

THE HIGH COURT OF SINDH, KARACHI

Suit No. 1285 of 2004

[Abdul Samad & others v. Haji Nazar & others]

Plaintiffs : Mr. Abdul Samad son of Muhammad Shafi & others through Mr. Asif Ahmed Memon, Advocate.

Defendants : Nemo.

Dates of hearing : 30-11-2023, 11-12-2023 & Re-hearing on 30-07-2024.

Date of decision : 02-08-2024

JUDGMENT

Adnan Iqbal Chaudhry J. - The Plaintiffs are legal heirs of late Muhammad Shafi, and in such capacity they filed this suit for specific performance of a sale agreement for two plots of land entered by their predecessor as purchaser with the Defendant No.8 who was the registered Attorney of the Defendants 1 to 7, the sellers. The Defendant No.9 was subsequently added as party as it claimed to be in possession one of the suit plots as owner.

2. The two plots subject matter of the suit are 2-00 acres in Survey No. 36, Deh Songal, Main Super Highway, Sector 3-B, Scheme No. 33, Karachi [**First Plot**]; and 4-00 acres in Survey No. 36, Deh Songal, Sector 3-B, Scheme No. 33, Karachi [**Second Plot**]. The Plaintiffs pleaded that the sale agreement was evidenced by two receipts dated 04-08-2004 issued by Defendant No.8 to the late Muhammad Shafi upon receiving two cheques of Rs. 500,000/- each against the sale consideration of Rs. 18,876,000/- for the First Plot, and Rs. 18,392,000/- for the Second Plot; that the said buyer and sellers agreed to execute a written sale agreement by 30-09-2004; however, before that, the buyer Muhammad Shafi passed away on 26-08-2004; that though the Defendants 1 to 8 acknowledged the sale agreement, they avoided to perform the same; hence the suit.

3. On 01-12-2004, counsel for the Defendant No.8 submitted before the Court that though his client had already entered into a sale agreement of the suit plots with a third-party, he is nonetheless willing to transfer the suit plots to the Plaintiffs without prejudice to his right to claim damages from them, and provided the Plaintiffs deposit the balance sale consideration and transfer expenses in Court within a month. On that statement, the suit was decreed 'as prayed' and the Plaintiffs were directed to deposit the balance sale consideration and transfer expenses with the Nazir of the Court within one month. But the Plaintiffs did not deposit any amount. Instead, they first moved an application under section 152 CPC for a correction in the order dated 01-12-2004, and then they proceeded to file J.M. No. 04/2005 under section 12(2) CPC for setting-aside the order/decreed dated 01-12-2004 on the ground that they had come to know that the Defendants 1 to 7 had appointed another person as their Attorney in place of the Defendant No.8. On 07-10-2005, J.M. No. 04/2005 was allowed by consent and the suit was revived.

4. On revival of the suit, the Defendant No.8 filed written statement. He pleaded that the late Muhammad Shafi had committed to execute a written sale agreement by 30-09-2004; that a draft was sent to him during his life time, but he did not execute the same as he was not ready with the funds; that after his demise his legal heirs (the Plaintiffs) were aware of the said facts but did not take any step to go through with the transaction because they too did not have ready funds; that since the Plaintiffs failed to deposit the balance sale consideration in Court despite opportunities, the suit for specific performance is liable to be dismissed; and that the Defendants 1 to 8 have rescinded the sale agreement.

5. Upon an inspection of the suit plots ordered by the Court, the Defendant No.9 came forward with an application under Order I Rule 10 CPC and claimed to be in possession of the First Plot as its owner. It was therefore made party to the suit and filed a written statement with supporting documents. The Defendant No.9 pleaded that it was

the actual owner of the First Plot which was allotted to it by the Board of Revenue in the year 1992; that its possession had been verified by the Nazir of the Court also in Suit No. 311/2004; that the predecessor of the Defendants 1 to 7 was never owner of the suit plots; and that entry No. 111/129 in Village Form II in the name of the Defendants 1 to 7 was made illegally, and had been cancelled by the District Officer (Revenue) by a judicial order dated 13-05-2006.

