

IN THE HIGH COURT OF SINDH AT KARACHI

SECOND APPEAL NO.52/2018

Appellant : Naseem Zehra,
Respondents : Ghayaz Ahmed and others.

SECOND APPEAL NO.57/2018

Appellant : Naseem Zehra,
Respondents : Muhammad Saleem and others.

Appearance:

M/s. Mehmood Habibullah and Muhammad Fahim Zia advocates for appellant.

Mr. Haider Raza Arain advocate for respondents No.1 and 2.

Date of hearing : 31.05.2018.

Date of order : 31.05.2018.

J U D G M E N T

Salahuddin Panhwar, J: Captioned appeals assail judgment dated 10.04.2018 passed by IIIrd Addl. District Judge, Karachi Central dismissing Civil Appeals No.147 & 148 of 2016 filed against consolidated judgment and decree dated 09.09.2016 of the trial court in Civil Suits No.929/2002 and 620/2007 whereby Suit No.929/2002 was decreed to the extent of prayer clauses A to F while Suit No.620/2007 was dismissed.

2. Succinctly, facts leading to filing of these appeals are that plaintiffs Ghayaz Ahmed and Muhammad Sikandar Zulqarnain (respondents herein) filed Civil Suit No.929/2002 for possession, declaration, mesne profit and injunction against the appellant and others, while later on plaintiff Mrs. Naseem Zehra (appellant herein) filed Civil Suit No.620/2007 for Declaration, permanent injunction and specific performance of contract; both these suits were consolidated vide order dated 24.10.2010 treating Suit No.929/2002 as leading one wherein it was pleaded that plaintiffs/respondents are brothers and sons of late Abdul Hakim son of Abdullah who was fully seized and possessed and well sufficiently entitled to a lease hold property bearing No.A-359/12, measuring 200 sq. Yards situated in scheme No.16, Federal 'B' Area, Karachi, duly leased out in their favour vide Registration No. 5017 dated 10.12.1982; that late Abdul Hakim during his life time gifted the said property to the plaintiffs who accepted the said gift and occupied the said property vide Registration No. 164-8 dated 5.5.1984, the plaintiffs were in lawful occupation and use of the said property since beginning and lived there up to the year 1993 without any obstruction and thereafter due to political crisis in the city of Karachi and especially in the area of Federal B Area where the said property was located, the plaintiffs shifted to Malir and started living therein along with their elder brother, mother; that the plaintiffs while leaving the said property they also left valuable articles therein worth Rs.50,000/- (Rupees Fifty Thousand) and locked the inner doors as well as main gate door of the said property; plaintiffs as routine practice were looking after the said property twice / thrice a month regularly without fail; that on or

about 14-06-1997 plaintiff No.1 on usual visit went to the said property and found / saw that some unknown persons are living in the said property without their consent illegally and unlawfully by breaking open the inner doors locks as well as outer door lock of the said property and after due enquiry made by plaintiffs, it was transpired that the defendant No.1 has illegally and unlawfully trespassed into the said property by breaking open the lock and thus committed offence punishable under the law; that plaintiff No.1 lodged a complaint on 16.06.1997 against defendant No.1, whereupon SHO Gulberg Police Station called the parties in the police station and recorded statements, during enquiry, conducted by the Police officer, the defendant No.1 promised to vacate the said property within one month thereof however inspite of the said undertaking failed to honour his commitment to vacate the said property. It was the case of the plaintiffs before the trial Court that they have never appointed any attorney in respect of said property, and the defendant No.1 after occupying the said property illegally, made certain changes in the said property resulting thereby impaired its value; that defendant No.1 was in unauthorized use and occupation of the said property since 14.6.1997 and is liable to pay compensation / mesne profits to the plaintiffs as well for such unauthorized wrongful use and occupation hence sent legal notice to defendant No.1 asking to vacate and hand over vacant possession of the said property which was not replied hence plaintiffs filed suit for following reliefs;-

- a. A decree for possession be passed against the defendant No.1 directing him to hand over the plaintiffs the actual

vacant and physical possession of the property bearing No.A-359/ 12, situated in F.B Area, Karachi, on account of unauthorized occupation and used by the defendant No.1.

- b. Declaration that the plaintiffs are the absolute owners of the suit property viz. A-359/ 12, measuring 200 sq. Yards situated in F.B Area, Karachi with its construction thereon and that the defendant No.1 being in occupation thereof himself or through his men, agents or assigns, attorney, principal, as trespasser liable to be evicted therefrom.
- c. A decree for Rs.9000/- being the amount of mesne profit for the period from 14.6.1997 to 31.7.1997, Rs.6000/- per month against the defendant No.1 favour of the plaintiffs.
- d. A decree for future mesne profit at Rs.6000/- per month from the date of the suit till the possession of the suit property is delivered by the defendant No. 1 to the plaintiffs.
- e. Permanent injunction restrain the defendant No.1 and his agents attorney sub-ordinate, assign, from parting with or handling over, alienating, mortgagee transferring, selling, disposing of the suit property or portion thereof in manner whatsoever which may be prejudice or adversely effect the plaintiffs proprietary or possessory rights in respect of the suit property or any portion thereof.
- f. Permanent injunction be issued against the defendant No.2 & 3 restraining them from mutation, transferring, registration by themselves or by any other Sub-Registrar subordinate to the defendant No.3 of any document including Gener:1 Power of attorney in respect of the suit or any portion / part thereof effecting tending to effect plaintiffs proprietary and possessory right in respect of the said suit property or ant parts thereof excepting the documents presented registration, mutation by the plaintiffs themselves.
- g. Costs of the suit, and
- h. Any other and / or better relief which this Honorable Court may deem fit and proper under the circumstance of the case.

