

ORDER SHEET
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.

R.A. No. 311 of 2010.

DATE	ORDER WITH SIGNATURE OF JUDGE
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	For Katcha Peshi. For hearing of CMA-1082/10. For hearing of CMA-843/14.
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Date of hearing : 21.08.2014.

Date of decision: .09.2014.

Mr. Hakim Ali Siddiqui, Advocate for the applicants.
Mr. Jagdesh R. Mullani, Advocate for Respondents No.1 to 5.
Mr. Anwar Baig Mughal, Advocate for Respondents No.6&7.
Mr. Saeeduddin Siddiqui, Advocate for Respondent No.10

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NAZAR AKBAR,J- This Civil Revision application is directed against the judgment and decree dated 24.5.2010 and 31.5.2010 passed by learned VIIth Additional District Judge, Hyderabad in Civil Appeal No.39 of 2005, whereby the appeal preferred by the applicant against judgment and decree passed by the Second Senior Civil Judge, Hyderabad in IInd Class Suit No.117 of 1999 filed by respondents No.1 to 5 were maintained.

2. Brief facts leading to this revision application are that Respondents No.1 to 5 claiming inheritance in shop No.14 Block D, Unit No.VII Latifabad, Hyderabad (hereinafter suit shop) filed suit No.117 of 1999 for declaration, cancellation of documents, possession, permanent and mandatory injunction against the applicant/defendant No.1 who is their step brother and defendants No.6 and 7, their real sister and brother with the following prayers:-

(a) Declaring and cancelling the managed and forged sale agreement (Farokhatnama) dated 30.07.1996 on the stamp paper No.472 dated 30.7.1996 as forged, fictitious, bogus, fraudulent, illegal and void and having no legal effect in the eyes of law.

(b) Declaring that the transfer of the shop No.14 Block, D, Unit No.VII Latifabad, Hyderabad in favour of the defendant No.1 by the defendants No. 4 and 5 on the basis of the alleged forged, fictitious, bogus, illegal and void sale agreement (Farokhatnama) dated 30.07.1996 and all subsequent proceedings including allotment order No.77 dated 7.5.1997

or any other transfer/sale based thereon are illegal, malafide, ultravires, bogus, without any lawful authority and jurisdiction of the defendants No. 4 and 5 are void ab initio.

(c) Declaring that the plaintiffs and defendants No.2 and 3 are legally and lawfully entitled to inherit their respective proportionate share in the shop No.14 Block D Unit No.VII Latifabad, Hyderabad according to law of inheritance and Muhammadan Law.

(d) Directing the defendant No.1 to hand over the vacant and peaceful possession of the shop No.14 Block D, Unit No.VII, Latifabad Hyderabad.

(e) Issuing permanent injunction restraining the defendant No.1 and defendant No.6 from selling, transferring, encumbering or renting or parting with the possession of the shop No.14 Block D, Unit No.VII, Latifabad, Hyderabad to any person in any manner.

(f) Granting a mandatory injunction directing the defendants No.4 and 5 to mutate the names of the plaintiffs and the defendants No.2 and 3 in the allotment order and other records and transfer the shop No.14 Block D Unit No.VII Latifabad, Hyderabad, to them being the legal heirs/representatives of the deceased allottee Abdul Waheed.

(g) Costs.

(h) Any other relief.

3. The plaintiffs claimed that father of plaintiffs and the Applicant/defendant No.1 as well as respondents No. 6 and 7 namely Abdul Razzak was in physical possession of two shops bearing Nos.14 and 15 situated in Block D Unit No.VII Latifabad, Hyderabad under notice dated 22.9.1972 issued by the Respondent No.9/defendant No.5 and after his death in 1976 both the shops came into the use and possession of Abdul Waheed, their real brother which fact is confirmed by the notices dated 29.05.1979. Subsequently Abdul Waheed retained shop No.14 and sold shop No.15 to the applicant vide notice dated 23.7.1979. The official Respondent on payment of price allotted shop No.14 to Abdul Waheed by order dated 15.9.1981 and the shop No.15 was transferred to the applicant by official respondent No.9/defendant No.5. The respondents / plaintiffs further contended that their brother Abdul Waheed expired on 05.02.1997 and after his death as the respondents / plaintiffs were entitled to inherit the suit shop, they approached respondent No.9 for mutation of suit shop in the name of legal heirs of Abdul Waheed. They came to know from the office of respondent No.9 that their step

