

Judgment Sheet

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

II<sup>nd</sup> Appeal No. 44 of 2010

Appellant : Chaudhry Muhammad Zaka Ashraf, through  
Sardar Muhammad Ajaz Khan, Advocate.

Respondents 1 to 3 : Mst. Sumera Iqbal, Muhammad Ashraf and  
Mst. Rukesh Raza, called absent.

Respondent No.4 : Deputy Director Lands Latifabad, Hyderabad,  
called absent.

Respondent No.4(a) : Municipal Commissioner Hyderabad, called absent.

Respondent No.5 : Sub-Registrar, Latifabad, Hyderabad, called absent.

Respondent No.6 : Government of Sindh, through the Secretary Revenue,  
Hyderabad, called absent.

Respondent No.7 : Mst. Zahida Naz, through Mr. Jhamat Jethanand,  
Advocate.

Date of hearing : 07.02.2013.

**J U D G M E N T**

**NADEEM AKHTAR, J.** – The appellant filed F.C. Suit No.305/1998 against the respondents for declaration, injunction, cancellation of sale deed, possession of 1/4<sup>th</sup> share, and mesne profits, which was dismissed by the learned II<sup>nd</sup> Senior Civil Judge, Hyderabad, vide judgment and decree dated 30.09.2004. Against the said judgment and decree, the appellant filed Civil Appeal No.298/2004, which was dismissed by the learned VII<sup>th</sup> Additional District Judge, Hyderabad, vide judgment and decree dated 10.08.2010 and 25.08.2010, respectively. Being aggrieved with the said judgments and decrees, the appellant has preferred this second appeal.

2. Respondent No.1 is the widow of late Muhammad Raza Ashraf (**‘the deceased’**), and respondents 2 and 3 are the real son and daughter, respectively, of the deceased. The appellant is the real brother of the deceased, the paternal uncle of respondents 2 and 3, and the brother-in-law of respondent No.1.

3. Relevant facts of the case are that respondent No.1, after the death of her husband / the deceased, filed an application before the learned Guardian Judge, Rahim Yar Khan, for appointment of herself as the guardian of the person and property of her minor children / respondents 2 and 3. The appellant, who was

impleaded as a respondent in the said application, contested the said application. Vide judgment delivered on 28.10.1993 by the learned Guardian Judge, the respondent No.1's application was allowed, and she was appointed as the guardian of the person and property of her minor children / respondents 2 and 3. Accordingly, a Guardianship Certificate was issued in the name of respondent No.1 on 06.11.1993. Thereafter, the appellant filed an application before the learned Guardian Judge for the removal of respondent No.1 as the guardian of minor respondents 2 and 3. On 11.03.1999, respondent No.1 filed an application, seeking permission to sell the properties of the minor respondents 2 and 3 situated in Deh Seri and Rajbari, Hyderabad Sindh. Both the applications were hotly contested by the rival parties, and the same were disposed of by the learned Guardian Judge by a consolidated order dated 10.05.1999. The respondent No.1's application for selling the properties of the minor respondents 2 and 3, was allowed, and the appellant's application for the respondent No.1's removal as the guardian of minor respondents 2 and 3, was dismissed.

4. It would not be out of place to mention here that the aforementioned application for the removal of respondent No.1 as the guardian of minor respondents 2 and 3, was filed by the appellant *inter alia* on the ground that the guardian / respondent No.1 did not get the property ; namely, Plot No.216/A, Unit No.2, Latifabad, Hyderabad, transferred as per the terms and conditions of the Guardian Certificate, but sold the said property through a registered sale deed dated 04.09.1998. In his above mentioned order dated 10.05.1999, the learned Guardian Judge observed that respondent No.1 had admitted that the said property was sold by her inadvertently without prior permission of the learned Guardian Judge, but the sale proceeds thereof were spent by her on constructing a bungalow in Lahore for the welfare of the minor respondents 2 and 3, as they had moved to Lahore with her and had settled there ; respondent No.1 had furnished statement of accounts in this behalf ; respondent No.1 had produced documents to establish that she had gifted in favour of the minor respondents 2 and 3, a valuable immovable property measuring 04 kanals situated in Defence, Lahore ; and, respondent No.1 had also produced documents to show that she had transferred in favour of her minor son / respondent No.2, agricultural lands measuring 60 kanals 04 marlas, and 76 kanals and 16 marlas, situated in Rahim Yar Khan. It was held by the learned Guardian Judge that the act of selling Plot No.216/A, Unit No.2, Latifabad, Hyderabad, by respondent No.1 ignoring the limitations prescribed by Section 29 of the Guardians and Wards Act, 1890 was an inadvertent act, as the sale proceeds of the said property were spent by her in constructing a residential house for the welfare of the minor respondents 2 and 3, and she also gifted and transferred in their favour immovable properties worth millions of Rupees. It was further held that there was nothing on record to suggest abuse of trust, failure or incapacity on the

