

SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present

Mr. Justice Nasir-ul-Mulk
Mr. Justice Amir Hani Muslim

Civil Appeal No. 248-P of 2010.

(Against the judgment dated 17.5.2010
passed by Peshawar High Court in C. R.
No. 444 of 2010).

Muhammad Wahid and anotherAppellants

Versus

Nasrullah and anotherRespondents

For Appellants : Mr. Abdul Sattar Khan ASC.

For Respondents : Mr. Mian Saadullah Jandal, ASC.

Date of hearing : 06.02.2014

JUDGMENT

Amir Hani Muslim, J.-Through the instant Civil Appeal, the Appellants have challenged the judgment passed by learned Peshawar High Court in C.R.No. 444 of 2010, whereby, the learned High Court while accepting the Revision Application, set aside the judgments of the Courts below, dismissed the suit and terminated the execution proceedings.

2. The facts relevant for disposal of the present Appeal are that Appellants No.1 and 2 filed a suit for specific performance of an agreement

to sell dated 2.12.2007 against the Respondents in the Court of Civil Judge, Samar Bagh. It was pleaded in the plaint that the suit property was devolved upon the Respondents, who agreed to alienate the same, by way of sale in their favour for a sum of Rs.14,00,000/- and an agreement to sell dated 2.12.2007 was executed in presence of the witnesses; whereby the Respondents No.1 and 2 agreed to transfer their respective shares in favour of the Appellants for a sum of Rs.7,00,000/- each. The Respondent No.2 received his share of sale consideration whereas a sum of Rs.3,00,000/- was paid to the Respondent No.1 as earnest money and the remaining sale consideration of Rs.4,00,000/- was agreed to be paid to the Respondent No.1 upon completion of sale and delivery of possession. It was further pleaded in the plaint that the Appellants pursued the Respondent No.1 to receive the remaining sale consideration and delivery of possession, who on one pretext or the other, avoided to abide by the terms of the agreement. It is pertinent to mention here that the suit was not pressed against Respondent No.2 and he was only impleaded as performa Respondent.

3. The trial Court proceeded with the case. The Respondent No.1 though was personally served did not appear and contested before the Court, therefore, on 15.7.2008, the trial Court decided to proceed with the case ex-parte. On 23.7.2008, the Respondent No.2 filed his cognovits, admitting the averments of the plaint. On 30.7.2008, the trial Court recorded ex-parte evidence of the Appellants and fixed the case on 31.7.2008 for announcement of order. On 31.7.2008, the trial Court passed ex-parte decree

against the Respondents, with direction to the Appellants to deposit remaining amount of sale consideration of Rs.4,00,000/- within forty days, failing which the suit would be deemed to be dismissed.

4. Admittedly, the Appellants failed to deposit the remaining amount of sale consideration with the trial Court within the stipulated time and on 14.10.2008, they made an application before the trial Court for extension in time to deposit the said amount, *inter alia*, on the ground that they were abroad and hence could not deposit the amount within time. Alongwith this Application, an Application for condonation of delay was also moved. Notice of these Applications was directed to be issued to the Respondents. On 31.10.2008, the trial Court allowed the Applications ex-parte and extended the time to deposit the said amount for ten months, holding that it had ample power under section 148 C.P.C to extend the time and that the decree was a preliminary decree.

5. On 4.11.2008, the Appellants filed an Application for passing the final decree, which was allowed and the trial Court passed final decree on 20.12.2008 in favour of the Appellants. On 20.4.2009, during the execution proceedings, the Respondent No.1 filed an Application before the trial Court for setting aside the ex-parte as well as final decree, *inter alia*, on the ground that he was in Kashmir in connection with earning his livelihood and that the Appellants had promised to withdraw the suit upon the intervention of the elders, therefore, he was unaware of the decree. An Application for

condonation of delay in filing the Application for setting aside the ex-parte decree was also moved. The Appellants resisted the Application. However, the trial Court, by order dated 5.12.2009 dismissed the Application for setting aside the ex-parte decree dated 31.7.2008 and final decree dated 20.12.2008.

6. The Respondent No.1 filed Appeal before the First Appellate Court, which was dismissed vide judgment dated 19.2.2010 against which the Respondent No.1 filed Civil Revision No.444 of 2010, which was allowed, the judgments and decrees of the Courts below were set aside and the suit of the Appellants was dismissed. The execution proceedings were also directed to be terminated. Hence this direct Appeal by the Appellants.

7. The learned Counsel for the Appellants has contended that the learned High Court has erred in law in allowing the Application of the Respondent No.1 for setting aside the *ex-parte* decree and dismissing the suit of the Appellants. He contended that the trial Court has rightly allowed the Application of the Appellants for extension in time to deposit the balance sale consideration in the Court, as under Section 148 CPC it has the power to extend the same. He submits that the impugned judgment of the learned High Court is liable to be set aside.

8. He next contended that the Application of the Application for extension in time was within time, as the final decree was passed on

20.12.2008 where the said Application was made on 14.10.2008 before the passage of the final decree.

9. On the other hand, the learned Counsel for the Respondent No.1 has contended that once the time fixed by the trial Court for deposit of the balance sale consideration was over, it had no jurisdiction to extend the same, as after passing the ex-parte decree the Court had no control over the lis.

10. We have heard the learned Counsel for the parties at length and have perused the record. It is an admitted fact that the trial Court passed the preliminary ex-parte decree on 31.7.2008 with direction to the Appellants to deposit the remaining sale consideration within 40 days, but the Appellants failed to comply with the direction of deposit of amount within the stipulated time. On 14.10.2008, after lapse of 40 days, they made an Application before the trial Court for extension in time, which was also proceeded with ex-parte and allowed. The trial Court fell in error in allowing the Application of the Appellant after the stipulated period of 40 days and that too after the passing of the preliminary ex-parte decree. The Application of the Appellants for extension in time was not competent, as after the lapse of period of 40 days it had no control over the lis and jurisdiction to entertain such Application.

11. As far as the contention of the learned Counsel for the Appellants that the trial Court passed the final decree after allowing the Application of the Appellants, suffice it to observe that the basic decree was

a nullity, therefore, the edifice built no it would fall to ground and no sanctity could be attached to it. In our view, the impugned judgment of the learned High Court, doing complete justice between the parties, is plainly correct to which no exception can be taken.

12. For the aforesaid reasons, we do not find any merit in this Appeal, which is dismissed with no order as to costs.

JUDGE

JUDGE

Announced in Open Court on _____ at Islamabad.

Judge

Not approved for reporting
Sohail/**