

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

IInd Appeal No.S- 18 of 2019

DATE	ORDER WITH SIGNATURE OF JUDGE
-------------	--------------------------------------

1. For hearing of MA No.595 of 2019
2. For hearing of main case.

26.05.2022.

Mr. Muhammad Saleem Ansari Advocate
 Mr. AshfaqueNabiQazi Advocate for respondent

.....

ZULFIQAR AHMAD KHAN,J: Through this 2nd appeal, the order of first appellant court passed in Civil Appeal No.80 of 2015 (Re: Muhammad Azam and others Vs. Muhammad Aijaz and other), has been impugned by the appellant which reversed the findings of the learned trial court in F. C. Suit No.33 of 2008 (Re: Muhammad Aijaz Vs. MuhammadAzam& Others) and aims to answer the single question as to whether the judgment of the learned appellate court warrants interference or not.

2. Brief facts of the case are that appellant/plaintiff/purchaser filed F. C. Suit No.33/2008 for specific performance of contract and permanent injunction in respect of four plots being part of revenue survey No.317 each admeasuring 1370 Sq. ft totaling 5480 Sq. Feet situated in Deh Mardanur Tapo Hatri, Taluka Qasimabad District Hyderabad (“suit property”) which were sold out to him through agreement dated 23.11.2006 against the total consideration of Rs.27,00,000/- out of which Respondent/seller received Rs.500,000/-

as advance. Later on respondent No.1 Muhammad Azam had also received Rs.200,000/- on 27.03.2007 and Rs.500,000/- on 02.8.2007 under valid receipt while remaining amount of Rs.15,00,000/- was to be paid at the time of registration of sale deed. Meanwhile respondent No.4 Mst. Sakina expired and appellant approached respondent No.1 Muhammad Azam who assured to get the Khata transferred of the share of late Mst. Sakina from her legal heirs, however, he could not fulfill his promises for his own plots and that of the deceased Sakina, that resulted in filing of the above referred suit with the following prayers:-

- a) That, this Honourable Court may be pleased to direct the defendants to execute their part of contract according to sale agreement by handing over the vacant physical to the plaintiff and receive Rs.1500,000/- in the event of failure to do so, the Honourable Court may be pleased to appoint the Nazir or any officer of this court to do the same.
- b) That grant of permanent injunction against the defendants whereby restraining them from selling, transferring or alienating the suit land to he any other person by the defendants themselves, through their servants, agents, nominees, attorneys in any manner whatsoever;
- c) Cost of the suit be borne by the defendants;
- d) Any other relief, which this Honourable Court may deem fit and proper under the circumstances of the same.

3. After service, respondents No.1 to 3 filed their joint written statement at Ex.44 admitting sale agreement dated 23.11.2006 with the condition that in para No.6 if the purchaser failed to comply with the terms, his earnest money shall be forfeited and if the vendors failed, they shall be liable to return penalty amount equal to the earnest money. They also admitted having received the amounts and

also admitted the sudden death of Mst. Sakina. Thereafter learned trial court out of the pleadings of the parties framed the following issues:-

- “1. *Whether the suit as framed is not maintainable and is time barred under the provisions of any law?*
2. *Whether the plaintiff is entitled to the relief claimed?*
3. *What should the decree be?”*

Subsequent thereto, the parties adduced their respective evidence and after hearing the parties counsel the learned trial court partly decreed the suit in the following manner:-

“In the light of findings on issues discussed above, the suit of the plaintiff is decreed to the extent relief claimed against defendants No.1 to 3 respecting their pots out of suit property and dismissed respecting the plot of deceased lady defendant. Since the value of the property has increased since filing of suit and so also the delay in trial has mainly occasioned due to acts of the plaintiff and remaining amount of consideration excluding the share of lady becomes Rs.08,25,000/- and have remained with plaintiff; therefore, it appears appropriate that a reasonable markup at the rate of 12% per annum be awarded on such amount of Rs.08,25,000/- to the defendants No.1 to 3, which will be to the tune of Rs.7,42,500/- for 7 ½ years since filing of suit till date approximately. The plaintiff, is therefore, directed to deposit such amount of Rs.15,67,500/- with Nazir of this Court within two months. In case of failure, the suit shall, stands dismissed. In case the amount of Rs.15,67,500/- is deposited by plaintiff within specified period then defendants No.1 to 3 shall receive the same and transfer their respective shares of the suit property to the plaintiff simultaneously before Sub-Registrar within 30 days thereafter. In case of failure of defendants No.1 to 3, the Nazir acting on their behalf by executing sale deed in favour of plaintiff complete the transaction accordingly where-after payment of the money shall be made to defendants No.1 to 3. On receiving such amount, the Nazir shall invest same in some profitable saving certificates in the name of Court and on completion of transaction; such amounts shall be paid to the defendants No.1 to 3. The suit to the extent of share of lady/legal heirs stands dismissed. In case of dismissal of suit due to failure of plaintiff to deposit remaining consideration as

