

JUDGMENT SHEET
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD
R.A. No. 38 of 2003

Date of Hearing : 10.09.2015

Date of decision ; 10.09.2015

Applicant : Anwar Hussain
Through Mr. Riazuddin Qureshi, Advocate

Respondent-1 : Rafiquddin through his legal heirs
Through Mr. Saeeduddin Siddiqui,
Advocate

Respondents No.2 to 8 : None present for respondents No.2 to 8.

J U D G M E N T

NAZAR AKBAR, J.- Through this Civil Revision, the applicant has challenged Judgment and decree dated 31.01.2003 whereby Civil Appeal No. 15 of 1995 filed by the applicant was dismissed by 1st Additional District Judge, Hyderabad and the judgment and decree for specific performance of contract passed by learned IInd Senior Civil Judge, Hyderabad in F.C. Suit No.313/1984 was maintained. The applicant has questioned concurrent findings of the courts below in the instant Revision Application.

2. Briefly stated facts of the case are that respondent No.2 to 7 being owners of shop No.6 constructed upon a portion of plot No.1/A Block C, Unit NO.5, Shah Latifabad Hyderabad (hereinafter referred to as suit shop) entered into sale agreement dated 13.05.1984 with respondent No.1/plaintiff through their Sub Attorney Niazamuddin for total sale consideration of Rs.35000/- . Respondent No.1 was already in possession of Shop No.6 as old tenant. A sum of Rs.10,000/- were paid by respondent No.1 at the time of sale agreement while remaining amount of Rs.25000/- was agreed to be paid within three months on execution of Sale Deed. Respondent No.1/plaintiff approached respondents No.2 to 7 to obtain necessary documents and also offered remaining sale consideration for completion of contract but the said respondents and their attorney did not give any response. Respondent

No.1/plaintiff served respondents No.2 to 7 with legal notice to perform their part of contract but they refused and replied the notice that they have cancelled the sale agreement. Consequently respondent No.1 filed suit against respondents No.2 to 7 who sold out the suit shop to the applicant after filing of the suit the applicant purchased the suit shop having knowledge of the sale agreement between respondent No.1/plaintiff and respondents No.2 to 7. The applicant was, therefore, joined in the proceedings of the suit as defendant No.8.

3. Respondents/defendants No.2 to 7 did not contest the suit. The applicant filed his written statement. Case of the applicant was that he is the owner of the suit shop having purchased the same from respondents No.2 to 7 and as respondent No.1/plaintiff was tenant of respondents No.2 to 7 he became his tenant. He further stated that according to sale agreement between respondent No.1 and respondents No.2 to 7, if any party to perform his part of contract, he shall pay Rs.10000/- to other party. Respondents No.2 to 7 had served respondent No.1 with notice dated 02.08.1984 and revoked the Sale agreement with him. Applicant further stated that he was the bonafide purchaser of the suit shop. The applicant also claimed to had right of preemption in respect of suit shop.

4. Learned Trial Court from the pleadings of the parties, framed the following issues:-

1. Whether the suit is not maintainable in law?
2. Whether any cause of action has accrued to the plaintiff to file this suit?
3. Whether the suit is barred under the provisions of Specific Relief Act?
4. Whether the defendant No.8 is bonafide purchaser of the shop No.6 in suit?
5. Whether the defendants No.1 to 7 would revoke the agreement to sale dated 13.5.1984 with the plaintiff without payment of Rs.10,000/- as penalty?
6. Whether the defendants No.1 to 7 were bound to execute the registered sale deed in favour of the plaintiff?
7. Whether the sale of the shop in suit in favour of the defendant No.8 on 29.08.1984 is hit by the principle of lis-pendence under section 52 of the Transfer of Property Act?

8. Whether the plaintiff's possession of the shop in suit after the agreement to sale dated 13.05.1984 by the defendants No.1 to 7, as tenant or as owner himself?
9. Whether the plaintiff was ready, willing and prepared to perform his part of the agreement?
10. Whether the time was essence of the contract of sale between plaintiff and the defendants NO.1 to 7?
11. Whether the plaintiff can enforce the agreement to sale of the suit in his possession only by way of registered sale deed against all the defendants?
12. Whether the said agreement of sale contains alterative contracts either to perform the sale or the defaulting party to pay a fixed amount of Rs.10,000/- to the other party? If so, what is its effect?
13. Whether the defendant No.8 has right to pre empt the sale of suit property in case the suit is decreed in favour of the plaintiff? If so what is its effect?
14. What should the decree be?

