

Judgment Sheet

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision Application No. S – 85 of 2015

- Applicants : Mumtaz Ali, Mohammad Umer and Liquat Ali, through Mr. Tariq G. Hanif Mangi Advocate.
- Respondents 1 to 3 : Arz Mohammad, Abdul Rehman and Raheem Bux, through Mr. Parya Ram M. Vaswani Advocate.
- Respondent No.4 : Mst. Jannat @ Jannan, through Mr. Zafar Ali Eidan Mangi Advocate.
- Respondents 5 to 9 : Mukhtiarkar Ghotki, Sub-Registrar Ghotki, SHO P.S. Ghotki, Incharge Complaint Centre DPO Office Ghotki at Mirpur Mathelo and Province of Sindh, through Mr. Abdul Ghaffar Memon, State Counsel.
- Dates of hearing : 27.11.2017, 14.05.2018, 21.05.2018 and 28.05.2018.

J U D G M E N T

NADEEM AKHTAR, J. – This Civil Revision Application has been filed by the applicants against concurrent findings of the two learned Courts below. Through a consolidated judgment dated 28.08.2010 and decree dated 02.09.2010 passed by the learned trial Court (Senior Civil Judge Ghotki) in consolidated F.C. Suit Nos. 39/2006, 43/2006 and 05/2008, F.C. Suit Nos. 39/2006 and 05/2008 filed by the applicants and respondent No.4, respectively, were dismissed and F.C. Suit No.43/2006 filed by respondents 1 to 3 was decreed. The above judgment and decree of the learned trial Court have been maintained by learned appellate Court (Additional District Judge Mirpur Mathelo) by dismissing Civil Appeal Nos. 30/2011 and 69/2010 filed by the applicants and respondent No.4, respectively.

2. Relevant facts of the case are that the present applicants filed F.C. Suit No.39/2006 against the present respondents 1, 2 and 3 and official respondents for declaration and permanent injunction. The case of the applicants, as averred in the plaint, was that they were the owners of the properties described in paragraph 2 of the plaint ; they entered into an agreement for sale in respect thereof with respondents 1 to 3 in consideration of Rs.10,000,000.00 out of which Rs.3,000,000.00 was paid by the said respondents and the balance amount of Rs.7,000,000.00 was to be paid by them on 25.01.2006 ; it was

agreed by the parties that if the balance amount was not paid by the respondents within the stipulated period, the advance payment made by them will be forfeited and the agreement will stand cancelled ; meanwhile, the applicants entered into an agreement with a third party for purchase of an agricultural land from him in consideration of Rs.7,000,000.00 and paid an amount of Rs.2,500,000.00 to him as advance part-payment and promised to pay the balance amount to him upon receipt of the balance sale consideration from the respondents ; despite several promises, the respondents committed breach of the agreement as they failed to pay the balance sale consideration to the applicants and failed to perform their agreed part of the contract ; and, the respondents used unfair means to pressurize the applicants to return the advance part payment to them. In this background, it was prayed by the applicants that the actions taken by the respondents for recovery of the advance part payment be declared as illegal, and they should be restrained from taking any such action or from pressurizing the applicants.

3. Respondents 1 to 3 filed their written statement in the applicants' F.C. Suit No.39/2006 wherein it was pleaded by them that when they approached the applicants with the balance sale consideration to complete the sale in their favour, they were informed by the applicants that their real sister / respondent No.4 was also a co-owner of the subject properties to the extent of 25%, and since her name had not been entered in the revenue record for want of her national identity card, the sale will be completed after fulfilling the requisite formalities i.e. making of her identity card and mutation of her name in the revenue record. It was further pleaded by respondents 1 to 3 that when they came to know in July 2006 that the applicants had purchased the said 25% share of their sister through a registered sale deed dated 01.06.2006 and mutation in respect thereof was effected on 07.07.2006, they requested the applicants time and again to complete the sale in their favour, but the applicants avoided / refused to do so. It was specifically pleaded by respondents 1 to 3 that they had always been and were still ready and willing to perform their agreed part of the contract by paying the remaining sale consideration to the applicants, and it was the applicants who had committed breach of the contract. In the above background, respondents 1 to 3 filed F.C. Suit No.43/2006 against the present applicants and their sister / respondent No.4 for specific performance of the above contract, declaration and permanent injunction.

4. F.C. Suit No.05/2008 was filed by respondent No.4 against present applicants and respondents 1 to 3 for declaration, cancellation and permanent

injunction, by alleging that she had never agreed to sell her 25% share in the suit properties to her brothers / the present applicants and as such the registered sale deed in respect thereof, having been obtained without any consideration and by way of fraud and misrepresentation, be cancelled.

