

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
(JUDICIAL DEPARTMENT)

“Civil Revision No.105 / 2012”

Ahmed Junaid Karim & others
Versus
Muhammad Nauroze Khan & others

Petitioners By: Syed Qamar Hussain Sabzwari, Advocate
Respondent By: M/s Asim Shahbaz Malik and Irfan Farooq,
Advocates.

Date of Hearing: 23.07.2020

GHULAM AZAM QAMBRANI, J.:- Through the instant Civil Revision Petition, the petitioners seek setting aside of order dated 30.04.2012, passed by the learned District Judge (West), Islamabad, and restoration of the judgment & decree dated 19.02.2004 passed by the learned Civil Judge 1st Class, Islamabad, whereby the suit filed by respondents/ plaintiffs was dismissed.

2. Briefly stated facts of the instant civil revision petition are that the respondent Muhammad Nauroze Khan filed a suit for declaration, mandatory and permanent injunction against the petitioner stating therein that he is owner of Plot No.1-AG-6/G-6, Blue Area, Islamabad, and constructed there a double story commercial plaza; the petitioner/ defendant, Ahmad Junaid Khan, purchased first floor of the suit plaza from him in the year 1987, thereafter, the petitioner transferred the said first floor to the petitioners No.2 to 5, Muhammad Masood Khan and others, through registered sale deed in the year 1991, they were authorized to use the roof of the building but specifically debarred from raising any construction on the roof through the sale deed. Petitioners No.2 to 5 filed a suit for declaration and permanent injunction against the respondent for using and raising construction over the first floor, which was dismissed by the learned Civil Judge vide judgment and decree dated 20.03.2001. The petitioner Ahmad Junaid Khan, in the year 1993, forcibly got possession of the roof and also got lodged an F.I.R against the respondents which was

cancelled by the Sub-Divisional Magistrate, Islamabad, on 31.01.1994, therefore, the petitioner fixed iron grill along with the door on the stairs of the first floor and blocked the way leading to the roof of the building, which was challenged by the respondent with the prayer that the petitioner has no right to obstruct the way leading to the roof of the building and that the respondent has a right to use the roof of the said property.

3. The petitioner contested the suit by filing written statement and also raised several preliminary objections regarding lack of cause of action and *locus standi*, maintainability of the suit, limitation and that the suit was barred under Section 42 of the Specific Relief Act. Out of pleadings of the parties, following issues were framed:-

ISSUES:

1. *Whether the plaintiff has no cause of action to file this suit? OPD*
2. *Whether this suit is not maintainable in its present form and is liable to be dismissed under Order 7 Rule 11 of CPC? OPD*
3. *Whether this suit is barred by law? OPD*
4. *Whether the suit is under valued for the purposed of court fee and jurisdiction? OPD*
5. *Whether the plaintiff is entitled to be decree as prayed for? OPP*
6. *Relief.*

4. Both the parties were directed to produce their respective evidence in support of their claim. Respondent/ plaintiff himself appeared as PW-1 and produced copy of order Ex.P-1, copy of judgment in appeal Ex.P-2, copy of transfer letter Ex.P-3, copy of order dated 28.06.1994 Ex.P-4, copy of report of commission Ex.P-5, copy of General Power of Attorney in favour of the petitioner Ex.P-6, and Ex.P-7, attested copy of report under Section 173 Ex.P-8, attested copy of F.I.R Ex.P-9, copy of Qalendra under Section 182 P.P.C, as Mark-B and order dated 15.01.2002, as Mark-C. On the other hand, the petitioner/ defendant appeared as DW-1. The learned Civil Judge 1st Class, Islamabad, vide judgment dated 19.02.2004 dismissed the suit of the respondent/plaintiff. Being aggrieved of the said judgment, the respondent preferred an appeal before the learned District Judge, Islamabad-West, which

was partly allowed vide Order dated 30.04.2012 to the extent that the petitioners can only use the open roof of the 1st Floor, but have no construction right, hence, the instant civil revision petition.

5. Learned counsel for the petitioner has contended that the first appellate Court has committed irregularity while passing the impugned order; that the suit of the respondent was barred under Section 11 CPC as their earlier suit was dismissed and their appeal was also dismissed; therefore, there was no question of the suit being maintainable; that the matter is still pending adjudication before the Hon'ble Supreme Court after dismissal of revision petition by this Court; that the learned first appellate Court failed to appreciate Ex.P1 whereby right of construction over the roof is expressly conceded in favour of the petitioners by the respondent; that transfer in favour of petitioners No.2 to 5 was affected in the year 1991 through registered sale deed, in pursuance of the agreement; that their right of construction has been denied without any justification. Further contended that the impugned judgment is result of mis-reading and non-reading of evidence available on record. Lastly, contended that the judgment passed by the learned trial Court has not been properly appreciated by the learned First Appellate Court, as such, the impugned order passed by the learned first appellate Court is liable to be set-aside.

