

IN THE HIGH COURT OF SINDH, KARACHI

Suit No.727 of 2012

[Iqbal Rasheed Vs. Babar Mirza Chughtai & another]

Date of hearing : 19.01.2017
Plaintiff : Iqbal Rasheed through Mr. Muhammad Sabir, Advocate
Defendants : Nemo for Defendants

JUDGMENT

Muhammad Faisal Kamal Alam, J: Plaintiff has filed this action at law against two private defendants, primarily in respect of his share arising out of agreement of partnership dated 08.12.1996 (Exhibit P.W.-1/2). Following relief has been sought: -

- “(A) *Direct Defendant No.1 to hand over the possession of 5 Shops and 2 Flats situated in Project namely PARK SQUARE or alternately cost of the same as per prevailing market rate with mark up at bank rate till its realization.*
- (B) *Direct Defendant No.1 to pay Rs.124000000/- (Rs.5 Crores for causing mental agony and lowering estimation and financial loss, Rs.6400000/- as 40% share on booking of Flats and Shops about Rs.16000000/- and Rs.1 Crore 50% share in joint Property, out of which a piece of the same was sold by Defendant No.1 to Defendant No.2 for Rs.2 Crores, with 14% mark up till its realization.*
- (C) *Direct Defendant No.1 to render accounts out of sale of 500 Flats and 13 Shops and of Rs.2835380/- against Rs.8035380/- through Chartered Accountants with the further direction that on completion audit of accounts to pay the share of the Plaintiff with mark up at Bank's rate.*

- (D) *Direct the Defendant No.1 to pay 10% profit to Plaintiff in the light of Agreement of Partnership, on the existing construction / position of the Project inasmuch as the Defendant No.1 in order to deprive the Plaintiff from his legal benefits purposely would not complete / finalize the Project or alternately Defendant No.1 be directed to finalize the Project within a period as deemed fit and proper by this Hon'ble Court.*
- (E) *Declare that Defendant No.1 has willfully caused damages / loss to Plaintiff and coupled with deprived the Plaintiff from his vested rights, since a considerable time.*
- (F) *Restrain Defendant No.2 not to operate his Petrol Pump within premises of PARK SQUARE till final disposal of this suit. the Defendant No.2 may also be directed to submit Statement showing the details of amount paid by him to Defendant No.1 in connection of purchase of piece of land for the purpose of setting up of apropos Petrol Pump.*
- (G) *Cost of suit.*
- (H) *Any other relief/s as deemed proper by this Hon'ble Court."*

2. Notices were served upon both Defendants but they opted to remain absent and did not pursue instant cause and consequently, the matter was ordered to be proceeded *ex parte* against them vide order dated 26.03.2015. The order of 16.11.2012 reflects that on 19.07.2012, Mr. Ghulam Rasool, advocate even undertook to file power on behalf of defendant No.1, which further substantiates the fact that service was duly effected.

3. Plaintiff has examined two witnesses; himself as P.W.-1 and the other one is Wazir Zada Afridi as P.W.-2, who basically produced an 'Arbitration Decision' in the proceeding, which has also been produced by the plaintiff and exhibited as Ex.P.W.-1/11 (page-79 of the evidence file).

4. The crux of plaintiff's grievance is that despite passage of so many years, defendant No.1 has particularly deprived the plaintiff of his lawful share in profits under the above mentioned partnership agreement (Exhibit P.W-1/2). In paragraph-8 of his pleadings and paragraph-10 of affidavit in *ex parte* proof, the plaintiff has categorically mentioned that he is entitled to 10% profit in the sale proceeds received by selling various units, both commercial and residential in the multistoried project, namely, 'PARK SQUARE'.

5. Mr. Muhammad Sabir, learned counsel for the plaintiff, argued that defendant No.1 on a number of occasions has breached his contractual obligations and when the said defendant No.1 saw that plaintiff is about to file legal proceeding, he persuaded the plaintiff to settle all the issues amicably. As per learned counsel, plaintiff reluctantly agreed and after protracted negotiations an 'arbitration decision' dated 22.06.2009 was executed between the parties hereto and the same has been mentioned in the preceding paragraphs as Exhibit P.W.-1/11.

6. I have considered the arguments of learned counsel for the plaintiff and with his able assistance have examined the record.