ordered above, then he shall be entitled to return of his advance/additional advance with 12% markup per annum. Let the decree be prepared accordingly.”

4. The said judgment and decree were challenged by the respondents through Civil Appeal No.80 of 2015 before the first appellate court that dismissed the judgment and decree of the trial court and appeal was allowed vide judgment and decree dated 10.01.2019 which judgment and decree are impugned before this court.

5. At the outset learned counsel for respondent submitted that they have reservation against the judgment and decree passed by the first appellate court also whereby they have been deprived of the legitimacy of their ownership of the subject property, which point per learned counsel for the respondent, was not even an issue before the learned first appellate court. While the learned counsel for appellant obviously challenged the said judgment and decree on merit. Both the learned counsel argued in their clients favour vehemently.

6. Heard the parties and perused the record.

7. The relationship between the parties started when they signed an agreement on 23.11.2006 where all four parties agreed to sell four plots to the buyer / appellant in the sum of Rs.2700,000/- out of which token amount of Rs.500,000/- was paid by the buyer on 26.11.2006. Per sale agreement, the buyer was given four months' time to make the payment of balance sale consideration whereafter the seller was to appear before the Registrar Hyderabad to conclude the transaction. It is pertinent to mention that out of the four sellers, one namely Mst.

Sakina expired few days after the agreement, therefore, the transaction was restricted in respect of three plots only. It appears that the seller only approached the concerned Mukhtiarkar for sale certificate on 06.03.2017 which was at the last leg of the four months' deadline. Learned counsel for respondent has shown Public Notice having appeared in the daily Kawish of dated 16.3.2017 calling for public objections in respect of the sale certificate. It is also admitted position that buyer paid two sums of money in the months of March 2007 and August 2007 to cater for the expenses incurred in obtaining the sale certificate on the request of the seller. As the trial court decreed the suit in favour of the appellant and directed the appellant to deposit the balance sale consideration of enhanced amount of Rs.15,67,500/- with the Nazir of the trial court within two months, it appears that such payment was also made in the form of Pay Order No.0133569 dated 16.11.2015 which sum is available with the Nazir of that court, where, upon an execution application, through Order dated 17.12.2016, Nazir was directed to proceed with the formalities of executing the transfer in favour of buyer in respect of three plots. It seems that when executing court was gearing up for the final act, first appellate court delivered its judgment which is impugned through instant appeal, which has been objected by both the parties. Learned counsel for the respondent took the main stance that seller did not perform his part of contract within the stipulated time, which aspect, in my humble view has been fully covered in the Judgment of learned trial court while answering issue No.2 where learned trial court has produced the evidence from the deposition of the parties which does not leave any

doubt in my mind that there is no illegality or impropriety in the judgment of learned trial court. In fact while deciding issue No.3, learned trial court has generously considered the aspect that since price of the subject property has been increased, it gave direction to the buyer to add sum of Rs.742,500/- to the agreed price which was complied with by the buyer and balance was deposited with the Nazir of trial court. In the circumstances, when both the sides are opposing the impugned Judgment and Decree of the appellate Court, and where the appellant made substantial payment to the seller in respect of three plots of the suit property, and where the delay is solely attributed to the seller as he took un-necessary time to obtain sale certificate, and even asked for some advance in respect of such certificate, which was even not provided for in the sale agreement, this appeal is allowed, first appellate court's judgment and decree are set aside and the judgment and decree of learned trial court dated 18.09.2015 are upheld. The Executing Court to proceed with the matter in accordance with law.

JUDGE