

Judgment Sheet

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Civil Revision No. S – 197 of 2020

Date of hearing: 20-09-2021

Date of decision: 20-09-2021

Mr. Mukesh Kumar G. Karara, Advocate for the Applicant.
Respondent No.2 Ghulam Akbar, present in person.
Mr. Shahryar Imdad Awan, Assistant Advocate General Sindh.

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J U D G M E N T

Muhammad Junaid Ghaffar, J. – Through this Civil Revision, the Applicant has impugned judgment dated 12-11-2020 passed by the Additional District Judge, Daharki in Civil Appeal No.70 of 2019, whereby the judgment and decree dated 17-09-2019 and 23-09-2019, respectively, passed by the Senior Civil Judge, Ubauro in F.C. Suit No.319 of 2017, through which the Suit of Applicants was dismissed, has been maintained.

2. Learned Counsel for the Applicant submits that the two Courts below have failed to appreciate the facts as well as law; that the Applicant had led its evidence which has gone un rebutted as the Respondents failed to file written statement; that they never turned up even to cross-examine the witnesses; that their application under Order VII Rule 11 CPC was also dismissed; that the case of the Applicants was also supported by the other legal heirs of the Respondents, therefore, the judgments of the two forums below are liable to be set aside.

3. Respondent No.2 is in attendance and submits that he also acts as an Attorney of his wife i.e. Respondent No.1 and will plead his case in person. According to him, no case is made out by the Applicant, however, while confronted as to why neither any written statement was filed nor evidence was led, he submits that he kept on watching the proceedings including the pleadings and the evidence and was of the view that the Applicant had no case; hence, he chose not to defend the same.

4. I have heard the learned Counsel for the Applicant and Respondent No.2 in person and perused the record.

5. It appears that the Applicant had filed Suit for specific performance of contract and permanent injunction valued at Rs.45,50,000/- and setup its case on the premise that initially the property was sold to him by the late father of Respondent No.1 by way of an oral agreement, and subsequently, the father (Khan Muhammad) expired, and after his death, the revenue record was mutated in the name of his legal heirs i.e. Abdul Latif (son), Mst. Bashiran (daughter), Mst. Nazeeran (daughter/ Respondent No.1) and Mst. Sardaran (widow). According to the Plaintiff's case, except Respondent No.1, the other legal heirs executed sale deed to the extent of their respective shares, but Respondent No.1 refused to do so. It is further case of the Plaintiff that notwithstanding the agreement between the deceased father of Respondent No.1, he entered into some settlement and a fresh agreement with Respondents No.1 & 2 for a lump sum amount of Rs.45,50,000/, out of which an amount of Rs.50,000/- was paid and remaining amount was required to be paid on execution of the sale deed, which Respondent No.1 failed to do so, and thereafter Suit for specific performance was filed.

6. The learned Trial Court dismissed the Suit of the Applicant and the Appeal also failed. On perusal of the judgments passed by the two forums below, it appears that they had misdirected themselves in reaching to the conclusion that the Plaintiff's stance is contradictory. This was based on the premise that the Applicant had stated in the plaint that initially the property was purchased from the deceased father of the parties, and thereafter it was stated that another agreement was also entered into with Respondent No.1 to the extent of her share. This after perusal of the record does not seem to be a correct view of the Courts below. It would be advantageous to refer to the relevant findings of the Trial Court as well as the Appellate Court, which reads as under:

(Trial Courts findings)

“06. Though there is no rebuttal to what has been deposed by the plaintiff in his ex parte evidence, however this Court has to see whether the plaintiff has successfully proved his case and that he is entitled to what he has prayed. Record reveals that plaintiff has prayed for specific performance of oral agreement to sell but surprisingly plaintiff has neither deposed for performance of contract between plaintiff and father of defendant No.01 or oral agreement to sale between plaintiff and defendant No.1. Perusal of the record shows that plaintiff at one hand is claiming that the father of the defendant No.01 namely Khan Muhammad son of Khuda Bux Panhwar was owner of agriculture land bearing S.No.104 (01-38), 107 (02-18), 108 (01-15), 112 (07-03), (02-13), 109 (02-16),

