

IN THE HIGH COURT OF SINDH, KARACHI

Civil Revision Application No. 135/2019

Muhammad Zakir

Applicant through : Syed Ehsan Raza, Advocate

Muhammad Faisal

Respondent No.1 through : Syed Khurram Kamal, Advocate

Date of Hearing : **28.12.2021**

Date of Order : **07.01.2022**

ORDER

Adnan-ul-Karim Memon, J. The instant Revision Application under Section 115 CPC has been filed by the applicant, wherein following prayer has been made:

To set-aside the judgment and decree dated 11.10.2019 passed by the learned III-Additional District Judge, Karachi Central in Civil Appeal No.60/2018 and the judgment and decree dated 14.04.2018 passed by the learned VIII Senior Civil Judge, Karachi Central, whereby Civil Suit No.246/2016 filed by the applicant / vendor was dismissed and the suit No.497/2017 filed by respondent No.1 was decreed.

2. Applicant has averred that he is the lawful owner of House No.L-269, Sector 5-B-2, North Karachi, near Two Minute Chowrangi, Karachi admeasuring 80 sq. yards duly constructed. It is the case of the applicant that he had agreed to sell the aforesaid property to the private respondent for a total sale consideration of Rs. 24, 00,000/- (Rupees Twenty Four Lac only). It is further averred that the applicant received an amount of Rs.18,00,000/- towards part payment from the respondent and the remaining amount of Rs. 600,000/- was agreed to be paid as per the terms and conditions of the agreement dated 01.12.2013. it is asserted that as per the terms and conditions of the sale of aforesaid property, the private respondent was/is liable to pay the balance sale consideration amount as per the agreement dated 19.11.2013 but said agreement in original was retained by the respondent and he did not provide any copy thereof despite repeated demands as well as the amount of balance sale consideration. It is further stated that now the value of the property is increased and in January 2015 the respondent started harassing/treating the applicant through different ways and pressurizing to hand over possession by involving political party and compelling to his terms. Compelling him to institute the subject suit No.246/2016 for cancellation of sale

agreement before the learned VIII Senior Civil Judge, Karachi Central. However, the private respondent also filed suit No.497/2017 for specific performance of the agreement dated 19.11.2013.

3. The learned trial Court after perusing the pleadings of both the cases consolidated them and suit No.246/2016 was treated as the leading case being filed first. The following consolidated issues were settled by the Court as under:

1. Whether time was fixed in the agreement dated 01.12.2013 for the payment of the balance amount and performance of the contract?
2. Whether any agreement dated 19.11.2013 was executed between the plaintiff and defendant?
3. Whether the plaintiff in Civil Suit No.246/2016 is not entitled for the relief claimed by him?
4. Whether the plaintiff of Civil Suit No.497/2017 is not entitled for the relief claimed by him?
5. What should the decree be?

4. The learned trial court after recording evidence of the parties decreed suit No.497/2017 filed by respondent No.1 and dismissed Civil Suit No.246/2016 filed by the applicant. An excerpt of the judgment is reproduced as under:

