

ORDER SHEET

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

R.A. No. 172 of 2009

DATE ORDER WITH SIGNATURE OF JUDGE

For katcha peshi.

Date of hearing : 18.01.2013

Mr. Jhamat Jethanand, advocate for the applicant.

Mr. Allah Bachayo Soomro, Additional A.G.

ORDER

Nadeem Akhtar, J. : Through this Revision Application, the applicant has impugned the order dated 26.8.2009 passed in Civil Appeal No. 35/2005 by the Additional District Judge, Sanghar, whereby the order of rejection of the applicant's plaint by the trial court has been maintained. This case has a

chequered history, therefore, the relevant facts will have to be mentioned briefly at this stage.

2. The relevant facts of the case are that the applicant filed F.C Suit No. 165/1995 against the predecessor-in-interest of respondents 1 to 5 (Gordhan) for specific performance of an agreement dated 19.01.1991. The case of the applicant was that Gordhan had agreed to sell to him an agricultural land measuring 28-03 acres (the land) in consideration of Rs.210,000.00, out of which the applicant paid Rs.65,000.00. The possession of the land was handed over to the applicant by Gordhan. While the suit was pending, the parties to the agreement entered into a fresh agreement in respect of the land. Due to this reason, the applicant did not pursue the suit, and as such the same was dismissed under Order XVII Rule 2 CPC vide order dated 14.12.1996. As per the fresh / new agreement, the applicant had to pay an additional amount of Rs.55,000.00 towards the sale consideration of the land. The fresh / new agreement was acted upon by the parties, as the applicant paid the entire additional amount. Rs.15,000.00 was paid by the applicant in the presence of *Amins* at the time of the *faisla*, and Rs.40,000.00 on 24.12.1996 the receipt whereof was acknowledged by Gordhan. The remaining amount was to be paid by the applicant at the time of execution and registration of the sale deed in his favour, which was expected in the year 2001.

3. Gordhan passed away in the year 1997 before the sale of the land could be completed in favour of the applicant. After his death, his legal heirs did not dispute the agreement for sale of the land in favour of the applicant, and Andaram, who was the son and one of the legal heirs of Gordhan, was representing all the legal heirs / vendors for this purpose. In the year 2004, Andaram also passed away. Since the *foti khata* of the land had not been changed after the death of Gordhan and Andaram, respondents 1 to 5 promised that the sale will be completed by them in favour of the applicant as soon as the *foti khata* is changed. According to the applicant, respondents 1 to 5 refused to

complete the sale in his favour in the year 2004 after the mutation of the land in their favour as the value of the land had increased. As such, the applicant filed F.C. Suit No. 22/2005 against them for specific performance and permanent injunction. Vide order dated 02.04.2005, the plaint of this suit was rejected.

4. The land has remained in possession of the applicant since 1991. Till 23.12.2005, Respondents 1 to 5 did not file any suit against the applicant for recovery of possession or for cancellation of the agreement. According to the applicant, respondents 1 and 2 tried to encroach upon the land forcibly on 27.04.2005, and on 28.04.2005, the applicant was pressurized by respondent No.6 [the Mukhtiarkar (Revenue) Taluka Sanghar] to vacate the land. In view of the above, the applicant filed F.C. Suit No. 32/2005 against all the respondents for declaration, specific performance, perpetual injunction and damages. As a counter blast to the applicant's suit, respondents 1 to 5 filed F.C. Suit No. 72/2005 against the applicants on 23.12.2005 for declaration, possession, permanent injunction and mesne profits. Vide order dated 29.11.2005 passed on the application filed by respondents 1 to 5 / defendants for rejection of the plaint, the plaint of the applicant's F.C. Suit No. 32/2005 was rejected by the trial court. The order of rejection of the applicant's plaint has been upheld by the lower appellate court through the impugned order.

5. Mr. Jhamat Jethanand, the learned counsel for the applicant, submitted *inter alia* that both the courts below did not appreciate the important and material aspects of the case, such as, the original agreement dated 19.01.1991 for sale of the land was substituted with the mutual consent of both the parties during the lifetime of Gordhan by a fresh / new agreement ; the said fresh / new agreement was acted upon by the parties ; under the principle of novation of contract embodied in Section 62 of the Contract Act, 1872, the rights and obligations of the parties were to be governed by the said fresh / new agreement, and not by the original agreement ; F.C. Suit No. 32/2005 was filed by the applicant in May 2005 in view of the causes of action accrued in the year

2004 when respondents 1 to 5 refused to complete the sale in favour of the applicant, and then in April 2005 when respondents 1 to 5 attempted to encroach upon the land forcibly and respondent No.6 asked the applicant to vacate the land ; the cause of action of F.C. Suit No. 32/2005 was distinct and separate from that of the earlier two suits, as the events pleaded in F.C. Suit No. 32/2005 were not in existence at the time of filing of the earlier two suits ; and that new reliefs of perpetual injunction and damages based on the fresh cause of action were sought by the applicant in the said suit.

