IN THE HIGH COURT OF SINDH, KARACHI

R.A. No.101 of 2015

PRESENT :
MR. JUSTICE ARSHAD HUSSAIN KHAN

Muhammad Saeed vs. Syed Muhammad Baqir Bukhari & others

Applicant:	Muhammad Saeed Through Syed Ehsan Raza, Advocate
Respondent No1:	Syed Muhammad Baqir Bukhari Through Mr. Muhammad Nawab Advocate
Date of hearing	19.12.2016

JUDGMENT

ARSHAD HUSSAIN KHAN, J. The Applicants through the instant revision Application has challenged order dated 11.11.2015 passed by VIIth Additional District and Session Judge Karachi (East) in Civil Appeal No 176 of 2014, upholding the order dated 23.10.2014 passed by VIth Senior Civil Judge Karachi (East) in Suit No.972 of 2014 whereby the plaint was rejected.

2. Brief facts leading to the present civil revision application as averred therein are that on July 2014 respondent No.1 being owner of Plot bearing No.A-386, Block-2, admeasuring 240 sq. yds., situated at Gulistan-e-Jauhar, Karachi, **[subject plot]** by virtue of Lease Deed M.F. Roll NoU-63242/5297, had entered into a sale transaction with the applicant to sell the subject plot for a total sale consideration of Rs.55,00,000/-. In this regard, on 22.07.2014 the applicant paid Rs.1,00,000/- as token money to respondent No.1 through cheque bearing No.76040803 dated 22.07.2014 drawn on Habib Metropolitan Bank University Branch Karachi. At the time of payment of token money it was agreed / settled by and between the parties that a sale agreement will be executed and balance amount of Rs.54,00,000/- will be paid by the applicant to respondent No.1 within 60 days' time at the time of execution of Sale Deed / Conveyance Deed in favour of the applicant. It is also averred that on 06.08.2014 the applicant published the general Notice in daily *Jasarat* in respect of sale transaction of subject plot but the applicant was shocked when respondent No.1

through public Notice dated 09.08.2014 totally denied said sale transaction. In response to respondent No.1's public Notice, the applicant besides sending legal Notice dated 09.08.2014 to respondent No1 also published a Notice on 10.08.2014 in daily Jasarat wherein refuted the public Notice of respondent No.1. The legal Notice served on respondent No.1 was never replied to by respondent No.1. Thereafter, applicant filed Civil Suit No.972 of 2014 before the learned trial Court viz: VIth Senior Civil Judge, Karachi East with prayers as follows:-

a. *To declare that the oral sale agreement dated 22.07.2014 between the parties is valid to declare that the plaintiff is bonafide purchaser of the said plot and paid the earnest money Rs.1,00,000/= as sale consideration of Plot bearing No.A-386, Block-2, admeasuring 245 sq. yds., situated at Gulistan-e-Jauhar, Karachi, and ready to pay the balance amount.*

b. *To direct the defendant No.2 not to register any sale deed of power of attorney in favour of anybody else except the plaintiff and execute and accept the sale deed in favour of the plaintiff and Not in the name of any other till the final disposal of the suit.*

c. *To direct the defendant No.1 to receive the balance amount of Rs.54 lacs and to execute the sale deed in favour of the plaintiff and in case of failure the Nazir of this Hon'ble Court may be appointed/directed to execute the sale deed.*

d. *To grant permanent injunction restraining the defendants, their agents, attorneys, workers, employees and other person or persons on their behalf to dispossess/reject the plaintiff from the suit property i.e. A-386, Block-2, admeasuring 240 sq. yds., situated at Gulistan-e-Jauhar, Karachi, till the disposal of the suit of the plaintiff.*

e. *Any other relief or relieves which this Hon'ble Court deem fit and proper under the circumstances of the case.*

f. *Grant cost of the proceedings.*

3. Upon service of the Notice of the said suit respondent No.1 filed written statement wherein while denying the allegations in the plaint, admitted the fact that though he had entered into sale transaction to the subject plot with the applicant however since the applicant failed to pay 10% amount, i.e. Rs.5,50,000/- within stipulated time as agreed between him and, therefore, respondent No.1 cancelled the deal and accordingly informed the applicant over phone.

