

IN THE HIGH COURT OF SINDH AT KARACHI

First Appeal 93 of 2017

Present: **Muhammad Ali Mazhar** and **Agha Faisal, JJ.**

Mrs. Nuzhat Zehra and Another
vs.
Shamsuddin

For the Appellants: Mr. Naeem Akhtar Khan Advocate

For the Respondent: In person

Date of Hearing: 17.01.2019

Date of Announcement: 17.01.2019

JUDGMENT

Agha Faisal, J. The present appeal was filed assailing the Judgment delivered by the learned 1st Additional District Judge, Karachi (Central) on 28.10.2014 (“**Impugned Judgment**”) in Summary Suit 32 of 2011 (“**Suit**”) and Decree dated 30.10.2014. The Impugned Judgment decreed the Suit in favor of the present respondent along with costs.

2. Briefly stated, the facts of the case are that the parties had entered into a sale agreement with respect to immovable property and in respect thereof an amount of Rs. 1,120,000/- was paid by the present respondent as advance / token money. The conveyance agreed vide the said agreement did not be take place, hence, the respondent demanded the return of the token money advanced. Two (02) cheques, aggregating Rs. 1,120,000, were issued to the respondent as a vehicle to return the token money advanced.

3. Upon dishonor of the said cheques, the respondent instituted the Suit in which leave to defend application was allowed to the present appellants, subject to furnishing surety. The present appellants failed to furnish the surety and the Suit was proceeded with by the Court. The respondent was examined on oath and also filed his affidavit in ex-parte proof exhibiting the relevant corroborating documentation, particulars whereof are elaborated in the Impugned Judgment. The learned Court proceeded with the matter and decreed the same in favor of the present respondent.

4. It is observed from the record that the present appellants filed Revision Application No. 16 of 2014 against the order dated 29.01.2014, by virtue whereof conditional leave to defend was granted to the present appellants. By virtue of the order dated 14.12.2014, a learned Single Bench of this Court issued notice in the said proceedings and directed the appellants to furnish surety in the sum of the decretal amount with the Nazir of this Court within a period of fifteen (15) days. Upon our query, we were informed by the learned counsel for the appellants that the said orders were not complied with and no surety was ever furnished. Instead thereof, the appellants preferred the present appeal wherein the following order was passed on 18.12.2018:

“3-4. Learned counsel requests that operation of the impugned judgment and decree be suspended as warrants of arrest of the appellants have been issued by executing Court in the execution proceedings initiated by the respondent. He states that the appellants are willing to furnish surety to the extent of the decretal amount. Subject to furnishing solvent surety by the appellants to the extent of decretal amount and to the satisfaction of the Nazir of this Court within (10) days from today, operation of the impugned judgment and decree shall remain suspended till the next date of hearing.”

5. The matter was listed for hearing today and we were informed by the learned counsel for the appellants that the surety directed to be deposited vide order dated 18.12.2018 has not been deposited till date.

6. Mr. Naeem Akhtar Khan, learned counsel for the appellants, admitted that despite three opportunities for the deposit of the surety, the appellants remained in default of the said successive directions. Per learned counsel, the appellants were not obliged to return the token money since upon non-performance of the sale agreement they were entitled to forfeit the same. It was contended that the cheques under consideration were obtained from the appellants by force, therefore, the dishonor of the same would not entitle the respondent to any relief. It was further argued that the contentions of the appellants were not considered by the learned Trial Court and no proper appreciation was given to the submissions preferred on behalf of the appellants. It was thus prayed that the appeal be allowed and the Impugned Judgment be set aside.

7. The respondent appeared in person and submitted that he was lured into the sale agreement on false pretenses since the underlying immovable property was mortgaged to the National Bank of Pakistan at all material times. It was submitted that the said fact was concealed from the respondent in order to unjustly enrich the appellants at the cost of the respondent. The respondent argued that once it was apparent that the sale agreement would not materialize on account of the failure / inability of the appellants to honor their commitment, the

respondent demanded the return / refund of the advance / token money paid thereto. It was added that the repayment of the said amount was delayed on one pretext or another and finally the two cheques were given to the respondent and the said cheques were dishonored by the relevant bank upon presentation. The respondent added that he has been running from pillar to post to seek redressal of his grievance since 2010 and that the appellants have been thwarting all such efforts by employing delaying tactics. The respondent supported the Impugned Judgment in its entirety and prayed that the present appeal be dismissed forthwith.

8. We have considered the respective submissions made before us and have also perused the documents arrayed on file. It is evident that the learned Trial Court had granted leave to the appellants subject to deposit of surety, however, the appellants chose to forego the said opportunity. It is also apparent that directions were issued to the appellants for deposit of the surety in the Revision Application filed before learned Single Bench of this Court and also subsequently in the present proceedings. It is observed, however, that the appellants have chosen to defy the said directions on each successive occasion. Notwithstanding, this issue of non-compliance, it is incumbent upon us to determine whether any infirmity has been pointed out with respect to the Impugned Judgment, which is the subject matter of appeal.

9. It is an admitted fact that two (02) cheques were issued to the respondent and it is also un-denied that the said cheques were dishonored by the bank upon presentation. Whether or not the

dishonor of the cheques was justifiable was an issue which the appellants were required to agitate before the learned Trial Court and it is apparent that they opted to forego the said opportunity. Nothing has been placed on the record to show that the respondent was not entitled to return of his token money upon non-materialization of the sale agreement. Furthermore, even if that was the case then there would have been no occasion to issue the relevant cheques thereto. The allegation that the cheques were obtained unlawfully is also a vague assertion, devoid of any corroboration from the record. The Impugned Judgment is a speaking order and meticulously details the corroboratory documents adduced there before on the basis whereof the learned Court was pleased to decree the Suit. The learned counsel for the appellants has been singularly unable to identify any infirmity in the Impugned Judgment.

10. In view of the reasoning and rational concern hereinabove, we find that the Impugned Judgment has properly addressed the controversy seized of by the learned Trial Court, hence, the same is maintained and upheld. It is for this reason that the present appeal, alongwith pending applications, was dismissed vide our short order dated 17.01.2019. These are the reasons for our afore-cited short order.

J U D G E

J U D G E

Karachi.

Dated 08th February 2019.

Shaban Ali/PA