

HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

IInd Appeal No.S-44 of 2022

[Riaz-ul-Din @ Rajab Ali versus Province of Sindh & Ors]

19.05.2023

Mr. Aqeel Ahmed Siddiqui, advocate for appellant

J U D G M E N T

ADNAN-UL-KARIM MEMON J:- Captioned appeal has been directed against the concurrent findings rendered by the two Courts below.

2. Brief facts of the case are that the appellant had filed F.C Suit No.16 of 2020 [Re: Riaz-ul- Deen @ Rajab Ali versus Province of Sindh & Ors] before Senior Civil Judge Tando Allahyar for Declaration, Cancellation & Permanent and Mandatory Injunction in respect of Shop/Cabin and upper portion constructed on 90 sq.ft at Survey No.1/A, situated at Ward-C Market Road Bus Stand Tando Allahyar (Suit Property), however the plaint was rejected by the trial court under Order VII Rule 11 C.P.C vide Order dated 01.03.2021, against which appellant preferred Civil Appeal No.41 of 2021, however, same was also dismissed vide judgment dated 10.02.2022 and decree dated 15.02.2022.

3. Facts of the case in brief are that, appellant instituted the aforesaid Suit claiming therein that, respondent No.6/defendant No.6 was/is possession of total area of 1296 sq. feet, out of which said defendant has registry of 975 sq. feet; that respondent No.6/defendant No.6 through her general attorney Abdul Jabbar, who is her husband sold out the suit property i.e. an area of 90 sq. feet out of 975 sq. feet to appellant/plaintiff through sale agreement dated 28.07.1994 in presence of witnesses on non-judicial stamp paper against total sale consideration of Rs.60,000/-, out of which Rs.20,000/- were paid at the time of agreement as cash while for the remaining amount of Rs.40,000/- a Cheque bearing No.16648759 dated 30.07.1994 was issued in the name of above attorney of respondent No.6; that possession of suit property was handed over to appellant/plaintiff at the time of agreement; that thereafter appellant/plaintiff demanded registry of suit property from respondent No.6, but he was kept on false hopes, that thereafter respondent No.7 filed rent application against appellant, as such he came to know that respondent No.6 had sold out the entire property i.e. 975 sq.feet, which also includes suit

property to respondent No.7 in the year 2004. The summons of suit were issued to defendants/respondents and in compliance whereof respondent No.7 through her counsel filed Written Statement alongwith an application under Order VII Rule 11, which was allowed and resultantly plaint was rejected vide impugned Order dated 01.03.2021 and said order was maintained by the Appellate Court vide Judgment dated 10.02.2022 and Decree dated 15.02.2022, hence the present appeal.

4. Mr. Aqeel Ahmed Siddiqui, learned counsel submits that the decisions of both the courts below suffer from legal infirmity; that both the courts below have failed to consider the objections filed by appellant in rent application; that Section 9 CPC empowers the civil court to hear and decide all the civil disputes after recording evidence, however, the trial Court rejected the plaint in summary manner and the said order has been maintained by the Appellate Court without assigning cogent reasons; that mere denial of agreement is not sufficient and that there was/is ample evidence on record to prove the execution of agreement but the courts below failed to appreciate the legal issue that matter requires evidence; that bare denial of the contents of documents would be of no significance as the execution of agreement and the payment of earnest money stood established on record with the stipulation that remaining amount would be paid at the time of registration of sale-deed. He lastly prayed that the impugned order as well as the judgment may be set aside and the matter may be remanded back to trial Court with direction to decide the same after recording evidence of parties.

5. I have heard counsel for the appellant on the maintainability of IInd Appeal and perused the record with his assistance.

6. The trial court invoked the powers under Order VII Rule 11 CPC and rejected the plaint vide Order dated 01.03.2021 on the premise that plaintiff had filed subject suit seeking specific performance of agreement dated 28.07.1994 shown to have been executed between plaintiff and defendant No.6 through her husband; however, it was pleaded that appellant in the rent case No.15 of 2019 claimed to be a tenant and now in suit he claims to have purchased the subject property in the year 2004 through sale deed. The trial court also after perusing the rent case and admission of appellant rejected the plaint whereas the purported sale agreement was executed in the year 1994 without signature of original owner of the suit property.

7. The appellant filed suit in the year 2020 whereas the alleged cause of action accrued to him just after lapse of three years from the date of execution of purported sale agreement; however, the appellant opted to show the first cause of action accrued to him when he received copy of rent application and second cause of action in the year 2019 when someone threatened the appellant. I do not agree with the proposition so put forward by the counsel for appellant for the simple reason that under Section 42 of the Specific Relief Act, 1877, a person entitled to any legal character or to right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief, but according to the attached proviso, no Court shall make any such declaration where the plaintiff, being able to seek further relief than mere declaration of title, omits to do so.

