

Judgment Sheet

THE HIGH COURT OF SINDH CIRCUIT COURT HYDERABAD

Revision Application No. 12 of 2017

- Applicants : (1) Sain Bux S/O Jumah Khan, (deceased) through his legal heirs,
(2) Muhammad Arif S/O Bashir Ahmed,
(3) Ibrahim S/O Wazir Ahmed,
(4) Muhammad Asif S/O Sain Bux,
(5) Abdul Sattar S/O Juma Khan,
(6) Faisal S/O Allah Bux,
through Mr. Imdad Ali R. Unar Advocate.
- Respondents 1 to 11: (1) Nadir Ali S/O Lakhi Muhammad,
(2) Irfan Ali S/O Mitho Khan,
(3) Asif Ali S/O Wali Muhammad,
(4) Ali Hassan S/O Ali Muhammad,
(5) Sabir Ali S/O Hakim Ali,
(6) Gul Hassan S/O Muhammad Yousif,
(7) Muhammad Haneef S/O Muhammad Yousif,
(8) Shaukat S/O Muhammad Yousif,
(9) Allah Ditto S/O Muhammad Bachal,
(10) Muhammad Lateef S/O Muhammad Ibrahim,
(11) Akhtiar Ali S/O Muhammad Hassan,
through Mr. Anwar A. Khan Advocate.
- Respondent No.12 : Mst. Bilqees Begum W/O Muhammad Aslam,
through Mr. Zafar Iqbal Seenhro Advocate.
- Respondent No.13 : Mukhtiar (Revenue) Taluka Tando
Allahyar, called absent.
- Respondent No.14 : Sub-Registrar Tando Allahyar, called absent.
- Respondent No.15 : Province of Sindh, called absent.
- Date of hearing : 16.12.2019.

J U D G M E N T

NADEEM AKHTAR, J. – The plaint of First Class Suit No.15/2004 for specific performance and injunction filed by respondents 1 to 11 was rejected by the learned trial Court vide order dated 17.07.2013 on the application filed therein by the present applicants under Order VII Rule 11 CPC ; however, Civil Appeal No.08/2013 filed by the said respondents was allowed by the learned appellate Court vide impugned judgment dated 10.01.2017 whereby the aforesaid order of rejection of the plaint was set aside and the matter was remanded to the learned trial Court for decision afresh within one month after recording evidence of the parties.

2. This case has a checkered history relevant facts whereof are that before filing of the above Suit No.15/2004 by respondents 1 to 11, applicant No.1 filed First Class Suit No.36/2002 on 20.07.2002 against respondent No.12, her husband and official respondents for specific performance of contract and permanent injunction. The case of applicant No.1 in his above Suit was that he was the lessee of respondent No.12 by virtue of lease agreement dated 06.06.1996 in respect of agricultural land bearing Survey Nos.117/2, 118/1 to 4, 120/2, 120/3, 121/1 to 4, 122/1 to 3, 123/1 to 4, 124/1 to 4, 155/2, 156/1, 2 & 4 and 157/2, total measuring 103.21 acres, situated in Deh Sanjar Chang, Taluka Tando Allahyar, Sindh (**'the suit property'**) ; the lease, which was originally for a period of three years, was extended by mutual consent of the parties ; vide agreement dated 06.10.2001, respondent No.12 agreed to sell the suit property to him in consideration of Rs.4,657,500.00, out of which substantial part payments were made by him to her and the balance sale consideration was to be paid by him at the time of registration of the sale deed in his favour on or before 05.07.2002 ; the time for completion of sale was extended by mutual consent of the parties ; the balance sale consideration was arranged by him as he had always been and was still ready and willing to perform his agreed part of the contract ; and, despite repeated requests and demands by him, the sale was not completed in his favour by respondent No.12. In this background, the above Suit No.36/2002 for specific performance and injunction was filed by applicant No.1. Subsequently, respondents 1 to 11 were joined as defendants in the above Suit as they were also claiming to have entered into an agreement for purchase of the suit property from respondent No.12.

3. Respondent No.12 had originally contested the above Suit, however, subsequently she and applicant No.1 arrived at an out-of-court settlement, and in pursuance of such settlement they filed a compromise application before the learned trial Court on 24.03.2004 praying that the applicant No.1's above Suit be decreed on the terms and conditions stipulated in the said application as she had received the entire agreed sale consideration from him. Another application was filed by applicant No.1 in his said Suit seeking its withdrawal against respondents 1 to 11. Both the above applications were dismissed by the trial Court. However, vide order dated 01.08.2006 passed by the learned appellate Court in Misc. Civil Appeal No.55/2004 filed by the applicants, the matter was remanded to the trial Court for deciding the compromise application afresh ; and vide order dated 01.08.2006 passed in Revision Application No.69/2004 filed by the applicants, withdrawal of the Suit sought by them against respondents 1 to 11 was allowed. It is pertinent to mention here that respondents 1 to 11 did not challenge any of the above orders. After remand of the compromise application, applicant No.1 and respondent No.12 appeared before the trial Court when they

confirmed and reiterated the contents of their compromise application. It may be noted that a sale deed in respect of the suit property had already been executed and registered by respondent No.12 in favour of applicant No.1 on 15.09.2004. In view of the above, the compromise application was allowed by the trial Court and consequently the applicant No.1's Suit No.36/2002 was decreed in terms thereof on 31.8.2006. The above consent decree was challenged by respondents 1 to 11 in appeal, but their appeal was dismissed which order of dismissal was not challenged by them any further and as such the consent decree passed in the applicant No.1's Suit No.36/2002 attained finality long ago.

