

Judgment Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Revision Application No. 53 of 2011

Applicant : Wali Muhammad, through Mr. Imtiaz Ahmed
Shaikh advocate.

Respondent No.1 : Habib-ur-Rehman, since deceased through his legal
heirs, called absent.

Respondent No.2 : Shakil-ur-Rehman, called absent.

Date of hearing : 30.05.2017.

J U D G M E N T

NADEEM AKHTAR, J. – The applicant filed Suit No.164/2008 before the IInd Senior Civil Judge Malir Karachi against the respondents for specific performance and permanent injunction, plaint whereof was rejected by the trial Court vide order dated 29.05.2010 on the ground that it did not disclose proper cause of action against the defendants / respondents. Civil Appeal No.51/2010 filed by the applicant before the IInd Additional District Judge Malir against rejection of his plaint was dismissed on 14.01.2011. Being aggrieved with the aforesaid order of the trial Court and judgment of the appellate Court, the applicant has filed this Civil Revision Application under Section 115 CPC.

2. Relevant facts of the case are that a Suit for specific performance and permanent injunction was filed by the applicant against the respondents on the basis of an agreement dated 27.01.2006 whereby respondent No.1 had agreed to sell to him Plot No.VIII-G-24/G-2, situated at MVC-559, Malir City, Karachi, ('the suit property') in consideration of Rs.540,000.00. It was claimed by him that part payment of Rs.200,000.00 was made by him to respondent No.1 whereafter possession of the suit property was handed over to him and subsequently further amount of Rs.60,000.00 was also received from him by respondent No.1. It was averred by him that since it was mutually agreed that the balance sale consideration of Rs.340,000.00 was to be paid by him on or before 15.05.2006, a pay order dated 15.05.2006 for the entire said amount was arranged by him. It was alleged by him that despite his repeated requests, respondent No.1 failed to complete the sale in his favour and finally he refused to perform his agreed part of the contract. Against respondent No.2, who was the owner of the adjoining property, it was alleged that his drainage and

sewerage line was passing illegally through the suit property. In the above background, a decree for specific performance and injunction was sought by the applicant against respondent No.1, and a decree seeking direction against respondent No.2 for removal of his drainage and sewerage line was also sought.

3. Respondents 1 and 2 filed applications before the trial Court seeking rejection of the plaint on the ground that it did not disclose any cause of action against them. The application filed by respondent No.1 was allowed by the trial Court on the ground that there was a stipulation in the sale agreement that in case respondent No.1 fails in performing his part of the contract he will be liable to return the double of the earnest money to the applicant, and there was no condition in the agreement that the applicant will be entitled to enforce the agreement against respondent No.1. The application filed by respondent No.2 was allowed on the ground that the applicant had no right to seek relief of injunction against respondent No.2 as the suit property was not in the name of the applicant. In view of the above findings, the plaint was rejected by the learned trial Court by holding that the plaint did not disclose any cause of action against respondents 1 and 2, and the above findings were upheld by the learned appellate Court.

4. Record shows that respondents 1 and 2 were duly served and they are being represented in this revision application by their respective counsel, however, on most of the dates of hearing the said respondents and their learned counsel remained absent. On 08.05.2017, it was observed that if none appears on their behalf on the next date, the matter shall be heard and decided in their absence. Despite the above caution, the respondents and their learned counsel have chosen to remain absent.

5. It may be noted that in his written statement respondent No.1 / vendor had admitted execution of the sale agreement and receipt of part sale consideration from the applicant / vendee. He had averred that the sale agreement stood cancelled / revoked as the applicant had failed to pay the balance sale consideration within the time stipulated in the agreement. It is well-settled that in cases of sale of immovable properties time is not of the essence of the contract even if any such stipulation is made in the agreement. In any event, the question as to whether the applicant had failed to pay the balance sale consideration within the alleged stipulated period or which of the parties had failed in performing his agreed part of the contract, could not be decided without evidence. The allegations and counter allegations by the parties were

sufficient to show that they are at variance on questions of fact which could not be resolved without recording their respective evidence. In my humble opinion, the plaint could not be rejected in these circumstances without affording opportunity to the parties to adduce evidence and without providing them chance of hearing. This view expressed by me is supported by (1) Q.B.E. Insurance (International) Ltd. V/S Jaffar Flour and Oil Mills Ltd. and others, 2008 SCMR 1037, (2) Mst. Karim Bibi and others V/S Zubair and others, 1993 SCMR 2039, (3) Muhammad Younis Arvi V/S Muhammad Aslam and 16 others, 2012 CLC 1445 (SC AJ&K) and (4) Muhammad Afzal V/S Muhammad Manzoor and 40 others, 2013 YLR 85 (SC AJ&K).

6. The trial Court had concluded that the plaint did not disclose any cause of action against respondent No.1 as there was a stipulation in the sale agreement that in case respondent No.1 fails in performing his part of the contract he will be liable to return the double of the earnest money to the applicant and also as there was no condition in the agreement that the applicant will be entitled to enforce the agreement against respondent No.1. As held above, the conclusion regarding breach of contract and the consequences thereof could not be decided without evidence. It is well-settled that where a cause of action is disclosed, the question as to whether the plaintiff will be able to prove it or not, is irrelevant for deciding an application for rejection of the plaint. It is also well-settled that for the purpose of rejection of the plaint, the averments and allegations made in the plaint are to be examined, and if upon a bare perusal thereof and assuming the same to be correct, a cause of action is spelt out from the plaint, it cannot be rejected. The ground for rejection of the plaint against respondent No.2 that the suit property was not in the name of the applicant was also not tenable as admittedly sale of the suit property had not been completed in favour of the applicant and due to this reason he had filed the Suit for specific performance.

7. In view of the above discussion, I do not agree with the findings of both the learned courts below. Therefore, the impugned order and judgment cannot be allowed to remain in the field and are liable to be set aside.

8. Foregoing are the reasons of the short order announced by me on 30.05.2017, whereby this civil revision application was allowed and the impugned order and judgment were set aside.

J U D G E