

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

IInd Appeal No. S- 58 of 2019

Balach	-----	Appellant
VERSUS		
Imtiaz-ul-Haq and others	-----	Respondents

IInd Appeal No. S- 60 of 2019

Balach	-----	Appellant
VERSUS		
Imtiaz-ul-Haq and others	-----	Respondents

Dates of hearing: 11.09.2020

Date of decision: 25.09.2020

Mr. Abrar Hussain Chandio, Advocate for Appellant (s)

Mr. Muhammad Sachal R. Awan, Advocate for Respondents 1 to 5.

Judgment

ADNAN-UL-KARIM MEMON, J. - These appeals are filed against the common Judgment & Decree dated 3.9.2019 passed by learned IInd Additional District Judge, Sanghar.

2. The case of the Appellant is that private Respondents agreed to sell Block No.2395 (08-00 acres) western side, Block No.2396 (6-00 acres), and Block No.2397 (16-00 acres), total 40-00 acres situated in Deh Sadrat, Tapo Jakhrao, Taluka and District Sanghar (suit land) fully described in the Sale Agreement dated 05.05.2014 entered into between the parties in the presence of witnesses for sale consideration of Rs.1,14,00,000/- (Rupees One crore and fourteen lacs). It is averred in the pleadings that Appellant paid Rs.5000, 000/- (Rupees five million only) to private Respondents as part payment of sale consideration and took over possession of the suit land; however, on 25.04.2015 cause of action accrued to Appellant for instituting F.C. Suit No.71/2015 against private Respondent No. 1, when he attempted to forcibly take over the possession of the suit land and refused to perform his remaining part of above-specified Sale Agreement.

3. The case of the private Respondent No.1 is that he executed Sale Agreement with the Appellant on 05.05.2014 in respect of suit land and

received Rs. 5000, 000/ (Rupees five million only) from the Appellant as part payment of sale consideration; however, the Appellant occupied the entire land of private Respondent compelling him to file F.C. Suit No.48/15 for Declaration Cancellation, Possession, Mesne Profit, Recovery of Rs. 25, 00,000/- as Damages and Permanent Injunction.

4. The trial Court framed the following issues:--

1. Whether the plaintiff No.1 of leading suit sold out his land as per boundaries through sale agreement dated 5.5.2014 to plaintiff of subsequent suit?
2. Whether the plaintiff in subsequent suit and defendant in leading suit manipulated and illegally inserted 4-00 acres land from S Nos: 2396,& 16-00 acres from S Nos: 2397 by over writing in agreement which were not the part of sale land?
3. Whether the defendant of leading suit No 48/2015 and plaintiff of subsequent suit No 71/2015, illegally occupied the area of 4-00 acres land from S Nos: 2396 and also taken away sugar cane crop of 16-00 acres and cause damages of Rs 2500000/- to plaintiff of leading suit?
4. Whether the plaintiff of leading suit No 49/2015 and defendant No 5of subsequent suit No 71/2015 himself sold out the suit land to defendant of leading suit for total consideration of Rs 1,40,00000/- through sale agreement dated 05-05-2014, and handed over possession of 40-00 acres land,?
5. Whether the defendant of leading suit did not make any manipulate and over writing in agreement dated 05-05-2014?
6. Whether the defendant of leading suit and plaintiff in subsequent suit is in possession of suit land as per agreement dated: 05-05-2014 without any manipulation.
7. Whether the defendant of leading suit and plaintiff in subsequent suit is in possession of excess area illegally as per report dated 18.07.2016?
8. Whether the sale agreement dated: 05-05-2014 is valid sale agreement and no over writing or insertion has been made by defendant of leading suit and plaintiff of subsequent suit in it?
9. Whether the plaintiff of leading suit and defendant of subsequent suit has no cause of action to file this suit?
10. Whether the subsequent suit No: 71/2015 is not maintainable?
11. Whether the plaintiff of leading suit and defendant of subsequent suit is entitled for possession?
12. Whether the defendant of leading suit is entitled for relief claimed?
13. Whether the plaintiff of leading suit is entitled for relief claimed?
14. What should the decree be?

