

THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

IInd Appeal No. 47 of 2010

Saeed Ahmed. Versus. Muhammad Iqbal and another

Appellant : Through Mr. Shamsuddin Memon,
Advocate.

Respondents : Through Ms. Razia Ali Zaman Khan
Patoli, Advocate

Date of hearing : 17.01.2019

Date of judgment : 11.02.2019

J U D G M E N T

Zulfiqar Ahmad Khan, J: Through instant IInd Appeal, appellant has impugned the judgments and decree dated 03.09.2010 and 07.09.2010 respectively, passed by learned Vth Additional District Judge, Hyderabad, dismissing the Civil Appeal No.108/2009 and maintaining the judgment and decrees dated 25.04.2009, passed by learned IIIrd Senior Civil Judge, Hyderabad, where F.C. Suit No.33/2005, filed by the appellant was dismissed.

2. Facts as disclosed in the plaint of F.C. Suit No. 33/2005, are that the appellant/plaintiff ("the buyer") filed said suit for specific performance of contract and mesne profits against the respondents/defendants ("the seller"), alleging therein that the seller being owners of house bearing C.S. No.D/1581, situated at Resham Gali, Hyderabad, agreed to sell the same for a consideration of Rs.9,50,000/-, through an agreement of sale dated 07.09.2002, where an amount of Rs.2,50,000/- was paid to the buyer as earnest money, while the balance amount of Rs.7,00,000/- was to be paid in the manner that Rs.1,00,000/- on 30.11.2002, and the remaining amount of Rs.6,00,000/- on 31.01.2003; so also the possession of the property was required to be delivered on the later date when the Sale Deed was also to be registered. According to the buyer, when he offered to pay Rs.1,00,000/- to the seller, instead of accepting his offer, the seller demanded Rs.4,00,000/- from

the buyer, which sum was paid through cheque No.113351 dated 06.02.2003. After this payment the buyer demanded execution of Sale Deed after receiving the balance amount and sought possession of the demised house, but the seller declined, and raised further demand of Rs.3,00,000/-. The buyer fulfilled the said demand too and paid Rs.3,00,000/- to the seller through a cheque No.113352 dated 02.04.2003 and such receipt was executed by the seller; however, despite full payment, the seller failed to execute the registered Sale Deed, which resulted, the buyer filling the said suit praying:-

- “(a) That a decree for specific performance of contract of sale in respect of suit property in favour of plaintiff and against the defendants be passed and they be directed to execute the Sale Deed in his favour or in case, they fail to do so, the Sale Deed be got executed by the Nazir of this Court.
- (b) That a decree for mesne profits to the tune of Rs.2,50,000/- alongwith future mesne profits till the delivery of possession of suit property to plaintiff be passed against the defendants.
- (c) Cost.”

3. In response to that plaint, seller filed his written statement, admitting the assertion as to the execution of agreement, and stated that on the basis of moneys to be received from the buyer, he entered into a separate agreement for the purchasing of another property bearing shop No.3, CS No.D-2219, Resham Gali, Hyderabad in the sum of Rs.16,00,000/- from one Mst. Sharifan and paid the earnest money and the remaining amount was to be paid on 02.11.2002, which fact was brought to the knowledge of the buyer, and when he demanded the balance amount, the buyer avoided to make payment. The seller admitted that two cheques as mentioned above were given to him, and the same were handed over to Mst. Sharifan, however both the cheques returned dishonoured, hence the seller sustained heavy losses and even his suit filed against Mst. Sharifan for Specific Performance was dismissed upto the level of this Court due to the dishonoured cheques given by the buyer. He contended that the buyer failed to be abide by the terms and conditions of the agreement, therefore, he was not entitled for the relief claimed.

4. Out of the pleadings, learned trial Court framed the following issued:-

- 1. Whether the whole amount has been paid by the plaintiff to defendant in stipulated time?

2. Whether the bearing two cheques of Rs.3 lacs A/C No.18060-29, Cheque No.113352 of Rs.4 lacs of Cheque No.13351 has not been encashed/dishonoured?
3. Whether the defendants came into sale agreement regarding shop No.3 having CS No.D-2219 lost their case viz. IInd Appeal No.04/2001 by Honourable High Court?
4. Whether the suit property was mortgage with the H.B.F.C. at the time of agreement of sale dated 02.09.2002? If so what is its effect?
5. Whether the plaintiff is entitled to the relief of Specific Performance of contract U/s 18(c) of the Specific Relief Act?
6. What should the decree be?

5. Thereafter, both parties led their respective evidence and after hearing parties' counsel, learned trial Court dismissed the suit of the buyer vide judgment dated 25.04.2009. Being aggrieved by the said judgment, buyer/appellant preferred civil appeal bearing No.108/2009, which met with the same fate through judgment dated 03.09.2010 passed by the appellate Court, against which the instant appeal has been preferred.

