IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Constitutional Petition No.D-984 of 2021

Present:
Mr. Justice Mehmood A. Khan
Mr. Justice Khadim Hussain Tunio

Munawar Ali and others	- - - - - -	Petitioners
	versus	
Umar Daraz & others	- - - - - -	Respondents

Mr. Arbab Ali Hakro, Advocate for petitioners.
Miss Shakira Niaz Ali Umrani, Advocate for respondent No. 1.
Mr. Allah Bachayo Soomro, Additional Advocate General.

Date of hearing: 24.08.2021
Date of decision: 24.08.2021

O R D E R

KHADIM HUSSAIN TUNIO, J.- Respondent No. 1 filed an FC Suit No. 94/2020 in the Court of respondent No. 7 for specific performance of contract, recovery of Rs.20,000,000/- as damages along with *mesne* profit, cancellation and permanent injunction in respect of suit property. Admittedly, respondent No. 1 claimed to have purchased suit land bearing Survey No. 1187 admeasuring 65340 Square Feet on NJS No. 452 dated 26.02.2011 from the petitioner No. 1 for a total consideration of Rs.1,60,00,000/- for which he paid Rs.1,16,00,000/- and also purchased suit land bearing Survey No. 1197 admeasuring 00-32 *ghuntas* on NJS No. 297 dated 24.08.2011 for a total sale consideration of Rs.84,00,000/-. Afterwards, the petitioner in FC Suit No. 94/2020 filed his written statement and denied the contents of plaint. Subsequently, the petitioner No.1 filed an application u/o VII Rule 11 CPC. Learned Senior Civil Judge, Shahdadpur (Respondent No. 7) dismissed the same vide impugned order dated 17.12.2020. The same was impugned through Civil Revision Application No. 6 of 2021 which was also dismissed

by the learned Additional District Judge, Shahdadpur (Respondent No. 8) vide impugned order dated 27.05.2021. By this petition, the petitioners have challenged both the orders.

2. Learned counsel for the petitioners has argued that both the courts below have failed to discuss the reasons for the dismissal of application u/o VII Rule 11 CPC filed by the petitioner; that both the impugned orders passed illegally dismissing the application u/o VII Rule 11 CPC; that the respondent No. 8 failed to consider, while deciding the revision application that the suit is barred by time and that no cause of action was disclosed in the plaint; that the cheques provided by respondent No. 1 were dishonoured due to insufficient funds which amounts to refusal from the respondent No. 1; that the suit of the respondent No. 1 was time-barred in terms of Article 113 of the Limitations Act; that the trial Court has miscalculated the amount and did not issue directions to the respondent No. 1 to deposit the remaining amount of Rs.44,00,000/-; that the respondent No. 1, being greedy, fraudulently entered himself into the sale agreement on behalf of unknown persons and kept the real names of the actual vendees suppressed though he had received a heavy amount from them; that the respondent No.1 on execution of sale agreements in written with the petitioners kept them on hollow hopes to pay the sale consideration amount and then failed to perform his part of contract and due to such non-performing of part of contract in relation to the payment of sale consideration, the sale agreements of the year 2011 were cancelled; that the petitioners neither entered into the sale agreement for any plot on behalf of anyone nor received any amount in said regard; that the respondent No.1, in order to save his skin from the unknown vendees from whom he had fraudulently obtained the money, levelled false and baseless allegations against the petitioners; that the cause of action has been managed by the respondent No.1 as well; that the impugned orders are illegal and a result of misreading and non-reading. He therefore prays that the impugned orders be set aside. He has referred the following case laws namely ***Mrs. Farzana Farrukh and others Vs. Administrator, Pakistan Defence Officers Housing Authority and 3 others,***

2017 YLR 1275, Sikandar Ali and 2 others Vs. Baddar-u-Din and 4 others 2019 CLC 1046, Abdul Salam Vs. Muhammad Siddique and others 2019 CLC 1623, United Bank Limited Vs. Ghulam Rafiq 2020 CLD 129, S.M. Sham Ahmad Zaidi through legal heirs Vs. Malik Hassan Ali Khan (MOIN) through legal heirs 2002 SCMR 338.

3. Learned counsel for the respondent No. 1 has argued that the respondent purchased 65340 square feet out of S. No. 1187 from the petitioners through sale agreement dated 26.11.2011 in the sum of Rs.1,60,00,000/-; that the respondent paid a huge amount to the petitioner and he has also already deposited the remaining amount of Rs.44,00,000/- with the trial Court; that it is upon the petitioners to adduce evidence to prove the contentions as alleged in the application u/o VII Rule 11 which he failed to do so. She has relied upon the case of placitum **namely *Mst. Kulsoom and 6 others Vs. Mrs. Marium and 6 others Vs. Marium and 6 others 1988 CLC 870].***

4. Learned AAG on the other hand has supported the case of respondent No. 1 and argued in the same line as argued by the counsel for respondent No. 1.