brother /applicant was trying to get the suit shop transferred in his favour on the basis of a forged sale agreement and had illegally occupied the suit shop along with articles left by the deceased Abdul Waheed. The Respondents / plaintiffs moved an application dated 30.05.1997 to Respondent No.9 informing them about the above situation. The Respondents/plaintiffs further contended that applicant/defendant No.1 had prepared a forged and bogus sale agreement dated 30.7.1996 for sale of the suit shop for consideration of Rs.35,000/- which was illegal and void document. They further contended that Respondents No.6 and 7/defendants No.2 and 3 being sisters and brothers of deceased are in collusion with applicant /defendant No.1 and Respondent No.9/defendant No.5 issued a letter dated 18.06.1997 verifying the transaction in favour of the applicant and advised the Respondents to approach competent Court of law. Hence the suit was filed before the trial Court. In their written statement, the present Applicant disclosed that on 15.5.1997, he had sold shop No.14 to one Nawazish Ali and therefore, he was impleaded as defendant No.10.

4. In their written statement, respondents No.6 and 7/defendants No.2 and 3 supported the version of the applicant that the deceased Abdul Waheed had sold out the suit shop to the applicant /defendant No.1 for consideration of Rs.35,000/-and also handed over possession thereof to the Applicant/defendant No.1. However, they did not appear in witness box to affirm this statement on Oath. Respondent No.1/defendant No.1 also pleaded in his written statement to have purchased the suit property legally and lawfully on payment of sale consideration amounting to Rs.35,000/-. Respondent No.11/defendant No.7 did not contest the suit and the Court proceeded *ex parte* against him.

5. Learned trial Court framed 10 issues from the pleadings and recorded evidence of the parties in support of their respective claims. After hearing the learned counsel for the parties, learned trial Court decreed the suit, which was assailed in appeal before the VII-Additional District Judge, Hyderabad in appeal No.39 of 2005, but failed as the learned appellate Court maintained the findings recorded by the learned trial Court. The applicant has preferred this revision against the concurrent findings.

6. Mr. Hakim Ali Siddiqui, Advocate for the Applicant has mainly contended that the judgment of the Ist. Appellate Court was in violation of mandatory provisions of Ordinance XLI Rule 31, CPC as the appellate Court has failed to frame the point for determination in respect of the controversy between the parties. His contention was that the finding of the fact about the execution of agreement to sell on the basis of non-examination of Nisar Ahmed, one of the attesting witnesses, was not proper since the said witness namely Nisar Ahmed had already expired and it has been categorically stated by the applicant in his examination-in-chief and the statement of the Applicant was not controverted in the cross examination, thus stands proved in terms of Article 132 of Qanoon-e-Shahadat, 1984 and, therefore, no adverse inference could have been drawn by the Courts below on account of non-production of Nisar Ahmed. He further contended that the provisions of Article 79 of the Qanoon-e-Shahadat Order, 1984 were wrongly applied by the lower Court to come to the conclusion that the agreement of sale between the applicant and late Abdul Waheed was not proved. In support of his contentions on the point of violation of Order XLI Rule 31, CPC, he has relied upon the following cases laws:-

- (i) 1996 SCMR 669 Syed Iftikhar-u-din Haider Gardezi v. Central Bank of India limited.
- (ii) 2009 SCMR 589 Gul Rehman v. Gul Nawaz Khan.
- (iii) PLD 2010 SC 906 Bashir Ahmed v. Mst. Taja Begum & others.

