

ORDER SHEET
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.

R.A. No.107 of 2014.
R.A. No.36 of 2018.
R.A. No.310 of 2016.

DATE	ORDER WITH SIGNATURE OF JUDGE
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09-11-2020

M/s. Ghulamullah Memon and Ahsan Gul Dahri advocates for applicants.
M/s. Rafiq Ahmed and Karim Bux advocates for respondent Abdul Aziz.
Mr. Allah Bachayo Soomro, Additional Advocate General Sindh.
Mr. Naveed Ahmed advocate holds brief on behalf of counsel for respondent No.2.

These are three connected revision applications. Their lineage/
pedigree is defined as under:-

1. R.A. No.107 of 2014, Ahmed Saeed versus Abdul Aziz and others, requires a decision on a review application filed in respect of a final order / judgment dated 13.05.2015, whereby the said revision application was dismissed. The lis arising out of a Suit No.60/2010 for specific performance filed by Abdul Aziz against Abdul Salam and Ahmed Saeed and others.

2. R.A. No.310 of 2016, filed by Ahmed Saeed against Abdul Salam and Abdul Aziz and others. The lis arising out of a Suit No.308/2014 filed by Ahmed Saeed against Abdul Salam and Abdul Aziz, wherein the plaint was rejected under Order VII Rule 11 C.P.C., which order was maintained by the appellate court in Civil Appeal No.37/2015.

3. R.A. No.36 of 2018, filed by Ahmed Saeed against Abdul Aziz and Abdul Salam and others. The lis arising out of an application under Section 47 C.P.C. filed in execution application No.04/2014 with reference to a decree in aforesaid Suit No.60/2010. The application was dismissed by the executing court being 1st Senior Civil Judge Nawabshah, which order was maintained by the appellate court in Civil Appeal No.42/2017 and consequently this revision application.

R.A. No.107/2014 impugned a part of consolidated judgment in three appeals i.e., C.A. No.46/2016. This revision application as aforesaid was

dismissed vide judgment dated 13.05.2015. Applicant preferred review application which was heard. With reference to this review application Mr. Ghulamullah Memon advocate has argued the matter at length, however, he is unable to assist as to how an order which was passed by this Court in detail and even discussed judgment of two Courts below, is reviewable u/s 114 CPC as there is no error apparently floating on the surface which could be reviewed by this Court. Admittedly the agreement in between Abdul Salam and Abdul Aziz was prior in time i.e. 20.08.2009 and was accordingly decreed in favor of Abdul Aziz in Suit No.60/2010, whereas, the suit for cancellation of the said agreement being No.48/2010 filed by Abdul Salam was dismissed. The subsequent alleged buyer Ahmed Saeed (applicant) was also party to these two suits and has subsequently filed suit for specific performance on the basis of a later agreement. Independent appeals were filed as Civil Appeals No.43, 44 and 46 which were decided by a common order/ judgment dated 15.03.2014. The judgments & decrees of trial Court were maintained. As against the judgment and decree of the appellate Court Ahmed Saeed also filed this independent revision application (R.A. No.107/2014) which was dismissed vide order dated 13.05.2015.

Learned counsel after arguing the matter at length has also summarized and conceded his case to the extent of main prayer and argued that the Court was not justified in rejecting the plaint under Order VII Rule 11 CPC as it contains an alternate relief of recovery of amount which was allegedly paid by Ahmed Saeed to Abdul Salam (alleged seller) as sale consideration, which order was maintained in C.A. hence R.A. No.310/2016.

Indeed, trial Court was justified in rejecting claim of specific performance in lieu of earlier suit of specific performance of Abdul Salam and Abdul Aziz when Ahmed Saeed was also party and consequently constructive res judicata would come into play against such relief. However there was no justification in rejecting claim of recovery of amount. If the trial Court and the

appellate Court were not inclined and has rightly so that the performance decree cannot be passed in the case of Ahmed Saeed and case for performance of agreement in suit No.308/2014 was denied, then it should have considered the alternate relief of the recovery of amount allegedly paid by Ahmed Saeed. Hence, in view of the above facts and circumstances and in view of arguments of applicants, I consider the suit of Ahmed Saeed filed by him as Suit No.308 of 2014 only to the extent of recovery of amount allegedly paid by Ahmed Saeed. Whereas, the suit to the extent of prayer clause of specific performance is not pressed by him. I am conscious of the fact that a plaint cannot be rejected in piecemeal, however once appellant herself is eager to proceed only to the extent of recovery of amount only, I deemed it appropriate to remand the case in suit No.308/2014 to such an extent only. However in view of the above the review application being M.A. No.621 of 2015 is dismissed.

Insofar as the Revision Application No.36 of 2018 is concerned which is arising out of an application under Section 47 CPC, applicant has proposed certain questions most likely to be decided by the Executing Court. Indeed whosoever is occupying the possession on behalf of the seller/ vendor i.e. Abdul Salam, the decree for performance is liable to be executed against him/ her as well under Section 27 of Specific Relief Act and that answers question number 1 and that in terms of question No.2 as raised in the application, no separate relief of possession could be claimed as the suit was for "performance of agreement" which includes all consequential reliefs including possession as part of terms of agreement. Insofar as the questions No.3, 4 & 5 are concerned, indeed if the applicant Ahmed Saeed could establish with some tangible evidence that the amount, allegedly disclosed in the memo of plaint was actually paid by them, the Court may pass appropriate order/ judgment and decree as deem fit and proper under the circumstances of the case, however, the application under Section 47 CPC was rightly dismissed by the trial Court which order was maintained by appellate Court, hence, this

revision is misconceived and is accordingly dismissed. Consequently, R.A. No.310 of 2016 is also dismissed with no order as costs with directions to the trial Court to proceed with the suits of Ahmed Saeed only to the extent of recovery of amount and be disposed of expeditiously within six months' time.

JUDGE

Irfan Ali