

*Order Sheet***IN THE HIGH COURT OF SINDH, KARACHI**

IInd Appeal No. 254 of 2023

[Shoukat Ali Gohar v. Muhammad Naseem Choudhry and others]

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Appellant	Through Mr. Muhammad Ibrahim Shaikh, Advocate.
Respondent No.1	Through Mian Muhammad Akram, Advocate
Respondents 5 & 6	Through Mr. Muhammad Aqil, Advocate
Respondent No.8	Through Mr. Muhammad Asif Malik, Advocate
Date of Hearing & Order	13.03.2025

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**ARSHAD HUSSAIN KHAN, J.** The appellant through instant second appeal has challenged the concurrent findings of the two courts below and sought the relief as follows:

- a) Set-aside the judgment & Decree dated 24.11.2021, passed by the learned Xth Senior Civil Judge at Karachi East (the impugned Judgment and Decree) in Civil Suit No.1363/2014, & Order dated 12-09-2023 in Appeal No. 269/2021.
- b) Restrain the respondents from creating any third party interest in subject property.
- c) Any other relief(s) which this Honourble Court may deem fit and proper in the circumstances of the case

2. Learned counsel for the appellant, inter alia, has contended that the impugned judgments and decrees are against the principle of law, equity and natural justice and is liable to be set aside. He has argued that the courts below failed to fully appreciate the material available on the record and incorporate the arguments advanced by the appellant. The impugned orders are defective as the courts below have omitted to consider the real facts and legal position related to the rights of the appellant and dishonest act of respondent No.1 and respondent No.2. He has further argued that the learned trial court has acted with material irregularities as there was no evidence against the appellant's claims in respect of fraud of respondent No.1 and respondent No.2 with the appellant as such the trial court is ambiguous of this fact as well as the law. He has contended that learned trial courts without taking real and current market value of the suit property from the government departments as well as from the local estate agencies has wrongfully determined the price of suit property and increased only Rs.40,00,000/- arbitrarily. He has relied upon the the case of *Muhammad*

*Hussain and others v.Dr.Zahoor Alam* [2010 SCMR 286]. Lastly, he has prayed that the impugned judgments and decrees are not sustainable in the law, as such, the same may be set aside.

3. Learned counsel for respondent No.1 [Muhammad Naseem Choudhary] while supporting the impugned judgments has contended that the decisions of the courts below are absolutely in accordance with the law and do not require any interference in the present appeal. He further submits that the present appeal is not maintainable and the same is liable to be dismissed.

4. The other private respondents and the official respondents in the present appeal support the judgment and decree passed by both the courts below.

5. Heard learned counsel for the parties and perused the material available on the record.

From perusal of the record, it reveals that the plaintiff/respondent No.1 Muhammad Naseem Chaudhary filed civil suit No.1363/2014, before Xth Sr. Civil Judge Karachi [East] for **Declaration, Specific Performance, Recovery of Damage / Compensation & Permanent Injunction** with the following prayers:

- a) Declare that the defendant No.2 is lawful general power of attorney holder of Bungalows No.A-4, Block-16-A, KDA Overseas Bungalows, KDA Scheme No.36, Gulistan-e-Johar, Karachi he has entered into sale agreement dated 24.06.2014 with the consent of defendant No. 1, wherein the plaintiff is vendee.
- b) Direct the defendants No.1 and 2 to perform their part as per agreement of sale dated 24.06.2014 as the plaintiff is ready to pay the balance / remaining part payment / sale consideration to them or depute the Nazir of this Honourable Court to act on behalf of the defendants No.1 and 2 and execute the sale deed / transfer of the subject bungalow in the name/favour of plaintiff.
- c) Declare that the plaintiff has paid Rs.15,00,000/- (Rupees Fifteen Lac Only) to the defendant No.3, for getting possession of subject bungalows.
- d) Direct the defendants No.1, 2 and 4 to pay Rs.50,00,000/-(Rupees Fifty Lac Only), to plaintiff as Damages and Compensation.
- e) Restrain the defendants, their employees, agents, representatives, subordinates, servants, or any person/s deputed by them or acting on their behalf, from dispossessing the plaintiff from the subject bungalows and from transferring /mutating or creating any third party interest in the suit property in whatsoever manner without due course of law.

- f) Cost of the suit or any other relief or relives which this Honourable Court may be pleased to deem fit and proper in the nature and circumstances of the case.

