

# IN THE HIGH COURT OF SINDH AT KARACHI

IIInd Appeal No. 22 of 2020

[Syed Mazhar Ali Jafri .....v.....Abdul Razzaq & others]

Date of Hearing : 22.02.2023  
Appellant through : Mr. Muhammad Aqil Zaidi, Advocate.  
Respondent through : Ms. Uzma Abbas, Advocate for Respondent No.1.

## 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 15.02.2018 as well as those of the first Appellate Court dated 10.01.2020 which are against the appellant.

2. Pithily, the facts of the case at hand is that the appellant entered into an agreement to sell dated 14.09.2015 with respondent No.1 to sell out a quarter constructed on plot No.80, Block No.6, measuring 43.33 sq. yrds Liaqatabad, Karachi (“said quarter”) against a sale consideration of Rs.27,50,000/-. It is alleged by the appellant that the respondent No.1 paid a sum of Rs.500,000/- as an earnest money however, the remaining balance sale consideration was to be paid on or before 15.02.2016 to which the respondent No.1 failed to pay on time, thereafter, he through a notice dated 20.02.2016 informed the respondent No.1 that as per the agreement the respondent ought to pay the remaining balance sale consideration on 15.02.2016 which he failed to do so, hence the earnest money forfeited, thereafter, the respondent No.1 filed a suit for specific performance of contract before the learned trial Court which was decreed vide judgment dated 15.02.2018. The appellant impugned

the said judgment & decree before the learned First Appellate Court by filing Civil Appeal No.38/2018 which appeal was dismissed vide judgment dated 10.01.2020, hence this second appeal against the concurrent findings.

3. The crux of arguments of the appellant is that the respondent No.1 failed to honour his promise as well as terms and consideration of the sale agreement as he deliberately failed to deposit the remaining sale consideration as per clause 2 of the sale agreement, therefore, respondent No.1 is not entitled for any relief.

4. In contrast, learned counsel for the respondent No.1 submitted that the respondent No.1 in order to fulfill his obligation sent a pay order before the fixed date of completion of the contract but the appellant deliberately did not receive the same as well as the respondent No.1 personally also visited the residence of the appellant to tender the pay order of the balance sale consideration but the appellant had not received the same. While concluding her submission, learned counsel argued that the concurrent findings are in favour of the respondent No.1 which cannot be disturbed.

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 the time was the essence of the contract as the respondent No.1 had to pay the remaining balance sale consideration on 15.02.2016 but he failed to do so, however, the respondent No.1 premised his case on the argument that the appellant has admitted the sale transaction as well as receiving of earnest money of the said quarter. I have gone through the evidence of the appellant as well as respondent No.1. The appellant has relied upon the legal notice dated 16.02.2016 which is reported to have communicated to the respondent No.1 after expiry of maturity period, however, the appellant failed to produce supporting courier receipt of such date, however, the receipt produced by the appellant is dated 22.02.2016 (issued by Perfect Courier Service) which is much after the date of maturity date of completion of contract. On the other hand, the respondent No.1 introduced on record during examination in chief a pay order dated 10.02.2016 which was also exhibited before the learned Trial Court and a communication addressed to the appellant as Exh. P/6 alongwith TCS receipts suggesting that such notice was received by the appellant on 12.02.2016 which is much prior to the date (i.e. 15.02.2016) for completion of contract. The learned trial Court being a fact finding authority having appreciated the entire facts as well as documentary/oral evidence decreed the suit of the respondent No.1 and negated the claim of the appellant. It is considered expedient to highlight the relevant excerpt of the Judgment of the learned trial Court which is delineated hereunder:-

