Order Sheet

IN THE HIGH COURT OF SINDH, KARACHI

IInd Appeal No. 02 of 2023

[The Administrator DHA Karachi and another v. Yousuf Rasool Naroo]

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Appellants	:	Through Mr. Hameed Ahmed, Advocate
Respondent	:	Nemo
Date of Hearing & Order	:	13.03.2025

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ARSHAD HUSSAIN KHAN, J. The appellants have preferred this second appeal against the concurrent findings of the two courts below, challenging the judgment and decree dated 07.11.2019, passed by the learned IV Senior Civil Judge, Malir, Karachi, in Civil Suit No. 340/2017, and the judgment and decree dated 19.10.2022, passed by the learned District Judge, Malir, Karachi, in Civil Appeal No. 166/2019. The appellants have prayed for setting aside the impugned judgments and decrees as being null and void, ab initio, and dismiss the suit as not maintainable and incompetent.

2. Briefly the facts of the case are that the respondent/plaintiff, Yousuf Rasool Naroo, through his guardian/father, instituted civil suit No. 340/2017 for declaration and permanent injunction against the appellants/defendants, seeking a declaration that he is the lawful owner of residential Plot No. 50, Sector 7, Sub-Sector "B", admeasuring 500 square yards, situated in DHA City, Karachi. The trial court decreed the suit in favor of the respondent/plaintiff, directing the appellants/defendants to issue an allotment order against the payment of balance sale consideration. The first appellate court, in Civil Appeal No. 166/2019, upheld the findings of the trial court and dismissed the appeal. The appellants/defendants have challenged the above concurrent findings in the present 2nd appeal.

3. Learned counsel for the appellants, inter alia, has contended that the impugned judgments and decrees of both the courts below are bad both in law and facts as the relevant laws applicable in the instant matter have neither been discussed nor applied. He has contended that the courts below committed serious errors by misreading and non-reading

of documentary as well as oral evidence. He has further contended that the trial court wrongly interpreted clause 21-d of the application form [Exh D/3]. He has further argued that the impugned judgments are erroneous, contrary to law and without application of judicial mind. Learned counsel has argued that the trial court in the judgment observed on its own that the plaintiff / respondent due to un-intentional bonafide mistake instituted suit for declaration instead of suit for specific performance whereas the appellate court also failed to take notice of such illegality despite pointing out the same. Learned counsel has contended that the learned appellate court failed to take notice that the suit was filed against the Administrator DHA & Director T & R and not against Pakistan Defence Officers Housing Authority, Karachi and since the respondent/plaintiff has never moved an application either for correction or for amendment as such how the learned trial court assumed and treated it as inadvertent bona fide mistake, which is neither proper nor justified. He has further argued that the courts below failed to apply its judicial mind towards the legal aspect of the present matter that the power of attorney on the basis of which the case was filed was not executed by the qualified person as the plaintiff being minor executed power of attorney in favour of Syed Hamid, which is absolutely null & void and as such on the basis of such power of attorney all proceedings stand in effective, unlawful and unauthorized. He has further argued that the suit was filed upon cancellation of allotment, vide letter dated 06.01.2017, which still intact and has not been challenged as such the suit was liable to be dismissed. He has argued that the impugned judgments were passed in hasty manner, which requires interference on the legal as well as factual aspects of the case. Lastly, he has contended that both the courts below misunderstood and misapplied principles of law and justice and ignored the material evidence available on the record as such the impugned judgments are liable to be set aside.

4. On the other hand, none on behalf of the respondent has marked the attendance, despite repeated notices.

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

Insofar as the contention of learned counsel that the trial court wrongly interpreted clause 21-d of the application form [Exh D/3] is concerned, while dealing with this issue, the trial court in its findings has observed as follows:

> "It is the pleadings of the Defendants that as per column No.21(d) of the Application Form, the Plaintiff being minor was not entitled for allotment of the Suit Property in his name. In order to highlight the importance of the point, it would be expedient to reproduce the column No.21(d), of the Application Form as under:-
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> **"All citizens of Pakistan including Overseas Pakistanis more than 18 years on the last date of submission of application ie. 28 Aug 2009 and 10 Sep 2009 for inland and overseas Pakistanis respectively".**
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> It is matter of record that the Plaintiff was minor at the time of submission of the Application Form but the Application Form was filled by the Plaintiff through his father, whose age was more than 18 years and the aforesaid condition does not apply to the case of the Plaintiff. A father can purchase property in the name of his son for which no permission is required under any law.
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> The Application Form was correctly filled by the Plaintiff through his father and no false information was incorporated in the Application Form. The Plaintiff had not made any misstatement in filling the particulars of the Application Form.

6. **Insofar as the contention regarding cancellation letter dated 06.01.2017 is concerned,** the trial court had the jurisdiction to determine whether such cancellation was valid and whether the respondent had a legal right to claim the suit property. The trial court in its findings, while discussing this point has observed as follows:

> "In view of the above discussion and admissions on the part of the authorized person of the Defendants, it is proved on record that the Plaintiff had not received the notice for cancellation of the file of the Suit Property in his name. Though the Plaintiff intimated the Defendants regarding change of his address but the Defendants had not issued a single notice to the Plaintiff on his fresh address. Thus, the cancellation of the Suit Property in the name of the Plaintiff without appropriate order of cancellation of the competent authority, issuance of prior show cause notice, without providing opportunity of hearing to the Plaintiff and without general body meeting is null, void ab-initio and of no legal effect. The impugned cancellation of the Suit Property in the name of the Plaintiff amounts to denial of the Plaintiff's right in the Suit Property.
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> [Emphasis supplied]