8. In the present lis, the appellant was claiming the title merely on the strength of sale agreement by husband of the original owner in the year 1994 while the owner never signed any such agreement so the trial court, rightly rejected the plaint. Besides, sale agreement could only be called in question when the original owner supposed to have signed the document whereas in the present case, respondent No.6 has not endorsed the document purportedly signed by her husband in the year 1994 and the appellate court also rightly maintained the order vide judgment dated 10.02.2020 and decree dated 15.02.2022. Appellant also claims cancellation of sale deed by and between respondents 6 and 7. Prima-facie, the appellant is precluded to call in question the registered instrument executed by and between the respondents 6 and 7 as for the reason that respondent No.7 filed rent case No.15 of 2019 before Senior Civil Judge/Rent Controller, Tando Allahyar wherein the appellant admitted that the property involved in the instant rent case was the ownership of Rafia Begum/respondent No.6 and the appellant was confronted that Mst. Rafia Begum sold out the subject property to respondent No.7 on 11.09.2004 and he also admitted to remit rent to respondent No.7 but she refused to receive and he has been sending money orders; however he did not deposit the rent amount in court. From the above, it is clear that appellant never executed sale agreement with respondent No.7.

9. To settle the legal proposition, the Supreme Court has held that on the basis of sale agreement, no legal character or right can be established to prove the title of the property unless the title is transferred pursuant to such

agreement to sell, but in case of denial or refusal by the vendor to specifically perform the agreement despite the readiness and willingness of the vendee, a suit for specific performance may be instituted in the court, but suit for declaration on the basis of a mere sale agreement is not the solution for appropriate relief.

10. The Supreme Court in the case of Muhammad Yousaf v. Munawar Hussain and others (2000 SCMR 204), held that the agreement to sell by itself cannot confer any title on the vendee because the same is not a title deed and such agreement does not confer any proprietary right, and thus, it is obvious that the declaratory decree as envisaged by section 42 of the Specific Relief Act cannot be awarded because declaration can only be given in respect of a legal right or character. The only right arising out of an agreement to sell is to seek its specific performance and not declaration whereas in the present case appellant also seeks cancellation of sale deed executed by and between respondent Nos. 6 and 7 knowingly the fact that he claimed specific performance with respondent No.7 and failed to achieve favorable result from the two courts below. Now the appellant is agitating the same point on the ground that the matter requires evidence. In my view evidence is required when the appellant has any legal character and right, title to sue the respondent No.7 as he purported to sign the agreement to sell with the husband of respondent No.7 which does not give him title to sue respondent No.7 under the law. Thus, the suit was not maintainable under the law.

11. Progress in further under section 22 of Specific Relief Act, the exercise of jurisdiction by the Court for decreeing the suit for specific performance of contract is discretionary in nature in which the Court is not bound to grant such relief, but in tandem the discretion is not to be exercised arbitrarily but should be based on sound legal principles after analyzing and gauging the circumstances, inter alia, whether the contract is such which gives an unfair advantage to the plaintiff over the defendant or the performance of contract encompasses some hardship on the defendant which he could not foresee or whether its non-performance would embroil some hardship to the plaintiff and whether the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance. In the present case, the plaintiff has no cause of action to file suit for specific performance and cancellation of sale deed executed by the respondents No.6 and 7.

12. The Supreme Court has held that where the limitation period for the institution of a law suit against non-performance is concerned, the starting point of limitation under Article 113 of Limitation Act, 1908 for institution of legal proceedings enunciates two limbs and scenarios. In the first segment, the right to sue accrues within three years if the date is specifically fixed for performance in the agreement itself whereas in its next fragment, the suit for specific performance may be instituted within a period of three years from the date when plaintiff has noticed that performance has been refused by the vendor but in both scenarios, the right to sue has not been left open ended.

13. In the present case, according to the appellant the cause of action accrued when he received copy of rent application that defendant No.6 purchased the property in the year 2004 and second cause of action accrued to him on 30.12.2019 when he was threatened to vacate the subject shop/cabin, therefore, the suit was not time barred.

14. I do not agree with the analogy so put forward by the appellant for the reason that Article 113 of the Limitation Act refers to the exactitude of its application when time is of the essence of contract, which means an exact timeline was fixed for performance of obligations arising out of contract/agreement hence, in this particular situation, the limitation period or starting point of limitation will be reckoned from that date and not from the date of refusal or alleged sale and purchase of suit property in the year 2004, however, if no specific date was fixed for performance of agreement and time was not of the essence, then the right to sue will accrue from the date of knowledge about refusal by the executant. Ref: *Khudadad v. Syed Ghazanfar Ali Shah alias S. Inaam Hussain and others* (2022 SCMR 933). However, in the present case, the appellant claims to have cause of action when the sale and purchase of the subject property by and between respondents 6 and 7 took place in the year 2004 if this argument is believed to be true and correct then the question arises as to why the appellant remained silent since 2004 till 2020 which gives rise that the appellant had no cause of action to sue the respondents No.6 and 7 for his alleged rights under the garb of sale agreement made in the year 1994.

15. The counsel for appellant has not been able to satisfy this court that on the basis of material available on record as well as legal point involved in the matter and in the facts and circumstances of the case, an equitable relief of

specific performance could be granted to the appellant or the findings arrived at by the two courts below were suffering from any perversity or there was any other legal defect in the impugned order/judgment calling interference of this Court at IInd Appeal Stage which has limited scope under section 100 CPC.

16. I do not find any infirmity or perversity in the impugned order and judgment warranting my interference, therefore this appeal was dismissed by my short order dated 19.5.2023. Above are the reasons for such dismissal.

JUDGE

Karar_Hussain/PS*