

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Muhammad Shafi Siddiqui

Second Appeal No. 99 of 2012

Abdul Rahim Memon
Versus
Mst. Amina Sheikh & others

Date of Hearing: 06.04.2021

Appellant: Through Mr. Qayyum Nawaz Kundi Advocate

Respondents: Through Mr. Muhammad Imtiaz Khan Advocate

J U D G M E N T

Muhammad Shafi Siddiqui, J.- Against conflicting findings, the appellant Abdul Rahim Memon has preferred this Second Appeal under section 100 CPC.

2. Brief facts are that in a suit for declaration, specific performance, possession, injunction and mesne profit the trial Court reached to conclusion that the subject agreement of which performance was sought was not lawfully executed as stamp paper was purchased in the name of seller and was (agreement) not attested by the competent authority.

3. The trial Court also reached to a conclusion that the agreement was executed in July 2000 but the respondent/plaintiff slept over his right, as he never approached competent forum within time for the specific performance. The agreement was stated to be unregistered and hence had no authenticity. It is further observed by the trial Court that the respondent/plaintiff had not given any notice for sale deed. Hence, on the strength of finding on Issue No.2, the trial Court reached to a conclusion that the suit was liable to be dismissed.

4. With above findings the trial Court dismissed the suit of the respondent who then preferred an appeal, which was allowed by the

appellate Court vide judgment impugned in this second appeal, on consideration of fact, circumstances and evidence recorded in the matter.

5. I have heard learned counsel for parties and perused material available on record.

6. The primary issue was whether there was an agreement of sale executed between parties and whether performance of it could be asked by the respondent. The defence of the appellant's counsel while he argued this matter was that it was attorney of the respondent who filed the suit and pursued the matter, therefore, the attorney had no personal knowledge in respect of the conversation or agreement between the parties, therefore, his evidence, per learned counsel for appellant, cannot be relied upon as being not confidence inspiring.

7. A perusal of the evidence available on record, would reveal that Abid Shoukat, the attorney of the respondent/plaintiff filed his affidavit-in-evidence and he was subjected to cross examination. In relation, he is also son of the plaintiff/respondent. He produced a number of documents however the most important document out of these is Ex. P/2 which is an indenture of lease of Karachi Municipal Corporation in respect of building/property in question along with receipts of certain payments which perhaps were made by the appellant. Though he continued to deposit some of the payments after execution of sale agreement but all originals were handed over to the respondent while they were in good terms. The contents of the affidavit-in-evidence of the respondent/plaintiff have almost gone un rebutted.

8. It was only suggested and/or a defence taken by the appellant that the documents were handed over to respondent for verification but verification from which department has not been explained. Furthermore, if at all the title documents were considered to have been

handed over for verification, then why the original receipts of the payments were handed over to the respondent.

9. This is not enough, in the cross-examination the appellant being defendant in the suit, has admitted that the other tenants of the building were paying rent to the respondent/plaintiff Mst. Amna since September 2001 i.e. after execution of sale agreement and payment. He also admitted that he entered into an agreement with the plaintiff i.e. respondent on 31.07.2000. It is the same agreement that is relied upon by respondent/plaintiff. He further admitted that at the time of agreement of sale son of the plaintiff/ respondent who in fact is attorney has paid some of Rs.100,000/- however he stated that it is only for the first floor consisting of five rooms. He also agreed that the agreement in respect of first floor consisting of five rooms was reduced into writing but he has not produced any such document/agreement. He also admitted that all the documents of property are lying with the plaintiff/respondent and he never approached him for return of those documents nor any application for return of the documents was filed in Court.

10. Thus, there is nothing in context of the defence of the appellant that only first floor of the building was sold out and that the attorney had no right in presence of principal to appear in the witness box. Whatever is deposed by the attorney, he deposed it on behalf of the principal on instruction and hence nothing could be taken away on the count that it was hearsay.

11. Plaintiff/respondent has also examined one of the witnesses of the agreement whereas the other had expired and hence according to Qanoon-e-Shahadat Order, 1984, it was otherwise proved through the evidence available on record. On the other hand the appellant examined himself only without corroboration of any other witnesses. Even

defendants No.2 and 3 did not turn up to examine themselves and/or to support the appellant/defendant No.1.

12. In view of the above, no interference is required in the impugned judgment of the appellate Court and this second appeal merits no consideration, which was accordingly dismissed by short order dated 06.04.2021 and these are reasons for the same.

Dated: 10.04.2021

Judge