

IN THE HIGH COURT OF SINDH, KARACHI

IInd Appeal No.149 of 2018

Date	Order with Signature of Judge
Appellant	: Muhammad Hanif, Through Mr. Muhammad Shahid, Advocate
<i>Versus</i>	
Respondent No.1	: Malik Muhammad Riaz Through Mr. Shahid Mushtaq, Advocate.
Respondent No.2	: IIIrd Addl. District & Session Judge, East Karachi.
Respondent No.3	: XIth Senior Civil Judge, East Karachi.
Date of hearing	: 10.02.2020
Decided on	: <u>06.03.2020</u>

J U D G M E N T

NAZAR AKBAR, J-- The appellant through this IInd Appeal has challenged the concurrent findings. The IInd Senior Civil Judge, Karachi, (East) by order dated **17.01.2017** decreed the suit filed by Respondent No.1 and the IIIrd Additional District Judge, Karachi (East) by judgment dated **01.10.2018** passed in Civil Appeal **No.37/2017** maintained the said findings of the trial Court.

2. Briefly the facts of the case are that in the month of September, 2014, Plaintiff/Respondent No.1 was engaged by defendant/appellant to construct a plaza over Plot No.A-49 (area 3993 Sq Feet), Block-1, Sector 14-A, Scheme No.33, Metro Vile-III, Karachi and demolish old building. Cost of demolition was fixed at Rs.300,000/- while cost of new construction was settled between the parties at Rs.2,000/- per square feet with complete work with finishing. However, the agreement was reduced into writing between the parties on

05.01.2015. Respondent No.1/Plaintiff started work of the plaza with his own material and labour. He alleged that he has completed almost 80% construction of ground floor and 30% of upper floor. Total cost of the construction work to be carried by him was fixed at **Rs.8,385,300/-**. It is averred that the appellant/defendant paid an amount of **Rs.3,174,800/-** to the plaintiff/Respondent No.1 on different occasions. On **28.4.2015**, Respondent No.1 submitted bill for payment, but the appellant/defendant did not honour the same. Hence, an amount of **Rs.5,210,500/-** is outstanding balance. It is averred that on **29.4.2015**, appellant/defendant after refusing to pay the balance amount to respondent handed over construction work to another contractor. At that time, the plaintiff/Respondent No.1 had left building material worth Rs.1,500,000/- at the site of the construction. Respondent after several incidents of quarrels with the appellant lodged complaint in police station Mobina Town and also filed direct complaint under **Section 200 Cr.P.C** r/w **Section 145 Cr.P.C** before the Judicial Magistrate. He further averred that on account of dispute with appellant he suffered losses of Rs.70,00,000/-. In this background Respondent No.1/Plaintiff filed suit for specific performance, recovery of damages and permanent injunction with the following prayers;

a. To direct the defendant to perform as per the terms and conditions of Agreement dated 05.01.2015 and schedule of payments.

b. To direct the defendant to pay the balance amount of Rs.7,010,500/- (Rupees Seventy Ten Thousand and Five Hundred Only) in which Rs.5,210,500/- (Rupees Fifty Two Lacs, Ten Thousand and Five Hundred Only) was of construction charges and Rs.1,500,000/- (Rupees Fifteen Lac) is of raw material of Plaintiff lying on the constructed plot of the defendant and Rs.300,000/- (Three Lacs only) was of demolishing charges.

c. To direct the Defendant to pay Rs.7,000,000/- (Seventy Lacs only) to the plaintiff as Damages plaintiff suffers irreparable losses, mental agony, insecure, severe financial losses, and disgraced.

d. To direct the defendant and their companions, agents, employs, attorneys and successors not to create any third party interest through lease, sublease, sale agreements, general power or any bars through mortgage through letting out of any short of construction, finishing, alteration or demolishing till final disposal of this case.

e. Cost of Suit.

f. Any other relief which deem fit and proper in the favor of plaintiff against defendants for the interest of justice and equity.

