

IN THE HIGH COURT OF SINDH AT KARACHI

BEFORE:
Mr. Justice Muhammad Shafi Siddiqui

IInd Appeal No. 30 of 2007

Mrs. Naseem Akhtar
Versus
Mst. Rehana Nihal & others

Date of Hearing: 11.12.2017

Appellant: Through Mr. Munir-ur-Rahman Advocate.

Respondents No.1 to 3: Through Mr. Muhammad Ali Lakhani Advocate

J U D G M E N T

Muhammad Shafi Siddiqui, J.- This Second Appeal is in respect of concurrent findings of two Courts below originates from suit for specific performance filed by the petitioner.

2. Brief facts of the case are that the subject property was owned by one Nehal Ahmed, a Lt. Commander of Pakistan Navy, who expired on 04.06.1975 leaving behind a widow, two sons and a daughter as respondents No.1 to 4. Respondent No.4 is the step brother of respondents No.2 and 3. Appellant was originally inducted in the subject premises as tenant on 05.11.1980. She claimed to have entered into an agreement of sale with respondent No.1 Mst. Rehana Nehal widow of Nehal Ahmed. On 30.10.1986 the agreement was stated to be executed between appellant and respondent No.1. It is claimed by the appellant that she (respondent No.1) being a widow and mother was authorized to sell the subject property and accordingly entered into an agreement of sale with respondent No.1. One attorney namely Nusrat Ali Chohan was appointed by respondent No.1 Mst. Rehana Nehal in respect of the subject property in November 1988 who further appointed sub-attorney

in terms of the Power of Attorney. The property was mortgaged with respondent No.5.

3. On account of failure to perform part of the agreement, suit for specific performance was filed by the appellant. Notices and summons were served and written statement was filed on behalf of respondents No.2 & 3 and 1 separately. Written statement was also filed by Muslim Commercial Bank. Issues were framed and the appellant recorded her examination-in-chief. Respondent No.1 however has not cross examined the appellant. The trial Court during the proceedings dealt with the case and framed as many as nine issues whereas prime consideration for the trial Court was whether respondent No.1 had authority to enter into an agreement of sale on behalf of other respondents. On the basis of record available before the trial Court the suit of the appellant was dismissed vide judgment dated 21.08.2004 and so also the appeal bearing No.129 of 2004 vide order dated 22.05.2007 hence this Second Appeal.

4. Mr. Munir-ur-Rehman attempted to show that the property was redeemed from the mortgage and the balance outstanding amount was deposited by the sub-attorney of respondent No.1 and hence are in possession of the title documents. He argued that they are in possession in part performance of sale and respondent No.1 had the authority to enter into an agreement on behalf of minors.

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

6. As observed by the trial Court and the appellate Court the prime consideration was/is the authority of respondent No.1 to enter into an agreement of sale and the bona fide of the appellant in presenting a transparent transaction to the Court.

7. The appellant was inducted in the premises only as a tenant and not in part performance of sale agreement. She knew the family before entering into the alleged sale transaction. The agreement of sale was executed by respondent No.1. The first party i.e. respondent No.1 in the agreement is shown as co-owner and guardian of minors and attorney of other shareholders. Respondent No.1 shown herself to be a guardian of the person and property of the minors in pursuance of an order passed in Guardian & Wards Application No.254 of 1987. Throughout the proceedings, from the date of execution of the agreement, the appellant has not been able to show the authority of respondent No.1 in entering into such transaction on behalf of the minors and other shareholders/co-owners of the property. The written statement of respondent No.4 shows that deceased was survived by (a) Mst. Rehana Nihal, (b) Azhar Nihal, (c) Hira Nihal, (d) Pervaiz Nihal, (e) Mst. Jawad-un-Nisa and (f) Nihal Fatima. The agreement of sale was executed on 30.10.1986 whereas the suit for specific performance was filed on 28.04.1992. The maternal grandmother of respondents No.2 and 3 and mother of respondent No.1, filed an application under section 12(2) CPC for the revocation and recall of order dated 27.10.1987 passed in Guardian & Wards Application, referred above. On consideration of the facts and circumstances, mentioned in the application under section 12(2) CPC, as the respondent No.1 claimed to have concealed material facts by not disclosing close relatives of the minors who may have interest in the matter relating to guardianship certificate of the person and property, the Court revoked and set aside order dated 27.10.1987 appointing respondent No.1 as guardian of the person and property of alleged minors.

8. In consideration of the findings of Issues No.1 and 2 in respect of an application under section 12(2) CPC, the Guardian Court reached to

the conclusion that the Guardianship certificate was obtained by concealment of facts and hence it was set aside. None of the counsels knows about the ultimate fate of Guardianship Application No.254 of 1987. R & P of the aforesaid suit was thus summoned and it was found that it was dismissed for non-prosecution in the year 1989.