4. Meanwhile, Suit No.15/2004, out of which the present revision application has arisen, was filed on 17.03.2004 by respondents 1 to 11 against respondent No.12 for specific performance wherein the present applicants were also cited as defendants. In their above Suit, it was alleged by respondents 1 to 11 that respondent No.12 had agreed to sell the suit property to them vide agreement dated 19.07.2002. The plaint of their above Suit was rejected by learned trial Court on the application filed by the present applicants under Order VII Rule 11 CPC, however, the appeal filed by respondents 1 to 11 was allowed and the order of rejection was set aside by the learned appellate Court through the impugned judgment. It was held in the impugned judgment by the learned appellate Court that the plaint could only be rejected when no triable issue was made out or the Suit was hit by any mandatory provision of law ; while considering rejection of the plaint, the Court was required only to consider the averments made therein without looking at the defence set up in the written statement ; the averments made in the plaint were to be deemed as true for the purposes of determining the cause of action of the Suit ; Suit No.36/2002 filed by applicant No.1 was not decided on merits ; only applicant No.1 and respondent No.12 had entered into a compromise in Suit No.36/2002 and respondents 1 to 11 (plaintiffs in Suit No.15/2004) were not parties to such compromise ; and, Suit No.15/2004 filed by respondents 1 to 11 was, therefore, not barred under Section 11 CPC and as such its plaint was not liable to be rejected.

5. Vide order dated 11.11.2019, learned counsel for respondents 1 to 11 was put on notice to satisfy the Court on the next date of hearing as to how Suit No.15/2004 filed by them seeking specific performance in respect of the suit property was maintainable when a decree passed in respect thereof by a competent Civil Court in Suit No.36/2002 in favour of applicant No.1 had attained finality long ago and is admittedly still in the field ; in view of the fraud and collusion alleged by respondents 1 to 11, when the remedy under Section

12(2) CPC was available to them for setting aside the consent decree passed in Suit No.36/2002, why such remedy was not availed by them and what will be the effect of such failure on their part ; and, if Suit No.15/2004 filed by respondents 1 to 11 was not maintainable in law, what error was committed by the learned trial Court in rejecting the plaint thereof.

6. The main thrust of arguments advanced by learned counsel for respondents 1 to 11 was that the plaint of their Suit No.15/2004 could not be rejected in view of the doctrine of *lis pendens* under Section 52 of the Transfer of Property Act, 1882, and in support of this contention, case law was also cited by him. It was also contended by him that the consent decree in the applicant No.1's Suit No.36/2002 was collusive and was obtained by applicant No.1 and respondent No.12 by fraud and misrepresentation inasmuch as the said Suit was deliberately and fraudulently withdrawn against respondents 1 to 11 so that the said decree could be obtained by them in their absence. Regarding the above queries made by the Court, no satisfactory reply was submitted by learned counsel for respondents 1 to 11. In fact, he frankly conceded that the said respondents did not challenge the consent decree under Section 12(2) CPC on the ground of fraud and misrepresentation alleged by them.

7. In view of the above, following admitted position has emerged from the record :

- A. The order passed by learned appellate Court on 01.08.2006 whereby the compromise application filed in the applicant No.1's Suit No.36/2002 by him and respondent No.12 was remanded to the learned trial Court for decision afresh, was not challenged by respondents 1 to 11.
- B. Similarly, the order dated 01.08.2006 passed by learned revisional Court whereby the applicant No.1's Suit No.36/2002 was allowed to be withdrawn against respondents 1 to 11, was also not challenged by the said respondents. Therefore, the order of dismissal / withdrawal of the above Suit against respondents 1 to 11 not only attained finality against them, but it was also accepted by them.
- C. As respondents 1 to 11 did not challenge the order of withdrawal of Suit No.36/2002 against them, they were not parties to the said Suit when the compromise application was considered and granted by the learned trial Court after remand.