The defendants No.1, 2 & 6 filed their written statements, whereas defendant No.3, 4 and 5 prefer not to file written

statements. The Defendant No.1 pleaded that the Suit fails for mis-joinder and non-joinder of parties and hit by the provisions of sections 42 and 56 of the Specific Relief Act, and section 9 C.P.C. as well Order 7 Rule 11 C.P.C.; that the suit is not maintainable in law in as much as it has neither cause of action against the defendant No.1 nor there is any balance of convenience in favour of the plaintiffs and it is barred by law and also undervalued; that the plaintiffs have wrongly filed the suit for possession, declaration, mesne profit and injunction against the defendant No.1 on false, fictitious and concocted ground with ulterior motives making entirely fraudulent story. It was pleaded that plaintiffs Ghayyas Ahmed and Muhammad Sikander Zulqarnain executed at Karachi, a general power of attorney duly attested by the Additional City Magistrate, Court No. III, Karachi West, on 9.5.1985, in favour of Mst. Rifat Quresi wife of Salauddin Qureshi resident house No.R-114, Habib, Road P.E.C.H Society Karachi, with general power to transfer the suit property by way of sale, gift and mortgage etc. to anyone. Simultaneously the plaintiffs Mohammad Sikander Zulqarnain and Ghayyas Ahmed executed a sale agreement, dated, 29.05.1985, the valuable consideration of Rs.5,75,000/- and received the total price of the said house. By virtue of the said agreement, the plaintiffs assured the said purchaser Mst. Rifaat Qureshi that the house was free from all sort of claims, liens demands sale, mortgage cases or any other encumbrances of whatsoever nature, that the plaintiffs had delivered the possession of the said house together with all papers, rights, titles, interests and privileges therein over the said house, and that the plaintiffs, (first party) shall keep the second Party (Mst. Riffat Qureshi) indemnify against all losses detriments the first party and any person demanding title from the first party, herein plaintiffs, shall be caused and better and more perfect the said house in favour of the second party, Mst. Riffat Qureshi; that plaintiffs passed on receipt for receiving the payment of Rs.7,75,000/- in respect of the suit premises viz. house No.A-359, Mst. Rifaat Qureshi, the purchaser and general attorney of the plaintiffs, Ghayyas Ahmed and Mohammad Sikander Zulqarnain executed sub-Attorney power in favour of Mohammad Saleem son of Mohammad Naeem duly

registered vide Registration No.131, dated 30.04.1997, with general power to sell, mortgage, etc. and to execute conveyance deed, sale deed gift deed, mortgage deed, rectification deed, etc., before the Sub Registrar, simultaneously sale agreement, dated 30.04.1997, was executed between Mst. Rifaat Qureshi and Mohammad Saleem for valuable consideration of Rs.6,90,000/- and the said consideration was received by Mst. Rifaat Qureshi under valid receipt. On 10.05.1997, Mohammad Saleem son of Mohammad Naeem being the owner of the suit property executed a sale agreement with Mst. Naseem Zehra wife of Nusrat Rizvi, for 8,50,000/- in respect of the said and paid the entire amount of Rs.8,50,000/ - to Muhammad Saleem under valid receipt, dated: 10.05.1997 as full and final settlement for the said house. The seller Mohammad Saleem delivered the peaceful physical possession with original documents and transaction became final. Thus the defendant No.1 through his wife came into physical possession the house as rightful owner and he is not the trespasser as fraudulently alleged by the plaintiffs, who have filed the present suit falsely, fraudulently and by clear misrepresentation.

Defendant No.2/KDA filed written statement stating that the suit is incompetent and bad in law for want of statutory notice as required under article 131 of the KDA Order No. V of 1957, as the same has not been served upon KDA before institution of the above suit and as such the suit is not maintainable and liable to be dismissed; that as per their record, the plot in question stands leased out in the name of Mr. Abdul Hakim son of Abdullah and there is no record in KDA showing relationship except two complaints against unauthorized occupation of the house; that no such documents as stated in the plaint have been submitted by the plaintiff in the office of answering defendant except photocopy of the complaint made to Gulberg Police station.

Defendant No.6 Mrs. Naseem Zehra (appellant herein) in her written statement had pleaded that the suit had no cause of action, not maintainable due to misjoinder and non-joinder of parties and is

