

IN THE HIGH COURT OF SINDH CIRCUIT COURT HYDERABAD

IInd Appeal No.26 of 2021

Appellants M/s Arif Brothers & another through
Mr. Muhammad Saleem Ansari, Advocate.

Respondent No.1 Allah Bux Unar son of Rahim Dino Unar through
M/s Muhammad Suleman Unar and Asad Ali Jatoi,
Advocates.

Respondents No.2 to 6 through Mr. Wali Muhammad Jamari, Assistant
Advocate General.

Date of hearing **18.02.2022**

Date of Judgment **11.03.2022**

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JUDGMENT

SHAMSUDDIN ABBASI, J:- By means of this IInd appeal filed under Section 100, C.P.C. the appellants have called into question the vires of the judgment and decree dated 14.01.2021 and 19.01.2021, penned down by the learned Additional District Judge-II, Hyderabad, in Civil Appeal No.207 of 2019, through which the appeal filed by the respondent No.1 was allowed setting aside the judgment and decree passed by the learned trial Court in F.C. Suit No.70 of 2016.

2. The facts giving rise to this appeal, briefly stated, are that the appellants launched a project in the name and style "Al-Rehman Tower", Wadhu Wah, Qasimabad, Hyderabad, (hereinafter referred to as the said project) in 2006. The respondent No.1 booked Flat No.8, Block No.A-6, situated at 2nd floor, Supreme Apartments consists of five rooms plus servant quarter (hereinafter referred to as suit flat) on 25.03.2006 for a total consideration of Rs.17,00,000/- (Rupees seventeen lac only) including flat charges, loan, lift charges and development charges etc., to be paid in 36 monthly installments as per payment schedule. According to the terms and conditions, the appellants were bound to complete the said project and handover possession of respective flats to the allottees within a period of three years. The respondent No.1 fulfilled his contractual obligation and paid the entire amount to the appellants in 36 installments without committing any default, receipts whereof were acknowledged through letter dated 08.12.2012. On payment of total sale consideration,

the respondent No.1 approached the appellants time and again and sought possession of the suit flat as well as execution of sale deed in his favour, but they avoided on one ground or the other and kept the respondent No.1 on false hopes. The appellants with malafide intention and ulterior motives inserted a mezzanine floor just to grab more money without any lawful authority and approval from concerned quarter. The project was approved for a four storied building but the appellants raised construction upto seven floor violating the rules and regulations of the Sindh Building Control Authority (SBCA). The appellants have also failed to provide utility facilities i.e. construction of lift, gas connection, electricity connection, water supply connection, drainage system, car parking and boundary wall etc despite receiving charges of such facilities from the allottees. The respondent No.1 having no response from the appellants served a legal notice dated 26.02.2014 upon them, which was not replied so he approached the Director SBCA, Hyderabad, but instead of redressing his grievances, he was asked to approach the competent Court of law. It also came to the notice of the respondent No.1 that the appellants in collusion with Sub-Registrar and Mukhtiarkar concerned intend to transfer the said property in the name of someone else. He, therefore, filed F.C. Suit No.70 of 2016 and prayed for following reliefs:-

- (a) *"To pass a decree for specific performs of contract directing the defendant Nos.1 and 2 to execute the register sale deed in favour of plaintiff in respect of Flat No.8 of Block A-6 at 2nd floor Supreme Apartments consist upon 5 rooms plus servant quarter, Al-Rehman Tower, Wadhu Wah Road, Qasimabad, Hyderabad and in case of failure of the defendant Nos.1 and 2 the Nazir of this Honourable Court may be directed to execute the register sale deed in respect of the suit property in favour of plaintiff.*
- (b) *This Honourable Court may be pleased to direct the defendant Nos.1 and 2 to handover the physical possession of the suit property to the plaintiff with full facilities.*
- (c) *Direct the defendants to provide utility facilities i.e. construction of lift, gas connection, electricity connection, water supply connection, drainage system, car parking and compound wall etc. in the suit property.*
- (d) *Direct the defendant Nos.1 and 2 to pay an amount of Rs.80,00,000/- (Rupees eighty lac only) towards the damages which the plaintiff sustained to delay on the part of defendant Nos.1 and 2 in handing over the possession of the suit property within the stipulated time.*