4. The learned trial court after hearing injunction application of the applicant while deciding the said application dismissed the suit of the applicant. Relevant portion of the said order is reproduced as under:

> "I have given careful consideration to arguments of learned counsel for the plaintiff and perused the record. Through the instant application, the plaintiff has sought relief for interim order by restraining the defendants from selling the property in question to any other person but according to the defendant No.1 transaction between him and the plaintiff has been cancelled as the amount of Rs.1,00,000/= given by the plaintiff to the defendant No.1 through cheque has already been deposited in the account of the plaintiff. The whole case is based on oral agreement between two parties and the same stood cancelled orally as evident from a copy of legal Notice dated 11.08.2014 annexed with the plaint as annexure-P/7 besides return of Rs.1,00,000/= paid by the plaintiff to the defendant as token money. Since the agreement is not in existence, question of specific performance of agreement does not arise.
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> For what has been discussed above, I am of the view that there is no prima facie case in favour of the plaintiff being devolved of reasonable cause of action. Therefore, the plaint is rejected under Order 7 Rule 11 CPC, with no order as to costs.
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> ***[Underlining is to add emphasis]***

5. The present applicant/plaintiff preferred Civil Appeal No.176 of 2014, against the above said order before VIIth Additional District Judge Karachi (East). The present respondent No.1 / defendant upon notice, filed counter affidavit while denying the allegations levelled in the appeal and supported the order passed by learned VIIth Senior Civil Judge Karachi (East). The learned ADJ, after hearing the parties, vide its judgment dated 11.11.2015 dismissed the said appeal; relevant portion whereof is reproduced as under:-

> "Learned counsel for the respondent pointed out that appellant in his legal Notice dated 11-08-2014 clearly admitted that respondent No.1 refused and cancelled the agreement to sell. Admittedly, in the present case, the token money of Rs.100,000/-, which was received by the respondent, was returned/ deposited in the bank account of the appellant. Therefore there is no agreement to sell in respect of suit plot and the alleged agreement under no provision of law or stretch of imagination can be considered as an agreement within meaning of section 2(b) of the Contract Act, 1872. Since only an agreement can be enforced by a suit for Specific Performance, therefore, the trial Court has rightly rejected the plaint of Civil Suit No.972/2014, while dismissing the injunction application. He has placed reliance upon 2008 CLC 175.
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> I have considered above submissions, perused the record and the case law referred to.

> It is well settled principal that an incompetent suit should be laid to rest at the earliest movement, so that no further time is wasted over what has been bound to collapse as not permitted by law. Reliance is placed upon PLD 2005 SC 430 and 2004 CLC 979.
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> In view of the above mentioned facts and circumstances, I do not find any illegality in the impugned order dated 23-10-2014, therefore no case has been made out for interference. The trial Court has rightly passed the order dated 23.10.2014, accordingly the instant appeal is dismissed with no order as to costs."

6. The present applicant/plaintiff challenged the said judgment of the learned lower appellate court in the present revision application. The record of the present case reveals that despite various Notices issued to respondent No.1, he failed to put his appearance in the matter and contest the present case. This matter is pending since 2015 and only legal question is involved, therefore, this court heard the learned counsel for the applicant and AAG and with their assistance perused the record and the relevant law on the point.