3. After summons of said suit, defendants/Appellant filed written statement wherein it is averred that suit is based on false and fabricated agreement and is not maintainable and plaintiff/Respondent No.1 offered the appellant/defendant for construction of his house. It is also averred that he himself demolished the old structure with own sources. It is further stated by him that he got purchased a Vitz car to the Respondent No.1/plaintiff worth Rs.2,50,000/- from his own funds. The Plaintiff/Respondent No.1 offered for construction of his house at the rate of Rs.800/- per square feet with all material till finishing within the period of four months. It is also averred that when appellant/defendant completed construction of ground floor, Respondent No.1 came with written agreement and asked the defendant/appellant to sign the same, after examining the agreement he found that respondent No.1 increased cost of construction from Rs.800/- to Rs.2000/- per square feet and forced him to sign the same by threatening him to stop the work. He contended the respondent suddenly demanded entire amount of Rs.52,10,500/- when by that time only 20% work was done. The

dispute was referred to agreed mediators namely Mr. Zaman Khan and Ghufran Bangash who demanded security of Rs.200,000/- each from both of us. The appellant paid cash and respondent gave a cheque which was dishonored. The appellant averred in written statement that from **May**, 2015 respondent did work at the site and therefore, the remaining work was done through another contractor. He categorically also denied all other allegations leveled by the plaintiff/respondent No.1 and lastly prayed for the dismissal of the suit.

4. The trial Court framed following issues.

1. Whether the suit is not maintainable and barred under the law?
2. Whether the plaintiff entered into an agreement with the defendant dated 05.01.2015 in respect of construction work?
3. Whether the defendant has deployed his own labour and construction material at the construction site?
4. Whether the total cost of construction was settled at Rs.83,85,500/-?
5. Whether plaintiff has spent Rs.98,85,300/- on the construction of defendant's project?
6. Whether plaintiff has not completed the construction of defendant's project?
7. Whether plaintiff has violated terms of agreement?
8. Whether the plaintiff is entitled for the relief claimed?
9. What should the decree be?

The plaintiff Muhammad Riaz Malik filed his affidavit in evidence and examined himself as PW-1. He also produced documents from Ex.P-1 to Ex.P-8. He also examined two witnesses namely Malik Abdul Rafey

and Qadir Bux in support of his case and closed his evidence. Afterwards, defendant Muhammad Hanif filed his affidavit in evidence and examined himself as DW-1. He examined Abid Ali and Gufran Gul in support of his case and closed his evidence too.

5. The trial Court after recording evidence, hearing the learned counsel for the parties decreed the suit by order dated **17.01.2017**, in the following terms:-

“In view of above reason and after taking into account evidence of both parties on basis of pre-porderance of possibilities; I have come to the conclusion that the evidence led by the plaintiff inspires confidence. He has produced his case through oral as well as documentary evidence and thus the suit filed by him is hereby decreed in the following terms:-

- a. Defendant is directed to pay an amount of Rs.52,10,500/- (rupees fifty two lac, ten thousand and five hundred only) as balance of construction charges in view of the terms agreed in the agreement dated 05.01.2015.
- b. He is further directed to pay an amount of Rs.15,00,000/- (fifteen lac only) for the cost of raw material lying on site of the construction.
- c. He is further directed to pay an amount of Rs.3,00,000/- (three lac only) as demolition charges of old structure.
- d. He is directed to pay Rs.70,00,000/- (rupees seventy lac only) as damages to the plaintiff.

6. The appellant against the said order of trial Court filed Civil Appeal **No.37/2017** before the appellate Court which was dismissed by judgment dated **01.10.2018** and the findings of the trial Court were maintained. The appellant has impugned both the order/judgment herein this IInd Appeal.

7. I have heard the learned counsel for the appellant and perused the record as well as written arguments filed by the learned counsel for the appellant.

8. Learned counsel for the appellant has contended that both the Courts below have failed to exercise their jurisdiction in accordance with law in as much as the burden of proof of the entire case was on the respondent/plaintiff has been shifted on the appellant/defendant. He contended that even issues were framed in in such a way that the burden which was supposed to be on the respondent/plaintiff was shifted on the appellant/defendant. He further contended that it was the duty of the plaintiff/respondent to show that the suit for specific performance of contract of service was maintainable and the trial Court declared that burden was on the defendant/appellant and held that suit was maintainable without referring to any provision of Specific Relief Act, 1877. He has contended that under **Section 12** of the Specific Relief Act, 1877 only those contracts are enforceable at law in which damages is not ascertainable and in the case in hand the respondent/plaintiff himself has claimed damages. He has further contended that issues No.(iii) & (iv) have been wrongly framed and again the language is such that the burden was shifted on the defendant/appellant from respondent/plaintiff. The respondent has filed that suit claiming that he has completed the project on appellant's plot. Then burden was on him to show that how and when he completed the construction. It was case of service charges as per so-called agreement whereas the plaintiff/respondent has claimed specific performance of the contract, then burden was on the respondent to show that how much of his duty has been performed by him and how much is left for which he sought the decree of the Court to allow him to perform his part of responsibility under the agreement. Learned counsel for appellant has also elaborately referred to the evidence of the respondent/plaintiff to show that the respondent/plaintiff has failed