105 (02-05), 106/1 (01-33), 106/2 (02-36), 102 (03-15) his whole share (25-19) situated in Deh Saindino Malik, Tapo Katta, Taluka Daharki, District Ghotki. In the year 1997 father of the defendant No.01 sold out whole above mentioned land in hands of the plaintiff, 1,05,000/- (one lac and five thousand rupees) total consideration amount Rs.26,75,000/- (twenty six lacs and seventy five thousand rupees) in presence of witnesses namely Gulzar Ahmed son of Ali Sher and Rehmatullah son of Qaim Deen Malik and executed oral agreement between both parties and the plaintiff apid whole consideration to father of defendant No.01 namely Khan Muhammad son of Khuda Bux Panhwar and possession of above mentioned land was also handed over to them since 1997 and deceased Khan Muhammad promised that he would transfer Khata of suit land in favour of plaintiff after getting sale certificate of suit land within few days. Khan Muhammad expired in the year 1998 and he left behind his L.Rs namely Abdul Latif (son), Mst. Sardaran (wife), Mst. Bashiran and Mst. Nazeeran (daughters). I alongwith time and again Plaintiff approached to L.Rs of Khan Muhammad but they told us that they would transfer Khata of suit land in favour of plaintiff after Foti Khata Badal of deceased Khan Muhammad. Foti Khata of Khan Muhammad mutated in favour of his legal heirs in the year 1999. After Foti Khata Badal of deceased Khan Muhammad we approached to his legal heirs and requested them for transferring Khata of suit land in favour of plaintiff. Mst. Sardaran, Abdul Latif and Mst. Bashiran transferred their due share in favour of plaintiff through registered sale deed dated 15.11.2002 & 13.03.2007 while Mst. Nazeeran did not transfer Khata of suit land 09-35 acres in favour of plaintiff. On other hand plaintiff has annexed and produced alongwith his evidence two sale deeds viz. Sr. No.1947 dated 15.11.2002 for sale of agricultural land area 09-02 acres for consideration of Rs.1,80,000/- at Ex.09/E executed by Abdul Latif son of Khan Muhammad, Bashiran daughter of Khan Muhammad, Mst. Sardaran wife of Khan Muhammad in favour of plaintiff and three others each namely Ali Sher son of Yar Muhammad, Allah Bux son of Janib and Gulan son of Moghal and second viz. Sr. No.987 dated 13.03.2007 for sale of agricultural land being 04-00 acres situated in Deh Saindino Malik, Taluka Daharki, District Ghotki for consideration of Rs.80,000/- (eighty thousand) executed by Mst. Bashiran wife of Khan Muhammad in favour of plaintiff and five others each namely Ali Sher son of Yar Muhammad, Allah Bux son of Janib and Gulan son of Moghal, Gul Hassan son of Moghal and Daim Din son of Gul Muhammad @ Gullu. It is surprising that if the plaintiff has already purchased the whole property viz. S.No.104 (01-38), 107 (02-18), 108 (01-15), 112 (07-03), (02-13), 109 (02-16), 105 (02-05), 106/1 (01-33), 106/2 (02-36), 102 (03-15) his whole share (25-19) situated in Deh Saindino Malik, Tapo Katta, Taluka Daharki, District Ghotki from father of defendant No.01 why he again has purchased the same and paid the amount second time to Abdul Latif, Mst. Bashiran and Mst. Sardaran and again held oral agreement with the defendant No.01 for purchase of same property. Such a contradictory stance of plaintiff made the contention of plaintiff unreliable. Furthermore, plaintiff has claimed in his plaint as well as in his evidence recorded before this Court that on 25.12.2016 at 05:00 pm plaintiff, defendants No.01 & 02 alongwith Lal Bux son of Allah Bachayo and Rehmatullah were present at OTAQ of one Nek-mard of locality namely Haji Muhammad Afzal Mahar where the defendants No.01 and 02 demanded money from plaintiff as per present

