

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD**

Civil Revision Application No.33 of 2011
[Haji and another v. Shabbir Ahmed and others]

Date of hearings : 16.11.2023 and 27.11.2023

Applicants No.1 and 2 : Haji and Rasool Bux, through
Mr. Parkash Kumar, Advocate.

Respondent No. 1 : Shabbir Ahmed, through
Mr. Abdul Ghafoor Hakro, Advocate.

Respondent No.2 : Allah Rakhio, through
M/s. Muhammad Arshad S. Pathan and
Safdar Hussain Leghari, Advocates.

Respondents No.3 to 6 : Mukhtiarkar (Revenue) Hyderabad, Sub-
Registrar Hyderabad, District Sub-
Registrar Hyderabad and Province of
Sindh, through Mr. Allah Bachayo
Soomro, Additional A.G.

JUDGMENT

Muhammad Faisal Kamal Alam, J: This Revision is filed against the Judgment and Decree passed by the First Appellate Court in the Civil Appeal No.14 of 2009, preferred by the Respondent No.1 (*Shabbir Ahmed*) against partly dismissal [to the extent of Survey No.217] of his Suit-FCS No.28 of 2005, *inter alia*, for Specific Performance and Cancellation of Registered Sale Deed, by the learned Trial Court.

2. Succinctly, the Respondent No.1 has stated that he has purchased the **Suit Land**, viz. Survey No.8 (*1.32 acres*) and Mohag of Survey No.249, admeasuring 2.00 acres and Mohag of Survey No.85 admeasuring 1.00 acre and Survey No.217 (*9.35 acres*) total 14.27 acres, situated in Deh Sukhpur,

Tapo A-Hoosri Taluka and District Hyderabad, from the Respondent No.2, but, the latter illegally sold out part of the Suit Land, that is, Survey No.217 [**disputed land**] to the Applicants.

3. The learned Advocates for the Parties have made their respective submissions.

4. Mr. Parkash Kumar, the learned counsel representing the Applicants has referred to the evidence and stated that the learned Appellate Court did not evaluate the evidence properly, in particular, about sale of Survey No.217, which is the main bone of contention between the Parties hereto; Suit for Specific Performance cannot be allowed against the present Applicants, because the Respondent No.1 has already transferred his title in respect of Survey No.217, in favour of the Applicants through the registered Sale Deed [Exhibit-60], hence Section-25 of the Specific Relief Act is applicable to the present facts. To augment his arguments, he has cited the following Case Law_

PLD 2011 Supreme Court-296
[Hafiz Tassaduq Hussain vs. Lal Khatoon and others]

5. Whereas, Mr. Arshad Pathan, Counsel for the Respondent No.2 [VENDOR] by referring to his pleadings supported the case of the present Applicants that Survey No.217 was sold to them (*the Applicants*) through a registered Sale Deed, *inter alia*, due to the default on the part of Respondent No.1, in payment of the entire balance sale consideration.

6. Complaint of the Respondent No.1 as Plaintiff, is that he entered into the Sale Agreement with Allah Rakhio (*present Respondent No.2*), dated 02.04.2002 in respect of the above Suit Land for a total sale consideration of Rs.675,000/- (*rupees six hundred seventy five thousand only*), paid Rs.200,000/- (*rupees two hundred thousand only*) through the Cheque as

the earnest money at the time of execution of Sale Agreement and physical vacant possession of the Suit Land was handed over to the present Respondent No.1; further paid Rs.80,000/- (*rupees eighty thousand only*) on occasions, leaving the balance of Rs.3,95,000/- (*rupees three hundred ninety five thousand only*) to be paid at the time of registration of Sale Deed; despite this, the Respondent No.2 failed to comply his part of the obligations, *inter alia*, non-obtaining of Sale Certificate and arranging other official record. On 26.05.2005 in his absence, the present Applicants (who have been impleaded as Defendants in the above Suit), illegally occupied the Survey No.217, admeasuring 9.35 acres, on the ground that Survey No.217 has been purchased by them through a registered Sale Deed from the Respondent No.2, of which the cancellation is also sought by the present Responded No.1. Mr. Abdul Ghafoor Hakro Advocate, representing the Respondent No.1, has argued that the Applicants are not *bona fide* purchaser for value without notice and thus, their sale transaction with the Respondent No.2 is void *ab initio*. To support his stance cited **2022 SCMR 1433 [Gulzar Ahmad and others vs. Ammad Aslam and others]**.