hit by the provisions of Section 42 & 56 of specific Relief Act and Section 9 CPC as well as order 7 rule 11 C.P.C. and has wrongly been filed against answering defendant and as against defendant No.1 and the plaintiffs has not come to the court with clean hands; she pleaded that it is an imaginary plea that the plaintiff left the house in question unattended and shifted to Malir after 1993 due to political crises in the city and that it is also a white lie that the plaintiff left the valuable articles valued Rs.50,000/- in the house and was looking after the house in routine from 1993; that no person having common sense can accept this unfounded plea of their leaving the house from 1993 to 1997 when the suit was filed with dishonest and fraudulent intention; that the defendant above named purchased the said house for valuable consideration of Rs.8,50,000/- and invested a lot on incomplete construction and repair occupied the house lawfully as owner thereof along with her husband S. Nusrat and children; she pleaded that plaintiffs had involved the police in the matter to deprive her of her lawful occupation and legal right and to pressurize her husband and harassment by police caused to give undertaking that has had no evidentiary value in the eyes of law and such statement or undertaking before the police cannot be treated as valid piece of evidence and the same cannot be used against her or her husband; that lodging of police report allegedly on 16.6.1997 against defendant No.1 has no concern with subject property and his undertaking keeping in view harassment and fear of police torture his promise to vacate the house as no evidentiary value under the circumstance; she pleaded that defendant No.1 had nothing to do with the said property and had no right to give any undertaking as the defendant No.6 is the owner of the said property and not the defendant No.1 at any point of time; that making application to the different departments to desist from giving any facilities/amenities to defendant No.1 or to give application to defendant No.2 not to mutate the property in the name of any person, are meaningless and such applications were frivolous as the plaintiffs were not owner at relevant time and it has been sold out to the defendant No.6 lawfully and she had become the owner of said property; she pleaded that defendant No.1 has nothing to do with the said property and not at

all liable to pay any so called alleged compensation and mesne profits to the plaintiffs as well as for such alleged unauthorized / wrongful use and occupation or any occupation to vacate the house; that the allegations of plaintiffs are misconceived, unfounded false, fraudulent and with ulterior motive; she stated that she is now the owner of subject property and possession thereof is legal and lawful and plaintiffs have no right to claim possession of the property and benefits therefrom.; that no notice as alleged was served on proper person viz the defendant No.6, she denied the claim as false and stated that plaintiffs are not entitled to any relief as prayed and prayed for dismissal of suit.

3. Plaintiff Naseem Zehra in her civil suit No.620/2007 pleaded that late Abdul Hakeem during his life time gifted the said property in favour of his two sons i.e. defendants No.2 and 3, who accepted said gift and occupied the suit property vide registration No.1648, dated 05.05.1984; she submitted in her plaint that on 29.05.1985 the defendant No.2 and 3 executed general power of attorney and sale Agreement in favour of defendant No.4, received entire sale consideration Rs.5,75,000/- and handed her all documents and physical possession of the suit property; it was pleaded that on 30.04.19974 defendant No.4 executed General Power of Attorney in favour of Defendant No.1, she executed an agreement of sale in favour of defendant No.1; defendant paid her entire sale consideration Rs.8,50,000/- and received physical possession of the suit property with documents; that on 10.05.1997 defendant No.1 executed an Agreement of sale in favour of the Plaintiff against total sale consideration of Rs.8,50,000/- the plaintiff paid him entire sale consideration and received physical possession of the suit property without any interception, that just after executing sale agreement Defendant No.1 went abroad and before executing the sale deed, and had promised to execute the sale deed after return from abroad; that the plaintiff vigilantly watching defendant No.1 for execution of sale deed, and after long period when in the year of 2006 he came back, the Plaintiff contacted him and requested him execute a sale deed in her favour at the first instance

he avoided to meet and then kept the plaintiff in false hopes on one another pretext and lastly 22.03.2007 he demanded enhancement of sale consideration, which the plaintiff refused, then Defendant No.1 refused to execute sale deed in favour of the plaintiff; it was pleaded that the Plaintiff has paid full sale consideration, received physical possession and entire documents hence denial of Defendant No.1 to execute the sale deed is illegal, hence prayed:-

- a. to declare that the Plaintiff is lawful purchaser of the suit property viz. bearing No.A-359, Block 12, measuring 200 sq. yards, situated in Scheme No.16, Federal B Area, Gulberg Karachi.
- b. The Defendant No.1 may kindly be directed to execute sale deed in favour of the plaintiff in respect of the suit property i.e. property bearing No.A-359 Block,14 measuring 200 Sq. yards, situated in Scheme No.16 Federal B Area, Gulberg Karachi, and failing which the Nazir of this Hon'ble Court may kindly be directed to execute sale deed in favour of the Plaintiff on Behalf of the Defendant No. 1 .
- c. The defendant their legal heirs, all agents / workers, any / all assignees, anybody on their behalf may kindly permanently be restrained and debar from interfering and raising obstacles in peaceful and physical possession and occupation of property bearing No.A-359, Block 12, measuring 200Sq. yards. situated in Scheme No.16, Federal B Area, Gulberg Karachi.
- d. Cost of the suit.
- e. Any other relief or relief's which this Hon'ble Court may deem fit and proper under the circumstance of this case.

The defendant No.2 & 3 filed their written statement while the defendant No. I and 4 chose not to file their written statements and they were debarred from filing written statement dated 23.02.2009; defendant No.2 & 3 raised preliminary legal objections that the suit of the plaintiff is false, fabricated, afterthought and not maintainable under the law, that the suit of the plaintiff is barred under Section 10 & 11 CPC, under the principles of Estoppel and Waiver, under the principles of non-joinder and misjoinder of the parties, barred by the law of Specific Act. They

