

Judgment Sheet

**IN THE HIGH COURT OF SINDH AT KARACHI**

**II<sup>nd</sup> Appeal No. 55 of 2016**

Appellant : Gul Muhammad, through Ms. Amna Usman  
Advocate.

Respondent : None present.

Dates of hearing : 29.11.2021 and 13.12.2021.

**J U D G M E N T**

**NADEEM AKHTAR, J.** : The appellant filed Suit No.1145 of 2012 against respondent before the learned trial Court for declaration, direction, specific performance and injunction which was dismissed by the learned trial Court vide judgment and decree dated 31.05.2013 ; and, Civil Appeal No. 173 of 2013 filed by him against the said dismissal was dismissed by the learned appellate Court vide judgment and decree dated 29.01.2016. Through this II<sup>nd</sup> Appeal under Section 100 CPC, the appellant has impugned concurrent findings of the learned Courts below.

2. It was case of the appellant before the learned trial Court that the respondent executed an agreement of sale dated 04.07.1987 (**‘the agreement’**) in his favour whereby he agreed to sell flat No. B/1-9 Sherton Square, Main University Road Scheme-33 Karachi, measuring 680 sq.ft. (**‘the suit property’**). The sale consideration was agreed at Rs.1,50,000.00. In addition to the said sale consideration, the parties had agreed that an amount of Rs.62,000.00 will be paid directly by the appellant to the House Building Finance Corporation (**‘HBFC’**) towards house building loan ; the agreed sale consideration of Rs.1,50,000.00 was paid by him to the respondent at the time of execution of the agreement and the possession of the Suit property was also handed over to him ; and, the suit property was redeemed by the appellant, whereafter the sale deed in respect thereof will be registered before the Sub-Registrar concerned. It was further averred by the appellant that an irrevocable general power of attorney was executed by the respondent in favour of the appellant’s wife which was duly registered with the Sub-Registrar concerned on 29.08.1991 ; the appellant rented out the Suit property to a tenant and in view of the default committed by the said tenant in payment of monthly rent, he filed Rent Case No.50 of 2008 against him

which was allowed by the Rent Controller vide order dated 11.08.2009 and accordingly, the said tenant was evicted from the Suit property. The appellant redeemed the Suit property paying entire outstanding amount to HBFC in the year 2015 ; the original documents pertaining to the Suit property viz. sub-lease of the Suit property, the agreement and the irrevocable general power of attorney executed by the respondent in favour of the appellant's wife were lost by the appellant while shifting his residence, which loss was reported by him to the police vide Roznamcha entry dated 01.06.2012. It was further stated by the appellant that his wife / attorney of the respondent passed away on 28.09.2011. It was claimed by him that despite payment of entire agreed sale consideration and redeeming the suit property, the respondent did not execute the sale deed in respect thereof in his favour. It was further stated by him that a legal notice was served by him to the respondent on 28.05.2012 which was not responded to by respondent. It was specifically pleaded by the appellant that respondent was not available / traceable to execute the sale deed in his favour.

3. In the above background, the appellant had prayed that he may be declared as sole owner of the Suit property and the respondent be directed to execute the sale deed in respect thereof in his favour or in case of failure, the Nazir of the Court be directed to do the needful. Consequential relief of injunction was also sought by the appellant that the respondent be restrained from creating third party interest in the Suit property. As the respondent could not be served through ordinary modes, he was served through substituted service by way of publication of summons in the newspaper. Despite proper service, he remained absent and accordingly vide order dated 11.04.2013 passed by the learned trial Court, he was debarred from filing written statement and the Suit was ordered to be proceeded ex parte against him. Thereafter, the appellant filed his affidavit-in-ex parte proof and examined himself. He produced copies of the relevant documents as the original thereof had been lost by him. After examining the material on record, the Suit was dismissed by the learned trial Court on the sole ground that the appellant did not examine the attesting witnesses of the agreement in terms of Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984. The learned appellate Court concurred with such findings of the learned trial Court and by relying on several reported cases, dismissed the appeal filed by the appellant. The respondent remained absent in the appeal also despite publication of notice in the newspaper.

4. The appellant has filed CMA No.4503 of 2020 seeking permission to file additional documents. The provision of law is not mentioned in this application,

however, it appears from the prayer made therein that it is an application under Order XLI Rule 27 CPC. The most of the documents attached with this application, such as, the agreement, the receipt, the irrevocable general power of attorney executed by respondent in favour of appellant's wife, indenture of sub-lease in respect of the Suit property and judgment dated 11.08.2018 by the Rent Controller ordering eviction of the appellant's tenant, are already on record as copies of the same have been filed by the appellant along with this appeal. Be that as it may, this judgment will dispose of this application as well.

5. In the instant appeal also, the respondent did not appear despite repeated notices and publication of notice in the newspaper. Accordingly, vide order dated 23.12.2020 service upon him was held good.

