

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE MAZHAR ALAM KHAN MIANKHEL
MR. JUSTICE JAMAL KHAN MANDOKHAIL

Civil Petition No.1193/2020

(On appeal from the Order dated 11.2.2020 passed by the Lahore High Court, Lahore in C.R.No.76197/2019).

Misbah Khanum

...Petitioner

Versus

Kamran Yasin Khan and another

...Respondents

For the Petitioner:	Mr. Kamran Murtaza, Sr. ASC (<u>Video-link-Queita</u>)
Respondent-1:	Mr. Rashid Mehmood Sindhu, ASC
Respondent-2:	Anis-ud-Din, ASC
Date of hearing:	26.10.2021

JUDGMENT

MAZHAR ALAM KHAN MIANKHEL, J.-

The Respondent No.1 filed a suit against the present Petitioner for specific performance of an agreement to sell dated 27th September, 2012 regarding a residential house built upon Plot No.143/B situated in Nazimabad, Faisalabad, owned and possessed by present Petitioner i.e. Mst. Misbah Khanum (Misbah Aziz). The Respondent No.2 (the real son of the Petitioner) appearing as a special attorney in the said case, recorded a conceding statement before the Trial Court and on the basis of that

statement, the Court passed a Decree in favour of Respondent No.1 vide its Judgment dated 9th October, 2013 (*the Decree laterly drawn on 14th March, 2014 and such delay per se will have no adverse effect on the matter before us*) subject to payment of balance sale amount of Rs.6,00,000/- (Six Lac) within a month. The Respondent No.1, despite decretal of his suit, filed an Appeal by alleging that his payments made earlier, amounting to Rs.36,00,000/- (*Thirty-Six Lac*) have not been referred to in the Judgment. The Appellate Court allowed the Appeal of the Respondent No.1 vide its Judgment dated 23rd January, 2014 (*the Decree in Appeal, too was drawn laterly on 9th December, 2019 but this delay will also not affect the merits of the case before us*) that too on the basis of yet another conceding statement of the even date, made by Respondent No.2 as attorney of present Petitioner by confirming the receipt of balance amount of Rs.6,00,000/- (Six Lac). It is not out of context to mention here that the Decree Sheet in Appeal was not prepared by the concerned clerk at the time of decision of Appeal and the same was got prepared on the basis of a separate Order dated 9th December, 2019 of the Appellate Court passed on the application made by Respondent No.1 in this regard as the Order of the alleged acceptance of Appeal was not being executed in absence of the Decree Sheet. The delayed preparation of Decree Sheets (*both the Trial Court and the Appellate Court*), as stated above, will have no bearing on the merits of the case before us and is immaterial.

2. The Respondent No.1, after getting Decree in his favour by the Appellate Court filed an execution petition dated 19th February, 2014. The Petitioner on getting knowledge of the Decree against her, initially filed a suit for declaration, challenging the

very agreement to sell dated 27th September, 2012, special power of attorney in favour of Respondent No.2, her real son. This suit of the Petitioner was rejected vide Judgment and Decree dated 4th January, 2017 under Order VII Rule 11(d) of Code of Civil Procedure, 1908 (C.P.C.) being barred by law (Section 11 C.P.C.). However, the learned Judge in its Judgment *ibid*, made a reference regarding pendency of an application under Section 12 (2) C.P.C. filed by the present Petitioner. But the record available before us would reflect that the said application under Section 12(2) C.P.C. was against the initial Decree for specific performance of agreement and the same after a full-fledged trial and at the time of final arguments, was dismissed as withdrawn subject to payment of costs of Rs.15,000/- vide Order dated 18th October, 2019 as yet another application at the same time with the same relief i.e. under Section 12(2) C.P.C. was pending adjudication before Additional District Judge, Faisalabad wherein the Decree of the Appellate Court was challenged.

3. The learned Additional District Judge, Faisalabad after hearing the parties, dismissed the said application under Section 12(2) C.P.C. vide its Judgment dated 9th December, 2019. The Petitioner feeling aggrieved, filed a Civil Revision before the High Court but this too, met the same fate of dismissal by the learned Judge in Chambers of the High Court vide impugned Judgment dated 11th February, 2020.

4. The Petitioner still not satisfied, has questioned the impugned Judgment by invoking the jurisdiction of this Court under Article 185(3) of the Constitution of the Islamic Republic of

Pakistan, 1973 through instant Petition for grant of Leave to Appeal.

