

IN THE HIGH COURT OF SINDH,

CIRCUIT COURT, HYDERABAD

IInd Appeal No. 47 & 48 of 2020

Appellants : M/s. Housing & Land Development (Pvt) Ltd through
Mr. Shahzeb Abbasi, Advocate

Respondents : Noor Muhammad Qureshi and others through
Mr. Arbab Ali Hakro, Advocate

Date of hearing : **29.08.2022**

Date of Announcement : **05.09.2022**

J U D G M E N T

ADNAN-UL-KARIM MEMON, J -. By this common Judgment, I intend to dispose of captioned IInd Appeals as the same are arising out of the common Judgment and Decree passed by the learned appellate court.

2. Through instant IInd Appeals, the Appellant-Housing and Land Development (Pvt) (HLD) has called in question the vires of Judgment and Decree dated 8.9.2020 passed by learned VIIIth Additional District Judge, Hyderabad in Civil Appeal Nos. 179 & 180 of 2016, whereby the learned Judge while allowing the appeals set-aside the Judgment and Decree dated 27.8.2016 passed by learned Vth Senior Civil Judge, Hyderabad in consolidated F.C. Suit Nos. 02 of 2000 and F.C. Suit No. 01 of 2001, inter-alia, on the ground that the private respondents had purchased only 9 plots and not 17 plots; and made payment of 9 plots only; and, subject six plots bearing Nos.C-21, C-287 to C-291 were transferred in their name on 22.04.1991; so far as Plots Nos. C-282 and 283 are concerned the same were transferred to them on 09.04.1991 vide registered lease deeds; the next plea taken by the appellants are that if the entire suit plots would have been purchased by them, why the respondents remained mum till 2000, as such the suit filed by the private respondents was hopelessly time barred; that the two forums below did not appreciate the entire evidence of the appellants on the aforesaid point; that there was no written agreement by and between the parties in respect of suit plots; , it was only for 09 plots, out of which 08 plots were transferred to them on payment of usual price, while one was cancelled on default of payment; and in this respect letter/notices were issued to the respondents, which were produced in evidence; that the judgment passed by the two Courts below is result of misreading and non-reading of evidence; that the respondents failed to rebut or shatter the evidence of the appellants despite lengthy cross-examination; therefore, there was no reason to disbelieve the contention of appellant; however, learned trial Court to the extent of Plot No.C-292, discarded the evidence without giving any valid reason; that there was no written contract between the parties and the payment receipts did not bear signature of the owner/appellants but the appellate Court failed to consider the

same and believed the stance of respondents to the extent of payment through representative of the appellant, which was not the actual factum. In support of his contentions, learned counsel has relied upon the case of Mst.Kubra Amjad v. Mst. Yasmeen Tariq and others, **PLD 2019 SC 704**. He lastly prayed for allowing the instant appeals.

3. At this stage, learned counsel for the appellants has filed a statement dated 29.08.2022 along with amended title, arraying the legal heirs of respondent No.5 in terms of order dated 26.05.2022, the other side has no objection to that extent. Amended titles are taken on record accordingly.

4. The case set up by the parties as per their pleadings is that respondent Noor Muhammad filed leading F.C. Suit No. 02 of 2000, for Specific Performance of Contract and Permanent Injunction, against the appellant-Housing and Land Development (PVT) while the appellants filed F.C. Suit 01 of 2001 against the respondents for possession and mesne profits. The case of respondent Noor Muhammad in the leading suit was that the appellants introduced a scheme for the sale of residential plots situated in Gulistan-e-Sajjad, Hyderabad. The respondent approached the appellants and the appellants offered plot Nos. C-272, 275, 277, 276, 278, 281, 282, 283, 284, 285, 286, 287, 288, 290, 291, 292 for sale at the rate of Rs.500/- per sq. yards on 21.01.1990. The respondent accepted the offer and paid part payment of Rs.160,000/- through valid receipts; that the sale transaction was orally made on the terms; (1) that the respondent will pay the balance amount and the appellant will receive the same in easy installment as and when offered by the respondent; when full sale consideration is cleared the appellant will transfer the above plots to him including his near relatives and caste fellows; (2) that the respondent will be at liberty to raise construction and boundary wall around all the plots purchased by him (3) All the expenses incurred upon the registered sale deed shall be borne by the respondent. Per learned counsel for respondent, he paid an amount of Rs.11,02,100/- at different times to the appellant-housing firm, and the appellants executed registered deeds of plots No.281, 282, 283, 287, 288, 289, 290, and 291 in favor of respondent and his relatives; that total sale consideration of 17 plots becomes 20,99,860/- and the respondent paid Rs.11,02,100/- and he was willing and offered the balance amount of Rs.9,97,760/- to the appellants with a request to execute the sale deed of the remaining plots, 272, 275, 276, 277, 278, 284, 286 and 292 but the appellant was not ready to perform his part of contract and wanted to enhance the rate of suit plots in terms of market price; that maternal nephew of respondent namely Shabir Ahmed received a notice dated 18.05.1998 from appellant to vacate suit plots Nos. 272, 275 to 278, 284 to 286, and 292 and the said notice was duly replied by the respondent with the assertion that the said plots have already been sold by the appellant and delivered the possession of the same to the respondent; that the appellant failed to execute the sale deeds in respect of remaining nine plots; before filing the subject suit, the appellant attempted to

