

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD
JUDICIAL DEPARTMENT

C.R.No.211/2016
Haja Raja Mubarak Hussain
Versus
Masood Alam

Date of Hearing: 25.09.2018
Petitioner by: Sardar M. Ashfaq Ahmad, Advocate.
Respondent by: Mian Abdul Razzaq, Advocate.

MIANGUL HASSAN AURANGZEB, J:- Through the instant civil revision petition, the petitioner (Haji Raja Mubarak Hussain) impugns the judgment and decree dated 25.11.2015, passed by the Court of the learned Additional District Judge, Islamabad, whereby the appeal filed by the respondent (Masood Alam) against the judgment and decree dated 12.11.2014, passed by the Court of the learned Civil Judge, Islamabad, was allowed and the matter was remanded to the learned Trial Court for decision afresh. The primary reason for setting aside the judgment and decree dated 12.11.2014, passed by the learned Civil Court was that the said Court had decreed the suit "*as prayed for*" whereas the body of the judgment showed that the suit had been partially decreed.

2. The facts essential for the disposal of the instant revision petition are that on 02.12.1999, the petitioner filed a suit for specific performance of the agreement dated 18.08.1990 against the respondent before the Court of the learned Civil Judge, Islamabad. The petitioner's case was that on 18.08.1990, an agreement to sell was executed between the petitioner and the respondent's father, Muhammad Saeed, whereby the latter agreed to sell to the former 60 *kanals* of land in nine *khasra* numbers situated in Revenue Estate *Maira Begwal*, Tehsil and District Islamabad ("the suit land") for a sale consideration of Rs.10,000/- per *kanal*. The suit land was owned by Muhammad

Saeed as well as his sons. Muhammad Saeed had executed the said agreement on behalf of his sons as well. Physical possession of the suit property was handed over to the petitioner/plaintiff at the time of the execution of the said agreement.

3. Prior to the execution of the said agreement, Muhammad Saeed's children, who were co-owners of the suit land, are said to have executed a general power of attorney in favour of Muhammad Saeed, who in turn had executed a special power of attorney in favour of Haji Sikandar Khan, who was the petitioner's predecessor.

4. The suit land was to be transferred in the petitioner's name after the correction of entries in the revenue record. Muhammad Saeed had three sons (namely, the respondent, Malik Dilpazir and Malik Fazal-e-Alam) and two daughters (namely, Mst. Zaiba Khatoon and Mst. Jamila Bibi). After the correction of the entries in the revenue record, the respondent's brothers and sisters transferred their respective shares in the suit land in the petitioner's favour. This was done in June/July, 1999. Since the respondent did not transfer his share of 12 *kanals* and 16 *marlas* in the suit land in the petitioner's favour, the petitioner filed the said suit against the respondent.

5. The respondent contested the said suit and in his written statement, he took the position that he had no knowledge about the agreement to sell entered into between the petitioner and the respondent's father; and that the said agreement was ineffective upon the respondent's rights. The respondent admitted the execution of the power of attorney in his father's favour. The respondent also pleaded that the said agreement was a forgery, and therefore, had no value in the eyes of law.

6. From the divergent pleadings of the contesting parties, the learned Trial Court, framed the following issues:-

- "1. Whether the plaintiff paid the whole consideration in lieu of the physical possession obtained from the successor-*

in-interest of the defendant in lieu of alleged executory contract? OPP

2. *Whether the plaintiff is entitled for the decree of specific performance of executory contract dated 18.08.1990 with consequential relief regarding the property detailed in para No.1 of the plaint in consideration of Rs.10,000/- per kanal? OPP*
3. *Whether the suit is not maintainable in its present form? OPD*
4. *Whether the plaintiff is estopped by their own conduct and acts to file the present suit? OPD*
5. *Whether the plaintiff has no cause of action or locus standi to file the instant suit? OPD*
6. *Whether the plaintiff file a suit of counterblast as a defendant has filed the suit of preemption against the plaintiff's son prior to this suit? OPD*
7. *Whether the plaintiff has filed this suit just to harass and pressurize which is liable to be dismissed with compensatory cost? OPD"*

7. The petitioner appeared as PW.1 and Raja Tabarak Hussain and Muhammad Zia-ul-Haq appeared as PW.2 and PW.3, respectively. The respondent appeared as DW.1 and Malik Dilpazir appeared as DW.2.

