ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

Civil Revision Application No.38 of 2010

Date | Order with signature of Judge

Present: Mr. Justice Nazar Akbar

Applicant : Junaid Ahmed Siddiqui
Through Mr. Abrar Hasan, advocate.

Versus

Respondent No.1 : M. Yaqoob Khan Niazi.
Through Syed Sultan Ahmed, Advocate.

Respondent No.2 : Rizwan Cooperative Housing Society. (Nemo).

Date of hearing : **03.03.2020**

Date of Decision : **18.05.2020**

JUDGMENT

NAZAR AKBAR, J:- This Revision Application is directed against the concurrent findings of the two Courts below. The II-Senior Civil Judge, Malir, Karachi by judgment dated **08.05.2008** dismissed Civil Suit No.472/2003 (Old suit No.1246/1999) filed by the applicant and the III-Additional District Judge, Malir, Karachi by Judgment dated **04.02.2010** dismissed Civil Appeal No.33/2008 filed by the applicant against the said judgment and upheld the findings of the trial Court.

2. Brief facts of the case are that the applicant filed Civil Suit before High Court in 1999 bearing **suit No.1246 of 1999** (Renumbered **472 of 2003**) for cancellation of lease, possession and injunction against the Respondents stating therein that Plot No.B-16, measuring 400 sq. yards or thereabout, situated in Sector 38-A, K.D.A Scheme No.33, Karachi (the suit plot) was firstly allotted to Mst. Salma Shaheen on **28.01.1980** by Respondent No.2/ Defendant No.2 in lieu of the first payment towards the cost of the suit plot by

her on **24.10.1978** Respondent No.2/Defendant No.2, after having received full cost amounting to **Rs.40,111.00**, has issued allotment order in her favour along with the terms and conditions. Thereafter Mst. Salma Shaheen sold out the suit plot to one Mst. Rehana Begum and the suit plot was transferred in her name in the record of Respondent No.2/ Defendant No.2 vide letter dated **10.01.1988**. Then said Rehana sold out the suit plot to one Mr. Miftahudddin Khan son of Minhajuddin and it was also transferred in his name in the record of Respondent No.2 according to transfer letter dated **27.02.1988** and possession was also given to him vide possession order dated **23.03.1988**. It was averred in the plaint that thereafter Respondent No.2/Defendant No.2 executed lease deed in favour of said Miftahuddin bearing registration No.11094 dated **08.06.1988**. The applicant/ Plaintiff has purchased the suit plot from said Miftahuddin through registered sale deed No.306, Book No.01 dated **21.01.1988**, M.F Roll No.880 dated **26.01.1989** and physical possession of the suit plot was also handed over to him and he constructed a compound wall and fixed iron gate on the suit plot. It was further averred that surprisingly the applicant/ Plaintiff found that Respondent No.1/ Defendant No.1 break opened the lock of gate and unauthorizedly occupied the suit plot and tried to raise construction. The applicant/ Plaintiff reported the case to the police and also approached Respondent No.2/ Defendant No.2 from where he came to know that Respondent No.2/ Defendant No.2 illegally and without any authority had issued another allotment order of the suit plot in favour of one Mst. Nasreen Sohail, who sold out the same to one Muhammad Younus on **07.9.1991** and Respondent No.1/ Defendant No.1 had purchased the same from the said Mohammad Younus through registered lease No.2813 dated **07.10.1992**. It was

further averred that since the suit plot was already allotted to Mst. Salma Shaheen in the year 1980 who subsequently sold it to Mst. Rehana and said Mst. Rehana sold it to Mr. Miftahuddin Khan in whose favour Respondent No.2 has even executed registered lease on **8.6.1988**, therefore, all subsequent acts of Respondent No.2/Society in respect of the suit plot viz; allotment order dated **10.6.1987**, transfer orders dated **07.09.1991** and dated **14.09.1992** and subsequent registration of lease dated **07.10.1992** in favour of Respondent No.1 were nullity in the eyes of law and all such documents were liable to be cancelled. The applicant/Plaintiff, therefore, has filed Civil Suit for cancellation and possession.