5. We have heard the learned counsel for the parties and have gone through the entire record including the original record of different files requisitioned vide Order dated 21st September, 2020 of this Court. The record of the case would reveal that the Petitioner is an old and illiterate lady who became owner of the house in question way back in the year 2006 and this very fact is not disputed.

The dispute/controversy in hand, arose when she got knowledge about the transfer of her house through a Decree for specific performance in favour of Respondent No.1. After getting this knowledge, (though no specific date of knowledge apparently reflects from the record but all the proceedings initiated by her i.e. the civil suit and both the applications under Section 12(2) C.P.C. are within the prescribed period of limitation, so, non-mentioning/non-appearance of exact date of knowledge would become immaterial as date of knowledge is normally required for calculating the period of limitation). No doubt, on the basis of legal advices available to her, she filed a civil suit referred to above and also an application under Section 12(2) C.P.C. before the Trial Court which, ultimately was dismissed as withdrawn, as referred to above, because of pendency of yet another application under Section 12(2) C.P.C. before the Appellate Court. The reason for filing two different applications might be on the assumption that there is no legal

bar in availing two or more available remedies even before different forums simultaneously and whichever is decided earlier would make the other/others redundant/infructuous or because of a legal apprehension in her mind regarding the appropriate/ultimate forum for filing of an application under Section 12(2) C.P.C. in view of the Judgment of this Court in the case of Maharunisa v. Ghulam Sughran (PLD 2016 SC 358) as there was yet another Decree of the Appellate Court dated 23rd January, 2014 which finally decided the controversy between the parties and the Judgment and Decree of the Trial Court was merged in the latter Judgment and Decree of the Appellate Court. In view of law laid down in the case of *Maharunisa supra*, the application under Section 12(2) C.P.C. before the Appellate Court was maintainable. Withdrawal of her earlier application under Section 12(2) C.P.C. before Trial Court and rejection of her Civil Suit will have no adverse effect on her instant application under Section 12(2) C.P.C. before the Appellate Court. It is also settled law of the land that there is no legal bar for a party to avail two or more available remedies under the law simultaneously and a decision in any one of such remedies availed would render the others as infructuous.

6. While coming to the merits of the case in hand, the Petitioner has alleged fraud and misrepresentation for which, once she filed a civil suit and also an application under Section 12(2) C.P.C. before the Trial Court and also approached the Appellate Court by challenging the Decree in Appeal through a separate application under Section 12(2) C.P.C. would show that fraud has

been committed with her and that too, by her husband and the son by managing to get executed an agreement to sell, a deed of special power of attorney and then by making a conceding statement in the Court by her son on the basis of a special power of attorney which she had categorically denied. She in her statement recorded as AW-1, in the proceedings under Section 12(2) C.P.C. before the Trial Court *(though withdrawn by her after the trial but it was between the same parties and making its reference would cause no prejudice to any of the party and is also available on the file, so, this Court, in the circumstances, can take judicial notice of the same to do complete justice between the parties)* had categorically stated about a similar fraud by the same persons regarding her other property i.e. a shop, regarding which litigation was also pending between the parties and said fact was also not confronted or cross-examined which means, the Respondents had nothing to say anything in denial or rebuttal. Yet another stance giving support to her allegations, is the Decree for dissolution of her marriage which resulted after all the mess referred to above occurred. That she was so dis-hearted that she went on to break the marital bond with her husband. Her son and the husband never appeared before the Court in rebuttal of her allegations before any forum. The Respondent No.1 remained in contest throughout and this aspect alone would be sufficient to support the allegations of Petitioner.

7. The most important legal aspect of the case which went un-noticed by the Courts below is that the alleged transaction was shown to be with an elderly, illiterate lady and the

Respondent No.1 being a beneficiary of the entire episode was legally bound to prove the genuineness of the alleged transaction in his favour. Law of the land places a heavy burden on the person who is ultimately on the receiving end in such like transactions. The said burden, as per record, has not been discharged by the Respondent No.1 at all. The record would suggest that the initial Decrees from both the Courts were based on the conceding statements made by the son of the Petitioner, the alleged special attorney on her behalf. The power of attorney present on original file of the main suit for specific performance was even not exhibited at the time of recording of the conceding statement of the alleged attorney, who happens to be her son. Even at the time of acceptance of Appeal, the photocopy of the said power of attorney was placed on file but was not referred to or exhibited at the time of recording that statement of the alleged attorney. Even reference of the same was not made in the statement nor in the Order of the Court. Such an authorization which lacks legal proof has no evidentiary value and cannot be relied upon and considered in evidence. Both the conceding statements, before the Trial Court and that of the Appellate Court can at the most be considered as the statements of '*Mudassar Ahmad Khan*' (Respondent No.2), himself and not as an attorney of the lady, his mother. The document which is denied and under the contest, even if available on the file/record cannot be looked into by the Court unless the same is tendered in evidence, exhibited and proved in accordance with law. This, in other words, would mean that there was no power of attorney before the Court to look into. The Suit or the Appeal was never contested. During the proceedings under Section 12(2)

