

Judgment Sheet

**IN THE LAHORE HIGH COURT, LAHORE
(JUDICIAL DEPARTMENT)**

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REGULAR SECOND APPEAL NO.75 OF 2002.

Asghar Ali (deceased) through LRs.

Versus

Ahmad Ali (deceased) through LRs, etc.

J U D G M E N T.

Date of hearing: **22.04.2024.**

Appellants by: Mr. Hammad Khalid Butt, Advocate.
Respondents No.2&3 by: M/s Ch. Muhammad Jameel Zafar
and Muhammad Talha Mushtaq,
Advocates.

Respondents No.4&5 by: M/s Ch. Amjad Ali Bajwa and
Khawar Shabbir Khan, Advocates.

AHMAD NADEEM ARSHAD, J. Through this Regular Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908 (*‘CPC’*), the appellant has called into question the vires, validity and legality of the judgment & decree of learned lower Appellate Court dated 22.03.2002 pursuant where to the appeal preferred by the respondents was accepted, judgment & decree of the learned Trial Court dated 16.01.1996 was set-aside and consequently suit of the appellant was dismissed.

2. Relevant facts forming background of the proceedings in hand are that plaintiff/predecessor of appellants, namely, Asghar Ali, (hereinafter referred to as *‘appellant’*) instituted a suit on 07.03.1990 for recovery of possession, cancellation of registered sale deed dated 03.05.1988 attested in favour of defendants/respondents No.2 to 4 (hereinafter referred to as *‘respondents’*) from defendant/respondent No.1 Ahmad Ali and sought performance of an agreement to sell whereby respondent No.1 agreed to sell his land measuring 103 Kanals, 04 Marlas (hereinafter referred to as *‘suit property’*) for a consideration of Rs.165,000/- and after receipt of Rs.130,000/- as an

earnest money executed the agreement to sell on 08.03.1986. It was pleaded that after execution of the agreement to sell, respondent No.1 transferred the suit property to respondents No.2 to 4 through registered sale deed dated 03.05.1988 for a consideration of Rs.380,000/- and thereafter respondent No.4 sold his share measuring 47 Kanals & 04 Marlas through oral sale mutation No.1180 dated 28.02.1990 to respondent No.5 for a consideration of Rs.180,000/-. Appellant prayed for cancellation of sale deeds and decree of his suit.

3. The suit was resisted by the respondents through filing of contesting written statements. Respondents in their written statement denied the execution of agreement to sell in favour of the appellant and claimed it to be forged and fictitious. They categorically denied the signatures of respondent No.1 on agreement to sell and purchasing of stamp paper, however, admitted that they purchased the suit property from respondent No.1 through registered sale deed with consideration and prayed for dismissal of the suit. Respondent No.5 also denied the execution of the agreement to sell and maintained that said agreement was prepared through fraud and the signatures attributed to respondent No.1 are also forged and fictitious by maintaining that the agreement has been prepared ante-dated by procuring stamp papers of back dates. In last, he prayed for dismissal of the suit. In the light of divergent pleadings of the parties, learned Trial Court reduced the controversy into necessary issues and after recording evidence of the parties pro & contra, oral as well as documentary decreed the suit vide judgment & decree dated 16.01.1996. Feeling aggrieved, respondents preferred an appeal. During the pendency of said appeal, at the time of arguments parties reached to a consensus that original record qua identity card of witness Mubashir be summoned and if in the middle column figure “89” or the figure after the year “86” appears then the suit of the appellant be dismissed and if the figure of “86” or before it reflects, then, the appeal be dismissed. Said statement of respondents (*appellants in the said appeal*) was accepted by Muhammad Sarwar