3. After service of notices/summons, Respondent No.1/Defendant No.1 filed his written statement wherein he denied the claim of the applicant/Plaintiff and contended that the suit plot was firstly allotted by Respondent No.2 to its registered shareholder namely Mst. Nasreen Sohail vide order No.107/1, dated **10.06.1987** and possession order dated **23.03.1988** was issued by Respondent No.2 and she as original allottee sold out the suit plot to one Muhammad Younus on **07.09.1992** and on **14.09.1992** such transaction was endorsed on the back of share certificate by Respondent No.2 as confirmed by the Society through letter dated **07.09.1991** to Muhammad Younus and through letter dated **14.09.1992** to Respondent No.1. He further contended that he is rightful owner of the suit plot and he paid transfer fee etc. and Respondent No.2 has executed lease deed in his favour on **07.10.1992** and since then suit plot is in his possession and he has built boundary wall and accommodation but on **19.12.1998** some persons demolished some part of boundary wall for which he later on came to know that those

persons were sent by the applicant/ Plaintiff. Respondent No.1/Defendant No.1 has also filed a suit for permanent injunction before Civil Court.

4. Rizwan Cooperative Society/Respondent No.2/Defendant No.2 also filed written statement through its administrator who contended that Government of Sindh vide Notification dated **11.05.1998** has suspended the management of Rizwan Cooperative Housing Society under **Section 7** of Cooperative Authority Ordinance, 1982 and from time to time appointed its Administrators and vide Notification dated **07.10.1999** appointed him as Administrator. Ex-Management of the Society has not handed over its record to him except some files despite repeated correspondence and letters to higher authorities about non-availability of the record, he is not in a position to give any proper reply regarding suit plot.

5. Prior to **10.12.2001**, learned counsel for the Respondents remained absent on several dates whenever the suit was listed for framing of issues, therefore, after taking notice of their consecutive absence, by order dated **10.12.2001** High Court adopted the following issues:-

1. *Whether Miftahuddin s/o Minhajuddin was lawful owner of plot No.B-16 measuring 400 sq. yds. Sector 38-A, K.D.A Scheme No.33, Karachi and he sold it to plaintiff lawfully purchased the same under Regd. Sale Deed No.306 dated 21.11.1989 and put the plaintiff in physical possession thereof?*

2. *Whether the plaintiff after he had purchased the plot constructed the compound wall with cement blocks and put in iron gate and was in lawful possession thereof till it was illegally trespassed upon the defendant No.1 after breaking open the lock?*

3. *Whether the defendant No.2 illegally, unauthorisedly and without and jurisdiction*

issued another allotment order in respect of said plot in favour of Mst. Nasreen Sohail while Society was not possessed the said plot at the time, the defendant No.2 issued the same and a nullity in the eyes of law?

4. *Whether the allotment order dated 10.6.1987 in favour of Nasreen Sohail and Transfer order in favour of M. Younus s/o Abdul Gaffar dated 7.9.1991 and further transfer in favour of defendant No.2 M. Yaqoob Khan Niazi dated 14.9.1992 and lease deed dated 7.10.1992 in his name are illegal, void and are no legal value since the defendant No.2 had no lawful authority to do so and as such all documents i-e Allotment, Transfer order and Lease Deed are null and void and are liable be called in court and cancelled as such?*

5. *Whether the plaintiff under the circumstances is entitled to a decree for Permanent Injunction as well as Mandatory Injunction as prayed for?*

6. *Whether the plaintiff is entitled to a decree against the defendant No.1 directing him to put the plaintiff in vacant and peaceful possession of the plot No.B-16, measuring 400 sq. yds. Sector 38-A K.D.A Scheme No.33, Karachi with boundary wall and iron gate around it?*

7. *Whether the plaintiff is entitled to mesne profit at Rs.10,000/- p.m from the date of suit till realization?*