- D. Respondents 1 to 11 also did not file any application before the trial Court for consolidation of their Suit No.15/2004 with the respondent No.1's Suit No.36/2002.
- E. The consent decree passed by the learned trial Court in Suit No.36/2002 was challenged by respondents 1 to 11, but their appeal was dismissed, whereafter they did not challenge it any further. Therefore, the consent decree in respect of the suit property not only attained finality, but was also accepted by them.
- F. After execution and registration of the sale deed in respect of the suit property by respondent No.12 in favour of applicant No.1 on 15.09.2004, respondents 1 to 11 did not file any application in their Suit No.15/2004 for amending its plaint seeking cancellation of the said registered sale deed.
- G. The consent decree passed in Suit No.36/2002, having attained finality, as well as the above mentioned registered sale deed in respect of the suit property in favour of applicant No.1 were in the field when the plaint of Suit No.15/2004 filed by respondents 1 to 11 was rejected by the learned trial Court.
- H. Though fraud and misrepresentation on the part of applicant No.1 and respondent No.12 was alleged by respondents 1 to 11 in relation to the consent decree passed in Suit No.36/2002, the said consent decree was never challenged by them on such ground under Section 12(2) CPC.

8. When the sale deed in respect of the suit property was executed and registered by respondent No.12 in favour of applicant No.1, respondents 1 to 11 ought to have immediately amended the plaint in their Suit No.15/2004 seeking cancellation thereof, however, they did not do so. They also did not file any application before the trial Court for consideration of their Suit No.15/2004 with the respondent No.1's Suit No.36/2002. After the grant of respondent No.1's Revision Application No.69/2004 on 01.08.2006 allowing withdrawal of the respondent No.1's Suit No.36/2002 against respondents 1 to 11, the said respondents ought to have challenged the said order before this Court if they were of the view that they were necessary parties to the said Suit and the withdrawal thereof against them was improper or illegal. However, they did not avail such opportunity / remedy and accepted the order of withdrawal of the said Suit against them and allowed the said order to attain finality. Likewise,

after dismissal of their appeal against the consent decree passed in the respondent No.1's Suit No.36/2002, respondents 1 to 11 ought to have challenged the order of the appellate Court before this Court if they were of the view that the consent decree was collusive, illegal and not maintainable, and ought not to have passed / maintained. However, this opportunity / remedy was also not availed by them and as such they not only accepted the consent decree, but also allowed it to attain finality. It was vehemently argued on behalf of respondents 1 to 11 that the consent decree was obtained by applicant No.1 and respondent No.12 by fraud and misrepresentation inasmuch as Suit No.36/2002 was deliberately and fraudulently withdrawn against respondents 1 to 11 so that a consent decree could be obtained by them in their absence. If this was the position, the only remedy available to respondents 1 to 11 under the law was to challenge the consent decree under Section 12(2) CPC, which was also not done by them. Thus, at every stage respondents 1 to 11 failed in exercising their purported right and or in availing the remedy(ies) available to them under the law.

9. As noted above, the registered sale deed in respect of the suit property in favour of applicant No.1 is still in the field, and the consent decree in respect of the suit property passed in Suit No.36/2002, having attained finality, is also in the field. Therefore, the relief of specific performance in respect of the same property could not be granted in favour of respondents 1 to 11 in their Suit No.15/2004 for the simple reason that the decree passed by the competent civil Court / trial Court could not be set aside by the same Court nor could the trial Court sit in appeal against its own decree. As long as the decree is in the field, no other decree can be passed in respect of the suit property. Though respondents 1 to 11 were not parties to the said decree, even then no other decree could be passed in respect of the same property without first setting aside the said decree. The fact that respondents 1 to 11 accepted the order of the revisional Court regarding withdrawal of the respondent No.1's Suit No.36/2002 against them as well as the consent decree passed therein subsequently in respect of the suit property and allowed the said order and decree to attain finality, cannot be ignored. Due to this reason, they cannot claim at this belated stage that the said decree was not binding on them. In the above circumstances, and also in view of the fact that in their Suit they did not seek cancellation of the registered sale deed in respect of the suit property in favour of applicant No.1, the relief of specific performance, being discretionary in nature, could not be granted to respondents 1 to 11. However, they could have claimed damages in their Suit No.15/2004, but they chose not to do so. The ground urged by them that the consent decree in Suit No.36/2002 was obtained by applicant No.1 and respondent No.12 by misrepresentation and

fraud is of no consequence at this stage as they admittedly never challenged the said decree on such ground under Section 12(2) CPC.

10. In my humble opinion, the learned appellate Court did not appreciate the above important aspect of the case, and the general principles / criteria regarding rejection of plaint by examining the contents thereof and considering them as true, as well as the doctrine of *lis pendens*, applied by the learned appellate Court, were not applicable to the case at hand. The case law cited and relied upon by learned counsel for respondents 1 to 11, being clearly distinguishable, is also not applicable in the present case.

11. In view of the above discussion, I am of the view that Suit No.15/2004 filed by respondents 1 to 11 could not succeed in any manner and under any circumstances. Accordingly, the impugned judgment of the learned appellate Court is hereby set aside and resultantly the order of learned trial Court is restored. However, respondents 1 to 11 will be at liberty to seek damages, if they are so advised and if permissible under the law. This Civil Revision Application is allowed in the above terms with no order as to costs.

J U D G E