

2012 Y L R 1362 [Lahore]

Before Muhammad Ameer Bhatti, J

Mst. NAFEES AKHTAR IJAZ and others---Appellants

versus

ADDITIONAL DISTRICT JUDGE and others---Respondents

Writ Petition No.4373 of 2008, decided on 21st July, 2011.

Specific Relief Act (I of 1877)---

---S. 12---Constitution of Pakistan, Art.199---Constitutional petition---Suit for specific performance of contract---Only the vendor of the suit land and one other defendant filed their independent written statements, while other defendants were proceeded ex parte due to their non-appearance in the suit---Defendant/vendor of suit property having conceded the claim of the plaintiff, suit was decreed against all the defendants, except the one who filed written statement--
-Two appeals were filed against the judgment of the Trial Court, one by the plaintiff against dismissal of the suit against the defendant who filed written statement; and the other by the defendants against ex parte decree passed against them by the Trial Court---Appellate Court below vide its single judgment, set aside the impugned judgment and decree of the Trial Court and remanded the case for its decision afresh after providing opportunity of hearing to all the concerned---Defendant who had filed written statement moved appeal against judgment of the Appellate Court---During pendency of said appeal all other defendants were proceeded ex parte due to their non-appearance---Plaintiff who appeared in the court made statement and conceded the appeal of said defendant and judgment of Appellate Court below was set aside to the extent of said defendant and order passed by the Trial Court was restored---Trial Court vide its impugned order found that the decree passed by it in the early round of litigation had already been restored by High Court while accepting First Appellate order, no further proceedings in that case were warranted by law and record was ordered to be consigned to the record room---High Court, however, clarified that order passed by it was to the extent of defendant who had filed written statement and order impugned in first appellate order was only set aside to the extent of said defendant---Judgment and order impugned in constitutional petition, passed by the Appellate Court below and civil court, respectively were set aside and case was remanded to the Trial Court for its decision afresh as directed by the Appellate Court below.

Moiz Tariq for Appellant.

Muhammad Sarwar Awan for Respondent.

Date of hearing: 21st July, 2011.

JUDGMENT

MUHAMMAD AMEER BHATTI, J.---Through this writ petition, the petitioners have impugned the judgment dated 3-4-2008 passed by the respondent No.1/Addl. District Judge Faisalabad and an order dated 30-1-2008 passed by the learned Civil Judge/respondent No.2.

2. The brief facts of the case necessary for the disposal of this petition are that the suit for specific performance was filed by one Nazir Ahmed respondent No.3 against the present petitioners and the respondents Nos.4 to 16. It is added that Sher Muhammad respondent No.4 was original owner of the land in dispute from whom not only the plaintiff/Nazir Ahmed/respondent No.3 purchased the land but also petitioners and respondents Nos.5 to 16 had purchased the land. It is added that Sher Muhammad and Tariq Mehmood respondent No.9 here filed their independent written statement, however, including the petitioners and others have been proceeded ex parte due to their non-appearance in the suit.

3. The suit was contested by the respondent No.6, however, during the pendency of the suit, the original owner/vendor Sher Muhammad conceded the claim of the plaintiff/Nazir Ahmed and the suit was decreed against all the defendants including the present petitioners except Tariq Mehmood vide judgment dated 25-1-2005 by the learned Trial Court.

4. Two appeals were filed against the judgment of learned Trial Court one by the plaintiff Nazir Ahmed against the dismissal of his suit against Tariq Mehmood and the other appeal filed by the present petitioners against the ex parte decree against them. The learned Additional District Judge/first Appellate Court vide its single judgment dated 8-5-2006 set aside the impugned judgment and decree of the learned Trial Court and remanded the case back for its decision afresh after providing opportunity of hearing to all the concerned. Tariq Mehmood challenged

the judgment of the First Appellate Court dated 8-5-2006 through F.A.O. No.257 of 2006 in this Court. During the pendency of this F.A.O., all the respondents in the F.A.O. including the present petitioners were proceeded ex parte due to their non-appearance, however, the plaintiff/Nazir Ahmed appeared and made a statement and conceded the appeal of the appellant Tariq Mehmood. It is added that the appellant in F.A.O. No.257 of 2006 had challenged the judgment of the learned First Appellate Court dated 8-5-2006 to the extent of his rights. However, on the statement of the plaintiff/Nazir Ahmed, the judgment dated 8-5-2006 has been set aside by this Court and the judgment and decree dated 25-1-2005 passed by the learned Civil Judge, Faisalabad was ordered to be restored. The parties according to the judgment of the First Appellate Court dated 8-5-2006 approached the learned Trial Court for its decision afresh according to their claims but the learned Trial Court vide its impugned order held that since the decree dated 25-1-2005 passed by the learned Trial Court in the early round of litigation has already been restored by this High Court while accepting the F.A.O. No.257 of 2006, hence no further proceedings in this case were warranted by law and files were ordered to be consigned to the record room.

