

IN THE HIGH COURT OF SINDH AT KARACHI

II-Appeal No. 102 of 2022

Appellant : Bahria Town (Pvt) Limited through Mr. Muhammad Masood Khan advocate

Respondent : Ahsan Ali Brohi through his Attorney Naeem Ahmed Khan

Date of hearing : 20.03.2023

Date of judgment : 27.03.2023

J U D G M E N T

SALAHUDDIN PANHWAR, J- Through captioned II-Appeal appellant has challenged judgment dated 26.02.2022, passed in Civil Appeal No.58/2020, whereby; the appeal was dismissed and judgment and decree dated 03.09.2020 passed by the trial Court were upheld.

2. Briefly facts as set out by the parties are that respondent/plaintiff Ahsan Ali Brohi through attorney filed Suit No.1050/2018, wherein it is stated that he purchased a Villa of 200 square yards from the appellant/defendant by furnishing an application after submission of Rs.1,000/- vide No.BFA-671098, R-No. GIK 205113, vide No.BTKH-RSH0260, on 04-09-2013 on monthly installments and initially paid an amount of Rs.58,000/- being credit adjusted of Registration on 04.10.2013. It is further stated that thereafter, respondent/plaintiff started paying the monthly installments on each and every month and finally paid the installment on 01.06.2017, but thereafter the respondent/plaintiff suffered heavy loss in his business and could not make further payment. As per respondent/plaintiff he paid total amount of Rs.30,31,850/- along with surcharge to the appellant/defendant and only Rs.14,25,000/- is outstanding against him. It is further stated that in February, 2018 the respondent/plaintiff again established his business, and he along with the arrears/outstanding balance amount approached the appellant/defendant and requested them for adjustment of the outstanding, and also ready for payment of overall arrears of the monthly installments, but the appellant/defendant made no positive reply. It is further stated that thereafter, appellant/ defendant kept the respondent/plaintiff on hopes and finally refused to receive the monthly

installments. Respondent/plaintiff shown his willingness to pay to outstanding amount to the appellant/defendant and also shown willingness to pay the surcharge if any, but the appellant/defendant despite to receive the remaining balance amount blocked the aforesaid Villa for cancellation. The respondent/plaintiff thus prayed in the suit with following prayers:-

- a. To declare that the Plaintiff is lawful purchaser of VillaNo.BFA-671098, R-No.GIK205113, BTKH-RSH0260;
- b. To direct the Defendant to play his part of specific performance and complete the contract in respect of Villa No.BEA-671098, R-No.GIK-205113, BTKH-RSH0260;
- c. To declare that the act of Defendant is illegal and unwarranted, therefore restrained the Defendant, his agents, colleagues, companions, person or persons acting under his or on their behalf from illegally and unlawfully cancelling the Villa bearing No.671098, Vide Villa No.BTKH-RSH0260;
- d. Any other relief or relief(s) which this Honourable Court may deems fit be awarded to the Plaintiff.

3. Notices were issued to the appellant/defendant, who filed written statement, whereby objection was raised on maintainability by raising plea that the suit is barred under Sections 42 & 56, of the Specific Relief Act. It is stated that the respondent/plaintiff had failed to file any Agreement / Contract/ Terms & Condition duly signed with the Defendant. As per appellant/defendant the respondent/plaintiff was himself to blame as his allotment has been cancelled on 10.11.2016 due to non-payment of dues and the said fact is within the knowledge of the respondent/plaintiff. Appellant/defendant took plea that the respondent/plaintiff is only entitled for refund as per agreed terms and conditions. Lastly, the appellant/defendant has prayed for dismissal of the suit.

4. From the pleadings of the parties, following issues were framed to resolve the controversy:

1. Whether the Suit of the Plaintiff is not maintainable the law?
2. Whether the Plaintiff is bonafide purchaser of the suit property Le. Villa No.BFA-671098, R.No.GIK-205113, BTKH-RSH0260?

3. Whether the Plaintiff has committed breach of terms and condition of the contract and failed to perform his part of contract?
4. Whether the Plaintiff is entitled for relief claimed?
5. What should the decree be?