8. *What should the decree be?*

6. Then on **03.5.2002**, on the application of plaintiff/ applicant for appointment of Commissioner for recording evidence, the High Court appointed Mr. Muhammad Shafi Ronjho, Advocate to record evidence of the plaintiff as Commissioner. Learned Commissioner recorded evidence of the plaintiff and submitted his report along with evidence on **07.8.2002** and it was taken on record on **02.09.2002**. The Commissioner report shows that Attorney of applicant/Plaintiff namely Tariq Bin Uzair filed affidavit in evidence and produced 13 documents in support of his case. The applicant/Plaintiff also produced two witnesses namely Shafi Ahmed Siddiqui and Faiz Muhammad Brohi who also field their affidavit in evidence. All the

witnesses were cross examined by learned counsel for Respondent No.1/Defendant No.1 while counsel for Respondent No.2/Defendant No.2 did not cross-examine them.

7. In the meanwhile pecuniary jurisdiction of Civil Court was amended and, therefore, by an administrative order dated **02.11.2002**, the suit was transferred from High Court to District Courts and ultimately it was tried by the Court of Senior Civil Judge, Malir where it was renumbered as **Suit No.472/2003** (old NO.1246/1999). At the time of transfer, the case was fixed for evidence of respondents/ defendants as the evidence of plaintiff has already been concluded but on **15.1.2004** instead of producing evidence, Respondent/ Defendant No.1 filed an application for framing 6 additional issues which was allowed, however, on Revision field by the applicant, instead of six issues the learned Revisional Court by order dated **11.2.2005** allowed only three **additional issues** reproduced below:-

1. *Whether the suit is barred by Section 42 of Specific Relief Act?*

2. *Whether the Sale Deed in respect of Pot No.D-16, bearing No.1194, in the name of Muftahuddin Khan is forged and fabricated document?*

3. *Whether the lease deed bearing No.306 Registered at Sub registrar T Div-12 Karachi in the name of Junaid Ahmed Siddiqui is also forged and fabricated document?*

8. The applicant/plaintiff after framing of additional issues did not lead any further/fresh evidence and relied on the already available evidence by him. Respondent No.1 in support of his case preferred to be examined through attorney, Mr. S.M Murtaza who filed his affidavit in evidence and produced certain documents. Respondent No.1/Defendant No.1 also examined two witnesses

namely Sadaqat and Nadeem Bakza. All the witnesses were cross-examined by counsel for the applicant. Respondent No.2/Defendant No.2 also filed affidavit in evidence of the then Administrator namely Naseemul Haque but he did not appear in witness box for cross-examination. Then Respondent No.1/ Defendant No.1 filed an application for calling Sub-Registrar of properties for evidence as witness, the said application was allowed by order dated **28.02.2006** and he was also examined.

9. The trial Court after the evidence had to decide 11 issues but after hearing the parties it answered only additional issue No.1 and dismissed the Civil Suit No.472/2003 as not maintainable by judgment dated **08.05.2008**. The applicant filed Civil Appeal No.33/2008 against the said judgment, which was also dismissed by the III-Additional District Judge, Malir, Karachi by judgment dated **04.02.2010** and the findings of the trial Court were maintained. The applicant preferred instant Revision Application against the said concurrent findings of the two Courts below.

10. On 20.2.2020 after hearing the parties at length it was observed by this Court that since both the Courts below have not touched any of the issues except one, the controversy for the purpose of Revision is reduced to the following question:-

> *Whether the trial Court's judgment in the given facts of the case is in line with **Order XX Rule 5 CPC** and at the same time the judgment of the appellate Court is also in line with **Order XLI Rules 30** and **31 CPC**, if not, then what is its effect?*

Both the learned counsel for the parties were requested to file written statement which they have filed and I have carefully perused their

arguments and gone through the record. My findings on the above preposition is as follows:-