denied that on 29.05.1985, the answering defendants executed a General Power of Attorney and Sale Agreement in favour of the defendant No.4 received entire sale consideration of Rs.5,75,000/- and handed her all documents and physical possession of the suit property. It was submitted that the late Abdul Hakim during his life time gifted the suit property in favour of the answering defendants who accepted the said gift and occupied the suit property vide registration No.1648 dated 05.05.1984. That the answering defendants are in lawful occupation and use of the suit property hence beginning and lived therein up to the 1993 without any obstruction and hindrance and thereafter due to political crises in the city of Karachi and especially in the area of Federal B Area , where the suit property was located, the answering defendant shifted to House No.1 near Masjid Jamia Millia Campus Malir, Karachi and stated living therein along with their elder brother, mother (who dead) and sister therein. That the answering defendants while leaving the suit property they left valuable articles therein worth Rs.50,000/- (Rupees Fifty Thousand) and locked the inner doors as well as main gate door of the suit property. That the answering defendants as routine practice are looking after suit property twice / thrice a month regularly without fail. That on or about 14.6.1997 the defendant No.1 on usual visit went to the suit property and found / saw that some unknown persons are living in the suit property without their consent illegally and unlawfully by breaking open %the inner door locks as well as outdoor lock of the suit property and after duly inquiry made by the answering defendants it was transpired that husband of the plaintiff namely Nusrat Rizvi illegally and unlawfully trespassed the suit property by breaking open the lock and thus committed offence punishable under the law. The defendant No.2 after two days i.e. on 16.6.1997 lodged a complaint against the husband of the plaintiff before Gulberg Police Station for necessary action who has committed offence punishable under the law. That on the said complaint, the SHO Gulberg Police Station called the parties in the police station and recorded statements. That during enquiry conducted by the police officer, the husband of tint-plaintiff promised to vacate the suit property within one month thereof. That the answering defendants

moved applications to the deferent departments concerned to desist upon to give any facilities of amenities to the husband of the plaintiff who is illegally and unlawfully occupied the suit property of the answering defendants. Photo Copies of the said application are annexed P/3 to P/4. That the answering defendants filed applications in the office of then KDA (Now City District Government) not to mutate the name of any person in the record in respect of the suit. They submitted in their reply that the answering defendants have never appointed any Attorney in respect of the suit property. It is further submitted that: the husband of the plaintiff after occupying the suit property illegal and unlawfully made certain changes in the suit property resulting thereby he has impaired the value of the suit property. That the husband of the plaintiff failed to handover the vacant possession of the suit property as per commitment and in failure thereof, the answering defendant filed a civil suit No.997/1997 in this Court against the husband of the plaintiff, KDA and District Registrar, said suit was transferred on the pecuniary jurisdiction increased up to Rs.30 Lacs by the Senior Civil Judge and renumbered as 929/2002 in the court of IInd Sr. Civil Judge Karachi Central. That during the pendency of suit in this Court, the plaintiff herein, defendant No.1 were impleaded as necessary parties and plaint was amended and they were joined as necessary parties and they are still parties in the suit pending in the Court of IInd Senior Civil Judge Karachi; that the alleged Power of Attorney dated: 29.5.1985 and sale Agreement undated annexed with the plaint allegedly executed by the answering defendants are forged and manipulated documents hence denied. They denied the alleged signatures on the said Sale Agreement, Receipt and alleged undated General Power of Attorney; they further denied that on 30.4.1997 the defendant No.4 executed General Power of Attorney in favour of defendant No.1 as alleged, the deed of gift annexed with the plaint was also denied being a forged document; they denied that on 10.5.1997 the defendant No.1 executed an Agreement of Sale in favour of the plaintiff against total sale consideration of Rs.8,50,000/- as alleged; it was submitted that the defendant No.1 is a fake person who is also a party in the suit filed by the answering

defendant and did not appear till now inspite of repeated notices given to her on her given address, it was denied that the plaintiff has paid full sale consideration, received physical possession and entire documents as alleged or otherwise. It was pleaded that the entire documents of the suit property are still with the answering defendants which can be produced at the time of evidence and whatever documents have been filed with the plaint are the documents which were supplied to the husband of the plaintiff at the time of complaint before the Police Station Gulberg and further documents annexed with the above mentioned suit and supplied copies thereof to the defendants whom the plaintiff and her husband are parties to that suit. The defendants prayed for dismissal of suit.

4. From the pleadings of the parties following consolidated issues framed were answered by the trial Court as under:-

| Issue No. | Issues | Findings |
|------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------|
| 1 | Whether the suit bearing No. 929/2002 is not maintainable and without any cause of action? | Affirmative |
| 2 | Whether the Suit No. 620/2007 is not maintainable and not time barred? | Affirmative |
| 3 | Whether the plaintiff in Suit No. 929/2002 are the absolute owners of the suit property bearing Suit No. A-359, Block No-12 F.B. Area, Karachi by virtue of registered Gift deed? | Affirmative |
| 4 | Whether plaintiff in Suit No. 929/2002 had not sold the Suit property prior and executed General Power of Attorney dated 29.05.1985 in favor of Mst. Rifat Qureshi, the defendant ? | As discussed |
| 5 | Whether Mst. Riffat Qureshi the defendant No.4 , in Suit No. 929/2002 , was legally authorized to sell the suit house by appointing Muhammad Saleem the defendant No. 5, in Suit No. 929/2002 as her registered power of attorney vide General power of attorney dated 24.04.1997. | As discussed |
| 6 | Whether Mrs. Naseem Zehara alias | As discussed |

| | | |
|---|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|
| | Shaheen, the defendant No. 6 in suit No. 929/2002 and plaintiff in Suit No. 620/2007 is in occupation of the suit property as bonafide purchaser from Muhammad Saleem by virtue of sale agreement dated 10.05.1997? | |
| 7 | Whether the plaintiff in Suit No. 620 /2007 are entitled to the relief claimed and to what extent? | As discussed |
| 8 | What should the decree be? | As discussed |