market value and refused to accept agreement with father of defendant No.01 Khan Muhammad, where both parties fresh negotiated regarding re-sale or agree new oral agreement executed between both parties in presence of Nek-mard Haji Muhammad Afzal Haq Mahar. The defendants No.01 and 02 again agreed to re-sell her land to the plaintiff at the rate of Rs.5,00,000/- (five lacs) per acre and total amount of Rs.45,50,000/- (forty five lacs and fifty thousands) and the plaintiff paid Rs.50,000/- (fifty thousands) in hands of the defendant No.01 and it was agreed that remaining amount of sale consideration of Rs.45,00,000/- (Forty five lacs) will be paid at the time of transfer of Khata of the suit Property though there is no rebuttal to the stance of plaintiff but plaintiff has himself recorded contradictory statement. Moreover, the plaintiff has attached one FAISLA/ decision of Nek-mard namely Haji Muhammad Afzal Haq Mahar though the same is not and exhibited and produced alongwith evidence of plaintiff but same is attached with the plaint therefore, Court can't itself take itself Judicial Notice of the same. Upon careful reading of the said decision/ FAISLA it is transpired that the same decision/ FAISLA is between nephews of the defendant No.01 each namely Khan Muhammad son of Abdul Latif and Nazeer Ahmed son of Abdul Latif and in that FAISLA/ decision it is mentioned at 1st page and 3rd last line that out of sale of property to Budho Faqeer, wife of Ghulam Akbar (defendant No.01 in present suit) would be paid Rs.45,00,000/- (Forty five lacs) as her share by the nephews of defendant No.01 which clearly establishes that indeed settlement if any was held between nephews of defendant No.01 with each other but not with the plaintiff and defendants No.01 and 02. Furthermore, the plaintiff himself has disclosed that Mst. Nazeeran (defendant No.01) has filed complaint/ misc application No. 470/2013 against plaintiff & others before Honourable Sessions Judge, Ghotki which was dismissed, the plaintiff also attached certified true copy of complaint alongwith his deposition at Ex.09/B, this contention of plaintiff shows that the parties were already not in a position of trust and a round of litigation has already went through them, the claim of plaintiff with regarding to his oral agreement with father of defendant No.01 had already caused unwarranted situation therefore, again entrance of plaintiff with defendants No.01 and 02 in an oral agreement has made the stance of plaintiff unbelievable. Thus, the plaintiff has failed to discharge his burden to prove execution of the agreement to sale of year 1997 so also agreement to sale dated 25.12.2016. Perusal of the record further reveals that as per plaintiff the amount of Rs.26,75,000/- was paid by the plaintiff to the father defendant No.01 at the time of agreement to sell and an amount of Rs.50,000/- (Fifty thousand) paid to defendants No.01 and 02 on 25.12.2016 also could not be established from the evidence brought on record by plaintiff. Therefore, the plaintiff has also failed to prove payment of consideration to the defendants No.01 and 02. Plaintiff and his witnesses are also failed to depose with regard to denomination of currency notes. Plaintiff and his witnesses are also not on same page with regard to time of the agreement to sale between plaintiff and defendant No.1. It is settled principle that decree for specific performance is a discretionary relief and cannot be claimed as a right and as according to supra discussion the evidence of plaintiff and his witnesses have already been found unconvincing. According to section 22 of Specific Relief Act, 1877 jurisdiction is discretionary only in the sense that it cannot be

claimed as a matter of right. As enjoined by the section itself, the exercise of the discretion is not to be arbitrary but sound and reasonable, guided by juridical principles and capable of correction by a Court of appeal. The exercise of the discretion to grant or refuse to grant relief will, therefore, depend upon the circumstances of the case and the conduct of the parties. In this regard I am fortified with case law titled re- Muhammad Abdul Rehman Qureshi VS. Sagheer Ahmed reported as 2017 SCMR 1696.

In view of above discussion and case law cited above, the suit of the Plaintiff stands dismissed. There is no order as to costs. Let the decree be prepared within seven days in accordance of judgment.”

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Appellate Courts findings

“Point No: 1.