5. Private Respondent in leading F.C. Suit No.48 of 2015 examined himself as PW-1 at Ex. 46 and produced Special Power of Attorney at Ex.47, certified true copy of V.F VII-B at Ex.48, Affidavit of witness namely Muhammad Deenar at Ex.49; PW-2 Muhammad Deenar at Ex.50, P.W-3

Muhammad Saleem at Ex.51, P.W-4 Babu Rai, Representative of Mukhtiarkar Office, Sanghar at Ex.63 who produced Village Form VII-B Entry No. 676 dated 07.10.1992 at Ex.64. Thereafter, learned counsel for plaintiffs closed the side vide Statement Ex.65.

6. Appellant in leading Suit examined DW-1 Khalid Tapedar, Mukhtiarkar Office, Sanghar at Ex.72 who produced Revenue Entry No. 676 dated 07.10.1992 at Ex. 73, deh Map of Chak No. 42 Deh Sadrath Block No. 2395, 2396, 2397 at Ex. 74. And, seen letter Nos. 248 and 309 and produced the same at Ex.75 and 76 respectively; D.W-2 Rai Chand, Assistant Officer, United Bank Limited, Sanghar at Ex.77 who produced original Letter issued by Branch Manager at Ex.78 along with details of Account No. 056937101079 in the name of Khurram Shahzad at Exs.79 to 82; D.W-3 Muhammad Haris, Operation Manager, Al-Falah Bank, Sanghar at Ex.83 produced Authority Letter at Ex.84, Bank Statement of Account No. 0259-1003870280 (25 leaves) at Ex.85, photocopy of cheque deposit at Ex.86, photo of the cheque at Ex. 87, Cheque No. CD-44580105 dated.07.05.2014 at Ex.88; DW-4 Faraz Ali, TSO Muslim Commercial Bank, Main Branch, Sanghar was examined at Ex.89 who produced Authority Letter at Ex.90, Account Maintenance Certificate at Ex.91, Account Statement of Balach (13 leaves) at Ex.92; DW-5 Kanhyo Mal, Stamp Vendor at Ex.103, who produced entry of Stamp Register at Serial No. 2726 dated 05.05.2014 at Ex.104, DW-6 Mehmood Ahmed, Manager, MCB Branch Head, Jamrao Road, Sanghar at Ex.105 who produced attested Account Statement of A/C No. 0369087231001392 (4 leaves) at Ex.106. Defendant Balach examined himself as D.W-6 at Ex.109 and produced Sale Agreement/ Qabooliat bearing No. 2726 dated 05.05.2014 at Ex.110, Original receipt No. 2948 dated 02.06.2014 on stamp paper at Ex.111. The side of the defendant was then closed vide Statement Ex.114.

7. Learned Trial Court after hearing the parties and perusing the record vide common judgment dated 28.9.2018 decreed F.C. Suit No.71/2015 of the Appellant and dismissed the Respondent's F.C. Suit No.48 of 2015.

8. The Respondent impugned the said Judgment and Decree in Civil Appeal Nos. 96 and 97 of 2018 before 2nd Additional District Judge, Sanghar. Learned Appellate Court framed the point for determination, that is, whether the impugned consolidated judgment and decree require interference? And, after hearing the parties set-aside the common Judgment and Decree dated 28.9.2018 passed by the learned Trial Court and decreed F.C. Suit No.48/2015 filed by private Respondents to the extent as reproduced below:

"23). In view of my findings on point No.1, the impugned judgment and decree dated 28-09-2018 is hereby set aside, instant appeal No.97/2018 is

partly allowed, resultantly suit of the plaintiffs/appellants bearing No.48/2015) is hereby decreed partly to the extent that the appellants/ plaintiffs have sold out the suit land as per boundaries mentioned in agreement dated 05-05-2014 viz Survey No. 2385 area 12-00 acres, Survey No 2395 16 acre and 2396,/12 acres, the possession of respondent besides above survey numbers is declared as illegal and liable to be restored to appellants forthwith, and respondent No 1 liable to pay mesne profit at the rate of 20,000/- per acre per year till restoration of possession to the appellant. However, remaining prayers for the recovery of damages is dismissed, Whereas Civil Appeal No.96/2018 is also allowed and F. C. Suit No.71/2015 filed by respondent Balach Khan is partly dismissed with condition that appellants party Imtiaz-ul-Haq & others are directed to execute Registered sale deed in favour of respondent Balach Khan in respect of 40-00 acres land which appellants as per their admission and version have agreed to sell out i.e. as the land which is adjacent to neighboring zamindar Khairo Chandio and to accept remaining sale consideration amount of Rs.64,00,000/-(Sixty Four Lac) and in alternate the sale deed be got executed by the Nazir of District court Sanghar accordingly.

9. It is submitted by Mr. Abrar Hussain Chandio, learned counsel for Appellant that findings on facts recorded by the learned Trial Court could not be set aside by learned Appellate Court under Section 96 CPC; that the learned Appellate Court re-appraised the evidence and substituted the findings of the learned trial Court without pointing out any error or mistake; that the Judgment of Appellate Court is based upon surmises and conjectures hence, is liable to be set aside. Learned counsel has submitted that learned Appellate Court has ignored the reasoning of the learned Trial Court; that learned Trial Court has given cogent reasons in the judgment based upon the evidence available on record and the same does not suffer from any illegality, misreading, or non-reading of evidence. Learned counsel in support of his case has relied upon the case of *Amjad Sharif Qazi and others vs. Salimullah Faridi and others* (PLD 2006 Supreme Court 777).

10. Mr. Muhammad Sachal R. Awan, Advocate for private Respondents has vehemently opposed the Appeals and supported the Judgment of Appellate Court; that the conclusion drawn by learned Appellate Court is based upon the evidence produced by the parties; that this Court cannot interfere in the findings of facts recorded by the Appellate Court while exercising jurisdiction under Section 100 C.P.C., unless such findings had been arrived at by the Courts below either by misreading or non-reading of material evidence; that this Court cannot undertake reappraisal of evidence in the Second Appeal. Learned counsel further argued that the Honorable Supreme Court in its various pronouncements has settled the proposition that a party seeking specific performance of an agreement to sell is essentially required to deposit the sale consideration amount in Court; that in fact, by making such a deposit the purchaser demonstrates his capability and willingness to perform his part of the contract, which is an essential pre-requisite to seek specific performance of the contract. Failure of Purchaser to meet the said essential requirement disentitles him

to the relief of specific performance, which undoubtedly is discretionary. In support of his contention, he relied upon the decision of Hon'ble Supreme Court in the case of Malik Bahadur Sher Khan v. Haji Shah Alam (2017 SCMR 902).

11. I have heard learned counsel for the parties and perused the material available on record.

12. The moot question involved in these Appeals is that whether extra area of land belonging to the Respondent No. 1 was occupied by the Appellant under the garb of Sale Agreement dated 05.05.2014?

13. I have observed that the private Respondent in his deposition has acknowledged the execution of the Sale Agreement dated 05.05.2014 in respect of the suit land and receiving of sale consideration of Rs.5000,000/- (Rupees Five Million) as part payment from the Appellant. And, the balance amount of Rs.64,00,000/- was / is liable to be paid by the Appellant to him. The Respondent has further acknowledged that the Sale Agreement dated 05.05.2014 shows the boundary of sold land and carries his signature. The deposition of the stamp vendor explicitly establishes that the Agreement of Sale of 40 acres was reduced into writing in his presence and duly affirmed by him and signed by the parties after completion of written correspondence. The deposition of Manager, MCB Branch, Jamrao Road, Sanghar shows that the amount of sale consideration was disbursed in favour of private Respondent through Bank transaction.