C.P.C. execution of both the documents, agreement to sell and the special power of attorney was categorically denied by the Petitioner. The agreement to sell in favour of Respondent No.1 was not legally proved as per requirements of Article 79 and other enabling provisions of the Qanun-e-Shahadat Order, 1984. If there was no contest in the main suit and a categoric denial and a hot contest in the proceedings under Section 12(2) C.P.C. then it was for the Respondents to have proved both the documents in their favour as they were the persons to get benefits on the strength of these documents. Payment of sale consideration of Rs.42,00,000/- (Rs. Forty-Two Lac) has been alleged but the same has also not been proved in accordance with the law. There is not an *iota* of evidence which could reflect that the alleged sale consideration was ever received by the Petitioner. This aspect of the case alone would be sufficient to nullify the Decrees in favour of the Respondent No.1. These are the sufficient examples of fraud and misrepresentation for the purpose of an application under Section 12(2) C.P.C. Even one of the ground of the three, if established on the record, would be sufficient for setting aside such an Order, Judgment and Decree etc.

8. The most important legal aspect which goes to the root of the case is that the initial Decree on the basis of the Judgment dated 9th October, 2013 was a conditional Decree. The Respondent No.1 though was granted a Decree for specific performance but the same was subject to payment of balance amount of sale consideration amounting to Rs.6,00,000/- (Rs. Six Lac) within thirty days (*starting from the same date*) and his failure in this respect was

sufficient enough for dismissal of the suit in the light of an unambiguous Order and legally no further Order for dismissal of the suit was required. The record of the case would further reveal that despite decretal of his suit, Respondent No.1 filed an Appeal before the District Judge on 8th November, 2013. This Appeal was against the Judgment and not against the Decree and non-filing of Decree sheet even was not dispensed with by the Court, is sufficient enough for its outright dismissal. It was in clear violation of the mandatory provisions of Rule 1 of Order XLI of C.P.C. It was for the office to have reported for such deficiency. This Appeal, despite the above deficiency, was allowed once again on the conceding statement made on 23rd January, 2014 by the alleged attorney, none else but her son Mudassar Ahmad Khan, that he has received the balance decretal amount of Rs.6,00,000/- (Rs.Six Lac) and has no objection on acceptance of Appeal. Appeal was allowed accordingly on the same day. Relevant text/Order is reproduced here-in-below for ready reference:-

"In view of statement of above and in the interest of justice, the instant appeal is accepted, as a result of which, the suit of the appellant stands decreed in favour of the appellant/plaintiff and against the respondent/defendant. There is no order as to cost. Copy of the order along with record of trial Court be sent back and file of appeal be consigned to the record room after completion, within stipulated period.

*Announced:
23.01.2014*

*Sd/-
Jamil Ahmad CH.
Addl. District Judge,
Faisalabad".*

9. No Decree Sheet was drawn in the light of above Order of acceptance of Appeal. In absence of the Decree Sheet, execution was not possible. So, the Respondent No.1 was compelled to file a separate application before District Judge for preparation of a Decree Sheet and ultimately Decree Sheet in Appeal was ordered to be drawn on 9th December, 2019. His application in this regard reflects that he has categorically written in Para-2 of the application that he failed to deposit the decretal amount within the prescribed time (*Page 117 of Paper-Book* of C.P.No.1193/2020). The record would further reveal that the operation of the initial Judgment dated 9th October, 2013 of Civil Judge was never suspended by the Appellate Court. Since the original Appeal file was not available along with other available files, so the same was requisitioned through a special messenger. The record of the Appeal file makes it abundantly clear that there was no stay Order and operation of the impugned Judgment of 9th October, 2013 was never suspended. The relevant documents reflecting the date of filing of Appeal and all the Order Sheets are scanned herein as part of this Judgment for ready reference: -



(Scanned documents overleaf.)