7. The suit was contested by the present Applicants and Respondent No.2 by filing Written Statement, denying the stance of Respondent No.1. The following Issues were framed, the Parties led the evidence and the Judgment was pronounced by the learned Trial Court, dismissing the Suit of Respondent No.1 to the extent of Survey No. 217 [disputed land] and decreeing for the remaining portion_

1. *Whether originally the defendant No.1 was owner of suit land?*
2. *Whether the defendant No.1 entered into sale agreement dated 02.4.2002 in respect of S.No.81 Mohag of S.Nos.249, 85 and S.No.217, total 15-00, acres situated in Deh Sukpur in favour of plaintiff for consideration of Rs.6,75,000/- at the rate of Rs.45,000/- per acre?*

3. *Whether the plaintiff paid Rs.2,80,000/- as earnest money to defendant No.1 through Cheque issued on Bolan Bank Limited Latifabad, at the time of sale agreement and physical vacant possession of the suit land was handed over the plaintiff in presence of witnesses same was got attested from Notary Public?*
4. *Whether no date for execution of sale agreement was fixed by the parties?*
5. *Whether the plaintiff paid Rs.80,000/- through installment of Rs.20,000/-, Rs.25,000/-, Rs.5,000/- and Rs.30,000/- on the request of the plaintiff so that he may be able to get the Revenue Record mutated and obtain the sale certificate?*
6. *Whether, defendants No.2 and 3 were in knowledge that defendant No.1 sold out the S.No.217 by executing sale agreement dated 02.04.2002 in favour of plaintiff, therefore, the defendants No.2 and 3 have no right to purchase and the same is illegal?*
7. *Whether, defendant No.1 is bound to execute the sale deed in favour of the plaintiff as sale agreement dated 02.04.2002 in favour of his prior and defendant No.1 has no authority to register the same in favour of defendants No.2 and 3?*
8. *Whether, defendant No.1 at the time of execution of sale deed in favour of defendants No.2 and 3 have not handed over the possession of S.No.217 to defendants No.2 and 3?*
9. *Whether, the plaintiff approached before notice, where defendant No.1 admitted in respect of execution of sale agreement in favour of plaintiff, the defendants No.2 and 3 have also admitted that they had forcibly occupied and dispossessed the plaintiff?*
10. *Whether, sale deed executed by defendant No.1 in favour of defendants No.2 and 3 is illegal, void and same is liable to cancelled?*
11. *Whether, defendants No.2 and 3 have forcibly, illegally without lawful authority have occupied the S.No.217 and dispossessed the plaintiff as plaintiff was in possession of prospective purchaser,*

therefore, the defendants No.2 and 3 are liable to handover the possession of above S.Nos. to the plaintiff?

12. *Whether, the plaintiff is in cultivating possession of S.No.81, Mohag of S.Nos.85 and 249, admeasuring 4.32 acres of Deh Sukpur and is legally entitled to retain the same till defendant No.1 execute register sale deed in favour of plaintiff?*
13. *Whether, the plaintiff miserably remained fail to comply the terms of sale agreement, though he was number of time, requested to make arrangement of Rs.4,75,000/- within stipulated period, hence, defendant No.1 cancelled the sale agreement and forfeited the earnest money?*
14. *Whether, the plaintiff has got no cause of action for filing present suit against defendants?*
15. *Whether, the plaintiff is entitled for the relief as prayed?*
16. *What should the decree be?*

8. Submissions heard and Record perused.

9. The undisputed facts are, that Sale Agreement dated 02.04.2002 was entered into between the Respondents No.1 and 2 [Exhibit-59, at page 185 of the Court record], whereas, the Sale Deed between the Applicants and the Respondent No.2 was executed on 23.02.2005 [Exhibit-60, at page-191 of the Court record], which is a registered document, therefore, there is a gap of around three years between the two documents.

