

Judgment Sheet

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Rev. Application No.S-48 of 2023

Applicants : Muhammad Faisal & others
through Mr. Farman Ali Rajput, Advocate

Respondent No.1 : Jan Muhammad, through Mr. Sarfraz A.
Akhund, Advocate

Respondents No.2 to4: Mukhtiarkar (Revenue) Taluka New Sukkur
& others Through Mr. Ahmed Ali Shahani,
AAG

Date of hearing : **08.12. 2023**

Date of Decision : **12.01.2024**

JUDGMENT

ARBAB ALI HAKRO, J.- Through this Civil Revision Application under Section 115, the Civil Procedure Code 1908 ("**the Code**"), the applicants have impugned Judgment dated 01.02.2023 and Decree dated 08.02.2023, passed by II-Additional District Judge(MCAC), Sukkur ("**the appellate Court**")in Civil Appeal No.70 of 2022, whereby; the Judgment and Decree dated 13.4.2022 respectively, passed by III-Senior Civil Judge, Sukkur ("**the trial Court**") in F.C Suit No.88 of 2018, through which the suit of the respondent No.1 applicant was dismissed has been set-aside by remanding the suit to the trial Court with directions to hear the parties afresh and pass speaking Judgment.

2. The facts, in brief, are that respondent No.1 filed a suit for Specific Performance of Contract and Permanent Injunction against the deceased Abdul Rasheed, who died during the pendency of the suit. Consequently, the applicants, being his legal heirs, contested the suit. Plaintiff/Respondent No.1 claimed that he agreed to sell with the deceased father of the applicants on 07.02.2018 concerning

Bungalow No.30, Sector-II, measuring 120 Sq. Yds, situated at Township Sukkur, Taluka New Sukkur, District Sukkur (the 'suit property'), for a consideration of Rs.3,350,000/-. Respondent No.1 paid a sum of Rs.500,000/- as earnest money, and the balance of the sale consideration amount of Rs.2,850,000/- was agreed to be paid on 30.04.2018 upon the supply of the original documents of the suit property. Respondent No.1, who was already in possession of the suit property as a tenant, met with defendant No.1 at his house on 30.04.2018, along with his son, Waseeh Hyder Khan. They asked defendant No.1 to supply the original documents and offered him the balance consideration amount. Defendant No.1 replied that the documents were not in his possession as they were mortgaged with the bank and requested time to obtain the original documents and sale certificate. Despite the extension, he failed to do so. Respondent No.1 also sent a legal notice to defendant No.1 on 30.06.2018, which he replied to on 09.07.2018. It is further claimed that respondent No.1 came to know that defendant No.1 was trying to sell the suit property to another party, which constrained the plaintiff to file the suit.

3. Upon service of summons, the deceased father of the applicants (defendant No.1) contested the suit and filed his written statement, while the remaining respondents/defendants were declared ex parte by the trial court. Defendant No.1, in his written statement, admitted the execution of the agreement to sell and claimed that respondent No.1 failed to pay the remaining balance consideration within the stipulated time, as it was to be paid by him to the concerned bank where the suit property was mortgaged. Therefore, the earnest money he paid was forfeited as per the terms and conditions of the agreement to sell.

4. From the divergent pleadings of the parties, the trial Court formulated the following issues:-

- i. Whether the suit of plaintiff is not maintainable?*
- ii. Whether the plaintiff was ready to pay Rs.2850,000/- i.e. remaining amount of sale consideration in consequences of agreement dated 07.02.2018 on 30.4.2018, but the defendant No.1 failed to perform the contract of his part?*
- iii. Whether the plaintiff defaulted in making timely payment and thus, the amount of Rs.500,000/- paid advance stood forfeited in terms of the sale agreement?*
- iv. Whether the plaintiff is entitled to the relief asked for?*
- v. Result?*

5. Both parties examined themselves and produced relevant documents to support their claims. In addition to himself, respondent No.1 also examined two other witnesses. After examining the evidence produced by the parties and hearing their respective submissions, the trial court dismissed the respondent's suit.

6. The above Judgment and Decree of the trial Court were then impugned by Respondent No.1 through an Appeal, and through the impugned Judgment and Decree, the Judgment of the trial Court was set aside. The suit was remanded back to the trial Court for deciding the same afresh after hearing the parties.

7. At the very outset, the learned counsel for the applicants argued that the impugned Judgment and Decree passed by the appellate Court contravenes the mandate of Order XLI Rule 23 to 25 and Section 107 of the Code. He contended that the appellate Court unnecessarily remanded the case to the trial court with a simple direction to hear the parties' advocates afresh and pass a speaking judgment on merit. He also argued that the appellate Court did not pass Judgment on each issue, and the evidence of the parties was not discussed to finalize the issues framed by the trial court. He cited case law reported as **PLD 2022 S.C 248, 1997 SCMR 1849, and 2015 CLC 1711** to support his contentions.