(*General Attorney of Asghar Ali, appellant*). Learned Appellate Court after recording statements of the parties, summoned the original file of the registration office of Identity Card and adjourned the proceedings for 09.01.1997. On the said date, Muhammad Asif Butt, Registration Clerk attended the Court along with relevant record but due to transfer of the Presiding Officer, no proceedings could be conducted. On that date, appellant also moved an application under Section 151 of C.P.C., for elaboration of interim order dated 08.12.1996 Respondents submitted its written reply on 05.03.1997 and the learned lower Appellate Court vide order dated 19.02.2002 dismissed the same with cost of Rs.3,000/-. The appellant moved a review petition on 12.03.2002 for recalling of said order and also deposited the cost. In the meanwhile learned lower Appellate Court recorded the statement of Clerk of the Registration Office who produced the original record with regard to the Identity Card of witness Muhammad Mubashir S/o Muhammad Siddique and after retaining the photocopy of the register as Mark-A returned the original register. Thereafter, in the light of said record of Registration Office wherein Identity Card of Mubashir was issued on 02.01.1989 the appeal was allowed by dismissing the appellant's suit vide judgment and decree dated 22.03.2002 and the review petition filed by the appellant was also dismissed on the same date vide separate order. Feeling aggrieved, appellant filed instant Regular Second Appeal. The appeal was dismissed by this Court on the ground that the appellant failed to implead the parties of the suit in the memorandum of appeal by declaring that said appeal having not been properly constituted vide judgment & decree dated 05.06.2007. The appellant assailed said judgment & decree through appeal (*Civil Appeal No.255-L of 2010*) before the Hon'ble Supreme Court of Pakistan which was allowed vide order dated 05.11.2020 with the observation that cases should be heard and decided on merits rather than being dismissed on such procedural technicalities and the matter was remanded with a direction to decide the same afresh on merits.

4. I have heard learned counsel for the parties at length and perused the record with their able assistance.

5. The appellant, through his suit, sought performance of the agreement to sell dated 08.03.1986 (Exh.P-1). Perusal of said document reflects that the stamp paper used for executing the said agreement to sell was issued vide serial No.1262 on 08.03.1986 in the name of Ahmad Ali (vendor). Said agreement has been shown to be witnessed by Muhammad Asghar Ali S/o Ali Muhammad (Identity Card No.303-42-389888), Muhammad Azeem Hashmi s/o Ghulam Mohy-ud-Din (Identity Card No.303-08-013996) and Muhammad Mubashir s/o Muhammad Siddique (Identity Card No.305-89-446872). Respondents No.1 to 4 and respondent No.5 in their written statements categorically denied the execution of said agreement to sell and claimed it to be forged and fictitious. Respondent No.5 also took a stance that agreement to sell was prepared anti-dated while showing the back-dates. In this background, when one of the attesting witness namely Muhammad Mubashir appeared as P.W.2, he was specifically cross-examined on 17.11.1991. He deposed that when the agreement Exh.P-1 was executed, he was 16/17 years old, however, he maintained that when he witnessed the agreement at that time his Identity Card had been prepared. He maintained that only one Identity Card was issued to him and deposed that he did not remember as to when the same was prepared. Said Mubashir appeared as PW-3 on 08.03.1992 and produced his Identity Card as Exh.P-4 and during cross examination maintained that his Identity Card was prepared almost 2/3 years ago. Said Identity Card has become blur/obscure and most of the contents are illegible. The respondents specifically argued that according to the statement of PW at the time of execution of the agreement to sell (Exh.P-1) he was at the age of 16/17 years, whereas, his identity card was prepared in the year 1989 and it clearly shows that the agreement to sell (Exh.P-1) was prepared in the back dates which was shown to be executed on 08.03.1986. Learned Trial Court also

replied the said objection in Para-12 of the judgment which reads as under:

“I am not in agreement with the argument advanced by learned counsel for the defendants because the identity-card Ex.P4 of P.W2 is absurd and entries on it are not readable. Further the defendants have not produced the record of identity-card office to prove that this identity-card was prepared in the year 1989. The perusal of agreement to sell Ex.P1 indicates that the figures of identity-card number of P.W2 are not under the ink of thumb impression of P.W2 on the agreement to sell, whereas the other word such as “تحصیل” is under the ink of the thumb impression. It means that the identity-card number of P.W2 on the agreement to sell Ex.P1 was not mentioned at the time of writing of agreement to sell. It looks that it was mentioned on it afterwards. It therefore, goes to show that it is an over act of plaintiff to further secure his rights. In view of this overact of the plaintiff, it cannot be observed that the document Ex.P1 was prepared in back dates particularly when its execution by defendant No.1 is proved from evidence on the record.”