part of respondent No.1 in the performance of her duties ; ill-treatment or neglect to take proper care of her wards ; or any interest adverse to careful performance of duties. On the basis of the above observations and findings, the aforementioned application for the removal of respondent No.1 as the guardian of minor respondents 2 and 3, was dismissed by the learned Guardian Judge vide order dated 10.05.1999.

5. The aforementioned consolidated order dated 10.05.1999 was assailed by the appellant before the learned Additional District Judge, Rahim Yar Khan, who dismissed the appeal filed by the appellant vide order dated 14.09.1999. The appellant then filed Writ Petition No.4354/1999 before the learned Lahore High Court, Bahawalpur Bench, Bahawalpur, which was allowed vide judgment delivered on 17.04.2000, whereby the matter was remanded back to the learned appellate court. After remand, the appeal filed by the appellant was once again dismissed on 31.05.2000 by the learned appellate court. This order was impugned by the appellant before the learned Lahore High Court, Bahawalpur Bench, Bahawalpur, in Writ Petition No.2947/2000, which was dismissed vide judgment delivered on 17.05.2003, by holding that both the learned courts below had passed the impugned orders on a due appreciation of law and facts ;and, no injustice had been done to the appellant, rather the same were also in conformity with the well-settled principles of justice, equity and good conscious.

6. On 07.09.1998, that is, after about five (05) years of passing of the order of appointment of respondent No.1 as the guardian of her minor children / respondents 2 and 3, the appellant filed F.C. Suit No.305/1998 before the II<sup>nd</sup> Senior Civil Judge, Hyderabad, against respondents 1 to 6, for declaration and injunction. It was claimed by the appellant in his Suit that, by virtue of a family arrangement and compromise before the learned Guardian Judge, he became the owner of 1/4<sup>th</sup> share in the aforementioned Plot No.216/A, Unit No.2, Latifabad, Hyderabad, with construction thereon (**‘the suit property’**) ; and, the remaining 3/4<sup>th</sup> share in the suit property became the ownership of respondents 2 and 3. In his Suit, it was the case of the appellant that the Suit property was illegally transferred by the Municipal Commissioner, Hyderabad / respondent No.4(a) in the names of respondents 1 to 3, as he had 1/4<sup>th</sup> share therein, and the remaining 3/4<sup>th</sup> share therein was owned by respondents 2 and 3 ; and, respondent No.1 had no share in the suit property. As the suit property had been purchased by respondent No.7 from respondents 1 to 3, she was impleaded in the appellant’s Suit through an amended plaint filed on 21.09.2000. It was prayed by the appellant in his Suit that he and respondents 2 and 3 be declared as the owners of 1/4<sup>th</sup> share and 3/4<sup>th</sup> share, respectively, in the suit property ; the approval and transfer order of the Municipal Commissioner for the transfer of the suit property in favour of respondents 1 to 3, be cancelled ; correct

entries in respect of the suit property be maintained ; and, possession of the 1/4<sup>th</sup> share of the appellant be handed over to him. Consequential relief of permanent and mandatory injunction was also sought by the appellant.

7. Respondents 1 to 3 filed their joint written statement, wherein they denied all the averments and allegations made by the appellant. It was specifically pleaded by them that the appellant's Suit was barred under Sections 42 and 56 of the Specific Relief Act, 1877. It was specifically denied by them that the appellant became the owner to the extent of 1/4<sup>th</sup> share in the Suit property by virtue of any family arrangement, compromise or order passed by the Guardian Judge. It was specifically pleaded by them that the Suit property was originally allotted to the deceased, who was the exclusive owner thereof ; after his death, the Suit property was inherited only by them ; and, the same was rightly transferred in their names. The facts relating to the proceedings before the learned Guardian Judge, the dismissal of the appellant's application therein, and the dismissal of the appellant's appeal, were also disclosed by respondents 1 to 3 in their written statement.

8. Respondent No.7 / the purchaser also filed her written statement, disputing the claim of the appellant. It was pleaded by her that she purchased the Suit property for valuable consideration from respondents 1 to 3, who were the lawful owners thereof. It was also stated by her that her title in respect of the Suit property was lawful and absolute, and the appellant had no right, title or interest in the Suit property.

