

IN THE HIGH COURT OF SINDH AT HYDERABAD

IIInd Appeal 09 of 2022 : Haider Builders & Developers
vs. Parkash Kumar & Others.

For the appellant : Mr. Imdad Ali R Unar, Advocate.

For the respondents : Mr. Wali M Jamari, AAG.
Mr. Parkash Kumar, Advocate.

Date/s of hearing : 28.11.2023.

Date of announcement : 28.11.2023.

JUDGMENT

Agha Faisal, J. Briefly stated, Suit 487 of 2013 was filed for specific performance of contract, possession and permanent injunction before the 5th Senior Civil Judge, Hyderabad and the same was allowed vide judgment dated 22.05.2021. In addition to the balance sale consideration, the then plaintiff was further directed to deposit additional consideration of Rupees One Million per flat. The imposition of the additional burden was assailed in Civil Appeal 138 of 2021 before the 2nd Additional District Judge, Hyderabad and the said stipulation in the impugned judgment was reversed / modified vide judgment dated 20th December, 2021. This second appeal impugns the appellate judgment. It is considered illustrative to reproduce the observations / findings in the orders refer to supra:

Trial Court judgment

"In view of the foregoing facts and circumstances, the defendant No.1 and 3 are indeed liable to perform their part of contract subject to payment of balance sale consideration of Rs.44,40,000/- by plaintiff in respect of all four flats plus additional consideration of Rs.10,00,000/- in respect of each flat i.e. Rs.40,00,000/- total additional consideration. Issue No.5 is answered as accordingly.

ISSUES NO.6 & 7:-

In view of findings of preceding issues, instant suit is decreed, without cost, in the following terms:

1. Plaintiff is directed to deposit total balance consideration of four flats amounting to Rs.44,40,000/- along with additional consideration of Rs.10,00,000/- in respect of each flat (total additional consideration of Rs.40,00,000/-) with the Nazir of this court within forty five (45) days of this judgment failing which instant suit will be deemed to have been dismissed.
2. In case of deposit of entire consideration as adjudged aforesaid within stipulated time, the suit shall be deemed to have been decreed and defendants No.1 and 3 shall be liable to execute registered conveyance deed in respect of suit flats in favor of plaintiffs in failure of which the Nazir shall do the needful in accordance with law. Issue No.6 is answered as accordingly. Let such decree be prepared.

Appellate Court judgment

"17. The assessment and evaluation of the evidence of the parties brought on record in this case, does not show that the respondent/defendant No.1, had moved any application for increase of the price to the Authority provided under the Sindh Building Control Ordinance for increase of the price of sale, nor any evidence has been brought on record to show that such application of the builder/respondent/defendant No.1, was accepted by the Authority meaning thereby the claim of respondent/defendant No.1, that he would perform his part of contract after receiving the amount of consideration of the booked flats at present market value is totally against the existing law and cannot be acceded to. The above detailed discussion shows that the impugned judgment and decree to the extent of imposition of additional consideration of Rs. 10,00,000/- (ten lac) per flat total Rs. 40,00,000/- is not sustainable and needs to be interfered by this court and reversed and modified accordingly. Thus, the point under discussion is hereby answered in affirmative.

POINT NO.2

18. In view of my findings on Point No.1, I am of the considered view that impugned judgment and decree to the extent of imposition of additional amount of Rs. 10,00,000/- (Ten lac) per flat total Rs.

40,00,000/- is hereby reversed and modified. The suit is decreed with directions to the respondents/defendant No.1 to perform his part of contract after receiving the balance sale consideration of Rs.44,40,000/-, failing which the Nazir of the Court shall do the needful in accordance with law. The appeal is allowed accordingly with no order as to costs.”

Learned counsel for the appellant relies upon the authority of *Muhammad Siddique*¹ and *Muhammad Saleh*² and submits that the trial Court had every right to enhance the amount required to be paid; even if such a prayer was absent in the pleadings. It was insisted that the court was always endowed with the inherent power to mold relief, if the circumstances so warranted. Learned counsel for the respondents controverted the arguments and articulated that no case has been made out to entertain this appeal per section 100 C.P.C.

Heard and perused. *Admittedly* there was no mention in the respective pleadings, before the trial court, seeking enhancement of the sale consideration. The issues framed for determination, available at typed page 5 of the trial court judgment, make no reference to this matter. The trial court judgment is also devoid of any discussion upon the said matter and only the un-deliberated findings, particularized supra, unilaterally enhancing the consideration are recorded therein.

The scope of a second appeal is circumscribed per Section 100 CPC³ and Section 101 CPC⁴ mandates that no second appeal shall lie except on the grounds mentioned as aforesaid. In order to consider whether the appellant's case merits relief herein, the point framed for determination, in compliance with the requirements of Order XLI Rule 31 CPC, is *whether in the facts and circumstances hereof the trial court was justified in enhancing the quantum of sale consideration beyond the amount agreed inter se in the agreement for which specific performance was sought; especially when the subject was alien to the pleadings, issues and deliberation.*

It merits little reiteration that the remit of civil proceedings is demarcated by the ambit of pleadings⁵ and the same *admittedly* did not contemplate any enhancement of sale consideration. The issues were also silent upon the matter and the enhancement granted was *admittedly* beyond the purview thereof⁶. No evidence was led to quantify or corroborate the enhancement and even otherwise leading evidence beyond pleadings does not meet the approval of law⁷. In view hereof, no case could be made out to justify the enhancement of consideration undertaken by the trial court.

