IN THE HIGH COURT OF SINDH AT KARACHI

First Appeal No. 142 of 2017

Before : **Mr. Justice Irfan Saadat Khan**
Mr. Justice Fahim Ahmed Siddiqui

Muhammad Iqbal Arain & others.	…..	Appellants
Versus		
Abdul Majeed Arain through LRs.	…..	Respondent

Date of hearing: **15.01.2020**

Date of judgment: _____

Appellant No.1 Muhammad Iqbal Arain and Appellant No.2 Mst Khair-un-Nisa through her L.Rs. through Mr. Mustafa Lakhani, advocate.

Appellant No.3 Muhammad Mossa through his L.Rs. through Mr.Muhammad Taqi, advocate.

Appellant No.4 Asadullah Arain through Mr. Muhammad Mustafa Hussain, advocate.

Respondent Abdul Majeed Arain through his L.Rs. through Mr. Tehsin Ahmed M. Qureshi, advocate.

J U D G M E N T

FAHIM AHMED SIDDIQUI, J:- Through this first appeal, the appellants questioned judgment 18.10.2001 and decree dated 23.10.2001, passed by the learned Senior Civil Judge, Sujawal in F.C. Suit No. 64 of 1997. Through the impugned judgment the said Suit filed by the respondent, was decreed.

2. Succinctly, the facts of the case, as alleged, are that the appellant No.1 for himself and as an attorney of others, entered into a registered Agreement of Sale dated 25-08-1994 with the respondent for the sale of an agricultural land, as described in Part-I, II & III of Scheme 'A', situated in Deh Layo, Tapo Mullan, Taluka Jati, District Thatta for a sale consideration of Rs.8,32,000/-, out of which an amount of Rs. 5,58,000/- was paid by the respondent and the remaining amount of Rs.2,74,000/- was to be paid at the time of execution of sale deed. It was alleged by the respondent that he made further payments in installments on 02-01-1995, 13-1-1995, 01.03.1997 and thereafter on various dates the remaining amount was paid on different dates in cash and kind and that even he overpaid Rs.4,770/- over and above the remaining payment. As per averments in the plaint, the vacant possession of the land in question was also handed over to the respondent on 01-03-1997, when he allegedly paid an amount of Rs.80,000/- and since then he was in possession of the suit land. As alleged by the respondent, he had also paid some dues in respect of the land in question and he also cleared the loan amount of about Rs.5,00,000/- of the Agricultural Development Bank of Pakistan (ADBP), Jati Branch by paying Rs.2,28,169/- being reduced liability offered as an incentive by the said Bank. Allegedly, the cause of action accrued in favour of the respondent in the first week of July 1997 when the appellants refused to execute the sale deed. The appellants in their Written Statement admitted the execution of the sale agreement and payment at the time of execution of the sale agreement. In Written Statement, they asserted that the respondent had to pay the balance sale consideration i.e. Rs.2,74,000/- on 15-03-1995, which he failed. The appellants also denied any subsequent payment and avowed that the respondent could not perform his part of the contract, as such the said agreement was canceled and no cause of action has accrued to him and the Suit was liable to be dismissed.

3. From the pleadings of the parties, the learned trial Court has framed as many as 10 issues on which the parties produced their evidence. After evaluating the evidence, the learned trial Court decided all the issues against the appellants No. 1 to 3 and in favour of the respondent, as such the Suit was decreed. It is worth noting that the appellant No.4 was not the party to the Suit and he was subsequently brought in the picture, when his application under Order I Rule 10 of CPC was allowed.

4. Mr. Mustafa Lakhani, the learned counsel for the appellants No.1 and 2 after going through the impugned judgment, pointed out that not only the respondent but the appellants were also agriculturists, as defined in the Dekkhan Agriculturists Relief Act, 1879. He submits that the claim of the respondent regarding possession was incorrect as the possession was never handed over by his clients to the respondent. He submits that the contract was to be completed on 15-03-1995 and that cut-off date indicated that the time was the essence of the contract and the remaining amount was not paid on or before the said date. According to him, non-fulfilling such important conditions and not honoring the cut-off date for payment amounted to annulment of the contract. After denying all the subsequent payments, he submits that the receipts of payments, produced by the respondent, were false as the same did not bear the signatures of any of the defendants/appellants. He submits that two of the said receipts bear signatures of one Abdul Sattar but the said Abdul Sattar was not examined, as such the same were not proved in terms of Article 79 of the Qanoon-e-Shahadat Ordinance, 1984. He submits that after denial of all those receipts, the trial Court was obliged to refer those documents to a handwriting expert or to come to a definite conclusion after comparing the signatures of defendant/ appellant No. 1 from his admitted signatures. Regarding possession, his contention being that the respondent could not establish the same by deducing trustworthy

evidence and no written document to fortify handing over of the possession was produced before the trial Court. Regarding payment of loan of ADBP, Mr. Lakhani submits that it will not improve the case of the respondent and if any payment was made, the same was without knowledge of his clients and the same was also made after the cut-off date of the part of performance of the respondent, besides, as per agreement, the same was to be paid by the respondent without any adjustment towards the remaining payment. He further submits that prior to filing the Suit, the agreement was canceled and the appellants entered into a sale agreement of the same land with the appellant No. 4 and the possession of the suit land was also handed over to him after receiving full sale consideration and this fact was well in the knowledge of the respondent. According to him, the respondent has no right over the suit land and there was no question of specific performance, hence the instant appeal needs to be allowed and the Suit, filed by the respondent, may be dismissed by exercising the appellate jurisdiction of this Court.

