

IN THE HIGH COURT OF SINDH AT KARACHI

IIInd Appeal No. 17 of 2016

[Mst. Yasmin Banov..... Haji Muhammad @ Haji Muhammad Hussain & others]

Date of Hearing : 08.03.2023
Appellant through : Mr. Ahmed Nawaz, Advocate.
Respondents through : Mr. Muhammad Shahid, 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 21.10.2015 & Decree dated 28.10.2015 (“Impugned Judgment & Decree”) passed by the learned First Appellate Court (IV Additional District Judge West, Karachi) in Civil Appeal No.249 of 2013 (“Civil Appeal”), whereby, the appeal was allowed.

2. Precise facts of the case are that the appellant filed a suit for specific performance, injunction, declaration, & mesne profit against the respondents alleging therein that she purchased a house No.1729/303, Gujrat Colony, Baldia Town, Karachi (“subject house”) for a total sale consideration of Rs.700,000/- from respondent No.1. It is claimed by the appellant that despite paying full consideration of the subject house, the lease documents are not being executed in her favour, however, the respondent No.1 during his life time undertook to execute the sale deed in her favour but soon after the death of respondent No.1, his legal heirs are not fulfilling the performance of the respondent No.1 having received the full sale consideration of the subject house, thereafter, having aggrieved with the conduct of the legal heirs of respondent No.1, the appellant filed a suit which was decreed vide Judgment dated 21.11.2013 & Decree dated 26.11.2013.

The respondent No.1 impugned by the Judgment & Decree of the learned trial Court by filing Civil Appeal No.249/2013 and that the learned First Appellate Court having observed and pros and cons reversed the findings of the learned trial Court through impugned Judgment & Decree, hence the appellant before this Court under the provision of Section 100 CPC being second appeal.

3. Mr. Ahmed Nawaz, Advocate set forth the stance of the appellant stating that appellant is bona fide purchaser of the subject house and through written document dated 02.01.2001 which in handwritten the respondent No.1 sold out the subject house to the appellant having obtained the entire consideration being Rs.700,000/- and that the respondent No.1 in the said written document (available at page 43 of the Court's file) undertook that as soon as he gets well, he would execute lease deed in favour of the appellant but unfortunately the respondent No.1 died. He emphatically contended that the legal heirs of the respondent No.1 despite receiving the entire consideration are avoiding to execute the lease deed in favour of appellant and it is poignant to state that the legal heirs of respondent No.1 having obtained the letter of administration are also not executing the lease deed in favour of the appellant and bent upon the usurp the subject house as well as consideration paid by the appellant to the respondent No.1. While concluding his submissions, learned counsel for the appellant introduced on record that learned trial Court having framed the necessary issues passed the Judgment & Decree which is in accordance with law but the learned First Appellate Court interfered

in the findings of the learned trial Court through impugned Judgment & Decree which be set aside by this Court.

4. In opposition to the above submissions, learned counsel for the respondent argued that the appellant could not produce any single receipt of payment of sale consideration which was admitted by the appellant during course of evidence. The learned First Appellate Court reached to the right conclusion that the suit filed by the appellant was time barred and that the learned First Appellate Court passed the impugned Judgment & Decree which is based upon the correct appreciation of law as well as evidence and does not require any interference by this Court.

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. 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. I have heard the learned counsel for the parties and scanned the available record. It is lucidly manifesting from the record that the agreement/handwritten document was executed on 02.01.2001, whereas, the suit for specific performance was filed on 03.05.2006 after the delay of more than two years.

8. At the onset, I would like to advert to the question of limitation. It is precisely demonstrable and conspicuous that Article 113 of Limitation of Act, 1908 has two tentacles. In the first fragment, the right to sue mounts up within three years if the date is specifically fixed for performance in the agreement itself whereas in its posterior constituent, the suit for specific performance may be instituted within a period of three years from the date when plaintiff/appellant has noticed that performance has been refused by the vendor. The first part denotes the rigors of its application where the time is of the essence which connotes a particular timeline fixed for the performance by the parties. In this condition, the limitation period will be reckoned from that date and not from date of refusal but if no exact date is predetermined then obviously, the right to sue will accrue from the date of knowledge vis-à-vis the refusal. The intelligence and perspicacity of the law of Limitation does not impart or divulge a right, but it commands an impediment for enforcing an existing right claimed and entreated after lapse of prescribed period of limitation when the claims are dissuaded by efflux of time. The acid test is to get the drift of whether the party has vigilantly set the law in motion for the redress or remained indolent. Under Section 3 of the Limitation Act, the Court is obligated