5. All the above mentioned three Suits were consolidated by the learned trial Court and it was ordered that F.C. Suit No.39/2006 filed by the present applicants will be the leading Suit. Originally five (05) issues were settled on 29.11.2006 by the learned trial Court in two consolidated F.C. Suit Nos.39/2006 and 43/2006 filed by the applicants and respondents 1 to 3, respectively, however, after consolidation of the third Suit viz. F.C. Suit No.05/2008 filed by respondent No.4, consolidated issues were again settled on 10.06.2008 in all the three said consolidated Suits. After addition of two additional issues on 21.08.2010, following eight (08) issues were finally settled in the said three consolidated Suits :

- “01. *Whether Mst. Jannat had not authorized the plaintiffs to sell share to the defendants No.1 to 3 and that a sale deed No.1031 dated 01.06.2006 is got executed by the plaintiffs, playing fraud ? O.P.D. on Mst. Jannat ?*
02. *Whether the plaintiffs in the leading Suit come under heavy loses due to non payment of remaining amount of consideration by the defendants in time ? O.P.P.*
03. *Whether the defendants in the leading Suit due to non availability of funds refused to pay the balance consideration and forced the plaintiffs for return of advance money ? O.P.P.*
04. *Whether the defendants No.1 to 3 failed to pay the remaining consideration of Rs.70,00,000/= within stipulated time ? O.P.P.*
05. *Whether the defendants had approached the plaintiffs offered them the remaining consideration in time, but the plaintiffs have failed to execute sale deed ? O.P.P.*
06. *Whether the plaintiffs are entitled to forfeit advance amount of Rs.30,00,000/= ? O.P.P.*
07. *Whether the defendants are entitled for the relief of specific performance of contract ? O.P.D.*
08. *What should the decree be ?”*

6. All the parties in the above Suits examined themselves and produced documents in support of their respective cases. After examining the evidence produced by them and after hearing them, the learned trial Court dismissed F.C. Suit Nos.39/2006 and 05/2008 filed by the applicants and respondent

No.4, respectively, and decreed F.C. Suit No.43/2006 filed by respondents 1 to 3 to the extent of prayers (A), (B) and (C). The learned appellate agreed with the above findings and thus dismissed the appeals filed by the applicants and respondent No.4. I have heard learned counsel for the parties at length and with their able assistance have also closely examined the material available on record and the case law cited by them at the bar.

7. Suit No.05/2008 filed by respondent No.4 Mst. Jannat was dismissed by the learned trial Court by holding *inter alia* that she had failed to prove that she did not execute the registered sale deed in respect of her 25% share in the subject properties in favour of the present applicants or it was executed by her without any consideration or as a result of some fraud, and she had also failed to disclose specific details of the alleged fraud ; and, on the contrary by producing witnesses the applicants had succeeded in proving the execution of registered sale deed in their favour by respondent No.4. It may be noted that respondent No.4 has not challenged the concurrent findings of the two learned courts below before this Court, therefore, the impugned judgments and decrees of both the learned courts below have attained finality to the extent of dismissal of her F.C. Suit No.05/2008.

8. In leading Suit No.39/2006 filed by the applicants it was held *inter alia* by the learned trial Court that the applicants had failed to prove that any losses were suffered by them due to non-payment of balance sale consideration by respondents 1 to 3 or that the said respondents were pressurizing or forcing them to return the advance part payment ; it was clear from the evidence that at the time of the agreement the applicants had concealed the fact from respondents 1 to 3 that respondent No.4 was also a co-owner of the subject properties to the extent of 25% share ; the applicants were, therefore, not the full owners of the subject properties at the time of the agreement ; non-disclosure of this important fact at the time of agreement showed malafides on the part of the applicants ; in such circumstances, respondents 1 to 3 were not obliged to pay the balance sale consideration unless the above deficiency in the title was cured by the applicants ; after transfer of the 25% share of respondent No.4 through a registered sale deed in favour of the applicants, they became the lawful owners of the entire property and were thus liable to complete the sale in favour of respondents 1 to 3 in view of the case reported as 1986 SCMR 888 ; the applicants had failed in proving that respondents 1 to 3 had refused or failed to pay the balance sale consideration or did not have adequate funds to pay the same ; and, on the contrary, respondents 1 to 3 had succeeded in

proving that despite repeated attempts by them the applicants had refused to accept balance sale consideration from them and to complete the sale in their favour even after preparation of the identity card of respondent No.4 and transfer of her 25% share in favour of the applicants.

