

IN THE HIGH COURT OF SINDH HYDERABAD CIRCUIT

IInd Appeal No. 77 of 2019

[Shamsher Ali versus Abdul Jabbar & Others]

- Appellant : Shamsher Ali through M/s. Muhammad Arshad Pathan and Safdar Hussain Laghari, Advocates.
- Respondents 1-6 : Abdul Jabbar & 05 others through Mr. Ghulam Nabi Meo Rajput, Advocate.
- Respondent 7-10 : The Mukhtiarkar & 03 Others through Mr. Rafique Ahmed Dahri, Assistant Advocate General, Sindh.
- Date of hearing: 12-11-2021 & 25-11-2021

ORDERS

Adnan Iqbal Chaudhry J. - F.C. Suit No. 93/2011 (new F.C. Suit No. 64/2017) was filed by the Appellant as vendee against the Respondents 1 to 6 as vendors for specific performance of an agreement dated 31-08-2007 for the sale of 38-26 acres of agricultural land in Deh 365, Taluka Jhudo, Mirpurkhas [**suit land**]. On the other hand, the Respondents 1 to 6 filed F.C. Suit No. 81/2015 (new F.C. Suit No. 65/2017) against the Appellant for possession of the suit land. Both suits were consolidated. By judgment and decree dated 23-10-2017 passed by the Senior Civil Judge, Mirpurkhas, the Appellant's suit for specific performance was dismissed, whereas the suit of the Respondents 1 to 6 for possession was decreed. The Appellant filed Civil Appeal No. 33/2017 against the consolidated judgment and the two decrees, which appeal was dismissed by the learned District Judge, Mirpurkhas by judgment and decree dated 31-08-2019; hence this Second Appeal.

2. The Appellant and the Respondent No.1 are brothers. The Respondent No.2 is the spouse of the Respondent No.1. The Respondents 2 to 6 are the children of the Respondent No.1. Admittedly, the suit land was joint and undivided property of the

Respondents 1 to 6; the Respondents 2 to 6 had not signed the sale agreement; and that the Respondents 5 and 6 were minors at the time.

3. It was the case of the Appellant that the sale agreement was signed by the Respondent No.1 also on behalf of the Respondents 2 to 6 as head of the family and as natural guardian of the minors; that at the time of the sale agreement, Rs. 780,000/- was paid to the Respondent No.1 in cash, and for the balance he was given a cheque of Rs. 500,000/- post-dated to 19-09-2007, which was credited to his account on the due date; that the Appellant was put in possession of the suit land in part performance; that the Respondent No.1 assured that he would execute a sale deed after obtaining permission from the Court of Guardians & Wards to sell the share of the minors; but later, when property prices escalated, the Respondent No.1 reneged. On the other hand, the Respondent No.1 denied that he had ever signed the sale agreement or that he received any sale consideration. He pleaded, so also the Respondents 2 to 6, that he was not even legally competent to sell the share of the Respondents 2 to 6; that the Appellant was in fact given possession of the suit land by way of an oral agreement in the year 1997 for 3 years for cultivating the suit land in consideration of lease rentals, and that such arrangement was renewed every 3 years up till March 2011; that the cheque of Rs. 500,000/- was given to the Respondent No.1 by the Appellant towards outstanding lease rentals; that when the Appellant stopped paying the lease rentals and was asked to vacate the suit land, he came up with a fabricated sale agreement.

4. Both the courts below held that there was no evidence to show that the alleged sale agreement was made on behalf of the Respondents 2 to 6; that the evidence of the Appellant and that of the attesting witnesses was contradictory and did not inspire confidence; that on the other hand, the evidence of the Tapedar showed that the Appellant had been cultivating the suit land on

behalf of the Respondents 1 to 6. Thus, both the courts below concluded that the sale agreement was fabricated and that the Respondents (plaintiffs in new F.C. Suit No. 65/2017) were entitled to possession.

5. Heard the learned counsel and perused the record. The defense of the Appellant in the Respondents' suit was the same as his plea in his suit for specific performance, viz. that he was given possession of the suit land in part performance of the sale agreement. Therefore, the central question for determination is whether the Appellant had proved that there was a sale agreement between the parties for the suit land.

