

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

C. P. No. D-8512 of 2019

Priority

1. For hearing of Misc. No.37338/2019
2. For hearing of main case

Date of hearing 21.02.2023.

Mr. Ayaz Ahmed Ansari, Advocate for the Petitioner Feroz Bari.
Mr. Zeeshan Haider, Advocate for Respondent No.1 Syed Ayaz Hussain.

AHMED ALI M. SHAIKH, CJ.- The Petitioner has invoked the jurisdiction of this Court under Article 199 of the Constitution seeking following relief:-

“It is, therefore, respectfully prayed that from the grounds shown herein above this Honourable Court may graciously be pleased set aside the impugned Order dated 12.10.2019 passed by respondent No.4 and also by setting aside Judgment dated 30.08.2013 and Decree dated 06.08.2013 passed in Civil Suit No.242 of 2013 by allowing the petitioner to file his written statement in the matter and to lead his evidence therein.

And/or in alternate

This Honourable Court may graciously be pleased to declare and/or permanently restrain respondents No.1, 2 & 3 from transferring the Plot No.S-104-U, Kh-e-Muhammad Hussain Shaheed, Phase VII Extension, Defence Housing Authority, Karachi, as the same is neither the suit property nor is the subject matter of the aforesaid Civil Suit No.242 of 2012 and judgment and decree passed therein.”

2. Briefly facts of the case, as pleaded in the memo of petition, are that the Respondent No.1 filed a Suit No.242 of 2012 (the “**Suit**”), against the Petitioner and Pakistan Defence Officers Housing Authority (the “**DHA**”), seeking specific performance, etc of a verbal sale agreement dated 26.01.2012 regarding immovable property bearing No.S-267, (100 square yards) 6th Street, Phase VII-Extension, DHA, Karachi (the “**Property**”). Petitioner claimed that he was never served with the notices/summons while the DHA, whose name struck off later, after service, on 08.05.2012 submitted written statement, inter-alia, disclosing that the Property has been relocated as Plot No.104-U, Khayaban-e-Muhammad Hussain Shaheed, Phase VII-Extension, DHA (the “**Relocated Property**”). The Suit proceeded ex-parte against the Petitioner and trial Court/Respondent No.3, passed Judgment dated 03.08.2013 and Decree dated 06.08.2013 following which execution application was filed and allowed vide order dated 29.03.2014.

3. The Petitioner filed two applications: (i) dated 26.04.2014, in terms of Order XXI Rule 26 read with Section 151 CPC; and (ii) dated 10.05.2014 under Section 12(2) read with Order IX Rule 13 CPC. The executing Court vide order dated 28.4.2014 dismissed the former application, against which Petitioner filed Civil Revision Application No.61 of 2014. During hearing the counsel for the Respondent No.1 made a statement that he will not press the execution application till disposal of the Application, whereafter the learned District and Sessions Judge, Karachi South, vide order dated 30.01.2015, set-aside the impugned order and directed the trial Court to pass a fresh order after concluding the proceedings on Application under Section 12(2) read with order IX Rule 13 and Section 151 CPC (the “**Application**”).

4. For decision of the Application, the trial Court aptly framed issues, recorded evidence and after hearing the parties dismissed it vide order dated 09.10.2018 (the “**Order**”) against which Civil Revision No.101 of 2018 was filed but that too met the same fate, vide impugned order dated 12.10.2019.

5. Learned counsel for the Petitioner submitted that the fora below failed to appreciate that the ex-parte Judgment and Decree was passed in respect of the Property but the respondent No.1 is attempting to execute the conveyance deed in his favour in respect of the Relocated Property while, in law, the executing Court cannot travel beyond the Judgment and Decree. He argued that the Respondent No.1 obtained the Judgment and Decree by means of fraud and mentioned two addresses in the title of the plaint while the Petitioner was not residing on the second address viz. House No.B-71, Block W, Allama Iqbal Town, North Nazimabad, Karachi. He pointed out that in any case the Petitioner was never served with the notices/summons issued either by the trial Court or Executing Court. According to him as the Respondent No.1 was seeking specific performance of a verbal agreement, burden lies on him to prove the same. In support of his submissions he relied upon the cases reported in 1985 SCMR 1228, 1993 SCMR 710, 2003 SCMR 549 and 2010 SCMR 1097.

