

IN THE HIGH COURT OF SINDH AT KARACHI

IInd Appeal No.13 of 2020

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

Before: Mr. Justice Nazar Akbar

Appellant No.1 : Yasir Khan,
Appellant No.2 : Mst. Kiran,
Appellant No.3 : Aamir,
Appellant No.4 : Mst. Kanwal,
Appellant No.5 : Mst. Parveen.
through Mr. Rajesh Kumar, advocate.

Versus

Respondent No.1 : Mst. Bilquees Fatima. (In person).
Respondent No.2 : IInd Senior Civil Judge, at Karachi (East).
Respondent No.3 : IXth Addl. District Judge, at Karachi (East).
Date of hearing : **19.03.2020**
Date of Decision : **18.05.2020**

JUDGEMENT

NAZAR AKBAR, J. The appellants through this IInd Appeal have challenged the concurrent findings of two Courts below. The II-Senior Civil Judge, East Karachi by Judgment dated **14.02.2012** decreed Civil Suit No.458/2006 filed by Respondent No.1 and IX-Additional District Judge, East Karachi by Judgment dated **27.09.2019** dismissed Civil Appeal No.76/2012 filed by the appellants and maintained the findings of the trial Court.

2. Brief facts of the case are that Respondents No.1/Plaintiff has filed Civil Suit No.458/2006 for Specific Performance of Contract and Permanent Injunction against the appellants/defendants stating therein that Respondent No.1/Plaintiff entered into an agreement of sale with deceased Nasir Khan/father of appellants on **01.4.2002** in respect of House No.L-233, Sector 48-B, Korangi No.2-1/2, Karachi

(the suit property) for a total sale consideration of **Rs.3,75,000/-**. At the time of sale agreement, Respondent No.1/Plaintiff paid **Rs.60,000/-** as part payment to deceased Nasir Khan and he acknowledged the receipt for the said amount and copy of lease, NIC and mutation was handed over by deceased Nasir Khan to Respondent No.1/Plaintiff. It was agreed between Respondent No.1/Plaintiff and deceased Nasir Khan that balance amount of sale consideration will be paid in installments and she paid **Rs.140,000/-** in installments to deceased Nasir Khan till **10.12.2004**. At the time of sale agreement, one Waqar Ahmed was tenant in the suit property on monthly rent of Rs.750/- per month. Respondent No.1/Plaintiff has remarried with said Waqar Ahmed. Deceased Nasir Khan had also solemnized second marriage with one lady namely Noor Jehan and the balance sale consideration was to be paid by Respondent No.1/Plaintiff to said Mst. Noor Jehan, wife of deceased Nasir Khan/ owner of the suit property as desired by deceased Nasir Khan, subsequently said Mst. Noor Jahan has also expired. It was further averred that the mutation of the suit property was in the name of deceased Nasir Khan and the original title documents of the suit property were in possession of appellants/ legal heirs of deceased Nasir Khan, who were duty bound to perform their part of obligation as per sale agreement. When they refused, she filed Civil Suit for Specific Performance of Contract.

3. After service, the appellants/Defendants filed their written statement wherein they denied the allegations leveled against them and contended that their father never entered into agreement of sale of the suit property with Respondent No.1 and signatures of deceased on the sale agreement are forged and the respondent has neither paid Rs.60,000/- towards part payment/advance money nor deceased

issued any receipt of the said payment. They also denied payment of Rs.140,000/- in installments till **10.12.2004** to deceased Nasir Khan. They further contended that even tenancy agreement was also a forged document as Respondent No.1 has forged the signature of deceased Nasir Khan in order to show less rate of rent as Rs.750/- per month instead of Rs.1500/- per month. They further contended that in fact tenancy agreement was executed between Waqar Ahmed and deceased Nasir Khan and Respondent No.1/Plaintiff is wife of said Waqar Ahmed but in the memo of plaint her husband name is mentioned as Muhammad Shami Zeeshan. They further contended that the suit property exists in the name of deceased Nasir Khan, who died in the year 2005.