to discharge his burden but on record both the Courts below have only referred to hardly one sentence of appellant from his cross-examination to prove the case of the plaintiff/respondent by ignoring the material evidence of the respondent/plaintiff himself available on the record.

9. In rebuttal learned counsel for the respondent/plaintiff has supported the impugned judgment of the Civil Judge and appellate Court. He has not referred to any of the legal pleas taken by the defendant/appellant. All the arguments of respondent are reproduction of impugned order of the trial Court.

10. On careful examination of the evidence, I have noticed that the plaintiff/respondent entered into agreement for raising construction on the plot of the appellant/defendant and subsequently got the terms and conditions reduced in writing. Irrespective of the fact that what was the quality of its contents, why, how and when the agreement was reduced into writing, the contention of learned counsel for the appellant that respondent's burden as plaintiff to prove his claim was not discharged appears to have force.

11. The learned trial Court has failed to appreciate that the respondent/plaintiff himself claimed that total cost for complete construction work with finishing was determined as **Rs.83,85,000/-** and perusal of prayer mentioned above reveals that respondent has claimed only **Rs.52,10,500/-** towards balance construction charges, it means that around a sum of **Rs.31,74,800/-** has already been realized by the respondent/plaintiff. The trial Court failed to appreciate that claim of balance amount of **Rs.52,10,500/-** towards construction charges were subject to proof of completion of construction by the respondent/plaintiff. That is why the learned

Trial Court has framed issue No.(iii) and (vi) whether the appellant has deployed his own workers and material and whether plaintiff/respondent has not completed the work. As rightly argued by the learned counsel, these issues were not properly framed and burden has been declared on the appellant. These issues were supposed to be from the plaint that whether plaintiff has completed the project to claim balance charges of construction. The findings of these issues should have been based on the evidence from both sides. Both the issues have been decided in hardly four lines each containing one sentence from appellant’s evidence. The trial Court has not divulged on the evidence showing the admission of the respondent that construction has not been completed by the respondent/plaintiff. In coming to this incorrect conclusion on issues No.(iii) and (vi) the Courts below have failed to appreciate admissions of the respondent/plaintiff himself and his own son. The respondent/defendant admitted in evidence that **“it is correct that there was dispute between me and defendant, when I stopped the work. It is correct that the respectable of community interfered in the matter. It is correct that those respectable demanded security of Rs.200,000/- from me as well as from defendant. It is correct that I have given a cheque as security.....**

.....I had completed the ground floor and only the whitewash was remaining, whereas at the first floor, only construction of roof was remaining.....

.....

I stopped the work. Vol. says that the defendant was not giving me the payment, therefore, how can I work? It is correct that I have not

produced any document regarding sanitary, glass, wood or electric work or marble work.

12. His son Malik Abdul Rafey in his examination-in-chief has categorically stated that ***we have constructed ground plus one story approximately completed ground floor, we had raised the structure of the first floor and put the shattering.*** Respondent stated that they do not want to continue construction work with plaintiff.....***The defendant started work with another sub-contractor, who started plaster and also installed gate.*** In the cross-examination his son conceded that, ***it is correct that my father issued a cheque of Rs.200,000/- being security to the respectable persons, who came forward as mediator/reconciliator. It is correct that said cheque was bounced.*** Despite all the evidence the trial Court in issue No.6 has held that respondent/plaintiff has spent Rs.98,85,300/- on the construction of the defendant/appellant project. And the reasoning given by trial Court is that the appellant/defendant counsel has not cross-examined the respondent on this aspect of the case.

13. The appellate Court, too, appears to have not read the evidence of the parties and simply endorsed the awfully illegal, incorrect judgment contrary to facts, law and evidence.

14. In view of the above facts and discussion, the findings of lower Courts are set aside, the suit filed by the respondent is dismissed and the instant IInd Appeal is allowed.

JUDGE

Karachi
Dated:06.03.2020

SM