

Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

RSA No. 03 of 2010

Mst Sadia Azam
Vs
Muhammad Arif Mian, etc.

DATE OF HEARING: 10-6-2013.

APPELLANT BY: Sardar Liaqat Ali Advocate.

RESPONDENTS BY: Mr Niaz Ullah Khan Niazi Advocate.

RIAZ AHMAD KHAN, J.- This judgment is
directed to dispose of RSA No. 03 of 2010.

2. Facts constituting the background of the present RSA are that House No. 446, Sector G-11/1, Islamabad was allotted to Muhammad Saghir Khan s/o Muhammad Ejaz Khan. Muhammad Saghir Khan, the original allottee, sold the said house to Asif Ali Hashmi s/o Muzafar Ali Hashmi. In respect of the sale, an agreement to sell was executed, wherein it was admitted that Muhammad Saghir Khan had

received the sale consideration i.e. Rs.12,25,000/-; however, instead of proper sale agreement, General Power of Attorney was executed in favour of Asif Ali Hashmi. Possession of the house, however, was handed over to Asif Ali Hashmi. On the basis of said General Power of Attorney, Asif Ali Hashmi entered into an agreement regarding sale of the same house with Muhammad Arif Mian. Earnest money Rs.3,25,000/- was paid to Asif Ali Hashmi and remaining amount of Rs.8,90,000/- was to be paid on or before 17-11-1995. Allegedly, the said amount was not paid, in time; so, Asif Ali Hashmi refused to enter into sale of the said house, therefore, Muhammad Arif Mian instituted suit for specific performance of contract against Asif Ali Hashmi, with whom the agreement to sell was executed as well as Muhammad Saghir Khan, the original allottee; Federal Government and CDA were also impleaded as party. The said suit was instituted on 10-3-1996 and was decreed on 28-5-2003. It is pertinent to mention that in the plaint, Muhammad Arif Mian, plaintiff, admitted that the disputed house had been sold to defendant No. 1, Asif Ali Hashmi and that he had paid Rs.12,25,000/- to the original allottee; however, it was stated that Rs.10,000/- was out standing against defendant No. 1, which were to be paid to Muhammad Saghir Khan, original allottee/defendant No. 2. Against decree dated 28-5-2003, Asif Ali Hashim filed an appeal, but during pendency of

the said appeal, he died on 02-8-2008. Application for impleading legal heir was submitted on 07-8-2008, but no action was taken on the said application and on 06-1-2010 the appeal was dismissed on merits, without impleading legal heir of appellant Asif Ali Hashmi. Against the said judgment dated 06-1-2010, present RSA was filed.

3. Learned counsel for the appellant submitted that Asif Ali Hashmi, predecessor-in-interest of the present appellant, had purchased the suit house from Muhammad Saghir Khan and had paid the sale consideration. This fact was admitted by Muhammad Arif Mian, respondent No. 1/plaintiff, in the plaint. Though there was no proper sale agreement, yet the fact was that claim of the appellant was admitted by respondent No. 1/plaintiff in the plaint, as an admitted fact, which did not require any further proof. The learned counsel further submitted that the General Power of Attorney was executed in favour of predecessor in interest of the appellant, only to facilitate him to further transfer the suit house. On the basis of said Power of Attorney, the predecessor-in-interest of appellant had entered into an agreement to sell regarding suit house with respondent No. 1/plaintiff. An amount of Rs.3,25,000/- was paid to predecessor-in-interest of appellants and the remaining amount of Rs.8,90,000/- was to be paid upto 17-11-1995, but the said amount was not

paid till due date. Since, the remaining amount was not paid in time, therefore, the agreement to sell had become infructuous. The non-payment of remaining amount did not entitle respondent No. 1/plaintiff for decree of specific performance of the contract. The learned counsel further submitted that in this respect a notice dated 26-11-1995 was also served upon respondent No. 1/plaintiff. The learned counsel further submitted that when respondent No. 1/plaintiff instituted the suit for specific performance of contract, the predecessor in interest of the appellant, deposited the earnest money Rs.3,25,000/- under the order of the Court, in the Court, in the year 1995 and since then there is no amount available with the deceased appellant or his legal heir, paid by respondent No. 1/plaintiff;; as such there was no question of specific performance of contract. It was further submitted that the learned Lower Appellate Court decided the appeal without impleading legal heir of Asif Ali Hashmi, appellant; whereas, the fact regarding death of the appellant had been brought before the Court. The judgment in appeal, was therefore, unlawful and liable to be set aside. It was further submitted that the legal heir of deceased Asif Ali Hashmi being owner in possession of the suit house, was aggrieved party and had every right to file present appeal.