6. The respondents in their memo of appeal also raised said ground. In the light of said scenario, at the time of arguments parties reached to a consensus that original record qua identity card of witness Mubashir be summoned and if in the middle column figure “89” or figure after the year “86” appears then the suit of the appellant be dismissed and if the figure of “86” or before it reflects then the appeal be dismissed. Said statement of respondents was accepted by Muhammad Sarwar (General Attorney of Asghar Ali, appellant). Learned Appellate Court after recording statements of the parties, summoned the original file of registration office of Identity Card and adjourned the proceedings for 09.01.1997. For better understanding, the order of Court dated 05.12.1996 with statements are reproduced in verbatim as under:

5-12-96

کو نسل فریقین حاضر۔

رشید احمد۔ محمد یوسف۔ محمد سعید ایپلائٹس اصالتا حاضر۔

محمد سرور ولد محمد شفیع مختار عام رسپانڈنٹ اصالتا حاضر۔

دورانِ بحث فریقین نے اس امر پر دعویٰ واپیل کے فیصلے پر راضی ہوئے ہیں کہ گواہ مبشر (PW-2) کے شناختی کارڈ کا اصل

ریکارڈ طلب کیا جائے اگر اس نے درمیانی خانے کا نمبر 89 ہو یا 86 کے بعد کا سال ہو تو مدعی کا دعویٰ خارج کیا جائے۔

بیان کو نسل ایپلائٹس مدعا علیہم بلا حلف۔

بیان کیا کہ اپنے موکلان کی ہدایت پر بیان دیتا ہوں کہ مبشر ولد محمد صدیق گواہ کے شناختی کارڈ کی اصل مسل طلب کر لی جائے۔ اگر اس شناختی کارڈ میں درمیانی سال 1986 کے بعد کا ہو تو اپیل ہذا منظور کر کے دعویٰ مدعی اصغر علی خارج کر دیا جائے اگر یہ سال 1986 سے پہلے کا ہو تو اپیل خارج کر کے دعویٰ ڈگری رہے۔

بیان محمد سرور مختار عام اصغر علی مدعی باقرار صالح
بیان کیا کہ فاضل کونسل ایپلائٹس کا بیان سن لیا ہے۔ اس کے مطابق اپیل و دعویٰ کا فیصلہ صادر فرمایا جائے۔ مجھے تسلیم ہو گا۔

سنکر درست تسلیم کیا۔

5/12/96

رجسٹریشن آفس شناختی کارڈ سیاکوٹ سے اصل مسل مبشر احمد ولد محمد صدیق موضع بن باجوہ تحصیل پسرور بابت شناختی کارڈ
305-illegible-446872-طلب کیا جائے۔ بتقرر 9/1/97 پیش ہو۔

7. Perusal of said order reflects that Rasheed Ahmad, Muhammad Yousaf, appellants of said appeal put their thumb impressions while Muhammad Saeed made his signature. Their counsel also made his signature. Whereas, attorney of the appellant namely Muhammad Sarwar put his thumb impression and his counsel also made his signature on the margin of order-sheet. Said proceedings were conducted in presence of the learned counsel for the parties. On 09.01.1997 Muhammad Asif Butt, Registration Clerk Office of Identity Card Sialkot appeared with record, however, his statement could not be recorded due to transfer of the Presiding Officer. Appellant moved an application on 08.01.1997 under Section 151 C.P.C. for elaboration of interim order dated 05.12.1996 with the contention that he is an illiterate person who was not made to comprehend the position on 05.12.1996, as such, the consent given by him should be deemed as withdrawn, unless the interim order is modified to the extent that the proof of either side on the issue will also be taken in consideration. Said application was adjourned to 09.01.1997 and on the said date copy was handed over to the respondents for its reply. The respondents resisted the application by filing contesting written reply. The learned Trial Court dismissed said application on 19.02.2002 with cost of Rs.3000/- and adjourned the proceedings for 12.03.2002. On the said

date, cost was paid and the appellant moved another application under Section 114 read with Order XLVII Rule I for review of the order dated 19.02.2002 and the proceedings were adjourned to 21.03.2002 for arguments. On 21.03.2002, in the light of order dated 05.12.1996, Muhammad Iqbal Registration Clerk, Registration Office Sialkot appeared and got recorded his statement. He deposed that he has brought the Office Record and according to the record at page No.94, serial No.446872 of the register name of Mubashir Ahmad s/o Muhammad Siddique is entered and the said entry qua procuring Identity Card has been made on 02.01.1989. He produced original register and after inspection photocopy was placed on the record as Mark-A and original register was returned.