7. Learned counsel for the applicant during the course of his arguments has contended that orders impugned herein are not sustainable in law and fact both. It is also contended that the learned courts below while passing the impugned orders have failed to consider the material fact that respondent No.1 in his written statement had admitted the transaction entered into between the applicant and respondent/defendant and further the respondent/defendant had returned the token amount by depositing the same in bank account of the applicant without any intimation to him and that too after receiving the Notice of the suit filed by the applicant/plaintiff. It is also contended that learned courts below erred in holding that oral contract/agreement cannot be specifically performed. Whereas the oral sale is also permissible under the law under Section 54 of Transfer of Property Act, 1882, and can be enforced through court of law. Further contended that the learned Judge failed to appreciate that where any of the prayer clauses is maintainable the provision of Order VII Rule 11 CPC cannot be invoked. Learned counsel for the applicant in support of his stance relied upon the following case law:

> **NLR 1991 CLJ 512**
> *Muhammad Ikhlaq v. Sheikh Muhammad Saeed.*

In the cited case, this court has held that receipt of advance in respect of immovable property wherein total sale consideration, description of property and witnesses are mentioned could be construed as sale agreement in a suit for specific performance. Such document for the purposes of section 10 of Transfer of property Act read with section 54 of the said for all practical purposes could be construed as an agreement of sale in absence of formal agreement.

8. On the other hand, the learned AAG supported the impugned judgments and also prayed for the dismissal of present revision application.

9. It is well settled that revision is a matter between the higher and subordinate Courts, and the right to move an application in this respect by the Applicant, is merely a privilege. The provisions of Section 115, C.P.C., have been divided into two parts; First part enumerates the conditions, under which, the Court can interfere and the second part specify the type of orders which are susceptible to revision. In numerous judgments, the apex Court was pleased to hold that the jurisdictions under section 115, C.P.C., are discretionary in nature, but it does not imply that it is Not a right and only privilege, therefore, the Court may not arbitrarily refuse to exercise its discretionary powers, rather, to act according to law and the principles enunciated by the superior Courts. The legislature in their wisdom have couched section 115, C.P.C., in the following language:-

> **"S.115. Revision**:---(1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears...
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> (a) to have exercised a jurisdiction not vested in it by law, or
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> (b) to have failed to exercise a jurisdiction so vested, or
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> (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,"
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> the High Court may make such order in the case as it thinks fit.
>
> [Provided that, where a person makes an application under sub-section he shall, in support of such application, furnish copies of the pleading, documents and order of the subordinate Court. and the High Court shall, except for reasons to be recorded, dispose of such application without calling for the record of the subordinate Court.]

10. From the bare reading of the above section, it is manifest that on entertaining a revision petition, the High Court exercises its supervisory jurisdiction to satisfy itself as to whether the jurisdiction by the courts below has been exercised properly and whether the proceedings of the subordinate Court do suffer or not from any illegality or irregularity. Reference may be placed in the case of *Muhammad Sadiq v. Mst. Bashiran and 9 others* ***(PLD 2000 SC 820)*****.** Taking guidance from this judgment of the Hon'ble Supreme Court (supra), I have left with no option but to decide the case, on the basis of the available record in absence of the respondent No.1/defendant who has failed to appear despite various court notices.

11. The record of the present case reveals that applicant/plaintiff filed Civil Suit No.972 of 2014 against respondent No.1/defendant before the learned VIth Senior Civil Judge, Karachi East, wherein the applicant sought specific performance of an oral contract/agreement, entered into between respondent No.1 and applicant whereby the respondent No.1 had agreed to sell his subject property to the applicant and in this regard the respondent had also received token money from the applicant through an account payee cheque in favour of the respondent No.1. However, later on the respondent refused to perform his part of obligation upon which above said suit was filed. The respondent No.1 in his written statement in the said suit though admitted the fact that oral contract / agreement for sale transaction in respect of the subject property was entered into between him and applicant, however, subsequently the said contract/agreement was cancelled on account of failure of the applicant to fulfill his commitment. Relevant portion of the said written statement filed by the respondent No.1 for the sake of ready reference is reproduced as under:

> "4. That the contents of para No.3 are partly admitted and partly denied, in this regard it is respectfully submitted that both the parties were agreed orally to sell and purchase plot bearing No.A-386, Block 2, Admeasuring 240 Square Yards, situated at Gulistan-e-Jauhar, Karachi, and the total sale consideration of the said plot was decided Rs.55,00,000/-, (Rupees Fifty Five Hundred Thousand only). The plaintiff issued a cheque amounting Rs.1,00,000/- bearing No.760408003, dated 22-07-2014, as token money in favour of the defendant drawn at Habib Metropolitan Bank, University Branch, Karachi, and the plaintiff received photocopy of lease and other documents for verification of the said plot, it is pertinent to mention here that it was decided that within two days only the sale agreement