بعدالت جناب ڈسٹرکٹ جج صاحب فیصل آباد

کا مرن بلین خان

کا مرن بلین خان

7-11-2013

7-11-2013

کا مرن بلین خان ولد محمد بلین خان قوم راجپوت ساکن چک نمبر 66 ج۔ ب دھادڑہ تحصیل ضلع فیصل آباد

ایپیلانٹ

نام

مسماۃ صبا عزیز زوجہ محمد عزیز احمد خان قوم پٹان ساکن مکان نمبر 21/D سول کوارٹرز کوٹوالی روڈ فیصل آباد محال شیم 76-P عبداللہ ٹی سندری روڈ فیصل آباد

رہائش

Box No.

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for

Date

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Date

ایپیل ہائیکورٹ حکم مورخہ 09.10.2013 صدرہ عدالت جناب ممتاز احمد صاحب سول جج فیصل آباد جس کی رو سے ایپیلانٹ کو بقیرہ زمین ملے گی

600,000/- روپے اندر 30 یوم داخل کرنے کا حکم صادر ہوا ہے اور ایپیلانٹ کی جانب سے ادا کردہ رقم ملے گی۔ 36,00,000/- روپے بابت قیمت مکان نمبر

143/B، ناظم آباد کی بابت کوئی وضاحت حکم زیر ایپیل مورخہ 09.10.2013

میں مذکور کی گئی ہے۔

District Sessions Judge,
Faisalabad.

استدعا و ایپیل:

منسوخ کئے جانے حکم مورخہ 09.10.2013 صدرہ از عدالت ماتحت اور

وضاحت کرائے جانے حکم بابت ادا کی گئی رقم زمین جناب ایپیلانٹ اور ختم کئے

جانے پابندی بابت جمع کرائے بقیرہ زمین مکان نمبر 143/B، ناظم آباد فیصل آباد

اندر 30 یوم

Handwritten notes and stamps are visible in this section. A date stamp reads "08 NOV 2013". A signature is present above the text "Addl. District Judge - FAISALABAD".

It is a fresh appeal, let it be registered. 08 NOV 2013

08.11.2013.

Present: Counsel for the appellant.

This file pertains to the court of Mr. Imtiaz Hussain, learned Addl District Judge, Faisalabad who is on leave today and the file was put up before me as Duty Judge.

2. This civil appeal has been filed against the order dated 09-10-2013 passed by Mr. Mumtaz Ahmad, learned Civil Judge, Faisalabad whereby he decreed the suit subject to the condition that the plaintiff will deposit the remaining consideration amount of Rs.6 lacs within 10 days.

3. Now to come up for preliminary arguments for 11-11-2013.

Announced.
08.11.2013

(Muhammad Amjad Ali Khan),
Duty Judge/Addl District Judge,
Faisalabad.

11 NOV 2013

محرمہ کوثر علیہ الرحمہ
 قلم و خط پر حین. سید علیہ الرحمہ
 صاحبہ راجہ ہر سید علیہ الرحمہ جو 11/23/13

سید علیہ الرحمہ
 Addl. District Judge
 FAISALABAD.

23 NOV 2013

محرمہ کوثر علیہ الرحمہ
 قلم و خط پر حین. سید علیہ الرحمہ
 صاحبہ راجہ ہر سید علیہ الرحمہ جو 10/23/13

Addl. District Judge
 FAISALABAD.

10 DEC 2013

محرمہ کوثر علیہ الرحمہ
 قلم و خط پر حین. سید علیہ الرحمہ
 صاحبہ راجہ ہر سید علیہ الرحمہ جو 17/13/13

Addl. District Judge
 FAISALABAD.

17.12.2013.

Present: Mr. Sardar Haris Ahmad Amin Adv. for appellant.

Mr. Farhan Sohail Adv. filed Wakalat Nama on behalf of respondents.

Preliminary arguments heard.

Points raised by learned counsel for appellant in the instant appeal needs consideration, hence in the interest of justice, instant appeal is admitted for regular hearing. To come up for arguments on 04.01.2014. Record of learned trial Court be also summoned for the date fixed.

Announced:

17.12.2013.

JAMIL AHMAD CH.
 Addl. District Judge
 Faisalabad.

04 JAN 2014

محرمہ کوثر علیہ الرحمہ
 قلم و خط پر حین. سید علیہ الرحمہ
 صاحبہ راجہ ہر سید علیہ الرحمہ جو 23/13/13

JAMIL AHMAD CH.
 Addl. District Judge
 Faisalabad.

برائے جج ایڈیشنل ڈسٹرکٹ جج
ایڈیشنل ڈسٹرکٹ جج ایڈیشنل جج ایڈیشنل

کامیون کیشن خاں جہر سماء معراج منیر

23 JAN 2014

کونسل فیکشن ماف

عقار خاص رسالہ ٹرنک مدینہ منورہ ماف
بیان جناح ماف

Adl. District Judge
Faisalabad.

