

IN THE HIGH COURT OF SINDH AT KARACHI

R. A. No. 149/1992**Present: Mr. Justice Nazar Akbar.**

Applicant: **Juma Khan (deceased)**
His legal representatives
i) **Hajiani Dhana**
ii) **Safia**
iii) **Hadija**
iv) **Hajiani**
v) **Abdul Karim**
vi) **Muhammad Iqbal**
vii) **Bashir Ahmed**
Through M/S K. B. Bhutto and Syed Sikandar
Advocates.

Respondents: **Tahir Ali and others through Mr. Abdul**
Mujeeb Pirzada Advocate.

Date of hearing: **18.08.2016**

Date of Judgment: **03.10.2016**

JUDGMENT

NAZAR AKBAR, J. This revision is directed against the judgment and decree dated **31.5.1992** passed by learned District Judge (West) Karachi, whereby Civil Appeal No. **52 of 1988** filed by respondent No1 was allowed and the judgment and decree dated **9.2.1988** in Suit No. **843/1973** passed by IIIrd Senior Civil Judge (West) Karachi in favour of the applicant was set aside.

2. Briefly stated the facts of the case are that Respondent No. 1 / the plaintiff filed Suit No. **843/1973** for Declaration, Specific Performance of Contract and Mandatory Injunction against the applicant and respondent Nos. 2 to 4 claiming that by agreement dated **09.05.1970**, he had purchased share of Respondent No. 2 / Defendant in the agricultural

land situated in Deh Narathar, Tapo Songal, Taluka and District, Karachi (the suit land) mentioned as under:-

DEH	S.NO.	SHARE
Narathar	98/18-116	0-5-8
*	99/12-35	0-5-8
*	105/25-24	0-4-0
*	107/5-33	0-4-0

3. The plaintiff / Respondent No. 1 further alleged that he had paid the agreed sale consideration amounting to Rs. 11,363/- to Respondent No. 2 and obtained vacant physical possession of the said land to the extent of his share. Respondent No. 2 on **9.12.1970** also obtained permission from Respondent No. 4 to sell his said share in the land. It was also averred in the plaint that by subsequent sale agreement dated **25.5.1970**, Respondent No. 2 contracted to sell his aforesaid share (the suit land) for Rs.6,750/- to the applicant / defendant No.1 and on the basis of said subsequent sale agreement dated **25.5.1970**, the applicant had filed Suit No. **2081/1970** against Respondent No. 2 for specific performance of the contract. Respondent No. 2 contested the Suit No. **2081/1970** and denied execution of the sale agreement dated **25.5.1970** with the applicant in his counter affidavit filed by him in the said suit. Respondent No. 1, on coming to know about the said development, filed an application under **Order 1 Rule 10 CPC** in Suit No. **2081/1970** to be impleaded as defendant being the necessary party in view of his earlier sale agreement dated **09.5.1970** with Respondent No. 2. However, pending application under **Order 1 Rule 10 CPC**, the applicant and Respondent No. 2 entered into a compromise in Suit No. **2081/1970** and the trial Court accepted the compromise without deciding the application under **Order 1 Rule 10 CPC** filed by Respondent

No. 1 in the said Suit. Respondent No. 1 against the said compromise decree dated **23.12.1970** filed Civil Appeal No. **5/1971** and the said appeal on **12.10.1974** was disposed of as infructuous by learned Vth Additional District Judge Karachi on the ground that during pendency of his Appeal No. 5/1971, respondent No. 1 has also filed **Suit No. 843/1973** and sought the following reliefs:-