8. As mentioned above, vide judgment and decree dated 12.11.2014, the learned Civil Court, decreed the said suit. The said judgment and decree was assailed by the respondent in an appeal before the Court of the learned Additional District Judge, Islamabad, who vide judgment and decree dated 25.11.2015, allowed the appeal and remanded the matter to the learned Civil Court with the direction to decide the matter afresh. The appellate judgment and decree has been impugned by the petitioner in the instant civil revision petition.

9. Learned counsel for the petitioner, after narrating the facts leading to the filing of the instant petition, submitted that the respondent, in his written statement, had pleaded that he had no knowledge of the agreement to sell in question, and also that same was a forgery but during the recording of his evidence, the respondent had admitted the execution of the said agreement; that the respondent in his evidence had made

a significant departure from his pleadings; that the petitioner had been in possession of the suit land ever since the execution of the said agreement to sell in 1990; that the respondent had not denied the execution of a power of attorney in his father's favour; that through the said power of attorney, the respondent had authorized his father to sell the respondent's share in the suit land; that the respondent was unnecessarily pressurizing the petitioner; and that the judgment and decree passed by the learned Civil Court did not suffer from any legal infirmity. Learned counsel for the petitioner prayed for the revision petition to be allowed and for the appellate judgment and decree to be set-aside.

10. On the other hand, learned counsel for the respondent submitted that the judgment and decree passed by the learned Civil Court was not executable; that the petitioner should have impleaded the respondent's siblings as parties to the suit; that a suit for specific performance cannot be partially decreed; that the suit for specific performance against the respondent only was not competent; that the petitioner had committed a forgery by adding/inserting four additional *khasra* numbers in the agreement to sell; that the said *khasra* numbers had belonged to the respondent; that the respondent had remained in possession of his portion of the suit land until 2002; and that there was a discrepancy in the contents of the agreement to sell produced as Exh.P/1 and a copy of the said agreement produced as Mark-D/A. Learned counsel for the respondent prayed for the revision petition to be dismissed.

11. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

12. The facts leading to the filing of the instant revision petition have been set out in sufficient detail in paragraphs 2 to 8 above, and need not be recapitulated.

13. The evaluation of the testimony of the respondent, who appeared as DW-1, is essential for the just adjudication of this petition. The respondent, in his examination-in-chief, deposed that his father had sold land comprising *khasra* Nos.729, 730, 731, 732, 733, 735 and 736; and that *khasra* No.734 had not been sold by his father. The respondent, in his evidence, produced a photocopy of the agreement to sell as Mark-D/A, which he claimed was given to him by his father. The respondent also admitted that his father had handed over possession of the property which he had sold to the petitioner. He also deposed that his father had executed a general power of attorney in favour of the petitioner's father; that *khasra* numbers 740 and 741 were subsequently inserted in the agreement to sell through interpolation; that after the respondent proceeded to Faisalabad in the year 2002, the petitioner forcibly occupied the respondent's land as well as house constructed in *khasra* No.741; that the respondent's father was going to transfer *khasra* Nos.740, 741, 770 and 771 comprising 14 *kanals* in the respondent's favour but he died before such transfer could be made; and that the respondent had also share in the *khasra* numbers owned by his father.

