

IN THE HIGH COURT OF SINDH AT KARACHI

IIInd Appeal No. 217 of 2022

[Saud Anjum Qaziv.....Muhammad Qasim & others]

Date of Hearing : 26.01.2023
Appellant through : Appellant in person.
Respondent through : Ms. Shamim Oalia, Advocate for Respondent No.1.
Mr. Pervaiz Ahmed Mastoi, AAG.
Ms. Sania Zubair, Advocate.

J U D G M E N T

Zulfiqar Ahmad Khan, J:- This Second Appeal moved under Section 100 of the Code of Civil Procedure, 1908 assails concurrent findings of the learned trial Court dated 01.12.2021 as well as those of the first Appellate Court dated 02.11.2022 which are against the appellant.

2. Pithily the facts of the case at hand is that the appellant filed a suit for declaration, possession, specific performance of contract, permanent injunction & mesne profit alleging that he purchased a flat No.C1-201, 2nd Floor, SR-2, Hammad Terrace, Sector-4/A, Surjani Town, Karachi against consideration of Rs.8,50,000/- on 26.11.2013. On 18.07.2017 he also purchased shop bearing No.4 Ground Floor, Hammad Terrace Sector 4/A, Surjani Town, Karachi in the sum of Rs.16,00,000/- (the flat and the shop will be collectively referred to as subject properties), out of them he paid Rs.800,000/- and remaining Rs.800,000/- was to be paid at the time of execution of sub-lease and handing over the possession within one year and in case of failure, respondent No.1 was to refund the amount alongwith penalty in the like amount to the appellant. The grievance of the appellant is that he requested the respondents for the transfer of the

subject properties in his name but they kept the appellant on hollow hopes and failed to execute the ownership documents in his favour, aggrieved with the said conduct of the respondent, appellant filed a suit which was dismissed by the learned trial Court dated 01.12.2021 after that the appellant impugned the said findings of the learned trial Court before the First Appellate Court by filing Civil Appeal No.11 of 2022 but the appeal also met the same result and the said appeal of the appellant was dismissed vide judgment dated 02.11.2022, hence this second appeal against the concurrent findings.

3. Appellant in person submitted that he purchased the subject properties through sale agreement and he has proper payment receipts in his possession and the same were produced before the Courts below but the same were not considered. He further submitted that his entire livelihood is on stake and despite paying consideration, he is out of ownership rights, therefore, the concurrent findings be set aside and his suit be decreed as prayed.

4. Respondents rest their claim inter alia on the grounds that the learned trial Court having adduced the evidence of the appellant came to the conclusion that the sale agreement on the basis of which the appellant is claiming to have purchased the subject properties, is forged and fictitious and having perused the entire record produced by the parties, the learned trial Court dismissed the suit of the appellant as well as the learned Appellate Court upheld the judgment and decree of the learned trial Court, therefore, the concurrent findings cannot be set aside.

5. I have heard the respective learned counsel and have also considered the record to which my surveillance was solicited. It is

considered pertinent to initiate this deliberation by referring to the settled law in such regard. To start with, it is common knowledge that right to file Second Appeal provided under section 100 of CPC, which can be set into motion only when the decision is contrary to law; failure to determine some material issue of law, and substantial error or defect in the procedure provided by the Code or law.

6. The appellant's entire case was premised on the argument that he entered into a sell agreement with respondents for purchasing the subject properties, however, the respondents candidly and unequivocally denied to have signed the sale agreement or ever sold out the subject properties. Therefore, the said agreement was required to be proved as mandated by Article 79 of the Qanun-e-Shahadat Order, 1984. If precedent is required for this trite contention, reference may be made to the decision in the case of *Nazir Ahmed v Muzaffar Hussain* (2008 SCMR 1639) which held, that *in case of denial of execution of document, the party relying on such document must prove its execution in accordance with the modes of proof as laid down in Qanun-e-Shahadat Order, 1984 and the party is required to observe rule of production of best evidence.* The Hon'ble Supreme Court recently in the case of *Sheikh Muhammad Muneer v. Mst. Feezan* (PLD 2021 S.C. 538) held the similar principle and would be conducive to reproduce the relevant excerpt which is delineated hereunder:-

“Where the purported seller denied the execution of the agreement and denied agreeing to sell his/her immoveable property, the said agreement was required to be proved by the party relying on the same as mandated by Art.79 of the Qanun-e-Shahadat, 1984.”

