

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Jawad Akbar Sarwana

High Court Appeal No. 326 of 2022

Mrs. Tanvir Kazi
Versus
Moin us Samad Khan & another

Date of Hearing: 13.12.2023

Appellant: Through Mr. Nasir J.R. Shaikh Advocate.

Respondent No.1: Through Mr. Abdullah Azzaam Naqvi Advocate.

Respondent No.2: Through Mr. Fida Hussain Advocate holds brief for Mr. Abdul Qudoos Advocate.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- A summary suit under section 37 Rules 1 and 2 CPC was filed by respondent No.1 against appellant and respondent No.2. On receipt of notice/summons leave application was filed, which was allowed and following issues were framed:-

“1. Whether the Defendant No.1 ever executed Annexure B/5 and Annexure C to the plaint in favour of Defendant No.1 and the plaintiff respectively where from consideration of the suit property flows and on which basis leave was also granted by this Court?

2. Who was the real owner, competent to convey the title of the suit property in favour of the plaintiff?

3. What should the decree be?”

2. Since it was a summary suit based on negotiable instrument, we have not been assisted as to what is the relevance of issue No.2 vide impugned judgment dated 22.08.2022.

3. Attorney of plaintiff, being respondent No.1 here, recorded evidence on behalf of plaintiff and produced documents which were exhibited as under:-

Special Power of Attorney	Ex. P/2
Agreement of sale dated 19.08.2006	Ex. P/3
Receipt dated 19.08.2006	Ex. P/4
Agreement of sale dated 11.09.2006	Ex. P/5
Receipt dated 11.09.2006	Ex. P/6
Cheque drawn on Faysal Bank Limited dated 11.08.2006 in the sum of Rs.100,000/-	Ex. P/7
Pay order drawn on Habib Bank AG Zurich dated 19.08.2006 in the sum of Rs.450,000/-	Ex. P/8
Two Pay orders drawn on Habib Bank AG Zurich dated 08.09.2006 in the sum of Rs.1,500,000/- and Rs.8,500,000/- respectively.	Ex. P/9 and Ex. P/10
Certificate of Habib Metropolitan Bank Ltd dated 17.01.2009	Ex. P/11
Agreement dated 12.09.2006	Ex. P/12
Promissory note dated 12.09.2006	Ex. P/13
Notice for payment of Rs.55,50,000/- dated 02.06.2008	Ex. P/14
Legal notice dated 28.11.2008	Ex. P/15
Public notice	Ex. P/16

4. Attorney of plaintiff/respondent No.1 was also subjected to cross-examination whereas Tanveer Qazi appellant was examined as being defendant No.1 in the suit wherein he only produced his affidavit-in-evidence as Ex.D/1 and was also subjected to cross-examination. He did not produce/exhibited any document in support of his evidence. Defendant No.2 (respondent No.2 herein) did not come forward to record his evidence as he had already been struck off.

5. In consideration of the pleadings and the evidence recorded the suit was decreed against which this appeal is filed.

6. We have heard the learned counsel for the parties and perused the record.

7. Appellant has raised three preliminary questions i.e.

(i) While recording examination-in-chief respondents produced only copies of Ex. P/11 to P/16 and the originals, which were

disclosed to have been seen and returned, stated to be an incorrect insertion;

(ii) His second submission is that the signatures on the promissory note (Ex. P/13) is forged and fabricated and since the signatures were disputed in it,

(a) it is respondent No.1's responsibility to have referred the matter to handwriting expert/signatures expert for a report in this regard, which respondent No1 failed to and

(b) it could not have been a summary suit.

(iii) Lastly he submitted that the learned Judge should not have compared the signatures on his own and while doing so learned Judge erred in reaching to a conclusion that signatures are similar/genuine or of the same person.

8. Insofar as objection of the appellant are concerned that only copies of the requisite documents were produced during the deposition and not the original, is not confidence inspiring. Firstly the commissioner recording the evidence has categorically stated that those documents were produced in original which were seen and returned. The endorsement of the Commissioner was made in presence of counsel for appellant who never objected. In fact he (counsel for the appellant) cross-examined on the strength of examination-in-chief, which includes such endorsement "original seen and returned". He never suggested that the originals were not produced. It was not even the case during cross. Insofar as Advocate's notices are concerned since these were though not disputed documents but nothing would turn on its production or non-production. In addition to it, it is a well settled principle that the objection to the formal proof of a document has to be taken at the earliest point of time, which in the instant case appears to be otherwise. Furthermore, the appellant has not termed the subject documents to be

inadmissible but in fact taken a stand that the mode of proof of these documents is irregular or insufficient however she has failed to appreciate that such objection should have been taken when the documents were exhibited and admitted to the record, which the appellant has admittedly not done. Reliance is placed on the case of Abdullah¹.