6. The following issues were settled by the Court on 10-08-2010:

1. *Whether the defendants No.1 to 8 had lawfully entered into sale agreement dated 30.9.2004? Its effect ?*
2. *What is location of land mentioned in the sale agreement dated 30.9.2004 ?*
3. *Whether the defendants No.1 to 8 had defrauded the plaintiff and wrongly agreed to sale the suit land to plaintiff's predecessor?*
4. *Whether defendant No.9 has lawfully and bonafide acquired ownership/lease of part of suit land? Its effect ?*
5. *Whether cause of action for the present suit subsists after the order dated 07.11.2005 ?*
6. *Whether the plaintiff is entitled for the relief of specific performance ?*
7. *What should the decree be ?*

7. For the Plaintiffs, evidence was led by the Plaintiff No.2. The Defendants did not turn up to cross-examine him, nor did they lead evidence. Though the order dated 11-10-2018 suggests that the Defendant No.8 had passed away, however, since he was sued only as the Attorney of the Defendants 1 to 7 and had not claimed any separate interest in the suit plots, the cause of action against him did not survive his death in terms of Order XXII Rule 2 CPC.

8. Mr. Asif Memon, learned counsel for the Plaintiffs submitted that since the Defendants did not cross-examine the Plaintiffs' witness and did not lead any evidence, the case of the Plaintiffs had gone

unchallenged and ought to be decreed. Reliance was placed on *Nur Jehan Begum v. Mujtaba Ali Naqvi* (1991 SCMR 2300) and *Muhammad Akhtar v. Mst. Manna* (2001 SCMR 1700).

9. Learned counsel was heard and the evidence was perused with his assistance.

Issues No. 1, 3 and 4:

10. These three issues are overlapping. The underlying question is whether the Defendants 1 to 7 were owners of the suit plots so as to be competent to sell the same to the Plaintiffs ? Therefore, issues No. 1, 3 and 4 are recast accordingly.

11. The Defendant No.9 had alleged that the Defendants 1 to 7 were not owners of the suit plots; and that entry No. 111/129 in Village Form II in the name of Ilyas and then the Defendants 1 to 7 as his successors, had been made unlawfully which was subsequently cancelled by the District Officer (Revenue) by a judicial order dated 13-05-2006. Though the Defendant No.9 did not lead evidence in that regard, the burden had been put on the Plaintiffs to prove that the suit plots vested in the Defendants 1 to 7.

12. To demonstrate that the suit plots were the property of the Defendants 1 to 7, the only evidence produced by the Plaintiffs was the following:

- (a) Exhibits PW-1/6 and PW-1/7, being NOCs for sale of the suit plots, dated 11-06-2004, issued by the Mukhtiarkar Scheme No.33 to the Defendants 1 to 8;
- (b) Exhibit PW 1/8, being Village Form II, bearing entry No. 111/129 which read that 23-7 acres in Survey No. 36, Deh Songal, taluka Scheme No. 33 (where the suit plots were situated) were held by one Ilyas as *qabuli* land (privately owned), which was then mutated to the names of the Defendants 1 to 7 as his legal heirs on 27-03-2004.

13. The note at the end of the examination-in-chief of the Plaintiffs' witness reflects that the aforesaid documents were photocopies. Though notice was given by the Plaintiffs to the Defendant No.8 under Article 77 of the Qanun-e-Shahadat Order, 1984 for producing the originals, that notice was misconceived to the extent of Village Form II, which is prescribed under Rule 72 of the Sindh Land Revenue Rules, 1968 as the register of land used/granted or assigned for non-agricultural purpose, and for which a certified copy can be obtained under Rule 36. Village Form II was thus a public document under Article 85 of the Qanun-e-Shahadat Order. Though clauses (f) and (g) of Article 76 of the Order admits secondary evidence of a public document, the Article further stipulates that "In case (f) or (g), certified copy of the documents, but no other kind of secondary evidence, is admissible." Thus, the only type of secondary evidence admissible of the Village Form II was a certified copy thereof, which was neither produced nor summoned by the Plaintiffs. The photocopy thereof produced as Exhibit PW 1/8 was inadmissible evidence.

