

HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

IInd Appeal No.19 of 2011

[Muhammad Amin Hasham & Ors versus Muhammad Nadeem & Ors]

Appellants : Through Mr. Imran Qureshi advocate

Attorney Moosa: Through Mr. Ravi R. Panjani advocate

Respondent No.1: Through Mr. Aamir Ali Memon advocate

Respondents 2&3: Through Mr. Rafique Ahmed advocate

Respondent No.6: Through Mr. Arbab Ali Hakro, advocate

Mr. Allah Bachayo Soomro, Additional A.G Sindh

Date of hearing: 21.10.2022

Date of Order: 31.10.2022

ORDER

The appellant has called in question the legality of the order dated 14.02.2011 passed by learned VIIth Additional District Judge Hyderabad in Civil Appeal No.272 of 2009, whereby the first appeal filed by the appellant through attorney Moosa was dismissed as withdrawn on the statement, said to have been filed on behalf of appellant No.1 as well as the general attorney of appellants 2 & 3. For convenience's sake, excerpt of the order dated 14.02.2011 is reproduced as under;

“Mr. Muhammad Umar Daudi Advocate for the appellant called present and Mr. Muhammad Hassan Mehmood Baig and advocate for respondent No. 01 called present. Mr. Muhammad Umar Daudi advocate for the appellant submitted that he is withdrawing the appeal in hand at the instructions of the appellant and also signed such statement. Accordingly, in view of the statement for withdrawal, the appeal in hand is disposed of and dismissed as withdrawn.”

2. Mr. Imran Qureshi learned counsel for the appellants in the above case, has submitted that the appellants do not wish to proceed with the matter on merits and intend to withdraw the captioned appeal. In this regard, he has referred to the applications bearing CMA No.1211/2011 & 1759/2021 and prayed for allowing the application filed under order 23 rule 1 CPC.

3. Mr. Ravi R. Panjani, who is representing the earlier attorney of the appellants namely Moosa, and Mr. Arbab Ali Hakro, who is representing respondent No.6 opposed the withdrawal of the appeal conditionally on the ground that the appellants may withdraw the appeal only unconditionally.

4. Mr. Ravi R. Panjani submits that earlier attorney Moosa had acted on the basis of Irrevocable Sub-General Power of Attorney dated 22.04.1999 executed by appellants in his favor; and, in the exercise of powers conferred by the above Sub-General Power of Attorney, attorney Moosa entered into Sale Agreement dated 4.5.2009 with respondent No.6 in respect of suit property, thereafter, appellants revoked the Sub-General Power of Attorney on 15.10.2011, after it has been acted upon and claim to sue the attorney for alleged fraud; that attorney Moosa had not committed any fraud but acted on the basis of Irrevocable Sub-General Power of Attorney admittedly executed by appellants, which was revoked after execution of Sale Agreement with respondent No.6. He referred to his objections dated 07.05.2012 filed in this regard. However, he prayed that if the application is allowed unconditionally, subject to the rights of attorney Moosa under the law.

5. Mr. Arbab Ali Hakro, representing respondent No.6, submits that attorney Moosa had executed the Sale Agreement dated 04.05.2009 in respect of the entire suit property with respondent No.6; and, in this regard, a Suit bearing No.17 of 2012 [*Re: Abdul Malik Abbasi versus Moosa & Ors*] is pending adjudication before the competent Court of law; therefore, if the captioned appeal is disposed of as withdrawn, which is the outcome of a suit filed by respondent No.1 in respect of same property, the interest of respondent No.6 would be seriously prejudiced.

6. Mr. Aamir Ali Memon, learned counsel for respondent No.1, submits that the total measurement of suit property i.e Plot No.23 was 1658-66 sq. yards, which was purchased by respondents No.1 & 6 to the extent of 50 paisa share each and it was admittedly bifurcated in two equal portions i.e. 23 & 23-A admeasuring 829 sq. yards each. He further submits that the same thing is also mentioned in the judgment and decree passed in Suit bearing No.57 of 2009 filed by respondent No.1. He added that since the present appeal is the outcome of the proceeding of Suit filed by respondent No.1 to the extent of his share in the suit property; therefore, the interest of respondent No.6 will not be prejudiced if the present appeal is withdrawn by the appellants, as the same only relates to the portion of property purchased by respondent No.1.