REASONS

ISSUE NO.1

The burden to prove this issue was on the plaintiff Muhammad Zakir of CS No. 246/2016 that time was fixed in agreement dated 01.12.2013 for the payment of balance amount and performance of contract. Plaintiff Muhammad Zakir filed his A/E. During the cross examination plaintiff Muhammad Zakir admitted that there is no time limit mentioned in agreement dated 01.12.2013 for the payment of balance amount. Plaintiff Muhammad Zakir during the cross examination in his Voluntarily statement before the court stated that prior to this agreement there was another agreement dated 19.01.2013 but he has not produced the said agreement nor the Photostat copy of the same to substantiate in his voluntarily statement. Plaintiff Zakir in his further cross admitted that in his A/E he stated that another agreement prior to the agreement of 01.12.2013 was executed in the year of 19.11.2013. Plaintiff Zakir in his cross examination admitted that he has received Rs. 1,800,000/- from the Faisal he also admitted that total sale consideration was decided as RS. 2,400,000/- he also admitted that it was decided that balance amount Rs. 600,000/- will be paid at the time of execution. Contention of the learned counsel for the plaintiff Muhammad Zakir that the time was fixed in the agreement that the amount will be paid within one year has no force because the agreement is not bearing any clause in this regard that the payment will be paid within one year. The contention of the learned counsel that it is mention in the receipt dated: 05.02.2014 that the amount will be paid within one year has also no force because no cogent and concrete evidence produced before the court that the plaintiff Zakir was refused by the defendant Faisal that he is unable to pay or he has denied to pay the amount. Plaintiff Zakir produced witnesses namely Babar S/O Shafiq who has filed his A/E. During the cross

examination witness also admitted that Rs. 1,800,000/- has been paid in different times. During the cross examination witness of the plaintiff denied that the defendant Faisal, who is plaintiff in CS No. 497/2017, is ready to pay the balance amount but he has also not produced any cogent evidence or corroborative evidence as to what time, what moment and at what place Faisal denied not to paying the balance amount. Appearance of the witness and his saying that Faisal denied the payment without giving/mentioning the time, place, date has no evidentiary value. It is also observed that witness admitted that he know the plaintiff Muhammad Zakir for last 18 to 20 years. He has also admitted that he was the partner of plaintiff Muhammad Zakir. Witness Babar also admitted that it is not mentioned in the agreement that within what time period amount will be paid. On the other hand defendant Faisal filed the A/E and he was cross examined as well. He has denied that he has not paid the amount within the period of one year after first payment. He stated in the cross that he is ready and willing to pay the amount but Zakir is not ready to receive the amount. It reflected that nothing has been extracted from the mouth of plaintiff of CS No. 497/2017 Muhammad Faisal who is also defendant in CS No. 246/2016 that the default is on his part. Therefore, this issue is decided in negative because it has not been proved that in agreement dated 01.12.2013 time was fixed for the payment of balance amount and for the performance of contract.

ISSUE NO.2

The burden to prove this issue was on the plaintiff Muhammad Zakir of CS No. 246/2016 that the agreement dated 19.11.2013 executed between the plaintiff and the defendant. Plaintiff in his plaint and in his A/E stated that agreement 19.11.2013 was executed between the plaintiff and the defendant but he has not produced any convincing evidence in this regard. Plaintiff produced witness Babar who has also not produced any cogent evidence in this regard. Plaintiff witness Babar in his A/E mentioned nothing about the execution of the agreement dated 19.11.2013. Plaintiff filed A/E of witness Waqas Ahmed but he has not produced him for the cross examination. Learned counsel for the plaintiff Muhammad Zakir has also not advanced his arguments in respect of agreement dated 19.11.2013. It observed that plaintiff Muhammad Zakir of CS No. 246/2016 who is also defendant in CS No. 497/25017 has been failed to prove that any agreement dated 19.11.2013 had been executed between the parties.

