

*ORDER SHEET*

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD**

R.A. No.309 of 2010.

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DATE	ORDER WITH SIGNATURE OF JUDGE(S)
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1. For katcha peshi.
2. For hearing of M.A-1079 of 2010.

28.03.2018.

Mr. Umaid Ali Khuwaja, Advocate for the applicants.

Mr. Raja Nauman Khan, Advocate for respondent No.1.

Mr. Wali Muhammad Jamari, Assistant A.G.

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Through this revision, judgment of the appellate Court passed in Civil Appeal No.216/2009 dated 26.07.2010 is assailed.

2. Brief facts of the case are that the applicants / defendants are undisputed owners of the agricultural land bearing Survey Nos.47/10 to 16 (7-0 acres), 48/1,2,3 (12-00 acres) and 45/3(0-04 acre) total admeasuring 19-04 acres, situated in Deh Chacharki Taluka Tando Allahyar (hereinafter referred to as "subject land"), and they still in possession of the same. The respondent No.1/plaintiff had filed a suit for specific performance of agreement, as available at page-87 of R&Ps, wherein it is clearly recorded that applicant Mirza Zaheeruddin Baig R/o Karachi had sold the subject land to the respondent No.1 / plaintiff for the total sale consideration of Rs.3,05,600/- at the rate of Rs.16000/- per acre. The agreement also shows that a sum of Rs.1,50,000/- has been paid to the seller, who had acknowledged the receipt of the same. Since as per the respondent No.1 / plaintiff, applicants / defendants were not performing the said agreement and handing over the possession of the subject land F.C. Suit No.32/2004

was filed for specific performance of contract wherein a prayer has been made that “to direct the defendants to receive balance sale consideration and to execute sale deed in favour of the plaintiff and hand over the possession of the suit land”.

3. Written statement is filed allegedly by the applicant / defendant No.5 by acting on his own and as an attorney of the remaining applicants / defendants No.1 to 4 and 6, denying the averments made in the sale agreement and its execution or having received any sum in this regard. As a matter of fact it was stated that Mirza Saeed Ali Baig, the defendant No.6 on the date of the execution of the alleged sale agreement was not in Pakistan and evidence of his absence by way of pages from the Passport was also provided.

4. Trial Court framed 05 issues which included key issue as to genuineness of the sale agreement being issue No.3. In issue No.2 the Court also considered as to whether the subject land was sold out in the sum described in the agreement.

5. The plaintiff / respondent No.1 himself appeared in the witness box and submitted that the subject land was purchased by him from the applicants / defendants and the sale agreement was executed in the office of Stamp Vendor. He has stated that he had only talked with respondent / defendant No.5 namely Mirza Rashid Ali Baig at his shop in Karachi about purchase of the subject property, however, he admits that the agreement / stamp paper was typed and prepared at Tando Allahyar. He also produced two witnesses in his support. The applicant No.5 / DW-1 Rashid Ali Baig deposed that applicants / defendants No.1 to 4 and 6 are his brothers and sisters, who have executed special power of attorney in his favour. He denied having signed the agreement of sale

or having received the earnest money from the respondent No.1 / plaintiff. He claimed that the sale agreement was forged.

6. The trial Court after considering the evidence and depositions minutely went through the entire record and reached to the conclusion by pointing out various infirmities that the sale agreement was forged, fictitious and a false document whereupon signatures of all the applicants / defendants were manipulated. Particular finding on issue No.3 recorded by the trial Court is reproduced as under:-

*“The burden of prove this issue lies upon the shoulder of defendants. In this regard defendants testified in his examination in chief “I see Ex.52, which does not bear my signature. The plaintiff produced forged agreement Ex.52 before the Court”. During cross examination he stated “it is correct that the signature of defendants No.1 to 6 have mentioned in the sale agreement. Voluntarily says that all are forged signatures”. The defendants entirely refused the claim of plaintiff pertains to execution of sale agreement and took the plea that it was managed and signature of all the defendants while the plaintiff’s claim is vice versa.*