- i) For declaration that the order dated 23.12.1970 and / or the compromise decree of the same date passed in Suit No. 2081 of 1970 and the second agreement of sale dated 25.5.1970 between the defendant Nos. 1 and 2 and the consequential mutation in the record of rights in favour of the defendant No. 1 are illegal, against law, void, without jurisdiction, nullity in the eyes of law, malafide, collusive, fraudulent, not binding upon the plaintiff and of no legal effect.
- ii) That a decree of specific performance be passed against the defendant No. 2 and in favour of the plaintiff with the direction that the defendant No. 2 shall execute the sale deed in respect of his share of five annas and eight pies in each Survey Nos. 98 and 99 his share of four annas in each Survey Nos. 103 and 107 in the agricultural land situated in Deh Narathar, Tapo Songal, Taluka and District Karachi in favour of the plaintiff and get it registered before the Sub-Registrar concerned and on his failure this Honourable Court or any other officer of the Court as required under the law.
- iii) Mandatory injunction be passed against the defendant No. 2 directing him to obtain income tax clearance certificate and other relevant permissions, if any from the relevant authorities which are necessary for him to obtain before executing a sale deed and to clear all dues if any of the Income Tax and for permanent injunction restraining the defendants from dispossessing the plaintiff from the land in dispute and from transferring, selling and / or disposing the said land in whatsoever manners.

- iv) Cost of the suit.
- v) Any other relief or reliefs this Honourable Court deems just and expedient to grant to the plaintiff in the interest of justice in the facts and circumstances of this case.”

4. The applicant and respondent No. 2 (i.e. defendants 1 & 2 in Suit No. **843/1973**) filed their respective but identical written statements denied the alleged agreement of sale dated **09.05.1970** and delivery of possession to Respondent No.2. Both, however, admitted proceedings of Suit No. **2081/1970** between them including counter affidavit filed by Respondent No. 2 (Defendant No. 2) in Suit No. **2081/1978** but alleged that it was procured by Respondent No1 by misrepresentation. Respondent No. 3 and 4 (Defendants No. 3 and 4) were proceeded ex-parte in the Suit.

5. The learned trial court from the pleadings of the parties framed the following issues:-

- i) Whether the defendant No. 2 executed an agreement of sale of his share in the property in Suit, as stated in para 2 of the plaint?
- ii) Whether in part performance of the said agreement of sale the defendant No. 2 received full consideration amount from the plaintiff and handed over to the plaintiff? If so, its effect?
- iii) Whether second agreement of sale deed dated 25.5.1970 between the defendant No. 2 and the defendant No. 1 in respect of disputed land is illegal, void against law and ineffective?
- iv) Whether the compromise decree in Suit No. 2081/1970 is illegal, void, nullity in the eye of law and obtained by fraud and not binding on the plaintiff?

- v) Whether the Suit is barred under section 11 of CPC?
- vi) Whether the Suit is barred under the provision of Section 42 of Specific Relief Act?
- vii) Whether the plaintiff has no cause of action?
- viii) Whether the Suit is undervalued and proper court fee is not paid in the Suit?
- ix) What should the decree be?

6. In support of his case plaintiff / Respondent No. 1 examined himself as PW-1, **Ex-5** and produced 25 documents as Ex.6 to Ex.25. He has also examined attesting witnesses to the sale agreement (Ex.6) Fakharuddin is PW-2, **Ex.26**. The Applicant / Defendant No.1 examined himself as DW-1, **Ex.27** and attesting witness of subsequent sale agreement dated 25.05.1970 Haji as DW-2 **Ex.29** and produced Receipt of payment of sale consideration dated **25.5.1970** as **Ex.28** and Sale agreement dated 25.05.1070 as **Ex.30**;

7. The learned trial Court after hearing the parties and going through the evidence, dismissed the Suit on **9.2.1988**. Respondent No. 1 impugned the said judgment and decree by filing Appeal No. 52/1988 and the learned appellate Court allowed the said appeal and set aside the judgment and decree of the learned trial court, hence this Revision, against the appellate decree in Suit No.843/1973.