7. I have gone through the application under Order 23 Rule 1 CPC wherein the appellants simply seek withdrawal of appeal and reserve their right to sue respondent No.1 namely Muhammad Nadeem and Moosa alleged attorney of appellants for damages, loss of reputation, and agony.

8. The parties have briefed this court on the subject controversy with the narration that respondent No.1 had filed F.C Suit No.57 of 2009 [*Re: Muhammad Nadeem versus Muhammad Amin Hasham & Ors*] before learned Vth Senior Civil Judge Hyderabad for Specific Performance of Contract and Permanent Injunction in respect of Plot No.23 GAR Survey No.142 admeasuring 1658-66 sq. yards situated

in Defence Housing Authority, Cantonment Hyderabad (**Suit Property**). It is/was the case of respondent No.1 Muhammad Nadeem before the trial court that the suit property was owned by the appellants, which was purchased by him and respondent No.6 Abdul Malik Abbasi through their attorney i.e. appellant No.1 against total sale consideration of Rs.1,05,00,000/- vide Sale Agreement dated 14.12.1998 and an amount of Rs.30,00,000/- was at the time of execution of sale agreement, while the remaining amount was agreed upon to be paid on 28.02.1999, accordingly remaining amount was paid on 28.02.1999 and the possession of suit property was taken over by purchasers i.e. respondent No.1 and 6 to the extent of their 50 paisa share each. It was further alleged by respondent No.1 in the plaint of his suit that appellant No.1 had appointed one Moosa as his sub-attorney to finalize the sale transaction and bifurcation of the suit property in two equal shares; the bifurcation was done accordingly and respondent No.1 approached the sub-attorney for the execution of Sale Deed, who, as alleged, firstly kept the respondent No.1 on false hopes but after about nine months finally refused, hence respondent No.1 filed the aforesaid suit, which was finally decreed against appellants, whereas same was dismissed as withdrawn in respect of official respondents No.2 to 5 vide Judgment dated 20.11.2009 & Decree dated 21.11.2009. The said Judgment and Decree were challenged by the present appellants before learned 1st appellate Court in Civil Appeal No.272 of 2009 [*Re: Muhammad Ameen Hashim & Ors versus Muhammad Nadeem*]; however, the same was dismissed as withdrawn vide Order dated 14.02.2011 on the statement said to have been filed on behalf of appellant No.1 as well as General Attorney of Appellants 2 & 3.

9. Per learned counsel, respondents No.1 & 6 purchased the suit property through the Sub-Attorney of the appellants namely Moosa based on Irrevocable Sub-General Power of Attorney; that revocation of Sub-General Power of Attorney itself establishes that it was executed by the appellants in favor of Moosa and the same was revoked at a later stage i.e. on 15.10.2011; that Moosa had acted based on admitted Irrevocable Sub-General Power of Attorney; therefore, he cannot be held liable for prosecution as portrayed by the appellants, till the date of revocation of Sub-General Power of Attorney. Per learned counsel, respondent No.1 also purchased the suit property, besides respondent No.6 @ 50 paisa share i.e. 829 sq. yards each; whereas, respondent No.6 is claiming to have purchased the entire suit property i.e.1658-66 sq. yards. Learned counsel next argued that the Sale Agreement dated 04.05.2009 by and between attorney Moosa and respondent No.6, shows that the said Sale Agreement was executed to the extent of 829.316 sq. yards; therefore the claim of respondent No.6 that he had purchased the entire suit property carried no weight.

10. I have also perused the Judgment & Decree passed by the learned trial Court in F.C Suit No.57 of 2009 filed by respondent No.1, which reflects that said was

passed only to the extent of 50 paisa of suit property claim to have been purchased by respondent No.1; and, since the present appeal is the outcome of said Judgment & Decree as such withdrawal of same by the appellants will not prejudice the interest, if any, of respondent Nos. 1 and 6, in the suit property as the respondent No.6 has already filed Suit which is pending adjudication before the competent Court of law. Admittedly respondents No.1 and 6 have not challenged the decree passed in the F.C Suit No.57 of 2009. The present proceedings are the outcome of the aforesaid decree in the suit and cannot be challenged in collateral proceedings.

11. In view of the above position of the case, since the appellants themselves intend to withdraw the appeal; therefore, CMA No. 1759/2021 for withdrawal of the appeal is allowed. The F.C Suit No. 17 of 2012 pending before the competent court of law shall be decided on its own merits, the pending applications, if any, is disposed of in the above terms.

JUDGE

Sajjad Ali Jessar