5. Mr. Muhammad Taqi, learned counsel for appellant No. 3 prefers to adopt the arguments, advanced by Mr. Mustafa Lakhani, learned counsel for the appellants No.1 and 2.

6. Mr. Muhammad Mustafa Hussain, the learned counsel for the appellant No. 4, while opening his arguments, points out that the appellant No. 4 was not made party in the litigation before the lower forum, while he was a proper and necessary party in the said Suit. According to him, the appellant. 4 was the subsequent purchaser and he has purchased the land in question after the cancellation of the agreement between the remaining appellants and the respondent. He submits that his client is in possession of the suit land and this fact was very much in the knowledge of the respondent, as the same was disclosed by the remaining appellants in their Written Statement. He submits that although the rest of the

appellants entered into a sale agreement with the appellant No. 4 but they did not disclose the pendency of the Suit. According to him, the remaining appellants intimated his client about the decree of the Suit and pendency of the present appeal when he insisted upon execution of the sale deed. He submits that such information was sent to the appellant No.4 by the remaining appellants through a letter, annexed with a legal notice issued by his client to the respondent, and he assured that the sale deed would be executed after getting the appeal decided in their favour. He submits that after getting such knowledge, appellant No.4 filed the requisite application in the present appeal and became a party to the litigation. According to him, being a proper and necessary party, the decree cannot be effectively executed and it would be appropriate that the matter may be remanded and the appellant No.4 be given an opportunity to participate in the litigation and put forth his case properly. In support of his contention, he relied upon the case reported as **UZIN Export and Import vs Union Bank of Middle East Ltd. (PLD 1994 Supreme Court 95).**

7. Mr. Tehsin Ahmed M. Qureshi, learned counsel for the respondent, while opposing the instant appeal, prefers his submissions at length. He submits that the counsel for the appellants could not point out any illegality in the impugned judgment, which is otherwise proper and free from any flaw. He submits that the sale agreement with the respondent was a registered document, as such the same has remained undeniable rather the same was admitted by the appellants. He denies that the time was the essence of the contract as according to him, even if it was to be performed on a particular date then the same could not be presumed to be canceled without giving a notice. He categorically denies receiving of any legal notice and submits that in absence of any notice, the agreement remains intact. According to him, on 15-03-1995, the respondent came to the office of the Sub-Registrar with the requisite payment but the appellants did not come, as such the respondent was not at fault. He submits that there was

no clause in the agreement regarding payment of a loan of ADBP and the fact is that in the agreement, it was mentioned that the property was free from all encumbrance. He submits that the second agreement with appellant No. 4 was made with *mala fide* intention and in presence of a registered agreement with the respondent the second agreement has no worth in the eyes of law. He draws attention towards Section 27-B of the Specific Relief Act and submits that in view of the said provision, the subsequent purchaser had to give the respondent a notice and without such notice, he has no *locus standi* in the instant matter. He submits that it was not the duty of the respondent to make the appellant No.4 party to the litigation but in fact, it was the responsibility of the appellants to do so. He submits that even a Suit could not fail on account of miss-joineder and non-joinder of a party; as such the decree passed by the trial Court is fully executable. In response to a query, the learned counsel for respondent No. 4 frankly admits that as per natural justice, no one can be condemned unheard, however, submits that it was the duty of the appellant No. 4 to be vigilant to approach the trial Court in which he remained failed. In support of his arguments, he relied upon the cases reported as **Aman Enterprises vs Rahim Industries Pakistan Ltd. (PLD 1993 Supreme Court 292)** and **Muhammad Shafi vs Muhammad Serwer (1997 CLC 1231)**.

8. We have heard the arguments advanced and have gone through the relevant record and have enlightened ourselves with the cited case laws.

9. A factual controversy between the parties was raised at the very initial stage of the trial that the time was the essence of the contract between the appellants No. 1 to 3 and the respondent. It is astonishing that in spite of raising this point in the Written Statement, the learned trial Court has not framed this issue, which according to us, goes to the root of the case. It is also worth noting that it has been pointed out in the Written

Statement that the land in question has been sold out through a subsequent sale agreement to the appellant No. 4 but in spite of that neither the trial court has issued any direction nor any of the parties of the litigation deemed it necessary to add the appellant No. 4 as a nessary party to the litigation. No doubt, a Suit cannot be failed on account of non-joinder and miss-joinder of a party but question is that whether an effective decree can be passed in absence of a necessary party. This also brings us to the question as to whether the principle of natural justice was required to be complied with. There cannot be any doubt that **'audi alteram partem'** is one of the basic pillars of natural justice which means that no one should be condemned unheard. Nevertheless, whenever possible, the principle of natural justice should be followed rather in view of Article 10-A of the Constitution, the same becomes obligatory. We are of the view that ordinarily in a case of this nature, the same should not be ignored and a party, which has appeared even at the appellate stage should be given a fair chance to put his case for proper adjudication and the same may also avoid any future complexity and multiplicity of litigations.

10. In the light of the above discussion, we consider that it would be appropriate in the interest of justice to set aside the impugned judgment and decree and remand the matter to the learned trial Court for a trial afresh with directions to implead the appellant No. 4 as one of the defendants being a proper and necessary party. The parties are at liberty to amend their pleadings, in the changed scenario or file additional pleadings if they so desire.

11. With these observations, the instant first appeal is disposed of with no order as to costs.

JUDGE

JUDGE