

JUDGMENT SHEET.

ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT.

F.A.O No.25/2014.

Mst. Maimoona Asad Raza etc Vs. Ms. Shamsa Ali etc.

Appellants by: Ch. Abdul Rehman Bajwa, Advocate.

Respondents No.1 to 4 by: Mr. Muhammad Ikhlaque Awan, Advocate.

Date of Decision: 15.11.2019.

MOHSIN AKHTAR KAYANI, J:- Through the instant appeal, the appellants have assailed the order dated 11.02.2014, passed by learned Civil Judge 1st Class (East) Islamabad, whereby application for review filed by the respondents for amendment in judgment and decree dated 13.07.2013 was accepted and relief of possession was deleted from the said judgment and decree passed in favour of the appellants.

2. Learned counsel for the appellants contends that the appellants have filed a suit for specific performance, recovery and permanent injunction against the respondents, which was decreed vide judgment and decree dated 13.07.2013 on the conceding statement of the respondents, in which it was acknowledged by the respondents that entire sale consideration was paid and they have no objection on passing of consent decree; that learned Trial Court passed judgment and decree dated 13.07.2013 in favour of the appellants with direction to hand over possession of the property to the respondents; that the possession was not available to the plaintiffs/appellants, which has to be settled from the respondents side.

3. Conversely, learned counsel for the respondents contends that execution has been filed by the appellants side and as such the question of possession can only be settled by the learned Executing Court, whereby the execution filed by the appellants is pending and the respondents are not in possession of the land in question; that at the time of passing of judgment and decree, the respondents took categorical stance that they are not in possession of the land and learned Trial Court knowing this fact has passed the judgment and decree.

4. I have heard the arguments and gone through the record.

5. Perusal of record reveals that the respondents have filed application for review U/S 114 CPC against judgment and decree dated 13.07.2013, whereby they have prayed for deletion of specific request of handing over the possession of the land to appellants No.2 & 3, whereas the said application has been allowed and the appellants have filed the instant appeal.

6. Before going into merits of the case, it is necessary to discuss maintainability of the instant appeal whereby appeal has been filed against order of review, although no appeal is provided under CPC, even otherwise review U/S 114 CPC could only be applicable where any mistake or error is apparent on the face of record. In the instant matter, review has been filed after passing of the judgment and decree before the same Court and the learned Trial Court has allowed the review and deleted the relief of possession granted in the judgment and decree dated 13.07.2013. Operative paras of the judgment and decree are reproduced as under:-

"4. It may be observed that defendant No.1 Shamsa Ali who was also attorney of other defendants has admitted all the contents of the agreement dated 21.02.2006. She also admits receiving of entire sale consideration. She also stated that defendants are ready to transfer the suit land in favour of plaintiff as and when directed by the court.

5. The only dispute remains with regard to possession. Defendant No.1 during arguments stated that possession of the suit land is already with the plaintiffs and are ready to transfer the same in their names as and when directed by the court. The plaintiffs, however, deny receipt of possession. There is no documentary evidence available on record to show that possession was delivered to the plaintiffs. As all the other facts regarding execution of agreement and payment of entire sale consideration have been admitted, therefore, the suit is partially allowed. Plaintiff No.1 has died during pendency of proceedings. Possession of the suit property be handed over to the plaintiff No.2 & 3. Tehsildar Islamabad is also directed to transfer the suit property in the names of plaintiff No.2 and 3 according to their shares, after completion of all necessary formalities."

7. The above referred paras clearly spell out that Trial Court has only used the phrase in the operative part that possession of the suit property be handed over to the appellants. This declaration or direction of the Trial Court reflects that same has been passed against the respondents side rather it can be considered against

Collector, Islamabad, who is custodian of land record although the respondents have challenged the said portion of the said judgment in review application but as of today the respondents have failed to justify the reasons for filing of the review as the respondents have already taken categorical stance that possession of the suit property was already with Syed Asad Hussain predecessor in interest of the appellants, therefore, this factual aspect is against the appellants, who could not point out any illegality in the said order. Similarly, there is no justification to allow the review in terms of section 114 CPC read with order XLVII CPC as no specific reason was brought on record to justify the order dated 11.02.2014 impugned in instant appeal. The remedy of review U/S 114 CPC is limited in nature and Trial Court has no authority to pass any order after passing of the final judgment and decree as the Court becomes functus officio, whereby such kind of orders can only be entertained in Revisional jurisdiction U/S 115 CPC and no appeal has been provided under the law.

8. The appellants have been confronted regarding maintainability of instant appeal in the light of order XLIII rule 1 CPC and order XLVII, whereby order XLIII rule 1(w) CPC provides right of appeal against the said order, therefore, the instant appeal is maintainable.

9. The second question for determination of this Court is as to whether Trial Court can review its judgment and decree in accordance with law through impugned order on the basis of defect or error apparent on face of the record. In this regard, the respondents have failed to justify any valid reason through which it could be ascertained that their review application is maintainable as such the record is silent qua any error on record rather it is plea of the respondents from very initial stage that they are not in possession of the suit property and on the basis of said plea they have taken stance that they could not be burdened with direction to hand over the possession. Be that as it may, whether the possession is available with the respondents or not and it is duty of learned Executing Court to implement the decree in case of specific performance as the Bailiff should be appointed, who after seeking report from the revenue authorities as well as with the help of revenue authorities have to put the appellants in possession by all means in the light of

authorities have to put the appellants in possession by all means in the light of procedure provided in order XXI CPC.

10. The basic principle of review discussed above in terms of section 114 CPC read with order XLVII CPC clearly spells out that error apparent on record has to be rectified by same Court as such Trial Court has acknowledged the error in the judgment & decree dated 13.07.2013, in which relief of possession was neither claimed nor acknowledged by the respondents side, therefore, in the light of principles referred above, Trial Court has amended and changed its own order in review. Learned counsel for the appellants have failed to justify their stance on the basis of available record and even they cannot substantiate their grievance on the basis of impugned judgment and order especially when their right to take possession is established in the judgment & decree dated 13.07.2013, when their suit for specific performance was decreed.

11. In the above referred situation, the Apex Court in case reported as **PLD 2006 SC 66 (Javaid Iqbal vs. Abdul Aziz and another)** held that:-

“suit could not fail merely for the reason that some relief which was available had not been claimed. Similar, defective drafting of plaint and prayer clause could have been rectified and High Court being a Court of record with powers of supervision and correction of orders passed by lower Courts was not helpless, in appropriate cases, to pass such order, in order to do substantial justice and to advance the cause of justice.”

Therefore, even if relief of possession has not been claimed, it is mandate of law in decree for specific performance in terms of section 12 of Specific Relief Act, 1887, whereby the agreement has to be considered valid and the same has to be implemented in a manner, which otherwise provides concept of delivery of possession, even in those cases where possession of the claimed property was not available to the vendor/owner/judgment debtor/defendant. The Courts are equipped to deliver the possession after taking from third party by application of procedure provided in order XXI CPC.

12. In view of above discussion, the instant appeal fails, therefore, the same stands **dismissed**. The appellant may approach learned Executing Court for execution of the decree in terms of order XXI CPC, if so advised.

(MOHSIN AKHTAR KAYANI)
JUDGE

R. Anjam