dispossess the respondent from the remaining nine plots; however, his attempt was aborted, the respondent being aggrieved by and dissatisfied with the above approached the trial court and prayed for direction to the appellants/ defendants to receive Rs.7,97,760/- (Rupees Seven Lacs, Ninety-Seven Thousands, Seven Hundred Sixty) being the balance of Sale Consideration and to execute Sale Deeds in his favour in respect of Plot Nos. 272, 275 (each measuring 200 and 252-76 sq yards respectively) 276, 277, 278, 284, 285, each measuring 200-00 sq yards, Plot No.286 and 292 measuring 297.76 and 245.00 sq Yards respectively total area 1995.52 sq Yards situated at Gulistan-e-Sajjad Hyderabad Jamshoro Road, Opposite Rajputana Hospital Hyderabad, Sindh and in case of failure of the appellants/ defendants, the respondent/plaintiff be allowed to deposit the balance consideration in Court and Nazir of the trial Court to execute the Sale Deeds before the Sub Registrar concerned. The appellants/ defendants filed written statement denying the allegations against him; it was stated that Commission Agent had received Rs.2,00,000/- which were received against the sale of nine plots which provisionally were booked and challan was issued and such acceptance was communicated to the respondent; that despite refusal the respondent through misrepresentation obtained Katcha receipt dated 05.03.1990 from Commission Agent Asghar Javed of payment of further amount of Rs.1,68,000/- towards 17 plots; that the suit was/is not maintainable and was/is time-barred and the trial court had no jurisdiction to try the suit.

5. While the facts of F.C. Suit No.01 of 2001 filed by appellant for Possession and Mesne Profits stating therein that appellant-company owned and possessed the suit plots in the Gulistan-e-Sajjad Main Jamshoro Road Hyderabad and the respondent No.3 through respondent No.1 made an offer to purchase 17 plots including suit plots which offer was made to commission agent Asghar Javed; that respondent 1 to 3 paid an amount of Rs.16,0000/- to Asghar Javed as Token Money on 21.01.1990 and a further amount of Rs.40,000/- on 15.02.1990. The appellant accepted the offer of respondent No.3 for Sale of Nine Plots only and the amount of Rs.2,00,000/- so received by the appellant through commission agent was actually towards nine plots; that respondent No.1 through misrepresentation and fraud obtained Katcha receipt dated 05.03.1990 from Commission Agent in respect of further amount of Rs.1,68,000/- towards 17 plots who had no authority to issue such receipt; that the appellant had refused the offer of respondents in respect of suit plots and only issued challan in respect of nine plots; that on account of non-payment of Rs.28,794/- the appellant canceled plot No.292 and earlier amount paid by the respondent was forfeited. The appellant lastly prayed for Judgment and Decree as under:-

- a) That the defendants be ejected from the suit plots viz C-272, C-275, C-276, C-277, C-278, C-284, C-285, C-286, and C-292 and vacant possession of the suit plots be delivered to the plaintiff.

- b) That the defendants do pay mesne profits at the rate to be determined by this Honourable Court from 1.03.1998 till the possession is delivered.