- (e) Grant the permanent injunction restraining the defendant from alienating, transferring and selling the suit property in any manner, themselves or through their agents and employees directly or indirectly.*
- (f) Restrain the defendant Nos.3 and 4 to entertain any sale deed, lease deed, sub-deed or any other documents regarding transfer of aforesaid property in favour of anybody else if presented by the defendant Nos.1 and 2 for registration.*
- (g) Direct the defendant Nos.1 and 2 to pay mesne profit since stipulated period of Al-Rehman Tower construction till handing over the possession of suit property to the plaintiff at the rate of Rs.25,000/- per month.*
- (h) The cost of the suit may be borne by the defendants.*
- (i) Any other relief is deemed fit and proper by this Honourable Court is required.*

3. The appellants contested the suit and filed their written statement wherein they have denied all the allegations leveled against them by the respondents No.1. According to them, the respondent No.1 committed default in the payment of monthly installments and paid the agreed amount in 71 installments instead of 36 installments as provided in the payment schedule. They have further submitted that the project was completed as per approved plan providing all utility facilities except gas connection owing to a ban imposed by the Prime Minister of Pakistan, and ready for possession, but the respondent No.1 avoided to take possession with malafide intention and ulterior motives, hence he is not entitled for the reliefs claimed.

4. A statement was filed on behalf of respondents No.3 to 5 stating therein that the dispute relates to two private parties involving no interest of the Government.

5. The following issues were framed:-

- 1. "Whether plaintiff has paid entire sale consideration according to payment schedule?"*
- 2. Whether the defendant has completed the project in time and is ready for possession?"*
- 3. Whether the defendants No.1 & 2 have failed to deliver the possession of the suit flat with all requirements including gas,*

electricity connections, lift, water supply, drainage system, car parking and boundary wall including other utility facilities?

4. *Whether defendants No.1 and 2 have failed to perform their part of contract?*
5. *Whether the plaintiff is entitled for mesne profit at the rate of Rs.25,000/- per month for 12 months and further till handing over the possession of suit flat?*
6. *Whether defendants No.1 and 2 are liable to pay an amount of Rs.80,00,000/- (eighty lac) towards damages sustained by the plaintiff due to delay on the part of defendants No.1 and 2 and handing over the possession of the suit property within time?*
7. *Whether plaintiff is entitled for the reliefs claimed?*
8. *What should the decree be?*

6. The parties led their evidence. The respondent No.1 examined himself and produced Abdul Ghaffar Pirzada as his witness. The appellants examined Zubair Ahmed Syed as their attorney. On behalf of respondents No.5 and 6, Kashif Ali, Assistant Director SBCA appeared and recorded his statement. The learned Senior Civil Judge-VIII, Hyderabad, after hearing the parties' respective counsel and assessing the record partly decreed the suit vide judgment dated 07.08.2019 in the following terms:-

"In view of the above discussions, the suit of the plaintiff is partly decreed to the extent that the defendants No.1 and 2 are directed to complete the same within the period of 60 days from the date of this judgment subject to the policies of the Government with regard to such facilities and after completion will also execute the sale deed in favour of the plaintiff failing otherwise the Nazir of this Court will appear before the concerned department to do the needful. However, since the relief being equitable if the defendants No.1 and 2 failed to comply the directions, the plaintiff would be entitled to the refund of his amount with 10% interest per annum to be paid by the defendants from the date of full payment by the plaintiff till the disposal of this present suit while the claim of mesne profit and damages stands dismissed. Hence suit of the plaintiff is partially decreed with no order as to costs. Let such decree be prepared within stipulated time hereof.

7. Feeling aggrieved by the judgment and decree passed by the learned trial Court, the respondent No.1 filed appeal (Civil Appeal No.207 of 2019) mainly agitating that the findings of the learned trial Court suffer from errors

of law as well as facts, based on surmises and conjectures, and in violation of Order XX rule 5, CPC, hence liable to be reversed.

