Judgment sheet

IN THE HIGH COURT OF SINDH AT KARACHI

IInd Appeal No. 150 of 2024

Present
Mr. Justice Muhammad Jaffer Raza

Muhammad Hussain Jawaid, ……..…… Appellant.

Versus

Khalid Zafar Ahmed & others ……..…… Respondents.

Mr. Zia-ul-Haq Makhdoom, Advocate for the Appellant a/w Ms. Hira Agha Advocate.

Mr. Dur Muhammad Shah, Advocate for the Respondents 2 and 3 a/w Mr. Muhammad Akram Advocate.

Dates of Hearing: 07.05.2025, 21.05.2025 and 29.05.2025.

Date of announcement: 07.07.2025

J U D G M E N T

***MUHAMMAD JAFFER RAZA – J*:** The instant Second Appeal under Section 100 CPC has been preferred by the Appellant being aggrieved with the judgment and decree of the learned Appellate Court dated 05.03.2024 passed in Civil Appeal No.54/2023 **("Appeal")**. The above noted Civil Appeal emanated from the judgment and decree of the learned Trial Court dated 31.01.2023 **("Second decree")** passed in Civil Suit No.599/2015 **("Civil Suit")**, which was filed by the Appellant for specific performance, permanent and mandatory injunction.

2. Brief facts of the case pertaining to the instant Appeal are that the Appellant filed the above-noted Civil Suit with the following prayer clauses:

> "a) Order defendant No.1-8 perform their obligations under the Sale Agreement and transfer the suit property in favour of the plaintiff upon full payment by the plaintiff.
> b) Permanently restrain the defendants from entering into the negotiations with any other party or entering into a Sale Agreement in respect of the suit property.
> c) Restrain the defendants from making threats or causing harm to the plaintiff or his family members.

d) Permit the plaintiff to deposit the balance of the sale consideration with this Hon'ble Court.
In addition thereto (and without prejudice to the aforesaid).
e) Orders defendant No.1 to perform the clause 4 of the Sale Agreement, in case as alternate remedy for making payment double of the amount received by him.
f) Any other relief which this Hon'ble Court seems appropriate in the facts of the case;
g) Costs."

3. The present case has very peculiar and convoluted facts which ought to be expounded in the instant judgment. The same shall be succinctly captured in the succeeding paragraphs:-

i. The Appellant filed the above-noted civil suit with the prayer clauses reproduced above.

ii. Thereafter, Respondents No.1, 4-7 filed their written statement admitting the claim of the Appellant. On the said basis the Appellant preferred an application under Order XII Rule 6 CPC and the learned trial court vide judgment and decree dated 03.09.2015 **("First Decree")** decreed the suit of the Appellant against the above-noted Respondents. At this stage it will be pertinent to mention that the above-noted Respondents collectively owned approximately 80 percent of the subject property. It is also imperative to mention that the said Respondents are siblings of Respondents No.2 and 3 and legal heirs of the deceased Zafar Ahmed.

iii. It is further imperative to note that the Respondents No.2 and 3 were declared exparte, and exparte judgement and decree was rendered against them vide judgment dated 26.11.2015. Thereafter, the said Respondents filed Civil Appeal bearing No. 232/2015 against the ex-parte judgment and decree noted above and the same was allowed vide judgment and decree dated 28.01.2019 and 01.02.2019 respectively. What is noteworthy is that vide the above-mentioned judgment and decree, the learned Appellate Court whilst

setting aside the exparte judgment and decree, also set aside the decree passed on admission dated 03.09.2015 i.e. First Decree.

iv. Subsequently, the Appellant preferred Second Appeal bearing No. 48/2019 which was disposed of vide order dated 18.08.2020. Relevant excerpt of the said order is reproduced below:-

> *"3. It is a fact that judgment dated 03.09.2015 was not in question hence appellate court was not competent to set aside that judgment. Even no reasons have been assigned. Accordingly by consent impugned judgement dated 28.01.2019 and decree dated 01.02.2019 passed by appellate court are set aside as well as judgment dated 26.11.2015 passed by the trial court is also set aside with direction to the trial court to decide the same after hearing the parties. Trial court shall decide the same within six months. Needless to mention that judgment dated 03.09.2015 was not assailed by any party hence the same will remain in the field."* (Emphasis added)

v. Thereafter, the matter was remanded back to the trial court. The learned trial court after recording of evidence rendered judgment and decree dated 31.01.2023 i.e. Second Decree, whereby the suit of the Appellant was dismissed against Respondents No.2 and 3, whilst observing that the First Decree shall remain in the field.