> will be executed without any delay or excuse, and the plaintiff will pay 10% i.e. 5,50,000/- of the total sale amount/consideration and it was also settled that the token amount will be considered in amount of 10%, without any default to the defendant No.1, and within a period of 30 days the defendant No.1 will transfer the said plot in the name of the plaintiff, and the balance amount of Rs.49,50,000/- will be paid through pay-order at the time of transfer of the said plot before the sub-registrar, on 23-07-2014 the cheque was presented before the concerned bank which was bounced, due to insufficient funds, the defendant No.1 contacted with the plaintiff and informed him about the bounced cheque, the plaintiff requested to the defendant No.1, that on 24-07-2014 you again present the said cheque you will get the amount of Rs.1,00,000/-, on 24-07-2014 the defendant No.1 again presented the cheque and received an amount of Rs.1,00,000/- , from the said bank.
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> 5. That para No.4 of the plaint vehemently denied, in this regard it is submitted that after 24th July 2014 the plaintiff started to avoid to attend the phone calls of the defendant No.1, it is pertinent to mention here that the plaintiff having no office of Estate Agency and only contact with him through cell phone, the plaintiff attended the phone call of the defendant No.1 on 26th July 2014, and requested that the plaintiff cannot execute sale agreement as per decided between the parties, and on his request the defendant No1 extended time up to 28-07-2014, but again the plaintiff failed to execute the sale agreement and again requested final and last chance on 29-07-2014 to execute the sale agreement, but again failed to fulfill his obligation, and disappeared from the screen and also was not attending the phone calls of the defendant No.1, on 05-08-2014 the defendant No.1 contacted with plaintiff and informed him about the cancellation of this deal due to his mis-commitment.
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> ***[Underlining is to add emphasis]***

12. The learned trial judge upon such undisputed facts instead of framing issues, recording evidence and deciding the case on merit while hearing the injunction application of the applicant rejected the plaint of applicant under order VII rule 11 of CPC, on the ground that the plaintiff failed to establish *prima facie* case in his favour and as such devoid of reasonable cause of action.

13. It is settled principle of law that while rejecting the plaint only contents of the plaint are to be looked into. Reliance is placed on a celebrated judgment of Hon'ble Supreme Court of Pakistan reported as *'Haji Abdul Karim and others v. Messrs Florida Builders (Pvt.) Limited'* **(PLD 2012 Supreme Court 247).** Relevant portion is reproduced herein below:-

> "After considering the ratio decided in the above case, and bearing in mind the importance of Order VII, Rule 11, we think it may be helpful to formulate the guidelines for the interpretation thereof so as to facilitate the task of courts in construing the same.

> Firstly, there can be little doubt that primacy, (but not necessarily exclusivity) is to be given to the contents of the plaint. However, this does not mean that the court is obligated to accept each and every averment contained therein as being true. Indeed, the language of Order VII, Rule 11 contains no such provision that the plaint must be deemed to contain the whole truth and nothing but the truth. On the contrary, it leaves the power of the court, which is inherent in every court of justice and equity to decide whether or not a suit is barred by any law for the time being in force completely intact. The only requirement is that the court must examine the statements in the plaint prior to taking a decision. Secondly, it is also equally clear, by necessary interference, that the contents of the written statement are not to be examined and put in juxtaposition with the plaint in order to determine whether the averments of the plaint are correct or incorrect. In other words the court is not to decide whether the plaint is right or the written statement is right. That is normal course and after the recording of evidence. In Order VII, Rule 11 cases the question is not the credibility of the plaintiff versus the defendant. It is something completely different, namely, does the plaint appear to be barred by law. Thirdly, and it is important to stress this point, in carrying out an analysis of the averments contained in the plaint the court is not denuded of its normal judicial power. It is not obligated to accept as correct any manifestly self-contradictory or wholly absurd statements. The court has been given wide powers under the relevant provisions of the Qanun-e-Shahadat. It has a judicial discretion and it is also entitled to make the presumptions set out, for example in Article 129 which enable it to presume the existence of certain facts. It follows from the above, therefore, that if an averment contained in the plaint is to be rejected perhaps on the basis of the documents appended to the plaint, or the admitted documents, or the position which is beyond any doubt, this exercise has to be carried out not on the basis of the denials contained in the written statement which are not relevant, but in exercise of the judicial power of appraisal of the plaint."