5. The trial Court from pleadings of the parties has framed the following issues:-

1. *Whether the suit is not maintainable?*
2. *Whether the deceased Nasir Khan sold the suit property to the plaintiff through sale agreement dated 01.04.2002 filed as annexure P-1 with the plaint?*
3. *Whether the deceased Nasir Khan received Rs.60,000/- as token money and further Rs.140,000/- vide receipt filed as annexure P-2 with the plaint?*
4. *Whether the plaintiff is entitled for transfer of the suit property in his (her) name on payment of balance amount Rs.1,75,000/- out of total sale consideration of Rs.375,000/-?*
5. *What should the decree be?*

6. Respondent No.1/Plaintiff in support of her case appeared as witness as PW-1 and produced agreement of sale, payment receipts and pay-orders of the balance sale consideration deposited by her with the Nazir of the Court even prior to recording of evidence. She

has also produced two witnesses namely Jameel Ahmed Qadri and Muhammad Umar as PW-2 & PW-3. They were cross-examined by the counsel for the appellants. From the appellants' side Yasir Khan one of the defendant has appeared as witness for himself and for other legal heirs.

7. The trial Court after hearing learned counsel for the parties, by judgment dated **14.02.2012** decreed the suit filed by Respondent No.1. The appellant against the said judgment filed Civil Appeal No.76/2012 before the first appellate Court which was dismissed by judgment dated **27.09.2019** and the findings of the trial Court were maintained. The appellant has impugned both the judgments herein this IInd Appeal.

8. I have heard learned counsel for the appellants and Respondent No.1, she has appeared in person, and perused the record.

9. Learned counsel for the appellants has contended that the two Courts below have erred in law by failing to appreciate the fact that in the first round the suit was dismissed under **Order VII Rule 11 CPC** and even the appeal was also dismissed, however, in civil revision case was remanded. By referring to the earlier judgment of appellate Court he has contended that in earlier round the appellate Court has also observed that signature of the father of the appellant on agreement to sell do not tally with his signatures on the rent agreement. He has also contended that the possession was not given to the respondents by the owner of the property. Therefore, the possession of the respondents was illegal since respondent No.1 has entered into the premises after marriage with the tenant.

10. The contention of learned counsel regarding observation of Court in earlier round about signature of the father of the appellants is misconceived since earlier plaint was rejected under **Order VII Rule 11 CPC** before recording of evidence and such an observation by appellate Court could hardly be a ground to reject the plaint. Even otherwise said observation is of no consequences since the said judgment has been set aside by this Court in Revision. The record shows that evidence was recorded after the Revisional Court has remanded the case and in the evidence not only the agreement of sale has been proved but also payment of sale consideration was proved by the respondent in her evidence and it was fully supported by two independent witnesses of the agreement and payment. The witnesses produced by Respondent No.1 have very categorically admitted their own signature as witness of execution of sale agreement and also confirmed that sale consideration has been paid by the respondents to the appellants' father. The requirement of **Section 17** of the Qunan-e-Shahadat, Order 1984 has been fully satisfied by the Respondents and the burden has been shifted on the appellants. The record does not show that any effort was made by the appellant to disprove signature of the executant at the time of evidence. The appellants have failed to establish the contentions raised by them in their written statement. Neither the two Courts below have suspected the signature of the executant on sale agreement and payment receipts nor the appellants have made any efforts by seeking permission of the Court to get the signature verified by the handwriting expert. Beside the above, the very fact the appellants have never filed any ejectment application against the tenants since 2004 nor they have filed any other suit for seeking declaration and possession of the suit property owned by their father also create

doubts on their claim. Mere statement that their father did not execute the agreement of sale was not enough to rebut the otherwise strong evidence by the respondent and corroborated by the independent witnesses. Respondent No.1 has already deposited balance sale consideration in the Court way back on **13.10.2010** to further prove her bonafide to perform her part of the contract, therefore, the application of rule of preponderance of evidence heavily weigh in favour of the respondent. Hence, the two Courts below have rightly decided the case on merits on the basis of the evidence produced by the parties. Even otherwise the scope of the Court of IInd Appeal is limited to the extent of finding error of law in the orders of the Courts below. Learned counsel for the appellants was unable to appreciate the requirement of **Section 100** of the CPC. It envisages only three possibilities for entertaining the second appeal against the order of the first appellate Court. The learned counsel was unable to point out that (i) the impugned decision was contrary to law or to some usage having force of law; or (ii) there was failure of the Court to determine the material issues of law or usage having the force of law; and/or (iii) there was substantial error or defect in the procedure provided in CPC which possibly has produced error or defect in the impugned decision.

11. In view of the above facts and discussion, the concurrent findings of the two Courts below are not required to be interfered by this Court, therefore, instant IInd Appeal is dismissed with no order as to costs.

JUDGE

Karachi, Dated: 18.05.2020

SM / Ayaz Gul