vi. The Appellant thereafter preferred Civil Appeal No.54/2023 which culminated in the Impugned Judgment and Decree. The learned Appellate Court disposed of the said appeal and for all intents and purposes set aside the First Decree directing the Respondents to return the inflated sale consideration. The learned Appellate Court observed as under:-

> *"14. Since respondent/defendant No.2 and 3 have not consented to the sale of the suit property to the appellant/plaintiff and suit property being a house cannot be partitioned hence its sell by remaining co-sharers cannot be executed. Indeed, partial decree in favour of appellant/plaintiff would not resolve the controversy between the parties rather it would multiply litigation. For this reason, the partial decree in the suit is neither equitable not executable thus invalid".* (Emphasis added)

4. The Appellant therefore has impugned the concurrent findings of the courts below. It is specified that the concurrent finding in the facts of the instant case are in respect of the learned Appellate Court setting aside both the Decrees.

The Appellant in respect of the trial court is only aggrieved with the dismissal of his suit against Respondent No.2 and 3.

5. Learned counsel for the Appellant has argued that he entered into the Sale Agreement with the above noted Respondents. The Respondents according to learned counsel failed to abide by the terms and conditions enumerated in the said Sale Agreement compelling the Appellant to file the above-noted suit. Learned counsel submitted that most of the Respondents in the Civil Suit, who collectively owned 80% of the suit property, gave their no objection to the grant of application preferred by him under Order XII Rule 6 CPC and First Decree was passed by the learned Trial Court. Further he has contended that the First Decree was never impugned before any Appellate forum by any of the Respondents therefore the same attained finality. Therefore, he contended, that the learned Trial Court only proceeded and adjudicated the case against the Respondents 2 and 3 who owned only 20% of the subject property and consequently the mandate of the Appellate Court was restricted to this extent only. Learned counsel has thereafter argued that the learned Appellate Court vide impugned judgment and decree has committed the same mistake which was earlier committed by the learned Appellate Court in Civil Appeal No.232/2015 and set aside the judgment and decree which was not impugned. Further, he has contended that even if this aspect is temporarily over looked, he has made out a case of specific performance against Respondents 2 and 3 and has deposited the balance sale consideration of Rs.2.5 Million before the learned Trial Court immediately after passing of the exparte judgment and decree. Lastly, the learned counsel has argued that the Respondents No.2 and 3 have become dishonest and are resultantly resisting the suit of the Appellant for the reason that the said Respondents are the only Respondents enjoying possession of the subject property to the detriment of their siblings i.e. other consenting Respondents.

6. Conversely learned counsel for the Respondents 2 and 3 has argued that the Respondents being represented by him have not received any amount as "earnest money" from the Appellant. The said amount was received by an

individual namely Anwar and he is in possession of the subject property, whilst his siblings i.e. the consenting Respondents, who have given their "no objection", reside abroad. He has lastly argued that the concurrent findings of the learned Courts below require no interference. I have specifically raised a question pertaining to the First Decree and the learned counsel in this respect has candidly stated that the Respondents being represented by him have no nexus with the same.

7. Order XLI, Rule 31 C.P.C. mandates an appellate court to determine points for determination, the decision on those points, and the reasons for the decision. The said principle was also expounded in the case of ***Meer Gul vs. Raja Zafar Mehmood through legal heirs and others***[1]. The points for determination are set out below: -

1. **Whether the learned Appellate Court erred in setting aside the First Decree?**
2. **Whether the Appellant has made out a case of specific performance against Respondents 2 and 3?**
3. **Whether the Impugned judgment and decree are liable to be set aside?**

8. I have heard learned counsel for the parties and perused the record with their able assistance. The findings on the points for determination are as follows:

POINT No.1.

9. The aforesaid point goes to the root of the matter and highlights a fundamental defect in the findings by the learned Appellate Court. It is inexplicable and perplexing that the learned Appellate Court went over and above the jurisdiction vested in it and in essence set aside the First Decree which was passed in the year 2015 and was never impugned before the learned Appellate Court. It is further ironic to note that the same mistake was committed earlier by the learned Appellate Court in Civil Appeal No.232/2015 and after an unambiguous finding given in Second Appeal No.48/2019, the learned Appellate Court again committed the same mistake by setting aside the decree which was not

[1] 2024 SCMR 1496

impugned before it. The scope of the Appellate Court was simply to examine whether the Appellant made out a case of specific performance against Respondents 2 and 3. Needless to mention that the First Decree was passed on admission on an application preferred by the Appellant under Order XII Rule 6 CPC. The same attained finality, as observed by this court in Second Appeal No.48/2019 and the Civil Suit was only remanded back to the learned Trial Court for adjudication of the remaining 20% and against Respondents 2 and 3 **only**. In this regard it is held that the learned Appellate Court has erred miserably in rendering its finding. It is further ironic to note that the learned Appellate Court directed all the Respondents including Respondents 1 and 4 to 7 (against whom the suit was partially decreed on admission) to return double the amount as earnest money when the said Respondents did not pray for the same and neither did the said Respondents contest the noted appeal. The error is further incomprehensible as the Impugned Judgment in its opening paragraph clearly states that the judgment and decree impugned before the learned Appellate Court is dated 31.01.2023 and the noted civil suit has already been decreed against Respondents 1 and 4 to 7.