9. The Deputy Director Lands Latifabad, and the Municipal Commissioner Hyderabad, respondents 4 and 4(a), respectively, also filed their joint written statement. They confirmed that the Suit property was originally allotted in the name of the deceased vide allotment order No.97 dated 05.06.1975 ; respondents 1 to 3, being the legal heirs of the deceased, were entitled to the Suit property ; and, in view of the Guardianship Certificate granted by the learned Guardian Judge, the Suit property was transferred in the names of respondents 1 to 3. It was denied by these respondents that any telegram was received by them from the appellant.

10. Following ten issues were framed by the learned trial court on the basis of the pleadings of the parties :

- “ 1. *Whether the plaintiff is owner of the 1/4<sup>th</sup> share of the property in dispute, as per compromise partition and settlement in the guardianship application No.319 of 1992 ?*
2. *Whether the sale of 1/4<sup>th</sup> share of the plaintiff on the disputed premises was illegally, fraudulently sold by the defendant No.2 to defendant No.7 ? If so what is the effect ?*

3. *Whether the Suit property was owned by the husband of defendant No.1 and father of defendant No.2 and 3 ?*
4. *Whether after the death of Muhammad Raza Ashraf the Suit plot was exclusive inherited by defendant No.1 to 3 who had full share of 100 paisas in the Suit plot ?*
5. *Whether the defendant No.1 has rightly sold away the Suit property to defendant No.7 by registered Sale Deed ?*
6. *Whether writ petition No.WP-2947/2000 BWP dated 03.07.22000 filed by plaintiff against Additional District Judge and others is pending before the Honourable Lahore High Court Bahawalpur Bench ?*
7. *Whether the Suit is not maintainable under the law ?*
8. *Whether this Court has no jurisdiction to try the Suit ?*
9. *Whether the Suit is barred U/S 42 and 56 of Specific Relief Act ?*
10. *What should the decree be ?”*

11. The parties led their respective evidence. The appellant produced his attorney Abdul Majeed as his witness, who produced a number of documents in support of his claim. Respondents 1 to 3 produced as their witness one Ziaullah, the attorney of respondent No.1, who also produced a number of documents including copies of judgments delivered by the learned Lahore High Court, Bahawalpur Bench, Bahawalpur. Respondent No.7's attorney Abdul Rasheed was examined on her behalf. Respondents 4 and 4(a) examined their officer Muhammad Iqbal, who produced several documents. After examining the evidence produced by the parties and after hearing them, the Suit filed by the appellant was dismissed by the learned trial court vide impugned judgment and decree dated 30.09.2004. Civil Appeal No.298/2004 filed by the appellant against the said judgment and decree, was also dismissed vide impugned judgment and decree dated 10.08.2010 and 25.08.2010, respectively.

12. The learned counsel for the appellant and respondent No.7 were heard at length, and the R&P of both the courts below was also examined by me in detail with their able assistance. The entire claim of the appellant was based on a family settlement / compromise purportedly arrived at between the parties before the learned Guardian Judge. It was noticed by the learned trial court that the appellant did not produce the compromise application filed before the learned Guardian Judge, nor did he examine the record keeper of the said court. It was further observed by the learned trial court that the purported compromise was also not produced by the appellant in his evidence, and no reliance could be placed on a document which was not a certified copy, especially when no one from the concerned court had been examined to verify the said copy. It was also observed by

the learned trial court that the appellant's witness had admitted in his cross examination that the suit property was originally allotted to the deceased. It was held by the learned trial court that the burden to prove that the appellant had 1/4<sup>th</sup> share in the suit property in pursuance of the alleged compromise, was upon the appellant, but he failed in discharging such burden, therefore he had no legal right or character in the suit property.

13. The learned lower appellate court noticed that the plaintiff's witness had failed to produce the disputed compromise, whereby the appellant was claiming 1/4<sup>th</sup> share in the suit property. It was also noticed by the learned lower appellate court that the appellant's witness had admitted in his cross examination that respondents 1 to 3 were the legal heirs of the deceased ; and, the suit property was owned by the deceased ; he did not produce any proof before the trial court regarding the case filed before the learned Guardian Judge. It was held by the learned lower appellate court that the burden to prove that the appellant was the owner to the extent of 1/4<sup>th</sup> share in the suit property in view of the compromise and settlement in Guardianship Application No.319/1993, was on the appellant, and since such claim had been specifically denied, the appellant was duty-bound to prove this issue, but he failed to do so. The judgment and decree passed by the learned trial court was upheld by the learned lower appellate court in view of the above observations and findings.