5. Record reveals that learned Senior Civil Judge vide common Judgments / decrees dated 30.01.2012 had earlier decided above suits whereby decreed suit No.929/2002 whereas suit No.620/2007 was dismissed; that judgment & decrees were impugned by the present appellant by filing Civil Appeals No.52/2012 & 53/2012 which was decided by the learned 2nd Additional District Judge, Karachi Central vide Judgment & decree dated 13.01.2016 whereby impugned Judgments / decrees passed by the learned Senior Civil Judge, Karachi Central were set aside and the appeals were allowed by remanding the cases back to the learned trial court with directions to provide opportunity to the appellant to lead her oral as well as documentary evidence and after hearing the parties to decide the case afresh on merits according to law. Consequent thereto, parties were examined at trial court and they were subjected to cross examined by their respective opposite counsel; after hearing the parties, the learned trial court vide consolidated judgment & decree dated 09.09.2016 decreed suit No.929/2002 to the extent of prayer clause A to F, whereas dismissed Civil Suit No.620/2007.

6. Learned Counsel for appellant Naseem Zehra argued that the impugned Judgment and decree are not warranted by law and facts, as such, liable to be set aside; that trial court failed to appreciate the evidence on record and the findings without applying the mind properly; that the findings of learned trial court are totally contrary on settlement of issues in respect of Section 53-A of the

Transfer of Properties Act 1882 as the appellant was put into possession as part performance of sale agreement dated 10.05.1997 therefore she is the bonafide purchaser of the suit property; that the learned trial court as well as appellate Court did not properly appreciate the evidence according to Qanoon-e-Shahadat Order 1984 and it is crystal clear from the plain reading of the impugned judgments that the courts below did not follow the real facts of the case of the appellant and have failed to understand the case of appellant in respect of the physical possession of the suit property; that the respondents failed to prove their case through evidence but the learned trial court passed the impugned judgment and decreed by not reading and misreading the evidence on record; that under the circumstances the impugned consolidated judgment and decree of the trial Court as well as judgment of the appellate court are liable to be set aside.

7. In contra, learned counsel for respondents No.1 and 2 (Legal heirs of Ghayaz Ahmed & Muhammad Sikandaer Zulqarnain) has argued that the Judgment & Decree passed by the two courts below are according to law and after discussing material available on the record; that the appellant has miserably failed to discharge her onus to prove the sale transaction allegedly arrived in between the Respondents Saleem & Riffat Qureshi, she also failed to prove the agreement and other documents allegedly executed in her favour, insomuch so even the marginal witnesses of the sale agreement allegedly executed in the name of the present appellant were not examined by her thus the requirement of Article 17(a) and 79 of Qanun-e-Shahadat Order been not been met by the appellant; that the attorney of the appellant himself has admitted that the original title documents concerning the suit property are in my custody, which were even shown to the said attorney at the time of his cross examination, thus the documents produced by the appellant through her attorney were all forged and fabricated; that the suit for declaration was filed by the appellant, whereas no title exists in her favour, but only an unregistered agreement of sale filed by the appellant, that too was executed by person who had no title in

respect of the suit property, thus the same could not have conferred any right, title of interest in favour of the appellant, even otherwise execution of such document, payment of consideration and delivery of possession is not proved by the appellant in nexus with the alleged transaction of sale; that plaintiffs of suit No.929/2002 had fully established their case before the learned trial court, inasmuch as they are undisputed legal and lawful owners of the suit property, which is still in their name and they are holding registered deed in their names in respect thereof, hence the learned trial court has rightly decreed suit No.929/2002 and dismissed suit No.620/2007 of the present appellant, hence judgments of the two courts below do not call for any interference.

8. Before going into merits of the case, in hand, I would like to examine the scope of the 2nd Appeal in the matter of concurrent findings of the two courts below. The scope of the 2nd appeal also appears to be no at much variance with that of the revision because for succeeding in the 2nd appeal the appellant has to, *prima facie*, establish that **decision was either contrary to law or substantial error or defect in the procedure was committed while deciding the matter.** A mere title of **second appeal** would not be sufficient to extend the scope thereof but criterion would remain *almost* same as that for a **revisional jurisdiction.** Reference in this regard may well be made to the case of Naseer Ahmed Siddique v. Aftab Alam (PLD 2011 SC 323) wherein it is observed as:-

“17.Where trial Court has, exercised its discretion in one way and that **discretion has been judicially exercised on sound principles and the decree is affirmed by the appellate Court**, the High Court in second appeal will not interfere with that discretion, unless same is contrary to law or usage having the force of law.”

In another case of Anwar Textile Mills Ltd. v. Pakistan Telecommunication Company Ltd., reported as (2013 SCMR 1570), it is observed as:-

“15. Thus, by reading of this provision, it is apparent that the High Court will be **justified to interfere with the decision of the lower Courts when it is contrary to law or failed to determine material issue of law or commits substantial error or defect in the procedure**, which may have resulted in error or defect in the decision of the case on merits.”

The above legal position, *prima facie*, makes it quite clear and obvious that to succeed in *second appeal*, the appellant must establish that concurrent findings of two courts below were / are result of their failure in determining the material issue or that conclusions, so drawn, were / are contrary to settled principles of law. Thus, point of determination for decision of instant appeal (s) could well be:

whether findings of two courts below are proper, legal and in accordance with available material and settled principles of law or otherwise?