11. Learned counsel for the applicant has contended that the parties have not abandoned any of the issues framed by the trial Court and therefore, it was mandatory for the trial Court as well as for the appellate Court to have answered each one of the issues raised by both the sides. He has also contended that the application of **Section 42** of the Specific Relief Act, 1877 could have automatically been answered had the trial Court examined and answered original issue No.1. He has further contended that in failing to decide all the issues after recording evidence the courts below have failed to discharge their duty of proper adjudication on the points raised in the case. Amongst others, learned counsel for the applicant has relied on the case of Syed Iftikar-ud-Din Haider Gardezi and 9 others vs. Central Bank of India Ltd., Lahore (**1996 SCMR 669**) on the point that since the issues have not been abandoned by consent of the parties the same ought to have been decided by the court. He has also relied on the case of Sh. Abdul Kabeer vs. Mian Abdul Wahid and others (**1968 SCMR 464**) wherein the Hon'ble Supreme Court has held that "*where a number of mixed question of law and facts were raised but these points did not receive due consideration in the judgment of the High Court, it cannot be regarded as a proper adjudication of the points raised in the case.*"

12. Learned counsel for Respondent No.1 in his written arguments has emphasized that when the title of the property is under dispute the simple suit for permanent injunction or possession is not maintainable without seeking declaration and, therefore, both the Courts below have rightly held that the suit was not maintainable

under **Section 42** of the Specific Relief Act, 1877. Amongst others, he has relied on the case of Sultan Mehmood Shah through L.Rs. vs. Muhammad Din and 2 others (**2005 SCMR 1872**) and Muhammad Aslam vs. Mst. Ferozi and others (**PLD 2001 SC 213**). He has also submitted that may be the suit was barred by limitation and on the question of limitation, too, he has referred case laws without realizing that neither respondents in their written statement have pleaded limitation as defense nor the trial Court below has framed issue on the question of limitation. None of the 11 issues framed by the trail Court was on the point of limitation. He has also stressed on the provisions of **Order XIV Rule 2 CPC** in support of two judgments. He has contended that it is within the powers of the court to decide the main case on the question of law without adverting to the question of facts. Lastly he has contended that in exercise of revisional jurisdiction the High Court cannot disturb the conclusion arrived at by the two Courts below and remand of the case to the trial Court for issue-wise decision after lapse of 20 years. He has also relied on the case of Cantonment Board through Executive Officer, Cantt. Board, Rawalpindi vs. Ikhlaq Ahmed and others (**2014 SCMR 161**).

13. Before taking the issue of requirement of Order XX Rule 5 and Order XLI Rules XLI and 31 CPC, I would examine the contention of learned counsel for Respondent No.1 that the trial Court as well as the appellate Court have rightly exercised their jurisdiction in exercise of powers conferred on Courts in terms of **Order XIV Rule 2 CPC** which is reproduced below:-

> **2. Issue of law and of fact.---** Where issues both of law and of fact arise in the same suit, **the Court is of opinion that the case** or any part thereof **may be disposed of on the issues of law only, it shall try those issues first,** and for that purpose may, if it thinks fit, **postpone the**

settlement of the issues of fact until after the issues of law have been determined.

The first thing to be noted is that in their respective written statement none of the Respondents has raised any legal issue about maintainability of the suit as barred by **Section 42** of the Specific Relief Act, 1877 and that is why on **10.12.2001** when this Court was seized of the suit, 8 issues were framed and none was issue of law. Therefore, the Court has recorded evidence of the applicant/plaintiff. If we carefully peruse **Order XIV Rule 2 CPC** we can appreciate that the purpose of conferring powers on the Court to first decide the case or any part thereof only on the issue of law is to save the precious time of both the Courts and the litigant. However, to avoid any miscarriage of justice in the name of decision on the issue of law, the court is required to form a conscious "opinion" to this effect in the light of the pleadings of the parties and in doing so the court may even *"postpone the settlement of the issues of fact until after the issues of law have been determined."* It means the Court has first to apply its mind to the pleading and put the parties on notice that in the "opinion" of Court the case may be disposed of on the issues of law and the Court shall try the issue of law first. In legal parlance it is called "preliminary legal issue" and purpose of exercising such power as already observed is to save the time and energy of both the litigants and the Court in framing issues of facts and doing labour of recording of evidence of the parties and hearing lengthy arguments of counsel on each issue. In the case in hand the Court has neither consciously framed issues of law nor expressed its intent to dispose of the case on the issue of law. Nor the Court has postponed the settlement of issues of fact rather the issues of fact were settled way back on **10.12.2001** and even evidence of the plaintiff has already