I have perused the pleadings as well as evidence available on record. Perusal of para No.1 of the plaint it reveals that it is alleged by the appellant/plaintiff that he has purchased an area of (25-19) acres out of S.Nos. 104 (01-38), 107 (02-18), 108 (01-15), 112 (07-03), 109 (02-16), 105 (02-05), 106/1 (01-33), 106/2 (02-36), 102 (03-15) acres from Khan Mohammad son of Khuda Bux Panhwar. It is further alleged in para No.5 of the plaint after death of vendor Khan Mohammad his L.Rs namely Abdul Latif, Mst. Bashiran and Mst. Sardaran executed registered sale deed in favor of appellant in consequences of the oral sale of Khan Mohammad and as per the appellant the L.Rs of Khan Mohammad namely Abdul Latif, Mst. Bashiran and Mst. Sardaran transferred area which was inherited to them out of suit land. It is the case of appellant that he has purchased an area of (25-19) acres from Khan Mohammad out of S. No. 104 (01-38), 107 (02-18), 108 (01-15), 112 (07-03), 109 (02-16), 105 (02-05), 106/1 (01-33), 106/2 (02-36), 102 (03-15) acres and again on 25.12.2016, respondent Mst. Naziran also sell out her shares from above said survey number but the prayer clause of plaint shows the appellant has also prayed for mutation of S.No. 82/2 (00-38), 82/3 (00-32) Ghunta being suit land but these survey numbers are not mentioned in para No.1, as well as Para No: 07 of the plaint as the land purchased from the Khan Mohammad and Mst Naziran, therefore, survey numbers mentioned in prayer clause does not match with the suit land mentioned in para No.1 of the plaint. Perusal of evidence of attorney of appellant namely Lal Bux reveals that he deposed that the appellant Budho Khan had purchased an area of (25-19) acres out of S. Nos. 102, 104, 105, 106/1, 106/2, 107, 108, 109 and 112 and he has never deposed in his evidence that whether the appellant has purchased any area of S.No.82/2 and 82/3 from Khan Mohammad or from the respondent Mst. Nazeeran. There was nothing in the evidence of attorney of appellant as well as witnesses namely Gulzar Ahmed and Rehmatullah about the purchase of area out of S.Nos.82/2 and 82/3. Perusal of averments of plaint as well as evidence of attorney of appellant and his witnesses reveals that it is the case of appellant that he had purchased an area of 25-19 acres from Khan Mohammad after his death he left one son, two daughter and one widow as his L.Rs and out of them one son, one daughter and widow transferred their

shares out of the land in favor of appellant and the respondent No. 1 Mst. Naziran who is daughter of vendor Khan Mohammad has not execute the sale deed extent to her shares but perusal of plaint as well as statement of attorney of appellant and his witnesses reveals that they have filed suit for specific performance of contract for an area of (09-35 1/4) acres and if the share of Mst. Naziran daughter of Khan Mohammad is calculated out of (25-19) acres it become 05-00 to 06-00 acres but case in hand appellant has claimed on mutation of an area of (09-35 1/4) acres which also not match with the shares of respondent No: 1, from total area of land mentioned in para No.1 of the plaint.

It is very surprising that it is the case of appellant that after death of Khan Mohammad, his daughter Mst. Nazeeran the respondent No.1 has not executed the sale deed and later on she turned dishonest and refused to execute the sale deed and she had filed applications before revenue forum as well as before learned director human right/Sessions Judge against the appellant but thereafter again appellant entered into oral sale agreement with the respondent No.1 which also not attract the prudent mind because dispute was already going between parties about sale of the suit land but even then the appellant has purchased the suit land from the respondent through oral agreement.