The trial court after framing of the issues and recording of the evidence as well as hearing the learned counsel for the parties, **decreed the suit of the plaintiff**, vide judgment dated **24.11.2021**, who while discussing issues Nos. 2 and 3 observed as follows :

“The defendant No.1 has taken plea that suit property was sold out at lower rate and defendant No.4 has offered higher rate, but the attorney of defendant No.1 in his cross has shown his unawareness about any such higher rate offered to defendant No.1. The attorney of defendant No.1 stated that it was collusive transaction in between the plaintiff and defendant No.2, but surprisingly till to-date neither the defendant No.1 has taken any action against defendant No.2 nor filed any suit for restoration of possession or cancellation of agreement against the plaintiff, although he was in knowledge that since November, 2014 that plaintiff is in possession of suit property. The attorney of defendant No.1 further admitted that defendant No.2 failed to deposit Rs.30 lacs of sale price in account of defendant No. 1, when he was asked by defendant No. 1 to pay the same in account of his brother. These admissions of attorney of defendant No.1 shows that actually there was dispute between the defendant No.1 and his attorney i.e. defendant No.2 on transfer of money and since the defendant No.1 has himself sent his living certificate alongwith copy of passport to plaintiff through e-mail of his son, this shows that due to non-availability of defendant No.1 in Pakistan and his dispute with his agent, the plaintiff was unable to pay remaining sale consideration amount, while on return of defendant No.1 the suit was filed. The plaintiff has produced such living statement of defendant No.1 and also examined his son in this regard to support his version and neither the defendant No.1 has denied such living statement nor his signature on such document, which suggests that he has written the same to plaintiff. The attorney of defendant No.1 in his evidence has produced letter dated 19-11-2014 written by defendant No. 1 to KDA wherein it is clearly mentioned by him that revocation of power of attorney shall have no effect on anything lawfully done or cause to be done under the powers conferred on him prior to the deed of revocation. The attorney of defendant No.1 himself admitted contents of such documents, which shows that an agreement of sale was entered into by defendant No.2 being attorney was protected/rectified by defendant No.1 himself. After going through the whole material it would not make any difference whether time was essence of contract, hence I am of the view that first sale agreement is very much admitted and lawful and plaintiff is bonafide purchaser of suit property, hence these issues are answered "in Negative".”

And the trial court while discussing Issue No.7 has given its findings as follows:

“For what has been discussed, above I am of the view that plaintiff has made out a good case in his favour for grant of decree of specific performance, but to get the suit property transferred in his name he has to pay double of the remaining sale consideration amount of Rs.40,00,000/- at Rs 80,00,000/-, then the defendant No.1 would execute sale deed or any other transfer instrument in his favour before competent authorities. The epitome of above discussion is that after going through evidence and whole record, **the suit of plaintiff is decreed as per prayer clauses (a), (b) and (e) with no order as to costs**. The sale price of suit property is increased from Rs.70,00,000/- (Seventy Lacs Only) and same is fixed at

Rs.1,10,00,000/- (One Crore, Ten Lacs Only), the plaintiff has already paid Rs.30,00,000/- (Thirty Lacs Only), while deposited an amount of Rs.40,00,000/- with Nazir, which shall be released in favour of defendant No.1 (with profit if any) and in addition to that the plaintiff is directed to pay further amount i.e @ Rs.40,00,000/- (forty lacs) to the defendant No.1, as increased sale price, within 30 days of this Judgment with Nazir of this District, while the defendant No.1 is directed to transfer suit property in name of plaintiff on receiving such increased/double of remaining amount. In case of his failure Nazir will do the needful on deposit of amount by plaintiff with him. In case of failure of plaintiff to pay increased sale price as ordered above, his suit would be deemed to be dismissed. Let such decree be drawn accordingly. Parties are left to bear own costs”.

The aforesaid judgment and decree of the trial court were challenged before Additional District Judge-IV, Karachi [East] in Civil Appeal No.269 of 2021, which was dismissed; the judgment and the decree of the trial court were maintained, vide order of the appellate court dated **12.09.2023**, who while discussing issue No.1 observed as follows:

“There is no denial from the appellant that respondent No:2 was his duly constituted attorney with specific powers to even sale the suit property. Thus the contract between respondent No:1 and 2 as attorney is a valid agreement and through implication of law it would be deemed as if such agreement was entered between respondent No:1 and appellant himself. The evidence clearly shows that the revocation of attorney by the appellant which was in favour of respondent No:2 is much after execution of agreement and by that time 3 million have been received by the attorney. Now it is between appellant and his attorney as to such amount and respondent No:1 cannot be made accountable for relationship of Principle and agent. It is settled principle of law that act of agent performed with due authority sufficiently binds the principle and in this case the appellant is bound with said agreement.