8. The learned lower Appellate Court, in the light of consensus arrived at between the parties on 05.12.1996 and keeping in view the statement of Registration Clerk, entry in Register (Mark-A) wherein it was specifically mentioned that Identity Card of Mubashir Ahmad was prepared on 02.01.1989 allowed the appeal and dismissed the suit of the appellant vide impugned judgment & decree dated 22.03.2002.

9. Learned counsel for the appellant argued that appellant promptly moved an application for withdrawal of his consent under Section 151 C.P.C. on 08.01.1997. He adds that the Court should have to be careful to see that such offer and acceptance are not recorded with the same snap speed with which they are made. Further states that the learned Court should not have acted so promptly, rather every possibility of ambiguity or emotions should have been ruled out before permitting such arrangement.

10. As discussed earlier, parties did not arrive at the consensus at the heat of the moment. Perusal of record reflects that respondents in their written statement and during the course of cross-examination over PW-2 namely Mubashir specifically put the question that he was minor when the agreement to sell (Exh.P-1) was allegedly executed and his Identity Card was prepared after the date of execution of the agreement to sell. In this regard, his Identity Card

was brought on record as Exh.P-4 which was blur/obscure and not readable. Mubashir while recording his statement as PW-3 on 08.03.1992 admitted that his Identity Card was made 2/3 years back. However, his Identity Card number was mentioned in the agreement to sell (Exh.P-1) and the figure “89” is reflecting in the middle column, the year of preparation of Identity Card. Said point was argued before the learned Trial Court which was also discussed in the judgment of learned Trial Court which is reproduced supra. Moreover, this point was specifically taken by the respondents in their memorandum of appeal. In these circumstances, it cannot be said that the point upon which consensus developed between the parties was a surprising thing for the appellant, hence, in these circumstances, appellant cannot resile or deviate from the settlement.

11. The Hon’ble Supreme Court of Pakistan in a case titled “MUHAMMAD ALI Vs. MAJOR MUHAMMAD ASLAM AND OTHERS” (PLD 1990 SC 841), observed that the question whether the party who has made an offer can resile from it depends upon the facts & circumstances of each case and explained such facts & circumstances in the following manner:

“11. In cases such as the present, where it is not possible to lay down guiding principles as to what facts or circumstances in a given case would induce a judge to permit a party to resile from either the offer or the acceptance, it is necessary for the Court to guard itself and the parties against snap decisions taken by the parties in this connection. More often than not, during examination of a party or a witness, or during a heated discussion or argument, a party in the excitement of the moment may be led to make a snap decision in this respect. He may in the heat of passion make such an offer, or accept such a one, which otherwise in a state of cool deliberation he would not do. The Court should be careful to see that such offers and acceptances are not recorded with the same snap speed with which they are made, for such offers and acceptances would not be founded in piety and grace and would not be made at the highest level of truth. For no sooner a person makes an offer to another to make a statement on the Holy Qur'an or his Holy Book, whichever it may be, with regard to any matter or fact, the effect of which will be to bind him in a particular manner, for good or for worse, he does so on the assumption that the person who will accept it is conscious of his trust and whilst making the statement on the Holy Book shall place himself figuratively before his Maker and his Holy Prophet and state the truth, on pain of divine wrath. The Court should, therefore, be somewhat circumspect in this matter and refrain from permitting parties to enter into such agreements, which otherwise do not appear to have been made by them in some reasonable frame of mind, or which appear to be the result of indecent haste, or which otherwise, from the apparent conduct of any of the parties, appear to be such as

would make a mockery of the oath. The need for recording separate statements of the parties in respect of the offer and acceptance made in such cases deserves to be over-emphasized, for such a procedure would give parties some short time to think over the matter and extricate themselves from hasty decisions, before appending their signatures to their statements. We do not wish to go down on the record as suggesting that this procedure must invariably be observed, for there is no such legal compulsion, not do we want to suggest that certain safeguards suggested here should be treated as rules of prudence to be observed in such cases, because sections 9 to 11 of the Oaths Act do not admit of such intrusions, but we would say that all this may be treated as a note of caution, for a Court is as much bound to ensure the solemnity of these proceedings, as the parties are bound to respect them.”

