

IN THE HIGH COURT OF SINDH, KARACHI
IInd Appeal No.64 of 2016

Date	Order with Signature of Judge
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Before: Mr. Justice Nazar Akbar

Appellant : Qamar Tahueed Bhatti & others
 through Mr. Mehmood Habibullah, Advocate.

Versus

Respondents : Abdul Waheed Bhatti & others
Mr. Shahid Mushtaq, advocate for
 Respondent No.1.

Date of hearing : **19.02.2020**

Decided on : **18.05.2020**

J U D G M E N T

NAZAR AKBAR, J. The appellants through this IInd Appeal have challenged the concurrent findings of two Courts below. The VIth Senior Civil Judge, Central Karachi by consolidated Judgment dated **30.11.2015** decreed **Civil Suit No.1117/2003** filed by Respondent No.1 and dismissed counter **Civil Suit No.40/2004** filed by the appellants. Learned IV-Additional District & Sessions Judge, Central Karachi by Judgment dated **18.03.2016** dismissed **Civil Appeal No.92/2015** filed by the appellants and the findings of the trial Court were maintained.

2. Briefly the facts of the case are that the appellant filed **suit No.40/2004** for partition, declaration, cancellation, possession, mesne profit & permanent injunction against the respondents' who has filed **suit No.1117/2003** for recovery of possession of only first floor of house No.V-C-8/10, measuring 233 sq. yards, situated in Block 5-C, Nazimabad, Karachi (the demised premises) and mesne

profits on the ground that he is owner of the demised property having purchased the same through registered sale deed on **7.7.1972** from the previous owner and now his own children have given up and he needs the demised premises for them. The appellants before filing written statement in suit No.1117 of 2003 filed counter suit No.40/2004 and alleged that the demised premises was purchased by their deceased father namely Abdul Hameed on **07.10.1972** in the name of Respondent No.1, who was the eldest son. Then it was consisted of ground plus 1st Floor. They further alleged that as with the passage of time the requirements of family increased, the second and third floor were also constructed and each one of them has contributed towards the cost of construction of 2nd and 3rd floor of the demised premises. Respondent No.1 after his marriage, the appellant alleged, under influence of his wife and in-laws preferred to break from the family and shifted to house bearing No.LS-51, Sector 1-D, Orangi Town, Karachi owned by late mother of the parties. Respondent No.1 while living in the said house fraudulently got the title of the said house changed in the name of his wife Mst. Shahida Begum. It is averred by the appellant that the deceased father of the parties was also sole proprietor of business called Union Traders and he had purchased a shop bearing shop No.3, Thattai Compound, M.A. Jinnah Road, Karachi on good will basis and another shop in Ghulam Shah street, Juna Market, Karachi by his own resources. It is averred that appellants' father and respondent No.1 had jointly started business in both the shops, one at Juna Market and other at Thattai compound. In the year **1970** Respondent No.1 spoiled the business and due to losses he come under heavy debts and the family decided to mortgage their other properties at Punjab to pay the debts of the market. One of the brothers of appellants was married in

the year 1978 and he resided in the 2nd Floor of the demised premises till 1989 before he was shifted to USA permanently. Mother of the parties expired on **11.10.1990** and father expired in the year **1993**. It is averred that after the sad demise of their parents all the brothers and sisters considered Respondent No.1 as their guardian being the eldest therefore, the affairs of the properties of the deceased parents were controlled by him. He started collecting rents of various portions of the demised premises amounting to Rs.10,000/- per month and he has also received an amount of Rs.65,000/- as rent of house in Orangi Town. It is averred that Respondent No.1 with malafide intentions and ulterior motives unjustly evicted old tenants from the rented portions of the house and let out the same to new tenants. Respondent No.1 had deprived all other legal heirs from their due shares in rent. It is further averred that Respondent No.1 also extended threats to the appellants to dispossess them from the first floor of the demised premises on the basis of title deed, which was benami transaction. Respondent No.1 filed Civil Suit No.1117/2003 in November, 2003 against the appellants after 10 years of death of their father, which compelled the appellants to file suit No.40/2004 in respect of the demised premises.

3. After summons/notices, defendant/Respondent No.1 filed written statement wherein he reiterated the same facts as were given in his suit No.1117/2003 and categorically contended that his father was not real owner of the demised premises nor has contributed in purchase of the demised premises. He contended that the demised premises was purchased when it was mortgaged with HBFC and the said loan was transferred in his name which he cleared. He further contended that in the year 1974 he obtained loan of Rs.50,000/-

from MCB against mortgage of the demised premises for additional construction of floor on the demises premises. He further contended that house of Orangi Town was originally leased in the name of his wife.

