

ORDER SHEET
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

R.A. No. 119 of 2001

Date of Hearing : 10.09.2015

Date of decision ; 30.09.2015

Applicant : Ghulam Mustafa
Through Mr. Suresh Kumar, Advocate

Respondent-1 : Shafi Muhammad (Since deceased) through L.Rs
Through Mr. Shahzeb Abbasi, Advocate.

Respondents No.2 & 3 : Nemo for respondents No.2 & 3.

ORDER

NAZAR AKBAR, J.- This Civil Revision is directed against the Judgment and decree dated 31.10.2001 and 8.11.2001 passed by 3rd Additional District Judge, Nawabshah whereby Civil Appeal No. 51 of 2000 filed by applicant was dismissed and the judgment and decree dated 25.9.2000 and 2.10.2000 passed by the 1st Senior Civil Judge, Nawabshah in F.C. Suit No. 92 of 1996 was maintained. The applicant has assailed concurrent findings of the courts below in the instant revision application.

2. Briefly stated facts of the case are that the plaintiff/respondent No.1 filed Suit for Specific Performance, Declaration, Return of Articles, Mesne Profits and Injunction against the applicant before learned trial court. Case of respondent No.1 was that the applicant being owner of Plot No. 30 measuring 1200 Sq.ft situated at Survey No. 49/B Azeem Colony, Nawabshah (hereinafter referred to as the suit property) sold out the same to him through sale agreement dated 10.12.1991 against total sale consideration of Rs.40,000/- with liability of Rs.91,000/- as loan of HBFC against the suit property. The plaintiff/respondent No.1 paid an amount of Rs.22,000/- at the time sale agreement i.e. 10.12.1991, balance sale consideration of Rs.18,000/- on 20.4.1992 to the applicant/defendant No.1 against proper receipts

and also deposited some instalments of HBFC loan. Respondent No.1 was put in possession of the suit property in terms of sale agreement. Besides sale agreement, applicant/defendant No.1 had also executed General Power of Attorney dated 11.12.1991 in favour of respondent No.1/plaintiff. Subsequently, the applicant/defendant No.1 illegally and unlawfully cancelled the said irrevocable registered general power of attorney through the deed of cancellation of General Power of Attorney dated 10.10.1995. The applicant/defendant No.1 also illegally occupied the suit property and articles of respondent No.1/plaintiff by inducing tenant of the respondent and obtained status-quo order by filing F.C. Suit No. 136 of 1995 against the applicant/respondent No.1 and others. However, later on the plaint in the said suit was rejected. The applicant/defendant No.1 assailed such order in Civil Appeal before IInd Additional District Judge, Nawabshah. The applicant/defendant No.1 refused to perform his part of contract in favour of the plaintiff/ respondent No.1 whereas he was always ready and willing to perform his part of contract, therefore, respondent No.1 filed the suit.

3. In his written statement, the applicant/defendant No.1 admitted the sale agreement in favour of respondent No.1 alongwith part payment of sale consideration of Rs.22,000/- however, denied receipt of balance amount of Rs.18,000/- and deposit of HBFC loan by the plaintiff/respondent No.1. According to applicant/defendant No.1 the power of attorney registered in favour of respondent No.1/plaintiff was revoked due to violation of the terms of agreement by the plaintiff/respondent No.1. The applicant further stated that he approached the respondent No.1 for payment of outstanding sale consideration of Rs.18,000/- as well as HBFC loan but respondent No.1/plaintiff kept him on false hopes and lastly HBFC issued notice dated 15.1.1995 for payment of loan amount disclosing deposit of only one instalment. The applicant approached respondent No.1 but he instead of clearing loan rented out the suit property to one Altaf Hussain Bughio. Thus, by consent of respondent No.1/plaintiff contract of sale was rescinded on payment of Rs.30,000/- to respondent No.1 and Rs.5000/- to his tenant Altaf Hussain, by the applicant/defendant No.1, consequently, applicant was put into possession of the suit property. Respondent No.1 tried to alienate the suit property, therefore, power of attorney dated 11.12.1991 was cancelled.

