

**ORDER SHEET**  
**THE HIGH COURT OF SINDH, KARACHI**  
**II APPEAL No. 226 of 2022**

Dated: Order with signature of Judge(s)

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1. For Orders on office Objections
  2. For hearing of CMA No. 7464 of 2022
  3. For haring of Main Case

Date of Hearing : 17 May 2023, 23 May 2023 and 31 May 2023

Petitioner : Muhammad Nazim through Mr. Liaquat Ali, Advocate.

Respondent No. 1: : Shams u Zaman Konndhar through Mr. Abdul Rauf Malik

Respondent No. 2 : Nemo

Respondent No. 3 : Nemo

Respondent No. 4 : Nemo

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

**MOHAMMAD ABDUR RAHMAN, J.** The Appeal has been maintained by the Appellant under Section 100 of the Code of Civil Procedure, 1908 as against the Judgement dated 29 August 2022 and Decree that was passed by the IXth Additional District Judge Karachi (South) in 1<sup>st</sup> Appeal No. 225 of 2021 which dismissed the appeal that had been filed by the Appellant as against a Judgement and Decree dated 9 November 2021 passed by the Xth Senior Civil Judge Karachi (South) in Civil Suit No. 795 of 2020.

2. The facts leading up to this Appeal are that the Appellant had availed the services of the Respondent No. 1 as an advocate to represent the Appellant in the following litigation:

| S No. | Case Description                 |
|-------|----------------------------------|
| 1.    | Rent Case no. 1287 of 2013       |
| 2.    | Execution No. 03 of 2014         |
| 3.    | First Rent Appeal No. 77 of 2015 |
| 4.    | CP No. S-2819 of 2017            |
| 5.    | Civil Suit No. 172 of 2017       |
| 6.    | Execution NO. 14 of 2019         |
| 7.    | Rent case No. 424 of 2018        |
| 8.    | CP No. S-988 of 2019             |

and for which the Respondent No. 1 claims a balance fee of Rs. 340,000 is payable and owing to him. The Respondent No. 1 has filed Civil Suit No. 795 of 2020 as against the Appellant before the Xth Senior Civil Judge Karachi (South) for the recovery of that amount. He further contends that the Respondent No. 2 was a guarantor for that amount and which amount he claimed in Civil Suit No. 795 of 2020 before the Xth Senior Civil Judge Karachi (South) as against the Appellant and the Respondent No. 1 jointly and severally. The Appellant conversely admits the claim of the Respondent No. 1 but states that he had sold a Flat No. CA-4, Ground Floor, Mini Market Defence View, Phase II, Karachi to the son of the Respondent No. 2 and on account of which the Respondent No. 2 owed the Appellant a sum of Rs. 355,000 and which the Respondent No. 2 had agreed to pay to the Respondent No. 1 to clear the liability of the Appellant. He states that such liability having been assigned by him, he no longer remains liable to the Respondent No. 1

3. The Xth Senior Civil Judge Karachi (South) after hearing the parties to the *lis* by a Judgement dated 9 November 2021 was pleased to decree Civil Suit No. 795 of 2020 on the same date to the amount of Rs. 340,000 as against the Appellant and the Respondent No. 1 jointly and severally. The Respondent No. 1 has maintained Execution Application No. 13 of 2021 before the Xth Senior Civil Judge Karachi (South) and which was also granted on 25 April 2022 with directions to attach the property of the Appellant with police aid.

4. The Appellant being aggrieved by the Judgement and Decree dated 9 November 2021 passed by the Xth Senior Civil Judge Karachi (South) in Civil Suit No. 795 of 2020 had maintained Civil Appeal No. 225 of 2021 before the IXth Additional District Judge Karachi South and which appeal was also dismissed on 29 August 2022.