6. The respondents filed written statement wherein they questioned the maintainability of the suit and jurisdiction of trial court, with the assertion that no cause of action accrued to the appellant to institute the subject suit; and denied the contents of plaint in terms of his earlier/leading suit. On the question of purchase of 17 plots, he submitted that the same was agreed upon by the parties to be sold and at the time of receiving token money of Rs.1, 60,000/- possession was handed over in consequences of part performance; respondent denied the allegations of obtaining Katcha receipt from Asghar Javed, representative/Manager of Housing and Land Development Authority, for running the subject housing scheme. The question of cancellation of plot No.292 has been vehemently contested. From the pleadings of the parties, the following consolidated issues were framed by the learned trial court.

1. Whether there was any contract between the parties in respect of 17 plots Nos. C-272 to C-278, C-281 to C-292 at the rate of Rs.500/- (Five Hundred) per sq yard on 21.01.1990 and the defendant received Rs.1,60,000/- (One Lac Sixty Thousands) as token money?
2. Whether the defendant entered into a contract for only nine plots Nos. C-281 to 283, C-287 to C-292?
3. Whether the defendants have handed over the possession of 17 plots to the plaintiff?
4. Whether the defendants have received Rs.11,02,100/- (Eleven Lacs, Two Thousand and One hundred Rupees) towards sale consideration of 17 plots in installment as mentioned in Para No.05 of plaint or for 9 plots.
5. Whether the plaintiff has been repeated approaching the defendant to perform their part of the contract by execution transfer deeds and offered the balance of consideration amount but the defendant avoided to receive the same with malafidely intention to enhance the same?
6. Whether the defendants are liable to receive being balance amount of consideration of Rs.7,97,760/- (Seven Lac, Ninety Seven Thousand, Seven Hundred Sixty Rupees) from the plaintiff and execute the sale deed in favour of the plaintiff in respect of plots Nos. 272, 275, 276, 277, 278, 284, 286, 292 area of each plot is mentioned in the prayer clause of plaint (this suit)?
7. Whether defendant No.1 is liable to hand over the vacant possession of plots C-272, 275 to 278, 284 to 286 and 292, if yes whether the plaintiff is liable to pay mesne profit to defendant No.01 the period and rate of mesne profit as determined by this court?
8. Whether the plaintiff is entitled for the relief as prayed?
9. What should the decree be?

7. On the above issues both the parties adduced their respective evidence and learned trial court after hearing the parties partly decreed and partly dismissed the

subject suit. The respondents being aggrieved by the said Judgment and decree, preferred Civil Appeals which were allowed by setting aside the Judgment and Decree of the trial court in the following terms:-

“21. In view of the above discussion I find that there had been a sale transaction of 17 plots in between the appellants and respondents and the amount of Rs.11,02,100/- is already paid as part payment of all the 17 plots and the respondents out of 17 plots, executed, sale deeds of eight plots in favour of appellants. I am of the further view that the respondent are legally bound to execute the registered sale deeds in respect of the remaining nine plots in favour of the appellants on payment of the remaining amount of Sale consideration of Rs.9,97,760/- by the appellants.

22. In view of the above discussion I am of the humble view that the learned trial court has erred in passing the impugned Judgment and Decree and as such the same are requiring interference of this court. Point No.1 is answered in Affirmative.

23. In view of my findings on point No.1, the impugned Judgment and Decree passed on dated 27.08.2016 in consolidated suit No.02/2000 and 01/2001 are hereby set aside. In the result suit, No.02 of 2000 is decreed as prayed and suit No.01 of 2001 is dismissed. In the result, appeals No.180 of 2016 and 179 of 2016 are allowed as prayed while appeal No.181 of 2016 is hereby dismissed. There will be no order as to costs.”

8. Mr. Shahzeb Abbasi learned counsel for the appellants submits that the crucial issue before the lower courts was to decide whether there was any valid contract by and between the parties in respect of suit plots; and, whether the appellant had received payment in respect of subject plots; and in this regard the appellant had categorically denied having sold out the suit plots to the respondents, who had pleaded to have purchased the same. Thus the contract between the parties was denied and to prove such contract the respondent had to produce attesting witnesses in terms of Article 117 of Qanun-e-Shahadat Order, 1984 but he failed to do so. Even the trial court partly decreed the suit to the extent of Plot No. C- 272, C-275, 276, 277, 278, 284, 285, and 286 but learned appellate court decreed the said suit in respect of all the plots i.e. 17 plots, without any cogent reason; that the trial court partly decreed the suit of the appellant to the extent of possession and mesne profits of suit plots No. C-272, 275, 276, 277, 278, 284, 285 & 286 based on evidence produced by the parties but failed to Decree the suit to the extent of plot No. C-292; that admittedly there was no written agreement by and between the parties in respect of suit plots and the claim of respondent was based upon the payment receipts which were not issued by the appellant-housing firm and in this regard issue of existence of contract could not be decided in favor of respondent without examining attesting witnesses; that learned appellate court failed to give its findings issue wise as required under the law; that learned appellate court has not properly appreciated the evidence of the parties and only based its findings on the admission of appellant though there was no admission on the part of appellant to the extent of suit plots; that as far as plot No. C-292 is concerned the respondent failed to make payment; therefore, it was canceled and his part payment was forfeited; the appellant categorically stated in the evidence that the offer was