7. **Insofar as the contention with regard to the power of attorney being issued by the minor is concerned;** firstly, this objection was neither raised before the trial court nor before the first

appellate court. Secondly, from the record it appears that the allotment of the suit property was applied by the respondent through his real father-the attorney of the respondent. Thirdly, the father of the respondent has paid the entire consideration on behalf of his son in respect of the suit property and the appellants received the application Form plus all the amount from the father of the respondent without raising any objection. Besides, the trial court has observed as follows :

> "It would be expedient to reproduce the Order XXXII Rule 1, of the Code of Civil Procedure, 1908 as under:-
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> "**1. Minor to sue by next friend: Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor".**
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> Bare reading of the aforesaid provision of law shows that "Every suit by a minor shall be instituted in his name by a person who in suit shall be called the next friend of the minor". The present Suit has been competently instituted by the minor Plaintiff through his father/natural guardian. In Case of M. Shahid Saigol and 16 others v. M/s. Kohinoor Mills Ltd. And 7 others (PLD 1995 Lahore 264), it has been held by the Honourable Lahore High Court that "*It is clear from the relevant provision of Order XXXII, C.P.C. that so far as the minor Plaintiff is concerned his next friend for filing the suit is not to be appointed by the Court and the person filing the suit as next friend would continue to be treated to be his next friend during the proceedings unless it was clearly shown that he was disqualified to act as such on account of his interest being in conflict with the interest of the minor/Plaintiff whereas as regards guardian-ad-litem of the Defendant the appointment with regard thereto is required to be made by the Court itself*". In Case of Muhammad Din v. Sarfaraz (minor) (1988 CLC 768), it has been observed that "Order XXXII, Rule 1, Civil Procedure Code states that every suit by a minor must be instituted in his name by a person called his next friend. Neither any permission nor order of the Court is required to constitute a person as next friend of the minor.

8. **Insofar as the contention that the trial court while converting the suit for declaration into a suit for specific performance has committed an error** is concerned, the trial court while dealing with this objection has given its findings as follows :

> "ISSUE NO.1.
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> The Plaintiff has instituted the present Suit for "Declaration and Permanent Injunction" against the Defendants. However, in prayer clause (b), the Plaintiff has sought direction against the Defendants to "receive the remaining payment from the Plaintiff and transfer/lease out the same in favour of [the] Plaintiff in respect of Suit Property viz. Residential Plot No.50, Sector 7, Sub-Sector"B", admeasuring 500 square yards", whereby the Plaintiff is seeking enforcement of the contract, which is in fact relief of "Specific Performance of the Contract" for all intents and purposes and not a Suit for Declaration. However, in the title of the Plaint it has been

> mentioned as "Suit for Declaration", which appears to be unintentional bonafide mistake. In Case of Javaid Iqbal v. Abdul Aziz and another (PLD 2006 Supreme Court 66). Honourable Supreme Court of Pakistan upheld the decisions of the learned Courts below converting the Suit for "Declaration" into "Specific Performance" and it was observed that "Evidently and essentially, this was a fit case for exercise of jurisdiction under Order VI. rule 17. Order VII, rule 7 and section 151, C.P.C., rather than attaching much importance to the defective drafting of the plaint and the prayer clause". In these circumstances, the Suit of the Plaintiff for "Declaration" is treated to be "Specific Performance of the Contract The case laws relied upon by the learned counsel for the Defendants are distinguishable from the facts and circumstances of this Suit".

9. **As regards the contention that the suit was filed against the Administrator DHA & Director T & R and not against Pakistan Defence Officers Housing Authority**, the trial court while discussing the very objection has observed as follows:

> "It appears that the Plaintiff has arrayed the Administrator of Pakistan Defence Officers Housing Authority as the Defendant No.1 instead of Pakistan Defence Officers Housing Authority through its Administrator; it can be termed as an inadvertent bonafide mistake and mere mis-description in the title of the plaint is not sufficient enough to non-suit the Plaintiff. It would not cause prejudice to the Defendant No.1 if the same is corrected at this stage. Reference may be made to the Cases of Hotel Inter-Continental, Karachi v. Vth Sindh Labour Court and another (PLD 1976 Karachi 301) & Ismail Haji Sulaiman v. Messrs Hansa Line and another (PLD 1961 Dacca 693) and Messrs Shabir Tiles and Ceramics Limited through Company Secretary v. Messrs Cache Systems Pakistan through Sole Proprietor (2013 CLC 518). The Administrator is an integral part of the Pakistan Defence Officers Housing Authority and the two are not distinct and independent legal entities. It is, therefore, not a case of addition or substitution of a party and did not attract the provisions of section 22(1) of the Limitation Act".

10. It appears that more or less all the objections/contentions raised by learned counsel for the appellants in the present 2nd appeal have already been asserted before the trial court and the trial court while dealing with each and every objection/contention raised by the appellant/defendant has given its findings based on sound reasoning and supported by references to the relevant laws, which are appreciated. Subsequently, the said findings of the trial court were upheld by the first appellate court as well. Hence, in my view, there arises no question that the impugned judgments are erroneous, contrary to law and without application of judicial mind as both the courts below while thoroughly examining the evidence and properly evaluating the facts reached a concurrent conclusion.

11. It is also well settled law that concurrent findings of the 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[1]. 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 appellants has also failed to point out any such material irregularity.

12. Besides, this is a second appeal, which has been filed under Section 100 C.P.C. 1908, under which 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.

13. 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 chocked with high pendency of cases".

14. In another case viz. *Muzafar Iqbal vs. Mst. Riffat Parveen and others*, [2023 SCMR 1652] the Supreme Court of

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[1] *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).

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".

15. Accordingly, in view of the above discussion, present appeal is **dismissed** being devoid of any merit.

JUDGE

*Jamil**