14. Whereas, the Appellant in his deposition acknowledges the Sale Agreement between the parties but, denies the suggestion that he occupied extra cultivated land of private Respondent other than the area agreed between the parties in the said Sale Agreement.

15. I have noticed that Mukhtiarkar concerned furnished a Report before the Trial Court which reads as under:-

"That S.No.2384, 2385, 2395, 2395, 2396, 2397, total area 80-00 acres are stand entered in the name of Imtiaz-ul-Haque and his brothers vide entry No.676 of V.F. VII-B of Deh Sadrat. On the site S.No.2395/1,2,7,8,9,10,15, 16 (08-00 acres) 2396/ 1 to 16, 16-00 acres and 2397/1 to 16 (16-00) acres total area 40-00 acres are in the possession of Balach Khan. According to an agreement produced by him, it also shows that above 40-00 acres are owned by Balach Khan. He also cultivated an area of 15-00 acres through Sugar Cane & gross.

According to boundaries, from the eastern side of B.No.2395/1,2,7,8,9,10,16 area 08-00 acres, the land of Imtiaz-ul-Haque & others consisted B.No.2395/3,4,5,6,11,12,13,14 is located, and from the western side B.No.2396 is situated Northern side B.No.2386 is situated while Southern Side Chak No. 54 is located.

While, from the Northern side of B.No.2396, the B.No.2385 is situated, Southern Side Chak No. 54 is located and the Eastern side B.No.2395 is situated and the Western side B.No.2397 is situated.

While from the Northern side of B.No.2397 the B.No.2384 is situated on, Southern side Chak No. 54 is located Eastern side B.No.2396 is situated Western side B.No.2398 is situated”.

16. In the prospect of the above factual as well as the legal aspect of the case, I have concluded that the decision of the learned Appellate Court is based upon sound reasoning; that survey numbers were fraudulently included by the Appellant which were not under sale. The findings of learned Appellate Court in this regard are as under:-

“19) It is worth mentioning that case of appellants/plaintiffs Imtiaz-ul-Haq and others is that they have sold out their 40-00 acres land out of 80-00 acres to respondent/defendant Balach Khan by mentioning boundaries and no survey/block numbers were mentioned for the reason of non-availability of Form No VII-B, whereas defendant/ respondent has occupied the whole land of 80-00 acres and claiming in possession of the land which was not sold out by the appellants as per sale agreement by mentioning boundaries of the suit property. The plaintiff/appellant asserted that in fact, they sold out their land area 16-00 acres of block/survey No.2395; 12-00 acres of Block No.2396, and 12-00 acres of block No.2385 while the respondent/ defendant occupied survey Nos. 2395 area 08-00 acres, 2396 area 16-00 acres, and 2397 area 16-00 acres and malafidely inserted such survey numbers in the sale agreement dated 05-05-2014, in support of case/controversy, plaintiffs/appellants have specifically mentioned in Para No.14 of the plaint of suit No.48/2015 that “it may be declared that the defendant has inserted the suit land by manipulating the last page (bag) of sale agreement dated 15-05-2014” and surprisingly in rebuttal of this assertion the defendant/respondent replied the said Para in his written statement as “that contents of Para No.14 of the plaint are vehemently denied. Let the plaintiff prove”. Moreover, in Para Nos.5 & 6 appellants/plaintiffs of the leading suit specifically alleged that defendant took over the possession of suit land which is not under sale viz. survey Nos.2395, 2396, and 2397 wrongly claimed instead of survey No.2395/16, 2396/12 and 2385/12 while in survey No. 2397 area 16-00 acres and survey No. 2396 area 04-00 acres appellants/plaintiffs have cultivated sugar cane crop which the defendant illegally occupied and took out the sugar cane crop from the occupied land and thereby plaintiffs/appellants sustained loss of Rs.2500,000/-. In reply of these Paras defendant/respondent stated that “the plaintiffs themselves handed over the agricultural land bearing Block No. 2395 area 08-00 acres towards the Western side, Block No. 2396 area 16-00 acres and block No. 2397 area 16-00 acres to the defendant in presence of witnesses as per sale agreement dated 05-05-2014 and there was no sugar cane crop of plaintiffs was standing, hence, no question arises to sustain loss and with regard to Para No.5/6 of the plaint are denied vehemently let plaintiff prove”. It is admitted position that in Para No.14 of the plaintiff appellants/plaintiffs urged that some manipulation made in Page No.4 by the defendant/ respondent but the respondent failed to deny the same categorically and stated only “it is denied vehemently and let the plaintiffs prove the same” is not enough under the law, as under the settled law in terms of Order VII Rule 5 if the allegation in the plaint was not denied in clear terms or by necessary implication and if there was evasive denial, such denial could not be considered an allegation in the plaint would be considered to be correct as held in case law 2012CLC-644.

