

Judgment Sheet
**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD**

IInd Appeal Nos. 44 of 2021

Abdul Malik v. Province of Sindh and others

IInd Appeal Nos. 45 of 2021

Abdul Malik v. Province of Sindh and others

Mr. Aqeel Ahmed Siddiqui, Advocate for appellant
Mr. Irfan Ahmed Qureshi, Advocate for Respondent 4 & 5

Date of Hearing : 29.04.2022

Date of Judgment : 03.06.2022

J U D G M E N T

MUHAMMAD SHAFI SIDDIQUI, J.- By a consolidated Judgment two suits were disposed off by trial court; appellant filed suit for specific performance against respondent Nos. 4 and 5 whereas they (respondents No. 4 & 5) filed suit for possession and recovery of rent and mesne profit. Following consolidated issues were framed:-

1. *Whether suit of plaintiff i.e. F.C. Suit No. 356 of 2015 is not maintainable? (OPD)*
2. *Whether suit of defendant (plaintiff in F.C. Suit No. 788 of 2016) is not maintainable? (OPP)*
3. *Whether there was an oral agreement dated 30.3.2009 between plaintiff and Abdul Malik and late Hushmet Ali Khan? If yes, whether late Hushmet Ali Khan sold out suit property i.e house No. A/115-2264/1 admeasured 139-1/2 Sq.yds, situated at Tando Wali Muhammad Hyderabad against sale consideration amount of Rs.75,00,000/-? If yes, whether plaintiff paid total advance amount of Rs.51,95,000/- in number of installments to late Hushmet Ali Khan? If no, whether, verbal agreement and receipt dated 30.3.2009 is a bogus, manipulated, fabricated and forged document with forged signature of late Hushmet Ali Khan and liable to be cancelled? (OPP)*

4. *Whether defendant No.2 was entered in suit property as a tenant which was given to him at the assurance of the defendant No.3? If yes, whether defendants are entitled for mesne profits of Rs. 14,65000/- due against the defendant No.2 & 3 jointly and severally? (OPD)*
5. *Whether defendants are entitle for the restoration of possession of suit property bearing city survey number A/115-2264/1 admeasuring 139-1/2 sq.yds situated at Tando Wali Muhammad, Hyderabad constructed house of two stories, such as ground + 2 stories for its physical, exclusive possession from defendant No. 2 & 3? (OPD)*
6. *Whether defendants are entitled for damages of Rs. 10,000,000/- from defendant No. 2 and 3? (OPD)*
7. *Whether plaintiff Abdul Malik is entitled for specific performance of contract as prayed? (OPP)*
8. *Whether defendants No. 4 & 5 (plaintiffs in subsequent suit) are entitled for relief as prayed? (OPD)*
9. *What should the decree be?*

2. Appellant in his leading suit recorded evidence of Muhammad Rashid as attorney being son of appellant, Shahid Iqbal s/o Laiq Ahmed being cousin of appellant, Anwar Shahzad s/o Shahid Rasool being friend of Muhammad Rashid (attorney), Abdul Raheem s/o Haji Khan Branch Manager MCB, Ahsan Ali Lodhi s/o Anwar Hussain. On the other hand Masood Ali Khan s/o late Hushmet Ali Khan deposed evidence. Iftikharullah being childhood friend of Hushmat Ali Khan. Copies of these depositions were filed by appellant for reappraisal in this Second Appeal having its precincts within frame of Section 100 CPC.

3. The trial court on preponderance pleased to dismiss the suit of appellant whereas partly decreed the suit of respondent Nos. 4 and 5 to the extent of prayer clause 'A' i.e. agreement of sale being forged, manipulated and fabricated. Appeal preferred by both set of litigants; Respondents 4 and 5 filed C.A. No. 242 of 2019 whereas appellant filed appeal No. 249 of 2019. After hearing respondent's appeal was allowed thereby granted Decree for possession, mesne profit as per different prayer clauses of suit No. 788 of 2016.

4. Aggrieved of consolidated Judgment passed in aforesaid appeals, instant second appeal was filed by appellant on the ground that the evidence was not considered and also that suit for possession and mesne profit should not have been decreed.