بیان انون عقار خاص رسالہ ٹرنک مدینہ منورہ ماف
کشفیت فیکشن ماف

بیان کشفیت ماف
کشفیت فیکشن ماف

کشفیت فیکشن ماف

Adl. District Judge
Faisalabad.

ORDER.

In view of statement of above and in the interest of justice, the instant appeal is accepted, as a result of which the suit of the appellants stands decreed in favour of the appellant plaintiff and against the respondent/defendant. There is no order as to cost. Copy of the order along with record of trial Court be sent back and file of appeal be consigned to the record room after completion within stipulated period.

Announced:
23.01.2014.

JAMIL AHMAD CH.
Adl. District Judge.
Faisalabad.

This makes it clear that the balance decretal amount of Rs.6,00,000/- (Rs.Six Lac) was neither deposited within thirty days of the Judgment dated 9th October, 2013 nor the same was ever suspended by the Appellate Court. This non-compliance would mean that the suit of the Respondents stands dismissed. Once the suit stands dismissed, the conditional Decree also gets buried with the suit. The acceptance of Appeal on 23rd January, 2014 on the conceding statement of the alleged attorney (*much latter than the specified period*) can in no way resuscitate the already dead suit. Before passing of the Decree in Appeal on 23rd January, 2014, the original Decree of 9th October, 2013 had succumbed due to its non-compliance within the given time. But this important aspect of the matter was concealed and ignored by the so called attorney and even not taken note of by the Court itself. It was also for the Appellate Court to have asked for compliance of the Order of deposit of balance amount. If the so called attorney was sincere to his principal (his mother) he would have straight away taken the plea of dismissal of the suit due to non-compliance of the Decree within the stipulated time. It appears that the Appellate Court has acted in a mechanical manner without application of its judicial mind. The Court while deciding a matter, even on compromise or on a conceding statement, has to see the legality and genuineness of the issue brought before it. Acting in a mechanical manner without application of judicial mind is not expected from a Judicial Officer. This would also paint a picture of his competence and conduct. This in other words means, playing with the rights of the people which cannot be expected from a Judicial Officer. In the given circumstance, the suit of the Respondent No.1 stands

dismissed. No Decree in his favour remains intact in the eye of law. Petitioner's ownership automatically stands restored with the dismissal of the suit. We, in the circumstances, for safe administration of justice, would like to observe that as per record, the apparent alleged transactions, if any, were between the Respondent No.1 and the Respondent No.2, the alleged attorney, and if there is any exchange of money or agreement to sell due to their mutual connivance and understanding, that would be between them alone by excluding the Petitioner.

10. Perusal of the impugned Judgments, especially that of the Additional District Judge, is based on surmises and conjectures and without any legal footing. It can in no way be termed as a legal Judgment. Acceptance of Appeal by the Additional District Judge in such a cursory manner would encourage such type of people to play with the rights of the others. Such type of Decrees cannot be given protection by the Courts where the rights of a third party like the Petitioner are going to be affected.

11. For what has been discussed above, this Petition is converted into Appeal and allowed. Consequently, impugned Order/Judgment of the High Court and Appellate Court, dismissing the application of the Petitioner under Section 12(2) C.P.C. are set aside and the said application of the Petitioner under Section 12(2) C.P.C. stands accepted and allowed. Resultantly, the Order/Judgment dated 23rd January, 2014 and its Decree, latterly drawn, on 9th December, 2019 of Additional District Judge, Faisalabad are set aside in view of the above

discussion. The Judgment of the Civil Judge dated 9th October, 2013 and its Decree, latterly drawn, has died its natural death due to its non-compliance which simply means there is no Decree in the field. Needless to mention that by accepting application under Section 12(2) C.P.C. and setting aside the Judgments and Decrees of both the Courts, *(the Trial Court and the Appellate Court)*; we are not going to send back the suit for specific performance for a trial afresh, as the suit itself stands dismissed for non-compliance of the Judgment dated 9th October, 2013 and the Decree arising thereof.

These are the reasons of our short Order dated 26th October, 2021 which is reproduced here-in-below:-

"For reasons to be recorded later, this petition is converted into appeal and allowed".

(If the Judges of the Trial Court and the Appellate Court are still in service, then copies of this Judgment be sent to them).

Islamabad,
26th October, 2021
Sarfraz /-
'Approved for reporting'