7. In rebuttal Mr. Jagdesh R.Mullani, Advocate for respondents No.1 to 5/ plaintiffs has contended that the appellate Court in substance has complied with the requirements of provisions of Order XLI Rule 31, CPC as the impugned order reflects that the learned appellate Court has discussed the evidence of the applicant in coming to the conclusion that the sale agreement (farokhatnama) dated 30.04.1996 was bogus as held by the learned trial Court. He has further contended that the appellate courts are not always required to deal with each of the issues particularly when the findings of facts recorded by the learned trial Court on the issues were to be maintained by the appellate Court. In the case in hand, learned appellate Court has maintained the findings of the facts recorded by the learned trial Court. In support of his contention, he has relied upon on the case law reported in **2010 SCMR 1861** (Muhammad

Iftikhar v. Nizakat Ali). He has further drawn attention of this Court towards evidence of the Applicant himself and pointed out that even in examination in chief the applicant Nadeem Khan has repeatedly stated that he has purchased shop No.15 through sale agreement dated 30.07.1996 for sale consideration of Rs.35,000/-. Even regarding possession, he has stated that Abdul Waheed handed over keys and documents of shop No.15 to him. The Applicant, be continued to assert, had also failed to support the contents of sale agreement wherein the entire amount of sale consideration is shown to have been paid at once and in the examination in chief he himself has stated that he has paid only Rs.27,000/- but he has not produced any receipt of such payment. In the cross examination, he has claimed that he paid Rs.27,000/- at the time of writing the stamp paper in presence of Gulsher and Naseem Khan but the said Naseem Khan has not supported the contention of the Applicant as he has not appeared in the witness box and Gulsher Khan in his cross examination has stated that the said transaction was made in respect of shop No.15 in between the parties and the amount of Rs.27,000/- was paid in his presence on his shop meaning thereby not at the time of writing of stamp paper. The only witness of so called sale agreement namely Gulsher has disowned the sale of shop No.14 and he has stated that he has witnessed the transaction of shop No.15. The transaction took place at his shop and the Applicant, the beneficiary of the agreement says that everybody affixed signatures on the sale agreement before the stamp vendor. According to the learned counsel, even the payment of sale consideration has not been proved. Every payment is supposed to be proved by producing the receipt and receipt has not been produced. The only attesting witness of the agreement failed to support the contents of agreement, place of payment of sale consideration and therefore, neither his evidence was confidence inspiring nor the requirement of section 79 of Qanoon-e-Shahadat Order, 1984 are fulfilled. The receipt was required to show payment of sale consideration and the best available witness namely Naseem has not come forward to support the version of the applicant.

8. He has further contended that in Revision concurrent findings cannot be reversed by the revisional Court unless non-reading of the evidence is shown. The applicant counsel, he further argued, has not referred to any evidence available on record to show that the learned Courts below has missed to

appreciate the agreement of sale has been established between the applicant and late Abdul Waheed.

9. Mr. Saeeduddin Siddiqui, Advocate for the respondent No.10 has adopted the arguments advanced by Mr. Hakim Ali Siddiqui. However, he has added that the respondent No.10 is the bonafide purchaser of the shop in question by agreement of sale dated 15.05.1997. He has further stated on 15.05.1997, the Respondent No.10 entered into agreement of sale with the applicant in respect of both the shops i.e. shop No.14 and 15 and he got registered sale deed executed in respect of shop No.15 on 25.05.2000. Till date he has only sale agreement dated 15.05.1997 in respect of shop No.14, but he has not filed suit for specific performance of agreement even after 17 years in respect of shop No.14 against the applicant Nadeem Khan.

10. I have examined the impugned judgments as well as evidence with the assistance of the counsel for the parties. All the counsel have conceded before starting their arguments that material issue between the parties is in fact issue No.5 i.e. "Whether the agreement dated 30.07.1996 on stamp paper No.472 dated 30.07.1996 is forged, bogus and fictitious? And therefore, they have advanced their arguments mainly on this issue. Even otherwise issues No.1 to 4 regarding maintainability of the suit, plaintiff's locus standi, application of section 42 of Specific Relief Act, and undervaluation of the suit property, which have been decided in negative by the learned trial court do not hurt any of the parties. The controversy is to be resolved by decision on issue No.5 as the findings on the said issue has direct bearing on the issue No.8 regarding entitlement of inheritance of respondents No.1 to 7.