5. I have heard learned counsel and perused the record.
6. I will deal with the suit for performance filed by appellant, which was concurrently dismissed by two courts below.
7. There was no impartial evidence of any witness of the appellant, sale consideration was not proved and substantial portion of sale consideration was claimed to have been paid in cash whereas only meager amount was shown to have been deposited in the accounts of respondent, which in fact was deposited towards part of rental outstanding. The evidence was unsatisfactory as found by the courts and not convincing even for this court, having jurisdiction under Section 100 CPC. Section 100 CPC enabled a court to reappraise if any of the evidence was outrightly ignored and / or could have overturn the decision, hence no interference, as far as dismissal of suit for specific performance of appellant is considered, is required.
8. In the suit for possession and mesne profit however I need to examine the evidence as crucial part of pleadings and evidence was perhaps missed in the count.
9. Respondent pleaded in written statement filed in Suit No. 356 of 2015 (Suit for Specific Performance of Contract) that appellant was inducted as tenant on the ground floor and later on other portion was also rented out cumulatively at Rs.20,000/- per month. In suit No. 788 of 2016 (Suit for Possession), respondents in their plaint also pleaded same and recorded evidence in pursuance thereof as Exhibit 62.

Para 17 of the Written Statement of Suit No. 356 of 2015

“that the contents of para No.9 of the plaint are vehemently denied to the extent that due to the owner of the suit property the father of the defendants rented out his house to the plaintiff only the portion of ground floor of the suit property hence the remaining Ist and IInd Floor was locked and at that time due to friendly affairs the plaintiff contracted the defendant father at USA and narrated the residential problem before the defendants father resulting the defendant father rent out the ground floor to the plaintiff without any rent agreement.

Para 9 of the plaint of F.C. Suit No. 788 of 2016

“that after the death of sister of late Hushmet Ali Khan, the defendant No.3 called the plaintiff father that the defendant No.2 is the friend of defendant No.3 having family terms, the defendant No.2 was residing in Ghotki Gali Hyderabad and the accommodation was very small, the suit property may be given to the defendant No.2 on monthly rental

basis. On such request of defendant No.3, the suit property was given to defendant No.2 on monthly rent in the sum of Rs.15,000/- per month only for ground floor, Late Hushmet Ali Khan consistently / repeatedly on telephone insisted and instructed for execution of rent agreement into writing with defendant No.2 but the defendant No.3 extended hollow hopes for the execution of rent agreement. The rent was already fixed to Rs.15,000/-, which was deposited by the defendant No.2 in the bank account No.4792-2 MCB Jail Road Branch Hyderabad, the account number was already supplied to the defendant No.3 by the father of the plaintiffs, which he communicated to defendant No.2 and also for depositing the rent amount in the same account number.

It is necessary to mention here that the wife of the defendant No.2 was expired, the defendant No.2 contracted 2nd marriage, at that time the defendant No.3 in America and requested the father of plaintiffs to give a room constructed on the 1st floor to the tenant defendant No.2 as the defendant No.2 has contracted a 2nd marriage, they live there, on such request late father of the plaintiff called on cell phone to Imran Hussain s/o Murtaza Hussain who is the neighbour of the friend Iftikharullah Khan to deliver the keys of 1st floor to the defendant No.2, who received the key from such Imran Hussain s/o Murtaza Hussain and reside there on the 1st floor. The defendant No.2 and 3 slowly and gradually after the death of late Hushmet Ali Khan in the month of August 2013, occupied the 2nd floor also and grabbed the entire house with the active connivance and havoc rule of defendant No.3. As such, the entire house is controlled by defendant No.2 and 3.

Para 10 of the plaint of F.C. Suit No. 788 of 2016

“ that since the month of November, 2011, till today the property on rent, the fraud is perpetuated after the death of late Hushmet Ali Khan. This entire fraud is played by the defendant No.3 Muhammad Aijazuddin Shaikh and make the defendant No.2 as a tool although the property is a rented property to the defendant No.2 only ground but on the false pretext the entire property is grabbed by the defendant No.2 and 3. The defendant No.3 is residing in the same premises with the family of defendant No.2 having no blood relation but being a master mind of perpetuating fraud through fraudulent sale agreement, making false signature of late Hushmet Ali Khan, as such no document was ever reduced into writing by Late Hushmet Ali Khan, nor sale out the suit property. All documents are bogus, fabricated, void and defendant No.2 was no more solvent to purchase the suit property.