Moreover, according to attorney of appellant and witnesses that in consequence of oral sale agreement between appellant and late Khan Mohammad, remaining legal heirs of late Khan Muhammad executed sale deed in favor of appellant and attorney of appellant produced the original sale deed at Ex:9/E and Ex.9/F, perusal of sale deeds Ex:9/E and Ex.9/F, reveals appellant and Ali Sher, Allah Bux, Gulan and Gul Hassan had purchased an area of 09-02 acres out of S. No: 109, 105, 106/1, 106/2, 102, this sale deed also not corroborates the version of appellant, because it is case of appellant that only appellant had purchased the suit land, but this sale deed also does not support the version of appellant about suit survey numbers because no any area out of S. No. 104, 107 and 108 (which are suit land as per Para No: 1 of plaint) was purchased through sale deed Ex.09/E. Moreover, according the appellant alleged sale deeds are executed as part of performance of oral sale agreement between appellant and late Khan Muhammad, but appellant failed to examine the vendors of sale deed Ex.09/E and 09/F, to prove that alleged sale deed were executed as part of performance of oral sale agreement of late Khan Muhammad.

No doubt the evidence of the appellant and his witnesses was remained un-rebutted but un-rebutted evidence does not amount to be believed as gospel truth but under the law appellant is required to prove his case through strong evidence which is lacking. Moreover, I have great reverence for the case law, relied upon by learned counsel for the appellant, the facts and circumstances of the reported case are quite different and distinguishable from the facts and circumstances of case in hand, hence same is not applicable to the present case. In view of reasons discussed above I am of the humble view that appellant has failed to prove its case, therefore, judgment of learned trial Court does not requires interference. Hence, this point is answered in negative.

Point No: 2.

In view of the reasons discussed above I do not find merits in the appeal, hence the appeal in hand is dismissed with no order as to costs.”

7. Perusal of the aforesaid findings of both the Courts reflects that the Plaintiffs has been non-suited only on one ground that he has taken a contradictory stance, that is, initially he pleaded that the Suit property was sold by the father, and thereafter, the same was alleged to have been sold by Respondents No.1 & 2 by way of subsequent agreement. However, I am of the view that there is no contradiction in such pleadings inasmuch as the Suit for specific performance was filed in respect of the subsequent oral agreement with Respondents No.1 & 2 and not in respect of the agreement with the deceased father of Respondent No.1. It would advantageous to refer to the relevant Paragraphs of the Plaint which reads as under;

“7. That finally on 25.12.2016, time 5pm, both parties plaintiff and defendants No.1 & 2 along with Lal Bux s/o Allah Bachayo Malik, Gulzar Ahmed s/o Ali Sher Malik and Rehmatullah s/o Qaim Deen Malik were present at “Otaq” of one nekmard of locality namely Haji Mohammad Afzal Haq Mahar, where the defendants No.1 & 2 demanded money from the plaintiff as per present market value and refused to except agreement with father of the defendant No.1 namely Khan Muhammad Panhwar, where both parties fresh negotiated regarding re-sale or agree new oral agreement executed between both parties in presence of nekmard Haji Mohammad Afzal Haq Mahar. **The defendants No.1 & 2 again agreed to re-sell her land to the plaintiff at the rate of 5,00,000/- (Five lac rupees) per acres and total amount Rs:45,50,000/- (Forty five lac and fifty thousand rupees) and the plaintiff paid to 50,000/- (Fifty thousand rupees) in hands of the defendant No.1 and defendant No.1 & 2 promised with the plaintiff they be take sale certificate within one month and Khata of suit land was mutated in favour of the plaintiff within one month after taking remaining sale consideration amount Rs:45,00,000/- (Forty five lac rupees) in the presence of above mentioned witnesses.** It was evening time and there was no any stamp vendor or petition writer readily available, besides the plaintiff and defendants have friendly terms, therefore, the plaintiff had the full trust on nekmard Haji Mohammad Afzal Haq Mahar and the defendants No.1 & 2, hence no any agreement etc was reduced in writing.

8. That after one month, last week of January 2017, the plaintiff approached the defendants No.1 & 2 along with above mentioned witnesses and requested to him for mutation Khata of suit land and received remaining amount Rs:45,00,000/-, the defendants No.1 & 2 requested for some time because the defendant No.1 was seriously ill and the defendant No.1 is regularly taking treatment from Rahim Yar Khan and now days they are residing there moreover, she could not walk, when she would be recovered her health, they would be come there and applied for sale certificate and they would be mutated Khata of suit land in favour of plaintiff as per oral agreement dated 25.12.2016.