5. We have heard the arguments advanced by the parties and have also gone through the evidence available on record.

6. From the perusal of record, it contemplates that the respondent No. 1 namely Umar Daraz filed an FC Suit No. 94/2020 against petitioners No. 1 to 3 for specific performance of contract, recovery of Rs.20,000,000/- as damages along with *mesne* profit, cancellation and permanent injunction. Whereafter, the petitioners filed their written statements. Perusal of record shows that the petitioner No.1 subsequently filed an application u/o VII Rule 11 for rejection of plaint. The respondent No.1 filed his objections to such application after which the Court below (Respondent No. 7) dismissed the same vide impugned order dated 17.12.2020. Upon further perusal, it is seen that the petitioners then filed Civil Revision Application No. 6 of 2021 before the Additional District Judge, Shahdadpur (Respondent No. 8), challenging the order dated 17.12.2020, which was also dismissed. A perusal of the factual

background of the case shows that the respondent No. 1 purchased two properties from the petitioners on the basis of three sale agreements dated 26.02.2011, 13.11.2012 and 24.08.2011. The respondent No.1 purchased 65,340 square feet out of S. No. 1187 through sale agreement dated 26.02.2011 in the sum of Rs.1,60,00,000/-. He paid Rs.15,00,000/- as advance amount to the petitioners which was mentioned in the agreement and also issued two cheques bearing No. 5062202 and 5062203 dated 20.03.2011 of Rs.2,000,000/- and Rs.2,500,000/-, totaling Rs.4,500,000/- which was withdrawn by the petitioner Muhammad Bux and such bank statement is available on the record. The respondent No. No.1 further issued four cheques bearing No. 5062204, 5062205, 5062206 and 5062207 in respect of the suit land which were delivered to the petitioners. Later on, sale agreement dated 26.02.2011 was substituted with the consent of the parties and entire paid amount was then adjusted in the new agreement dated 13.11.2012. Therefore, it is an admitted position as of now, that even if the objections as raised by the learned counsel for petitioners are upheld, the plaint cannot be rejected against respondent No. 1 at least, and the suit will proceed against the said defendant. It is a settled principle of law that ***a plaint cannot be rejected in parts or piecemeal***. The provision of Order VII, Rule 11, C.P.C. is procedural in nature and has to be exercised only in exceptional circumstances and in cases where the court comes to the conclusion that, even if all the allegations are proved, the plaintiff will not be entitled to any relief. The Court has only to see whether any cause of action has been disclosed, and it is immaterial for the court at this stage of the case to see that whether the plaintiff will be able to prove it or not, which in any case cannot be decided without framing of issues and recording of evidence. In all fairness, in fact the case as set up is not at all covered by the provisions of Order VII, Rule 11, C.P.C., as none of the situations stipulated in any clauses of Rule 11 are applicable in the instant matter. In so far as the provision in clause (d) is concerned wherein it has been provided that the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law, the learned counsel for the petitioners has not been able to point out any law under which the

plaint could be held to be barred except that the plaint is barred by Article 113 of the Limitations Act. This would not mean that this clause / condition by itself would put bar on any person or a party to file a suit in the Court, as this is not a provision of substantive law determining the right of the plaintiff to file the suit in the face of cause of action but this is an enabling provision of law, which empowers the court to reject the plaint when it is barred by any substantive law abridging the rights of the plaintiff to file a suit in a particular situation on a given cause of action. It is also a settled law that no proceedings in court could be ipso facto defeated just because of Non-joinder or Misjoinder of parties and the court always enjoys ample powers to add or delete or transpose parties to a suit depending upon the nature of the case. In the instant matter, the proper course would be to provide the plaintiff to correct the technical defect, if any, and not to dismiss or reject the plaint on these issues. Law always prefers decisions on merits and discourages the technical knockout. The purpose behind legal and codal formalities and procedure is nothing but only to ensure the safe administration of justice and avoid/thwart the chances of injustice/mis-carriage of justice. In this respect, reliance is placed on the case-law reported as ***Imtiaz Ahmed v. Ghulam Ali [PLD 1963 SC 382]***, wherein the Hon'ble Apex Court has been pleased to observe that:-

> "I must confess that having dealt with technicalities for more than forty years out of which thirty years are at the Bar, 1 do not feel much impressed with them. I think the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it be essential to comply with them on ground of public policy. The English system of administration of justice on which our own is based may be to a certain extent technical but we giving effect to the form and not to the substance defects substantive rights is defective to that extent. The ideal must always be a system that gives to every person what is his."

