

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

CIVIL REVISION NO.225/2015

MALIK ALAM KHAN

Vs.

RUSTAM ALI KHAN

Petitioner by : Mr. Zulfiqar Ali Abbasi, Advocate.

Respondent by : Ex-parte.

Date of hearing : 11.02.2020.

LUBNA SALEEM PERVEZ, J. Through instant civil revision petition, Petitioner has assailed the judgment dated 09.03.2015, passed by the learned Additional District Judge-II, Islamabad-East, whereby, judgment and decree dated 25.06.2013, passed by the learned Civil Judge, Islamabad-East, has been modified with the direction to the Petitioner/Respondent (Malik Alam Khan) to return double of the earnest money i.e. Rs. 12,00,000/- for lapse of time of ten years in view of devaluation of currency, however, appeal filed by the Respondent/Appellant (Rustam Ali Khan) was dismissed.

2. As per Office Report, notice *parvi* was issued to the Respondent and has been served on the Respondent through registered post A.D. but no one is in attendance on his behalf. Same was the position on the last date of hearing i.e. 14.01.2020. Thus, Respondent is proceeded against ex-parte.

3. Brief facts of the case, as per record, are that a suit No. 438 of 2012, was filed by Rustam Ali Khan (**hereinafter referred to as Respondent**) against Malik Alam Khan (**hereinafter referred to as Petitioner**) on 09.06.2004, for possession through specific performance of agreement to sell dated 01.09.2003 and declaration and permanent injunction, in respect of House No. 702, Margalla Town Phase-I, Islamabad, which was allotted to Petitioner, vide CDA allotment letter dated 30.12.1993. According to sale agreement dated 01.09.2003, an amount of Rs. 24,00,000/- was fixed as sale consideration out of which Rs. 6,00,000/- were paid by the Respondent to the Petitioner as earnest money. Petitioner also filed a Civil Suit No. 1071/2013, on 26.01.2007, for declaration, recession of sale agreement and permanent injunction in

respect of the same sale agreement. After framing of issues from divergent pleadings of the parties and recording of evidence thereupon, both the suits were decided by the learned trial Court, vide consolidated judgment dated 25.06.2013, in the following manner:-

ISSUE NO. 1

Whether the defendant has voluntarily executed agreement to sell dated 01.09.2003, in favour of the plaintiff after receiving the earnest money as Rs. 6,00,000/-? OPP

It was held: The perusal of cross-examination of PW-1 to PW-3 and Exh-P1, itself speaks that the Exh-P1, is not a valid document in the eye of law. From the reason above, this issue is answered in negative.

ISSUE NO. 2

Whether the plaintiff namely Rustam Ali Khan is entitled to decree for permanent injunction as prayed for?

It was held: In view of my finding upon Issue No.1, this issue is decided against the plaintiff.

ISSUE NO. 3

Whether the plaintiff of connected suit is entitled to the decree as prayed for in the plaint?

It was held: It is obvious from the record that the thumb impression of plaintiff marked upon Exh-P1 does not look clear. Admittedly, the plaintiff never executed agreement to sell dated 01.09.2003, in favour of defendant.

This issue to the extent of recession is decided against the plaintiff and the rest of the issue is decided in favour of the plaintiff.

ISSUE No.4.

Whether the plaintiff has no cause of action and locus standi to file the suit?

It was held: Therefore, the issue is decided against the defendant.

ISSUE NO.5.

Whether the suit of the plaintiff is not proceedable and the same is liable to be dismissed?

It was held: Therefore, the plaintiff is not entitled to a drcrece of possession through a specific performance. The defendant by producing cogent, reliable, coherent and solid evidence has proved this issue hence, the issue is decided in favour of the defendant.

ISSUE NO.6.

Whether the plaintiff has not come to the court with clean hands? OPD

It was held: The defendant by producing solid evidence have proved that the defendant has not executed agreement to sell dated 01.09.2003. For the reasons above this issue is decided in favour of the defendant.

ISSUE NO. 7.

