ORDER SHEET IN THE HIGH COURT OF SINDH AT KARACHI

R.A. NO.172/2009

Date Order with signature of Judge

PRESENT: MR. JUSTICE SALAHUDDIN PANHWAR

- 1. For hearing of CMA No.3965/2009
- 2. For hearing of main case.

09.10.2020

Mr. Khawaja Shamsul Islam advocate for applicant.

Mr. Muhammad Ali Hakro advocate for respondent.

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Heard learned counsel for respective parties. Learned counsel for respondent has relied upon 2009 SCMR 574, PLD 1993 Karachi 805, 2014 CLC 98, 2014 CLC 311 and PLD 1983 SC 53.

2. Precisely, relevant facts are that respondent No.1 filed suit for declaration, injunction, cancellation of trust deed and possession of Macca Masjid contending that Kathiawar cooperative Housing Society was registered on 25.2.1949 under the Cooperative Society Act with the object that the said society has to carry that trade of building and of buying, selling, hiring, letting out and development of the land in accordance with the principles of the society so also to carry on social, creative and educational work in connection with its member. The society enjoyed full power to do all things it deems fit and necessary or expedient for the accompaniment of all the object of the society envisaged in the by-laws. The society acquired a plot of land from Government and after having the same developed and divided into 3 blocks namely A, B and C the society earmarked the plot of land for construction of Mosque and constructed the mosque in each block with own funds without any donation. The name of all the 3 mosques were Mecca Masjid, Madina Masjid and Maryam Masjid. The society controlled the affairs of administration and management of each mosque through sub-committee elected annually. It is further averted in the plant that in the first week of January 1991, the plaintiff's society heard a rumor that a trust is being created by the regular Namazies of the Macca

Mosque, who are secretly trying to create the said trust behind the back of the plaintiff's society with malafide intention, subsequently it transpire that defendant No.2 to 9 managed to form so called Macca Masjid Trust on 19.1.1991 which enlightened on 28.1.1990 when they terminated the Imam namely M. appointed by the society. The election of the executive committee of the society and subcommittee of the mosque used to be held regularly without any discrimination about belief, maslak or faith.

- 3. The core issue, involved, is with reference to non-framing of the 'point of determination' i.e non-compliance to mandatory requirement of provision of Order XVI rule 31 CPC. I would take no exception to legal position that framing of point for determination is mandatory in nature, however, the purpose thereof is to have a reasonable and legal response from the appellate Court to available material for stamping or reversing the judgment of trial court. I would take guidance from the judgment, relied upon by learned counsel for appellant as 2009 SCMR 589. The relevant portions thereof are as follows:-
 - "8. ... In the instant case, a bare perusal of the judgment of the first appellate Court clearly reflects that it has not given due attention to the available evidence on record...
 - 9. ...In the case in hand the appellate Court has given cursory judgment mainly depending on the decision of the trial Court although sufficient material in the shape of evidence was available before it. *The judgment of the first appellate Court is itself a big reason for remand of the case*.

(underlining is for emphasis)

Admittedly, appellate court has failed to determine 'the point of determination' which, otherwise, is mandatory requirement within meaning of Order 41 rule 31 CPC. Issue No.3, 5, 6 as referred were discussed by the trial court in very detailed manner except issue of applicability of section 92 CPC.

4. At this juncture it would be conducive to refer Para E, F, G and H of appeal wherein plea was taken:-

- "E. that the trial court has failed to appreciate that there has been no complaint whatsoever of mismanagement or misappropriation against the trust or any of the trustees.
- F. That the trial court has erred in holding that the suit is not under valued. The very contents of the plaint itself showed the suit to have been grossly under valued and also that he present respondent NO.1 had avoided to pay the court fee stamps as required under section 7(v) of the Court Fees Act read with section 8 of the Suits Valuation Act which are the provisions applicable to the present case.
- G. That the trial court has not taken into consideration the fact that the property in a mosque vests in Almighty Allah being the religious waqf while the beneficiaries are namazees; and that the trust in dispute is created for their benefit.
- H. That the trial court has passed its judgment mainly on photostate copies of documents placed on record by the plaintiffs which are neither produced as required under law nor the same are admissible."
- 5. All these grounds were not answered and discussed by the appellate court separately which, otherwise, is requirement of procedural law because in appeal the whole case stands reopens. I would also add that plea of *prejudice* because of failure is also there which appears to be having substance because without referral to record (evidence) a 'legal conclusion' can't find its satisfaction because in law it is not the 'conclusion' but the legal reasoning / justification for such conclusion matters. A referral to evidence would always require an explanation to legal question, arising out of such referral which is termed as 'point of determination'. This is, prima facie, reason because of which adherence to such requirement is made as mandatory. Needless to mention that appellate court failed to discuss all the issues nor point of determination, covering all issues, is there hence impugned judgment is not in accordance with law.
- 6. In consequence to above legal position, the impugned judgment of appellate Court is set aside. Case is remanded back to the appellate court to decide the case after framing all the points of determination and providing opportunity of hearing to the parties, preferably within three months.