

IN THE HIGH COURT OF SINDH, AT KARACHI

IInd Appeal No.46 of 2011

Date of hearing : 23.08.2013.

Date of decision : .08.2013.

Applicant Mst. Hina Haroon Pasha through : Mr. Nazakat Ali Tanwari, Advocate
None for the respondent.

J U D G M E N T

IRFAN SAADAT KHAN, J: This IInd Appeal has been filed against the judgment passed by the VIth Additional District Judge, Karachi South, in Civil Appeal No.06 of 2010, dated 07.04.2011.

2. Briefly stated the facts of the case are that the appellant entered into a sale agreement dated 05.08.2002 with the respondent for purchase of flat bearing No.C/2 (F/F), situated on plot No.10-C, Khayaban-e-Shehbaz, Phase-VI, DHA, Karachi. As per the sale agreement the total sale consideration of the flat was fixed at Rs.7,50,000/-. A sum of Rs.5,00,000/- was paid by the respondent to the appellant through pay order No.355137, dated 05.08.2002, whereas the remaining amount of Rs.2,50,000/- was paid in cash. After receipt of total sale consideration the appellant handed over the possession of the said flat, alongwith original title documents, to the respondent. As per the desire of the appellant the respondent rented out the said flat to one Kamran Yousuf, who is a relation of the appellant, at a monthly rent of Rs.8000/-. The said Kamran thereafter failed to pay the monthly rent to the respondent and subsequently the respondent filed an ejectment case bearing No.07/2004 against him, which case was decided in his favour and possession of the flat was given by the Court on 29.01.2005 in Execution No.27/2004. Since the appellant failed to transfer the title of the flat in favour of the respondent, the respondent filed a suit for specific performance bearing Civil Suit No.193/2005 with the prayer that the title of the said flat be transferred in his name. The said suit proceeded before the VIth Senior Civil Judge, Karachi South, who, vide his order dated 04.11.2009, decided the matter in favour of the respondent, with the directions to the appellant to execute the sale deed in respect of the said flat within two months and in case of failure, the respondent will be entitled to get executed the sale deed through a Commissioner appointed by the Court. Being aggrieved with the said order an appeal was preferred before the VIth Additional District Judge, Karachi South, who also, vide his order dated 07.04.2011, dismissed

the appeal of the appellant by observing that the said appeal is meritless. It is against this order that the present IInd Appeal has been filed.

3. Mr. Nazakat Ali Tanwari, Advocate appeared on behalf of the appellant and stated that the orders passed by the two Courts below are illegal, as the material facts obtaining in the case have not been properly examined. While elaborating his viewpoint, he submitted that there are material contradictions in the statements of the witnesses. He also stated that an application has been alleged to have been moved to the Cantonment Board, which has not been produced by the respondent. He further stated that Kamran Yousuf was never examined by the Court, who was a necessary party to the proceedings. He also stated that the amounts alleged to have been paid by the respondent to the appellant are also doubtful. He further stated that the appellant was not made party in the rent proceedings initiated by the respondent against Kamran Yousuf and his application under Section 12(2) CPC in the said matter is pending adjudication. Learned counsel further submitted that it is a settled proposition of law that nothing could be proved beyond the pleadings but in the impugned orders the two Courts below were not justified in giving such observations, which were not part of the pleadings as the facts not pleaded cannot be considered. He further stated that it is a requirement of the law that two marginal witnesses should attest a document, whereas in the instant case the special power of attorney, executed on 21.08.2004, has not been signed by two marginal witnesses. He further stated that in view of the above facts, the orders passed by the lower Courts are liable to be set aside. In support of his above contentions the learned counsel has relied upon the following decisions:

1. *Muhammad Rasheed Khan Vs. Mst. Mehr-un-Nisa* (2009 SCMR 740)
2. *Rafaqat Ali Vs. Mst. Jamshed Bibi* (2007 SCMR 1076)
3. *Abdul Khalid Vs. Muhammad Asghar Khan* (PLD 1996 Lahore 367)
4. *Muhammad Yaqoob Vs. Naseer Hussain* (PLD 1995 Lahore 395)
5. *Sana Ullah Vs. Muhammad Manzoor* (PLD 1996 Supreme Court 256)
6. *Mst. Meraj Begum Vs. Mst. Shamshad Akhtar* (2000 YLR 1678)
7. *Echo West International (Pvt.) Ltd. Vs. Pakland Cement Ltd.* (2008 YLR 206)
8. *Muhammad Yousaf Vs. Mst. Zainab Bibi* (2006 YLR 490)
9. *Sayed Abbas Taqi Mehdi Vs. Mst. Sayeda Sabahat Batool* (2010 SCMR 1840)
10. *Allah Ditta Vs. Shameer* (2010 CLC 1273)

