

HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

R.A No.15 of 2006

[Mst. Begum & Ors versus Irshad Ahmed]

Applicants : Through Mr. Imdad Ali R Unar advocate
Respondent : Through Mr. Kamaluddin advocate
Date of hearing : 17.10.2022
Date of Judgment : 31.10.2022

J U D G M E N T

ADNAN-UL-KARIM MEMON, J. This revision has been directed against the concurrent findings of the courts below. The respondent had filed FC Suit No.91 of 1991 for Specific Performance of Contract and Injunction valued at Rs.250,200/- in respect of Upper Floor of House bearing C.S No.B/21-318/A situated at Moolchand Giani Lane, Tilk Incline Hyderabad (**Suit Property**) against applicants before learned 1st Senior Civil Judge Hyderabad which was decreed vide Judgment dated 18.05.1999 and Decree dated 28.05.1999 against which applicants preferred Civil Appeal No.91 of 1999 before learned IIIrd Additional District Judge Hyderabad; however, the same was dismissed vide Judgment dated 31.10.2005 and Decree dated 02.11.2005.

2. Brief facts of the matter are that respondent filed the above suit claiming that late Abdul Ghafoor was the owner of suit property and on 07.07.1990 he entered into an agreement to sell with respondent in respect of suit property against sale consideration of Rs.250,000/-, out of which he paid Rs.150,000/- as earnest money and the remaining amount was agreed to be paid before Sub-Registrar at the time of execution of Sale Deed after three months viz. on 07.10.1990; that late Abdul Ghafoor could not arrange the other accommodation for his family within the agreed period, as such in continuation of first agreement dated 07.07.1990 second agreement dated 04.10.1990 was executed between them according to which Sale Deed was agreed to be executed upto 25th December 1990; however, Abdul Ghafoor died on 15.11.1990 leaving behind applicants as his legal heirs; that after the death of Abdul Ghafoor he served notice on 18.12.1990 to applicants /legal heirs for completion of contract in pursuance of aforesaid agreements;

however, they refused to executethe agreements being false and managed, which compelled the respondent to file the aforesaid suit, which was decreed in his favor and appeal preferred there against stood dismissed vide impugned Judgment & Decree passed by learned Appellate Court, hence this revision application.

3. Mr. Imdad Ali R.Unar, learned counsel for applicants, inter-alia, contended that the Judgments and Decrees of both the courts below are opposed to law and facts; that both the courts below committed material illegalities in not exercising jurisdiction vested in them; that both the courts below have not considered the legality of existence of two agreements, which were created after the death of Abdul Ghafoor, which was/is clear by the fact that since first agreement was allegedly executed on 07.7.1990 then why second agreement was executed after three months viz. on 04.10.1990; that perusal of both the agreements clearly show the same witnesses in same place as well as attestation of Saeeduddin Qazi, which reflects that the documents were maneuvered; that both the courts below have not appreciated the evidence that both stamp papers of agreements were purchased by Abdul Ghafoor and under the law purchaser never purchases the stamp papers; that entry No.34, shown in agreement of sale explicitly shows that Abdul Ghafoor had purchased the stamp paper, but there was/is no signature of Abdul Ghafoor; that similar position is in entry No.1455, thus both the documents were/are forged in the name of late Abdul Ghafoor; that both the Courts below have not appreciated the legal position that respondents have failed to prove that the signatures were of late Abdul Ghafoor on the said agreements; that evidence of both the witnesses is tutored one they being close to the respondent had given obliging statement; that Saeeduddin Qazi in his evidence clearly admitted that he did not know Abdul Ghafoor nor the payment was made in his presence; that both the courts have not considered the evidence of Amanullah who had clearly stated that there was dispute regarding staircase and he had also denied that there was an agreement or signature of his father. He lastly prayed for allowing this revision and dismissal of the suit filed by the respondent. In support of his contention learned counsel relied upon the cases reported as Ghulam Muhammad and 3 others v. Ghulam Ali (2004 SCMR 1001), Habib Khan and others v. Mst. Bakhtmina and others (2004 SCMR 1668), Loung and others v. Allah Ditto and others (2002CLC 1307), Hayat Muhammad and others v. MazharHussain (2006 SCMR 1410), Government of Pakistan and 3 others v. KamruddinValika (1996 CLC 1086), Haji Abdul SattarChapri v. Secretary, Karachi Grains & Seeds Merchants

Group and another (1991 MLD 2697) & Lips Records (Private) Ltd. v. Ms. Haqida Mahmood Kiani and 2 others (PLD 2002 Karachi 141).