20). It is an admitted position that during course of evidence, defendant Balach Khan deposed that at the time of execution of sale agreement appellant offered me to select the land towards the neighbouring zamindar and he selected land of near to Khairo Chandio and admitted that sale agreement was written as whole not in pieces and further deposed that the sale agreement was attested in presence of stamp vendor which admittedly attested on 07-05-2014 not on same day on 05-05-2014 while Pw Kanaya lal

stamp vendor failed to depose that the sale agreement was attested from oath commissioner in his presence after two days of agreement rather he deposed that agreement completed on 05-05-2014, which apparently appears that respondents in connivance with stamp vendor, the manipulation was made in the sale agreement but could not succeed to prove the same, whereas it would not out of place to mention here that agreement of sale is comprising of four pages and the controversy is on page no 4 only whereas as per contents of para no 03 it is in Sindhi writing column No 10 it is specifically written that the suit land is sold as per agreement without Form No VII and Survey Numbers and the same is written on the direction of both parties, which clearly proves the case of appellants that they have sold out the suit land as mentioned above, moreover, It would not be out of place to mention that subscriber of sale agreement namely PW Kanaya-Lal/ stamp vendor was examined at Ex.103 who deposed that survey numbers of sale transaction were mentioned in presence of both witnesses, but during course of evidence not a single question was put to both the marginal witnesses rather they categorically denied about mentioning of survey numbers, on the contrary they deposed that the sale agreement was executed on the basis of boundaries not the block and survey numbers. As per Article 17 & 79 of Qanoon-e-Shahadat Order, the contents of any document/agreement are to be completely supported by the marginal witnesses of such documents, which are in support of appellant contentions and as per the requirement of Article 17 & 79 it demonstrates that except for a Will no document could be used in evidence until the same was proved by two attesting witnesses. As held in case law Zakallah and other Vs Manzoor Hussain through L Rs reported 2016 CLC 1245.