8. Conversely, the learned counsel for respondent No.1 has argued in support of the impugned Judgment passed by the appellate Court. He contended that the remand order issued by the appellate Court was justified under the facts and circumstances of the case.

9. The learned Additional Advocate General for Respondents No.2 to 4 contended that there was a dispute between the private parties regarding the agreement to sell. However, the Judgment and Decree of the appellate Court are in accordance with the law.

10. The arguments have been heard at length, and the available record has been carefully evaluated with the assistance of the learned counsel for the parties. To evaluate whether justice has been dispensed, it is imperative to analyze the findings of both the Courts below.

11. Upon examining the impugned Judgment of the appellate Court, it is apparent that the appellate Court remanded the case back to the trial court with directions to hear the parties' advocates afresh and pass a speaking judgment. For expediency, the relevant findings of the appellate Court, which compelled it to remand the case back to the trial court, are reproduced as follows: -

“The perusal of agreement of sale dated 07.02.2018 produced by the appellant/plaintiff at Ex.2/D shows that it is also one of the condition in agreement that the suit property is not sold to any party or person prior to this agreement and it is not mortgaged and if it is proved then the deceased respondent/defendant No.11 will be responsible and he will make payment to the appellant/plaintiff. It is also condition in the sale agreement that there is no any share holder in the suit property and if the appellant/plaintiff fail to make payment of outstanding amount within stipulated time then advance amount is to be forfeited in favour of deceased respondent/ defendant No.1 and if deceased respondent/ defendant No.1 fail to deliver original documents at the time of receiving last payment then the deceased respondent/ defendant No.1 will pay double amount to the appellant/ plaintiff.”

The perusal of agreement of sale clearly indicates that both the parties had to perform their part of contract and the deceased respondent/defendant No.1 made concealment of facts by misrepresentation that the property is not mortgaged but in written statement the deceased respondent/defendant No.1 admitted that the suit property was mortgaged and even the deceased respondent/defendant No.1 was bound to handover original documents of suit property to the appellant/plaintiff at the time of receiving last payment but he failed to do so as the original documents were lying with the bank, therefore, the deceased respondent/defendant No.1 failed to perform his part of contract and according to Section 28 of the Specific Relief Act, 1877 such type of contract cannot be enforced due to being invalid on account of fraud, undue advantage and misrepresentation committed by the deceased respondent/defendant No.1.

The trial Court in its Judgment has given findings in respect of failure on the part of appellant/plaintiff to make remaining amount of sale consideration to the deceased respondent/ defendant No.1 within stipulated time as per terms and conditions of agreement of sale but there is no provision in the Specific Relief Act which cast any duty on the Court or required the appellant/plaintiff to first deposit the balance sale consideration and even the trial Court had not directed the appellant/plaintiff to deposit remaining sale consideration amount in Court as he was not put to notice that non-deposit of balance sale consideration amount will be deemed to be his incapability of performing his part of contract as envisaged U/S 24(b) of the Specific Relief Act rendering the agreement non-enforceable, therefore, the trial Court has not considered such aspect of the case and has only discussed consequences of non-payment of balance consideration amount in Court and dismissed the suit without discussing other merits of the case specially to be performed by the deceased respondent/ defendant No.1 for execution of sale deceased, therefore, keeping in view such aspect of the case, impugned Judgment and Decree passed by trial Court is illegal which is not sustainable in law and requires interference by this Court. Hence this point is answered in affirmative.”

[emphasis supplied]

12. From the perusal of the above findings, it is evident that the reasons which led the appellate Court to remand the case to the trial court are that the trial court did not consider the terms and conditions of the Agreement to Sell, which were to be performed

by both parties, especially by the deceased Abdul Rasheed. The power and discretion of the learned appellate Court to remand the case are provided under Order XLI Rules 23 to 26 of the Code. For ease of reference, these are reproduced below: -

"23. Remand of case by Appellate Court. Where the Court from whose Decree an appeal is preferred has disposed of the suit upon preliminary point, and the Decree is reserved in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its Judgment and order to the Court from whose Decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

24. Where evidence on record sufficient, Appellate Court may determine case finally.---Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce Judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the Judgment of the Court from whose Decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court Proceeds.

25. Where appellate Court may frame issues and refer them for trial to Court whose Decree appeared from---Where the Court from whose Decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose Decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor.

"26. Findings and evidence to be put on record. Objections to findings. (1) Such evidence and findings shall form part of the record in the suit; and either party may, within a time to be fixed by the Appellate court, present a memorandum of objection to any finding."

13. From a bare reading of the above provision, it becomes clear that Rule 23 covers a situation where the trial Court decides the case on a preliminary point and the Decree is reversed in appeal.