10. In light of what has been observed above I have come to the inevitable conclusion that the learned Appellate Court erred in setting aside the First Decree. Consequently, the point is answered in the affirmative.

POINT No.2.

11. It is apparent that the Civil Suit of the Appellant was dismissed by the learned Trial Court vide judgment and decree noted above. Prior to adjudicating the merits of the claim of the Appellant against Respondents No.2 and 3 it will be pertinent to reiterate that the remaining Respondents, identified above, have already admitted the execution of the sale agreement through their attorney namely Khalid Zafar Khan i.e. Respondent No.1. The said admission culminated into the First Decree as mentioned above.

12. The Appellant to advance his claim exhibited various documents including the relevant sale agreements, power of attorney, public notice, receipt, receiving

copies of cheques and affidavit of no objection executed by the contesting Respondents. I have specifically perused the Affidavit in Evidence filed by the Appellant in which the Appellant specifically reiterated his stance and furnished details of the transaction executed between the respective parties. For the sake of brevity the same need not be elaborated in the instant judgment. I have also carefully perused the cross examination of the Appellant conducted by the contesting Respondents. It is evident that not a single question was asked from the Appellant regarding the Supplemental Sale Agreement dated 03.03.2015, which after successive negotiations was the final agreement between the parties. Further, no categorical suggestion was made by the contesting Respondents in the above-noted cross examination regarding the power of attorney executed in favour of Respondent No.1. The Appellant was only questioned in respect of whether he knew if the signatures of the contesting Respondents are forged. It is also noteworthy that no question was put to the Appellant regarding the receipt of Rs. 3,000,000/-. The perusal of the entire cross examination of the Appellant reveals that the contesting Respondents failed to effectively cross examine the Appellant thereby admitting the claim of the Appellant therein. This aspect of the case was ignored by the courts below.

13. It is also noteworthy to mention that the contesting Respondents at no stage filed a suit seeking cancellation of the Sale Agreements, power of attorney or affidavit of no objection. It's apparent from the record that the contesting Respondents became aware of the existence of the said documents during the pendency of the suit in which they led evidence. However, as categorically admitted by the Respondent No.2 during his cross examination, no efforts were undertaken in respect of seeking cancellation of the said documents. The burden of proving the alleged forgery lay squarely on the contesting Respondents and no effort was made to discharge the same. Further, no legal proceedings were initiated against Respondent No.1 who allegedly forged the signatures of the contesting Respondents. The contesting Respondents, as is evident from their arguments

reflected above, only extend a bare denial to the Appellants claim without seriously contesting any of the averments made by the Appellant.

14. The willingness and ability of the Appellant can be gauged from his conduct in depositing the balance sale consideration of Rs. 2,500,000 soon after the ex-parte judgment was rendered by the learned trial court as mentioned above. Moreover, the Appellant has during the course of his arguments has categorically stated that the said amount is still deposited with the Nazir of the trial court and has not been withdrawn by the Appellant. Additionally, one of the prayer clauses (prayer clause "e") in the suit preferred by the Appellants seeks permission to deposit the balance sale consideration before the learned trial court.

15. In light of what has been discussed above the instant point of determination is answered in the affirmative.

POINT No.3

16. I am mindful of the scope of Section 100 CPC and the parameters which have been set by the Hon'ble Supreme Court of Pakistan repeatedly. However, I cannot be oblivious to the glaring errors which have been committed by the Courts below and in that regard, I am inclined to allow the instant IInd Appeal within the narrow parameters set in the case of ***Sheikh Akhtar Aziz Versus Mst. Shabnam Begum and others***[2] wherein it was held as under: -