8. The appellate Court through its judgment dated 14.01.2021 allowed the appeal setting aside the judgment and decree passed by the learned trial Court and remarked as under:-

"For what has been discussed above on point No.1, I am of the considered view that impugned judgment and decree is not sustainable under the law, as such the same is set-aside. The suit filed by the plaintiff is hereby decreed except mesne profits with directions to the defendants/respondents No.1 and 2 to complete the flat within 30 days with all amenities/utilities (except the sui gas connection which will be provided as per Government policies) and handover the possession of same to the plaintiff/appellant failing which the Nazir of the Court will do the needful. The defendants/respondents No.1 and 2 are also directed to pay the damages to the appellant/plaintiff at the rate of Rs.20,000/- per month from date of filing the suit till delivery of possession of flat to him. The parties are left to bear their own costs".

9. Impugning the judgment and decree passed by the learned appellate Court, the appellants have preferred this IInd appeal.

10. It is contended on behalf of the appellants that project has been completed and the appellants are ready to handover possession to the allottees including the respondent No.1 as well as transfer the flats by way of mutation in the revenue record. It is next submitted that possession of the flats have been handed over to the respective allottees and most of the families are residing there, but the respondent No.1 is not ready to take possession of the flat. It is also submitted that the impugned judgment and decrees passed by the learned appellate Court is bad in law and facts, without appreciating the evidence in line with the applicable law and surrounding circumstances and based its findings on misreading and non-reading of evidence and arrived at a wrong conclusion in decreeing the suit acting upon the material put forward by the respondent No.1 and ignoring the neutral appreciation of whole evidence adduced by the appellants. Reliance has been placed on the cases of *Government of Khyber Pakhtunkhwa and others v Syed Jaffar Shah* (2016 MLD 223) and *Pak Petrochemical Industries Pvt Ltd v Syed Hamid Ali* (2014 CLC 837).

11. The learned counsel for the respondents No.1, on the other hand, has controverted the submissions raised by the learned counsel for the appellants and submitted that project was started in the year 2006 and respondent No.1 paid the entire amount within time in installments as agreed and undertaken by the parties. Though there was a condition of loan from House Building Finance Corporation (HBFC), but the same was not sanctioned, despite the respondent No.1 fulfilled his part of contract and paid the remaining balance amount as per agreed terms and conditions. It is next submitted that appellants have failed to complete the project within time and yet the work is in progress, hence the damages granted by the learned appellate Court to the tune of Rs.20,000/- per month is justified. It is also submitted that the project was consisted of 2500 apartments, but the appellants in collusion with SBCA officials enhanced the number of apartments from 2500 to 7500 and also failed to provide basic amenities in the project. The learned counsel while summing up his submissions has emphasized that the impugned judgment passed by the learned appellate Court is speaking and well-reasoned, to which no exception could be taken. The appellants have failed to point out any material illegality or serious infirmity committed by the learned appellate Court below while passing the impugned judgment, which is based on fair evaluation of evidence and documents brought on record, hence call for no interference by this Court.

12. Arguments advanced by the learned counsel for the parties have been heard and record perused carefully with their able assistance.

13. Admittedly, the appellants have failed to place on record completion certificate, issued by SBCA. According to the appellants, the project was started in the year 2006 after obtaining approval from the concerned quarter, but no completion certificate has been produced either at trial or before first appellate Court or before this Court, which is a mandatory requirement of Sindh Building Control Ordinance, 1979.

14. Had there been a completion certificate issued by the competent authority, the appellants ought to have made it part of the record. The failure of appellants in filing completion certificate strengthened the case of the respondent No.1 that yet project has not been completed and work is in

progress. A keen look of the record reveals that the project was started in the year 2006 and at the time of booking it was agreed and undertaken by the builders that they would complete the project and handover possession of the flats within a period of three years, but inspite of lapse of 15 years the appellants have failed to complete the project and handover possession of the flats to the allottees. The learned trial Court too while accepting the claim of respondent No.1 to the extent of specific performance partly decreed the suit directing the appellants to complete the project within 60 days and execute sale deed in favour of the respondent No.1, but declined the claims with regard to damages and *mesne profit*. The learned appellate Court reversed the findings of the learned trial Court and decreed the suit of the respondent No.1 as prayed except *mesne profit*, directing the appellants to pay a sum of Rs.20,000/- per month (equivalent to one month rent of similar flat) as damages on account of failure to perform their part of contract from the date of filing of the suit till delivery of possession of suit flat to the respondent No.1.

