

# IN THE HIGH COURT OF SINDH AT KARACHI

IIInd Appeal No. 38 of 2016

[Abdul Rauf Khan .....v..... Saleem Saba]

Date of Hearing : 25.01.2023  
Appellant through : Mr. Muhammad Aziz Khan, Advocate.  
Respondent through : Mr. Naseem Akhtar Dogar, 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 is directed against the Judgment dated 09.03.2016 & Decree dated 17.03.2016 passed by the learned First Appellate Court (District Judge Karachi South) in Civil Appeal No.63 of 2005 (“Civil Appeal”), whereby, the appeal was dismissed.

2. The instant case has chequered history. The appellant is standing at this forum third time. Chronologically, a Judgment dated 06.12.2008 in the Civil Appeal was passed by the learned First Appellate Court which was impugned by the appellant in this Court by filing IIInd Appeal No.01 of 2009, however, having heard the parties this Court remanded matter for decision afresh vide judgment dated 11.03.2009. The learned First Appellate Court in the said Civil Appeal having heard the parties and scanning the record & proceedings again dismissed the Civil Appeal vide Judgment dated 26.01.2010 followed by Decree dated 28.01.2010. Interestingly, the appellant again impugned the said Judgment and Decree before this Court by filing IIInd Appeal No. 10 of 2010 whereupon this Court having heard the respective counsel, remanded the matter back and forth to the learned First Appellate Court vide judgment dated 25.08.2015 with

directions to pass a denovo judgment. The said Civil Appeal again taken up for rehearing and reappraising of the evidence and material too available in the R&Ps by the learned First Appellate Court and the learned First Appellate Court having perused and scanned the material again dismissed the Civil Appeal vide Judgment dated 09.03.2016 followed by Decree dated 17.03.2016 (“Impugned Judgment & Decree”). The appellant again before this Court and impugned the Judgment & Decree through this second appeal.

3. The pith and substance of the lis at hand is that appellant vide sale agreement dated 02.05.1990 purchased three floors (5<sup>th</sup> to top) measuring 42 x 64 sq. ft. constructed on plot No. MR-7 60/2 Market Quarters, Weaver Lane, Bolton Market, Karachi (“subject property”) for total sale consideration of Rs.1600,000/- and at the time of execution of the sale agreement, the appellant made payment of an amount of Rs.800,000/-. Akin to the appellant, possession of the subject property was handed out to him and having obtained the possession, he established a Hotel & Restaurant in the name and style of Aryana Hotel consisting of 40 rooms. Appellant alleged that per clause 6 of the sale agreement, he had to make payment of balance consideration of Rs.700,000/- by 31.03.1991 which he failed to do so, however, he made the said payment to the respondent on 01.02.1992 against the acknowledgment receipt. Appellant asserted that he is ready to pay the balance amount of Rs.100,000/- to the respondent but he is avoiding and instead of executing the sale deed, respondent filed a rent case for ejection of the subject property and on the other hand, the appellant a suit No.930 of 2003 for specific performance against the respondent and after recording the evidence

the learned Trial Court decreed the suit vide Judgment & Decree dated 03.03.2005. On the appeal filed by the respondent, the Appellate Court reversed the findings of the learned trial Court and set aside the Judgment and Decree recorded by the learned Trial Court.

4. Mr. Muhammad Aziz Khan, Advocated the case of the appellant stating that learned Trial Court is the fact finding authority where all issues have been adjudicated upon and having examined the material the trial Court decreed the suit of the appellant and such findings are according to law as well as based upon proper appreciation of the evidence. He next contended that it had been proved to the hilt that sale agreement was executed and sale consideration had also made to the respondent but the respondent is adamant not to execute the sale deed in favour of the appellant.

5. Contrariwise, Mr. Naseem Akhtar Dogar, Advocated the case of the respondent stated that the sale agreement is concocted and fictitious document which was not proved during the trial. He further contended that appeal is a continuation of the suit where the learned First Appellate Court having read the entire evidence and record came to the conclusion that the findings recorded by the learned trial Court based upon misreading and nonreading of evidence, thereafter, the learned First Appellate Court set aside the findings of the trial Court thrice. While concluding his submissions, he contended that the appellant is bent upon to drag the respondent into false and frivolous litigation more particularly when the First Appellate Court reached to the conclusion three times that the sale agreement is a false

document, therefore, the appeal must be dismissed with compensatory cost.

6. 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. In the case of **Madan Gopal vs. Maran Bepari (PLD 1969 SC 617)**, the Hon'ble Supreme Court held that if the finding of fact reached by the first Appellate Court is at variance with that of Trial Court, such a finding by the lower Appellate Court will be immune from interference in second appeal only if it is found to be substantiated by evidence on the record and is supported by logical reasoning, duly taking note of the reasons adduced by the first Appellate Court.