5. In order to prove the case, both the parties filed affidavits-in-evidence and produced relevant documents. After going through the evidence and material brought before the Court and hearing learned counsel for the parties, learned trial Court vide judgment dated 03.09.2020 decreed the suit, which was assailed by the appellant/defendant before learned Appellate court by preferring Civil Appeal No. 58/2020, but the same was too dismissed vide impugned judgment dated 26.02.2022, resultantly the judgment of the trial Court was upheld.

6. Learned counsel for the appellant/defendant argued that the impugned judgment is passed in slipshod manner without taking into consideration the evidence and material produced at trial; that the findings of the learned trial Court are also based on non-reading and mis-reading of evidence/record therefore, concurrent findings recorded by both the Courts below require interference by this Court.

7. Conversely, learned counsel for the respondent/plaintiff mainly argued that both the Courts below minutely gone through the evidence and material available on record; that trial Court was as well as Appellate Court properly evaluated the evidence and recorded their findings which do not require any inference by this Court.

8. Heard and perused the record.

9. Before going into the merit of the case, I would like to examine the scope of the 2nd Appeal in the matter of concurrent findings of the courts below.

10. The scope of the 2nd appeal is *narrow* and it could be exercised *only* if the decision is being contrary to law; failure to determine some material issue of law, and substantial error or defect in the procedure provided by the Code or law for the time being in force which may possibly have

emanated an error or slip-up in the determination or decisiveness of the case on merits. Guidance is taken from the case of the *Gulzar Ahmad and others vs. Ammad Aslam and others (2022 SCMR 1433)* wherein the Hon'ble Apex Court has held that:

"7. Compliant with section 100, C.P.C., the second appeal only lies in the High Court on the grounds that the decision is being contrary to law; failure to determine some material issue of law, and substantial error or defect in the procedure provided by the Code or law for the time being in force which may possibly have emanated an error or slip-up in the determination or decisiveness of the case on merits. Meaning thereby, it does not lie to question the findings on facts. In the case of Madan Gopal v. Maran Bepari (PLD 1969 SC 617), this court held that if the finding of fact reached by the first appellate court is at variance with that of trial court, such a finding by the lower appellate court will be immune from interference in second appeal only if it is found to be substantiated by evidence on the record and is supported by logical reasoning, duly taking note of the reasons adduced by the first court which have been disfavored in the contrary finding. It was further held that interference would be justified if the decision of the lower courts is found to be contrary to law or some usage having the force of law has failed to determine some material issue of law. Whereas in another case reported as Amjad Ikram v. Mst. Asiya Kausar (2015 SCMR 1), the court held that in case of inconsistency between the trial court and the appellate court, the findings of the latter must be given preference in the absence of any cogent reason to the contrary as has been held by this court in the judgments reported, as Madan Gopal and 4 others v. Maran Bepari and 3 others (PLD 1969 SC 617) and Muhammad Nawaz through LRs. v. Haji Muhammad Baran Khan through LRs. and others (2013 SCMR 1300)."

11. The above legal position, prima facie, makes it clear and obvious that to succeed in second appeal, the appellant must establish that the finding of fact arrived at by the first appellate court is not found to be substantiated by evidence on the record and is result of its failure in determining the material issue or that conclusions, so drawn, are contrary to settled principles of law.

12. In the instant matter, according to the appellant/defendant, when respondent/plaintiff failed to pay monthly installments, they cancelled the subject property in November 2016, however, record reflects that respondent/plaintiff deposited land and development charges installment No.13 amounting to Rs.240,000/- on 10.06.2017, which were accepted by the appellant/defendant and thereafter, no cancellation notice was issued to the respondent/plaintiff, hence by accepting such amount, cancellation of the

subject property was seemingly withdrawn by the appellant/defendant and such fact of receiving the amount even after cancellation was admitted by the appellant/defendant's representative during his cross examination. In the circumstances, the appellant/defendant has failed to substantiate the stance taken in the present appeal and it is found that the learned courts below passed the impugned judgments and decree upon proper evaluation of the evidence available on record. There are concurrent findings of fact against the appellant/defendant, which do not require any inference by this Court.

13. These are the reasons of short order dated 20.03.2023, whereby instant II-Appeal was dismissed.

Sajid

J U D G E