9. The record of Guardian & Wards Application No.254 of 1987 further reveals that vide order dated 27.10.1987 respondent No.1 was appointed as guardian of the minors. On an application filed by respondent No.1 to sell the property objections were filed by Mst. Badr Munir Akhtar and Perwaiz Nihal, respondent No.4, followed by their evidence. After recording of the evidence, vide order dated 12.03.1984 the Guardian & Ward Court set aside order dated 27.10.1987 in terms whereof respondent No.1 was appointed as guardian of the minors and consequently the main application under section 10 of Guardian & Wards Act was restored to be decided on merit however the same was finally dismissed in default. The contents of counter-affidavit filed by Mrs. Badar Munir Akhtar, who is mother of respondent No.1, are very material, which for the sake of convenience are reproduced as under:-

(wherever the word 'applicant' in the following text appears it represent 'respondent No.1')

6. *That the applicant has misrepresented the facts once again. She has misrepresented herself as widow of Late Nihal Ahmed while the fact is that the applicant is presently the wife of Mr. Amanullah Khan and residing with him at House No.244/X, Liaquatabad, Karachi, along with the children from him.*

7. *That prior to the present marriage the applicant had married one Mr. Javeed after the death of Nihal Ahmed. She also has two children from Javeed.*

8. *That the applicant once again gave out Mr. Perwaiz Nihal as a minor whereas the position is that he attained the age of majority in 1968, two years prior to the marriage of the applicant with Lieut Comdr. Nihal Ahmad in 1970. Presently Mr. Perwaiz Nihal is living in U.S.A. with his wife and children and earning handsomely.*

9. *That the other two children of late Nihal Ahmad i.e. Azfar Nihal is 17 years of age while Miss Hina Nihal is 15*

years of age and both of them are living with me after the death of their father in 1975 and I am supporting them and bearing all expenses including education.

10. That it is absolutely incorrect to say that the applicant is looking after and supporting the minors and Pervaiz Nihal. It is also incorrect and false that money is required for the education or otherwise of the children. I am feeding and educating the minors and I do not require any money for them.”

10. The proceedings, referred above, reveal that not only respondent No.1 acted against the interest of respondents No.2 and 3 but also against the interest of respondent No.4, real son of deceased Nehal Ahmed from his first wife and Jawad-un-Nisa, mother of deceased, and such facts were not disclosed in the application under Guardian & Wards Act, which was filed in an attempt to obtain guardianship certificate in respect of person and property of minors. The appellant also acted malafidely at the time of entering into the agreement of sale as no permission to sell was provided to the respondent No.1. Not only at the time of entering into an agreement of sale but at no point of time such permission was ever made available by the respondent to the appellant which could have made her (appellant) believe that she (respondent No.1) had the authority to sell the subject property. Respondent No.1 has also concealed the date of birth of respondents No.2 to 4.

11. The protection under section 41 of the Transfer of Property Act and Section 27 of the Specific Performance Act in the above position is thus not available to the appellant. Such authority on the part of the respondent No.1 to act as guardian of person and property of the alleged minors was also revoked in March, 1989 whereas the suit was filed in the year 1992.

12. The appellant also attempted to show that on 22.03.1989 further sum of Rs.5,50,000/- was paid to respondent No.1 and also on 26.11.1991 when outstanding dues of defendant No.5/bank were paid. Although respondent No.1 had no authority to act on behalf of the

alleged minors, as the authority under the above guardianship certificate was only to act as the guardian of person and property, having no powers to sell, yet such alleged certificate was revoked much before above date of 1989 and 1991 when an order under section 12(2) CPC was passed on 12.03.1989 revoking the authority of respondent No.1, if any. As far as the General Power of Attorney whereby respondent No.1 authorized one Nusrat Ali Chohan son of Muhammad Sultan Ahmed to act as her attorney to deal with the property is concerned is of no use as she was acting as alleged guardian and there was no occasion to appoint an attorney to deal with the property in the absence of any order of the Guardian Court in respect of the immovable property as to its disposal. A sub-attorney claimed to have been appointed on 21.05.1989 on behalf of the attorney when principal's power had already been revoked, who appeared before the concerned bank for redemption of the documents. Respondent No.5 Bank filed written statement in the suit denying to release documents without consent of legal heirs. Written statement was filed on 16.11.1992. The documents appear to have been collusively redeemed by the concerned manager when a statement was recorded in Court in Banking Suit No.155 of 1991 filed for recovery of loan.