5. Respondent No.1/plaintiff examined himself and produced sale agreement, receipt, legal notice dated 15.07.1984, reply to legal notice, Newspaper, letter of defendant No.8, photostat coy of letter of appellant copy of registered sale deed. He also examined Sami ur Rehman and Abdul Rashid and then closed his side. The applicant/defendant No.8 examined himself and one Aqeel Khan, Estate Agent and closed his side.

7. The learned Trial Court after hearing the parties decreed the suit of respondent No.1 and such decree was assailed by the applicant in Civil Appeal No. 15 of 1995. The learned Appellate Court after hearing learned counsel for the parties dismissed the appeal and upheld the decree passed by learned trial court in favour of the respondent No.1/plaintiff.

8. I have heard, learned counsel for the parties.

9. Learned counsel for the applicant has contended that the applicant is a bona fide purchaser of the suit shop, since he has purchased the same after the cancellation of agreement between respondent No.1 and respondent Nos. 2 to 8 and the two courts below have failed to appreciate that there was a penalty clause of Rs.10,000/- to be paid by the defaulting party in case of their failure to perform their part of agreement. However, he has not been able to

demonstrate from evidence that there was any actual cancellation of agreement of sale between the parties and he has not even produced in evidence the so called cancellation letter which was shown to him by the Estate Agent.

10. Learned counsel for respondent No.1 Mr. Saeeduddin Siddiqi, has contended that neither there was any stipulation in the agreement that either party can seek cancellation on payment of penalty nor there was any justification for cancelling the agreement after having receipt the earnest money of Rs.10,000/- and respondent No.1 was also ready to perform his part of contract. His agreement with respondent Nos. 2 to 8 was coupled with the possession of the suit shop and therefore his agreement was protected against any third party. Agreement subsequent to the agreement with respondent No.1 which is admitted position from the written statement of applicant / defendant No.8 that he was fully aware of the fact that respondent No.1 was in possession of shop No.6 and that there was an agreement between respondent No.1 and 2 to 7 which was prior in time and yet the applicant entered into the agreement for purchasing of the suit shop on persuasion of broker and sub attorney of respondent Nos. 2 to 8. The sale deed executed pursuant to the subsequent agreement did not show that the applicant has been put in possession at the time of execution of sale deed and admittedly respondent No.1 is in possession as he was on the date of agreement of sale.

11. I have gone through the concurrent findings on issue No.4 which is regarding bona fide purchase of Shop No.6 by the applicant. The applicant has failed to produce any evidence that at the time of purchase of the suit shop he has made any effort to check the status of agreement between respondent Nos. 1 and 2 to 8. He conceded in his evidence that he has purchased Shop Nos.3, 4 and 5 and even there was no separate agreement of purchase of Shop No.6 after the alleged cancellation of agreement of sale between respondent No.1 and 2 to 8 rather it was only interpolation in the agreement of sale between the applicant and sub attorney of respondent Nos. 2 to 8 that shop No.3 was changed to shop No.6 in the said agreement with a view to obtain separate portion of the building which is in fact in two parts. At no point of time respondent No.1 was contacted by the applicant to confirm that the agreement of sale with him was cancelled by respondent Nos. 2 to 7 though he admits

that he was next door neighbour as he was already in possession of shop No.5. The bona fide has not been established by the applicant and therefore the crucial issue No.4 against the applicant was rightly answered by both the courts below. The remaining issues which were between respondent No.1 and 2 to 7 who were already exparte and therefore there was no need of any discussion. However, both the courts below have taken pains to decide the same by referring to the evidence and the case law.

12. In view of the above discussion no case was made out for interference in the concurrent findings of two courts below. The Revision Application was dismissed by short order dated 09.09.2015 and the above are the reasons of the same.

JUDGE

Karat/-