14. From bare perusal of the plaint of suit No. 972 of 2014, it reflects that the applicant clearly discloses a cause of action. Furthermore, after scrutiny of the impugned order, it appears that the learned trial court only intended to dispose of the application for grant of temporary injunction and the arguments to that extent was heard by learned trial court, hence while hearing the arguments on the injunction application, the rejection of plaint is not justifiable. It is also an established law that in such like a situation the order for rejection of plaint while hearing arguments on an application under Order 39 Rules 1 and 2 CPC cannot be passed. Learned courts below passed the impugned orders / judgments in complete oblivion of the law on the point. The difference between Order XXXIX Rules 1 and 2 CPC and Order VII Rule 11 CPC has been elaborately discussed in case law reported as *'Jewan and 7 others v. Federation of Pakistan through Secretary, Revenue, Islamabad and 2 others'* **(1994 SCMR 826)**. The relevant portion is reproduced herein below:-

"A plain reading of the Order VII, Rule 11, CPC would show that the rejection of plaint under this provision of law is contemplated at a stage when the court has not recorded any evidence in the suit. It is for the reason precisely, that the law permits consideration of only averments made in the plaint for the purpose of deciding whether the plaint should be rejected or not for failure to disclose cause of action or the suit being barred under some provision of law. The court while making action for rejection of plaint under Order VII, Rule 11, CPC cannot take into consideration pleas raised by the defendant in the suit in his defense, as at that stage the pleas raised by the defendants are only contentions in the proceedings unsupported by any evidence on record. However, if there is some other material before the court apart from the plaint at that stage which is admitted by the plaintiff, the same can also be looked into and taken into consideration by the court while rejecting the plaint under Order VII, Rule 11, CPC. Beyond that the court would not be entitled to take into consideration any other material produced on record unless the same is brought on record in accordance with the rules of evidence. We may point out here that there is marked difference between the scope of proceedings of an application under Order XXXIX, Rules 1 and 2, CPC, filed by the plaintiff for grant of temporary injunction in a pending proceeding and the rejection of the plaint under Order VII, Rule 11, CPC, on account of failure to disclose a cause of action in the plaint or the plaint being barred under some provision of law. In the former case, the court while deciding the application for grant of temporary injunction ascertains existence or otherwise of a prima facie case, balance of convenience and the possibility of irreparable injury to the party seeking injunction in case the relief is withheld. While considering existence or otherwise of a prima facie case in proceedings under Order XXXIX Rules 1 and 2 CPC, the court is not only entitled to look into the pleadings of the plaintiff and documents filed by him in support of case but it can also take into consideration the documents of pleadings filed by the defendant. However, the courts while rejecting a plaint under Order VII, Rule 11 CPC on the ground that the plaintiff failed to disclose any cause of action or the suit is barred under some provision of law, the extent of examination of relevant facts by the court to reach these conclusions has to be only on the basis of averments made in the plaint and any other material or document which is admitted by the plaintiff. The reason for this different approach while rejecting a plaint under Order VII Rule 11 CPC is quite obvious. In the former proceedings (under Order XXXIX, Rules 1 and 2 CPC) even if the court reaches the conclusion that the plaintiff has failed to make out a prima facie case, it can only refuse to grant temporary injunction and reject the application under Order XXXIX Rules 1 and 2 CPC but this rejection cannot result in the dismissal of the suit which proceeds to trial notwithstanding a finding by the court that the plaintiff has failed to make out a prima facie case for grant of temporary injunction. On the contrary, if the court reaches the conclusion that the plaint failed to disclose any cause of action or suit appears to be barred under some law, the proceedings come to an end immediately and the plaintiff is non-suited before he is allowed an opportunity to lead evidence and substantiate his allegation made in the plaint. We are, therefore, of the view that the rejection of plaint at a preliminary stage when the plaintiff has not led any evidence in support of his case, is possible only if the court reaches this conclusion on consideration of the statements contained in the plaint and other material available on record before the court which the plaintiff admits as correct."