Para 11 of the plaint of F.C. Suit No. 788 of 2016

“that defendant No.2 only paid a meager amount of rent in the bank account of late Hushmet Ali Khan as a monthly rent of the ground floor. And claim of the same as purchased property from Late Hushmet Ali Khan, which claim of the defendant No.2 is bogus claim merely to deprive the plaintiff from their lawful, legitimate inherited property, after the death of plaintiffs father, such act of defendant No.2 and 3 is contrary to law, liable for criminal proceedings.

Para 12 of the plaint of F.C. Suit No. 788 of 2016

“that the suit property was on rent with the defendant No.2 ground floor only and after the death of late Hushmet Ali Khan in August 2013 the other two portion the suit property are also taken by the defendant No.2 and each floor also contain the rent of Rs.10,000/- per month, but after payment of only an amount of Rs.195,000/- in the bank account, nothing is to be paid in lieu of monthly rent by the defendant No.2 as such the entire rent amount is outstanding dues against the defendant No.2.

10. The significant pieces of evidence which may have a role in reconsidering the finding of Appellate Court in the suit for possession is as under:-

“All assurance on behalf of Abdul Malik was given by professor Aijaz Shaikh. Subsequently, on such assurance, the ground floor of the suit house was given on rent through verbal commitment to Abdul Malik against rent of Rs.15,000/- per month. There was two rooms at ground floor which were fully furnished while third room was used as drawing room in which my father under locked. In absence of my father, one mutual friend namely Murtaza was used to look after the first and second floor of the suit property. My father has asked Abdul Malik to deposit the rent amount in his bank account of MCB Bank jail road branch Hyderabad. In October 2011, uncle Iftikhar came at our house in Los Angeles and when Aijaz had heard about presence of uncle Iftikhar in our house, he started visiting him in our house. During third/ fourth visit, Aijaz has asked my father that Abdul Malik requires first floor of the suit property as he was getting second marriage. My father has obtained opinion from uncle Iftikhar about proposal given by Aijaz and uncle Iftikhar has given his consent to rent out the first floor to Abdul Malik. Uncle Iftikhar further asked my father not to rent out one room situated at first floor which was personal room of my father but my father told him that said room was required by Abdul Malik as said room was fully furnished having a Air-Condition but subsequently, first floor of suit property was also rented out to Abdul Malik against a rent of Rs.5000/- per month and collectively rent of ground floor and first floor became 20,000 per month but Abdul Malik never deposited any rent in account of my father.”

11. In view of above, how a suit for possession could be maintained, since eviction under rent laws is possible only on grounds available under Section 15 of Sindh Rented Premises Ordinance, 1979, such as default, personal requirement, re-letting, misuse and reconstruction etc and under Section 14 of Sindh Rented Premises Ordinance, 1979. Although law does not restrict landlord to file suit but for eviction of tenant of premises under Sindh Rented Premises Ordinance, 1979, jurisdiction however, vest with rent controller. Tenancy under any other law is not under discussion.

12. The pleadings and evidence shows that ground and first floor was admittedly rented out by respondent to appellant and hence eviction of such portions could only be possible through eviction proceedings under SRPO 1979. Since appellant was in occupation as tenant of ground and first floor, respondent was / is entitled for a fair rent of the period the tenement would remain in occupation of appellant and respondent may recover rental outstanding and not mesne profit. The judgment / decree of appellate court in C.A. No. 242 of 2019 to the extent of mesne profit and possession of rented premises i.e. ground and first floor is set aside whereas for a premises which was not rented out the decree of the appellate court would remain intact and executable. Resultantly IInd Appeal No. 44 of 2021 is allowed in the above terms and IInd Appeal No. 45 of 2021 is dismissed.

JUDGE