11. It is an admitted position from the pleadings that the shop No.14 was owned by the father of respondents No.1 to 7, who died in 1976. Right of inheritance has not been disputed by the applicant and his main contention was that the suit shop was purchased by him from Abdul Waheed against sale consideration of Rs.35000/- and therefore, it cannot be the subject matter of inheritance among the respondents. The trial court while deciding issue No.5 against the applicant has referred to the evidence and answered issue No.5 against the applicant has referred to the evidence and answered issue No.5 in

negative, amongst others, on the ground that the applicant himself has changed his own version in respect of the payment of sale consideration. In the written document i.e. sale agreement Ex.232, the applicant has claimed to have paid entire sale consideration at once but contrary to the contents of document, both the beneficiary of the document and his witness Gulsher have contradicted the document without any explanation. The trial court did not find evidence of the applicant confidence inspiring also on the ground that Mr. Pervez Khan advocate, who identified the executants of the document and ACM Phuleli, Hyderabad, who attested the sale agreement were the material witnesses but they were not produced. The appellate court while affirming the findings of trial court referred to the contents of the written statement and found that the applicant has even denied the allotment of the shop to Abdul Waheed from whom he has claimed to have purchased the same in the year 1996 for total sale consideration of Rs.35000/-. He claimed to have paid sale consideration in presence of witnesses. Not only the contents of document i.e. sale agreement were contradicted but even the stand taken by the applicant in written statement was contradicted by him and his witness. The contention of Mr. Hakim Ali Siddiqui that the trial court and appellate court have misread the evidence is limited to the one liner statement in the examination in chief that one of the attesting witnesses of the agreement has died and therefore, he was not produced. In my humble view the evidence referred to and relied upon by the learned trial court to come to the conclusion that the applicant has failed to establish that the agreement of sale dated 30.07.1996 was not bogus was unshakeable even without taking into consideration the non availability of Nisar Ahmed, one of the attesting witness. Burden of this issue was on the applicant/ defendant No.1 namely Nadeem Khan and he has failed to corroborate the stand taken by him in the written statement at the time of his evidence.

12. The very fact that the applicant admits in the evidence that till date the entire sale consideration has not been paid as sister of Abdul Waheed has not contracted marriage shows that the sale consideration has not been passed on even till date. Interestingly enough, the perusal of sale agreement shows that in the description of parties, the agreement has not been made binding on the legal heirs of the parties. The story of document of payment of Rs.8000/- till

the time of marriage of sister of Abdul Waheed namely Riffat, too failed since it is by itself negation of contents of sale agreement. There is no mention of part payment and putting of payment of balance sale consideration to an unspecified date in future. The story developed by the applicant in his written statement in defence of the claim of the respondents failed at the trial when in the examination in chief the applicant changed the entire version taken by him in the written statement. The applicant in presence of witnesses claimed to have paid a sum of Rs.27000/- and produced only one of them. Even otherwise, the moment he stated on Oath that he paid Rs.27000/-, the contents of agreement to sell were disproved as according to the agreement to sell he had paid entire sale consideration in presence of the witnesses and, therefore, the contention of Mr. hakim Ali Siddiqui, Advocate that the Court has drawn a wrong conclusion by referring to non-production of Nisar Ahmed, one of the attesting witness of the agreement, becomes irrelevant. Once document by itself contradicted by the beneficiary of the document himself, the document stands disproved without referring to the question of proof of document in terms of article 79 of Qanoon-e-Shahadat Order, 1984. In these circumstances, the law referred to by the parties on the point of article 79 of Qanoon-e-Shahadat Order, 1984 is out of context in the present case.

13. The contention of learned counsel for the applicant that the Judgment of the appellate Court is not in accordance with the requirement of Order XLI rule 31 CPC is not very convincing. The citations relied upon by Mr. Hakim Ali Siddiqui, Advocate are not relevant in view of the facts and circumstances of the present case. In **1996 SCMR 669**, the Honourable Supreme Court has examined the provisions of Order XLI Rule 31, CPC only on the point of delay in announcement of the Judgment once it was reserved by the Court. In **2009 SCMR 589**, the facts of the case were that the High Court at revisional stage has reserved the concurrent findings and the Honourable Supreme Court remanded the case to appellate Court when it came to the conclusion that the evidence of three P.Ws were not examined by the appellate Court. In the case in hand, the evidence offered by the applicant was examined by both the Courts as burden was on the Applicant to prove not only the agreement but also the payment of sale consideration. The appellate Court has not only relied on the findings of the trial Court rather it has also examined the written

statement and evidence of both the witnesses before coming to the conclusion that findings of the trial Court was perfect and, therefore, the facts of citation **2009 SCMR 589** are quite different. In **PLD 2010 SC 906** the provisions of Order XLI Rule 31, CPC was not even consideration and the citation is on the scope of jurisdiction of Court in second appeal and, therefore, the same is totally out of context.