15. A party cannot be held responsible to suffer a loss due to failure of other party in performing his part of contract. In the case in hand, appellants have failed to perform their part of contract and did not complete the project inspite of lapse of fifteen years, which was to be completed within a period of three years. I am, thus, of the opinion that the findings of the learned appellate Court in the impugned judgment are just and proper and based on fair evaluation of evidence and documents brought on record. There is no denial of the fact that the appellants are builders and failed to perform their part of contract, hence they are liable to pay compensation/damages as ordered by the learned appellate Court. I am also conscious of the fact that the appellants have not impugned the judgment and decree passed by the learned trial Court in appeal and it was the respondent No.1, who being aggrieved by the decision of the learned trial Court filed appeal and when the learned appellate Court passed the judgment and decree of damages in addition to the relief of specific performance, only then they filed instant IInd appeal, which finds support the case of the respondent No.1 that project was not completed within stipulated period of time and gives rise to a presumption that the judgment and decree passed by the learned trial Court to the extent of

specific performance was accepted by the appellants, therefore, they avoided to challenge such a decision in appeal.

16. Insofar as the contention of learned counsel for the appellants that the judgment, impugned herein, is bad in law and facts, is not legally correct. I am convinced that learned appellate Court has appreciated the evidence and scrutinized the material available on record in complete adherence to the principles settled by the Hon'ble apex Courts in various pronouncements and has reached a just conclusion while passing the impugned judgment and decree. No evidence or any other material has been brought on record on behalf of the appellants that they completed the project within time and it was the respondent No.1 who refused to take possession of the suit flat. It is established beyond doubt that appellants have committed breach of contract and failed to complete the project and handover possession of the apartments to the allottees within time. Section 73 of the Contract Act, 1872, entitles a person to claim compensation in case of breach of a contract whereas Section 19 of the Specific Relief Act, 1877, empowers the Court to grant compensation in addition to the relief of specific performance. Here it would be appropriate to reproduce Section 73 of the Contract Act, 1872, and Section 19 of the Specific Relief Act, 1877, which read as under:-

"73. Compensation for loss or damage caused by breach of contract.---*When a contract 'has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.---*When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract".*

Explanation. *In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account".*

"19. Power to award compensation in certain cases.--

Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.

If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

Compensation awarded under this section may be assessed in such manner as the Court may direct".

Explanation.--The circumstances that the contract has become incapable of specific performance does not preclude the Court from exercising the jurisdiction conferred by this section.

17. Reviewing the above Sections, it is manifest that the Court while exercising power under section 19 of the Specific Relief Act though come to the conclusion that the party is entitled for specific performance, instead of granting relief for specific performance can grant relief of compensation for the breach of contract or further while granting relief of specific performance, to meet the ends of justice, in addition to relief of specific performance can grant compensation also. Reliance may well be made to the case of *Messrs Nigar Pictures, Karachi v Messrs United Brothers, Lahore and 6 others* (PLD 1970 Karachi 770), wherein it was held that "*section 19 of Specific Relief Act empowers the Court to grant remedy in lieu or in addition to decree for specific performance*". The case law cited by the learned counsel for the appellants, in support of his submissions, in my humble view, the facts and circumstances of the said cases are distinct and different from the present case, therefore, none of the precedents cited by the learned counsel are helpful to the appellants.

18. For what has been discussed above, I am of the view that judgment and decrees passed by the learned appellate Court is based on proper application of judicial mind to the facts and circumstances of the case, therefore, there is no reason to interfere. In view thereof, the

findings recorded by the learned appellate Court are upheld. Resultantly, the instant IInd Appeal petition is bereft of merit stands dismissed.

JUDGE