6. Assuming for the sake of argument that the sale agreement (Exhibit 54/A) had been signed by the Respondent No.1, that sale agreement did not recite that it was being executed by him also on behalf of the Respondents 2 to 6. Rather the recital in the sale agreement attributed to the Respondent No.1 was that the entire suit land was his "*zaati malkiyat*" (personal property). Admittedly, that was not correct as the Respondents 2 to 6 too were co-owners. There was nothing to show that the Respondents 2 to 4, who were adults, had ever authorized the Respondent No.1 to sell their share in the suit land. Similarly, the argument that the Respondent No.1 as natural guardian could sell the immovable property of his minor children without the permission required of section 29 of the Guardians & Wards Act, 1890, could have been examined had the sale agreement purported to sell the property of the minors, which it never did. Therefore, to begin with, there was no contract between the Appellant and the Respondents 2 to 6 which could have been specifically enforced against the latter.

7. The fall-back argument of Mr. Arshad Pathan, learned counsel for the Appellant, was that the sale agreement was severable for the independent share of the Respondent No.1 in the suit land, and thus enforceable to the extent of the Respondent No.1. Firstly, that was

never the case set-up by the Appellant in his suit. Secondly, though section 16 of the Specific Relief Act, 1877 permits enforcement of part of a contract, but that is only where that part stands on a separate and independent footing from the other part. The sale agreement in question had contemplated a single indivisible transaction of the entire suit land without even mentioning the separate shares held therein by the co-owners. Thus, section 16 was not attracted. Since the case was not covered by sections 14 to 16 of the Specific Relief Act, section 17 thereof prohibits any direction for part performance of contract. Reliance is placed on *Wali v. Manak Ali* (PLD 1965 SC 651), *Razia Sultana Bano v. Muhammad Sharif* (1993 SCMR 804), and *Sinaullah v. Muhammad Rafique* (2005 SCMR 1408).

8. The alleged sale agreement was said to have been attested by four witnesses, out of whom two were examined by the Appellant. The first one, namely Pervaiz Ali, who was the Appellant's brother and aligned with him in business, stated that both the Appellant and the Respondent No.1, along with all four attesting witnesses, had gone together to the stamp vendor where the sale agreement was drafted and signed. On the other hand, the second attesting witness, namely Mohammad Farooq stated on cross-examination that the Respondent No.1 had not signed the sale agreement in his presence; and that only he (Mohammad Farooq), the Appellant and Pervaiz Ali had gone to the stamp vendor while the Respondent No.1 was at his shop. Admittedly, the sale agreement was notarized after a month. Therefore, the finding of the courts below that the Appellant's evidence on the execution of the sale agreement was contradictory, is borne from the record.

9. On the other hand, the Tapedar of the beat deposed that the Appellant was in possession of the suit land for cultivation since 1997, and from time to time the Appellant had paid dhal (land revenue) on behalf of the Respondents 1 to 6. In support of that, the Tapedar had produced dhal receipts dated 26-02-1998, 31-07-2000

and 24-06-2008 as Exhibit 78/A to Exhibit 78/C. The evidence of the Tapedar had not only negated the Appellant's version of being in possession of the suit land in part performance of the sale agreement, such evidence further supported the Respondent No.1's version that the sale agreement was a fabrication.

10. Mr. Arshad Pathan had then drawn attention to a '*faisla*' (decision) dated 26-03-2009 (Exhibit 54/B) given by the Nazim, Union Council Jhudo in favor of the Appellant. He submitted that such evidence had been completely ignored by the courts below. I do not see how that evidence was of any help to the Appellant when the Respondent No.1 was never part of any hearing before said Nazim, which fact was acknowledged by the Nazim in his deposition, so also the fact that the Appellant was related to him.

11. In view of the foregoing, I do not see any error of law in the impugned judgments nor any misreading of evidence by the courts below. Resultantly, this Second Appeal is dismissed along with pending applications. `

JUDGE