

FORM NO.HCJD/C
JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

Regular Second Appeal No.08/2006

Mrs.Tabinda A.Moiz versus. Tahir Abbasi & Another

Date of hearing : 01.10.2012

Appellant by : Maulvi Ejaz-ul-Haq, Advocate for appellant.

Respondents by : Sardar Muhammad Ashfaq Abbasi, Advocate for respondents.

NOOR-UL-HAQ N. QURESHI J:- This Regular Second Appeal has been preferred assailing the judgments and decree passed by learned Civil Judge, Islamabad on original side and learned Additional District Judge, Islamabad on appellate side.

2. Facts leading to the instant RSA whereby the appellant is bonafide owner of plot No.30-A, Housing Scheme Rawalpindi for Pakistanis living abroad known as Gulzar-e-Quaid, measuring 1 kanal. Appellant by an oral agreement sold the said plot to respondent No.1 through respondent No.2 for total consideration of Rs.12,70,000/- under a schedule of payment mentioned below:

- a. Rs.25000/- as earnest money paid on 17.3.2002.
- b. First installment of Rs.175,000/- to be paid on 20.3.2002.
- c. Second installment of remaining sale consideration of Rs.10,70,000/- to be paid on 20.4.2002.

3. It is the case of appellant that earnest money already paid to the appellant is to be confiscated as the respondent No.1 backed it out. Otherwise, appellant should have paid double amount of said earnest money. The appellant kept waiting up to 20.3.2002 but both of them never turned up to make payment of first installment of Rs.175,000/- for which respondent No.2 being introducer of respondent No.1 was also responsible. Despite

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efforts when none responded, for the first time on 29.3.2002 respondent No.2 could be contacted who failed to reply satisfactorily for remaining payment which was promised to be paid by 20.3.2002. Even the address of respondent No.1 was not disclosed by him, therefore, appellant had no option to terminate the oral contract which she communicated in such oral telephonic conversation on 29.3.2002 for the confiscation of earnest money of Rs.25000/-. Under the circumstances, she was not under any moral or legal obligation to perform such oral contract and to transfer the plot. Also she had taken the stance that respondents being typical property dealers started blackmailing to enforce performance of oral contract which they by their habit, used to detain the property with earnest money then secure another purchaser they used to complete the transaction by creating third party interest. The appellant also filed suit for declaration and permanent injunction which too was agitated by both the parties, however, suit filed by the respondent No.1,2 was decreed and suit filed by the appellant was dismissed, therefore, appeal No.170/2005 was preferred by the appellant, which has been dismissed with no order as to costs vide judgment dated 13.3.2006.

4. Both the learned counsel for the parties in support of their contentions raised their respective pleas. Learned counsel for the appellant has mostly emphasized the point of jurisdiction while referring application moved under Order VII Rule 10 CPC for the reasons that the suit property is situated in Rawalpindi, therefore, Civil Court while entertaining the suit of respondent No.1 assumed the jurisdiction. It is further contended that legal point of jurisdiction can not extinguish at any stage, therefore, suit was incompetent and Appellate Court has not even cured about it. Next he contended that from the perusal of evidence, it became crystal clear that the respondent never approached the appellant, they went to hire 3rd party,

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remaining balance amount was not paid. The visiting, alleged by the respondent has not been corroborated by any other independent evidence. He while referring page 73 and 74 argued that the plea raised by the appellant has not been controverted. Again with regard to territorial jurisdiction he argued that section 16-D of CPC provides the jurisdiction vested to the Courts where subject matter is situated which in fact is in Rawalpindi. He while relying upon case law reported in 2010 CLC 1226 Karachi, 2005 SCMR 1388 SC, 2003 CLC 163 Karachi, PLD 2008 Lahore 175, 2001 YLR 2773 Lahore and 2000 MLD 30, Lahore closed his arguments.

5. Learned counsel for the respondents at the very outset referred the suit filed by the appellant at para-11, she herself admitted the jurisdiction vested to the civil court at Islamabad which is a sufficient proof and in fact she did not agitate. On the contrary an application under Order VII Rule 11 CPC was moved, which too, was dismissed and no appeal was preferred against the order dated 02.12.2002. Again, while referring page 59 para-3 of the above said order which emphasized all such legal pleas raised and in view of observations, as well as considering the suit filed by the appellant herself admitted the jurisdiction of Civil Court, Islamabad. The Civil Court held to entertain the said suit failure to challenge it presumably is an admission which can not be agitated at this verge of second appeal. Learned counsel for the respondents has referred para 10, its last four lines of the instant appeal, whereby appellant herself has again admitted the territorial jurisdiction to file the said suit for declaration and permanent injunction being exclusively vested in Civil Court at Islamabad. Therefore, he argued that for the suit preferred by the respondents, she is seeking relief on double standard. Otherwise, the suit with regard to the jurisdiction, cause of action was taken into consideration which arose at Islamabad being the initial agreement executed there and the amount paid in lieu thereof. Learned counsel for the

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respondents has argued that the amount of Rs.175,000/- was to be paid on 20.3.2002n which when refused to be accepted, the respondent No.1 through pay order of Bank, deposited the same which has been duly supported by the bank Manager and said receipt of pay order was also exhibited as P-2. He also argued that balance amount of Rs.10,70000/- was deposited in compliance with Court's order, therefore, amount payable towards answering defendant has been paid and rightly both the courts below have observed. He also while referring some portion of evidence argued that it amounts to an admission on the part of appellant.

6. Learned counsel for the respondents while arguing scope of second appeal, emphasized that factual controversy not to be decided in second appeal. Plea of prejudice or failure of justice has not been taken. Also he argued that the appellant has not challenged the dismissal of her own suit as well as findings with regard to her suit nor the judgment of appellate court has been challenged in the prayer clause nor the findings of trial court, therefore, ultimate result would be that same definitely would stand as still. As such even if, appeal is allowed, the judgment and decree would remain intact. He relied upon case law reported in 2010 CLC 1226 Karachi, 2008 SCMR 240 SC, 2005 SCMR 1388 SC, 2003 CLC 163 Karachi, PLD 2008 Lahore 175. Learned counsel for the appellant in rebuttal argued that it is a non transferable property as such decree can not be executed. Since any other relief has been prayed in prayer which covers the prayer with regard to the lower court also.

7. I have heard the arguments carefully, perused the record and relevant provisions of law as well as case law referred in support of their contentions.

8. From the record, it transpired that both the courts below while examining the issues, raised by either parties, have been properly securitized

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in view of material and evidence recorded and placed before them. The points raised by the respondents in arguments while referring the relevant portion of the material does not require any interference. On the contrary, the arguments advanced by learned counsel for the respondents carries weight which fully supports their viewpoint taken since beginning. A fake plea has been raised against the answering respondents that they being property dealers used to detain the properties. In my humble view it is not a strong plea raised to substantiate their case. In view of my findings, the instant Second Appeal carries no weight nor learned counsel for the appellant was able to substantiate her claim in view of evidence, documents and other material placed before the Court. Therefore, both the courts below have rightly observed in favour of respondents. Since, no legal or factual infirmities are brought in to light or legal points raised with regard to factual controversy, no prejudice or failure of justice has been alleged. Hence, instant second appeal is dismissed with no order as to costs.

(NOOR-UL-HAQ N. QURESHI)
JUDGE

Imran

Announced in open Court on 15-10-2019

JUDGE

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