8. I have heard learned Counsel for the parties and perused the record.

9. Learned counsel for the applicant has contended that the execution of agreement between Respondent No.1 & 2 dated **9.5.1970** in respect of the suit property was not proved. The two courts below, according to him, have failed to appreciate that the beneficiary of the agreement has not

produced the two attesting witnesses. The evidence was recorded on a date when the Qanun-e-Shahdat Order, 1984 has already been in field and in the absence of one of the witnesses of the agreement the same was hit by **Section 17** of the Qanun-e-Shahdat Order, 1984. He has further contended that agreement between Respondent No.1 & 2 was also hit by **Section 25** of the Contract Act, 1872. It was without consideration and the trial court has answered issue No.2 in affirmative on the basis of admission of Respondent No.1 about non-payment of sale consideration to Respondent No.2. He has further contended that the contents of the counter affidavit by Khoro (Respondent No.2) were of no legal consequence since it was filed through the same advocate, who has filed an application under **Order 1 Rule 10 CPC** on behalf of Respondent No.1 in the suit filed by the applicant (Suit No.2081/1970) . He has lastly contended that the compromise decree has attained finality since an appeal filed by Respondent No.1 against compromise decree was dismissed and no further revision or IInd appeal had been filed by Respondent No.1.

10. Learned counsel for Respondent No.1 has contended that the agreement was sufficiently proved when original of the same was produced in Court and even one of the attesting witness was also examined who admitted execution of the agreement in his presence. He further contended that it was admitted document because it has not been denied by the executant i.e Respondent No.2 / Defendant No.2. Respondent No.2 has admitted the very agreement on oath in his counter affidavit filed by him in the suit No.2081/1970. To the contrary in the same counter affidavit Respondent No.2 has denied subsequent agreement of sale dated **25.5.1970** with the applicant. However, subsequent to the filing of the said counter affidavit, he under coercion to

defraud Respondent No.1 entered into compromised with the applicant in suit No.2081/1970 at the back of Respondent No.1 pending his application under **Order 1 Rule 10 CPC**. The learned Sr. Civil Judge accepted the compromise without going through the contents of the compromise application. He has relied on the case law *Muhammad Hafeez and another ..Vs.. District Judge, Karachi East and another (2008 SCMR 398)* in support of his contention that in case of conflicting judgments of the two court below, the judgment of the appellate court is to be respected.

11. This is an admitted position from the record that the applicant and Respondent both drive their title in the suit property on the basis of sale agreements executed by Respondent No.2. The applicant in support of his claim has filed only two documents before the trial court i.e. payment receipt (Ex.28) dated **25.5.1970** and only one of the two attesting witnesses namely Haji DW-2 who was examined at Ex.29 and produced agreement of sale dated **25.5.1970** (Ex.P/30) between the applicant and Respondent No.2. Respondent No.1, beside other documents, too, has produced his agreement of sale dated **9.5.1970** (Ex.P/6) with Respondent No.2 and only one of the attesting witnesses of the said agreement namely Fakhruddin at Ex.27. Both sides have also relied on the the respective permissions for sale of suit land in their favour by the Deputy Commissioner.

12. The first contention of the learned counsel that the agreement executed by Respondent No.2 in favour of Respondent No.1 (Ex.P/6) was not proved on the ground that only one of the attesting witnesses had appeared, if we accept as a correct legal proposition in the given facts of the case, then the subsequent agreement of sale executed in his favour on 25.5.1970 (Ex.30) by the same Respondent No.2 was also not proved