4. The learned Trial Court from the pleadings of the parties framed the following issues:-

1. Whether plaintiff paid a sum of Rs.18,000/- to the defendant No.1 on 20.4.1992 against receipt executed by defendant No.1?
2. Whether the plaintiff paid a sum of Rs.15,000/- to the defendant No.3 towards the loan outstanding against the suit house?
3. Whether plaintiff made improvements in the suit house, if so, what are its details?
4. Whether the defendant No.1 cancelled the general power of attorney dated 10.10.1995? if so, what is its effect on the sale agreement?
5. Whether the cancellation of General Power of Attorney dated 10.12.1991 by the defendant No.1 is illegal, fraudulent, malafide, without lawful authority?
6. Whether the plaintiff agreed that agreement dated 10.12.1991 be cancelled and rescinded and plaintiff agreed to handover vacant possession of suit house to defendant No.1 on receipt of Rs.30,000/- and on payment of Rs.5,000/- to his tenant Altaf Hussain Bughio, if so, what is its effect?
7. if issue No.1 is decided in affirmative, whether defendant No.1 paid a sum of Rs.30,000/- to the plaintiff and the plaintiff handed over possession of the suit house to the defendant No.1 voluntarily through his tenant Altaf Hussain?
8. Whether Altaf Hussain handed over possession of suit house to the defendant No.1 with the consent of plaintiff?
9. Whether the suit is hit by law of Waiver, Estoppel and Acquiesces?
10. Whether defendant No.1 took away articles of plaintiff mentioned in para 4 of the plaint and is liable to return the same or value thereof to plaintiff?
11. Whether the suit is not maintainable in law?
12. Whether the suit is not in proper form?
13. Whether plaintiff is entitled to the relief claimed?
14. What should the decree be?

5. Respondent No.1/plaintiff examined Maqbool Hussain, an Officer of Grade-3 of MCB, Nawabshah at Ex.85, who produced three receipts of payment of HBFC loan deposited by respondent No.1 as Ex.86, 87 and 88. Respondent No.1/plaintiff also examined himself as Ex.102 and produced agreement of sale at Ex.103, power of attorney at Ex.104 and other General Power of Attorney at Ex.105, receipt of Rs.18000/- as Ex.106, certified copy of application and order thereon in C.A. No. 02 of 1996 as Ex.107 and then close his side.

6. The applicant examined his attorney Mukhtiar Ahmed as Ex.116, who produced General Power of Attorney as Ex.117 and deed of cancellation of contract as Ex.118, deed of cancellation of power of attorney as Ex.119. Abdul Hakeem at Ex.132, Mohammad Bachal at Ex.142, Shaman at Ex.143, Rasheed Ahmed, Bond Writer at Ex.153, Mehboob Illahi, Notary Public at Ex.154 and closed his side.

7. The learned Trial Court after hearing the parties, decreed the suit of respondent No.1 and the said decree was assailed by the applicant in Civil Appeal No. 51 of 2000. 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 respondent No.1/plaintiff. This revision is directed against both the judgments.

8. I have heard learned counsel for the parties, perused evidence and record.

9. Learned counsel for the applicant while attacking the concurrent findings of facts against the applicant has failed to point out single instance of misreading or non-reading of evidence to show that the courts below have come to the wrong conclusion by not reading the said evidence. He has raised routine objections to the judgment of Appellate Court that it is not in accordance with the provisions of Order XLI Rule 31 CPC.

10. The perusal of record shows that the concurrent findings of both the courts have referred to the evidence and discussed that the applicant has admitted the execution of contract of sale with the respondent and handing over possession of the suit property on realizing substantial amount of Rs.40,000/- in cash along with transfer of HBFC loan in favour of the respondent. Admittedly the property in

question was rented out by the respondent and he had been paying HBFC loan, therefore, there was no justification for the applicant to unilaterally cancel the power of attorney without notice to the respondent and fraudulently obtain possession by inducing the tenant of respondent. The plea taken by the applicant in defence that the power of attorney has been cancelled lawfully and the applicant has entered into a compromise in presence of nekmards wherein the respondent has agreed to rescind from the agreement on receiving just Rs.30,000/- from the applicant has not been established by cogent evidence.

11. I have gone through the evidence and the record which show that the respondent has established by cogent evidence the payment of Rs.22,000/- at the time of entering into an agreement and payment of another Rs.18,000/- towards balance sale consideration payable by the respondent to the applicant in cash and a sum of Rs.5350/- and Rs.15,000/- towards payment of HBFC loan against the suit property and therefore, it does not appeal to the senses that the man in possession of the suit property under sale agreement having already paid almost Rs.63,000/- to the applicant and not a single penny was payable by him would commit any act which could give rise to a cause of action to the applicant to cancel the power of attorney which was coupled with agreement of sale meaning thereby the power of attorney was not without consideration. The applicant has failed to prove the plea taken by him in the written statement that the power of attorney was lawfully cancelled. It is admitted position from the record and the evidence of the applicant himself that he has not made any public notice in newspaper while revoking the power of attorney. The applicant who claimed to have entered into an agreement with the respondent to rescind from the contract on receiving a sum of Rs.30,000/- has failed to prove the same in evidence. Not only that the applicant witnesses of the so called agreement of rescinding the agreement of sale (Ex.118) with the respondent were not nekmards of the locality as claimed by applicant in his written statement but they were chance witnesses namely Bachal and Shaman.