13. Respondents No.2 to 4 were not aware of execution of General Power of Attorney and Sub- Power of Attorney and hence the transaction was collusive, sham and bogus. This alleged authority/General Power of Attorney is of no consequence in the absence of any authority from the concerned guardian Court to sell the property and if at all she acted under the guardianship certificate that has already been revoked on 12.03.1989 much before statement filed by the concerned Manager in Civil Appeal on 20.09.2005. The deed of release was executed on 12.03.1995 without notice to the real owner/legal heirs of Nihal Ahmed and the documents were unlawfully redeemed to Ch. Muhammad Sharif,

the alleged sub-attorney of respondent No.1 and husband of appellant. Such redemption would not take away any right and interest on the part of the respondents No.2 to 4. The collusiveness is obvious in presence of paragraph 20 of written statement of Bank which is reproduced as under:-

“20. With regard to the contents of Para 25 of the plaint, the defendant No.5/Bank has rightly refused to release/redeem the title documents of the said property to Chaudhry Mohammad Shareef Fareedi, or to execute/release/redemption Deed in respect of the said property. It is denied that this act of the defendant No.5/Bank is clearly illegal, wrongful, and malafide. It is respectfully submitted that the defendant No.5/Bank cannot release/redeem the property in question without any consent or permission of the legal heirs of the deceased/borrower. It is further submitted that this act on the part of the defendant No.5 is absolutely legal and bonafide, strictly according to law.”

14. The findings of the Guardian Court while disposing of application under section 12(2) CPC are very material and I feel it necessary to reproduce the same recorded in respect of following two issues which are as under:-

“1. Whether the order for appointment of Guardian has been obtained by the applicant through fraud and misrepresentation?

2. What should the order be?

Objector No.1, Mrs. Badar Muneer is examined as Exbh O with cross and she produced as photocopy of provisional certificate Asfar Nehal as Ex O/1.

Objector No.2 Baqar Hussain was examined as Ex.O/2 with no cross and he produce the photo certified copy of order passed in petition No.341/68 as Ex. O/3.

Applicant failed to lead her evidence through appointment was given to her.

I have carefully perused the evidence brought on record. My finding on the above issues with reasons are as under.

Issue No.1

Objector No.1, Mrs. Badar Muneer has stated that applicant is her daughter she was married with Nihal in

the year 1970. From his first wife he had a son namely Pervez Nihal who was in America at the time of applicant's wife but thereafter he had come and meet with her. She has further stated that at that time he was aged about 22 or 23 years. Applicant has two children from Nihal namely Asfar who was born in April 1971 and Hina Nihal. She has produced the provisional certificate of Asfar Nihal as Ex.O/2. She has further deposed that after the death of Nihal the applicant got another wife (in fact it is 'husband') and since then both children are with her and she is looking after and maintaining them. She has further deposed that Pervez Nihal the son of deceased Nihal has two aunt, one related uncle are real maternal uncle and one paternal uncle. She has further deposed that she had no knowledge about the pendency of that case nor any notice was ever served upon her or her family. She came to know about it where the applicant was trying to sell the bungalow. Applicant has obtained the order for appointment of Guardian of all three children fraudulently suppressing the facts from the court. Objector No.2 has also given the same statement.

Neither the applicant has cross examined these witnesses nor she lead her evidence in rebuttal of objector's evidence, therefore the evidence of objectors has gone unchallenged and un-rebutted and I have no hesitation to believe it. Admittedly the notices were issued through publication in daily Inqilab, which is not a very popular newspaper and it is possible that the same was not read by the objectors. Except this mode if service no other mode of service was attempted in the case. Therefore in view of above evidence and circumstances of the case I have come to the conclusion that the matters requires further enquiry because the order for appointment of Guardian was obtained by the applicant suppressing the real facts from the court through fraud and misrepresentation. Issue answered accordingly.

Issue No.2

In view of my findings on the above issue, I therefore, allow the above application setting aside the order dated 27.10.87 with the directions to objectors/respondents to file written reply on main application on the next date of Hg."

15. In view of above facts and circumstances and the reasoning assigned by the trial Court as well as appellate Court I do not find any reason to interfere with the conclusion drawn by the trial Court and the appellate Court and hence the appeal is dismissed along with pending

application, although the suit was disposed of as being not maintainable but the findings reached by the trial Court do not require any interference insofar as disposal of the suit on merit on the basis of above findings are concerned. Respondent No.1 has not denied to have taken amount towards alleged sale which is prayed by appellant alternatively.

16. In view of the above, the appeal is dismissed and the order of dismissal of suit for specific performance is maintained however in view of admission and receipt of amount by respondent No.1, suit is decreed for recovery of amount in the sum of Rs.950,000/- and Rs.400,000/- with interest at 16%, as claimed in paragraph (e) of prayer clause, against respondent No.1.

17. Above are the reasons of my short order dated 11.12.2017.

Dated:

Judge