10. The Respondent No.1/Plaintiff, in his cross-examination has admitted that till the sale of Survey No.217 [that is, upto February 2005], no Legal Notice was given by him to Respondent No.2 for completing the transaction. Although, it is claimed in the pleadings and examination-in-chief that besides paying Rs.200,000/- (*rupees two hundred thousand only*) through cheque he paid an amount of Rs.80,000/- (*rupees eighty thousand only*) on different occasions, but did not obtain receipt for the same. On a

suggestion, he has specifically stated that he is not ready for registration of Sale Deed in his favour for the area of 4.32 acres [remaining land] on the same rate as mentioned in the Sale Agreement [Exhibit-59]. Acknowledged that no notice was published for the information of general public about purchase of Subject Land. Reply to the suggestions put forth by the Counsel for present Applicants, that the latter [*the Applicants*] are in possession of Survey No.217, while voluntarily adding, that it was taken forcibly; did not dispute the execution of registered Sale Deed [Exhibit-60]; did not dispute that Applicants are making payments of Land Revenue Charges and Water Charges to the concerned Government Department.

11. Mohammad Safdar, one of the witnesses of the Sale Agreement [PW-3], has corroborated the version of Respondent No.1, but in his examination-in-chief did not mention Survey No.217, as one of the Surveys about which Sale Agreement has been executed. In his cross-examination, **he contradicted himself**, by stating that he did not remember whether he was on duty or on leave, when the Sale Agreement (*ibid*), was signed between the Respondents No.1 and 2, of which he is claiming to be the witness.

12. Jamil-ur-Rahman, another witness of the Sale Agreement [PW-4] adduced the similar testimony, but did not mention Survey No.217. However, he stated in his examination-in-chief, that he did not know about possession of the Suit Land; this assertion contradicts the claim of the Respondent No.1 about his possession in respect of the Subject Land including the disputed land [Survey No.217].

13. The Respondent No.1 also examined his father, brother and the two Harees [tillers], viz. Rasool Baksh and Anwar, in order to substantiate his claim that besides paying Rs.200,000/- (*rupees two hundred thousand*

only), he paid Rs.80,000/- (*rupees eighty thousand only*) to Respondent No.2 at different occasions.

14. Rasool Baksh (PW-7) corroborated the version of Respondent No.1, but has stated that he is not Haree of Plaintiff's father, which piece of evidence belies the testimonies of Respondent No.1 and his family members that Rasool Buksh is their Haree.

15. The Applicant No.1 testified in favour of his claim, that he is a *bona fide* purchaser for value without notice and possession of disputed Survey No.217 was handed over to the Applicants by Respondent No.2. In his cross-examination, nothing contrary could be elicited from him.

16. The Respondent No.2 (*Allah Rakhio*), the Owner of the Suit Land testified. Denied that the Sale Agreement was witnessed by the above named witnesses, nor the physical possession was ever handed over to the Respondent No.1. Has specifically deposed that only Rs.2,00,000/- (*rupees two hundred thousand only*) has been paid till date out of total sale consideration of Rs.6,75,000/- (*rupees six hundred seventy five thousand only*); that he has sold the Survey No.217 to the Applicants after informing the Respondent No.1 in presence of the Applicants, through executing the Sale Deed [*ibid*] and receiving the entire sale consideration. In his cross-examination, he remained consistent that the Sale Agreement was not witnessed by the above person. Denied that he has taken the amount of Rs.80,000/- (*rupees eighty thousand only*) from the Respondent No.1 on different occasions. Could not be falsified that he (*Respondent No.1 as owner*) did not receive any amount from the Applicants and the registered Sale Deed / Exhibit-60 is a void document. The specific assertion of the Respondent No.2 about his forewarning to Respondent No.1 for completing the transaction and the sale of Survey No.217 to the Applicants could not be disproved.