7. Perusal of record shows that the alleged sale agreement was produced at the time of recording evidence and the same has been exhibited, however, mere exhibiting the agreement is not ipso fact proof of its execution. Furthermore, there was no evidence that the payment of sale consideration of the subject property as mentioned in the sale agreement had ever been paid in the presence of the witnesses. The learned trial Court in its Judgment (*at page 12*) discussed the testimony of the appellant and it would be pertinent to reproduce the relevant excerpt of the testimony of the appellant which is delineated hereunder:-

“The plaintiff has admitted in his cross that the contents of his affidavit in evidence does not show as to whom he has given sale consideration amount and it does not show the name of any witness of sale agreement. He further admitted that he has not produced any booking receipt or any documentary proof to show about it. PW Faisal Ahmed deposited that he is not a witness of said sale agreement. He further admitted that the contents of his affidavit in evidence does not show about the date, time and place where alleged sale agreement was executed. He also admitted that the contents of his affidavit in evidence does not show that payment of sale consideration amount in respect of subject property was made in his presence.”

8. It is gleaned from appraisal of the foregoing that the appellant admitted that he could not produce any booking receipt or any documentary proof to show that he purchased the subject properties. It further unfurls from the above excerpt that appellant admitted that it does not emerges from his affidavit in evidence that to whom he has paid the sale consideration as well as the witness (PW Faisal Ahmed) cited and produced by him in his presence admitted that he is not the witness of the sale agreement. Object of producing witnesses under Art.79 of the Qanun-e-Shahadat, 1984 is

twofold, i.e. firstly, to make the document usable and admissible as evidence and secondly, to prove the execution of document. It is an admitted position that Court should not accept blindfold presence of the attesting witnesses as proof of the existence and execution of the contested documents.

9. PW Faisal Ahmed produced by the appellant before the learned Trial Court was neither the attesting witness of the sale agreement nor he acknowledged to have signed the said sale agreement, even he went on to admit that consideration of the subject properties was not made in his presence. A scribe may be an attesting witness provided the agreement itself mentions/nominates him as such. The agreement mentioned two attesting witnesses by name and the PW Faisal Ahmed produced by the appellant before the learned Trial Court was not one of them. In the case of *Tassaduq Hussain v Muhammad Din* (PLD 2011 S.C. 241) the Hon'ble Supreme Court had held that:

“Therefore, in my considered view a scribe of a document can only be a competent witness in terms of Article 17 and 79 of the Qanun-e-Shahadat Order, 1984 if he has fixed his signature as an attesting witness of the document and not otherwise; his signing the document in the capacity of a writer does not fulfill and meet the mandatory requirement of attestation by him separately, however, he may be examined by the concerned party for the corroboration of the evidence of the marginal witnesses, or in the eventuality those are conceived by Article 79 itself not as a substitute.”

10. To state that the PW Faisal Ahmed was an attesting witness is contrary to the contents of the said agreement. The question of the requisite number of witnesses to prove the execution of a document and the role of a scribe may also be considered from the perspective

of Article 17 of the Qanun-eShahadat, which is reproduced hereunder:

17. Competence and number of witnesses. (1) The competence of a person to testify, and the number of witnesses required in any case shall be determined in accordance with the injunctions of Islam as laid down in the Holy Qur'an and Sunnah:

(2) Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law, -

(a) in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men or one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly; and

(b) in all other matters, the Court may accept, or act on the testimony of one man or one woman or such other evidence as the circumstances of the case may warrant.

