Judgment sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Present
Mr. Justice Muhammad Jaffer Raza

IInd Appeal No. 369 of 2024

M/S. R & J Builders and Developers & another…… Appellants.

Versus

Muhammad Sajjad & others……..……..…… Respondents.

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Versus

Muhammad Sajjad & others ……..……..…… Respondents.

Mr.Naveed Ahmed Khan, Advocate for the Appellant a/w
Mr. Ubaid-ur-Rehman Advocate.

Syed Nayyar Raza Zaidi, Advocate for the Respondent No.1 a/w
Mr. Muhammad Aslam Advocate.

Ms. Afsheen Aman, Advocate for Respondent No.3.

Dates of hearing : 28.04.2025 & 12.05.2025

Date of announcement: 21.07.2025.

J U D G M E N T

MUHAMMAD JAFFER RAZA – J: By the instant judgment both the above noted Second Appeals shall be adjudicated. Both the Appeals have been filed against the consolidated judgment and decree dated 04.10.2024 and 09.10.2024 respectively in Civil Appeals Nos.31/2024 and 32/2024.

2. Brief facts of the case are that the Appellant filed a Civil Suit bearing No.2138/2020 for declaration and cancellation of booking agreement with the following prayer clauses:-

> "i) To declare that the defendant No.1 has violated the terms and conditions of the agreement/Booking Form dated

24.03.2015 as well as Payment Schedule, by defaulting in payment of installments.

ii) To declare that the agreement/Booking Form dated 24.03.2015, in respect of property in question viz. Flat bearing No. III, Type Star, First floor, in the project Burj-ul-Khalid, situated at Plot No. SB-171, Sector 4-B, Scheme 41, Surjani Town, Karachi, has been cancelled validly and lawfully by the plaintiff vide it's "Cancellation Notice" dated 03.12.2018.

iii) To declare that the defendant No.1 is only entitled to receive re-fund of the amount as per terms and conditions of the agreement/Booking Form dated 24.03.2015.

iv) To pass the order for Permanent Injunction to restrain the Defendants, their agents, employees, attorneys, person or persons working under them or for them from pressurizing or harassing the Plaintiff in any manner.

v) Any other relief or relieves, which this Honourable Court deem fit and proper in the circumstances of the case.

vi) Cost of the suit may also be awarded."

3. Thereafter, Respondent No.1 filed Civil Suit bearing No.806/2022 for declaration and specific performance with the following prayer clauses:

"a) Declare the plaintiff is lawful purchaser of the suit property ie. Flat No.111, Star Category, First Floor, in the project known as Burj ul Khalid situated in Surjani Town Karachi & defendants are bound to perform their part & handover peaceful possession of said flat with all necessary fixtures & fittings to the plaintiff.

b) Directed the defendant to receive remaining balance amount i.e. Rs.595000/- in 30 equal installments & Rs.150,000/- for documentation charges at the time of sub lease of said suit property in favour of plaintiff & handover all relevant papers/certificates with regards to suit property to the plaintiff.

c) Restrain to defendants from transfer/conveyance, alienate, charge & mortgage the said suit property to any other person except to the plaintiff or his nominee.

d) Specific Performance of the contract directing the defendants to Sub-Lease the said property to the plaintiff as agreed/if defendant failed to perform the contract direct the Nazir of this Hon'ble Court to execute a sub-lease Deed in favour of the plaintiff or his nominee in respect of the said property i.e. Flat No.111, Star Category, First Floor, in the project known as Burj ul Khalid situated in Surjani Town Karachi."

4. Subsequently, consolidated issues were framed and the learned Trial Court passed the judgment and decree dated 11.01.2024 dismissing the Civil Suit filed by

the Appellant and decreeing the Civil Suit filed by Respondent No.1 in the following terms:-

> "These suits are came up for final disposal on 11.01.2024 in the presence of Advocate for Plaintiff & advocate for Defendant No.1. It is ordered that suit No.2138/2020 is hereby dismissed. Suit No.806/2022 is hereby decreed in terms of Section 19 of the Specific Relief Act, 1877 and the Plaintiff of suit No.806/2022 is entitled to receive compensation amounting to Rs.4,000,000/- (Rupees Four Million) from the RJ Builders/Plaintiff of leading suit and Defendant No.1 to 3 of suit No.806/2022. There is no order as to costs."