During evidence it is also come on record that respondent No:1 tried to make payment, but appellant directed him to deposit 4 million in account of his brother, which was rightly not done by the respondent No:1 since the brother of appellant was not privy to contract and such payment was difficult to account for in respect of agreement. The respondent No:1 had already deposited balance consideration with the Nazir of account, which show his intention to complete his part of agreement. The learned trial court has rightly held that nowhere the appellant had taken action against his agent/respondent No:2 and also no intention of recalling the agreement as well. Thus the agreement was duly executed by the attorney of appellant and nowhere it was shown by the appellant that how time was essence of contract.

The final contention of the respondent that amount of Rs.4 million is not justified, in this regard I think the civil court has to make complete justice and the enhancement of sale consideration appears justified in the circumstances as respondent No:1 had remained continuously in possession of property and enjoying the same, whose value has increased manifold, whereas he appellant had even not received benefit of sale consideration. Therefore point No:1 is answered as negative”.

The appellant has challenged the above concurrent findings in the present appeal.

6. This is a Second Appeal, which has been filed under Section 100 C.P.C. Under Section 100 of the Code of Civil Procedure 1908 CPC a second appeal to the High Court lies only on any of the following grounds: (a) the decision being contrary to law or usage having the force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law; and (c) a substantial error or defect in the procedure provided by CPC or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon merits. However, in the instant matter, none of the aforesaid grounds is involved. The Supreme Court of Pakistan in the case of *Zafar Iqbal and others v. Naseer Ahmed and others* [2022 SCMR 2006] while interpreting the scope and ambit of section 100 of the CPC has observed as follows :

“The scope of second appeal is thus restricted and limited to these grounds, as section 101 expressly mandates that no second appeal shall lie except on the grounds mentioned in section 100. But we have noticed that notwithstanding such clear provisions on the scope of second appeal, sometimes the High Courts deal with and decide second appeals as if those were first appeals; they thus assume and exercise a jurisdiction which the High Courts do not possess, and thereby also contribute for unjustified prolongation of litigation process which is already choked with high pendency of cases”.

7. In another case viz. *Muzafar Iqbal vs. Mst. Riffat Parveen and others*, [2023 SCMR 1652] the Supreme Court of Pakistan while dilating upon the scope of second appeal, inter alia, has held as under :

“There is a marked distinction between two appellate jurisdictions; one is conferred by section 96, C.P.C. in which the Appellate Court may embark upon the questions of fact, while in the second appeal provided under section 100, C.P.C., the High Court cannot interfere with the findings of fact recorded by the first Appellate Court, rather the jurisdiction is somewhat confined to the questions of law which is sine qua non for the exercise of the jurisdiction under section 100, C.P.C. The High Court cannot surrogate or substitute its own standpoint for that of the first Appellate Court, unless the conclusion drawn by lower fora is erroneous or defective or may lead to a miscarriage of justice, but the High Court cannot set into motion a roving enquiry into the facts by examining the evidence afresh in order to upset the findings of fact recorded by the first Appellate Court”.

8. It is also well settled law that concurrent findings of facts by the courts below cannot be disturbed by the High Court in the second appeal,

unless the courts below while recording the findings of fact have either misread the evidence or have ignored the material piece of evidence<sup>1</sup>.

9. From perusal of the impugned judgments, it appears that both the courts below thoroughly examined the evidence and reached a concurrent conclusion that respondent No. 1 is the lawful owner of the suit property whereas the appellants failed to prove his version before the two courts below.

10. Moreover, the concurrent findings of fact recorded by the two courts below are entitled to deference and cannot be interfered with in absence of any legal infirmity, jurisdictional error, or misreading of evidence, which in the present case is missing. Learned counsel for the appellant has also failed to point out any such material irregularity. Accordingly, in view of the above discussion, present appeal is **dismissed** being devoid of any merit.

JUDGE

*Jamil\**

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<sup>1</sup> *Keramat Ali and another v. Muhammad Yunus Haji and another* (PLD 1963 SC 191), *Phatana v. Mst. Wasai and another* (PLD 1965 SC 134) and *Haji Muhammad Din v. Malik Muhammad Abdullah* (PLD 1994 SC 291).