SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present:
Mr. Justice Umar Ata Bandial
Mr. Justice Syed Mansoor Ali Shah

C.A. No. 775 of 2015
(Against the judgment dated 12.11.2014 and decree dated 22.06.2015 of Lahore High Court, Lahore passed in RSA No.19 of 2006)

Zafar Iqbal and others. **……. Appellant(s)**

Versus

Naseer Ahmed and others. **……. Respondent(s)**

For the appellants: Barrister Umer Aslam, ASC.

For respondents No.1-3: Moulvi Anwar-ul-Haq, ASC.

For respondents Nos. 4 -8: Ex-parte.

Date of hearing: 01.10.2021

JUDGMENT

Syed Mansoor Ali Shah, J.- The appellants have filed this appeal, as of right, under Article 185(2)(d) of the Constitution of the Islamic Republic of Pakistan 1973 against the judgment dated 12.11.2014 and decree dated 22.06.2015[1] of the Lahore High Court passed in Regular Second Appeal No. 19 of 2006 of respondents No.1 to 3.

2. The High Court has, by the impugned judgment, set aside the judgment of the first appellate court, whereby that court had upheld the judgment of the trial Court, with minor modification, decreeing the recovery of the paid advance consideration amount instead of specific performance of the agreement to sell prayed for by respondents No.1 to 3 in their suit.

3. The facts of the case, briefly stated, are that one Waryam, the predecessor-in-interest of respondents No. 1 to 3 (“vendee”), instituted a suit for specific performance of an agreement to sell dated 15.01.1984 (“agreement”) against Mirza Abdul Rashid (“vendor”) and his wife Noor Begum (“wife of vendor”), the predecessors-in-interest of respondents No. 4 to 8,

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[1] Decree sheet prepared on 22.06.2015 after correction of a clerical error in the judgment.

and for cancellation of sale deed dated 21.02.1985 executed by the vendor in favour of the present appellants ("subsequent purchasers"). He asserted that the vendor agreed to sell his land as well as land of his wife measuring 10 acres ("suit land") to him by the agreement against a consideration of Rs.40,000/- per acre; but despite having received partial consideration amount Rs.2,79,000/- from him, the vendor transferred land measuring 6 acres out of the suit land to the subsequent purchasers, to defeat the fulfillment of the agreement.

4. The vendor, the wife of the vendor, and the subsequent purchasers contested the suit by filling their written statements separately. The vendor admitted the execution of the agreement to the extent of his land, but denied to have agreed to sell the land owned by his wife. He further asserted that the vendee failed to make payment of the balance consideration amount till the agreed date, therefore, the agreement stood cancelled. The wife of the vendor asserted that she was not a party to the agreement and also denied to have given any authority to her husband to sell her land. The subsequent purchasers claimed themselves to be the bona fide purchasers of 6-acre land out of the suit land.

5. The trial court came to the conclusion that the wife of the vendor was not party to the agreement, therefore, the agreement could not be operative to the extent of her land, and that the subsequent purchasers were bonafide purchasers for value without notice. In view of these findings, the trial court rejected the prayer of the vendee for specific performance of the agreement, but granted him the relief of recovery of the paid consideration amount of Rs.2,79,000/- against the vendor. The vendee being not satisfied of the relief granted appealed in the District Court. As the vendor had not appealed against the decree passed by the trial court against him for recovery of the paid consideration amount, the appellate court only examined the issue on the assertion of the subsequent purchasers to be the bonafide purchasers, in detail, and affirmed the findings of the trial court thereon. The appellate court thus dismissed the first appeal of the vendee, maintaining the judgment of the trial court with a minor modification in the terms that the vendee was held entitled to receive 10% markup

also on the paid consideration amount from the date of payment till its recovery.

6. The vendee still being not content with the relief granted to him by the appellate court, filed a second appeal in the High Court, pressing for the grant of relief of specific performance of the agreement and challenging the concurrent findings of fact on the issue of claim of the subsequent purchasers to be the bonafide purchasers. The High Court allowed the second appeal: set aside the concurrent findings of fact of the two courts below on that issue, and decreed partially the claim of the vendee for specific performance of the agreement to the extent of 6-acre land owned by the vendor, which had been purchased by the subsequent purchasers, as well as 5-kanal land owned by the wife of the vendor. Hence, the subsequent purchasers have filed the present appeal.

7. We have heard the arguments of the learned counsel for the parties and gone through the record of the case with their assistance.

8. At the very outset, we observe that the High Court hearing a second appeal, in the present case, has re-read and re-appraised the evidence of the parties in the way a first appellate court does, without realizing the distinction between the scope of the first appeal and the second appeal. Under Section 100 of the Code of Civil Procedure 1908 (“CPC”), a second appeal to the High Court lies only on any of the following grounds: (a) the decision being contrary to law or usage having the force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law; and (c) a substantial error or defect in the procedure provided by CPC or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon merits. The scope of second appeal is thus restricted and limited to these grounds, as Section 101 expressly mandates that no second appeal shall lie except on the grounds mentioned in Section 100. But we have noticed that notwithstanding such clear provisions on the scope of second appeal, sometimes the High Courts deal with and decide second appeals as if those were first appeals; they thus assume and

exercise a jurisdiction which the High Courts do not possess, and thereby also contribute for unjustified prolongation of litigation process which is already chocked with high pendency of cases.

