

IN THE HIGH COURT OF SINDH AT KARACHI

IInd Appeal No.21 of 2014

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

Before: Mr. Justice Nazar Akbar

Appellant : Muhammad Shahid.,
Through Qazi Hafizur Rehman, advocate.

Versus

Respondent No.1 : The Ist Addl. District & Session Judge
(Central) Karachi.

Respondent No.2 : The VITH Sr. Civil Judge (Central)
Karachi.

Respondent No.3 : Naveed Akhter,

Respondent No.4 : Mst. Nighat Ashraf,

Respondent No.5 : Muhammad Zahid

Respondent No.6 : Mrs. Uzmahai,

Respondent No.7 : Mrs. Mana Ashraf

Date of hearing : **14.05.2019**

Date of Decision : **14.05.2019**

JUDGEMENT

NAZAR AKBAR, J. The appellant through this IInd Appeal has challenged the concurrent findings. The Vth Senior Civil Judge, Central Karachi by Judgment dated **24.03.2011** decreed **suit No.543/2004** filed by Respondents No.3 to 7 and the Ist Additional District Judge Central Karachi by judgment dated **21.02.2014** passed in **Civil Appeal No.63/2011** maintained the said findings of the trial Court.

2. Precisely the facts of the case are that Respondents No.3 to 7 claiming themselves as legal heirs of deceased Muhammad Ashraf who owned a shop No.A4/1/2, in Maymar Centre, Block-7 F.B. Area, Karachi (the said shop) and after his death the ownership of the said shop was devolved upon them / respondents by way of inheritance. The respondents/plaintiffs averred that their late father in his life time had negotiated with the appellant/defendant for sale of the suit shop and the appellant / defendant had paid token amounting to Rs.50,000/- on **29.5.1997**, however the agreement was not finalized and the appellant/defendant had undertaken to pay all dues, over the suit shop to the bank. The appellant/defendant did not pay the same in spite of requests made in this behalf. Therefore, the said token money was forfeited by the deceased Muhammad Ashraf as in the absence of original documents of the suit shop, which were lying in Bank, no sale deed could be executed. The respondents/plaintiffs have averred that at the time of negotiation between their predecessor-in-interest i.e. Muhammad Ashraf and the appellant / defendant the shop in question was in occupation of one Munawar Jafferi as tenant of the said deceased and at no point of time, the physical possession of the shop was handed over to the appellant / defendant. The rent was being paid regularly by the said tenant to Muhammad Ashraf. The appellant /defendant by taking advantage of illness of owner, posed himself as landlord of the said shop with ulterior motives and without knowledge and consent of the deceased landlord filed R.C No.603/1997 against the said tenant Munawar Jaferi in the Court of 3rd Rent Controller Central, Karachi and obtained ejectment order on **06.10.1998**. Thereafter

the appellant / defendant inducted another person into the said shop allegedly in the capacity of tenant, although the appellant / defendant was neither owner/landlord nor he was given such authorization by the actual owner (Late) Muhammad Ashraf. The respondents/plaintiffs also averred that after the death of Muhammad Ashraf the appellant / defendant forced them to transfer the said shop in favour of the appellant / defendant but they refused to transfer the same. The appellant / defendant filed **suit No.192/2002** against respondent/plaintiff which was later on withdrawn by him. It is submitted by the respondents/plaintiff that they are lawful owners of the suit property and all the original documents relating to the said shop are in their possession, therefore, the appellant / defendant is not entitled to retain the possession of the suit property. The appellant / defendant is also liable to pay mesne profit to him, which he was receiving as monthly rent from the present tenant since 2002. Therefore, Respondents No.3 to 7 /plaintiffs filed **civil suit No.543/2004** against the appellant / defendant for declaration, possession mesne profits and permanent injunction.