4. On the other hand, learned counsel for respondent No. 1/plaintiff, submitted that the appeal is incompetent, as the appellant had no right to file present appeal. The learned counsel further submitted that Muhammad Saghir Khan, the original allottee of the house in question had only executed a General Power of Attorney in favour of deceased appellant Asif Ali Hashmi. Though, Asif Ali Hashmi had filed appeal against the decree of Civil Court, yet after death of Asif Ali Hashmi, the General Power of Attorney lost its value. Muhammad Saghir Khan, the original allottee, after death of Asif Ali Hashmi, had remained owner of the house and he had been proceeded against exparte. The appeal was therefore, rightly decided by the learned Lower Appellate Court. It was further submitted that since the appeal was decided on merits, therefore, the same could not be questioned by the legal heir of deceased appellant Asif Ali Hashmi.

5. I have heard learned counsel for the parties and have also perused the record.

6. The record shows that respondent No. 1/plaintiff had instituted suit for specific performance of contract in the year 1996, against Asif Ali Hashmi and Muhammad Saghir Khan. In the plaint he admitted that Asif Ali Hashmi had purchased the suit house from Muhammad Saghir Khan, the original

allottee, for a sale consideration of Rs.12,25,000/-; however, he added that Rs.10,000/- was out standing. But the fact remains that it was matter between Muhammad Saghir Khan and Asif Ali Hashmi. It could not be said that because of out standing amount of Rs.10,000/-, when an amount of Rs.12,25,000/- had been paid, Asif Ali Hashmi could not be considered as purchaser of the house. In this respect, the appellant through a C.M. had filed agreement to sell, executed between Muhammad Saghir Khan and Asif Ali Hashmi, but since it was not exhibited during the course of evidence, therefore, no reference is made to the said agreement. The fact regarding sale/purchase between Asif Ali Hashmi and Muhammad Saghir Khan was admitted by respondent No. 1/plaintiff, in the plaint. So, no other proof to this effect was required. Asif Ali Hashmi deceased was thus the purchaser of the suit house. It seems that in order to avoid registration fee and miscellaneous expenses, a proper sale deed was not executed, rather a General Power of Attorney was executed by the seller Muhammad Saghir Khan in favour of purchaser Asif Ali Hashmi. Object of General Power of Attorney was to enable Asif Ali Hashmi, purchaser, to sell the house in question onward. On the basis of said power of attorney Asif Ali Hashmi entered into an agreement regarding sale of the suit house to respondent No. 1/plaintiff. Admittedly, Rs.3,25,000/- was paid to Asif Ali Hashmi and

the remaining amount was to be paid on 17-11-1995. According to respondent No. 1/plaintiff Asif Ali Hashmi could not prepare the transfer documents and for the said reason he did not pay the remaining sale consideration; whereas, according to Asif Ali Hashmi, the plaintiff was not in a position to pay the remaining sale consideration and therefore, the agreement to sell had lost its value. The plaintiff, therefore, filed suit, which was decreed in favour of the plaintiff, Muhammad Arif Mian.

7. It is also an admitted fact that the appeal was filed by Asif Ali Hashmi before the learned Lower Appellate Court and during pendency of the said appeal, he died. Application in respect of death of the appellant was filed before the learned Lower Appellate Court; but even then, the appeal was decided on merits, without impleading legal heir of the deceased Asif Ali Hashmi. The argument that Asif Ali Hashmi was only an attorney holder and after his death the attorney had lost its value carries no weight, for the reason that admitted position in the present case was that Asif Ali Hashmi had purchased the suit house on payment of sale consideration. Once, it was admitted by respondent No. 1/plaintiff, that Asif Ali Hashmi was purchaser/owner of the suit house, then it could not be said that he was only an attorney and after his death the General Power of Attorney

had lost its value. The Power of Attorney, in such like circumstances would become irrelevant. Once, it is admitted that Asif Ali Hashmi was owner/purchaser of the suit house, then it can not be said that the learned Lower Appellate Court was justified in deciding the appeal, after death of appellant Asif Ali Hashmi, without impleading his legal heir.

8. In the circumstances, the judgment of learned Lower Appellate Court dated 06-1-2010 is set aside and the case is remanded back to the learned Lower Appellate Court with the direction to implead legal heirs of Asif Ali Hashmi and then decide the appeal afresh in accordance with law. Since, it is an old matter, therefore, the appeal be decided expeditiously preferably within two months.

(RIAZ AHMAD KHAN)
JUDGE

Announced in open Court, on 17th June, 2013.

JUDGE

Tanveer Ahmed.

Approved for reporting.