already an issue No.5 and likewise proposed issue No.2 was similar to already existing issue No.2 which were framed by the trial Court on **02.8.2008**. And on top of it declaration by Additional District Judge that issue No.4 was formal was patently an illegal order. In fact by scoring off the existing issue No.4, the Additional District Judge misguided the trial Court and indirectly asked the trial Court to re-write the judgment on the existing issues without examining the issue No.4 for which the main burden of proof was on the appellant to claim have acquired the subject property through sale agreement and power of attorney as against the claim of Respondent No.1/plaintiff. Since the crucial issue No.4 was dropped by the appellate Court by declaring it “being forma” in post remand proceedings it was not before the trial Court and the appellant despite directions in the remand order to adduce evidence smartly declared that he will rely on the evidence recorded during proceedings under **Section 12(2) CPC** and suppressed the evidence of **Sharif Ahmed** DW-1 recorded during the trial. This is how the appellant managed to keep the evidence of Sharif Ahmed out of the view of the trial Court.

14. Irrespective of the above glaring irregularity in the remand order dated **10.11.2010**, the trial Court of Senior Civil Judge, **Mr. Kamran Atta Soomro** on the same evidence of the parties like an appellate Court by judgment dated **31.5.2010**, reversed the findings on each issue in the judgment dated **29.5.2009**. Learned Senior Civil

Judge in his judgment has begun his discussion on each issue by saying that; *“this issue was decided in negative by the then learned Judge of this Court vide judgment dated 25.9.2009”* and answered in affirmative. This line is repeated in each issue and finding in negative were substituted with the findings in affirmative and vice versa by novel reasoning without any reference to the evidence in its correct perspective. Therefore, the order of appellate court in **appeal No.133/2009** whereby earlier judgment and decree dated **25.9.2009** was set aside and the case was remanded by itself was an illegal order and the trial Court while examining veracity and correctness of the claim of Respondent No.1 was supposed to first examine the appellant/ defendant No.1 that what was her claim on the subject property and “the particular cause of action” on which Respondent No.1/plaintiff has filed his suit.

15. As thoroughly examined and discussed above, in written statement the appellant has not claimed any right or title in the subject property and, therefore, in post remand proceedings she had no locus-standi to continue to be a party in the suit itself since she (appellant/defendant No.3) had not shown any interest and/or right in the subject property after getting the exparte decree set aside by invoking provisions of **Section 12(2) CPC**. I must mention here that the learned counsel for the appellant in the instant second appeal has filed copies of evidence recorded during hearing of application under **Section 12(2) CPC** and he has suppressed the evidence of power of attorney holder **Sharif Ahmed** which was recorded by trial Court after framing issues for decision on merit. Besides above legal aspect discussed in preceding paras, even if we examine the evidence of Defendant No.3/appellant’s witness **Sharif Ahmed** in suit as well as her evidence from the proceedings under **Section 12(2) CPC**, we

clearly appreciate that all the three documents relied upon by the defendants have neither been proved nor created any right or interest in the subject property in favour of the appellant as compared to the documentary evidence brought on record by Respondent No.1/plaintiff. Respondent No.1 has placed on the record original gift deed. The very fact that the original gift deed was in the hands of Respondent No.1/plaintiff is dated 1972 was for more strong and cogent evidence of title as compare to the so-called power of attorney which was executed by unidentified daughters of Mst. Hawa Bai in favour of appellant/legal heir of appellant namely **Sharif Ahmed** on a date when said **Sharif Ahmed** was admittedly in Jail. The appellate Court in the impugned judgment has relied on the relevant evidence and referred to the case-law in support of its findings.

16. In view of the above, this IInd Appeal is dismissed with cost throughout right from 2010.

JUDGE

Karachi
Dated:14.12.2018

Ayaz Gul/P.A