11. It is well settled that the Trial Court (Senior Civil Judge) was the fact finding authority and the learned trial Court framed approximately 12 issues which were answered against the appellant. The First Appellate Court have also examined the record and proceedings. The purpose of appellate jurisdiction is to reappraise and reevaluate the judgments and orders passed by the lower forum in order to examine whether any error has been committed by the lower court on the facts and/or law, and it also requires the appreciation of evidence led by the parties for applying its weightage in the final verdict. It is the province of the Appellate Court to re-weigh the evidence or make an attempt to judge the credibility of witnesses. The learned First Appellate Court having examined the entire record and proceedings made available to it went on dismiss the First Appeal filed by the appellant and held that appellant herein

failed to establish the execution of the sale agreement and payments of the sale consideration. It is considered expedient to reproduce the pertinent excerpt of the impugned Judgment hereunder:-

“Saud Anjum produced agreement dated: 18.7.2014 as Ex P/6, and from perusal of the same it appears that in the same Asad Khan and Khizar Hayat are shown as witnesses but appellant failed to examine them. The burden to prove the execution of sale agreement by the Muhammad Qasim was upon the appellant. For proving the execution of agreements, it was essential that two attesting witnesses should appear before the Court and state that the agreement was executed by the executant in their presence and that they identified the signatures of Muhammad Qasim. The appellant also failed to examine the stamp vendor and scribe of such agreement. It pertinent to mention here that from perusal of the sale agreement it appears that the stamp paper was not purchased by appellant but the same was issued in the name of Zafarullah Junejo Advocate. The appellant also failed to examine Zafar Ullah Jenejo Advocate in support of execution of sale agreement. In these circumstances, the possession of the Saud Anjum on the suit property is illegal.”

Saud Anjum claimed that he purchased flat bearing No.C1-201, second floor and shop bearing No.4, constructed on plot of Muhammad Qasim but Saud Anjum failed to examine witnesses in whose presence Muhammad Qasim sold the same to him although it was mandatory for the Saud Anjum to prove the sale agreement and payment in respect of the suit property. Saud Anjum has produced receipt of payment but in the same the signature of Muhammad Qasim are not available and address is mentioned as SB-10, sector 4-B, Surjani Town, Karachi. In the plaint as well as in the evidence of Saud Anjum he has not disclosed the name of person who was authorized by Muhammad Qasim in respect of collecting the sale consideration amount on his behalf.

The outcome of the discussion made hereinabove is that the judgment & Decree of the trial Court is proper and legal and requires no interference. The instant appeal is dismissed with no order as to cost.

12. To me, the concurrent findings are based upon the correct appreciation of law as well as on fact. When the findings are based on mis-reading or non-reading of evidence, and in case the order of the lower fora is found to be arbitrary, perverse, or in violation of law or evidence, This Court while exercising jurisdiction under Section 100 C.P.C. can exercise its jurisdiction as a corrective measure. If the error is so glaring and patent that it may not be acceptable, then in such an eventuality the High Court can interfere when the finding is based on insufficient evidence, misreading of evidence, non-consideration of material evidence, erroneous assumption of fact, patent errors of law, consideration of inadmissible evidence, excess or abuse of jurisdiction, arbitrary exercise of power and where an unreasonable view on evidence has been taken. No such avenues are open in this case as both the judgments are well jacketed in law. It has been held time and again by the Apex Court that findings concurrently recorded by the courts below cannot be disturbed until and unless a case of non-reading or misreading of evidence is made out or gross illegality is shown to have been committed.¹

13. In light of the above discussion, the instant IInd Appeal is dismissed alongwith pending applications.

Karachi
Dated:26.01.2023

JUDGE

Aadil Arab

¹ Farhan Farooq v. Salma Mahmood (2022 YLR 638), Muhammad Lehrasab Khan v. Mst. Aqeel un Nisa (2001 SCMR 338), Mrs. Samina Zaheer Abbas v. Hassan S. Akhtar (2014 YLR 2331), Syed Shariq Zafar v. Federation of Pakistan & others (2016 PLC (C.S) 1069).