There was reference to the concept of molding relief, in order to justify the judgment of the trial court. It is trite law that no court has power save as that conferred by the Constitution / law⁸. In the context of the

¹ *Muhammad Siddique vs. Muhammad Akram* reported as 2000 SCMR 533.

² Per *Mahmood A Khan in Muhammad Saleh & Another vs. Muhammad Amin & Others* reported as 2021 YLR Note-23.

³ 100. (l) Save where otherwise expressly provided- in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court on any of the following grounds, namely:

(a) the decision being contrary to law or to some usage having the force of law;
(b) the decision having failed to determine some material issue of law or usage having the force of law;
(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

⁴ 101. No second appeal shall lie except on the grounds mentioned in section 100.

⁵ Per *Shahid Waheed J in Muhammad Munir vs. Umar Hayat* reported as 2023 SCMR 1339; Per *Syed Mansoor Ali Shah J in Pak Suzuki Motors vs. Faisal Jameel* reported as 2023 SCMR 482; Per *Ijaz ul Ahsan J in Muhammad Yaqoob vs. Sardaran Bibi* reported as PLD 2020 Supreme Court 338;

⁶ Per *Gulzar Ahmed J in Essa Engineering vs. PTCL* reported as 2014 SCMR 922.

⁷ Per *Jawwad S Khawaja J in Wasiuddin vs. Fakhira Akhtar* reported as 2011 SCMR 1550. Per *Faqir Muhammad Khokhar J in Abdul Haque vs. Shaukat Ali* reported as 2003 SCMR 74.

⁸ Article 175(2) No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.

Supreme Court, Article 187⁹ contemplates a concept of *complete justice* that provides *inter alia* for molding of relief sanguine to the circumstances¹⁰. In the context of civil proceedings the concept of molding relief is read from Order VII Rule 7 C.P.C¹¹, however, the same does not empower the court to override the law¹². In the present circumstances, the suit was filed by the present appellant and certainly there is no case for an enhancement having been sought in the plaint. There is no case set forth to suggest any counter claim before the trial court, hence, the issue of enhancement is completely alien to the pleadings. The law, as cited supra, disapproves of issues / evidence beyond pleadings, however, without prejudice thereto no issue was framed or evidence led to justify and / or quantify any enhancement to the consideration. Therefore, the present circumstances could not be demonstrated to befall within the remit of the concept of molding relief. It also merits observing that at no stage does the trial court judgment qualify its findings as molded relief.

The enhancement of consideration undertaken by the trial court could not be sustained before the appellate court and this court records its concurrence with the said findings. The authority relied upon the appellant's learned counsel does not augment the appellant's case as *Muhammad Siddique* contemplates the Constitutional power of the Supreme Court to mold relief per Article 187 of the Constitution and *admittedly* such powers were never available to the trial court. *Muhammad Saleh*¹³ is a judgment of a learned Single Bench of this Court in exercise of revisionary powers per section 115 of the C.P.C; such powers were never available to the trial court. Notwithstanding the non-binding nature of the authority, the judgment appears to have been rendered upon the peculiar facts and circumstances, mutually exclusive herewith, and no persuasive exposition of law arising therefrom could be identified by the appellant's learned counsel.

A second appeal does not ordinarily disturb findings of fact¹⁴ supported by evidence on record¹⁵, however, it is well within this Court's remit to examine whether there exists proper material to support the findings¹⁶. Section 103 CPC duly empowers this Court, if the evidence on the record is sufficient, to determine any issue of fact necessary for the disposal of the appeal, which has not been determined by the lower appellate Court or which has been wrongly determined by such Court; by reason of any illegality, omission, error or defect. No infirmity could be identified in the impugned judgment, especially warranting interference per section 100 C.P.C, and the point framed for determination supra is answered in the negative, in favour of the respondent and against the applicant.

A second appeal may only lie if a decision is demonstrated to be contrary to the law; a decision having been failed to determine some material issues; and / or a substantial error in the procedure is pointed out. It is categorically observed that none of the aforesaid ingredients have been identified by the appellant's learned counsel. In such regard it is also

⁹ Subject to clause (2) of Article 175, the Supreme Court shall have power to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it...

¹⁰ Per *Muhammad Ali Mazhar J in Sohail Ahmed vs. Pakistan* reported as 2023 SCMR 1387.

¹¹ Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement.

¹² Per *Yahya Afridi J in Muhammad Farooq vs. Javed Khan* reported as PLD 2022 Supreme Court 73.

¹³ Per *Mahmood A Khan in Muhammad Saleh & Another vs. Muhammad Amin & Others* reported as 2021 YLR Note-23.

¹⁴ PLD 1969 Supreme Court 617; 2015 MLD 1605.

¹⁵ PLD 2007 Supreme Court 27; 1986 SCMR 1814; 2012 MLD 1697; 1988 MLD 937.

¹⁶ 2004 SCMR 1342.

important to advert to section 101 of CPC, which provides that no appeal shall lie except on the grounds mentioned in the Section 100 of CPC. It is the deliberation view of this Court that no case has been set forth to entertain the present appeal in view of the reasoning stated above. As a consequence hereof this appeal is hereby dismissed along with pending application. The office is directed to communicate a copy hereof to the appellate court.

Judge

Ahmed/Pa,