9. Insofar as objection as to the signatures to be forged and fabricated is concerned undisputedly it is the burden upon the appellant who alleged the signature to be forged and fabricated who appears to have not taken any step in this regard. There was nothing to prevent the appellant from applying for its forensic scrutiny, which was not undertaken by the appellant. Reliance is placed on the cases of Najaf Iqbal² and Abdul Rasheed³.

10. As to the comparing of signature by the Court, Article 84 of Qanoon-e-Shahadat Order, 1984 empowers the Court to compare the signature and it is not necessarily be sent to the handwriting expert. If any authority is needed one can rely on the cases of Ghulam Rasool⁴ and Waqas Enterprises⁵.

11. Coming to the facts of the case, although it is a summary suit and has nothing to do with the immovable property i.e. flat in question, but since the respondent No.1 has pleaded that he has paid the amount to appellant for the purchase of a flat, we deemed it appropriate to deliberate upon the controversy while looking into such aspect of the matter as well. The appellant has admitted to have purchased the flat from respondent No.2 and so also the agreement annexed with the plaint. Respondent No.1 pleads that it is purchased from his

¹ PLD 1968 SC 140 (Abdullah v. Abdul Karim)

² 2020 SCMR 1621 (Najaf Iqbal v. Shahzad Rafique)

³ 2016 SCMR 2163 (Abdul Rasheed v. Syed Fazal Ali Shah)

⁴ 1997 SCMR 976 (Ghulam Rasool v. Sardar-ul-Hassan)

⁵ 1999 SCMR 85 (Waqas Enterprises v. Allied Bank of Pakistan)

amount/funds, which he claims to have given in terms of agreement (Ex.P/12). The appellant however claims that she has purchased the flat from the funds of her husband and pleads against respondent No.1.

12. Receipt of builder (Ex. P/7) made on a cheque for token amount of flat shows that it (cheque) was received from respondent of his account. It is not even pleaded that these documents (Ex. P/7 to P/10) were from her (appellant's) account, which in fact is proof of payment of money to vendor. There is nothing to rebut the payments which were shown to have been made to vendor through some negotiable instruments such as Ex. P/7 to Ex. P/10, whereas appellant executed a promissory note for respondent which was the cause along with payment made to recover it via summary proceeding.

13. Respondent No.1 in proving his plea has remained consistent and has also relied on certain documents in respect thereof, which were exhibited, referred/detailed above. On the other hand, the appellant could have rebutted such claim by showing how she utilized her funds to purchase the flat. But on all material questions put to her during the cross-examination in this regard, she had replied 'no knowledge' except the one that she has purchased such flat by paying cash, provided by her husband. She has however exhibited not a single document in support of her claim. Although it is not conceivable that such a big amount could be paid in cash, but she has not exhibited even a receipt in respect thereto what to say of any cheque or pay order. She has also not examined vendor to whom she alleged to have paid cash for consideration. Thus, her (appellant's) evidence under no stretch of imagination can be termed to be confidence inspiring, particularly when it is compared with that of the respondent No.1.

14. The burden of proving fraud is always on the party alleging it, which in the instant case is appellant, which should be based on clear,

strong and convincing and/or independent evidence, particularly when long period has expired and valuable rights have accrued to the other side, which in the instant case is respondent No.1 who since 2008 is pursuing his case for recovery. The appellant, in view of above, has not been able to produce any clear or convincing evidence thus not entitled for any indulgence. Reliance is placed on the cases of Ahsan Ali⁶ and Shamir⁷

15. A perusal of judgment impugned in this appeal stipulates that all aspect of the matter, factual as well as legal, were thoroughly considered by learned Single Judge hence the findings, as recorded via impugned judgment, do not call for any interference hence the appeal merits no consideration and the same is accordingly dismissed along with pending application.

16. Above are the reasons of our short order dated 13.12.2023.

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⁶ PLD 1969 SC 167 (Ahsan Ali v. District Judge & others)

⁷ 1993 SCMR 145 (Shamir v. Faiz Elahi)