Rule 24 empowers the Court to decide the matter where evidence on record is sufficient. Rule 25 applies where the trial Court omits to frame or try the issue and enables the appellate Court to frame the issue and refer the same for trial to the Court from whose Decree the appeal is preferred. Rule 26 stipulates the procedure to handle the proceedings recorded on the fresh issues framed under Rule 25.

14. Perusal of the impugned Judgment and Decree reveals that the appellate Court remanded the case without any of the above situations. The above provisions of law do not permit the appellate Court to remand the case on the failure of the trial Court to decide the case on the basis of available records. If the evidence available on record was not considered by the trial Court, the learned Appellate Court was under obligation to consider the same and should have passed speaking judgment by considering the entire evidence available on record instead of remanding the matter to the trial Court. There is no cavil with the proposition of law that a remand of the case should not be lightly ordered, and if the evidence on record is sufficient, then the appellate Court should decide the case itself. The Courts administering justice have to bear in mind that an order of remand re-opens another chain of litigation which not only entails wastage of public time but also delays disposal of the cases, involves the unnecessary expense of the parties, and these vices are seriously detrimental to the justice system. In Case of **Habibullah v. Azmatullah (PLD 2007 Supreme Court 271)**, it has been held by the Supreme Court of Pakistan that:

“Under rule 23-A, a remand would be justified when the Court considers re-trial of the suit necessary. Under rule 25, the appellate Court retains the file on its record and remits the case to the trial Court for the decision of the issues not 'determined and return the findings to the appellate Court. Therefore, none of the aforesaid provisions was attracted to remand the case to the learned trial Court for recording findings on the issues which were not determined by the said Court. We will like to observe that there are some judgments of the superior Courts which recognize inherent powers of an

*appellate Court to remand a case. We will, however, like to observe that in the first instance, it is doubtful where in view of express provisions for remand of a case the inherent powers could at all be exercised and secondly, we do not find any unusual feature in this case to warrant a remand under inherent powers. This Court, has, in a number of judgments, reiterated that a remand of the case should not be lightly ordered and if evidence on record is sufficient then the appellate Court should decide the case itself. The Courts administering justice have to bear in mind that an order of remand re-opens another chain of litigation which not only entails wastage of public time but also delays disposal of the cases, involves unnecessary expense of the parties and these vices are seriously detrimental to the justice system". Reliance is also placed on the cases reported as **Paramatha Nath Chowdhury and 17 others vs Karim Mondal and others (PLD 1965 SC 434)**, **Fateh Ali vs Pir Muhammad and another (1975 SCMR 221)** and **Nasir Ahmad and another vs Khuda Bakhsh and another (1976 SCMR 388)**".*

15. In such circumstances, the appellate Court, in not deciding the case itself, failed to exercise the jurisdiction vested in, whereas while remanding into the trial, the Court exercised the jurisdiction not so vested under the law.

16. The Judgment of the appellate Court, remanding the case to the trial Court to decide the matter afresh, is not only violative of the law declared by the Supreme Court of Pakistan in the above-referred authorities but also excessive exercise of jurisdiction, which is not sustainable and this Court must interfere in the exercise of its revisional jurisdiction under Section 115 of the Code.

17. I want to refrain from commenting on the observations made by the trial Court, as the matter is still to go back to the appellate Court, as the Judgment of the learned appellate Court is not tenable in the eye of Jaw. It was the duty of the appellate Court to decide the matter itself instead of remanding the case to the trial Court inasmuch as mere non-discussing the terms and conditions of the agreement to sell and its' consequences do not render the Judgment of the trial Court illegal. The trial Court gave the findings on each issue and decided the matter in accordance

with the law. Therefore, the appellate Court ought to have decided the appeal after hearing the parties and going through the record of the case. However, while remanding this case, the appellate Court travelled beyond its jurisdiction. Consequently, this Court while exercising the jurisdiction provided under section 115 of the Code, comes to this conclusion that the Appellate Court committed material illegality and irregularity while remanding the case to the trial Court for its decision afresh, whereas, the trial Court had already decided the matter after considering the entire evidence available on the record. In Case of Noor Hussain and others v. Mst. Hussain Bibi and others (2007 SCMR 378), it was held by the Supreme Court of Pakistan that:

“It is a settled proposition of law that when the Appellate Court had decided the case in violation of law laid down by this Court, then it is termed as material irregularity or illegality within the meaning of section 115 of C.P.C. as law laid down by this Court in Shaukat Nawaz's case 1988 SCMR 851”.

18. For the foregoing reasons, the impugned Judgment and Decree passed by the Appellate Court are hereby set aside. Resultantly, the appeal shall be deemed to be pending before the appellate court, which shall adjudicate the same strictly in accordance with the law after providing the opportunity to the parties without being influenced by any observation made by this Court in respect of the merits of the case. He is further directed to dispose of the appeal on merits, strictly in accordance with law, as expeditiously as possible, preferably within 30 days from the date of receipt of this order. Revision application **disposed of** accordingly.

J U D G E