5. The revision petition was filed by the present petitioners against this impugned order which was also dismissed vide judgment dated 3-4-2008 by the Additional District Judge, Faisalabad and both the orders have been impugned before this Court through this writ petition.

6. The learned counsel for the petitioners contends that the order dated 25-4-2007 passed on F.A.O. No.257 of 2006 was only to the extent of the appellant before this Court at that time. Since the claim of the appellant in the appeal was only to the extent of his claim and he prayed in his appeal for setting aside the order impugned in the said FAO of the First Appellate Court dated 8-5-2006 to his extent and his claim was conceded by the plaintiff/Nazir Ahmed, so the rights of the others which were not pending before this Court in F.A.O. No.257 of 2006 cannot be considered to have been set aside through the order dated 25-4-2007. While accepting the said F.A.O., it was pointed out that since nothing was pending before this Court in the said F.A.O. against the present petitioners and others so non-appearance of the present petitioners and others in the F.A.O. No.257 of 2006 did not affect their rights.

7. On the other hand, the learned counsel for the respondents/plaintiff has not disputed the present situation, however, raised legal objections that it was the duty of the present petitioners to get the order dated 25-4-2007 passed in F.A.O. No.257 of 2006 clarified from this Court.

8. I have given the anxious consideration to the contentions of parties and perused the record and the relevant file of the F.A.O. No.257 of 2006 and I have noticed that the appeal (F.A.O. No.257 of 2006) filed by Nazir Ahmed was to the extent of his rights. Since the learned Trial Court vide

its judgment dated 25-1-2005 dismissed the suit of the plaintiff to his extent on merits and when the learned First Appellate Court set aside the decree of the learned Trial Court vide its judgment dated 8-5-2006 and remanded the case back as a whole while accepting two appeals one by the plaintiff against Nazir Ahmed and other filed by the present petitioners who have been condemned unheard. The order of the learned Additional District Judge dated 8-5-2006 was challenged by Nazir Ahmed through this F.A.O. No.257 of 2006, to his extent that the suit of the plaintiff had been rightly dismissed by the learned Trial Court and the order dated 8-5-2006 passed by the learned First appellate Court to this extent was not in accordance with and this fact has been conceded by the plaintiff while appearing in FAO No.257 of 2006 and on his statement, the F.A.O. No.257 of 2006 was allowed and the decree dated 25-1-2005 passed by the learned Civil Judge was restored, where the suit of the plaintiff Nazir Ahmed against Tariq Mehmood, the appellant of F.A.O. No.257 of 2006 had been dismissed.

9. Keeping in view of the aforementioned position, though the order of this court is not clear, yet the presence marked in the order sheet and the grounds on appeal along with prayer clause if read in conjunction with the order of this Court dated 25-4-2007, the picture becomes clear that the order of this Court was only to the extent of Tariq Mehmood. Even it was not a case of the plaintiff that he made the statement for setting aside the order of the learned Additional District Judge dated 8-5-2006 through which he has remanded the case back to the learned Trial Court after setting aside the decree of the plaintiff because the plaintiff has not challenged that order. This aspect of the case has not been considered by both the courts below as they got influenced from the order of this Court dated 25-4-2007 which was passed in F.A.O. No.257 of 2006 filed by the defendant against whom the suit of the plaintiff had been dismissed by the learned Trial Court as there is no occasion to understand that order of this Court can set aside the order dated 8-5-2006 passed by the Additional District Judge as a whole because this order was neither pending before this Court as a whole nor the beneficiary of the judgment and decree dated 25-1-2005 has challenged the order of the Additional District Judge dated 8-5-2006 in this Court.

So taking into consideration the above ambiguity, this Court feels no hesitation to clarify that the order dated 25-4-2007 passed by this Court was to the extent of Tariq Mehmood and the order impugned in the said F.A.O. No.257 of 2006 was only set aside to the extent of the appellant in the said FAO and the judgment and decree of the learned Trial Court was restored to the extent of Tariq Mehmood, the appellant of the said F.A.O.

8(sic) Consequently, the judgment and order impugned in this writ petition dated 3-4-2008 and 30-1-2008 passed by the respondents Nos.1 and 2 respectively are hereby set aside and the case is remanded back to the learned Trial Court for its decision afresh as directed by the learned Additional District Judge vide his judgment dated 8-5-2006. Needless to say the matter shall be decided within a period of six months from today. No order as to costs.

H.B.T./N-7/L

Case remanded.