4. Mr. Kamaluddin learned counsel for the respondent; however, argued that the concurrent findings are present in the matter, which do not require interference by this Court; that the findings of the courts below are well justified and the same are not suffering from any irregularity or illegality; that the revision has a limited scope and this Court has only to see if there is any apparent illegality or irregularity in the impugned Judgments and Decrees and since applicants have failed to point out any illegality or irregularity, therefore, present revision application is liable to be dismissed. In support of his arguments, he relied upon the cases reported as Noor Muhammad and others versus Mst. Azmat-e-Bibi [2012 SCMR 1373], Ahmed Khan versus Mst. Bilqees Begum and 2 others [2013 YLR 1545], Muhammad Siddique versus Abdul Rehman [2012 CLC 1164], (v) Muhammad IssaAbbasi through Legal Heirs and others versus Abdul Qadir through Legal Heirs and others [PLD 2013 Sindh 60], Nadeem Manzoor Hasan versus Muhammad Adil Khan and 2 others [2014 MLD 1551], Abdul Ghani versus Khalil Ahmad through Legal Heirs [2004 SCMR 1059], Nawab Din versus Abdul Khaliq and another [2004 MLD 827].

5. I have heard the arguments of learned counsel for the parties and perused the record with their assistance and case law cited at the bar.

6. The questions involved in the present proceedings are whether the suit for specific performance of contract filed by the respondent was maintainable in law and whether the sale agreements dated 7.7.1990 and 4.10.1990 were / are forged documents and never executed by late Abdul Ghafoor during his lifetime.

7. It appears from the record that learned trial court framed five issues including the maintainability of Suit and after recording evidence of the parties reached to the conclusion that the subject sale agreements were genuine on the premise that the applicants failed to prove that the agreements were not executed by late Abdul Ghafoor. The findings of learned trial Court were assailed before the appellate court on the ground that before execution of purported sale agreements, Abdul Ghafoor passed away. However, that assertion could not convince the Appellate Court, which ended in dismissal of appeal of the applicants by the appellate Court vide judgment dated 31.10.2005 and decree dated 02.11.2005 with directions to the

respondent/plaintiff to pay balance consideration to the applicants at the time of execution of sale deed.

8. To appreciate the concurrent findings of Courts below and to see whether the respondent could succeed to prove the execution of sale agreements in terms of Article 79 of the Qanun-e-Shahadat Order.

9. Primarily, Article 79 of Qanun-e-Shahadat Order 1984, is germane to the proof of execution of document required by law to be attested which cannot be used as evidence until "two attesting witnesses" at least are called to prove its execution, if there be two attesting witnesses alive and subject to the process of the court and capable of giving evidence, in this regard, the evidence recorded in the Trial Court reflects that plaintiff Irshad Ahmed who produced original agreement to sale dated 02.07.1990 at Ex.83, and payment receipt of amount Rs.1,50,000/- out of total consideration of Rs.2,50,000/- as Ex.84, the second agreement to sale dated 4.10.1990 as Ex.85, legal notice as Ex.86, City Survey Extract as Ex.88, and in support of his case, he produced his witnesses namely Pir Burhanuddin, Abdul Wahab, and Saeeduddin Qazi, who were also examined. On the other side, applicant No.2 Amanullah son of Abdul Ghafoor was examined and Waseem Jarwar was also examined in his support who produced attested copy of entries No.34 dated 02.07.1990 and 1455 dated 04.10.1990.