*The plaintiff and his witnesses given contradictory statement with regard to preparation of Ex.52, which was already discussed in issue No.2, therefore, I feel no necessity to repeat that evidence, however besides the above contradiction the plaintiff himself admitted in his cross examination “It is correct that upper portion of page of sale agreement and lower portion of sale agreement is net and clean while in portion on which signature of defendants and witnesses is not so much clean”. I have also scrutinized that portion of Ex.52 which reveals that the portion where signature of defendants and witnesses bears is looking dirty which can visualize from naked eye, while the rest of portion of Ex.52 on both pages is net and clean and it seems that said dirty portion is some blackish colour, which was used for any electronic device in order to trace the signature of defendants on it.*

*It is also matter of admission that plaintiff and his witnesses given contradictory and discrepant version for preparation of the documents. In his evidence plaintiff admitted in his cross examination “Defendant No.5 dictated the contents of sale agreement to the typist”. While the PW Akhtar Ali admitted in his cross exam: “The agreement was typed by Barkat Ali as per routine format of agreement”. The above statement controversial statement of plaintiff and his witnesses reveals that plaintiff claimed that contents of sale agreement were dictated by defendant No.5*

*to Barkat Ali while PW-2 stated that it was typed on a routine format of sale agreement, hence sufficient evidence has been brought on record that sale agreement Ex.52 dated 04-12-2003 is a forged, fictitious, false document and signature of all the defendants was manipulated, hence, issue No.3 is proved and answered as affirmative.”*

7. The said judgment was assailed through an appeal wherein the appellate Court reversed the findings of the trial Court by declaring that the discrepancies in the evidence were of minor nature.

8. The instant civil revision accordingly challenges the said appellate Court's judgment.

9. Learned counsel for the applicants went in detail through the judgments passed by the Courts below and contended that the sale agreement was a forged document and the same clearly shows on his reverse page that the signatures of the parties have been subscribed as different characters have compared to the rest of the document. It is also contended that no proof as to the claim of any money being made was provided to the trial Court. He being still in possession of the subject land makes the absolute owner and rendering the suit for specific performance as malicious. He with regard to the appellate Court's judgment points out that under Order XLI Rule 31 C.P.C. the appellate Court has to deliver its judgment on all the contentious points for determination and since the main controversy was regarding the genuineness of the agreement being issue No.3, the appellate Court has completely ignored the findings of the trial Court. He, therefore, prayed that the appellate Court's judgment be set aside. Then counsel for respondent No.1 challenged these assertions and stated that the sale agreement was executed by applicant No.5 being attorney of the other applicants as per the power of attorney available at page-65 of the R & Ps. He further stated that the applicant No.5 /

defendant / attorney has made an admission that he had entered into the agreement of sale, however, when he was asked to specify at which part of the evidence the applicant No.5 has made an admission with regard to execution of the sale agreement or having received the money, he was unable to point out the same.

10. Heard the arguments and considered the material available on record. To me, any agreement by which parties seeking its enforcement as to clearly show to the Court that money changed hands through whatever possible evidence the claimant can produce. In this case, there is no proof that money actually changed hands. Not even a receipt on plain paper is available. He made serious jolts in the case of the respondent No.1 / plaintiff, however, the assertion of the counsel that the agreement was entered into by the attorney of the applicants is unfounded, as a look on the same clearly shows that it is allegedly signed by all parties. In the given circumstances, where these discrepancies are available on the record and the counsel for the respondent No.1 having failed to make out any plausible case, the contention of the learned counsel for the applicants with regard to the application of Order XLI Rule 31 C.P.C. to the judgment passed by the appellate Court having substantiate weight that the appellate Court has failed to consider the facts available before the trial Court and has failed to consider the moot point that neither money changed hands nor it was admitted that the agreement in question was not a fake agreement. In the circumstances, I allow this revision by setting aside the judgment of the appellate Court.

JUDGE

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