

IN THE HIGH COURT OF SINDH, AT KARACHI

**IInd Appeal No. 97 of 2011
IInd Appeal No. 98 of 2011**

1. IInd Appeal. No. 97 of 2011

Saleh Muhammad Appellant

V E R S U S

Mst. Rahima Bai and others Respondents

2. IInd Appeal No. 98 of 2011

Saleh Muhammad Appellant

V E R S U S

Mst. Rahima Bai and others Respondents

Appellants : Through Mr. Shaikh Liaquat Hussain, Advocate.

Respondents : Through Mr. Naeem Akhtar Memon, Advocate

Date of hearings : **06.07.2017.**

J U D G M E N T

ADNAN-UL-KARIM MEMON, J: The above captioned IInd Appeals are being disposed of through this common judgment because both pertain to identical points of law and facts.

2. A brief history of the case is that on 06.02.2008 the appellant filed Civil Suit No 60 of 2008 before the Court of IIIrd Senior Civil Judge, Karachi South for Declaration, Specific Performance of Contract and Permanent Injunction against the Respondents. Subsequently, on 07.07.2008 the Respondents No.1 to 6 filed Suit for Possession of Immovable Property and Mesne Profits. Suits were consolidated, evidence was led and

consequently the learned trial Court decreed Suit No. 60 of 2008 and dismissed Suit No. 692 of 2008. The said Judgment & Decree were challenged by the Respondents No.1 to 6 via Civil Appeals No. 76 & 77 of 2011 before the learned Vith Additional District Judge at Karachi South. The Learned Appellate Court reversed the findings of learned trial Court and Decreed the Suit of Respondents No.1 to 6 and dismissed the Suit and Decree of the Appellant through consolidated Judgment dated 13.10.2011 and Decree dated 18.10.2011 (Impugned Judgment and Decree) in consolidated suits bearing No. 60 and 692 of 2008 respectively and the said Judgment and Decree have been assailed by the Appellant through the instant appeals.

3. Mr. Shaikh Liaquat Hussain, learned counsel for Appellant has contended that Impugned Judgment and Decree is contrary to law and facts and the same is premised on misreading and non-reading of evidence; that the learned Appellate Court failed to appreciate that Appellant proved his case for Specific Performance of Contract by producing oral as well as documentary evidence before the learned trial Court; that Appellant also proved payment of entire sale consideration of Rs. 900,000 (Rupees nine lac only); that findings of learned Appellate Court are against basic sprit of law particularly with regard to return of Rs. 400,000 (four lac only); that learned Appellate Court failed to appreciate that Respondents admitted payment of money to Adam (deceased) in the year 1997/1998 and possession of Subject Property was handed over to Appellant with all Original Title documents; that Adam passed away in the year 2006 and his legal heirs (Respondent No. 1 to 6) did not make any effort to execute conveyance Deed with the Appellant; that Respondent No. 1 and 2 have admitted in their cross examination regarding payment of

such amount to deceased but took somersault by taking the plea that it was a loan amount and not for sale of the subject property; that despite having received the said amount as consideration, the learned trial court was misled and Respondent No. 1 to 6 were directed to return the said loan amount to the Appellant although the Appellant has produced sufficient oral as well as documentary evidence before the learned trial Court to prove the contrary; that the learned trial Court without considering the evidence brought on record believed the version of respondents and observed that this is the loan amount and not the sale consideration received by deceased Adam and discarded the evidence of the appellant that deceased Adam and his legal heirs had received the entire sale consideration of Rs. 900,000/- (Rupees Nine Lac only); that learned Appellate Court failed to discuss the issues settled by the learned trial Court and evidence lead by the parties in the trial Court; that the judgment of learned IIIrd Senior Civil Judge South Karachi is well reasoned and the same has been wrongly reversed by the Appellate Court, which is in contravention of the law settled by the Hon'ble Supreme Court; that the learned Appellate Court erred in directing the Appellant to vacate the Suit Property and deliver possession to the Respondent No.1, which is not warranted under the law; that learned Appellate Court failed to appreciate that deceased Adam during his life time handed over vacant and peaceful possession and Title documents of the Suit Property to the Appellant and that aspect of the matter has been ignored by the learned Appellate Court. He lastly prayed for setting aside the Impugned Judgment and Decree.