10. The respondent/plaintiff admitted in his evidence that the suit building was evacue property; and the ground floor was allotted to his father; and, the first floor was transferred with staircase and one living room on the ground floor was allotted to late Abdul Ghafoor (seller). He also admitted that his father and Abdul Ghafoor were real brothers. He also admitted that late Abdul Ghafoor was illiterate. Witnesses namely Pir Burhanuddin and Abdul Wahab supported the version of respondent/plaintiff. PW Abdul Wahab also admitted in his evidence that both the agreements of sale were attested by the notary public on the same day in his presence; and, that of the parties and other witnesses. PW Saeeduddin Qazi / Notary public also supported the execution of sale agreement; however, he failed to endorse on the point whether the signature of Abdul Ghafoor was false and fabricated. He also admitted that he did not know Abdul Ghafoor. He also admitted that payment of sale consideration was not paid in his presence.

11. Applicant No.2 Amanullah was also examined and admitted that after knowledge of execution of sale agreement, they did not complain to any

authority or the department nor made any sort of complaint against the respondent /plaintiff and they did not file suit in any court of law against the respondent /plaintiff in respect of sale agreements.

12. I have gone through the entire record of the case including findings of learned trial Court as well as appellate Court. There is no denial of fact that the seller and purchaser were inter-se related who entered into sale and purchase transaction of suit property. The cause of action accrued to the respondent /plaintiff in the year 1990 when the sale agreements were executed by late Abdul Ghafoor in favor of respondent/plaintiff, however, after his death, the legal heirs of late Abdul Ghafoor denied the execution of sale agreements on the premise that the subject sale agreements were never executed by their father during his lifetime resulting in preparing forged sale agreements and filed the subject suit with malafide intentions, which were hotly contested by them before the trial Court on the premise that the signature on the sale agreements was not of late Abdul Ghafoor, which ought to have been verified through forensic department and failure of trial Court caused miscarriage of justice as well as appellate Court failed to consider this aspect of the case and reached on the erroneous conclusion and concurred with the view of trial Court. This stance was considered by the trial court which gave elaborative judgment on each issue. The appellate Court also concluded on the same analogy. Now, the question before this Court is whether the concurrent findings of facts could be disturbed in revision or otherwise. Primarily, this is not a Court of appeal to see the propriety, and legality of the findings of the Courts below, and this Court could only oblige to see any irregularity surfaced on the record. The record reflects that the respondent/plaintiff met the criteria as provided under Article 79 of the Qanun-e-Shahadat Order by producing original sale agreements, which were subjected to scrutiny of the trial Court and lengthy cross-examination by the parties, however, nothing could be brought on record to substantiate the plea that the same were forged documents for the simple reason that two marginal witnesses appeared before the trial Court and deposed the existence of sale agreements and payment made thereon to the parties, notary public also appeared and supported the version of respondent/plaintiff. Besides, applicant Amanullah also admitted in his evidence that after knowing the agreements of sale he could not approach the competent court of law for cancellation of sale agreements, thus presumption goes against him that the sale agreements were executed by the father of applicants. So far as the authentication of signature/thumb impression of deceased Abdul Ghafoor on the sale agreements is concerned,

this court at this stage cannot send the signature/thumb impression of late Abdul Ghafoor for forensic evaluation for the reason that much water has flown under the bridge since 1990 and evidence has also been brought on record which could not be thrashed out in revisional jurisdiction, therefore, the plea taken by the applicants seems to be an afterthought for the reason that it was available for the applicants just after knowing the sale agreements to challenge the execution before the courts for its cancellation but they remained mum for considerable period and now they at revisional stage take plea for sending the case for comparison of thumb impression/signature of late Abdul Ghafoor for forensic authentication.