since the applicant himself has relied on only one of the two attesting witnesses of the agreement with him. It is true that in terms of **Article 17** of the Qanun-e-Shahdat, Order, 1984 the agreement of sale was required to be proved by two witnesses of execution of agreement. This Article 17 of the Qanun-e-Shahdat Order, 1984 is, however, equally applicable to the documents filed by the applicant. The applicant, too, has produced only one attesting witnesses and this argument of his counsel was, therefore, equally fatal to his own case. The rule of production of two witnesses as proof of execution of a document is not an absolute rule to be applied in every case. The Courts are not supposed to apply legal propositions in isolation. Every case has to be decided on its own merit both on facts and law. In the first place, the need to provide proof of execution of an agreement arises when the denial comes from the executant of the agreement. In the case in hand the executant was not proceeded exparte. Once he has filed his written statement, he should have either cross-examined respondent No.1 or appeared in the witness box to support his claim from written statement on oath. The agreement of sale between Respondent No.1 & 2 dated **09.5.1970** was already admitted by Respondent No.2 even before institution of suit for specific performance by Respondent No.1 when on **31.10.1970** he filed counter affidavit to an application in suit No.2081/1970 filed by the applicant against him. In this context para-10 and 19 of the counter affidavit which was produced as Ex.10 are relevant. In para-10 Respondent No.2 has denied both the sale agreement dated **25.5.1970** (Ex-30) and even payment receipt (Ex.28). And to the contrary in para-19, he had admitted the agreement of sale dated **9.5.1970** with Respondent No.1. Not only agreement of sale was admitted he had also admitted the acceptance of sale consideration and permission to sale in favour of Respondent No.1.

The contention of the counsel for the applicant that Respondent No.2 was identified before the commissioner for taking affidavit by the same counsel who was also advocate of Respondent No.1, therefore, its credibility is doubtful is misconceived. Unfortunately the counsel for the applicant has advanced this argument without going through the written statement filed by Respondent No.2 in the suit filed by Respondent No1 (Suit No.843/73). Written statement of Respondent No.2 has been drafted by the same advocate who has filed and drafted the written statement filed by the applicant. Therefore, like the argument about application of **Article 17** of the Qanun-e-Shahdat Order 1984, in the context of present case, this contention, too, has no force. Learned trial court has held that the sale agreement dated **9.5.1970** was executed by Respondent No.2 was prior in time and the learned Appellate Court has rightly up held this finding against the applicant since he has not challenged the said finding on issue No.1 by means of cross-appeal / objection. Therefore, the finding of the lower and the appellate courts on issue No.1, that there did exist an agreement of sale dated **9.5.1970** between Respondent Nos. 1 & 2 cannot interfered with.

13. The courts of law while evaluating the evidence have to scrutinize each and every aspect of the document produced by the parties to assess the credibility of witness and value of his evidence for giving judgment in favour of either party. The preponderance of evidence is to be gathered from oral statement of the witness with reference to the documents produced by the witness in support of his oral statement in Court. In the present case, Respondent No.1 has not relied only on the question of prior agreement of sale with Respondent No.2 but there is also a series of documents which were also prior in time even to filing of suit N.2081/1970 by applicant against Respondent No.2 and compromise

decree. Respondent No.1 has, amongst other, relied on the following document which have not been shaken in cross-examination. The documents are:

- i. **Ex.6** agreement of sale dated 09.05.1970;
- ii. **Ex.17** is an application for permission to sell the property in favour of Respondent No.1 was moved by Respondent No.2 is dated **14.9.1970**;
- iii. **Ex.24 & 25** are statement of Respondents No.1 & 2 before the relevant Revenue Authority confirming sale purchase between them are dated **03.10.1970**.
- iv. **Ex.10** Certified copy of counter affidavit filed by Respondent No.2 in suit No. 2081/1970 dated **28.3.1971**.
- v. **Ex.7** is permission of sale by Deputy Commissioner to Respondent No.2 to sale the suit land to Respondent No.1 it is dated **9.12.1970**.
- vi. **Ex.13** compromise application between Applicant and Respondent No.2 in Suit No.2081/1970;
- vii. **Ex.15** Certified copy of judgment dated **12.10.1974** in C.A No.5/1971;

As against these documents the applicant has referred to the following documents in support of his entitlement:-