6. Conversely, Mr. Zeeshan Haider, learned counsel for the Respondent No.1/Plaintiff submitted that the Petition against the concurrent findings of the fora below merits no consideration and is liable to be dismissed as the evidence/material placed on record by the parties was rightly appreciated by the trial Court as well as Revisional Court. According to him, the Petitioner is only trying to drag the proceedings as much as he can just to deprive him from the fruits of the Order/Judgment passed in his favour.

7. We have considered the submissions advanced at the bar by the learned counsel for the parties and with their able assistance have gone through the material available on record.

8. In paragraph No.2 of the plaint the Respondent No.1 pleaded that the Petitioner under an oral agreement agreed to sell the Property for total consideration of Rs.34,00,000.00 and later while receiving part payment of Rs.300,000.00 through cheque dated 26.1.2012 issued a handwritten receipt (the “**Receipt**”) thereunder mentioning the number of the Property and payment of balance sale consideration till 10.02.2012, obligating that in case of any readjustment of the Property by the DHA, he will transfer the same. For ready reference the Receipt, copy annexed with the plaint and also available at page 177 of Court file, is reproduced hereunder:-

“Received with thanks Rs.300,000/- Three Lac only—through Cheque No.0151598 of Askari Bank against plot No. S 267, 6th Street Phase VII Ext Dha Karachi measuring 100 Sq yds considered price Rs.3400,000/- Thirty Four hundred Thousand only—Balance payment Rs.3100,000/- Thirty one hundred Thousand only—will be paid on or before 10th February 2012—In case of any re-adjustment plot from Dha against my pot, I am bound to transfer.”

Sd/-
Feroz Bari
26.1.2012”

(emphasis added)

9. In the memo of Application, the Petitioner while denying any privity of contract and issuance of the Receipt, claimed that the latter document is a forged and fabricated one. Record reveals that he did not submit any application challenging his alleged handwritten Receipt or even made attempt to get framed an additional issue of referring the matter to handwriting expert during hearing of the Application by the trial Court. Nonetheless, during evidence before the trial Court, he made following admission:-

“It is incorrect to suggest that I did never try to return the cheque of Rs.3 lacs dated 26.1.2012 to Ayaz Hussain. Vol. says I that I tried to return the said cheque to Mr. Baber Sohail who had delivered to me. It is correct to suggest that said cheque was got deposited by me in my bank account. It is correct to suggest that I also had issued a receipt in terms of said cheque to the plaintiff/D.H. It is correct to suggest that the said cheque was issued by Ayaz Hussain/Plaintiff but was delivered to me by Baber Sohail.” (emphasis added)

10. From above, it manifests that the Petitioner not only encashed the cheques but issued the Receipt, inter-alia, undertaking to transfer the Property in case of any re-adjustment from DHA against the same. In this regard, he in his cross-examination has uttered that:-

“It is correct to suggest that the DHA itself had relocated/changed the number of the plot S-267 to S 104-U, Phase VII, Ext. DHA, Karachi. Vol. says that said change was made in the year 2011.”

11. In this regard, perusal of the file shows that the DHA vide letter dated 14.10.2011 addressed to the Petitioner at his residential address bearing Apartment No.6, Plot No.4-C, 12th Jami Commercial Street, Phase VII, DHA, Karachi, (the “**Postal Address**”) informed that:-

“1. Revised planning of Phase-VII (Extn) and adjustment of boundary wall of existing graveyard has affected certain residential plots which have now been readjusted in the near vicinity.

2. Please note that your **Plot No.S-267, 6th Street, Phase –VII (Extn), measuring 100 Sq yds** approx. has been relocated as **Plot No.S-104-U, Kh-e-Muhammad Hussain Shaheed, Phase VII (Extn.) measuring 100 sq yds** approx..”

12. Notably, in the Application the Petitioner in paragraph No.10 claimed that the aforesaid letter dated 14.10.2011 issued by the DHA (well before issuance of the Receipt) was received by him months after in February, 2012 i.e. after issuance of the Receipt while in paragraph No.2 he asserted that he came to know about the suit/execution proceedings vide letter dated 16.4.2014 issued by the DHA and received by him on 17.04.2014 and hence rushed to the Court to avail remedy provided under the law. The plea taken by the Petitioner, per pleadings, is quite unfair and self-contradictory as the DHA in instant matter issued two letters to him. The one relocating the Property was received months back while the other giving cause of action was received very next day on the same Postal Address. In fact, in the letter dated 16.4.2014 the DHA informed him that the Property is being transferred pursuant to Court orders passed in the Suit and Execution.