14. Even assuming that Exhibit PW 1/8 was admissible evidence, it was for the Plaintiffs to prove that title to the suit plots had vested in Ilyas, the predecessor of the Defendants 1 to 7, and that the mutation entry in favour of the Defendants 1 to 7 was subsisting. That burden of proof was never discharged as the Plaintiffs did not produce or summon the chain of record of rights to show how the suit plots came to vest in Ilyas, and whether the mutation entry in favour of the Defendants 1 to 7 was intact after 2004 and had not been cancelled in 2006 as alleged by the Defendant No.9. Reliance merely on Village Form II of the year 2004 and NOCs for sale issued by the Mukhtiarkar was never enough to prove that the Defendants 1 to 7 held title to suit plots, especially when there was no evidence that the Defendants 1 to 8 were ever in possession of the suit plots. In such circumstances, the case-law cited by learned counsel is of no help. Issues No. 1, 3 and 4

as recast in para 10 above, are answered in the negative against the Plaintiffs.

Issue No.6:

15. It is settled law that for relief for specific performance of an agreement to sell immovable property, the plaintiff/vendee has to demonstrate that he was ready and willing at all times to pay the sale consideration to the defendant/seller as per the sale agreement, failing which such relief is to be declined.¹

16. The receipts dated 04-08-2004 (Exhibits PW 1/4-B and PW 1/3-B) which evidenced the sale agreement between late Muhammad Shafi and the Defendants 1 to 8, had stipulated that the transaction would be formalized by the parties by executing a sale agreement in writing before 30-09-2004. Though Muhammad Shafi passed away before that date, it is the case of the Plaintiffs that as his legal heirs they were always ready and willing to conclude the transaction and to pay the balance sale consideration being Rs. 18,376,000 for the First Plot and Rs. 17,892,000 for the Second Plot (total Rs. 36,268,000). However, the record reflects otherwise.

17. Upon institution of the suit, the Plaintiffs sought a temporary injunction to restrain the Defendants 1 to 8 from creating third-party interest in the suit plots. On 11-11-2004 an interim order to that effect was passed by the Court but on the condition that the Plaintiffs deposit 25% of the balance sale consideration with the Nazir of the Court. That condition was not met by the Plaintiffs who stated before the Court that until Letters of Administration were issued for the estate of late Muhammad Shafi to enable them to access his bank accounts, they were not in a position to make the required deposit. Again, on 01-12-2004, when the suit was first decreed (subsequently set-aside), it was with a direction to the Plaintiffs to deposit the balance sale consideration and expenses of transfer with the Nazir of

¹ *Muhammad Yaqub v. Muhammad Nasrullah Khan* (PLD 1986 SC 497).

the Court within one month. Yet again, the Plaintiffs did not deposit any amount. Instead, they themselves prayed that the order/decree for specific performance may be set-aside (as discussed above).

18. Therefore, during the life of this suit, the Plaintiffs were given an opportunity twice to demonstrate that they were ready and willing to pay the balance sale consideration to the Defendants 1 to 8. On both occasions they declined. Against that, no evidence whatsoever was led by them to show that they were ready, willing and able to pay the balance sale consideration. Therefore, issue No. 6 is answered in the negative against the Plaintiffs.

Issue No.5:

19. Having answered issue No.6 in the negative, issue No.5 becomes redundant.

Issue No.2:

20. Issue No.2 would have been relevant had the Plaintiffs succeeded on the other issues. Having answered those issues against the Plaintiffs, issue No.2 also becomes redundant.

Issue No. 7:

21. Firstly, the Plaintiffs failed to prove that the suit plots vested in the Defendants 1 to 7 for sale. Secondly, the Plaintiffs also did not prove that they were ready and willing to pay the balance sale consideration to perform the sale agreement. Resultantly, the suit is dismissed.

JUDGE

Karachi
Dated: 02-08-2024