7. The appellant's entire case was premised on the argument that he entered into a sell agreement with respondent for purchasing the subject property, however, the respondent candidly and unequivocally denied to have signed the sale agreement or ever sold out the subject property. 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 immovable 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.”

8. Perusal of record it furls that the alleged sale agreement was produced at the time of recording evidence and the same has been exhibited, however, mere exhibiting and admissibility of sale 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 through banking channel as all payments are said to have been made in cash. The appellant produced two witnesses in his favour who are also scribes as witnesses of the sale agreement. The learned Appellate Court in the Impugned Judgment discussed the testimonies of the said two witnesses who were at variance each other as one witness Hayatullah Khan Kakar during evidence stated that he does not know Muhammad Naseem who happens to be the second attesting witness of the sale agreement. The witness further went on to disclose that the money transaction was not taken place in his presence as well as they further introduced on record that the respondent/owner of the subject property never signed the sale

agreement in his favour. Object of producing witnesses under Art.79 of the Qanun-e-Shahadat, 1984 was two fold, i.e. firstly, to make the document usable and admissible as evidence and secondly, to prove the execution of document. Court should not accept blindfold presence of the attesting witnesses as proof of the existence and execution of the contested documents.

9. I have had the opportunity to examine carefully the sale agreement and the payment receipts which clearly showed that signature of the seller as well as that of the Judge differ from page to page. Qanun-e-Shahadat, 1984 empowers a Judge to examine a document and hold a view as to genuineness of signatures. To me, having seen hundreds of such documents, it is clear that the signatures are faked. While a scantily is attempted to be given by having the sale agreement stamped by the seal of the Court of District Judge South but one fails to understand why a Judge in his personal capacity would place his stamp on a private agreement and it is also a fact that the said Judge was not produced in the Court for examination.

10. 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:-

**“30. In the light of the above discussion, I am of the opinion that the respondent/plaintiff has failed to establish the execution of agreement to sell dated 02.05.1990 (Ex.P/1) and payments of sale consideration mentioned in Ex.P/2 & P/3. The points are answered accordingly.**

Point No.3

31. The burden to prove this point is on the respondent/plaintiff to establish that he was delivered the possession of the property in question as a part performance of the agreement to sell dated 02.5.1990 (Ex.P/1). The respondent/plaintiff has relied upon the sale agreement and so also the evidence of the attesting witnesses of the said agreement. **The validity and genuineness of the sale agreement including the credibility of the evidence has been discussed in detail in the findings of points No.1 & 2 and held that the facts of the execution of the agreement to sell (Ex.P/1) and payments of sale consideration under Ex.P/2) & P/3 have not been proved accordingly.**

32. It has been discovered from the evidence that the disputed property consisting upon 40 rooms, **but the same is not mentioned in the agreement to sell, no valid & reliable documentary evidence has been produced to establish that the possession of the property in suit had been delivered to the respondent/plaintiff as a part performance of the agreement to sell on the day of its execution i.e. 02.5.1990. The respondent/plaintiff has not examined any adjoining owner or occupant of the same building to say and establish that the respondent/plaintiff came in possession of the property in suit on the day of the execution of sale agreement. In absence of the tangible and credible evidence, it cannot be said and accepted that the respondent/plaintiff came in possession of the property as a part performance of the agreement to sell.**

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*35. In the result of the findings on points No.1 to 5, I am of the humble view that the respondent/plaintiff has failed to prove the execution sale agreement dated 02.5.1990, payment of sale consideration mentioned Ex.P/2 dated 02.5.1990 and Ex.P/3 dated 02.5.1990 so also delivery of possession of property in question as a part performance of the said agreement, hence he is not entitled for a relief of Specific Performance of Contract as claimed. The appeal in hand stands allowed, the impugned judgment & decree dated 03.2.2005 stands set aside and suit No.930/2003 (Old No.539/1992) of the respondent/plaintiff is dismissed. There is no order as to costs.”*

11. To me, the findings of the learned First Appellate are based upon the correct appreciation of law as well as on fact. In the case of **Madan Gopal vs. Maran Bepari (PLD 1969 SC 617)**, the Hon’ble Supreme Court held that if the finding of fact reached by the first Appellate Court is at variance with that of Trial Court, such a finding by the lower Appellate Court will be immune from interference in second appeal only if it is found to be substantiated by evidence on the record and is supported by logical reasoning, duly taking note of the reasons adduced by the first Appellate Court.

12. In light of the above discussion, the instant IInd Appeal is dismissed with cost of Rs.50,000/- and let proceedings for perjury be instituted against the appellant at the appropriate forum.

Karachi  
Dated:25.01.2023

JUDGE

Aadil Arab