5. Learned counsel for the Appellant has contended that the Impugned Judgment and decree require interference of this Court within the permissible limits of Section 100 CPC. Learned counsel has further contended that dismissal of the Appellant's suit and decree in suit filed by Respondent No.1 to the tune of Rupees Four Million is unwarranted as no prayer in respect of compensation was made by Respondent No.1. He has further contended that the Respondent No.1 did not abide by the terms and conditions of the agreement between the parties therefore the Appellant being a builder had no option, except the one exercised by it, by cancelling the booking made by Respondent No.1. He has further argued that the said booking was cancelled due to non-payment and the said non-payment is evident, even from the prayer clause of the suit filed by Respondent No.1. In this regard he has most specifically argued that the suit filed by Respondent No.1 itself prays for alteration of the terms and conditions of the agreement between the parties. He has further averred the suit filed by Respondent No.1 was filed after two years of the suit filed by the Appellant and the Appellant in the suit filed had already deposited the amount which was received from Respondent No.1 and after cancellation, allotted the subject apartment to a third party. He has averred that in the suit for specific performance it has to be shown that the Plaintiff is ready and willing to perform, however, bare perusal of the suit filed by Respondent No.1 shows that the Respondent No.1 was never willing and/or able to perform the agreement. Lastly, learned counsel has averred that both the Civil

Appeals filed by the Appellant were dismissed on erroneous considerations by the learned Appellate Court and the same require interference of this Court.

6. Conversely, learned counsel for the Respondent No.1 has argued that the instant Appeals do not merit consideration within the limited scope of Section 100 CPC and no exceptional circumstances are present to alter the concurrent findings of the learned Courts below. He has further argued that the Courts have the power under the Specific Relief Act, 1877 **("Act")** to grant compensation, even if, the same is not prayed for specifically. He has further argued that the breach of the terms and conditions of the agreement were on behalf of the Appellant therefore the Respondent No.1 is entitled for compensation as determined by the learned Courts below.

7. Order XLI, Rule 31 C.P.C. mandates an appellate court to determine points for determination, the decision on those points, and the reasons for the decision. The said principle was also expounded in the case of ***Meer Gul vs. Raja Zafar Mehmood through legal heirs and others***[1]. The points for determination are set out below:-

1. **Whether the Appellant was in breach of agreement?**
2. **Whether compensation was lawfully granted to the Respondent No.1 under Section 19 of the Act?**
3. **Whether the concurrent findings require interference of this court?**

Point No.1

8. I have heard the learned counsels for the respective parties and perused the record. It is admitted between the parties that an agreement was executed between them on 24.03.2015. It is also not denied that the agreement could not be performed. I shall now examine the evidence recorded by the respective parties to adjudicate the instant point of determination.

9. It is evident from the bare perusal of the prayer clauses of the suit filed by the Respondent No.1 that the said Respondent sought specific performance of the agreement mentioned above. In this regard the said Respondent was burdened

[1] 2024 SCMR 1496

with proving that he was at all material times willing and able to perform his part of the agreement[2]. Perusal of the examination of the respective parties will reflect that the Respondent was unable to establish that burden. The said Respondent admitted during his cross examination, the execution of the agreement, and the right of the Appellant to cancel the allotment in case of non-payment. Relevant excerpts of the cross examination of the said Respondent are reproduced below:-