9. The main contentions of the appellant seem to be that there was a *valid* agreement of sale in her favour and that her possession was protected by Section 53-A of the Transfer of Property Act but both the Courts below failed to *properly* appraise such position.

At the outset, I would say that I am conscious that the Code does not explain as to whom the burden would rest but the Court (s) should always be conscious that it is the Qanun-e-Shahdat Order 1984 which provides a complete mechanism in this respect per

Part-III Chapter-IX under title '*of the Burden of Proof*'. This Chapter starts with Article 117 which reads as :-

117. Burden of proof. (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exists.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person;

The Article 118 further explains that:

118. On whom burden of proof lies. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

The above articles are very much clear in explaining that as to on whom the burden would rest in respect of a particular question of law and fact. Since, it is the appellant who is claiming to be holding possession over subject matter under a *valid* sale agreement therefore burden was upon her to establish the *legality* of such document as well her assertions of being in *bona fide* possession. It is, needless to add that, it is, *by now*, an equally settled principle of law that it is the duty and obligation of the beneficiary of a transaction or a document to prove the same. Reference may be made to the case of *Amjad Ikram v. Asiya Kausar* (2015 SCMR 1). There can be no denial to *another* well established principle of law that mere possession over a property would not, *ipso facto*, vest title but claimant would always require in establishing *title* independently and a failure thereof would turn such possession into *unauthorized / illegal*.

10. Perusal of the record would show that property in question was gifted to the respondent No.1 & 2 by their father which fact *even* is not disputed by the present appellant herself rather is admitted in cross-examination by the present appellant yet she (appellant) claims *Specific Performance* from defendant no.1. This shall stand evident from a referral to relevant admission (s), made by attorney of appellant during cross-examination i.e :

‘It is fact that I not produce title documents in my evidence which shows ownership in favour of defendant no.4 and 5 of leading suit. It is fact that the **title documents are still on the names of plaintiffs of leading suit**. It is fact that I pray in my suit for specific Performance of the contract from defendant No.1 Muhammad Saleem and also sought execution of sale deed in favour of plaintiff namely Naseem Zehra from said defendant’

Such admission (s) were always sufficient to make it clear that there had never occasioned any *cause of action* for the present appellant to file a suit against a person, having no title. It may well be added here that the relief of *Specific Performance of Contract* could be sought against an ***ostensible owner*** and not against the person who *legally* was / is not competent to make a *legal sale* (transfer). Reference may well be made to the case of *Major (R) Pervaiz Iqbal v. Munir Ahmed & Ors* (2018 SCMR 566) wherein it is held as:-

“8. Under the agreement dated 10.7.1986, the petitioner agreed to sell seven Kanals which were part of the property that at that time had not yet been transferred in his name by the successors-in-interest of Syed Chiragh Ali Shah, therefore, unless such transfer takes place , there was no occasion for the buyers to seek transfer of seven Kanals of land in their names. This uncertainty continued until a compromise was reached in the suit filed by the petitioner and the property in question was eventually conveyed in the name of the petitioner on 02.03.2000. It was from this date onwards that the petitioner was legally competent to honour his commitment under the agreement entered into with the buyers.”

“11. In the case of Imran Naqshaband v. Haji Shaikh Ijaz Ahmed (PLD 1995 SC 314) it was held as under:-

‘6. It is by now well settled that the cause of action to sue for the specific performance of the contract arises only when **the vendee is in a position to perform his part of contract effectively** and till such date no cause of action arises for the other party to compel him to perform his part of the contract.....”

It may also be added that a mere *agreement* with an incompetent person alone would not entitle the holder of such *agreement* to claim title in **immovable property** because an *agreement / contract* with a competent person alone could give rise to claim title but would leave the person (*deceived*) with a *single* option to claim damages / compensation. Reference may well be made to the case of Falak Sher v. Province of Punjab & Ors (2017 SCMR 1882) wherein it is held as:

“3. Even otherwise, it is settled law that title in immovable property cannot be claimed merely on the basis of an agreement and the alleged status of the petitioner vis-à-vis the property in dispute has been adjudicated upon unfavourably by the Civil Courts in two rounds of litigation as well as revenue authorities.”

The above *legal* position was always sufficient to hold the suit of the present appellant as *incompetent* unless the appellant brings her case within *exception*, provided by the Section 18 of the Specific Relief Act which *too* covers those *agreements* only, executed *bona fide* with a person, having an **imperfect title**. An **imperfect title** shall never be equated with that of **‘no title’**. The provision reads as:-

“18. Where a person contracts to sell or let certain property, having only an **imperfect title** thereto, the purchaser or lessee (except as otherwise provide by this Chapter) has the following rights:-

(a) if the vendor or lessor has subsequently to the sale or lease acquired any interest in the property, the purchaser or lessee may **compel him to make good the contract** out of such interest;

(b) where the concurrence of other persons is necessary to validate the title, and they are bound to convey at the vendor's or lessor's request, **the purchaser or lessee may compel him to procure such concurrence;**

(c) where the vendor professes to sell unincumbered property, but the property is mortgaged for an amount not exceeding the purchase-money, and the vendor has in fact only a right to redeem it, the purchaser may **compel him to redeem the mortgage and to obtain a conveyance from the mortgagee;**

(d) where the vendor or lessor sues for specific performance of the contract, and the suit is dismissed on the ground of his **imperfect title**, the defendant has a right to **a return of his deposit (if any) with interest thereon**, to his costs of the suit, and to a lien for such deposit, interest and costs on the interest of the vendor or lessor in the property agreed to be sold or let.”