17. Re-assessment of the evidence shows that except for payment of Rs.2,00,000/- (*rupees two hundred thousand only*) as part payment towards sale consideration, by Respondent No.1 to Respondent No.2, further payment of Rs.80,000/- (*rupees eighty thousand only*) could not be proved by the Respondent No.1, so also that he was in possession of the Suit Land, in view of his reply in cross-examination, that he had not produced any proof, that the Suit Land is cultivated by him from the date of purchase; this reply is **very material, as from the date of purchase (dated 02.04.2002) and when the Suit was filed on 02.04.2005 (after three years)**, had he was in cultivating possession of the Suit Land, he would have produced payment of Revenue Cess and Charges.

Similarly, the arguments of Applicants' Counsel, that Survey No.217 has been inserted through interpolation, as earlier the said Survey number was scored off and again mentioned at the top of the other Survey number loses significance, in view of the admission of Respondent No.2 (as Vendor / Seller), that the Sale Agreement-Exhibit-59 between him and Respondent No.1, has been executed, for a total sale price of Rs.6,75,000/- (*rupees six hundred seventy five thousand only*), out of which Rs.2,00,000/- (*rupees two hundred thousand only*) has been paid.

Conclusion of the above is, that even after passage of three years when the said Suit has been filed, balance sale price was not paid by the Respondent No.1, to show his *bona fide* and willingness to complete the sale transaction. **Secondly**, in his evidence, the Respondent No.1 (*Plaintiff*) has stated that he is not ready and willing to purchase the remaining area as mentioned in the Sale Agreement. No Legal Notice has been sent by the Respondent No.1 as purchaser to Respondent No.2 as Seller for completing

the sale transaction in these three years; which again has the adverse effect on his willingness to purchase the Suit Land.

18. A Sale Agreement Exhibit-59, which remained incomplete hitherto, due to the above reasons as compared to the registered instrument-Sale Deed (Exhibit-60), which transaction stood completed in respect of Survey No.217 between the Applicants and Respondent No.2 (owner), in these particular circumstances, has the preference over the Sale Agreement. Therefore, the Case Law cited by the learned Counsel for Respondent No.1, is distinguishable, *inter alia*, because in the reported Judgment, the owner sold the property to third party before the cutoff date mentioned in the Sale Agreement, in order to fetch the higher price, so also the Sale Deed between the parties was tainted with collusiveness; but here the Respondent No. 1 did not pay the balance sale consideration for three years and he is not ready and willing to purchase the remaining portion of the Suit Land.

19. The relief of Specific Performance of Contract is discretionary in view of Section-22 of the Specific Relief Act. The evaluation of the evidence is not properly done as required, by the learned Appellate Court and this significant legal principle about the discretionary relief, has been over looked while setting aside the Decision of the learned Trial Court. The impugned Judgment cannot be maintained.

20. The summation of the above is that the impugned Judgment of the Appellate Court is set-aside and that of the learned Trial Court is maintained, rather modified, in view of the above evidence; that is to say, if the Respondent No.1 is not interested in purchase of remaining **Suit Land**, then the Respondent No.2 shall return him the amount of Rs.200,000/- (*rupees two hundred thousand only*) [earnest money] within the shortest possible time, as determined by the learned Trial Court, together with 10%

(*percent*) markup [**per year**] from the date of the Judgment and Decree of the learned Trial Court (25.07.2009) till the realization of the amount.

JUDGE

Hyderabad,

Dated: _____.

M.Javid.PA