> *"It is correct to suggest that as per para No.6 of the contents/terms and conditions of agreement executed between me and plaintiff dated 24.03.2015 plaintiff was competent to canal said agreement in default of payment. Vol. says I have never received any notice from plaintiff. It is correct to suggest that after booking in the said Project I went abroad & did not intimate in respect of the same…… It is correct to suggest that I have not deposited any amount in the bank account of plaintiff….. It is correct to suggest that in my counter suit No.806/2022 I have stated that I requested the builder I will pay the loan amount through instalments. It is correct to suggest that as per para No.7 of the contents/terms & conditions of agreement executed between me & plaintiff dated 24.03.2015 the loan amount will be approved after handing over the possession of the property in instalments. It is correct to suggest that as per para No.7 of the contents/terms & conditions of agreement executed between me and plaintiff dated 24.03.2015 the buyer will make arrangement for payment of loan amount from his/her own resources. It is correct to suggest that as per para No.8 of the contents/terms & conditions of agreement executed between me and plaintiff dated 24.03.2015 buyer will be bound to pay all the charges of sanctioning loan….. It is correct to suggest that settlement was done between my sister and plaintiff before SBCA & Repayment Schedule was settled between the parties. Vol. says. When my sister went to SBCA they asked her to sign said settlement otherwise they will cancel the flat. It is correct to suggest that in the year 2019 said project was completed & possession was allotted to the allottees who paid the complete the payments"*

10. Perusal of the cross-examination reproduced above will reflect that Respondent's inability and lack of willingness to abide by the terms of the agreement. It is further evident that the burden of obtaining the loan from a financial institution lay heavily on the Respondent. Further, the prayer clause of the suit filed by the Respondent itself seeks an alteration of the agreed terms and conditions between the parties.

11. In order to completely understand the "repayment schedule" referred to in the cross examination above it is imperative to observe that the sister of the

[2]2025 SCMR 495. Zeeshan Pervez (Late) through Legal Heirs Versus Muhammad Nasir.
2024 S C M R 1883. Liaquat Ali Khan Versus Muhammad Akram and another.

Respondent approached the provincial ombudsman for settlement of the dispute. The said ombudsman directed the parties to settle their dispute before the SBCA (Respondent No.3). The "repayment schedule" mentioned above was coined between the parties and an alternate payment schedule was presented by the Appellant. The Respondent, after failing to abide by the "repayment schedule", subsequently during the course of his cross examination, took the plea that the said schedule was forcibly signed between the Appellant and his sister. Moreover, the said Respondent and his sister (who was produced as a witness) failed to produce any power of attorney empowering her to approach the office of the ombudsman above. Furthermore, the Respondent at no stage sought cancellation of the said "repayment schedule" and subsequently filed the above-noted suit, seeking for all intents and purposes, an alteration in the agreement executed between the parties. The said prayer of alteration, made approximately seven (7) years after the execution of the agreement, is sufficient to thwart the plea that the said Respondent was willing and able to perform his part of the contract. However, both the Impugned judgements make no deliberation on the willingness and the ability of the Respondent No.1 to perform the contract. The lack of willingness and ability can also be gauged from the fact that the suit of the Respondent No.1 was preferred approximately eighteen (18) months after the suit of the Appellant. In the same vein, it is noted that the learned courts below made no adjudication on terms of the agreement pertaining to time being the essence of the contract.

12. The learned Trial court further erred in holding that the sister of the Respondent No.1 was coerced into executing the said "repayment schedule" as no convincing evidence was led by the said Respondent in this regard. The learned Trial court shifted the burden of the same on the Appellant and held that it was the Appellant's failure to establish that the "repayment schedule" was executed with *"free consent"* of the Respondent No.1. It is held that the burden was disproportionally and unjustifiably placed on the Appellant, as the plea of coercion was only taken by the Respondent No.1.

13. In the same vein, the learned Trial court has rendered a detailed deliberation on the financial circumstances in and around the pandemic which engulfed the world and the Respondent's inability to make large payments to the Appellant. No evidence in this regard was ever led and neither was this plea taken by Respondent No.1. The view rendered by the learned Trial court in this regard, with respect, is unnecessarily sympathetic towards the Appellant and divorced from the proceedings being adjudicated by the learned Court.