Whether the suit is false, vexatious and frivolous and the answering defendant is entitled to receive special cost U/S 35-A CPC? OPD

It was held: Onus to prove this issue was placed upon the defendant. Neither the defendant has produced any evidence in support of this issue, nor has the counsel of defendant pressed this issue during the argument. Therefore, this issue is decided against the defendant.

4. Against the judgment of trial Court, both the parties filed appeals before the learned Additional District Judge-II, East, Islamabad, who vide consolidated judgment dated 09.03.2015, decided both the appeals in the following manner:

ISSUE No.1

It was held: Although the above finding of the trial court are correct to the extent of agreement Ex.P1, however, it is further added that inspite of categorical denial of the defendant about the execution of Ex.P1 the plaintiff never applied to the trial court for comparison of thumb impression upon Ex.P1 attributed to the defendant. It is further observed that the learned trial court did not give any findings about the earnest money of Rs.6,00,000/- which is clearly admitted by the defendant in his pleadings and statement before the court, therefore, the findings of learned trial court against issue No.1 are hereby modified and issue No.1 is decided against the plaintiff and in favour of defendant to the extent of execution of agreement to sell Ex.P1, whereas, to the extent of receipt of Rs.6,00,000/- from the plaintiff this issue is decided against the defendant and in favour of plaintiff positively.

In the light of above discussion, the appeals filed by the appellant are dismissed, however, keeping in view the payment of Rs.6,00,000/- as earnest money and lapse of time approximately 10 years, devaluation of currency and facts and circumstances of the case, the impugned consolidated judgment and decree dated 25.06.2013, are hereby modified and the respondent/defendant is directed to repay/return the amount (Rs.12,00,000/-) equivalent to double of the amount received by him as earnest money from the plaintiff.

ISSUES NO. 2 TO 7

It was held: so far as the remaining issues are concerned, this court is of the view that the issues No. 2 to 7 have rightly been decided by the trial court in the light of evidence produced by the parties, therefore, there is no need to disturb the findings of the trial court against these issues.

5. Learned Counsel for the Petitioner submitted that the directions issued by the learned Appellant Court, vide impugned judgment dated 09.03.2015, to return the amount of Rs. 12,00,000/- instead of Rs. 600,000/- received as earnest money, while modifying the judgment and decree dated 25.06.2013, is not legally sustainable as the agreement to sell dated 01.09.2003, has been declared as an invalid document in the eye of law which findings, even otherwise, have been confirmed by the learned Appellate Court. Learned Counsel submitted that though the cross litigation have been filed by the Respondent but he deliberately avoided appearance before the Court which shows his *malafide* and submitted that when the basic contention and the

document i.e. sale agreement/Ex:P1 is rejected, the question of granting double earnest money is not justified. He submitted that learned Appellate Court has travelled beyond its jurisdiction to allow the repayment of amount double of the earnest money which contention was never raised by Respondent. Thus the judgment of the Appellate Court is based on misreading of fact on the ground that the agreement to sell is proved to be fake & fraudulent document. He thus, prayed for setting aside of the direction of returning Rs. 12,00,000/- to the Respondent. Learned counsel in support of his contentions relied on case laws reported as **Muhammad Nasim Siddiqui Vs. Ali Akbar (PLD 2018 LHC 703), Zurich Insurance Company Vs Hayward (2017 SCMR 24) and Mirza Shakir Baig VS Miss Iffat Chughtai (2017 YLR 58 HC KHR).**

6. Arguments heard, record perused.

7. The only grievance voiced by the Petitioner through instant petition is regarding direction for returning Rs. 12,00,000/- as double of the earnest money of Rs. 6,00,000/- received by him, on the ground that the agreement on the basis of which said direction is issued has been declared to be invalid and ineffective by the learned Trial Court. It is apparent from the record appended with the petition that although execution of the sale agreement Ex:P1 has been denied by the Petitioner/Defendant but he did not deny the receipt of earnest money of Rs. 6,00,000/- from the Respondent/Plaintiff rather in his pleadings and statement recorded on oath before the learned Trial Court, this fact has been admitted in the following words:-