accepted only for 09 plots and not for 17 plots but the appellate court erroneously held that it was for 17 plots thus the findings of appellate court requires interference at this stage. Learned counsel lastly submitted that the question of law and facts are involved in this case; therefore, the instant second appeal may be allowed by setting aside the impugned judgments and Decrees of lower courts.

9. On the other hand Mr. Arbab Ali Hakro, learned counsel for respondents has argued that the appellants have admitted the sale transaction of suit property and also received payment of sale consideration but the trial court without applying its judicial mind passed the impugned Judgment and Decree illegally and against the facts and law; that the appellants sold out 17 plots to the respondents and the respondents paid an amount of Rs.11,02,100/- out of total sale consideration of Rs.20,99,860/- and there remains only Rs.9,97,760/- in balance but the appellants with malafide intention refused to receive the said amount and also refused to execute sale deed of nine plots, while the appellants executed sale deeds in respect of eight plots only; that the respondents paid sale consideration in excess then the price of eight plots, which was paid as price of remaining plots and there remains only 9,97,760/- payable by the respondents to the appellant at the time of execution of sale deeds, however on refusal the same amount was deposited in court; that the appellants became greedy and with malafide intention demanded more amount than that of agreed price. He lastly argued that the possession was delivered to the respondents in the year 1990 by the appellants; therefore, the instant IInd Appeals are liable to be dismissed.

10. I have heard learned counsel for the parties on the subject issues involved in the proceedings and perused the entire evidence brought on record by the parties and the case law cited at bar.

11. The entire case of the parties is based on the payment receipts and delivery of possession of the suit plots to the respondents at the relevant time of booking.

12. Before touching on the subject issue involved in the matter, let me say that a contract is an agreement having lawful object, entered into voluntarily by two or more parties each of whom intends to create one or more legal obligations between them. The basic requirements of a valid and enforceable contract are offer, acceptance, exchange of consideration, and mutuality of obligations. Further, a fundamentally important ingredient of a valid contract is that it should be between the parties who are competent to contract. The intention of the parties to a contract must be looked at to determine where a contract has come into existence. As far as the relief of specific performance is concerned, I am of the considered view that the relief of specific performance is discretionary and despite proof of an agreement to sell, the exercise of discretion can be withheld if the Court considers that grant of such relief would be unfair or

inequitable. However in the present case, the parties did not dispute the oral agreement of the subject sale and purchase; as they have already executed the lease deed of nine plots in favour of private respondents based on oral agreement to sell, thus no further discussion is required on this point.

13. Coming to the essential elements for sale of immovable property, there are two basic elements i.e. (a) payment of the sale price of the property or promise to pay the same by the buyer to the seller, and (b) delivery of possession of the property. In case, these two essential terms of sale of immovable property can be determined based on the contents of agreement between the parties, with certainty, it may constitute a valid agreement of sale between the parties which, subject to the discretion of the Court, can be directed to be specifically performed. The basic test for resolving whether the parties had reached a consensus for concluding a contract is to ascertain where the parties had a consensus on all material points at the time the said agreement was executed between the parties. On the aforesaid proposition, I am guided by the decision of the Honourable Supreme Court in the case of Sheikh Akhtar Aziz v. Ms6t Shabnam Begum and others, **2019 SCMR 524**.