14. Further the learned trial court erred in holding that the burden of obtaining the loan on behalf of Respondent No.1 was on the Appellant. The relevant clause pertaining to the said loan is categorical in its language and places the burden of the same entirely on the buyer i.e. Respondent No.1. This, as noted above, has also been admitted by the said Respondent during his cross examination.

15. The learned Appellate Court in this regard made no deliberation whatsoever and simply agreed with the finding of the learned Trial Court, without rendering a finding itself. Further, the learned Appellate Court failed to frame points of determination under Order XLI, Rule 31 C.P.C, which as noted above was necessary for effective adjudication. In light of what has been held above the instant point of determination is answered in the negative.

Point No.2.

16. To adjudicate the instant point of determination it will first be expedient to peruse Section 19 of the Act. The same is reproduced as under:-

> *"19. Power to award compensation in certain cases.*
> *Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.*
> *If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.*
> *If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly. Compensation awarded under this section may be assessed in such manner as the Court may direct. Explanation - The circumstance that the contract has become incapable of specific performance*

does not preclude the Court from exercising the jurisdiction conferred by this section."

17. It is clear from the plain reading of the above-noted section that the court is empowered to grant compensation in cases where specific performance ought not to be granted and the defendant is in breach of the contract[3]. What is therefore a condition precedent for awarding compensation, is a finding of breach attributable to the defendant. It has already been held in adjudicating Point No.1 above that the breach of the agreement cannot be attributed to the Appellant. Consequently, it is held that the Respondent No.1 is not entitled for the compensation determined by the courts below. The quantum of the compensation is a question which is immaterial in light of the finding rendered in Point No.1 above. Therefore, the instant point is answered in the negative.

Point No.3

18. I am mindful of scope of Section 100 C.P.C. The principles pertaining to the said section have been expounded in several judgments of the Hon'ble Supreme Court and it is held that the instant appeal falls well within the narrow scope outlined by the Hon'ble Supreme Court in the case of ***Sheikh Akhtar Aziz Versus Mst. Shabnam Begum and others***[4] wherein it was held as under: -

"14. As far as the argument of the learned counsel for the appellant that the learned High Court had travelled beyond the parameters of section 100, C.P.C., the same in the facts and circumstances of the case has been found by us to be totally misconceived. Although in second appeal, ordinarily the High Court is slow to interfere in the concurrent findings of fact recorded by the lower fora. This is not an absolute rule. The Courts cannot shut their eyes where the lower fora have clearly misread the evidence and came to hasty and illegal conclusions. We have repeatedly observed that if findings of fact arrived by Courts below are found to be based upon misreading, non-reading or misinterpretation of the evidence on record, the High Court can in second appeal reappraise the evidence and disturb the findings 52019 SCMR 524 9 which are based on an incorrect interpretation of the relevant law. We have examined the record and found that the issues have not properly been determined by the lower fora and there are material and substantial errors and defects in the reasoning and conclusions drawn by the trial as well as the first appellate Court which materially affected the outcome of the case on merit. The High Court was therefore, in our opinion, quite justified in

[3]2024 M L D 1115. Miss Uzma Amjad Ali and another Versus Mrs. Saeeda Bano and another.
2021 M L D 1313, MUHAMMAD IMRAN and another Versus MULTAN and 5 others.
[4] 2019 S C M R 524

> *interfering with this matter and correcting the errors of the lower fora in order to do complete justice."* (Emphasis added).

19. The learned counsel for the Appellant has successfully made out a case for interference. For the foregoing reasons the instant appeals are allowed. The suit filed by the Appellant bearing Suit No. 2138/2020 is decreed as prayed and consequently the suit filed by the Respondent No.1 bearing suit number 806/2022 is dismissed. The Respondent No.1 is at liberty to file necessary application for withdrawal of sale consideration deposited by the Appellant before the Nazir of the learned trial court, along-with profit accrued thereon, if any. Instant point of determination is answered in the affirmative. Office to prepare decree accordingly.

J U D G E

Nadeem Qureshi "PA"