ISSUE NO.3

The burden to prove this issue that the plaintiff in Cs No. 246/2016 is not entitled for the relief claimed by him was on the defendant Muhammad Faisal who is also plaintiff in CS No. 497/2017. Defendant Muhammad Faisal in his WS as well as denied that the default is on his part rather it is on the part of the Muhammad Zakir. Defendant Muhammad Faisal filed his A/E and he has filed the original receipt of amount of Rs. 300,000/- as Ex D/1 and another receipt of Rs. 300,000/- as Ex D/2 and the original cheque having the thumb impression of Muhammad Zakir as Ex D/3. Ex D/1, D/2 and D/3 are available in consolidated suit No. 497 /2017, which prima facie shows that amount, was received by the plaintiff Muhammad Zakir of CS No. 246/2016. Plaintiff Muhammad Zakir in his CS No. 246/2016 Prayed for the declaration that defendant has no right to forcibly taken the possession, agreement dated 19.11.2013 and 27.11.2013 have been come to an end due to the failure of the defendant to perform the part of contract and plaintiff is entitled to forfeit the token amount of Rs. 400,000/-, for surrendering the original agreements restraining the defendant not to harass him, Cost of suit and other reliefs. Plaintiff Muhammad Zakir himself admitted in his cross that he has received the amount of Rs. 1,800,000/-. Plaintiff witness Babar S/O Shafiqur-Rehman also admitted that plaintiff Zakir received Rs. 1800000/-. Plaintiff also admitted that total sale consideration was fixed Rs. 2400000/-. It is also admitted by him that the balance amount was to be paid at the time of execution. The plaintiff Muhammad Zakir failed to prove that defendant has not paid the amount on time and in such circumstances plaintiff has no right to forfeit the token amount and no declaration can be passed as prayed by the plaintiff

Muhammad Zakir. In the light of the evidence and the admissions made therein plaintiff Muhammad Zakir is not entitled for the reliefs claimed by him in his prayer clause.

ISSUE NO.4

The burden to prove this issue was on the shoulder of the plaintiff Muhammad Zakri of CS No. 246/2016 that the defendant Faisal who is plaintiff in CS No. 497/2017 is not entitled for the relief claimed by him. Plaintiff of CS No. 497/2017 prayed for the decree of his suit with the direction to the defendant No. 1 Zakir to transfer the subject suit property in his name and other reliefs mentioned in the prayer clause of his suit. Plaintiff Muhammad Faisal in CS No. 246/2016 in his WS prayed for dismissal of the CS No. 246/2016. Defendant Muhammad Zakir could not produced cogent, coherent and concrete evidence to prove that there is a default on the part of Muhammad Faisal for the part performance of the contract rather he himself admitted that he has received the amount of Rs. 1800000/- out of Rs. 2400000/-. It observed that possession is still with the plaintiff Muhammad Zakir despite of receiving more than half amount and he has not only enjoyed the amount but possession too. On the other hand defendant Muhammad Faisal after paying amount is running after plaintiff Muhammad Zakir for possession of the property and the performance of the contract. Therefore, the plaintiff of the CS No. 497/2017 is entitled for the relief.

ISSUE NO.5

In View of the evidence, and finding discussed in issue No. 1 to 4 CS No. 246/2016 is hereby dismissed with no order as to cost and the CS No. 497/2017 of the plaintiff is hereby decreed. As the value of the property has been increased therefore, plaintiff Muhammad Faisal of CS No. 497/2017 is hereby directed to pay RS. 1,200,000/- instead of Rs. 600,000 to the defendant Muhammad Zakir and defendant Muhammad Zakir is hereby directed to appear before the Sub-registrar and execute the sale deed in favour of plaintiff Muhammad Faisal and handover the peaceful vacant possession of the subject suit property along-with original documents within 30 days in case of failure plaintiff Muhammad Faisal is directed to deposit the amount in the office of Nazir District Central Karachi, and then court will proceed to his course in accordance with law.

5. Applicant being aggrieved by and dissatisfied with the judgment and decree dated 14.04.2018 passed by the learned VIII Senior Civil Judge, Karachi Central, preferred statutory appeal No.60/2018 before the learned III-Additional District Judge, Karachi Central which was too dismissed vide judgment and decree dated 11.10.2019. An excerpt of the judgment is reproduced as under:

“Point No.1

The record shows that there is dispute between the parties over sale and purchase of their suit property. According to plaintiff of suit No.497/2017 Muhammad Faisal that he purchased the suit property from Muhammad Zakir.