3. The Appellant/defendant was served and filed written statement and contended that the instant suit is not maintainable, the Respondents/plaintiffs have approached the court with malafide intention and without succession certificate issued by any competent Court of law. He further contended that the plaintiffs deliberately and intentionally have concealed the true facts from this Court and misrepresented the Court just to get illegal relief. The appellant / defendant has contended that the Respondents/plaintiffs have no rights in the said shop as their

deceased father and deceased husband of plaintiff No.2 had entered into an agreement of sale of the said shop on **29.5.1997** for total sale consideration of Rs.1,50,000/- plus outstanding loan amount obtained by deceased husband / late Muhammad Ashraf in his life time and on the very date the constructive possession of the suit shop was transferred to him. Furthermore the previous deceased owner had informed the tenant of the said shop that he has sold out the said shop to him and he shall be deemed absolute / owner / landlord, hence he shall be entitled to receive the future rent from June 1997. Thereafter the tenant deliberately avoided and failed to pay the monthly rent than he has served a legal notice through his previous owner late Muhammad Ashraf to issue NOC to the bank for the release of original documents as well as to the said tenant. The appellant / defendant has further contended that agreement was finalized by virtue of handing over the copies of title documents of the suit shop alongwith its constructive possession and the plaintiffs have fraudulently obtained original title documents from the bank on the pretext of being widow of said deceased. Therefore, appellant / defendant filed suit for permanent injunction against respondents/plaintiffs and that Court restrained the respondent/plaintiff and others but the respondent / plaintiff has avoided to file written statement. Thereafter parties reached an amicable settlement. The appellant after getting amount of Rs.1,00,000/- for the purpose of getting original documents released from the bank agreed to transfer the title of the said shop in his name, but they had never complied with the agreement and after laps of one and half year have filed instant suit against him.

4. The trial Court after considering the material available on record decreed the suit in favour of Respondents/plaintiffs by judgment dated **24.03.2011**. Against the said judgment, the appellant filed **Civil Appeal No.63/2011** before Ist Additional District Judge Central Karachi, which was dismissed and findings of trial Court were maintained.

5. I have heard learned counsel for the parties and perused the record.

6. Learned counsel for the appellant has contended that the judgment and decree was an exparte judgment since the appellant had neither cross-examined the witness of respondent nor his evidence has been recorded by the trial Court and as such it was case based on incomplete evidence. It is further contended that on the basis of the agreement of sale the appellant has already acquired constructive possession of the said shop and therefore, he subsequently filed ejectment against the tenant and rightly obtained the possession from the tenant. The two Court below, he further contended, have failed to take into account the fact that the respondent has received an amount of Rs.50,000/- on **29.5.1997** as token money, however, no agreement was executed as it has been even mentioned by the respondent in the pleadings. The counsel for the respondent has contended that admittedly there was no agreement of sale purchase between the parties and therefore, merely on payment of token money the appellant cannot lawfully be considered in constructive possession of the said shop. The appellant since 1997 has not even filed any suit for specific performance of the contract nor he has paid remaining sale

consideration, if at all there was any understanding of sale between the parties. He has contended that the trial Court judgment was based on the evidence which has gone un-rebutted and had there been any truth in the story of the appellant first he should have filed at least a suit for declaration and possession which he has never filed nor he has produced any evidence to establish that any agreement of sale was executed between the parties. Therefore, this being second appeal the appellant was not supposed to rely only on the stance which he has otherwise not been able to establish before the trial Court. The repeatedly failure of the appellant to cross-examine the respondent as well as lead his own evidence was enough to decree the suit. In view of such conduct, the appellant has failed to bring the case within the ambit of **Section 100** of the **CPC** which requires the appellant to show that the decisions of the two Courts below were contrary to law or to some usage or that there was any procedural failure on the part of the trial Court in passing impugned judgment. The learned counsel for the appellant has failed to point out any substantial error or defect in the judgment.

7. In view of the above facts, no case for interference in the judgments of two courts below is made out since there was no illegality or irregularity in the impugned judgments nor the decisions are contrary to law, therefore, instant second appeal was dismissed alongwith pending applications by short order dated **14.05.2019** and these are the reasons for the same.

Karachi
Dated: 26.07.2019

JUDGE

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