9. No doubt, the expression “law” used in the phrase “the decision being contrary to law” in the ground (a) mentioned in Section 100 of the CPC is not confined to “statutory law” only, but also includes the “principles of law” enunciated by the constitutional courts, which have the binding force of law under Article 189 and 201 of the Constitution of the Islamic Republic of Pakistan 1973. And, it is an elementary principle of law that a court is to make a decision on an issue of fact on the basis of legally relevant and admissible evidence available on record of the case, which principle is also incorporated in the statutory law, that is, the first proviso to Article 161 of the Qanun-e-Shahdat Order 1984. The said proviso states in unequivocal terms that a judgment must be based upon facts declared by the Qanun-e-Shahdat Order to be relevant and duly proved.

10. The decision of a court is, therefore, considered “contrary to law” when it is made by ignoring the relevant and duly proved facts, or by considering the irrelevant or not duly proved facts. The expressions “relevant evidence” and “admissible evidence” are often used interchangeably, in legal parlance, with “relevant facts” and “duly proved facts” respectively, and a decision is said to be “contrary to law” and is open to examination by the High Courts in second appeal when: (i) it is based no evidence, or (ii) it is based on irrelevant or inadmissible evidence, or (iii) it is based on non-reading or misreading of the relevant and admissible evidence. A decision on an issue of fact that is based on correct reading of relevant and admissible evidence cannot be termed to be “contrary to law”; therefore, it is immune from scrutiny in second appeal. A High Court cannot, in such case, enter into the exercise of re-reading and re-appraisal of evidence, in second appeal, and reverse the findings of facts of the first appellate court, much less the concurrent findings of facts reached by the trial court as well as the first appellate court. It has, in second appeal, no jurisdiction to go into the question relating to weightage to be attached to the statements of witnesses, or believing or disbelieving their

testimony, or reversing the findings of the courts below just because the other view can also be formed on the basis of evidence available on record of the case.[2]

11. In the present case, the trial court and the appellate court after reading and appraising all the relevant and admissible evidence adduced by the parties in support of their respective assertions, recorded the findings that the vendee could not prove his assertion that two of the subsequent purchasers were present at the time of execution of the agreement and he had also informed them about the agreement after execution thereof, while the subsequent purchasers proved their stance of having purchased 6 acre of land out of the suit land with payment of consideration amount Rs.300,000/- in good faith and without notice of the agreement between the vendor and vendee. The said courts underlined the facts that the vendee was not put in possession of the suit land in pursuance of the agreement, rather the subsequent purchasers were in possession of the suit land as tenants before as well as at the time of purchasing land measuring 6 acre, and that the agreement between the vendor and vendee was entered between them in a city other than that where the suit land was situate; therefore, they held that the subsequent purchasers could not be presumed to have knowledge of the agreement prior to purchasing 6 acres of land. The appellate court also believed the stance of the subsequent purchasers that they had purchased the land after inquiry (*poochh guchh*) from the residents of the village.

12. The High Court, in the second appeal, without pointing out non-reading or misreading of relevant and admissible evidence by the trial court and the appellate court, proceeded to re-appraise the evidence and came to the conclusion that the sale transaction between the vendor and the vendee was “the talk of the town”, and the subsequent purchasers had also not inspected the revenue record regarding title of the vendor before purchasing land. With

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[2] See Rafiul Qadre v. Safia Sultana 2009 SCMR 254; Nazeer Ahmed v. Maqsood Ahmed 2008 SCMR 190; Amjad Sharif v. Salim Ullah PLD 2006 SC 777; Mussarat Sultana v. Muhammad Saeed 1997 SCMR 1866; Abdul Rashid v. Bashiran 1996 SCMR 808; Muhammad Amir v. Khan Bahadur PLD 1996 SC 267; Sultan Ahmad v. Naeem Raza 1996 SCMR 1729; Keramat Ali v. Muhammad Yunus PLD 1963 SC 191.

this view formed on the basis of re-appraising the evidence, the High Court set aside the concurrent findings of the two courts below. We have observed that it was nobody's case that the copy of his ownership record for selling out the suit land (*fard malkiat barai bai*) was obtained by the vendor from the revenue officials before execution of the agreement in favour of the vendee with an entry of issuance of that copy in the revenue record, i.e., the daily dairy (*roznamcha*), or that the fact of execution of the agreement was reported by the vendor or vendee to the revenue officials for entering the same in the daily dairy (*roznamcha)*; therefore, the emphasis of the High Court on the fact that the subsequent purchasers did not enquire from the revenue officials and inspect the revenue record before purchasing the land is totally misconceived. Nor was there any such overwhelming evidence on the basis of which it could be held that the agreement of the vendee to purchase the suit land was "the talk of the town." The High Court also fell into error by reversing the finding of the trial court that the wife of the vendor was not party to the agreement therefore the agreement was not operative to the extent of the wife of the vendor.

13. The argument of the learned counsel for respondents No. 1 to 3 regarding grant of partial performance of the agreement under section 14 of the Specific Relief Act, 1877 pales into insignificance after the categorical finding that the appellants were *bonafide* purchasers for value without notice.

14. The decision rendered by the two courts below was in no way based on no evidence, or on irrelevant or inadmissible evidence, or on non-reading or misreading of the relevant and admissible evidence. The High Court wrongly interfered with their concurrent findings of fact and in so doing exceeded its jurisdiction under Section 100 of the CPC. We, therefore, allow this appeal: set aside the judgment of the High Court and restore that of the first appellate court.

Judge

Islamabad,
1st October, 2021.
Approved for reporting
Iqbal

Judge