It has been a matter of record that the **title** till date is in name of the respondents (plaintiffs of leading suit) and *undeniably* the present appellant claims specific performance from defendant No.1 namely Muhammad Saleem while claiming him (Muhammad Saleem) to be *lawful sub-attorney of* defendant Mst. Riffat Qureshi. Such claim would, *at the most*, bring the case within meaning of Section 18(b) of the Act whereby the purchaser (appellant) could have sought a relief of compelling the seller (defendant no.1 Muhammad Saleem) to obtain such *concurrence*. However, it is also a matter of record that no such relief was sought by the present appellant but she (appellant) sought title from defendant No.1 Muhammad Saleem *only*.

Be that as it may, I would add that even to substantiate a claim of **creditor** it was always be necessary for the appellant (purchaser) to establish that such person was / is bound to give such *concurrence*. Reference may well be made to the case of Nisar Ahmed

Afzal v. Muhammad Taj & Ors (2013 SCMR 146) wherein the term **creditor** has been explained as:

“21. The cancellation deed (Exh.D.W.1/3) between the respondents Nos.1 and 2 on the face of it was hit by the provisions of section 53 of the Transfer of Property Act, which provides that if a fraudulent transfer is made with intent to defeat the interest accrued to a party which it has acquired through a sale agreement, then such party can enforce the same not only against the vendor but also against the person from whom such a vendor has acquired the interest. The word ‘Creditor’ used in section 53 of the Transfer of Property Act is not to be construed in a narrow sense while interpreting the section. **The word ‘Creditor’ would mean and include the one, who has a right to require of another the fulfillment of a contract or obligation and or one to whom another owes the performance of an obligation.**”

In search of an *answer* to above, the perusal of the record shows that Muhammad Saleem (defendant no.1) was never claimed to be direct *attorney* of respondents (plaintiffs in leading suit) but was / is claimed to be *sub-attorney* of defendant Mst. Riffat Qureshi who *allegedly* had purchased the subject matter from the respondents (plaintiffs in leading suit) against a consideration and had obtained a **general power of attorney** in her favour. Thus, I would conclude that to establish *legal* obligation of such persons (plaintiffs in leading suit) for title in favour of the present appellant, it was always obligatory upon her to *first* prove the root (pleaded facts) i.e:-

- i) Mst. Riffat Qureshi (defendant) had purchased subject matter from respondents (plaintiffs in leading suit) against consideration under an *agreement*;
- ii) In consequence to such a concluded agreement between Mst. Riffat Qureshi (defendant) and respondents (plaintiffs in leading suit), she had obtained a *lawful* general power of attorney;

However, it is a matter of record that in proof of *first* part, the appellant produced such a *sale agreement*. The perusal whereof reveals that it does not bear the date and time of its execution and such fact also been admitted by the appellant in her cross as:

" It is fact that **some over writing is made on the Ex.D/5 in the date of stamp paper**. It is fact that in Ex.D/5 the date, month of execution is not mentioned and remained blank. **It is fact that in the entire sale agreement the date and month of execution is not mentioned.**

Further, no witness to such a *claimed* concluded agreement (Ex.D/5) was examined by the appellant despite full opportunity. Worth to add that since such *agreement* was / is the **root** of the claimed right of the appellant hence the burden was always upon her (appellant) to prove the same and a *failure* would make the appellant to face the consequences thereof.

Be that as it may, it is also an *admitted* position that the appellant while claiming specific performance from defendant no.1 Muhammad Saleem *first* acknowledged the title (*general power of attorney*) of defendant no.4 Mst. Riffat Qureshi as *lawful*. Thus, it was also obligatory upon her (appellant) to prove such title of defendant No.4 Mst. Riffat Qureshi as ***lawful***.

11. There can be no *denial* to the legal position that for a claimed ***general power of attorney*** to earn the status of '**lawful**' , it must be established that same is *duly* registered, as required under the Registration Act, 1908. The perusal of the document (claimed general power of attorney in favour of Mst. Riffat Qureshi), same does not appear to have been registered before '**Registrars or sub-Registrars**' , as defined by Section 6 of the Registration Act rather it

is claimed to be '**attested**' before "**the Additional City Magistrate, Court No. III, Karachi West**" who has never claimed to have been notified as '**registrar or sub-registrar**' for purpose of registering a document within meaning of Registration Act as well to endorse the certificate of **registration** within meaning of Section 60 of the Registration Act. Needless to add that it is by now a well settled principle of law that where things are required to be done in a *particular* manner then same must be shown to have been done so and a *departure* thereof shall render the act nothing but a *nullity* because dictates of law cannot be termed as *technicalities*. Reference is made to the case of Muhammad Anwar & Ors v. Mst. Ilyas Begum & Ors (PLD 2013 SC 255) wherein it is observed as:-

"It is a well known principle of law that where the law requires an act to be done in a particular manner it has to be in that manner alone and such dictate of law cannot be termed as a technicality.

In addition to above, there is also a categorical admission of the attorney of the present appellant that:

"It is fact that Ex.D/4 , General power of attorney produce by me in favour of Riffat Qureshi is not registered in the office of sub-registrar. It is fact that it is not mentioned in General Power of attorney that the same be given to Riffat Qureshi for consideration or in respect of any sale agreement.