6. Learned counsel for the appellant submitted that the impugned judgments, passed by the Courts below are against the facts, law and equity; that the impugned judgments are based on no evidence and the same are liable to be reversed; that both the Courts below have ignored and not considered the oral as well as documentary evidence available on record; that the Courts below have taken the plea raised by the seller/respondents in their written statement as gospel truth; that the Courts below failed to consider that appellant paid earnest money of Rs.2,50,000/-. Moreover, respondents accepted two cheques on 30.01.2003 for Rs.4,00,000/- and Rs.3,00,000/- and as per even bank record, available on the trial Court's record, that on 06.02.2003 the appellant had balance of Rs.4,20,000/- in his account and those cheques would have been encashed if appellant desired so; that the Courts below have misapplied and even not considered the evidence on record and have decided the matter on mere surmises and suppositions; that the impugned judgments are liable to be set aside. Learned counsel relied upon the cases of **Ghulam Nabi and others v. Seth Muhammad Yaqub and others** (PLD 1983 SC 344), **Abdul Latif v. Muzammal Mehdi** (2005 YLR

851), **Malik Muhammad Yaseen v. Syed Raza Hyder and 3 others** (2014 YLR 1927), **Syed Abbas Ali Shah through General Attorney v. Ch. Mohammad Zaheer** (2017 CLC Note 55), **Ahmad through Legal Representatives v. Allah Ditta and another** (2010 CLC 1905) and **Muhammad Taj v. Arshad Mehmood and 3 others** (2009 SCMR 114).

7. Counsel for the private respondents while supporting the impugned judgments submitted that both the Courts below have rendered the judgments in proper manner after considering all material aspects as well as examining the evidence available on record, therefore, no irregularity or material illegality is apparent on surface of the judgments impugned. She submits that the impugned judgments be maintained and the instant revision may be dismissed. She relied upon the cases of **Muhammad Rasheed v. Mst. Saeeda Bano and 4 others** (2014 CLC 990) and **Haji Muhammad Yaqoob through Legal Heirs v. Shah Nawaz** (1998 CLC 21).

8. Heard counsels and reviewed the material available on record.

9. It is admitted that both the Courts below held that the agreement of sale was entered into between both the parties and the question which remained heart of the matter was whether the balance sale consideration was effectively paid by the buyer to the seller or not. In that connection, apart from the evidence of the parties, documentary evidence was also recorded where one Abdul Razzaq, Manager HBL Station Road Branch, Hyderabad was called and examined at Ex.29, who produced certain documents. Admittedly, as per appellant's own case, he had issued cheques for consideration of Rs.4,00,000/- and Rs.3,00,000/- respectively, from his account and same were given to the respondents, as such, according to him, he has made the payment but the case of the respondents is that both the cheques were handed over to a third party for onward purchase of a shop from Mst. Sharifan but both the cheques were returned/dishonoured by the Bank, and the witness/Manager of the Bank namely Abdul Razzaq in his deposition has stated that both the cheques were dishonoured and returned for want of availability of funds in the account of the appellant. Further, the appellant in his

cross-examination admitted that the cheques issued by him were not encashed by the Bank authorities. When the cheques given by the buyer were not encashed, admittedly then how it can be considered that the buyer has paid the balance sale consideration, thus clearly the buyer himself failed to discharge his liability, rather he seems to have played a fraud upon the seller and issued cheques which were dishonoured; thus he has not acted in good faith but in malafide manner, hence the seller was not bound to execute the Sale Deed in his favour. The fact is that the bank account held by the buyer was a 'photo-account' meaning thereby, the cheques issued by the account holder could only be encashed if the account holder was present in the bank branch, which fact was not revealed by the buyer, resultantly even bank dishonoured both the cheques on this account also causing loss to the seller, whose subsequent deal based on these cheques was cancelled, causing losses to him, the buyer clearly failed to perform his part of the contract.

10. The instant IInd appeal has been preferred against the concurrent findings of the Courts below. A review of both the judgments suggests that all aspects of the controversies as well as the evidence produced by both the parties have been examined by the Courts below. It is an established position that second appeal does not lie on the ground of error or question of fact as it could only lie on the ground of law or error in procedure, which might have affected decision of the case upon merits. The decisions delivered by the Courts below clearly are not based on irrelevant or inadmissible evidence or that the evidence in any way was misread by the Courts. Reversal of concurrent findings of fact as a result of re-appraisal of evidence on record under Section 100 of C.P.C. as sought by the appellant is not permissible unless the same was found to be perverse or contrary to the evidence on record, reliance is placed on **2009 SCMR 254**. Also to be kept in mind is the dictum laid down by the Apex Court in the case of **Amjad Qazi Vs. Saleemullah Fareedi** reported as (**2006 PLD 777**) where the Apex Court held that concurrent findings of facts could not be reversed on surmises and conjectures or merely because another view was also possible. The Apex

Court further held that the High Court could not have interfered in concurrent findings of the facts recorded by two Courts below while exercising jurisdiction under Section 100 C.P.C. no matter how erroneous those findings might be, unless such findings had been arrived at the Courts below either by misreading of evidence on record or by ignoring the material piece of evidence on record or through perverse appreciation of evidence, none of these conditions prevail in the case at hand.

11. The judgments cited by the learned counsel for the buyer are distinguishable from the facts of the case at hand because mostly those cases are on the point of period for execution, whereas in the present case the cheques which were delivered by the buyer to the seller, have been dishonoured, which fact was affirmed by the banker. Further, the account being a "photo-account" could only have been operated by the buyer personally, which fact was not brought to the seller's knowledge. Intentionally, the buyer did not make any pay-order, or bank-draft, which would have helped both the parties to materialize the transaction.

12. To me, the impugned judgments are rendered after minutely scrutinizing the evidence, legal as well as factual aspects of the case and no illegality or irregularity warranting interference have surfaced.

13. In the given circumstances as well as in the light of the judgments of the Apex Court, referred hereinabove, the instant second appeal which merits no consideration is dismissed alongwith all pending applications.

JUDGE

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