

IN THE HIGH COURT OF SINDH HYDERABAD
CIRCUIT.

R.A. No. 78 of 2012.

| DATE | ORDERS WITH SIGNATURE OF JUDGE |
|----------------------------|---------------------------------------|
| Of hearing. 28.08.2017. | |

FOR KATCHA PESHI.
FOR HEARING OF CMA 438/2012.

Mr.Arbab Ali Hakro, Advocate for applicant.
Mr. Nawab Ali Kaka, advocate for respondent No.1.
Mr. Bashir Ahmed Choudhry, A.A.G.

ORDER

Through this revision application the applicant has impugned and challenged the order of the Additional District Judge, Umerkot passed in Civil Appeal No.25 of 2011.

Brief facts are that respondent No.1 filed suit No.147 of 2010, on 11.10.2010 for specific performance of contract. The agreement claimed to have been executed on 17.10.2007 in presence of witnesses in respect of two acres out of survey No.551/1 admeasuring 3-19 acres situated in Deh Umerkot for consideration of Rs.200,000/-. Applicant was served and filed written statement and the suit was contested and parties recorded the evidence of their respective witnesses and the trial court after framing issues was pleased to dismiss the suit.

Aggrieved of the order of the trial court passed by 1st Senior Civil Judge, the Civil Appeal No.25 of 2011, was filed by the respondent No.1 and on consideration of the facts and grounds and after hearing both the parties the appeal was allowed and the suit was decreed however, only to the extent of 1-29 ½ acres as total area of land measuring 3-19 acres being enjoyed by applicant and other co-owner in equal proportion. The other co-owner of 50% of the land was initially impleaded as party however, on an application moved by the co-owner his name was deleted

vide order dated 14.01.2011. On behalf of the applicant/plaintiff the evidence of Ahmed Hussain, Sajjan, Gulab was recorded whereas Tekchand also recorded his evidence. After considering the evidence the appellate court has allowed the appeal and decreed the suit. The R & P was also summoned from the trial court and I have heard the counsels and also perused the record.

The frame of section 115 CPC though is limited but since it is a case of conflicting finding, therefore, I have perused the evidence recorded by the trial court and also came across an order passed on an application filed by plaintiff/respondent under Article 84 of the Qanoon-e-Shahadat Order, 1984. The object of moving the application is to refer the subject agreement to a hand writing or signature expert along with signatures of the applicant which are admitted however, after hearing the application the trial court was pleased to dispose it off by observing that both the counsels have agreed for the examination of document through magnifying glass by the court. The court found the suggestion to be appropriate and the Exhibit No.32-A i.e. agreement, written statement of defendant No.1 Ex.17, counter affidavit to application under order 39 rule 1 and 2 as Ex.13 and Vakalatnama of defendant No.1/applicant as Ex.11 was observed to be examined by the trial court through magnifying glass in presence of both the learned counsel and parties. The respondent in the order was directed to provide the magnifying glass for comparison of the signature and the application was disposed of accordingly. I have perused the order of the trial court as well as of the appellate court.

The trial court took the burden on itself for examining the signatures on the disputed and admitted documents though it apparently require an expert to examine however, be that as it may, both the orders of the trial court and of the appellate court are absolutely silent as to the above compliance which trial court undertook.

The trial court framed as many as eight issues and the issue No.2 could be stretched down for the purposes of declaring the subject agreement to be genuine or forged one. The issue is as under:-

“Whether the suit land was purchased by the plaintiff in the sum of Rs.200,000/- by way of sale agreement dated 17.10.2007, if so, its effect?

The trial court nowhere attempted to compare the signatures of the applicant as undertaken while disposing of application for referring the agreement to handwriting/signature expert. The trial court in the judgment held that it was the burden of the respondent/plaintiff to prove the agreement which he has failed. It is very surprising that despite an attempt on the part of the respondent to prove that document by referring it to handwriting/signature expert the trial court undertook to carry out the task by itself and that task too was not performed by the trial court.

In these peculiar facts and circumstances it cannot be said that the respondent/plaintiff has failed to perform or failed to discharge the burden as argued. The respondent and his witnesses recorded evidence and apart from other witnesses one of the signatory who signed the agreement as witness was also examined. It does not sound convincing when the trial court held that the plaintiff/respondent failed to prove the agreement. On the other hand the appellate court while considering the evidence of the witnesses came to the conclusion that there is sufficient evidence to prove that the agreement was executed by the applicant. The evidence to the extent of possession of the respondent has also gone unchallenged that the respondent was/is in occupation of the subject land as the electric meter was installed in a house which was constructed on the subject piece of land which was agreed to be sold. The decision as to the performance of the agreement is based on the execution of the agreement despite the fact that other issues may have drawn the attention of the appellate court for the specific performance of the agreement yet it should not have escaped the mind of appellate court that neither the trial court attempted to compare the signatures nor have made any observation in this regard.

In fact the bonafide of the respondent No.1 for referring the agreement to a handwriting/signature expert was also declined. After going through the evidence of the parties, I deem it appropriate to remand it back to the trial court after setting the orders of the two courts below. I also set-aside the order passed on an application under Article 84 of Qanoon-e-Shahdat Order 1984, dated 26.09.2011 and direct the trial court to refer it to an impartial renowned handwriting/signature expert and decide all issues afresh in consideration of the evidence i.e. recorded.

The revision application stands disposed of.

Judge

A.