"میں نے پلاٹ مندرجہ کا سودا ستمبر 2003 میں کیا تھا۔ میرا پلاٹ مندرجہ کا زبانی سودا رستم کے ساتھ ہوا تھا۔ یہ غلط ہے کہ مذکورہ سودا بیع رستم خان کے گھر ہوا تھا۔ از خود کہا کہ ڈبل روڈ پر پراپرٹی ڈیلر کے دفتر میں ہوا تھا۔ یہ درست ہے کہ میرا معاہدہ بیع غنفر علی پراپرٹی ڈیلر کے ذریعہ ہوا تھا جو کہ زبانی معاہدہ تھا۔ بوقت معاہدہ بیع مجھے رقم مبلغ چھ لاکھ روپے ادا کی گئی تھی۔"

Thus, even after declaration of the sale agreement Ex-P1, produced by the Respondent/Plaintiff declared to be invalid, fact regarding oral bargain qua the suit house and receipt of Rs. 6,00,000/- as earnest money by the Petitioner/Defendant was invariably admittedly proved before the learned Trial Court which, after its admission by the Petitioner/Defendant was not required to be proved through. So far as the jurisdiction of Appellate Court is concerned Section 107 Order XLI, Rule 33 CPC caters the jurisdiction and powers as the appeal is the continuation of original proceedings. Thus the learned Appellate Court was within its powers while modifying the findings of the learned trial Court against issue No.1 to the extent of return of earnest money and after considering all the relevant facts and circumstances issued directions for

repayment/return the amount of Rs. 12,00,000/- equivalent to double of the amount of Rs. 6,00,000/- admittedly received by the Petitioner/Defendant as earnest money. Guidance in this regard has been sought from the case law reported as **Muhammad Iqbal Vs. Mehboob Alam (2015 SCMR 21)** and **Muhammad Azeem Vs. Shabbir Hussain (2007 MLD 484)**. The Hon'ble Apex Court in it's above referred judgment directed the plaintiff to deposit the amount of balance consideration in the following words:-

*"8. Before parting, it may be mentioned (note: this fact has already been briefly mentioned above) that during the pendency of his second appeal before the learned High Court, the respondent had moved an application to the trial Court for the permission to withdraw the amount of Rs. 18,00,000 which he had deposited under the order of the Court dated 23-7-2003 and the learned Court vide order dated 7-12-2014 granted him the permission to withdraw the said amount. Thus while this judgment was being dictated in the Court and the appeal was being dismissed, Mr. Taqi Ahmed Khan, learned counsel for the respondent stated that as the learned High Court while allowing his appeal has not passed any order directing the respondent to deposit the balance amount of consideration (Rs.18,00,000), thus he has requested that a direction be issued in this behalf and respondent may be allowed one month period from today to make such deposit. This has been objected to by the learned counsel for the appellant on the same pleas earlier urged by him on the subject. **Be that as it may, we have questioned Mr. Taqi Ahmed Khan, learned Advocate Supreme Court that on account of the withdrawal and use of the money for such long period the respondent obviously stands enriched; the currency has devalued while the value of the suit property has considerably increased. If the said amount was not withdrawn and was invested by the court in some profit bearing scheme of the Government, the amount would have been doubled by now, the learned counsel promptly and voluntarily agrees that his client shall pay an amount of Rs.36,00,000 (i.e. double of Rs.18,00,000). That being so, let the respondent deposit with the trial Court an amount of Rs.36,00,000 as the balance sale consideration within one month from today.**"(Emphasis provided)*

6. In view of the above discussion, I am of the considered view that the learned Appellate Court took into consideration all the material aspects while passing the impugned judgment and there is nothing which can be described as misreading, non-reading of evidence and perversity in the eyes of law rather impugned judgment covers all factual aspects and mandates of law, thus same does not call for any interference.

7. Instant Revision Petition, being devoid of any merit, is accordingly dismissed.

(LUBNA SALEEM PERVEZ)
JUDGE