to advert to the question of limitation¹. Furthermore, the appellant had filed the suit in the year 2006, seeking specific performance of a purported sale agreement dated 02.01.2001, that is, after a period of 06 years. A suit seeking specific performance of a contract is required to be filed within three years, as per Article 113 of the First Schedule to the Limitation Act, 1908²., hence, the learned First Appellate Court rightly observed that the suit of the appellant was barred by time.

9. The learned First Appellate Court examined the case of the appellant on legal as well as factual aspect. The legal aspect of the matter has already been demonstrated supra. 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 to 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 relevant constituent of the impugned Judgment hereunder:-

“7.....It was plaintiff to prove positively that deceased Haji Muhammad had actually sold suit

¹ Per Muhammad Ali Mazhar J. in *Muhammad Iftikhar Abbasi v. Mst. Naheed Begum* (2022 SCMR 1074)

² Per Qazi Faez Issa J. in *Muhammad Afzal Khan v. Muhammad Aslam (Deceased) through Lrs* (2022 SCMR 1275).

property to her. When examined before trial Court the plaintiff deposed that in December 2000 deceased Haji Muhammad expressed his intention to sale the suit property and he he also got such notice published in newspaper. The plaintiff has not deposed that in whose presence deceased expressed his intention to sale the suit property and he also got such notice published in Newspaper. The plaintiff has not deposed that in whose presence deceased expressed such intention. Hoswever, expression of such intention is not amount to proposal for sale or sale agreement. It has also not been deposed by the plaintiff that she asked the deceased vendor that she wanted to purchase the suit property by accepting such proposal. She claim in her evidence that at the time of such disclosure made by deceased to sale suit property she made payment of Rs.2,00,000/- to him as token. It is very strange that why plaintiff paid such amount to deceased Haji Muhammad when there was no sale agreement made between them. During cross-examination she admitted that she has not produced receipt of such amount Rs.2,00,000/- paid by her as advance to deceased owner. The plaintiff further deposed that she purchased the suit property for total sale consideration Rs.7,00,000/- out of which Rs.2,00,000/- were already paid by her in December 2000. As stated above since there was no agreement when plaintiff paid Rs.2,00,000/- without receipt as deceased only expressed his intention to sale the suit property. She again deposed that the remaining amount was arranged by her and on 02.01.2001 hence, she alongwith witnesses Abdul Malik, Mansoor and Tariq Mehmood went to deceased vendor and paid her Rs.5,00,000/- to him in presence of above witnesses as well as Aysha Bai, Muhammad Sohail and Muhammad Hanif were also present. She has also not produced any receipt of payment of this amount Rs.500,000/- with her evidence. She claimed in evidence that deceased handed over all original documents of suit property to her on the same day i.e. 02.01.2001 after receiving such amount. During cross-examination she admitted that in the year 2002 the legal heirs of deceased had filed Succession Petition. At this stange it is not understandable as to how without original papers of suit property that succeszsion petition proceeded and was allowed.

9. It is gleaned from appraisal of the foregoing that there was no agreement or sale agreement between the respondent No.1 and appellant in respect of the subject house. The appellant had failed to produce any receipt with regards payment of sale consideration to

respondent No1. The possession of subject house is in possession of the legal heirs of deceased respondent No.1 who have acquired letter of administration under Succession Act as discussed in the above reproduction. The learned First Appellate Court having examined the pros and cons of the subject *lis* reached to the correct observation that the appellant had failed to prove that deceased respondent No.1 had sold out the subject house to her as well as the appellant failed to discharge the burden of proof and also failed to prove that handwritten document dated 02.01.2001 (available at page 43) is a sale agreement which even does not bear her signature which has been admitted by her during the course of evidence.

10. 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.

11. In light of the above discussion, the instant IInd Appeal is dismissed along with pending applications upholding the Judgment dated 21.10.2015 and Decree dated 28.10.2015 passed in Civil Appeal No.249/2013 by learned IV-Additional District Judge West, Karachi.

Karachi
Dated:08.03.2023

JUDGE