

JUDGMENT SHEET
IN THE HIGH COURT OF SINDH
CIRCUIT COURT HYDERABAD

IIInd Appeal No.20 of 2014

DATE ORDER WITH SIGNATURE OF JUDGE

24-08-2017

1. For katcha peshi.
2. For hearing of CMA No.1695 / 2015.

Mr. Rafique Ahmed advocate for appellant.

Mr. Arbab Ali Hakro advocate for respondent No.4.

This second appeal is arising out of the concurrent judgments of two Courts below i.e. one passed in Civil Appeal No.44 / 2012 and the other F.C Suit No.96 / 2007. Appellant filed a suit for Specific Performance in the year 2007 in pursuance of an agreement of sale dated 11.01.2005 available as annexure-H page-207. Counsel submits that respondent No.4 in fact is a subsequent purchaser of the property and has prepared a forged agreement having dates prior to the date of appellant's agreement with the respondents No.1, 2 and 3. He submits that the respondent No.4 is a purchaser of property having notice of an earlier agreement between appellant and respondents No.1, 2 and 3. He has further urged that the agreement between the appellant and respondent No.4 could also be struck down in term as being malafide on account of cash payment of Rs.10 million shown to have been paid prior to the payment of earnest money of appellant. He further submits that respondent No.4 made subsequent payment through pay orders and hence, this is sufficient to prove that the agreement is a subsequent agreement and the vendee / respondent No.4 has the knowledge of earlier agreement with the appellant. Learned counsel has also read the relevant part of the evidence of witnesses to establish that the respondent No.4 had the knowledge of earlier agreement.

I have heard the learned counsel and perused the record. The only material question requires consideration is whether in terms of section 41 of

the Transfer of the Property, 1882 and section 27 (b) of the Specific Relief Act, 1877. Respondent No.4 is a bonafide purchaser of the property on payment of valuable consideration and without notice of earlier agreement. I have carefully gone through the evidence and in particular, the evidence of Muhammad Haroon respondent No.4 who was cross examined by appellant's counsel. Nowhere in the entire cross-examination, has he agreed that he had knowledge of the prior agreement. To all suggestions of the learned counsel of the appellant, he has come up with the denial. The material questions as to the payment of Rs.10 million in cash was also put to the respondent but he has denied the suggestion that it was not paid on 12.12.2004 as earnest money. Perhaps, the material questions were never put to the witnesses and as such, it left unproved that the amount of Rs.10 million has not been paid. The purchaser and the seller have admitted the amount to have been paid. It is, thus, the burden upon the appellant to establish that this sale deed that was executed between respondents No.1 to 3 and 4 was a malafide transaction.

In the case of "Messrs RAEES AMROHVI FOUNDATION (REGD.) v. MUHAMMAD MOOSA and others (1999 C L C 296), Mr. Justice Sabihuddin Ahmed, as he then was went to observation that "equity of specific performance could not be enforced against a person who had, subsequently, purchased property and paid his money in good faith and without notice of original contract." Appellant has also failed to establish that after execution of the agreement, the public notices were issued in newspapers, as such, there is not even presumption that he could have read such information in the newspaper as to the agreement between appellant and respondents No.1, 2 and 3. The entire evidence of one Muhammad Azam and Muhammad Aslam also does not attribute malafide to respondent No.4. No doubt, respondents No.1, 2 and 3 may have taken the earnest money from the appellant but then this act of respondents No.1, 2, and 3 cannot be attributed to respondent No.4 who in terms of the evidence comes out to be a bonafide purchaser and without notice. The appellant may seek his remedy as he deems fit and proper.

against the respondents No.1, 2 and 3, but as far as respondent No.4 is concerned, the equity lies in favour of respondent No.4 and he cannot be deprived of a property which is being safeguarded in terms of section 27(b) of Specific Relief Act, 1877 and section 41 of Transfer of Property Act, 1882. Consequently, second appeal is dismissed along with pending application.