12. Learned counsel for the appellant also argued that learned lower appellate Court while dismissing his application with cost allowed him to argue on the main appeal subject to payment of Rs.3000/- and as the cost was paid, therefore, the learned Lower Appellate Court was bound to provide opportunity of arguments on main appeal and should have decided the main appeal after giving issue-wise findings. The said contention of learned counsel for the appellant has no force as the learned lower Appellate Court passed the order in the following terms:

“This application is dismissed with cost of Rs.3000/- to the respondent. Respondent shall have a right of argument on main appeal subject to payment of Rs.3000/-.”

Through the said order permission was granted, subject to payment of cost to argue his view point in the light of order dated 05.12.1996.

13. Appellant moved the application for recalling of his consent when the offer made by the respondents was accepted by him and had become a binding contract. Offer made by a party to decide the lis on a particular way when accepted by the other side had matured into an agreement, same was enforceable under the law and nobody would be allowed to resile from it unless said agreement/contract was either void or had become frustrated.

14. An agreement made in the Court is a settlement to which the Court is also a party, therefore, such an agreement is not one of those agreements which a party may keep or break as it liked. To allow a party to resile from his earlier commitment without adequate reason would amount to allowing him to play a game of hide and

seek with other party and even would amount to abuse the process of Court.

15. Where parties choose deviation from normal course and a mode (procedure) for decision of lis is adopted by the Court on their request, the decision given in pursuance thereof should be given effect to and the parties are estopped from challenging such mode of decision and they could not resile or feel aggrieved against the procedure adopted by the Court.

16. Appellant would have no right whatsoever to wriggle out from such accepted offer being an agreement of binding nature and also on the principle of approbate and reprobate. It is settled proposition of law that offer once made by any party and accepted by the other party becomes a binding contract between the parties and nobody is allowed to resile or back out from it on the principle of estoppel. Reliance is placed on the cases titled “SALEEM AHMAD Vs. KHUSHI MUHAMMAD” (1974 SCMR 224), “ATTIQULLAH Vs. KAFAYATULLAH” (1981 SCMR 162), MUHAMMAD MANSHA AND 7 OTHERS Vs. ABDULSATTAR AND 4 OTHERS (1995 SCMR 795) MUHAMMAD RAFIQUE AND ANOTHER Vs. SAKHI MUHAMMAD AND OTHERS (PLD 1996 SC 237).

17. I have carefully gone through the case laws referred by learned counsel for the appellant (Muhammad Akbar and another Vs. Muhammad Aslam and another (PLD 1970 SC 241), Ghulam Qadir Vs. Fazal Din and 3 others (1971 SCMR 537) and Mirza Muhammad Siddique Vs. Muhammad Abdullah (1989 MLD 54) and observed that the same are distinguishable from the facts and circumstances of the case in hand.

18. Learned counsel appearing on behalf of the appellant remained unable to point out any substantial error or procedural defect in the impugned judgment & decree of the lower Appellate Court. He failed to satisfy the Court with regard to presence of basic ingredients of regular second appeal that the impugned judgment and decree is contrary to law or failed to determine material issue of law, or usage having the force of law; committed a substantial error or defect in the procedure provided by C.P.C, or by other law for the time being in-force, which may possibly have produced error or

defect in the decision of the case upon the merits. The judgment & decree of the first Appellate Court is neither perverse nor arbitrary, so as to justify the interference of this Court in exercise of jurisdiction as contemplated under Section 100 of CPC.

19. The learned Appellate Court rightly decided the appeal in the light of consensus arrived at between the parties on 05.12.1996. Even otherwise when it was established on record that Identity Card had been issued to Mubashir witness on 02.01.1989, it made the agreement to sell anti-date/doubtful which was allegedly executed on 08.03.1986 wherein name of witness Mubashir was entered with his Identity Card No.305-89-446872. The specific performance is a discretionary relief. Such discretion can be exercised or recognized on the principles of equity and fairness.

20. Consequently, instant Regular Second Appeal is **dismissed** being devoid of force/substance with no order as to costs.

(AHMAD NADEEM ARSHAD)
JUDGE

APPROVED FOR REPORTING.

JUDGE

ANNOUNCED IN THE OPEN COURT ON_____

JUDGE

M.Arsalan