4. The trial Court consolidated both the suits. Suit No.40/2004 was treated leading suit and following consolidated issues were framed:-

1. *Whether father of the parties late Abdul Hameed Bhatti was the actual owner of the suit property bearing No.V-C/8-10 and the Defendant No.1 is only Benami owner?*
2. *Whether the registered sale deed dated 07.07.1972 and mutation letter dated 09.02.1973 issued in favour of the Defendant No.1 in respect of the suit property are liable to be cancelled?*
3. *Whether the Plaintiffs are residing in the suit house as co-owners by inheritance?*
4. *Whether the Plaintiffs are liable to pay mesne profits as claimed by the Defendant No.1?*
5. *Whether the Defendant No.1 is entitled for recovery of vacant possession of the suit house?*
6. *Whether the Defendant No.1 is liable to pay share of the rent to the Plaintiffs and other legal heirs of the deceased Abdul Waheed?*
7. *What should the decree be?*

5. The trial Court recorded evidence and after hearing the parties decreed Civil Suit No.1117/2003 filed by Respondent No.1 and dismissed Civil Suit No.40/2004 filed by the appellants by consolidated judgment dated **30.11.2015**. The Appellants against the said judgment filed Civil Appeal **No.92/2015** before the appellate Court which was also dismissed by judgment dated **18.04.2016** and the findings of the trial Court were maintained. The appellant has

challenged the concurrent findings of the two Courts below herein this IInd Appeal.

6. It is indeed very unfortunate that learned counsel for the appellant has not filed written arguments despite directions given to him on **19.2.2020**. Respondent No.1 has filed written synopsis. In fact the burden was on the appellant to satisfy the Court that how the decision of the trial Court was contrary to law or to some usage having force of law or the Courts below have failed to determine any material issue of law between the parties. In the leading suit the appellant have challenged the ownership of the demised premises by Respondent No.1 and alleged that it was purchased by their deceased father in the name of Respondent No.1. This was the only vital issue and burden was squarely on the appellant to satisfy the Court that Respondent No.1 was Benami owner and their father was real owner who has independently purchased the demised premises.

7. In absence of arguments from the appellant side I have perused the grounds of appeal to appreciate possible contentions of learned counsel for the appellant against the concurrent findings of facts given by the two Courts below. He has contended that certain piece of evidence has not been examined by the learned trial Court as well as appellate Court. He has emphasized on the point that some of the defendants have not been examined and even chance has not been given to them to lead evidence. However, the record does not show that any grievance of not allowing anyone to lead evidence has been raised by any of the defendants/Respondents. In fact it is the duty of the parties themselves to produce their evidence. The record shows that initially other brothers and sisters were not made party in the

suit filed by the four appellants who were facing suit No.1117/2003 for possession by Respondent No.1. Respondent No.1 in his written statement filed in **March 2004** has pointed out that suit filed by appellants suffers from non-joinder of parties. The title of the suit No.40/2004 available at page No.169 does not mention name of other defendants. However, they have filed common written statement in 2006 almost after two years and their counsel has never appeared in Court. Be that as it may, the Court has not stopped any of the defendants No.4 to 8 to appear in the witness box nor they have shown their grievance for not allowing them to appear in the witness box. As far as the evidence referred by the appellant in memo of appeal is concerned, not a single piece of evidence is confidence inspiring. Mere statement that father of the parties has contributed for purchase of the demised premises without any documentary proof after 31 years of execution of sale deed in favour of Respondent No.1 and 10 years after death of the alleged real owner is of no consequences. The appellants have neither alleged nor produced any evidence to identify any motive of their father to purchase the demised premises in 1971 in the name of Respondent No.1. However, two of their witnesses who appear to be aunties of the appellants have made an attempt to attribute motive of their father at the stage of evidence by alleging that the demised premises has been purchased in the name of Respondent No.1 as he was mentally disturbed in those days and by purchasing the demised premises in his name the father seems to have tried to please his disturbed son. However, this motive was not even mentioned in the plaint nor supported by the appellants. In the plaint the allegation was that the entire business has been spoiled by Respondent No.1, in **1970** whereas the demised premises was purchased in **1972**. However, no

evidence was brought on record to show that how the business was spoiled by Respondent No.1.

8. Contrary to the claim of the appellants, the evidence of Respondent No.1 showing official record of KDA and registered sale deed in favour of Respondent No.1 has gone un-rebutted. Besides this, the appellants have failed to cross-examine Respondent No.1 on the point of construction in the demised premises in 1974 after taking loan from Muslim Commercial Bank. The other facts alleged by Respondent No.1 in his plaint and affidavit, such as the Respondent has purchased the demised premises when is already mortgaged with HBFC and he has cleared the mortgage has gone unrebutted. The right of ownership has been exercised by Respondent No.1 without any objection from the deceased father of the parties who was alive for twenty years from the date of purchase in 1971 to his death in 1993 and even after his death the demised premises has remained in possession and control of Respondent No.1. Mere assertion on oath that father was owner was not enough to discharge the burden of proof. Registered title documents and other official record have sanctity of genuineness and it cannot be nullified on mere oral claim of legal heirs of a deceased that the deceased was real owner when the real owner in his lifetime for well over twenty years has never claimed any title or interest in the demised premises. Both the Courts below for deciding the issue of benami transaction against the appellants have relied on the evidence available on record and the learned counsel for the appellants has failed to show from the evidence that such conclusion is contrary to the law.

9. In view of the above facts and discussion, there is hardly anything in the decisions impugned in this IInd Appeal to be considered as contrary to law. There is no allegation of failure of the Courts below to decide any material issue between the parties; therefore, no case is made out for interference by this Court in the concurrent findings of the two Courts below. Consequently the instant IInd Appeal is dismissed with no order as to costs.

JUDGE

Karachi, Dated:18.05.2020

SM / Ayaz Gul