6. The learned counsel for the applicant further submitted that both the courts below committed a grave error in law by ignoring the settled principles for rejection of the plaint ; namely, the plaint cannot be rejected if out of several prayers, any one or more prayers are not barred by law ; and that, for ascertaining as to whether the plaint discloses a cause of action or not, the contents of the plaint are deemed to be correct. He argued that, if the courts below had come to the conclusion that the applicant's suit for specific performance was barred, the suit was not barred in respect of the other two prayers for injunction and damages as the said prayers were made by the applicant in view of the fresh cause of action accrued to him in April 2005. The learned counsel submitted that, without prejudice to his above submission, the applicant's suit for specific performance was also not barred by time ; firstly, as time was not of the essence of the contract ; secondly, the predecessors of respondents 1 to 5, and then respondents 1 to 5 themselves, kept on promising to complete the sale ; and lastly, respondents 1 to 5 finally refused to complete the sale in April 2004. In the end, the learned counsel argued that, as the original agreement had been substituted by a new / fresh agreement, both the courts below erred in law by not discussing the said new / fresh agreement, and by holding that the original agreement was the basis of the applicant's claim in F.C. Suit No.32/2005.

7. In support of his submissions, the learned counsel for the applicant cited and relied upon a number of reported cases. However, I will briefly discuss only such cases which are relevant at this stage. In *Muhammad Ilyas Hussain V/S Cantonment Board, Rawalpindi, PLD 1976 Supreme Court 785*, the plaintiff had separately valued the two reliefs for declaration and permanent injunction, and had prayed for them as two independent and substantive reliefs. One relief was held to be not maintainable, but the other relief was allowed by the Honourable Supreme Court. It was held that the mere fact that the plaintiff has asked for more than he can get does not give the court a discretion to refuse to grant even that part of the relief to which he is entitled. In *Musarat Masood Lodhi and others V/S Masood Hameed Lodhi and others, 2003 MLD 09*, it was held by this court that if one of the reliefs claimed in a suit was unavailable on account of any technical difficulty, the others, if claimed and available, cannot be disallowed merely because of the bar which applied to the first.

8. On the point that a fresh suit is maintainable on the same cause of action under Order VII Rule 13 CPC, the learned counsel relied upon *Sakhi Muhammad V/S Munshi Khan, PLD 1992 Supreme Court 256*, wherein it was held *inter alia* by the Honourable Supreme Court that under Order VII Rule 13 CPC, a fresh suit on the same cause of action is not barred if the plaint of the previous suit had been rejected. The learned counsel also relied upon *Bomanshaw Burjorji Gazdar and another V/S Mst. Mumtaz Begum and others, 1985 SCMR 554*, wherein it was held by the Honourable Supreme Court that when no time was fixed in the agreement for completing the sale transaction, limitation commences from the date when the plaintiff has notice that performance was being refused. On the point of examining the contents of the plaint for the purposes of deciding as to whether the plaint should be rejected or not, the learned counsel relied upon *Pakistan Agricultural Storage and Services Corporation Limited (PASSCO) V/S Qamar-ul-Islam, 2005 YLR 879*, wherein it was held by a learned Division Bench of the Lahore High Court that application of judicial mind was necessary and was a condition precedent to decide the

application under Order VII Rule 11 CPC, and without adverting to the contents of the plaint, the plaint cannot be rejected.

9. On the contrary Mr. Allah Bachayo Soomro, the learned A.A.G. submitted *inter alia* that the plaint was rightly rejected and the order was rightly upheld as the applicant did not file any application for restoration of his first suit ; he did not file any appeal against rejection of the plaint of his second suit ; the third suit filed by him was hopelessly barred by time as the prescribed period of limitation was three years Article 113 of the Limitation Act, 1908, for the specific performance of the alleged agreement. He further submitted that, except for oral assertions, there was nothing on record to show that the original agreement was substituted by a new agreement, or that respondents 1 to 5 promised to complete the sale, or that they finally refused to do so in April 2004. The learned A.A.G cited and relied upon three reported cases ; namely, (i) Muhammad Yaqoob V/S Hakim Ali, 2003 MLD 833, (ii) Muhammad Hannan etc. V/S Dr. Anwar-ul-Hassan, etc., 2002 CLJ 678, and (iii) Sikandar Ali and another V/S Abdul Raheem alias Leemon and another, 1996 CLC 1273. In Muhammad Yaqoob (supra), the suit for specific performance filed by the plaintiff was dismissed by the trial court, but the same was decreed in appeal by the appellate court. The revision application filed by the defendant / vendor was dismissed by the Lahore High Court. This case relied upon by the learned A.A.G supports the case of the applicant. In Muhammad Hannan etc. (supra), the question of filing the suit for specific performance after three years and the principle of Order II Rule 2 CPC, were discussed. In Sikandar Ali (supra), it was held that, after dismissal of the earlier suit for non-prosecution, the proper course for the plaintiff was to make an application for setting aside dismissal.

10. The submissions made on behalf of the applicant, especially regarding novation of contract, acting upon the new / fresh contract by the parties, time not being the essence of the contract, promises of respondents 1 to 5 to complete the sale in favour of the applicant, accrual of fresh causes of action in

April 2004 for specific performance and in April 2005 for injunction and damages, the said fresh causes of action being separate and distinct from the cause of the action of the earlier suits, the applicant having claimed all reliefs separately, the new / fresh contract and causes of action having not been considered or discussed by both the courts below, require consideration in my humble opinion. Further, the effect of the law laid down by the honourable Supreme Court in Muhammad Ilyas Hussain (supra) on this case, will also have to be examined, as the applicant had valued all his reliefs separately, and he could have given up his prayer for specific performance had his plaint not been rejected. This revision application is, therefore, admitted for regular hearing. Let notice be issued to respondents 1 to 5 through all ordinary modes. As respondents 6 to 9 are already on notice and are being represented by the learned A.A.G., no notice is necessary to them.

It is hereby clarified that the observations made herein are tentative in nature, and that the same shall not affect the merits of the case of any of the parties at the time of the final hearing.

J U D G E

Karar/-