6. Conversely, learned counsel for respondent has opposed the contentions of learned counsel for the petitioners and supported the judgment passed by the learned District Judge, Islamabad-West, contending that it is clearly mentioned at page 10 of the sale deed dated 03.01.1991 (Ex.P2) *"that the vendees can use open roof but have no construction right."* Further contended that the petitioners are bound to follow the conditions mentioned in the said sale deed, therefore, the learned District Judge has rightly held while partly allowing the appeal filed by the respondent, that *"it is ordered that the defendants/respondents can only use the open roof of the first floor but have no construction right."*

7. I have heard the arguments of learned counsel for the parties and have perused the material available on record with their able assistance.

8. From scrutiny of the record it reveals that PW-1, Ahmed Junaid, attorney of the petitioners No.2 to 5, deposed that the respondent has sold the first floor alongwith sky rights to the petitioners through agreement to sell dated 05.05.1987 (Ex.P3). In his cross-examination, he admitted that petitioners No.2 to 5 were not party to the said agreement to sell, whereas in the sale deed EX.P4, it is clearly mentioned that the vendee can use the open roof but have no construction right. Muhammad Farooq, who is the marginal witness of the sale deed (Ex.P4), while appearing as PW.2 deposed that he was witness of sale deed (Ex.P4) and that possession of the first floor was handed over to the petitioners whereas, he did not mention anything with regard to the construction rights of the petitioners over the first floor. On the other hand, all the witnesses produced by the respondent corroborated the contentions of the respondent/ plaintiff stating that the petitioners were only sold the first floor of the building but were not given the construction right upon the roof.

9. Perusal of the record reveals that the sale deed was the final transaction between the parties and as per Ex.P4, the petitioners were not entitled to raise any construction over the first floor. Further the presumption of truth is attached to the registered sale deed (Ex.P4) which was independently executed on 03.01.1991, through which the petitioners purchased the disputed property and in that document, the factum of agreement to sell dated 05.05.1987 is not mentioned. The photocopy of agreement to sell dated 05.05.1987 reveals that the same was executed between Muhammad Nauroze Khan owner of the building, Plot No.1-A, Blue Area, F-6/G-6, Islamabad, and Muhammad Masud Khan, petitioner No.2 and Muhammad Moudood Khan, whereas, the registered sale deed was executed on 03.01.1991 between Muhammad Nauroze Khan owner and Muhammad Masud Khan & Muhammad Moudood Khan sons of Dr. Abdul Rehman, Mohammad Munib Khan & Mohammad Majid Khan sons of Mohammad Masud Khan,

therefore, it is clear that the purchaser of the agreement to sell dated 05.05.1987 and the purchasers mentioned in the registered sale deed dated 03.01.1991 are totally different except the present respondent/ Muhammad Nauroze Khan. Perusal of the registered sale deed further reveals that it has not been executed in consequence of the agreement to sell dated 05.05.1987, as such, it cannot be gathered that the sale deed was the result of that agreement to sell.

10. In view of the above, I am convinced that vide sale deed dated 03.01.1991, the petitioners were only given the right to use the open roof but were not given any construction right over the roof, as such, the petitioners are not entitled to raise any construction over the roof of the disputed building i.e. 1st floor of the property constructed on Plot No.1-A, Blue Area, F-6/G-6, Islamabad.

11. In the cases reported as "Muhammad Hassan versus Khawaja Khalil-ur-Rehman" (2007 SCMR 576) and "Muhammad Hafeez and another versus District Judge, Karachi East and another" (2008 SCMR 398) it has been held that:-

"It is well-settled that in the event of conflict of judgments finding of Appellate Court are to be preferred and respected unless it is shown from the record that such findings are not supported by evidence; that the conclusions drawn are against the material on record; that the judgment of the Appellate Court suffers from misreading or non-reading of evidence or that the reasons recorded for reversal of judgment are arbitrary, fanciful and perverse."

12. For what has been discussed above, learned counsel for the petitioners has not been able to point out any mis-reading or non-reading of evidence available on record, in the judgment dated 30.04.2012, passed by the learned District Judge, Islamabad– West or that the same is fanciful or perverse.

Resultantly, this civil revision has no merits and the same is hereby **dismissed**.

~~(GHULAM AZAM QAMBRANI)~~
JUDGE

Announced in open Court, on this 28th day of 2020.

JUDGE

Reza. M. 9/4.