7. Now coming to the question of limitation under Article 113 of the Limitations Act, we would like to refer to case law titled as ***Tarique Mahmood Chaudhry Kamboh Vs. Najam-ud-din [1999 SCMR 2396]***, wherein the Hon'ble Apex Court has held that:-

> "The question of limitation in the case was a mixed question of law and fact and thus the issue can only be resolved after recording of evidence touching the controversy"

8. The same point of law has again been reiterated on multiple occasions such as in the case reported as ***Nawaz Khan Vs. Kaleem Khan [2013 YLR 2395]*** wherein the general legal principle has been highlighted that the question of limitation, being a mixed question of fact and law needs evidence to resolve and each case has to be seen in its own facts and circumstances. The rejection of the plaint in the meaning of Order VII, Rule 11, CPC and dismissal of the suit on the ground of its maintainability on the factual pleas are entirely two different things. Very basis of the suit disappears by the rejection of the plaint, while dismissal of the suit comes to an end. When a factual controversy is involved, the plaint cannot be rejected in spite of the fact that the plaintiffs may not succeed in establishing allegations made in the plaint. Therefore, the same could not be decided while deciding an application under Order VII, Rule 11, C.P.C as the question of limitation should have been resolved in the light of evidence adduced.

9. Even otherwise, it is well settled principle of law that the High Court in exercise of its constitutional jurisdiction is not supposed to interfere with findings on the controversial question of facts, even if such findings are erroneous. The scope of the judicial review of the High Court under Article 199 of the Constitution in such cases, is limited to the extent of mis-reading or non-reading of evidence or if the findings are based on evidence which may cause miscarriage of justice but it is not proper for this Court to disturb the findings of facts through reappraisal of evidence in writ jurisdiction or exercise this jurisdiction as substitute of revision or appeal. In the case of

Farhat Jabeen Vs. Muhammad Safdar and others [2011 SCMR 1073] wherein the august Supreme Court of Pakistan has declared as under:-

> "Heard. From the impugned judgment of the learned High Court, it is eminently clear that the evidence of the respondent side was only considered and was made the basis of setting aside the concurrent finding of facts recorded by the two courts of fact; whereas the evidence of the appellant was not adverted to at all, touched upon or taken into account, this is a serious' illegality committed by the High Court because it is settled rule by now that interference in the findings of facts concurrently arrived at by the courts, should not be lightly made, merely for the reason that another conclusion shall be possibly drawn, on the reappraisal of the evidence; rather interference is restricted to the cases of misreading and non-reading of material evidence which has bearing on the fate of the case."

10. Moreover, in the case of ***Shajar Islam v. Muhammad Siddique and 2 others [PLD 2007 SC 45]*** the Hon'ble Supreme Court has laid the law to the following effect:-

> "The learned counsel for the respondent has not been able to point out any legal or factual infirmity in the concurrent finding on the above question of fact to justify the interference of the High Court in the writ jurisdiction and this is settled law that the High Court in exercise of its constitutional jurisdiction is not supposed to interfere in the findings on the controversial question of facts based on evidence even if such finding is erroneous. The scope of the judicial review of the High Court under Article 199 of the Constitution in such cases, is limited to the extent of misreading or non-reading of evidence or if the finding is based on no evidence which may cause miscarriage of justice but it is not proper for the High Court to disturb the finding of fact through reappraisal of evidence in writ jurisdiction or exercise this jurisdiction as a substitute of revision or appeal.

> In sequel to above discussion, we are of the considered view that the interference of the High Court in the concurrent finding of the two Courts regarding the existence of relationship… between the parties was beyond the scope of its jurisdiction under Article 199 of the Constitution and consequently, we convert this petition into an appeal, set aside the judgment of the High Court and allow the appeal with no order as to costs."

11. For what has been discussed above, we are of the opinion that the learned two Courts below, while assigning sound reasons, have rightly dismissed the application u/o VII Rule 11 of the petitioners, hence the same do not call for any interference by this Court. Accordingly, by our short order dated 24.08.2021, the present Constitutional Petition was dismissed, these being the reasons for the same. Needless to state that the trial Court may frame legal as well as factual issues according to the pleadings of the parties in order to resolve the controversy between the parties.

JUDGE

JUDGE

Ali Haider