12. The two witnesses of rescinding agreement (Ex.118) admitted in the cross examination that they were chance witnesses and they came to Nawabshah from Kandiaro when the applicant informed them about their dispute with the respondent. In their cross examination both have conceded that they are not nekmards of

Nawabshah. Conversely the contention of the respondent in his plaint was established when the tenant of respondent appeared as witness of applicant and admitted that he was put in possession of the premises by respondent, however, he handed over possession of the suit land to the applicant on receiving Rs.5,000/-.

13. The persons who appeared before the Sub Registrar as witnesses of registration of revocation of power of attorney (Ex.119) did not come in the witness box. Even the contents of cancellation of deed of power of attorney did not disclose the reason for cancelling the same and it was contrary to clause 14 of the power of attorney whereby cancellation of power of attorney was to be proceeded with no objection from the HBFC. In any case, the cancellation of power of attorney after having receiving entire consideration for executing the same was not lawful on the part of applicant.

14. The record further shows that the applicant after having realizing the entire sale consideration and having got substantial liability of HBFC paid of by the respondent managed to takeover possession of the suit property from the tenant of respondent in 1995 and by false allegation of having rescinded the sale agreement with the respondent on consideration of Rs.30,000/- has perpetuated his illegal possession of the suit premises. In a way he succeeded in his ill designs by delaying the case in court for almost 20 years. The F.C. Suit No. 92 of 1996 was decreed against the applicant on 25.09.2000 and his Civil Appeal No. 51 of 2000 was dismissed on 31.10.2001. The present Revision was filed on 13.12.2001 and he obtained interim orders on 21.01.2002. Since then he managed to get the adjournments for well over 14 years until 10.9.2015 when this case was ultimately argued by the counsel for the applicant. In this context I have gone through the entire order sheet and found that it was always the counsel for the applicant alone who kept on seeking adjournments despite repeated last chances were given to him.

15. Regarding the contention of appellant that the lower appellate court has not complied with the mandatory requirement of Order XLI Rule 31, CPC. Suffice it to observe that the lower appellate court has examined all the issues framed by the trial court reappraised has also discussed the evidence and affirmed the findings of trial

Court. It was sufficient compliance of the provisions of Order XLI Rule 31, CPC. In the case reported in 2010 SCMR 1868 (Muhammad Iftikhar v. Nazakat Ali), this proposition was examined by the Honourable Supreme Court and held that the appellate Court is not always required to discuss each issue unless the same is reversed by the first appellate Court. The relevant part of the judgment is reproduced below:-

“It appears from the perusal of the impugned judgment and that by the first appellate Court, in substance compliance of the provisions of Order XLI Rule 31, CPC was made and it is not always required that in each case the appellate Court would deal with each of the issue and to resolve the same separately in the light of the evidence available on the record unless the same had caused any serious violation of the law or resulted into a grave miscarriage of justice to any of the parties to the suit.

In the instant case, the findings of facts recorded by the learned trial Court on the issues were maintained by the learned first appellate Court, therefore, unless the findings are reversed by the first Court of appeal which is not so in the present case, decision on each issue may not be distinctly and essentially recorded, provided in substance compliance of the provisions of the Order XLI Rule 31 CPC has been made.”

16. The upshot of the above discussion is that this Revision Application must fail as there is hardly any misreading or non-reading of evidence and the concurrent findings of the courts below cannot be set-aside. The Revision Application is dismissed with cost throughout.

17. In view of the fact that the counsel for the respondent was absent, the Additional Registrar of this court is directed to send a copy of this judgment to the Sub Registrar, Nawabshah for his record and entry in relevant register so that no third party interest is created in the suit premises by the applicant and a copy may also be sent to the legal heirs of deceased respondent Shafi Muhammad though they were brought on record on 4.9.2003 and represented by a counsel, but he was absent.

JUDGE