13. Additionally, the appellate Court framed the point of determination to the extent whether deceased Abdul Ghafoor had executed both the sale agreements in question and after considering all the material aspects as well as evidence brought on record and reached the conclusion that the judgment and decree passed by learned Senior Civil Judge was based on correct appreciation of law, thus called for no interference in terms of the findings recorded on the point of determination. Principally the view taken by the courts below is correct for the simple reason that mere denial of applicants about the execution of sale agreements would not shatter the existence of subject documents until and unless contrary position is substantiated from the record, which he failed to bring on record any cogent evidence to discard the evidence of respondent and his witnesses on the subject issue. Regarding the question of deposit of balance sale consideration in court, learned counsel for respondent has replied to the query and submitted that the law on the subject has evolved in terms that unless the party would have been put to notice by the court that non-deposit of balance sale price would be deemed to be his incapability of performing his part of contract as envisaged under section 24(b) rendering the contract non-enforceable, the suit could not be dismissed. Learned counsel referred to Order XVII, Rule 3 which provides that the Court may, notwithstanding such default, proceed to decide the suit forthwith is permissive and discretionary and does not in all circumstances entail penal consequences; besides the trial court directed to deposit balance amount at the time of sale deed, which part has not yet been performed by the applicants.

14. Section 24(b) of Specific Relief Act provides that the contracts which cannot be specifically enforced provide that specific performance of contract cannot be enforced in favor of a person who has become incapable

of performing or violates, any essential term of the contract that on his part remains to be performed. The Hon'ble Supreme Court in recent Judgment has held that the vendee while seeking specific performance/enforcement of a condition to be performed by the vendor must state that either he has performed all the conditions under the contract he was bound to perform and/or that at all times right from the date of agreement to the date of filing the suit he has been ready and willing to perform/fulfill his part of deal. He is not only supposed to narrate in the plaint his readiness and willingness at all material times to fulfill his part of agreement but also is bound to demonstrate through supporting evidence such as payment orders, Bank statements, or other material, his ability to fulfill his part of deal leaving no doubt in the mind of the Court that the proceedings seeking specific performances have been initiated to cover up his default or to gain time to generate resources or create the ability to fulfill his part of deal. It is in that pursuit that the Court to weigh his capacity to perform and intention to purchase may direct the vendee to deposit balance sale consideration. The readiness and willingness on the part of vendee to perform his part of obligation prima facie demonstrate that the non-completion of contract was not the fault of vendee and the contract would have been completed if it has not been renounced by the vendor. On the aforesaid proposition, I am guided by the decision of the Honorable Supreme Court in the case of Muhammad Asif Awan versus Dawood Khan and others [2021 SCMR 1270], for convenience sake, an excerpt whereof is reproduced as under:-

“13. Besides, it is to be kept in mind that strict non-compliance of the directions of the Court by a vendee to deposit the balance sale price while keeping the lis of specific performance alive has totally different consequence than the cases where the Court while directing the balance price terminates the lis or where the direction to deposit the balance sale price are issued at the instance of the vendor who has shown his readiness to perform his part of the contract. In the first instance, the Court does not lose its jurisdiction to review its order by extending time for depositing the balance sale price for the simple reason that the vendee on the face of denial or plea of termination of agreement has only to establish his bona fide/seriousness to stand by his part of the commitment, whereas, in the second instance the Court ordinarily becomes functus officio and loses its authority on the lis and consequently has no jurisdiction to extend the time for the deposit of the balance sale price. In the instant case not only the lis was alive but the order directing the deposit of the balance sale price did not stipulate the consequences for non-deposit which normally are the vacation of injunctive order or the dismissal of the suit, consequently, the order of the High Court non-suiting the appellant cannot be sustained and therefore, requires interference by setting it aside.”

15. The concurrent findings of two Courts below on the subject issue are not open to interference in the limited revisional jurisdiction of this Court, the principles of reappraisal of evidence by this Court in revisional jurisdiction are not called for as the applicants have failed to establish that the two Courts below, have grossly misread or non-read the material evidence and the impugned judgments and decrees are perverse, causing serious miscarriage of justice. On the aforesaid proposition, I am guided by the decision of Honorable Supreme Court in the case of Mst. Zaitoon Begum versus Nazar Hussain and another [2014 SCMR 1469].

16. From the above facts and circumstances of the case, I am of the view that the respondent succeeded to prove the existence of sale agreements duly supported by two witnesses as well as Notary public thus this revision application is accordingly dismissed along-with pending application with no order as to costs.

JUDGE

Sajjad Ali Jessar