

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision No. S – 139 of 2009

Muhammad Younus v.

Khadim Hussain (deceased) through his Legal Heirs and others

Date of hearing: **21-02-2022**

Date of decision: **21-02-2022**

Mr. Nishad Ali Shaikh, Associate of Mr. A. M. Mobeen Khan,
Advocate for the Applicant.

Mr. Kalander Bakhsh M. Phulpoto, Advocate for private Respondents.

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J U D G M E N T

Muhammad Junaid Ghaffar, J. – Through this Civil Revision Application, the Applicant has impugned judgment / decree dated 16-09-2009 and 19-09-2009, respectively, passed by the Illrd Additional District Judge, Khairpur in Civil Appeal No.52 of 2004, whereby while allowing the Appeal of Respondent No.1, judgment / decree dated 30-06-2004, passed by the Senior Civil Judge, Mirwah in F.C. Suit No.12 of 2003 has been set aside, through which the Applicant's Suit was decreed.

2. The Applicant's Counsel has filed written arguments, which have been perused.

3. Insofar as the Respondents' Counsel is concerned, he has contended that the Appellate Court's judgment is correct in law, whereby, the judgment of the Trial Court has been set aside; that the Trial Court had misread the evidence; that admittedly, a sale deed was already in field duly executed by Respondent No.5 in favour of Respondent No.1, and being prior in time, could not have been cancelled or set aside; that the Trial Court was misdirected in placing reliance on Article 79 and 80 of the Qanun-e-Shahadat Order; that the sale deed was never disputed or denied by the executant, hence, no case was made out for a decree of specific performance and cancellation of the sale deed of the private Respondents. In support, he has relied upon the cases reported as Sajid Ahmed v. Muhammad Saleem Alvi (2021 SCMR 415), Abdul Rasheed v. Muhammad Yaseen and others (2010 SCMR 1871), Mst. Kulsoom Bibi and another v.

Muhammad Arif and others (2005 SCMR 135) and Manzoor Hussain v. Haji Khushi Muhammad (2017 CLC 70).

4. Heard learned Counsel for Respondents and perused the written arguments of the Applicant's Counsel as well as available record.

5. It appears that the Applicant had filed a Suit for specific performance, cancellation and injunction, and sought the following prayers:

- (a) *That, by passing the decree of specific performance of contract in favour of plaintiff thereby directing the defendant No.4 to execute the sale deed in respect of suit land as in case of refusal the sale deed in respect of suit land as in case of refusal the sale deed be got execute through the any officers of this Hon'able court.*
- (b) *To cancel the registered sale deed No.591 of dt:-10-12-85 which is false and fake not binding upon the plaintiff.*
- (c) *To issue permanent injunction thereby restraining the defendant or any body else not to sell, mortgage, lease of alienate from and interfering in any manner with rights, possession and enjoyment or any body claiming through their from directly or indirectly with the suit land of plaintiff in any manner.*
- (d) *To award the costs of the suit.*
- (e) *Any other relief which this Hon'able court.*

6. The learned Trial Court, after recording of evidence, was pleased to decree the Suit; whereas, in Appeal, the Appellate Court through impugned judgment has set aside the judgment of the Trial Court by allowing the Appeal.

7. Insofar as the learned Trial Court is concerned, it appears that the learned Trial Court came to the conclusion that the agreement of sale was duly proved by the Applicant; whereas, the said evidence had gone unchallenged. Similarly, the Trial Court also was persuaded to believe that the sale deed was forged and liable to be cancelled. The said finding of the Trial Court, on the face of it, does not appear to be in consonance with law as well as the facts available in this case.

8. It is in admitted position that the sale deed of Respondent No.1 executed by Respondent No.5 was prior in time, and even in the evidence of the Applicant, such fact has been admitted. It is also a matter of record that the executant of the sale deed i.e. Respondent No.5 came before the Court and duly admitted said execution, and therefore, it could not have

been held to be a fake or bogus sale deed. It is settled proposition of law that registered sale deed prior in time must be given due weightage over the latter sale deed¹. Here, in this matter, there is not even a subsequent sale deed; but a mere agreement to sell.

9. The Applicant's case was premised on an agreement of which the specific performance was being sought, and in that case, either the Court could have decreed the suit for performance of the agreement or in the alternative, the Suit was to be dismissed. However, in a Suit which is based on a purported agreement of sale; no other relief can be claimed or granted, notwithstanding the fact that the Plaintiff had also sought some other relief. Even a claim for refund or compensation of the amount paid by the buyer, by itself would show the intention on the part of the buyer that he does not want specific performance of the agreement of sale. The Applicant in this case, by himself, had no right to seek cancellation of the sale deed executed between other Defendants, as for such cancelation no right had accrued to the Applicant. The said sale deed was a matter between the executant and the beneficiary. The only alternative available for the Applicant, and for that matter, to the Trial Court was that if a case for specific performance is made out and the same cannot be executed in any manner, then perhaps compensation was the other remedy available to the Applicant. However, the Applicant never claimed any such compensation nor the learned Trial Court deemed it appropriate to grant the same.

10. It may also be of relevance to observe that insofar as Respondent No.1 is concerned, it had no concern with the Applicant as the matter was between the Applicant and Respondent No.5, who had purportedly executed the agreement with the Applicant as claimed. How and in what manner, Respondent No.1 could be penalized for a transaction with which he had no concern; whereas, coupled with the fact that the very execution of the sale deed in his favour was never disputed by the executant; rather the said executant came before the Court and duly admitted such execution. This important legal question has escaped the attention of the learned Trial Court which has perhaps resulted in decretal of the Applicant's Suit, and as a consequence thereof, even the sale deed of Respondent No.1 has been declared to be forged and liable to be cancelled. This could not have been done in the Suit for specific performance filed by the Applicant. Lastly, it is

¹ Abdul Rasheed v. Muhammad Yaseen and others (2010 SCMR 1871)

also a settled proposition that in cases of specific performance, even if a case is made out and established, it is not mandatory to grant such relief as firstly it is a discretionary relief; and secondly, if for some other attending circumstances, (as is the case in hand), the grant of relief is to be declined, and it must be so ordered. Even in cases where the agreement to sell was validly proved by the plaintiff, the courts may refuse to allow the relief of specific enforcement as the Court was neither obliged to grant the relief of specific performance nor could the plaintiff claim it as a matter of right². Relief of specific performance of agreement was purely discretionary in nature and the court was not bound to grant such relief merely on the basis that it was lawful to do so. Peculiar facts and circumstances of each case, particularly, the terms of the agreement between the parties, its language, their subsequent conduct and other surrounding circumstances, would enable the Court to decide whether the discretion in terms of S.22 of Specific Relief Act, 1877 ought to be exercised in favour of specific performance or not³.

11. In view of hereinabove facts and circumstances of this case, it appears that the learned Appellate Court was fully justified in setting-aside the judgment and decree of the trial Court, and therefore, this Civil Revision Application does not merit any consideration, hence, was **dismissed** by means of a short order in the earlier part of the day and these are the reasons thereof.

Abdul Basit

J U D G E

² FARZAND ALI V KHUDA BAKHSH (PLD 2015 SC 187)

³ LIAQAT ALI KHAN V FALAK SHER (PLD 2014 SC 506)