11. Dr. Zia-ur-Rehman Khan Vs. Dr. Atiq-ur-Rehman Khan (PLD 2009 Lahore 641)

4. Nobody has appeared on behalf of the respondent despite service.

5. I have heard the learned counsel at considerable length and have perused the record, the law and the decisions relied upon.

6. Perusal of the order passed by the trial Court would reveal that the learned Judge has framed three issues i.e. 1) whether the plaintiff (respondent) is entitled for specific performance of the contract, 2) whether the amount of the sale consideration has been paid by the plaintiff (respondent) to the defendant (appellant) and 3) whether the sale agreement and the special power of attorney are valid documents or not? The trial Court while deciding the issue No.1 has examined the respondent, the documents produced by him and the statements given by the witnesses in detail. It is seen from the order passed by the trial Court that after examining all these relevant factors, he has opined that the respondent is a bonafide purchaser of the said property and is entitled for specific performance. The trial Court has also observed that since no proceedings were filed by the appellant before any Court of law for cancellation of the documents produced by the respondent, therefore, they have remained un-rebutted, and are to be relied upon. The trial Court has further observed that these documents have remained unchallenged as such these are to be considered as genuine for all practical purposes. The trial Court has further observed that evidences produced by the respondent have been examined in detail and the statements given by the witnesses have been considered, which fully support the contentions of the respondent about payment of the sale consideration of the flat and the execution of the said documents. The trial Court has further observed that even in the cross examination, the counsel for the appellant had failed to make any dent in the case of the respondent. The trial Court has further observed that the statements of the witnesses have remained unshaken. It is also seen from the record that the power of attorney furnished by the respondent is a duly registered document being registered vide registration No.508 before the Sub-Registrar, T-Division, Karachi and the validity of the two documents have remained uncontroverted. The trial Court subsequently, after examining all the above aspects, came to the conclusion that the respondent was able to bring home his case by producing satisfactory evidences and documents and thereafter decreed the suit filed by the respondent and directed the appellant to execute the said sale deed.

7. Perusal of the order of the appellate Court reveals that the learned Court has considered the arguments of both the parties at considerable length and has also passed an exhaustive order thereupon. The appellate Court has observed that the statements of the witnesses despite cross-examination had remained consistent and unshaken and the documents produced have also remained unchallenged. The appellate Court has also observed that ample opportunity was provided to the appellant before the appellate Court, who has miserably failed to controvert the submissions made by the respondent.

8. I have also considered the facts of the case in detail and have perused the record. Before me also the learned counsel has failed to point out any illegality committed by the two Courts below. Though the learned counsel has stated that the facts not pleaded cannot be proved and furnished some case laws in this regard but has not pointed out as to what are the facts, which were not pleaded before the Court but were proved. It is seen that the witnesses who appeared before the trial Court have fully supported the contentions of the respondent regarding payment of the sale consideration and only on the premise that the same has not been proved cannot be relied upon as the appellant has to prove with cogent material that what were the facts, which had remained unproved. Not a single fact, which had remained unproved was pointed out by the learned counsel.

9. So far as the contention of the learned counsel that since two marginal witnesses have not signed the said power of attorney hence the same is illegal, suffice to observe that this point does not find mention either in the order of the trial Court or in the order of the appellate Court. Now the question is whether any issue, which has neither been raised nor agitated upon before the two Courts below nor there is any finding of the two Courts below on this issue could be raised before this Court. In my view, answer to this question would be an emphatic 'NO', as the said issue could not be considered to be arising out of the orders passed by the two Courts below. The arguments advanced and the decisions relied upon by the learned counsel on this issue are thus found to be misplaced.

10. In view of the observations made above, I do not find any illegality in the orders passed by the two Court below. The present IInd Appeal is found to be devoid of any merit and is hereby dismissed alongwith the pending application.

JUDGE