The *position* , being undeniably so, permits me to say that the claimed *general power of attorney* in favour of defendant Mst. Riffat Qureshi could never be declared as '**lawful general power of attorney**'. The consequence of such conclusion would be nothing but that *sub-attorney*, if any, executed by said Mst. Riffat Qureshi in favour of Muhammad Saleem (defendant no.1) would be of no **legal**

consequence nor would be sufficient to deprive the respondents (plaintiffs in leading suit) of their property. In other words, the appellant also failed to establish herself to be a **creditor** so as to take benefit of Section 53 of the Transfer of Property Act. The *legal* position, being so, was / is always sufficient for dismissal of the claim of the present appellant and render the *agreement* of appellant with defendant Muhammad Saleem as **void** to extent of subject matter. I may also add that remedy of *Specific Performance of a Contract*, being equitable in nature, cannot be granted to enforce a transaction which *otherwise* is void. Reference is made to the case of Mst. Naseem Akhter & ors v. Abdul Tawab & Ors (2012 SCMR 1526).

Be that as it may, I would also attend the claim of *bona fide* of the appellant in claimed purchase of the subject matter. I would add that this would only be available to a person who *first* satisfies himself of following *four* facts i.e:

- “(a) that the transferor was the ostensible owner; (b) that the transfer was made by consent express or implied of the real owner; (c) that the transfer was made for consideration; and
- (d) that the transferee while acting in good faith had taken reasonable care before entering into such transaction.”

Unless it is established that these four imperative / essential ingredients co-exist the person cannot claim the benefit of the equitable principle. If the appellant would have taken a *little* care she (appellant) would have *easily* learnt that the *Mst. Riffat Qureshi* (defendant no.4) never possessed a **lawful general power of attorney** hence sub-attorney, if any, executed by her in favour of defendant no.1 Muhammad Saleem was also of no *legal* value.

Guidance is taken from the case of Ghulam Rasool & Ors v. Noor Muhammad & Ors (2017 SCMR 81) wherein it is observed as:-

“5. ... the essential ingredients of this section are, (a) that the transferor was the ostensible owner; (b) that the transfer was made by consent express or implied of the real owner; (c) that the transfer was made for consideration; and (d) that the transferee while acting in good faith had taken reasonable care before entering into such transaction. These four imperative / essential ingredients must co-exist in order for a person take the benefit of the equitable principle, however, merely on account of some error committed by the revenue staff in the revenue record unintentional or deliberate or motivated which excludes the name of the lawful owner of the property therefrom and the property, shown to be in the name of some other person who is not the owner of the whole or a part thereof by itself shall not deprive and denude the true and actual owner from the title of the property and this by no means can be construed that the transfer, to the person claiming protection of the rule of equity *ibid* by a person who actually is not the owner is being made by consent express or implied of the real owner.Thus if the appellants had taken reasonable care in going into the genesis of the ownership, and examining the record in depth, which they as purchasers were required to do so, they would have found that the property being an inherited property was originally owned by Muhammad Siddique which devolved upon his legal heirs i.e fourObviously such unauthorized sale to the extent of their share in the sold property was void and that the case of the appellants do not squarely qualify the test of section 41 and, therefore, they could not take up the plea of bona fide purchaser and their sale could not be protected on that account.”

Further, it is also a matter of record that *single* witness, examined by the appellant, himself admitted in his cross-examination as:-

‘It is fact that the seller of agreement (Ex.D/10) namely Muhammad Saleem is not known to me personally. I do not know whether said Muhammad Saleem was **owner of the property of the sale agreement or otherwise**. I cannot say **whether said Muhammad Saleem was not owner of the disputed property at that time**. I do not remember the place at where the said agreement of sale was reduced and executed between the parties. I also do not remember that who and how many persons were present at the time of said agreement of sale. **I also do not remember regarding payment of sale consideration and its mode of payment.**’

From above, it is quite obvious that appellant had never taken any *reasonable* care in going into the genesis of the ownership of

defendant No.1 Muhammad Saleem, which she, as purchaser, was required to do so. Thus, *prima facie* floating of this aspect is sufficient to conclude that appellant also failed to establish co-existence of all above four *ingredients*.

12. I am conscious that appellant also failed in producing two attesting witnesses of the claimed *agreement* with defendant no.1 Muhammad Saleem but would not go in much details as such *agreement* was / is with defendant Muhammad Saleem and respondents (plaintiffs in leading suit) are not parties nor it is proved, as discussed above, that defendant Muhammad Saleem was lawful and competent person to enter into a *lawful* agreement as it may prejudice the claim of *compensation / damages*, if appellant subject to law, intends to launch against defendant Muhammad Saleem.

As against the claim of the present appellant, the *admitted* title holders i.e respondents (plaintiffs in leading suit) had claimed that due to law and order situation in year 1993 they had shifted from subject matter; later found the appellant's party into unauthorized possession for which had made complaint to police and such application was also placed on record. Such claim was also admitted by the attorney of the present appellant. The admitted owners of the subject matter i.e respondents (plaintiffs in leading suit) cannot be denied their right to have their *immovable property* merely on basis of a claimed *agreement* which otherwise proved to be **void**.

13. In consequence of what has been discussed above, I am of the clear view that concurrent findings of the two Courts below are not open to any exception and the point for determination is answered accordingly.

These are reasons for short order dated 31.05.2018.

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J U D G E