> *"14. As far as the argument of the learned counsel for the appellant that the learned High Court had travelled beyond the parameters of section 100, C.P.C., the same in the facts and circumstances of the case has been found by us to be totally misconceived. Although in second appeal, ordinarily the High Court is slow to interfere in the concurrent findings of fact recorded by the lower fora. This is not an absolute rule. The Courts cannot shut their eyes where the lower fora have clearly misread the evidence and came to hasty and illegal conclusions. We have repeatedly observed that if findings of fact arrived by Courts below are found to be based upon misreading, non-reading 2019 S C M R 524 or misinterpretation of the evidence on record, the High Court can in second appeal reappraise the evidence and disturb the findings 52019 SCMR 524 9 which are based on an incorrect interpretation of the relevant law. We have examined the record and found that the issues have not properly been determined by the lower fora and there are material and substantial errors and defects in the reasoning and conclusions drawn by the trial as well as the first appellate Court which materially affected the outcome of the case on merit. The High Court was therefore, in our opinion, quite justified in interfering with this matter and correcting the errors of the lower fora in order to do complete justice." (Emphasis added).*

[2] 2019 S C M R 524

17. Prior to allowing the instant appeal I would like to note that relief under Section 22 of the Specific Relief Act 1877 **("Act")** is discretionary. However, the court in appropriate circumstances in order to avoid injustice, can determine a consideration (different from the consideration agreed upon between the parties) keeping in mind factors such as inflation and passage of time. In this regard I am guided by the judgement in the case of ***Muhammad Abdur Rehman Qureshi Versus Sagheer Ahmad***[3] wherein it was held as under:-

> *"18. Scope of section 22 of the Act has been broadened by providing for awarding reasonable compensation to the parties in order to avoid injustice and balance the equities, keeping in view all relevant circumstances which may include factors like the rate of inflation, rate of return on investment, appreciation or depreciation of the value of real estate, passage of time and change in the circumstances or status of the suit property."*

18. The above-noted judgement relied upon the judgement in the case of ***Liaqat Ali Khan v. Falak Sher***[4] wherein it was held as under:-

> *"18. A plain reading of above reproduced statutory provision leads to a definite conclusion that the relief of specific performance claimed by respondents Nos.1 to 4 in their suit is, purely discretionary in nature and the Court is not bound to grant such relief merely as it is lawful to do so. At the same time, the discretion to be exercised by the Court shall not be arbitrary, but it should be based on sound and reasonable analysis of the relevant facts of each case, guided by judicial principles and capable of correction by a Court of appeal. Moreover, in sub-paragraphs Nos. i, ii and iii of section 22 (ibid) some instances have been given, where the Court can refuse to exercise its discretion to pass a decree for specific performance. A careful reading of these instances, which are self-explanatory, further amplify vast powers of the Court in the matter of exercise of its discretion for ordering specific performance or otherwise. When the above reproduced provision of law is read in conjunction with the case-law cited at the Bar by both the learned Senior Advocates Supreme Court, the things as regards powers of the Court in exercising its discretion, become even more clear that there is no two plus two, equal to four formula available with any Court of law for this purpose, which can be applied through cut and paste device to all cases of such nature. Conversely, it will be the peculiar facts and circumstances of each case, particularly, the terms of the agreement between. the parties, its language, their subsequent conduct and other surrounding circumstances, which will enable the Court to decide whether the discretion in terms of section 22(ibid) ought to be exercised in favour of specific performance or not. Besides, some well articulated judgments on*

[3] 2017 S C M R 1696
[4] PLD 2014 SC 506

> *the subject, have further broadened the scope of exercise of such discretion of the Court by way of awarding reasonable compensation to the parties, keeping in view the other surrounding circumstances, such as rate of inflation, having direct bearing the value of suit property, inordinate delay/ passage of time, and change in the circumstances or status of the subject property etc.* (Emphasis added)

19. During the course of hearing the instant appeal the learned counsel for the contesting Respondents showed his willingness to perform the agreement subject to payment of Rs 10,000,000 (Rupees ten million only) keeping in mind the passage of time, inflation and increase in the value of the subject property. The said proposal was extended to the Appellant who categorically refused the same stating that significant sums of money have already been deposited by the Appellant pursuant to the ex-parte judgment and decree. In the absence of any agreement between the respective parties both the learned counsels proposed that this court may determine consideration in case the suit of the Appellant is decreed. In light of the same and being guided by the principles enunciated in the cases of **Muhammad Abdur Rehman Qureshi** (supra) and **Liaqat Ali Khan** (supra) I deem it appropriate to decree the suit of the Appellant for a cumulative sum of Rs.7,500,000/- (Seven and a half million only), to be deposited by the Appellant before the Nazir of the trial court. For the sake of clarity, it is specified that the cumulative sum mentioned herein includes the amount deposited earlier by the Appellant pursuant to the exparte judgment and decree.

20. For the foregoing reasons the instant appeal is allowed. The Impugned judgment and decree are set-aside and the suit of the Appellant is decreed as prayed in respect of prayers clauses (a)-(d) against Respondents 2 and 3 for the sum mentioned in paragraph No.19 above. Office to prepare decree accordingly.

J U D G E

Nadeem Qureshi "PA"