The plaintiff of the suit has filed the suit for Specific Performance of Contract. The record shows that the said Muhammad Zakir has admitted execution of sale agreement and also admitted the date of performance was fixed as 01.12.2013 while during cross examination he has admitted that no date was fixed for performance. Since the execution of sale agreement dated 01.12.2012 is admitted and it is also admitted that the same was not fixed for performance. Therefore in my humble view the plea raised by the counsel for Muhammad Zakir that suit No.497/2017 was time barred and carry no weight. In view of own admission of Muhammad Zakir. AS regard the suit No.246/2016 filed by

Muhammad Zakir it appears that he has sought Declaration that the defendant Faisal has no right as title over the suit property and declare that the Agreement of sale came into end due to nonperformance of his part of contract and failure of taken amount. I have already observed that no time was fixed for performance of agreement as admitted by the appellant, therefore in my humble view that the plea taken by Muhammad Zakir suit carry no weight. I therefore find that the learned trial court has passed impugned judgment and decree in both suit legally and do not require any interference. Point No.1 is answered in Negative.

Point No.2

In view of my findings on point No.1, the impugned judgment and decree are maintained. Consequently the appeal in hand stands dismissed with no order as to costs. Let such decree be prepared. The copy of this judgment and decree along with record and proceedings of civil suits be sent to the learned trial court for information and compliance.”

6. Learned counsel for the applicant has mainly contended that the judgment and decree dated 11.10.2019 passed by the learned Appellate Court in Civil Appeal No.60/2018 are not sustainable under the law as the same is not speaking judgment which hits the provision of Section 24-A of the General Clauses Act, 1897; that the learned courts below have grossly ignored the case laws, whereby both the Courts below have ignored the Articles 189 and 201 of the Constitution of Pakistan, 1973. Learned counsel for the applicant emphasized that in the suit for specific performance of the agreement to sell, time is the essence of the contract; that the failure of the respondent to pay remaining part of the amount of consideration to pay the balance amount up to the specified date, time and place, however, on the part of the respondent to pay the same is fatal, thus suit filed by the private respondent was not maintainable. Learned counsel emphasized that the respondent needed to deposit the balance amount with the trial Court, however, he failed to deposit on the first date of hearing of his suit. Learned counsel on the point of limitation has submitted that the point of limitation was required to be determined by the trial Court or appellate Court seized of the matter, however, both the learned Courts below failed to consider the limitation in filing the suit for specific performance of the contract. Learned counsel has relied upon the cases of Muhammad Buta v. Habib Ahmed [PLD 1985 SC 153], Muhammad Latif v. Riaz [2019 CLC 840], Kuwait National Real Estate Company (Pvt.) Ltd. v. Educational Excellence Ltd. [2000 SCMR 171], Hamood Mehmood v. Shabana Ishaque [2017 SCMR 2022], Kubra Amjad v. Yasmeen Tariq [PLD 2019 SC 704], Bahadur Sher Khan v. Shah Alam [2017 SCMR 902], Anwar Sajid v. Abdul Rashid Khan [2011 SCMR 958] and Fazal-ur-Rehman v. Ahmed Saeed Mughal [2004 SCMR 436]. He lastly prayed for allowing the instant revision application.

7. Syed Khurram Kamal, learned counsel for the private respondent, has raised the question of the maintainability of the instant petition and argued that the applicant is not entitled to the relief against the concurrent findings of the facts and law. He supported the impugned judgments and decrees passed by the learned Courts below. At this stage, I asked learned counsel whether the balance amount has been deposited with the learned trial Court, he candidly admitted that the learned trial Court vide judgment and decree dated 14.4.2018 directed him to pay Rs.12,00,000/- instead of Rs.600,000/- to the applicant, however, the same was deposited in the office of Nazir District Central Karachi in compliance of the aforesaid judgment and decree, thus nothing is left on his part to pay. He prayed for dismissal of the instant revision application.