14. In reply to all these citations, Mr. Jagdish R. Mullani, Advocate for Respondents No.1 to 5 has relied upon the case reported in **2010 SCMR 1868** (Muhammad Iftikhar V. Nazakat Ali). In this recent Judgment, the Honourable Supreme Court has held that the appellate Court is not always required to discuss each of the issues unless the same has caused any serious violation of law or resulted into a grave miscarriage of justice to any of the parties to the suit. The relevant part of the Judgment is reproduced below:-

“It appears from the perusal of the impugned Judgment and that by the first appellate Court, in substance compliance of the provisions of Order XLI Rule 31, CPC was made and it is not always required that in each case the appellate Court would deal with each of the issue and to resolve the same separately in the light of the evidence available on the record unless the same had caused any serious violation of the law or resulted into a grave miscarriage of justice to any of the parties to the suit.

In the instant case, the findings of facts recorded by the learned trial Court on the issues were maintained by the learned first appellate Court, therefore, unless the findings are reversed by the first Court of appeal which is not so in the present case, decision on each issue may not to be distinctly and essentially recorded, provided in substance compliance of the provisions of the Order XLI Rule 31 CPC has been made.”

15. The impugned Judgment of the lower appellate Court in the case in hand has discussed not only the evidence of the Applicant and his sole witness as discussed by the trial Court, but also other material available on Court file while affirming the findings of the trial Court. The observation of lower appellate Court on the point of evidence of Nisar Ahmed in the impugned Judgment that witness Gulsher never deposed in his whole evidence that second attesting witness Nisar Ahmed was present at that time and signed the sale agreement (Farokhatnama) dated 30.07.1996 as Ex.232, is reply to the contention of learned counsel for the applicant that Courts below overlooked the fact that Nisar Ahmed was dead so he was not produced. Therefore,

following the dictum laid down in **2010 SCMR 1868** in my humble view the lower appellate Judgment has shown substantial compliance of the provisions of Order XLI Rule 31, CPC. And this being Revision against the concurrent findings and even I, on examination of evidence, am also of the view that the findings of both the courts are supported by evidence and there is no misreading and non-reading of evidence to claim miscarriage of justice. Even the applicant's counsel has not been able to pin point any particular piece of evidence from the record to question the findings of the courts below and claim that it has resulted in any injury to their claim on the basis of such evidence.

16. Now I take up the claim of respondent No.10 who has been represented by Mr. Saeeduddin Siddiqui, Advocate that he being bonafide purchaser is in possession of the property. Suffice is to say that he has not established his claim independent to the claim of applicant from whom he has purchased the suit shop, therefore, the findings of the lower courts against the Applicant are equally binding on respondent No.10. He has no better title than the title of seller from whom he has purchased the property. The other aspect of his case is that applicant Nadeem Khan claims to have purchased the property by an agreement to sell dated 30.07.1996 which he has failed to establish. Admittedly from 30.07.1996 till 07.02.1997 when the seller viz. Abdul Waheed had died, he did not approach the Deputy Director Land. Not only that the so called allotment obtained by him is dated 07.05.1997 and on 15.05.1997 he immediately sold the suit shop to respondent No.10 within hardly 07 days. The Respondent No.10 neither before entering into sale agreement nor since 15.05.1997 has made any effort to ascertain the title of the seller. He, in fact, was waiting for the outcome of this litigation and in the process he has enjoyed exclusive possession of the suit shop for well over 17 years without any lawful basis.

17. In view of above discussion, I am of the considered view that this Civil Revision Application has no merit and no inference can be justified in concurrent findings of the trial Courts below. Accordingly, this Revision Application is dismissed alongwith listed applications with cost throughout to be borne by the applicant and Respondent No.10 jointly and severally.

JUDGE.