9. At the outset, Mr. Tariq G. Hanif Mangi, learned counsel for the applicants, submitted that the impugned judgments and decrees of both the learned courts below are liable to be set aside as a consolidated decree was drawn up by the learned trial court in respect of all the three Suits pursuant to the consolidated judgment delivered therein. According to him, separate decrees ought to have been drawn up by the learned trial court for each Suit in view of Zahid Zaman Khan and others V/S Khan Afsar and others, **PLD 2016 S.C. 409**. In the cited authority, the Hon'ble Supreme Court was pleased to give the following direction at page 419 :

“We direct all the trial courts of the country that where two or more suits have been consolidated and disposed of through a common judgment, that separate decree sheets with all the material particulars as per the requirements of Order XX of the C.P.C. must be drawn up. This direction shall be for the future and consequence of non-compliance thereof shall be considered in appropriate cases.” (emphasis added)

It may be noted that the above-cited case was decided on 24.02.2016 and the direction contained therein was for the future. Therefore, it cannot be applied in the instant case retrospectively as the impugned decree was drawn up by the learned trial court on 02.09.2010.

10. It was strenuously argued by Mr. Tariq G. Hanif Mangi, learned counsel for the applicants, that the discretionary relief of specific performance was wrongly granted by both the learned courts below to respondents 1 to 3 as their witness had admitted in his cross-examination that due to non-payment of the balance sale consideration, the said respondents had themselves requested the applicants to return the advance part payment made by them. According to him, in view of this important admission it was clear not only that respondents 1 to 3 had no intention to pay the balance sale consideration, but also that they had asked for return of the advance part payment made by them. In reply to this, Mr. Parya Ram M. Vaswani, learned counsel for respondents 1 to 3, drew my attention to the cross-examination of the above witness from the R & P of the trial court, wherein no such admission was found. On the contrary, it revealed that the said witness had in fact denied the suggestion made on behalf of the applicants that respondents 1 to 3 had asked for return of the advance

part payment. Accordingly, the above argument of learned counsel for the applicants, being contrary to the record, fails.

11. It was next contended by learned counsel for the applicants that respondents 1 to 3 were bound to pay the balance sale consideration on or before the date stipulated in the agreement and since penal consequences of forfeiture of the advance amount were provided in the agreement, time stipulated therein was of the essence of the contract. It was urged by him that as the balance sale consideration was admittedly not paid by respondents 1 to 3 within the stipulated period, the agreement stood cancelled and the advance part payment made by them stood forfeited. With due respect to the learned counsel, his above contention cannot be accepted for the simple reason that it was an admitted position before both the learned courts below as well as before this Court that on the date of the agreement and even up to the date stipulated therein for completion of the sale, the applicants had not acquired full ownership of the suit properties and respondent No.4 was also a co-owner thereof, and the applicants became the full owners thereof much after the said completion date stipulated in the agreement when the legal and codal formalities for transfer of 25% share of respondent No.4 in their favour were completed. It may be observed that since the fact that respondent No.4 was also a co-owner of the suit properties was not disclosed to respondents 1 to 3 at the time of the agreement, the agreement was voidable at their option and they could have revoked the same by exercising such right. However, after acquiring knowledge about the above fact and in view of the promises made by the applicants that complete ownership will be acquired by them by acquiring the share of respondent No.4 before transferring the title in favour of respondents 1 to 3, the said respondents did not cancel the agreement and instead demonstrated their readiness and willingness to perform their agreed part of the contract by offering the balance sale consideration to the applicants as soon as the applicants acquired full ownership of the suit properties.

12. In the above context, reliance by the learned trial Court on the case reported as Shamoon and others V/S Ahmed and others, **1986 SCMR 888**, was fully justified. In the said authority, it was held by the Hon'ble Supreme Court that Section 18 of the Specific Relief Act, 1877, provides that a person entering into an agreement for sale of a property having imperfect title, but subsequently acquiring interest in the property, is bound to make good the contract out of such interest. It is an admitted position that the imperfect title of the applicants subsequently became perfect in all respects when they acquired 25% share of

respondent No.4. After examining the evidence led by the parties, the trial Court came to the conclusion that respondents 1 to 3 never avoided to pay the balance sale consideration and they were still ready and willing to perform their agreed part of the contract. In view of the above admitted position and finding of the learned trial Court, and particularly in view of the above-cited authority, the applicants were bound to complete the sale in favour of respondents 1 to 3. In my humble opinion, findings of both the learned Courts below on this point are unexceptionable and there is no misreading or non-reading of evidence in this regard.

13. In view of the above, I am of the considered view that the material on record was duly appreciated by both the learned courts below in its true perspective, and their concurrent findings are neither perverse nor patently against the evidence, nor was the evidence misread, nor had any material piece of evidence been ignored by the learned courts below, and there was no jurisdictional error in the proceedings. The findings of both the learned lower courts are based on correct appreciation of evidence and full and proper application of mind. Thus, I do not find any infirmity or illegality in the impugned judgments and decrees, which in my humble opinion, do not call for any interference by this Court. This Civil Revision Application is, therefore, liable to be dismissed.

14. Foregoing are the reasons of the short order announced by me on 28.05.2018 whereby this Civil Revision Application was dismissed leaving the parties to bear their own costs.

J U D G E