7. The stance of the plaintiff has throughout remained unchallenged, which he reiterated by entering the witness box and deposing the same on oath. Notwithstanding to this aspect of the case that present proceeding is *ex parte*, still the Court has to apply its judicial mind before handing down a decision, as, it is not necessary that in every case, the relief as claimed should be granted. Pleading of the plaintiff has not specifically mentioned the amount, which the plaintiff is entitled to receive as a share of profit under partnership, but his prayer clause itself

mentions about rendering of accounts by defendant No.1 and appointment of a Chartered Accountant Firm for this purpose.

8. No convincing evidence has been led by the plaintiff in support of his plea / claim seeking damages of Rs.150 Million (approximately), for going through mental agony and suffering financial losses. Appraisal of the evidence shows that this claim has not been proved. Therefore, this relief of damages cannot be granted. If the above mentioned arbitration decision (Exhibit P.W.-1/11) is taken into account, it leads to the conclusion that the same with specific details has calculated the liability of defendant No.1 at that relevant time, that is, when it was executed by all the parties on 22.06.2009, to the tune of Rs.23,50,000/- (Rupees Twenty Three Lacs Fifty Thousand only) out of total claim of Rs.80,00,000/- (Rupees Eighty Lacs only).

9. In this case, points for consideration can be framed as under: -

- i. Whether plaintiff has proved his partnership with defendants, particularly defendant No.1, if yes, then what amount the plaintiff is entitled to?
- ii. Whether the 'Arbitration Decision', can be termed as an Award or a Settlement Agreement?
- iii. Whether that decision can be given against defendant No.2 against whom the grievance of plaintiff is that he is running his Petrol Pump on the land of the project, which was illegally sold out to him by defendant No.1?

10. In the light of above discussion, the plaintiff has proved the factum of partnership with defendant No.1 and is, therefore, entitled to his share in the profits of partnership.

11. Adverting to the second point that whether the Exhibit P.W.-1/11 is an arbitration decision, in this regard, Section 26(A) of the Arbitration Act, 1940 is of relevance, which mentions that the award should state reasons and sufficient details, whereas Section 14 enjoins the Arbitrators or Umpire to file award in Court for making the same as Rule of the Court followed by a decree. In this regard, Rules 281 to 284 of the Sindh Chief Court Rules (O.S) also provide an insight into this issue. These rules relate to the prescribed format of the Award, its filing in Court and commencement of proceeding consequent thereupon. None of the above ingredients as mentioned in the above statutory provisions or Rules have been complied with or are present in the above document (Ex.P.W.-1/11) and, therefore, it can safely be held that the above document is not an arbitration decision, but is in fact a Settlement Agreement between the parties hereto viz. plaintiff and defendant No.1 only.

12. It is apparent from the record that no arbitration proceeding under the Arbitration Act, 1940 took place. To a query, learned counsel for the plaintiff did not deny this fact that the said arbitration decision which in fact is a Compromise Agreement, which is a result of mediation done by two persons, namely Zaheer H. Minhas, Advocate and Wazeerzada Afridi; the latter has also testified about the authenticity of the above document (Exhibit P.W.-1/11), as P.W.-2.

13. Even in the prayer clause, plaintiff has mainly claimed his relief against defendant No.1. Since, defendant No.2 admittedly was / is neither party in the partnership agreement (Exhibit P.W.-1/2) nor the aforementioned settlement agreement (Exhibit P.W.-2/11), hence, considering the nature of controversy as pleaded, relief claimed against said defendant No.2 is disallowed.

14. The peculiar facts of the present case also justify that the relief should be moulded so that the controversy is effectively and completely resolved. Accordingly, suit is decreed in the following terms: -

- i) Defendant No.1 to render accounts with regard to sale of units, flats, shops etc., in the project 'PARK SQUARE' and in this regard a Chartered Accountant Firm will be appointed by plaintiff for undertaking the above exercise and the said Chartered Accountant Firm shall determine the above mentioned share of profit of the plaintiff in the partnership business. Fee of the Chartered Accountant Firm shall be payable by defendant No.1 at the first instance and same will be adjustable by him once the share of profit of plaintiff is worked out. From the amounts payable to plaintiff by defendant No.1 as the profit of plaintiff, fifty percent fee of the Chartered Accountant Firm shall be deducted and the remaining fifty percent portion of the fee of Chartered Accountant Firm shall exclusively be borne by defendant No.1.
- ii) Defendant No.1 is liable to pay an amount of Rs.23,50,000/- (Rupees Twenty Three Lacs Fifty Thousand only) as agreed by him in the above Settlement Agreement dated 22.06.2009 (Exhibit P.W.-1/11) together with 10 percent markup from the date of institution of this suit till the realization of the said amount.
- iii) Parties to bear their own costs.

Judge

Dated: _____.