been recorded by the Court before the so-called issue of law was proposed by Respondent No.1. Not only this, the trial Court even after framing three additional issues including the one on which suit had been disposed of by judgment dated **08.5.2008** as not maintainable, has proceeded to record evidence of Respondent No.1 and also evidence of sub-registrar of properties on the application filed by Respondent No.1. Therefore, it was neither fair and proper nor it was intention of law maker to empower a Court to give up the noble cause of doing justice by giving decision on merit supported by reasons based on the evidence and prefer a shortcut at the last stage of the proceedings, leaving the parties to wonder that why the Court, despite the material available on the record, has not given its findings on issues of facts in absence of any legal bar on deciding the issues of fact. It has been repeatedly held by Superior Courts that once the Court has consumed time in recording evidence then efforts should be made to decide the case both on law points as well as on merit. It is strange that after completing the exercise of full trial, that is, framing issues, recording evidence of contesting parties and hearing the counsel for the parties on all the issues, the trial Court instead of passing a judgment on merit has preferred to follow the course which is permissible only prior to recording evidence. In this context, one may refer to the judgment of the Hon'ble Supreme Court in the case of Hafiz Muhammad Siddique Anwar vs. Faisalabad Development Authority and others reported in **2007 SCMR 1126**. In this judgment the facts of the case are almost identical to the facts of the case in hand. In the reported case the trial Court and the appellate Court after framing 8 issues and recording of evidence have dismissed the suit only on the question of jurisdiction and even the High Court has maintained the dismissal of the suit but the Hon'ble Supreme Court

reversed three concurrent findings and held that the Court once consumed time in recording evidence the effort should have been made to dispose the case both on law points including question of jurisdiction as well as on merit. The relevant observations of Hon'ble Supreme Court are as follows:-

> 6. It is to be noted that learned trial Court despite recording evidence of both the parties on the issues arising out of pleadings of the parties refrained to dilate upon the merits of the case and non-suited the appellant on deciding the issue of jurisdiction in affirmative, holding that under paragraph 10(b) of MLI No.23, it has no jurisdiction to adjudicate upon the merits of the case. As far as the question of jurisdiction of the Court is concerned, it has always considered to be of a fundamental nature in judicial proceedings and the Court seized with the matter preferably should decide such question on priority basis instead of considering the merits of the case **but in such situation time should not be consumed in recording evidence on the issues pertaining to the merits of the case and if it is possible to decide the question of jurisdiction without recording evidence, it should decide the same expeditiously as early as could be possible with a view to save its own time as well as the time of public litigants**. However, once the Court had consumed the time in recording evidence, then efforts should be made by it to dispose of the case both on law points including the question of jurisdiction as well as on merits.
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> 7. Be that as it may, in the instant case the findings recorded by the Civil Court on the issue of jurisdiction were maintained by the Appellate Court vide order/decree dated 11th June, 1990, as a result whereof the appellant was non-suited for the reason of non-availability of jurisdiction of the Civil Court against the orders of Martial Law functionaries, but **surprisingly learned High Court in its limited jurisdiction under section 115, C.P.C. proceeded to decide the issues on merits as well, without realizing that such exercise at a revisional stage is likely to cause prejudice to any of the parties before it became the one out of them against whom decision has been given on merits has been deprived of the right of appeal before the next Court**. Therefore, we are inclined to hold that on this score alone the impugned judgment is not sustainable in law.