14. In the present case, the findings of learned appellate court are based upon the admission of appellant in suit proceedings on the analogy that the respondents had booked 17 plots and paid Rs. 1,60,000/- at the time of booking of plots in the year 1990 to the representative of appellant, namely Asghar Javed and such receipts were obtained by the respondents which were exhibited in evidence and the said receipt explicitly shows that the amount was received as earnest money for all the 17 plots and not for nine plots as portrayed by the appellant. Primarily, the learned appellate court assessed the evidence in a very elaborate manner. As far as payment of Rs. 11,02,100/- made to the appellants is concerned, the receipts of payment were brought on record through evidence i.e. (i) receipts for Rs.40,000/- dated 15.02.1990 and (ii) receipt of Rs.1,68,000/- dated 01.03.1990, (iii) receipt for Rs.1,50,000/- dated 13.03.1991, (iv) receipt for Rs.3,00,000/- dated 10.04.1991, (v) receipt for Rs.50,000/- dated 23.04.1991, for Rs.1,18,000/- dated 04.08.1991, (vi) receipt for Rs.36000/- dated 04.06.1991, (vii) receipt for Rs.36000/- dated 04.08.1991, (viii) receipt for Rs.44100/- dated 15.02.1992.

15. The learned appellate court concluded that the appellant had not specifically denied the receipt of above-noted amount. However they simply deposed that Asghar Javed had no authority to issue the Katcha receipt of Rs. 1,68,000/-, to the respondents, however, the aforesaid version of the appellant was discarded by the appellate court on the analogy that the appellant had admitted in the evidence that Asghar Javed was their representative/commission agent to carry out the business of housing schemes; and, also did not deny the receipts issued on printed receipts.

16. As regards the entire sale consideration of Rs. 20,99,860/- for all 17 plots is concerned, the appellant has neither denied nor disputed the same in evidence. So far as the possession of suit plots is concerned, the same were /are in possession of respondents since 1990 with effect from the date of booking of the said plots, the same factum has been admitted in cross-examination that the respondents had already erected boundary wall around the subject plots by the respondents; besides no proceedings has been initiated by the appellants about illegal dispossession of suit plots at the hands of private respondents. However the appellant simply deposed that the respondents have encroached upon the suit plots; however, the appellant failed to show the date, month, and year of the alleged encroachment over the suit plots by the respondents. On the aforesaid factum, the trial court held that the suit plots were handed over to the respondents in the year 1990 as they remained silent and did not take any effort or initiate any legal proceedings against respondents and simply filed suit for possession in the year 2001 after lapse of considerable period. So far as the sale transaction is concerned the same has been disclosed to be oral; and, the appellants had already executed sale deeds in respect of eight plots. The record further reflects that a major portion of sale consideration has been paid by respondents to the appellants and there remained only Rs.9,97,760/-, which amount has been stated to be deposited in court, and the sale deed has been executed through Nazir of the trial court in execution proceedings, thus decree stood satisfied as per record.

17. The scope of Second Appeal is limited to the three grounds mentioned in Section 100 of CPC. These grounds are mentioned in the language of the very statute as under:-

"100. Second appeal. (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court, on any of the following grounds, namely:-

(a) the decision being contrary to law or to some usage having the force of law;

(b) the decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

(2)"

18. Primarily, in second appeal, ordinarily this Court is slow to interfere in the findings of fact recorded by the lower fora. However, this is not an absolute rule. The Courts cannot shut their eyes where the lower fora have misread the evidence and come to hasty and illegal conclusions. The Honorable Supreme Court in such circumstances has repeatedly observed that if the findings of facts arrived by Courts below are found to be based upon misreading, non-reading, or misinterpretation of evidence on record, the High Court can in Second Appeal reappraise the evidence and disturb the findings which are based on an incorrect

interpretation of the relevant law. In the present case, the record has been examined with the assistance of learned counsel for the parties, and found that none of the aforesaid grounds are in favor of the appellant; all the defense plea taken by the appellant has been considered by the First Appellate Court and discarded on the aforesaid analogy.

19. It is well settled that the term suit would take in its connotation a continuation in appeal or second appeal. It is now well settled that if a defense is to be disallowed in the First appellate stage, it would then follow that it has to be disallowed in the continued projection of the same litigation, in the higher second appellate stage until and unless it is shown that the entire case is based upon misreading and non-reading of evidence or legal flaw in the appellate judgment, for which learned counsel for the appellant has failed to show to reach to another conclusion.

20. In these appeals, learned counsel for the appellant has not been able to point out any illegality or infirmity in the impugned judgment and decree, which are based upon proper appreciation of evidence and with sound reasoning.

21. In view of above, the findings of learned appellate Court below do not require any interference by this Court. Accordingly, these Second Appeals are dismissed with costs.

JUDGE

Karar_Hussain /PS