8. I have heard the learned counsel for the parties and perused the material available on record. The first and foremost question involved in the present revision application is about maintainability. Undoubtedly, Revision is a matter between the higher and subordinate Courts, and the right to move an application in this respect by the Applicant is merely a privilege. The provisions of Section 115, C.P.C., have been divided into two parts; the first part enumerates the conditions, under which, the Court can interfere and the second part specifies the type of orders which are susceptible to Revision. In numerous judgments, the Honorable Supreme Court was pleased to hold that the jurisdiction under Section 115 C.P.C. is discretionary.

9. I have scanned the evidence available on record and found that findings arrived at by the learned courts below are within the parameters of the law. Primarily both the courts have dealt with the issue of the applicant as discussed supra, very elaborately, thus cannot be lightly interfered with unless some question of law or erroneous appreciation of evidence is made out, for which the learned counsel for the applicant has failed to point out any perversity and illegality in the impugned judgments and decrees passed by the learned Courts below.

10. In principle, the applicant has lost his case; and, at the revision stage, he has agitated the grounds already exhausted by him and properly adjudicated by the competent forum including the plea that the suit filed by the respondent was time-barred on the premise that he made last payment to the applicant on 12.8.2015 whereas, he filed his suit No.497/2017 for declaration, specific performance of sale agreement, permanent injunction and consequential relief on 24.4.2017 means 01 year, 08 months and 12 days. This plea has been taken care

of by the learned appellate Court in the point of determination to the effect whether the impugned judgment and decree required any interference to that effect. The record reflects that the plaintiff namely Muhammad Faisal filed suit for Specific Performance of Contract and the defendant Muhammad Zakir (applicant) admitted the execution of sale agreement dated 01.12.2013 in respect of property bearing No.L-269, Sector-5-B/2, North Karachi, admeasuring 80 square yards against the total sale consideration of Rs.24,00,000/-. The date of performance was effected from the execution of the sale agreement, while in his cross-examination he has admitted that no time limit was fixed for performance for payment of balance amount. Since the execution of the sale agreement dated 01.12.2013 is admitted and he received the payment of Rs.18,00,000/- against the total sale consideration of Rs.24,00,000/- and it was decided that balance amount of Rs.600,000/- would be paid at the time of execution of sale deed, therefore, the plea of the applicant that Suit No.497/2017 was time-barred was rightly discarded by the learned appellate Court vide judgment and decree dated 11.10.2019. He also admitted his thumb impression over the payment of receipt i.e. Annexure 'B' filed with the affidavit in evidence, which factum *prima facie* shows his admission of receiving certain amounts in 2015.

11. So far as Suit No.246/2016 filed by the applicant for declaration and permanent injunction that the defendant Faisal has no right over the suit property and sought a declaration to the effect that the agreement of sale came into end due to non-performance of his part of the contract and failure of the taken amount is concerned, this plea of the applicant has been taken care of by the learned appellate Court while deciding the point of determination as discussed supra. Thus in my view, no perversity and gross illegalities have been pointed out to upset the decision of the learned courts below, therefore, it does not appeal to remand the case to the learned subordinate Courts for re-determination of the question discussed supra as the matter has been decided on merits. The case-law cited at the bar will not be helpful to the applicant in the facts and circumstances of the present case.

12. I am of the view that learned Appellate Court has considered every aspect of the case and thereafter passed an explanatory Judgment and decree dated 11.10.2019 on merits by maintaining the judgment and decree of the learned trial Court, therefore, no ground existed for reevaluation of evidence, and thus, I maintain the Judgment and Decree dated 14.04.2018 passed by the learned VIII-Senior Civil Judge Karachi Central duly concurred by learned appellate Court vide judgment and decree dated 11.10.2019.

13. In the light of the above facts and circumstances of the case, I do not see any illegality, infirmity, or material irregularity in Judgments of the learned trial and Appellate Court warranting interference of this Court. Hence, the above Revision Application is found to be meritless and is accordingly dismissed along with the listed application(s).

J U D G E

Shahzad Soomro