14. Now I will examine the merit of the decision of the courts below in disposing of the suit on additional issue No.1 by holding that the suit was barred by **Section 42** of the Specific Relief Act, 1877. The perusal of the plaint and written statement suggest that the preposition affirmed by the plaintiff/ applicant and denied by the defendant in his defence do not suggest that the appellant/plaintiff has filed suit under **Section 42** of the Specific Relief Act, 1877. Both the courts below and even their counsel seem to have failed to appreciate the pleadings of the parties in correct perspective. The issues are framed by the Courts under **Order XIV Rule 1** from the pleadings of the parties which reads as under:-

> **1. Framing of issues.--** (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.
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> (2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.
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> (3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.
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> (4) Issues are of two kinds: (a) issues of fact, (b) issues of law.
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> (5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.
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> (6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

In fact the plaintiff / applicant has prayed for recovery of possession of the suit plot from defendant/Respondent No.1 on the basis of registered title document in respect of the suit plot which were never

challenged by anyone. His main prayer in the suit was prayer clause-4 that *"the vacant and peaceful possession of plot be restored to the plaintiff"* and such prayer was admittedly based on a valid title document with the plaintiff. The applicant in para-2 of his plaint has given details of the title documents which included registered lease executed by Respondent No.2 in favour of Mr. Miftahuddin, the previous owner, and from said Miftahuddin the applicant has obtained title through a registered sale deed dated **26.01.1989**. Respondent No.1 in his written statement has claimed that he has no knowledge of the contents of para-2 of the plaint and to set up his defense he has given details of another set of title documents on the basis of which he has acquired the title and set up a defense as owner to deny possession of the suit plot to the applicant. Therefore, the reading of plaint suggest that the applicant/ plaintiff has filed a simple suit for recovery of possession of specific suit plot under **Section 8** of Specific Relief Act reproduced below:-

> **8. Recovery of specific immoveable property.**—A person entitled to the possession of specific immovable property may recover it in the manner prescribed by the Code of Civil Procedure, 1908 (V of 1908).

The plaint shows that the plaintiff has not sought any declaration as to his entitlement to any legal character and the perusal of written statement also shows that Respondent No.1 has not raised any preliminary legal objection to the bar to the suit in terms of **Section 42** of the Specific Relief Act, 1877 which reads as follows:-

> **42. Discretion of Court as to declaration of status or right.---** Any person entitled to any legal character, or to any rights as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and

> the plaintiff need not in such suit ask for any further relief.
>
> **Bar to such declaration.----** Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

There has been no denial of legal character or to any right to any property from either side prior to filing of the suit by the applicant to recover possession of the suit plot. In fact both the parties were disputing their entitlement to hold/ possess specific 'suit plot' on the basis of certain title documents. And the question of title of the applicant and/or Respondent No.1 could have automatically been determined had the Court chosen to decide issue No.1, 3 & 4 relating to entitlement of possession of the suit plot by the contesting claimant. The applicant has prayed for cancellation of the document relied upon by Respondent No.1 as basis of his entitlement to hold possession of the suit plot. **Section 8** of the Specific Relief Act reproduced above refers to the manner prescribed by the Civil Procedure Code for the person entitled to the possession of specific immovable property to recover it and the provisions of **Section 42** of the Specific Relief Act, 1877 are about declaration of legal character of any person if the said legal character has been denied by any person. Therefore, in view of the pleadings of the parties even the additional issue No.1 relating to the bar of **Section 42** of the Specific Relief Act, 1877 was neither relevant nor proper application of law in the given facts of the case in hand. The case-laws relied upon by both the counsel dealing with the maintainability of the suit under **Section 42** of the Specific Relief Act, 1877 has no relevance in the present case.

15. The two provisions of the Specific Relief Act, 1877 are not complementing each other. Both are independent provisions of law and deal with different kind of grievances for which one may have to approach the Court. The perusal of **Section 42** of the Specific Relief Act, 1877 does not show that any person who is deprived of his immovable property by any unscrupulous person cannot sue the said illegal occupant and recover its possession without seeking a declaration of his entitlement to his legal character. The Hon'ble Supreme Court in the case of Taj Wali Shah ..Vs.. Bakhti Zaman reported in **2019 SCMR 84** has categorically held that a person who is entitled to the possession of specific immovable property is not required to seek a prior declaration to any legal character. In a suit for recovery of possession of immoveable property by an owner of the property the relief of declaration of the entitlement is an inbuilt relief. The relevant observations of Hon'ble Supreme Court in Taj Wali Shah case are as under:-