6. I have heard learned counsel for the appellant and have also examined the material available on record and the law cited at bar. The record shows that the entire agreed sale consideration was paid by the appellant to the respondent at the time of execution of the agreement when the possession of the Suit property was also handed over to him ; and, the suit property was subsequently redeemed by the appellant as per agreement. The agreement was executed on 04.07.1987 and till the date of filing of the Suit by the appellant, respondent never claimed or asserted any right, title and or interest in the Suit property nor did he take any step for cancellation of the agreement or registered irrevocable general power of attorney executed by him in favour of the appellant's wife. Moreover, it is a matter of record that respondent has remained absent throughout the proceedings despite proper service and never took any step to contest the proceedings at any stage. This clearly shows not only that he had relinquished all his rights, title and interests in the suit property after execution of the agreement, receiving agreed sale consideration and handing over possession of the Suit property to the appellant. The demise of his attorney / appellant's wife did not change the position as respondent had executed agreement in favour of the appellant whose wife was merely an attorney of the respondent in relation to the Suit property, however, the execution of a registered irrevocable general power of attorney by the respondent in favour of appellant's wife clearly indicates that the same was for consideration and it was specifically mentioned therein that the same shall not be revoked, altered or amended by him without consent of his attorney. Be that as it may, the burden to prove the sale in his favour was indeed upon the appellant as his case was dismissed by the learned trial Court on the sole ground that he did not examine the marginal witnesses of the agreement. It may be noted that his Suit

was not dismissed on the ground that he did not produce the relevant documents, particularly the agreement and the receipt, in original. Thus, copies of the above documents produced by him in support of his claim were not rejected by the learned trial Court. Regarding the ground on which the Suit was dismissed that the appellant did not examine the marginal witnesses of the agreement, it is well-settled law that a sale agreement can be oral. In this contest, the Hon'ble Supreme Court, in an unreported judgment dated 20.10.2020 pronounced in Civil Petition No.84 of 2016 (*Sajjad Ahmed Khan v. Muhammad Saleem Alvi and others*) was pleased to hold, inter alia, that the production of two witnesses in order to prove execution of a document is not absolute rule to be applied in every case. It is settled law that a sale / agreement to sale can be oral or offer and acceptance of sale can also be inferred from the acts of the parties of the same agreement ; the provisions of Article 79 of the Qanun-e-Shahadat Order, 1984 are applicable only in those cases where execution of the document is disputed between the maker of the document and the person in whose favour the same is purportedly executed ; the execution of the agreement in the cited authority, though was denied and disputed, but mere denial would not be sufficient in presence of plethora of overwhelming evidence on record ; such evidence could not be discarded merely for non-production / non-appearance of the marginal witnesses ; and, the prime and foremost requirement of Article 79 ibid is to prove execution of the document in case of the denial of the execution by producing two marginal witnesses.

7. In the instant case, overwhelming evidence produced by the appellant showing execution of the agreement and receipt by the respondent in his favour, handing over possession of the Suit property to him, redemption of the Suit property by him and uninterrupted possession without any adverse claim from or on behalf of the respondent, was sufficient to prove sale of the Suit property by the respondent in his favour, especially when such evidence was not rejected or discarded by the learned trial Court and there was no denial or rebuttal to the same.

It was contended by learned counsel for the appellant that the learned Courts below were of the view that the absence of respondent cannot be deemed as an admission on his part, such view is untenable in law as in ex parte proceedings unless any document or evidence is rebutted in cross-examination or

by the evidence of the opposite side, said document or evidence shall be deemed to be proven / admitted. In support of this contentions, learned counsel placed reliance on an unreported judgment pronounced by a learned Divisional Bench of this Court on 14.09.2012 in High Court Appeal No.149 of 2008, wherein it was held that affidavit-in-ex parte proof filed by the plaintiff had fully corroborated the contents of the plaint and the same had remained un-rebutted ; as such, there was no reason or plausible cause to discard the ex parte evidence adduced before the learned trial Court. It was further contended by learned counsel that in view of the execution of the agreement by the respondent in favour of the appellant, the payment of sale consideration by the latter and delivery of possession of the Suit property in part performance to the appellant by the respondent, an interest in the Suit property had created in favour of the appellant and his possession is protected under Section 53-A of the Transfer of Property Act, 1925. It was also contended by learned counsel that it is settled principle of law that if the Suit is allowed to proceed ex parte against the defendant, even then the defendant is allowed to cross-examine the plaintiff. In the instant case, all the requirements and formalities in relation to service of summons were duly fulfilled, but the respondent still chose to remain absent and due to his absence, the averments made by the appellant in his plaint and the evidence produced by him in support thereof remain un-rebutted.

It may be noted that the absence of the respondent at the time of trial was not due to any fault of the appellant as he himself chose to remain absent despite proper service in accordance with law. Therefore, the consequences, if any, because of his absence at the trial could not be attributed to the appellant especially when the appellant came into witness box and produced convincing evidence in support of his claim.

The reported cases relied upon by the learned appellate Court while dismissing the appeal filed by the appellant, were not relevant. The learned appellate Court erred in law by holding that the agreement relied upon by the appellant was merely a sale agreement and was not a registered document and only a registered document has sanctity attached to it. Learned appellate Court failed to appreciate that a Suit for specific performance is filed for enforcement of an agreement when a party to the agreement avoids or refuses to perform his agreed part of the contract ; and, had the title of the Suit property been transferred and registered in favour of the appellant through a registered deed, the appellant would not have filed a Suit for specific performance. The legal position that the

burden to prove the contents of a document and passing consideration shifts upon the beneficiary in case of denial of execution of such document by the executor, was acknowledged by the learned appellate Court in the impugned judgment, however, it failed to appreciate that such principle was not applicable in the instant case as admittedly there was no denial by the respondent himself and or by indication.

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