21). **It worth mentioning that it is admitted position that sale agreement Exh. 110 is not disputed except page No.04 of the same, as per appellants' version suit property was sold out as per boundaries and no survey number was mentioned for the reason that at that time Form VII-B was not available and the same was executed in presence of two witnesses Mohammed Saleem and Mohammed Deenar Chandio which also an admitted position.** I have perused the evidence of Muhammad Saleem and Muhammad Deenar who both are admittedly marginal witnesses of the sale agreement in question, both the marginal witnesses of sale agreement have deposed that **in the contents of sale agreement survey numbers were not inserted but only boundaries/directions of land under sale were mentioned that in North there is lands of Malik Razzaq, in South there is main Water Course, in West there is remaining lands of plaintiffs and in East there is land of one Khairo Chandio while the assertion of appellants/ plaintiffs that they sold the land as per sale agreement dated 15-05-2014 without boundaries of following survey numbers with area in total 40-00 acres, i.e. from Survey No. 2395, area 16-00 acres, from survey No.2396 an area of 12-00 acres from survey No.2385, area 12-00 acres, total area 40-00 acres,** appears to be convincing as the appellants asserted the same grounds in their legal notice which is admittedly served upon respondent No.1 but not replied, it is worth mentioning that to prove the execution of any document specially sale agreement in question, the role/ evidence of marginal witnesses as per law are very much important and their evidence carry weight. The burden to prove such a document is always lying upon the beneficiary of such a document. **In the instant case both the marginal witnesses of the sale agreement in question have not supported the version of respondent No.1 and categorically deposed before the Court that such document has been manipulated by inserting survey numbers which were agreed to sell by the appellants/plaintiffs. It is the case of appellants/plaintiffs that fraud has been committed by the defendant/ respondent No.1, the survey numbers as mentioned in the sale agreement were never sold out by them to respondent No.1 Balach. Such version of plaintiffs/appellants has also been supported by witnesses Muhammad Saleem & Mohammed Deenar Chandio who is caste fellow of the respondent and his name also appears in list of witnesses of the respondent; moreover, despite of cross-examination of both the marginal witness they were not asked material question, hence, their version went unshattered** and in case law 2012 CLC-644 it is held that in terms of Article 133 of Qanun-e-Shahadat Order that cross-examination of witness was a right of adverse party and if a particular portion

of the statement of witnesses was not examined that could be deemed to be admitted as true and if the statement of any witness would go against the defendant and he failed to cross-examine on that point then the point would be deemed to be admitted as it is admitted position that appellants/plaintiffs examined both the marginal witnesses of said sale agreement Ex.110 namely Muhammad Saleem and Deenar who both categorically supported the version of appellants/plaintiffs. Consequently, in such circumstances, **it proves that fraud has been committed by defendant Balach by inserting survey numbers purported to be sold out to him by the appellants, whereas the plaintiff/seller of such land has denied the sale of said survey numbers and his version has been supported by the attesting witnesses of a sale agreement in question.** In such a situation the version of the appellant/plaintiffs is convincing and credible, however, the appellants have failed to produce any tangible and convincing evidence in respect of cutting sugar cane crop by respondent No.1 as they have not produced any concrete evidence oral or documentary, **hence, prayer towards damages is decided as not proved.**

22). The learned trial court has failed to appreciate the above-mentioned evidence and facts which shows that a fraud has been committed by the respondent. **In view of the above discussion I have reached at the conclusion that the impugned judgment and decree passed by the trial Court is not in accordance with law without considering the evidence of marginal witnesses of the agreement in question,** there is no substance in the arguments of learned counsel for the respondent, the judgment and decree dated 28-09-2018 passed by learned trial Court is not sound in accordance with evidence brought on record, which requires interference, hence, the point No.1 is answered in affirmative.”

17. From the perusal of aforesaid findings, it appears that the parties are blaming each other for non-compliance with the terms of the Sale Agreement.

18. In the instant case, I have noticed that learned appellate court to meet the ends of justice has fairly modified the common judgment passed by learned trial court in Suit No.71/2015 to the extent that **“FC Suit No.71/2015 filed by respondent Balach Khan is partly dismissed with condition that appellants party Imtiaz-ul-Haq & others are directed to execute Registered sale deed in favour of respondent Balach Khan in respect of 40-00 acres land which appellants as per their admission and version have agreed to sell out i.e. as the land which is adjacent to neighboring zamindar Khairo Chandio and to accept remaining sale consideration amount of Rs.64,00,000/- (Sixty Four Lac) and in alternate the sale deed be got executed by the Nazir of District court Sanghar accordingly.”**

19. In the light of the above discussion, I am of the firm view that there is no justification for this court to interfere with the common Judgment and Decree dated 3.9.2019 passed by learned IInd Additional District Judge, Sanghar. The consequences prescribed thereby shall follow.

Appeals are dismissed.

JUDGE