14. The aforementioned observations by the courts below and the categorical admissions made by the appellant's witness have also been noticed by me. In addition to the above, I have also noticed that the appellant's witness Abdul Majeed made a false statement on oath in his cross examination. He denied the suggestion that Writ Petition No.2947/2000 was filed by him before the learned Lahore High Court. The correct position was that the said Petition was filed by the appellant through his attorney Abdul Majeed (the appellant's witness), and this fact is clearly mentioned in the title of the said Petition. The evidence produced by this witness on behalf of the appellant became doubtful in view of the false statement given by him on oath. Writ Petition No.2947/2000 filed by the appellant was dismissed on 17.05.2003 by the learned Lahore High Court, as noted in paragraph 5 (supra), and the said judgment attained finality long time back. It is to be noted that Civil Appeal No.298/2004, wherein the impugned judgment and decree were passed, was filed by the appellant on 01.11.2004, and this Second Appeal was filed by the appellant before this Court on 08.11.2010. The fact of the dismissal of his Writ Petition No.2947/2000 by the learned Lahore High Court on 17.05.2003 was concealed by the appellant from the learned lower appellate court as well as from this Court. On the contrary, the grounds mentioned in the memorandum of this appeal have been urged as if the judgment delivered by the learned Lahore High Court on 17.05.2003

dismissing the appellant's Writ Petition No.2947/2000, does not exist, or is not in the field.

15. It is an admitted position that the Suit property was originally allotted to the deceased, and respondents 1 to 3 are his legal heirs. It is also an admitted position that respondent No.2 is the real son of the deceased. Thus, in the presence of respondent No.2, the appellant / brother of the deceased did not inherit any part of the estate of the deceased, and the entire estate of the deceased devolved only upon respondents 1 to 3. As far as the question of the alleged family settlement / compromise is concerned, the appellant miserably failed to prove the same, although the burden to prove the same lay heavily upon him and he had full opportunity to do so. It was urged on behalf of the appellant that both the learned courts below failed to notice that the appellant had produced the family settlement / compromise. Upon examination, the said document revealed that it does not bear the signatures of the parties on every page, especially the page on which the suit property is allegedly mentioned. It was held by the learned courts below that the said document was inadmissible in evidence, as it was not a certified true copy. The trial court had discussed the entire evidence and had given exhaustive findings on each and every issue after full application of mind. Likewise, the learned lower court below also gave detailed reasons in the impugned judgment for agreeing with the learned trial court. After examining and appreciating the evidence, I have come to the conclusion that the findings of both the learned courts below are in accord with the evidence on record, and are based on proper appreciation of the evidence.

16. In *Muhammad Feroze and others V/S Muhammad Jammal Ali*, **2006 SCMR 1304**, it was held by the Hon'ble Supreme Court that jurisdiction of High Court is limited in second appeal to the extent of interference on a question of law and not on facts. In the case of *Abbas Ali Shah and 5 others V/S Ghulam Ali and another*, **2004 SCMR 1342**, the Hon'ble Supreme Court was pleased to hold that ordinarily the findings of the appellate court are not interfered with in second appeal if the same are found to be substantiated by evidence on record and are supported by logical reasoning. In *Fazal Rehman V/S Amir Hyder and another*, **1986 PSC 1222**, the Hon'ble Supreme Court was pleased to hold that concurrent findings of fact reached by the lower courts will not be disturbed by the High Court in second appeal, even if it disagrees with such findings on its own view of the evidence. In *Malik Katoo and three others V/S Allah Bakhsh and two others*, **1986 PSC 635**, the Hon'ble Supreme Court refused leave and maintained the decision of the High Court dismissing the second appeal on the ground that a concurrent finding of fact could not be disturbed if the same is based on evidence. In the cases of *Fazal Ellahi V/S Sarfraz Khan*, **1987 PSC 195**, and, *Qurban Hussain etc. V/S Hukam Dad*, **1984**

**PSC 939**, it was held by the Hon'ble Supreme Court that concurrent findings of fact could not be disturbed by the High Court.

17. The upshot of the above discussion is that the concurrent findings of both the learned lower courts do not call for any interference by this Court in this second appeal, which is liable to be dismissed. Foregoing are the reasons of the short order announced by me on 07.02.2013, whereby this second appeal along with all pending applications was dismissed.

J U D G E