- i. **Ex.18** is request for permission to sell the property by the applicant (Juma Khan) and not by the seller i.e Respondent No.2 is dated **24.12.1970**;
- ii. **Ex.19** is statement of the applicant before Mukhtairkar. It is also dated **24.12.1970**;
- iii. **Ex.20** is an statement of Respondent No.2 before Mukhtairkar, West Karachi. It is also dated **24.12.1970**.
- iv. **Ex.21** Order of the Deputy Commissioner on the request for permission to sell the land to Juma Khan. It is dated **4.1.1971**;
- v. **Ex.22** certified copy of statement of the applicant before Mukhtairkar dated **04.01.1971**;
- vi. **Ex.23** certified copy of statement of the respondent No.2 before Mukhtairkar dated **04.01.1971**;

On comparing these documents to properly weigh the evidence of the parties we find that all the documents of the applicant are subsequent to the date of compromise decree dated **23.12.1970**. The dates on these documents confirm that Respondent No.2 had not applied for permission to sale the suit property to the applicant prior to the compromise decree nor the permission was obtained by the seller i.e Respondent No.2 even after the decree for the obvious reason that he had already obtained permission on **9.12.1970** to sell the suit property to Respondent No.1. The perusal of Ex.20 and Ex-21 is very important in the context of the present dispute. **Ex.20** is a statement said to have been recorded by Respondent No.2 before the Mukhtairkar on **24.12.1970** after the compromise decree. Even according to this document Respondent No.2 has categorically stated before Revenue authorities that he had already sold the suit land to respondent No.1 with permission of Deputy Commissioner. The relevant portion of his statement is as follows:-

“prior to this I had agreed to sell same land to Tahir Yousuf Ali to which I had obtained sanctioned of the sale of land to Tahir Yousuf Ali. Against that sale one Juma Khan son of Abdul Karim Jokhio filed civil suit in Civil Court. The Hon’ble Court decided I can sale the land to Juma Khan only. It is therefore requested that according to the decision of Civil Court sanction may kindly be granted to me to sell land to Juma Khan son of Abdul Karim Jokhio on the same terms and condition”.

Ex.21 is claimed to be the order of permission by Deputy Commissioner dated **4.1.1991** to sell the suit property to Respondent No.2. Its operative part reads as follows:-

“There is no question of fresh permission. The owner can sell his land to anybody he likes at his own risk provided provision of MLR No.64 or 64-A are not violated”.

The above documents are reconfirmation of the contents of the counter affidavit (Ex.10) filed by Respondent No.2 in the suit filed by the

applicant bearing Suit No.2081/1970 that there has been a prior sale between Respondent No.2 and Respondent No.1 and prior permission to sell in favour of Respondent No.1 by Deputy Commissioner dated **09.12.1970** (Ex.7)

14. The other unfortunate piece of evidence for the applicant on record is the receipt of payment of sale consideration dated **25.5.1970** produced by him as **Ex.28** whereas the record of Revenue Department shows that applicant (Juma Khan) has paid the total sale consideration on **04.1.1971** and the so-called sanction of Deputy Commissioner (Ex.21) reproduced above is also of same date. The **Ex.22** is fatal to the contents of written statement filed by applicant and Respondent No.2 as well as it contradicts the contents of compromise application in suit No.2081/1970. It was asserted by the applicant and Respondent No.2 in their pleadings that an agreement was executed on 25.5.1970 and on the same day full payment of sale consideration was received by Respondent No.2. In Ex.28 dated **04.1.1971** the applicant himself states before the Revenue Authority and I quote relevant statement of Juma Khan (the applicant) as under

“I have paid total consideration amount of Rs.7350/- finally today i.e. 4.1.1971. Sanction No.32/1971 dated 4.1.1971 has been obtained from the Deputy Commissioner Karachi for this sale.