10. *That the plaintiff thereafter approached the defendants No. 3 and 4 and requested them to avoid from entertaining any sale certificate or sale deed executed by the defendants No.1 in favour of any body else in violation of oral agreement dated 25.12.2016 but they are seems to be in collusion with defendants No.1 & 2 and are bent upon to cause loss to the plaintiff while entertaining sale deed executed by the defendant No.1 in favour of third party and getting it registered in violation of oral agreement dated 25.12.2016, therefore, they are impleaded as party in the suit.*

11. *That the plaintiff are already to pay remaining sale consideration amount Rs:45,00,000/- (Forty five lac rupees) and performed their part of contract.*

13. *That the cause of action accrued to the plaintiff firstly on last week of January 2017, when the defendants No.1 & 2 took some time because the defendant No.1 is seriously ill in Rahim Yar Khan and lastly on 22.10.2017 when the defendants No.1 & 2 tried to dispossess the plaintiff and reused to perform their part which is continue.”*

8. The Applicant / Plaintiff to prove its claim regarding this settlement agreement came forward with four witnesses, out of which two came before the Court and supported the Plaintiff's version, whereas, they were never cross examined. It was only as a matter of record that the plaint also disclosed the earlier agreement between the Applicant and the late father of Respondent No.1; but specific performance was sought only in respect of the subsequent agreement with Respondent No.1 & 2.

9. Though it is settled law that in cases where a defendant is ex parte, the Court is required to take extra care in accepting the plea of the plaintiff; however, this does not mean that the Court by itself involves into looking for deficiencies and contradictions, in the evidence of the Plaintiff, if any. Here in this matter, the only issue was that whether the Applicant has been able to prove the oral agreement purportedly entered into with Respondents No.1 & 2. For that, he led his evidence and even brought witnesses in his support. This all went unchallenged, and therefore, merely for the reason that the Plaintiff had asserted initially that the property was sold by the deceased father of Respondent No.1, hence, it could not be again sold by Respondent No.1 separately is by itself was not a valid ground to dismiss the Suit of the Applicant. It is also a matter of fact that the remaining legal heirs had executed the sale deed to the extent of their shares, whereas, they never came forward to challenge such sale deed. Lastly, it is also a matter of record that this Court called upon the Mukhtiarkar to file a report as to present possession of the Suit property and it has come on record that for the last 23 years at least, Respondents No.1 & 2 have never been in possession of the Suit property. It is also a matter of fact that they have not filed any Suit for possession in their favour against the present Applicant.

10. The upshot of the above discussion is that both the Court(s) below have miserably failed to appreciate the evidence properly and it is a fit case of misreading and non-reading of evidence led by the Applicant, which even otherwise went unrebutted, and therefore requires interference by this Court while exercising its revisional jurisdiction, in view of the dicta laid down by the Hon'ble Supreme Court in the case of, ***Nazim-Ud-Din v Sheikh Zia-Ul-Qamar (2016 SCMR 24)***, ***Islam-Ud-Din v Mst. Noor Jahan (2016 SCMR 986)***, ***Nabi Baksh v. Fazal Hussain (2008 SCMR 1454)***, ***Ghulam Muhammad v Ghulam Ali (2004 SCMR 1001)***, & ***Muhammad Akhtar v Mst. Manna (2001 SCMR 1700)***.

11. In view of hereinabove facts and circumstances of the case, I am of the view that both the Court(s) below have failed to exercise the jurisdiction so vested in them and have failed to appreciate the evidence resultantly arriving at a wrong conclusion by dismissing the Suit of the Applicant. Accordingly, this Civil Revision was allowed by means of a short order dated 20.09.2021 and both the impugned judgments dated 17-09-2019 and 12-11-2020 passed by the Senior Civil Judge, Ubauro and the Additional District Judge, Daharki, respectively, were set aside; and the Suit of the Applicant was decreed; however, subject to payment / deposit of the balance sale consideration as pleaded in Para No.11 of the Plaint. These are the reasons for the short order.

12. The Civil Revision Application stands **allowed** in the above terms.

Abdul Basit

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