14. The respondent, in his cross-examination, admitted that in the written statement he had not pleaded that his father had sold *khasra* Nos.729 to 736 except *khasra* No.734. He also admitted not to have made any mention in the written statement regarding possession of the property sold by his father being handed over to the petitioner. He also admitted that when the agreement to sell (Exh.P/1) and the special power of attorney (Exh.P/2) were executed, *khasra* Nos.740, 741, 770 and 771 were owned by his father; that the respondent was not the owner of any of the said *khasra* numbers; that after the respondent's father's demise, his two brothers and two sisters transferred their respective shares in the suit land in the petitioner's favour; that the land transferred

by the respondent's siblings in the petitioner's favour included land in *khasra* Nos. 740, 741, 770 and 771; that the respondent had filed a suit for preemption when he came to know about the transfer of land made by his siblings in the petitioner's favour; that in the said suit, he had not pleaded that the petitioner had fraudulently transferred the said *khasra* numbers in his favour; that the agreement to sell (Exh.P/1) had not been challenged by the respondent before any Court; that he had not produced any evidence to the effect that he had been in possession of any property in the suit land before 2002; and that the respondent had not instituted a suit for possession of any land against the petitioner.

15. During the proceedings before the learned Civil Court, the respondent adopted contradictory positions. As mentioned above, the respondent, in his written statement, had pleaded that he had no knowledge about the agreement to sell dated 18.08.1990, whereas in his evidence, he produced a copy of the said agreement as Mark-D/A, and furthermore, deposed that the same was given to him by his father. Additionally, the respondent, in his written statement, had pleaded that the said agreement was a forgery. However, during his evidence, the respondent deposed that the said agreement had been executed but that four *khasra* numbers were unlawfully added to it. It is my view that the learned Civil Court was correct in observing that the said contradictory positions adopted by the respondent had created a doubt on the truthfulness of his version.

16. There was no pleading in the respondent's written statement to the effect that his father had given him the land in the four *khasra* numbers allegedly inserted in the said agreement. Therefore, the respondent's evidence to the effect that four *khasra* numbers had been fraudulently added in the agreement to sell is beyond the pleadings and cannot be taken into consideration. It is well settled that a party cannot make a

departure from its pleadings and is bound by the same. No evidence contrary to or beyond the pleadings could be permitted to be adduced by a party to the suit. The foundation of a case is laid by parties to a suit in their pleadings. Since the respondent had denied the execution of the agreement to sell dated 18.08.1990 and had also pleaded that the same was a forgery, he could not be permitted to put up an entirely different defence of admitting the execution of the said agreement but denying it only to the extent of the insertion of four *kharsa* numbers therein. The respondent should have conducted himself equitably by taking a position in his written statement which was in consonance with his evidence.

17. The respondent, in his written statement, also admitted the execution of the general power of attorney in his father's favour. It is on the basis of the said general power of attorney that the respondent's land was sold by his father. The power of attorney that was executed by the respondent in his father's favour was with respect to his entire share in *Mouza Maira Begwal*. Although the respondent admitted the execution of the agreement to sell dated 18.08.1990 by his father, he questioned the said agreement only to the extent of the insertion of *kharsa* numbers 740 and 741. The learned counsel for the respondent was not able to explain as to why the respondent, in his written statement did not question the said agreement to sell to the extent of the insertion of the said *kharsa* numbers therein.

18. It is an admitted position that the respondent's brothers and sisters transferred their respective shares in the suit land in favour of the petitioner. It is also not disputed that the petitioner has remained in possession of the entire suit land ever since 1990. At no material stage did the respondent file any suit for the possession of *kharsa* numbers 740 and 741, which according to him were not the subject matter of the said agreement to sell. Furthermore, neither the petitioner nor his

siblings have challenged the agreement to sell before any forum.

19. It appears that the learned Appellate Court did not appreciate that when the agreement to sell dated 18.08.1990 was executed, Muhammad Saeed was not the sole owner of the suit land. The respondent also had a share in the suit land. It is for this reason that a general power of attorney was given by the respondent to his father with the authorization to sell the respondent's share in the suit property.

