

ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

IInd Appeal No.34 of 2012

IInd Appeal No.35 of 2012

DATE	ORDER WITH SIGNATURE OF JUDGE(S)
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11.12.2017

Mr. Jhamat Jethanand, Advocate for appellant.
Mr. Arbab Ali Hakro, Advocate for respondents.

ORDER

MAHMOOD A. KHAN, J:- Both these proceedings filed by the same appellant arise out of counter suits for Specific Performance and Possession in contestation. Learned Counsel for the appellant contends that the possession of the property was with the appellant against part payment and the learned Trial Court as well as the learned Appellate Court have failed to consider that the dismissal of the appellant's proceeding was not called for and is violative of Section 29 of the Guardian and Wards Act. It is further contended that the learned Trial Court has failed to appreciate properly the evidence in respect of the Issues No.4, 5, 6 and 7. It is also contended that the sale agreement in the matter provided for a payment of Rs.400,000/- and that against the said payment the respondent No.1 had to obtain the mutation, only whereafter the sale deed could be got executed as the same was not forthcoming, eventually the proceedings for specific performance were filed.

2. Learned Counsel for the respondents on the other hand contends that it is a matter of record that on the day of the alleged agreement of sale the earlier owner had already expired. It is further contended on part of the learned Counsel for the respondents that the appellant was not in possession against part payment as he had acquired possession from another person who was never

authorized in this regard and all this has come up in the evidence. It is further contended on part of the learned Counsel for the respondents that the matter of Guardian and Wards as is being relied upon by the learned Counsel for the appellant stands decided by the learned Courts below on merits and the respondents have succeeded in consideration of non-payment of balance amount as well as the appellant not acquiring in possession from the owner and as such the concurrent findings in these second appeal are not liable to be disturbed. He, however, claims the mesne profit as claimed in the matter.

3. Learned Counsel for the appellant in rebuttal submits that the appellant had in all bonafide filed the application to bring the legal owners on record, which was opposed by the respondent No.1. The sale agreement in the matter provided for a limitation after two months of the initial payment and where the owners were not forthcoming to the required on their part, the possession was handed over as compensation. It is also contended on part of the learned Counsel for the appellant that the person in possession of the property as alleged by the respondents was never in possession in actuality and this fact is borne from the agreement. It is also contended that non-consideration of the above matter comes within the ambit of misreading of evidence and as such liable to be allowed in favour of the appellant or otherwise the matter is liable to be remanded for further evidence.

4. Having heard the learned Counsels, it is a matter of record that the parties had admitted sale and payment of part consideration, however, it was for the appellant to show before the learned Trial Court that the possession available to him was in consideration of the part payment and handing over the possession cannot be left to a simple presumption, failure of the same has led to failure of discretionary relief for specific performance. For a claim of specific performance, the element of non-payment of balance sale consideration is

clearly present. The balance sale consideration had admittedly stood in the sum of Rs.10,00,000/-, whereas only Rs.400,000/- seems to have been paid. The claim of the respondents for mesne profit in the present circumstances is also not liable to be considered as failure is present of not depositing the said part payment received. In the circumstances, these appeals stand dismissed, however, in the circumstances with no order as to costs.

Sd/- MEHMOOD A. KHAN,
JUDGE.