> 13. Let us now address the preliminary objection of the learned counsel for the respondent; that Taj Wali Shah could not seek possession under section 8 supra without praying for a declaration of his title over the disputed house. This issue has been aptly commented upon in a recent judgment of this Court passed in the case of Hazratullah and others v. Rahim Gul and others (PLD 2014 SC 380), in terms that:
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> > "... it may be held that in a suit under section 8 of the Specific Relief Act, 1877, the declaration of the entitlement is an inbuilt relief claimed by the plaintiff of such a case. Once the plaintiff is found to be entitled to the possession, it means that he/she has been declared to be entitled, which includes the declaration of title of the plaintiff qua the property."
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> 14. Interestingly, in the present case, the trial Court, in fact, framed two issues relating to the contesting claim of title over the disputed house to the effect:
>
> > "……
>
> 7 Whether the defendant is the owner of the disputed house?

> 8. Whether the plaintiff is the owner of the disputed house vide Iqrar-Nama dated 31.03.2010? "
>
> 15. In furtherance to the aforementioned two issues framed by the trial Court, and the evidence adduced by the parties in support of their respective claims to title over the disputed house, the trial Court passed a definite finding in favour of Taj Wali Shah. This finding transcended into an express declaration of title in the decree, when no specific prayer for title of the disputed house was sought by Taj Wali Shah in his plaint. This being so, it reaffirms the ratio of Hazratullah's case supra, that in a suit under section 8 of the Act of 1877, there is ordinarily an inbuilt prayer for the declaration of entitlement to possession, which is sought by the plaintiff. In view of the express declaration of title in the decree passed by the trial Court, the preliminary objection of the respondent and direction of the High Court, for Taj Wali Shah to first seek a declaration of title under section 42 of the Act of 1877 before filing a suit for possession under section 8 supra was not justified, and in the circumstances of the present case it would in fact be an exercise in legal futility.

The record shows that the trial Court has also framed issues No.1 and 4 relating to the claim of title over disputed suit plot. Therefore, the case in hand is fully covered by the law laid down by the Hon'ble Supreme Court in the case of Taj Wali Shah (supra).

16. In the above background when I have to conclude that the findings of the two courts below treating the additional issue No.1 as legal and dismissing the suit is not sustainable and the trial court has withheld its verdict on the issues of facts I am left with no option except to remand the case. The Hon'ble Supreme Court in the case of Hafiz Muhammad Siddique Anwar (supra) has also observed that in its limited jurisdiction under **Section 115** of the CPC the High Court is not supposed to decide the issues of fact on merit as it may **cause prejudice to any of the parties before it became the one out of them against whom decision has been given on merit has been deprived of the right of appeal before the next Court**. Had the

learned courts below instead of preferring shortcut to their solemn responsibility of doing substantive justice between the parties the 21 years spent in this litigation from 1989 to 2020 could not have been a total loss of time. This also explains the wisdom of the superior court in repeated emphasis that once the court has consumed the time in recording evidence an effort should be made to dispose of the case both on law point as well as on merit. As experienced in the case in hand while reversing the findings of the two courts below on the issue law, non-compliance of the provisions of **Order XX Rule 5 CPC** and **Order XLI Rule 30 CPC** by the two courts below has become even more painful on account of lapse of 20 years. It has adversely reflected on the performance of the courts since this case has to be remanded for decision on merit on the pending issues.

16. In view of the above, both the impugned judgments of the two Courts below are set aside. It is a case of one date for hearing of final arguments; therefore, both the parties are directed to appear before the trial Court on the first opening day of Civil Courts after summer vacations file their respective arguments in writing on each issue and also address the Court if so desired as the case is remanded to the II-Senior Civil Judge, Malir, Karachi. The learned trial Court should give decision on each and every issue on merits within 30 days from the first day of nmmreopening of Courts after summer vacations. Compliance report should be sent to this Court by the concerned Senior Civil Judge through MIT-II for perusal in chamber.

JUDGE

Karachi, Dated:18.05.2020

SM / Ayaz Gulq