[Underlining is to add emphasis]

This judgment of the Hon'ble Supreme Court of Pakistan has consistently been followed in case laws reported as *'Mushtaq Hussain v. Province of Punjab through Collector Jhelum District and 6 others'* **(2003 MLD 109)**, *'Muhammad Tariq Mahmood and 2 others v. Anjuman Kashmiri Bradari Khisht Faroshan through President Abdul Ashfaq and 21 others*' **(2003 CLC 335)**, *'Mst. Amina v. Muhammad Easa and 11 others*' **(2008 YLR 1405)** and '*Iftikharul Haq v. District Canal Officer and others*' **(2005 CLC 1740)**.

The ratio of above judgments is that while passing order on an application for the grant of temporary injunction, plaint cannot be rejected.

15. As regards the observation of the learned courts below vis-à-vis non-existence of contract being oral and, therefore, specific performance of the agreement does not arise, is absolutely a misconception specially in presence of admission, as mentioned in para-10 above, by respondent No.1, Hence, it cannot be said that the agreement is not in existence. Furthermore, from perusal of the written statement filed by respondent No.1 in suit, it appears that the subject contract was a valid contract irrespective of the fact that it was oral. Oral agreement would be a valid and enforceable as a written agreement provided it fulfills all the requirements of a valid contract. Reference may be made to a reported decision of the Hon'ble Apex Court; *BASHIR AHMAD v. MUHAMMAD YOUSAF through Legal Heir* **(1993 SCMR 183).** However, whether or not the contract in question can be enforceable or not, it is to be decided by the Trial Court after a full dress trial, as, inter alia, relief of specific performance is a discretionary one.

Question of enforceability of oral agreement to sell and yardstick to prove such type of agreement was dealt with by Hon'ble Supreme Court of Pakistan in the case of *Ch. Muhammad Hussain and another v. Hidayat Ali and 6 Others* **(NLR 1981 SCJ 460)** wherein it was held **at page 462** as follow:-

> "As regards the oral evidence and its effect and credibility, the learned counsel is not correct in insisting that oral evidence should be tested for its own worth and should not be related to the contemporaneous human conduct of affairs concerning matters in

> issue. Voluminous oral evidence may have little weight where documents are ordinarily required to be prepared or are usually prepared and not satisfactory explanation for departure from the practice is forthcoming. Courts were correct in assuming that in case of agricultural land and transactions read over a long period and involving huge amounts there should have been some evidence in the nature of writing receipt or acknowledgment to evidence the transactions. In giving effect to such a standard the courts were not laying down the absolute rule that there could be no oral contract or that an oral contract wherever existing could be upset on such conjectural grounds or that oral evidence carries no weight. The conduct of the parties, the subject-matter of the controversy, the nature of the relationship and experiences of the parties and their handling of the matter, all are relevant for determining the credibility of oral evidence on such matters".

16. Sequel of the above discussion is that the conclusion drawn by the learned trial court in the instant matter which was subsequently upheld by the learned lower appellate court through judgments impugned herein are legally not sustainable being result of jurisdictional error and defect and as such the impugned orders/judgments passed by both the Courts below are hereby set aside and the case is remanded to the learned trial court to decide the suit of the applicant/plaintiff after proper trial and recording of evidence in accordance with law on merits and without being influenced by any of the observations contained herein above.

JUDGE

Karachi;
Dated: 24.01.2017