4. Mr. Naeem Akhtar Memon learned counsel for the Respondent No. 1 to 6 has supported the Impugned Judgment and Decree; that deceased father of Respondent No.4, Muhammad

Hassan took loan of Rs.400,000/- (Rupees Four Lac only) in two installment in the month of February 1998; that possession of ground floor of Suit Property was handed over to appellant till return of loan amount; that Original Papers of suit Property were given to Haji Hashim as amanat/security; that deceased Adam tried to return back loan amount to the Appellant but he refused to take back his loan amount and illegally occupied Suit Property after breaking the lock of the rooms and then matter was taken up in Kachi Muslim Singhar Jamat where Appellant leveled false allegations against deceased Adam; that he had promised to sale the Suit Property but deceased Adam stated before the Singhar Jamat that he had only stated to Appellant that he would consider selling the suit property; that the deceased time and again requested the Appellant for handing back the possession of suit property but he lingered on the matter on one pretext or another and finally refused to vacate the suit property. Thereafter, the deceased became seriously ill and died. Subsequently, his legal heirs requested the Appellant to vacate the suit property on payment of the loan but he refused; that the Respondents No.1 to 6 had also requested Haji Hashim to return the original documents of suit property but he in collusion with Appellant/Saleh Muhammad refused to return the original documents of suit property; that Respondent No.1 sent a legal notice to Appellant through her advocate on 14.12.2007, who replied to the said notice dated 18.12.2007 through a legal counsel and refused to vacate the suit property; that the suit of the Appellant for specific performance of agreement to sell was time barred; that Oral Agreement of sale of immoveable property does not confer title upon the Appellant to claim property in absence of evidence; that the appellant failed to produce marginal witnesses of oral agreement, therefore suit of Appellant was rightly dismissed by the

learned Appellate Court because he had no cause of action against the Respondents No.1 to 6; that Appellant filed Suit against Respondents for Declaration, Specific performance of contract and Permanent Injunction; that Suit No. 60/2008 filed by Appellant was rightly dismissed by the learned Appellate Court and Suit No. 692 of 2008 filed by Respondents No.1 to 6 was rightly decreed. He lastly prayed for dismissal of the both IInd Appeals filed by the Appellant. Learned counsel for the Respondents in support of his contention has relied upon the case of Muhammad Nawaz through LRs Vs. Haji Muhammad Baran Khan & others (2013 SCMR 1300), Muhammad Ramzan Vs. Muhammad Qasi (2011 SCMR 249).

5. I have heard the learned counsel for the parties and perused the material available on record and the case law cited at the bar.

6. Perusal of consolidated judgment dated 28.02.2011 and decree passed by the learned IIIrd Senior Civil Judge Karachi South, the controverted pleading of the parties necessitated framing of the following issues:-

- i. Whether the plaintiff entered into verbal agreement with deceased Adam (husband of defendant No.1) in respect of suit property/House AK-7-B-67 S-108 for total sale consideration of Rs. 9,00,000/-
- ii. Whether the deceased (husband of defendant No.1) received Rs. 4, 00,000/- as loan from the plaintiff and original papers were handed over to Haji Hashim as security?
- iii. Whether the defendant NO.6 illegally occupied the first floor of suit house?
- iv. Whether the deceased Adam and defendant No.2 Muhammad Hussain received the balance amount in respect of sale of suit house before panchayet committee?

- v. Whether the defendant No. 1 to 6 are entitled for the possession of the suit House?
- vi. Whether the defendant No. 1 to 6 are entitled for relief of mesne profits from plaintiff Saleh Muhammad, if so, from what period and at what rate?
- vii. Whether the suit is maintainable?
- viii. Whether the plaintiff is entitled for any relief claimed?