13. In any case, from above, it is clear that the Petitioner at the time of signing the Receipt was fully aware of the adjustment of his Property with the Relocated Property by the DHA but deliberately concealed the said fact and mentioned the address of the Property in respect of which the Respondent No.1 filed the Suit. This deliberate and willful concealment on his part and the undertaking to transfer the re-adjusted plot, fizzles out the submission of the learned counsel for the Petitioner that the agreement is unenforceable or the Decree passed in respect of the Property cannot be executed for the Relocated Property, which is more technical rather than legal, particularly, when the case mainly hinges on the contents of the Receipt, copy annexed with the plaint and exhibited by the Respondent No.1 in his examination-in-chief before the trial Court. The DHA in their written statement dated 08.05.2012 also stated that the Petitioner is owner of the

Property which has been relocated with S-104-U, Khayaban-e-Muhammad Hussain Shaheed, Phase VII (Ext), measuring 100 sq yds. Furthermore, it is not the case of the Petitioner that the Property did not exist at all or the number of the Property (later adjusted with the Relocated Property) is incorrect. It is settled principle that technicalities of law should not obstruct the way of justice as rule or procedure are framed to foster the cause of justice and not otherwise. In law, the executing has power to interpret the decree considering the Judgment.

14. Similarly the contention of the learned counsel for the Petitioner that as the Respondent No.1 came forward to seek a decree for specific performance of contract of sale of immovable property on the basis of oral agreement, burden heavily lies on him, which he failed to discharge, also stands vitiated in wake of the admission of the Petitioner in the cross-examination before the trial Court, as reproduced hereinabove, that the Receipt, mentioning the date of part payment, amount of balance sale consideration and date of completion of the transaction, was issued by him against the cheque of the Respondent No.1. He even admitted in his evidence that the cheque of Rs.300,000.00 dated 26.1.2012 issued by the Respondent No.1 as part payment of the sale consideration, was deposited by him in his bank account.

15. Now adverting to the contention of the learned counsel that Petitioner was never served with the summon/notices of the trial Court and came to know about the passing of the Judgment and Decree only after receipt of the notice/letter dated 16.04.2014 from DHA regarding transfer of his plot pursuant to the orders of the trial Court passed in the Suit and Execution Application No.20 of 2013.

16. Perusal of the record reveals that the Respondent No.1 in his plaint has mentioned two addresses of the Petitioner, including the Postal Address reflected verbatim in the letters/notices issued by the DHA, photocopies available on the file, which were received and rejoined by the Petitioner. In this context, the trial Court in the Order observed that—

“I see a bunch of several reports of bailiff including TCS/courier which reflects that notices upon that correct address of DHA were issued time and again but always same were returned unserved with endorsement that always a lady found available at the address, who deliberately and intentionally did not receive notices under undisclosed directions. Report of bailiff particularly dated 14.3.2012 and 19.7.2012 reflects that lady/wife available at the premises replied that at present defendant is not available and she refused to receive summons. Record reflects that since institution of this suit in the year 2012 this court repeatedly issued process time and again against the defendant No.1 on both addresses mentioned in the plaint upto period of about one year but same were deliberately and intentionally refused to receive.”

The case law cited by the learned counsel for the Petitioner are quite distinguishable on facts and circumstances of the instant case and are of no help at all.

17. Apparently, the Petitioner was playing hide and seek with the judicial proceedings as while answering the notices/letters of the DHA, he ignored the court summons/notices delivered through bailiff and courier inscribing the same Postal Address. He only shown interest and opted to contest the matter when the DHA vide letter dated 16.04.2014 informed him that the Property is being transferred pursuant to the order of the District Court (South) Karachi passed in the Suit and Execution Application No.20 of 2013.

For the foregoing reasons, we do not find any merit in the Petition, which is accordingly dismissed along with pending misc. application.

CHIEF JUSTICE

JUDGE