4. The Appellant being aggrieved by the Judgement dated 29 August 2022 and Decree dated September 2022 that was passed by the IXth Additional District Judge Karachi (South) in 1<sup>st</sup> Appeal No. 225 of 2021 has now maintained this Second Appeal before this Court. He reiterated that he admitted the claim of the Respondent No. 1 but states that he had sold Flat No. CA-4, Ground Floor, Mini Market Defence View, Phase II, Karachi to the son of the Respondent No. 2 and on account of which the Respondent No. 2 owed the Appellant a sum of Rs. 355,000 and which the Respondent No. 2 had agreed to pay to the Respondent No. 1 to clear the liability of the Appellant and as such he was not liable to the Respondent No. 1. He further contended that there was an understanding with the clerk of the Respondent No. 1 that this amount would be adjusted. He on this basis argued that the Judgement dated 29 August 2022 and Decree dated September 2022 that was passed by the IXth Additional District Judge Karachi (South) in 1<sup>st</sup> Appeal No. 225 of 2021 and the Judgement and Decree dated 9 November 2021 passed by the Xth Senior Civil Judge Karachi (South) in Civil Suit No. 795 of 2020 was incorrectly premised in law and were liable to be dismissed. At the time of arguments, the Counsel for the Appellant did not rely on any case law in support of his contentions.

5. Mr. Abdul Rauf Malik appeared on behalf of the Respondent No. 1 and contended that the Appellant having accepted the liability it was not open to him to assign a liability that was admittedly owed by him to the Respondent No. 1 without the consent of the Respondent No. 1. Regarding the alleged settlement that had been made with the clerk of the Respondent No. 1 he alleged that no such agreement was in fact made but assuming that it was neither was the clerk deposed in evidence nor did he have the authority to act on behalf of the Respondent No. 1 to settle such a liability. At the time of arguments, the Counsel for the Respondent No. 1 did not rely on any case law in support of his contentions.

6. I have heard the counsel for the Appellant and the Counsel for the Respondent No. 1 and have perused the record. The Appellant contends that the burden of his contract with the Respondent No. 1 was in effect assigned by him to the Respondent No. 2 without the consent of the Respondent No.1. I am clear that the burden of a contract cannot be assigned with the consent of the creditor and the assignee of that liability. The law has been very succinctly settled in the decision reported as **Tolhurst vs. Associated Portland Cement Manufacturers (1900) Ltd.**<sup>1</sup>

wherein it was held that<sup>2</sup>:

“ ... *Neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor onto those of another without the consent of the contractee. A debtor cannot relieve himself of the liability of his creditor by assigning the burden of the obligations to someone else; this can only be brought about by the consent of all three, and involves the release of the original debtor.*”

The law being clear, the Appellant had no right to assign his liability on to the Respondent No. 2 without the consent of the Respondent No. 1. That consent having admittedly not been forthcoming the liability will remain that of the Appellant.

7. The second contention of the Appellant is equally misplaced. The contention of the Appellants that the debt was settled with a third party who admittedly was neither deposed in evidence to prove such a fact nor apparently had the capacity to settle on behalf of the Appellant is not at all appealing and must be rejected. Clearly the burden of proving such a fact lay on the Appellant and which he having failed to discharge must be rejected.

8. For the foregoing reasons, I seen no illegality or infirmity in either the Judgement dated 29 August 2022 and Decree passed by the IXth Additional District Judge Karachi (South) in 1<sup>st</sup> Appeal No. 225 of 2021 or in the

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<sup>1</sup> [1902] KB 660

<sup>2</sup> *Ibid* at pgs. 668 669

Judgement and Decree dated 9 November 2021 passed by the Xth Senior Civil Judge Karachi (South) in Civil Suit No. 795 of 2020. This Appeal is therefore is misconceived and is dismissed along with all listed applications, with no order as to costs. The officer is directed to return the Record & Proceedings of Civil Suit No. 795 of 2020 to the Court of the Xth Senior Civil Judge Karachi (South) forthwith.

JUDGE

Karachi dated 30 August 2023