7. I have perused the reasoning/findings of the learned trial Court and the evidence led by the parties. The record reflects that the Appellant was cross examined by the counsel for the Respondents No.1 to 6 on issue No.1. With respect to the same, the Appellant has deposed that he purchased the suit property for a total sale consideration of Rs. 9,00,000/- (Rupees Nine Lac Only) out of which Rs.400,000/- (Rupees Four Lac only) paid as advance money. Thereafter, deceased Adam handed over the title documents and possession of the suit property to the Appellant. In support of his contention he produced copy of decision of Kachi Muslim Singhar Jamat as Ex: P/1 and reply to the legal notice dated 14.12.2007 as Ex: P/2. During evidence, it was also revealed that when the legal heirs went against the word of the deceased Adam and the matter became contentious, the same was arbitrated by Muslim Singhar Jamat, which also delivered a decision dated 11.8.1998 in favour of the Appellant which is available on record as Exhibit P/1. In support of his case, the Appellant further examined witnesses Usman Ghani, Muhammad Umer and Ibrahim Nasir, who corroborated his version.

8. Whereas, the Respondent No.1 during her cross examination had deposed that her deceased husband Adam had taken the amount of Rs 400,000/- (Rupees Four Lac only) as a

loan from Appellant and had handed over possession of suit property, however, she admitted in her affidavit-in-evidence in Para No.3 that title documents of the suit property was given to Haji Hashim as Amant /Security. In support of her contention, she examined witness Muhammad Hussain son of late Adam who deposed during examination that his deceased father had not returned Rs 400,000/- (Rupees Four Lac only) to Appellant; neither had he given any legal notice to him or approached him to return the loan amount or for gaining back the possession of the suit property; that suit property is in possession of Appellant since 1998 along with title documents , he has failed to substantiate the assertion that the amount was given as a loan and that there was any attempt on the part of the Respondent No.1 to 6 to return the loan amount.

9. As far as the issue with respect to limitation is concerned, record shows that the performance of the contract was categorically refused by the Respondents No.1 to 6 through legal notice dated 14.12.2007. On receipt of the same, the Appellant apprehending the infringement of his proprietary rights filed the suit against the Respondents No.1 to 6 within the prescribed limitation of three years. Therefore, this Court finds no justification in the assertion of the learned counsel for the respondents No.1 to 6 that the suit of the appellant is time barred. Even on merits, the Appellant has discharged its burden of proof and on the balance of probability, he has established his case of specific performance of the contract for sale of the suit property under Specific Relief Act 1877, whose uninterrupted possession he is enjoying since 1998 till date and also has the title documents of the suit property. Having discharged the burden of proof, the onus lay on the Respondents No.1 to 6 to prove to the contrary. However, they have

failed to provide any oral or documentary proof to substantiate the claim that the sale consideration was in effect a loan and furthermore, the record is completely silent on the fact that any attempt was ever made by the deceased or his legal heirs to repay the loan and take back the possession of the suit property.

10. The case law cited by the learned counsel for the respondents No.1 to 6 is distinguishable from the facts and circumstances of the case.

11. In view of the foregoing, I am of the view that learned Appellate Court/VI Additional District Judge Karachi South has failed to appreciate and take into consideration the contradictory evidence of the Respondents No.1 and 2 which is available on record and therefore, has erred in reaching the conclusion that suit No. 60/2008 is not in accordance with law and dismissed the same without appreciating the evidence of the parties. The Impugned Judgment dated 13.10.2011 and Decree dated 18.10.2011 passed by the learned V-Additional District Judge Karachi South in Civil Appeal No.76/2011 and Civil Appeal No.77/2011 is based on misreading and non-reading of the evidence, and thus not sustainable in law, hence, the same is set aside. The Judgment dated 28.02.2011 and Decree dated 28.02.2011 passed by the learned III-Senior Civil Judge Karachi South in Suit No.60/2008 is restored whereby, the suit filed by the Appellant stands decreed and Suit No.692/2008 filed by Respondent No.1 to 6 stands dismissed.

12. IInd Appeal No.97/2011 and IInd Appeal No.98/2011 are allowed in above terms.

JUDGE