15. The documentary evidence discussed in proceeding paragraphs is consistent with the pleading of Respondent No.1 in his plaint. Every sequence of events of transaction between Respondent No.1 & Respondent No.2 was prior in time to the collusive compromise decree dated 23.12.1970. Both the applicant and Respondent No.1 have made one line denial of contents of para-8 of plaint that the counter affidavit (**Ex.10**) was procured by Respondent No.1 by misrepresentation and

fraud. The particulars of fraud have not been mentioned in the written statement nor such fraud was disclosed in the evidence by the applicant. Respondent No.2 has not appeared in the witness box to disown the said documentary evidence.

16. The contention of the learned counsel for the applicant that the compromise decree has attained finality since the appeal filed by Respondent No.1 has been dismissed is also misconceived. Learned counsel seems to have not read the judgment of the appellate court, which was filed by Respondent No.1 as Ex.15. The appeal had not been dismissed, it had been disposed of in the following terms:-

“The learned counsel for the respondents (the applicant and Respondent No.2) stated that the appellant has already filed a suit wherein he has questioned the legality and propriety of this decree. The learned counsel for the appellant admits having filed a suit in civil court challenging the legality of the impugned decree.

In this situation I find that the present appeal has become infructuous as the appellant is prosecution his remedy in a proper forum”.

The above operative part of judgment in appeal negates the contention of the applicant counsel that the appeal was dismissed.

17. Now I take up the issue “whether the compromise decree was collusive and liable to be declared so through suit filed by Respondent No.1. In view of the findings of the appellate Court in appeal No.5/1971 quoted above, the appeal was not decided on merit. Even the appellate Court has observed that “**the appellant** (Respondent No.1 herein) **is prosecuting his remedy in a proper forum**”. The appeal was not the remedy to challenge the decree obtained on the basis of fraud and misrepresentation by the private parties and on **23.12.1979**, the provisions of **Section 12(2) CPC** were also not in the field. Even otherwise the learned Sr. Civil Judge failed to appreciate that suit for

specific performance is maintainable only when either of the party refuses to perform his part of the contract. Once the two side of a contract, even during the course of litigation agree to perform their respective obligations under the contract, the court ceases to have jurisdiction and it cannot pass any order except the order that the suit for specific performance of contract is dismissed for having become infructuous. In fact the cause of action ceases to continue for the Plaintiff to pursue his suit. However, the need to obtain a compromise decree in such cases arises only to defeat interest of third party in the suit property OR the compromise decree is needed to influence government functionaries for manipulation in the official accord in respect of the suit property. In the case in hand the perusal of para-6 of the compromise decree reflects that it was obtained to defeat the claim of Respondent No.1 set up by him in his application to be impleaded in the suit. Para-6 from compromise decree reads as under:-

6. That one Tahir Yousuf had obtained Defendant's signatures on certain papers in October, 1970 by misrepresentation, and the Defendant hereby denies the contents of the said documents including the alleged agreement of sale dated 8.5.1970, which is a fictitious date. the Defendant's T. Impression was obtained in October, 1970 and not in May, 1970 Defendants thumb impression on all the papers filed in this suit herein before have been obtained by misrepresent and they were not explained to the Defendant and same are denied.

The above contents of compromise were more than enough to appreciate the ulterior motive of the executant of compromise. Then this compromise decree dated **23.12.1970** was used to influence the Deputy Commissioner on **24.12.1970** to seek permission of sale of suit property (Ex.21) to the applicant and on the same day statement of the applicant and respondent No.2 before the Revenue authorities were also recorded on the basis of compromise decree. Thus obvious motive was to influence

government functionaries and frustrate right of Respondent No.1 to enforce an agreement of sale with him. What else can be termed as fraud and misrepresentation for obtaining an endorsement of counsel to serve an ulterior motive in the name of a compromise decree.

18. The above discussion of facts and evidence inescapably leads us to the conclusion that the learned trial Court has not fully examined the evidence. It has failed to look into the dates and contents of documents, their implications and passed the judgment contrary to law. The appellate Court has discussed all the issues one by one and by referring to the evidence has rightly set aside the findings of the lower court. Consequently, this revision is dismissed.

JUDGE

SM