20. The respondent admitted the execution of a general power of attorney in favour of his father authorizing the latter to sell the suit land. He also admitted that the said power of attorney had been executed with respect to the respondent's entire land in *Mouza Maira Begwal* and *khasra* No.741 was in the petitioner's name. As regards the respondent's reliance on Mark-D/A, no credence could be given to the same since the Hon'ble Supreme Court, in the case of State Life Insurance Corporation of Pakistan Vs. Javaid Iqbal (2011 SCMR 1013), has held *inter-alia* that photocopies of documents cannot be produced in evidence and the Mark has no evidentiary value.

21. The petitioner in his suit sought for a decree for specific performance of agreement to sell dated 18.08.1990 for land measuring 60 *kanals* comprising of *khasra* Nos.729, 730, 731, 732, 733, 735, 736, 740 and 741. Respondent No.1, in his examination-in-chief, himself admitted that his father sold the land in *khasra* Nos.729, 730, 731, 732, 733, 735 and 736, whereas as regards *khasra* Nos.740 and 741, respondent No.1 deposed that the said *khasra* numbers were included in the agreement to sell through fraud. However, no particulars of the alleged fraud have been given either in the written statement or in the respondent's evidence.

22. Now the learned appellate Court set-aside the judgment and decree dated 12.11.2014, passed by the learned Civil Court and remanded the matter with the direction to the learned Civil

Court to decide the same afresh. The learned appellate Court also observed that the learned trial Court may also record any evidence required for reaching a just conclusion.

23. It is well settled that the remand of a case can only be made where it comes absolutely necessary and inevitable in view of insufficient and inclusive evidence on the record (2005 SCMR 152). It is only when the available record is not sufficient for deciding the points in controversy should a matter be remanded. Remand for a technical reason is not appreciated. A Court, before remanding a case should point out the questions of fact which were essential for a just decision. In the case at hand, the learned appellate Court remanded the matter after observing that the decree passed by the learned Trial Court was not executable. As it had not been stated in the plaint as to how the respondent's share in the suit land had been calculated to be 12 *kanals* 16 *marlas*. It was also observed that there were "*other controversial points*" raised by the parties which the appellate Court did not consider the need to discuss!

24. I am of the view that the learned appellate Court erred by not appreciating that the petitioner was seeking specific performance of the agreement to sell dated 18.08.1990 only to the extent of the respondent. The other legal heirs of the respondent's father had already transferred their respective shares in the petitioner's favour in pursuance of the said agreement to sell. In the suit for specific performance, the petitioner had clearly pleaded that the respondent was "*reluctant in transferring his share i.e. land measuring 12 kanals 16 marlas in favour of the petitioner*". The respondent's reply to the said pleading was a simple denial. It is well settled that when an evasive denial is given in a written statement to a fact pleaded in the suit, it is to be treated as an admission. Reference in this regard may be made to the law laid down in the cases of Muhammad Hussain Vs. E.D.O. (Education) (2007 SCMR 855), Ghulam Abbas Vs. Manzoor Ahmed (PLD 2004

Lahore 125) and United Bank Limited Vs. Ali Muhammad B. Rajani (1994 CLC 173). Since the respondent evasively denied the petitioner's pleading to the effect that the respondent was not transferring 12 *kanals*, 16 *marlas* in the suit land, it is to be treated as an admission. Consequently, there was no need for the petitioner to state in his pleadings the exact quantum of land transferred by the respondent's siblings in the petitioner's favour. This is moreso, when the decree passed by the learned Civil Court would be executable only to the respondent's extent and with respect to his share mentioned above.

25. In view of the above, the instant petition is allowed, the impugned appellate judgment and decree dated 25.11.2015 is set-aside, whereas the judgment and decree dated 12.11.2014 passed by the learned Civil Court is restored. There shall be no order as to costs.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

ANNOUNCED IN AN OPEN COURT ON ____/2018.

(JUDGE)

*Qamar Khan**

Uploaded By: Umer Rasheed Dar