*“However, plaintiff has admitted that he has not produced delivery report of receiving of first notice dated 11.02.2016 through he has produced courier receipt of the notice Exh. P/6 in respect thereof report was also called from the TCS department*

which disclosed that such notice was received by the consignee on 12.02.2016 which was prior to stipulated period 15.02.2016 moreover it is also admitted fact through bank document that plaintiff got pay order of twenty lacs rupees on 10.02.2016 all such facts are sufficient to prove that plaintiff was ready and was willing to perform his contractual obligations in time or before. So therefore, defense plea that plaintiff was remained silent till expiry of stipulated time does not existed. It is also surprise to point out that defendant No.1 has relied upon legal notice dated 16.02.2016 allegedly given to the plaintiff after expiry of maturity period but during evidence defendant No.1 himself failed to produced supporting courier receipt of such date contrary place on record both courier receipt which were issued Perfect Courier Service on 22.02.2016 which documentary evidence negates the version of defendant No.1. Therefore, I have concluded that plaintiff has discharged the obligations arose from the clause 2 of agreement hence issue decided in affirmative”.

7. It is gleaned from appraisal of the foregoing that the respondent No.1 tendered a pay order of balance sale consideration to the appellant on 10.02.2016 to which the appellant avoided to receive which was prior to the completion of date of the contract. The respondent No.1 so as to fulfill his obligation and to show his readiness and willing also addressed communication dated 11.02.2016 TCS receipt dated 12.02.2016 was also exhibited as Exh. P/6 informing the appellant to receive the balance sale consideration but that too was avoided by the respondent No.1 as discussed by the learned trial Court as well as First Appellate Court.

8. Counsel for the appellant constantly pressed that the time was essence of the contract and respondent committed wilful default to pay the balance sale consideration. In relation to contracts of immovable property, the rule is that time ordinarily is not the essence, which shows that suitor did not commit any fault while performing his part of contract and merely mentioning a specific date for performance of contract would not make time the essence of

contract, hence, time could not be treated to be essence of the contract, therefore, Section 55 of the Contract Act would not give any force in the instant matter. I have discussed the similar principle in a reported case of Muhammad Bachal v. Muhammad Arif Memon (2019 YLR 1040) and it is considered pertinent to reproduce the relevant excerpt of that verdict which is delineated hereunder:-

“7. At the very outset, it is evident that though execution of the agreement is an admitted fact and it is settled principle of law that a fact admitted needs no proof, yet the same is not a registered document, thus, protection granted under Section 16 of Registration Act, is not amenable to it. Clause-7 of the sale agreement discloses that appellant was bound to obtain Sale Certificate and with regard to said clause, appellant pleaded that he moved application to Mukhtiarkar for issuance of sale certificate yet no such record is brought on record to show that appellant attempted to obtain Sale Certificate to discharge his contractual obligation. I have gone through the evidence of the appellant available at Ex.87 wherein he deposed that he did not receive any Sale Certificate from the concerned Mukhtiarkar. I in fact called for the Mukhtiarkar in my Court with record, who confirmed that not even any application for obtaining Sale Certificate was filed by the appellant, which gives reasons to believe that the appellant (seller) had no intention to seek the Sale Certificate. To the contrary, it is proved on the part of the respondent that he was operating a bank account and he deposited the balance sale consideration before the trial Court, which also establishes that he was willing and ever ready to perform his part of agreement. It is an admitted fact that appellant got published a notice in the newspaper dated 14.02.2006, yet appellant had not clarified in the said publication that he has obtained Sale Certificate from the concerned Mukhitarkar being his contractual duty, which shows that he was not at fault to perform part of agreement. Counsel for the appellant constantly pressed that the time was essence of the contract and respondent committed wilful default to pay the balance sale consideration. At this point of juncture, I draw my attention to the case law reported at 2015 SCMR 21 (d) where Apex Court held that in relation to contracts of immoveable property, the rule is that time ordinarily is not the essence, which shows that suitor did not commit any fault while performing his part of contract and merely mentioning a specific date for performance of contract would not make time the essence of contract, hence, time could not be treated to be essence of the contract, therefore, Section 55 of the

**Contract Act would not give any force in the instant matter.”**

9. It is well settled that the Trial Court (Senior Civil Judge) was the fact finding authority and the learned trial Court framed approximately 08 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

10. 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.<sup>1</sup>

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

Karachi  
Dated:22.02.2023

JUDGE

Aadil Arab

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<sup>1</sup> Farhan Farooq v. Salma Mahmood (2022 YLR 638), Muhammad Lehasab 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).