Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

REGULAR FIRST APPEAL NO. 412 of 2020

Muhammad Ashraf

Vs

Sardar Ali, etc.

APPELLANT BY:	Mr. Adil Aziz Qazi, Advocate.
RESPONDENTS BY:	Ms. Mehraj Tareen, Advocate for CDA. Respondents No. 1 to 17 proceeded ex-parte.
DATE OF HEARING**:**	21.04.2021.

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BABAR SATTAR, J.- This is a Regular First Appeal against the judgment and decree of the learned Civil Judge, First Class, Islamabad West dated 09.12.2020, whereby suit filed by the appellant for specific performance of agreement to sell dated 12.09.2017, was dismissed.

2. The relevant facts briefly are that the appellant claim to have entered into an agreement to purchase land measuring 287 kanals, 07 marlas located in the revenue estate of Sorain, Islamabad **("suit property")** against sale consideration of Rs.50 million and the entire sale consideration was paid to respondents No. 1 and 2. The appellant filed a suit for specific performance of this agreement. The said respondents appeared before the learned Civil Court and submitted that they have general power of attorney on behalf of

respondents No. 3 to 17 stated to be legal heirs of Mian Akbar Ali, and they have no objection if the suit is decreed in favour of the appellant. Respondents No. 1 and 2 who appeared before the Court in person to concede the suit of the appellant and submitted affidavits for such purpose claim to have general power of attorney on behalf of respondents No. 3 to 17 pursuant to which they were authorized to dispose of the suit property. The learned Civil Court directed the appellant to produce the original power of attorney executed by respondents No. 3 to 17 in favour of respondents No. 1 and 2, which was not produced. Respondent No.1/CDA produced its record and asserted that the suit property is the ownership of Mian Akbar Ali and has not been transferred to respondents No. 3 to 17 who have been presented as legal heirs of Mian Akbar Ali in the suit. The learned trial court in the absence of general power of attorney authorizing respondents No. 1 and 2 to dispose of the suit property on behalf of respondents No. 3 to 17 and in view of the power of attorneys filed before it came to the conclusion that respondents No. 1 and 2 had no authority to transfer the suit property. It also questioned the authenticity of the sale agreement dated 12.12.2012 on the basis that the stamp paper was not endorsed by the issuing authority and its place of issuance was also not mentioned. The learned trial court dismissed the suit on the basis that the agreement sought to be specifically performed had not been produced in original and the respondents No. 1 and 2/sellers had been unable to establish the title of the suit property and that the document relied upon by the appellant/plaintiff and respondents No. 1 and 2 were not genuine documents.

3. Nobody appeared on behalf of respondents No. 1 to 17 before this Court and consequently after issuance of repeated notices it was directed that a proclamation be issued to procure the attendance of respondents No. 1 to 17 and even after that nobody appeared on behalf of the respondents and consequently, they were proceeded against ex-parte.

4. Learned counsel for the appellant submitted that the Civil Court had made determination of facts in the impugned order without framing issues and affording an opportunity to the appellant to produce evidence in support of the appellant's claim which was a breach of the provisions of Order XIV of CPC. He placed reliance on Fatima Bibi and others v. Muhammad Hanif and others (2015 YLR 789), Pakistan Railways Employees Cooperative Housing Society Ltd. through General Secretary v. Haji Ghulam Haider and 3 others (2018 CLC 45), Quetta Metropolitan Corporation through Administrator v. Abdul Malik and 39 others (2018 YLR Note 276) and Nasir Ali Shah v. Kabir Hussain Shah (2018 YLR 475) to submit that the trial court was under an obligation to frame issues and afford the appellant an opportunity to produce evidence to discharge onus of proof in relation to his claim before passing the judgment and decree in the instant case.

5. Learned counsel for the respondent/CDA stated that as per CDA's record Mian Akbar Ali is the owner of the suit property who was not a party to the suit and is also not a party in this appeal and that the suit property has neither been transferred in the name of respondents No 3 to 17 nor is the CDA aware that respondents No. 3

to 17 are the legal heirs of Mian Akbar Ali or even Mian Akbar Ali is still alive or not.

6. The only question before this Court is whether the learned Civil Court erred in law when it passed the impugned judgment and decree without framing issues and affording the appellant an opportunity to adduce evidence in support of his claim. In view of the provisions of CPC as interpreted in the light of principles of natural justice read together with Article 10A of the Constitution every citizen has the right to due process for determination of his civil rights. Due process mandates that the substantive rights of the parties are to be determined after affording them their procedural rights as provided by law. In the event that the court is to make a determination of fact in relation to a claim before it, the party making the claim has a right to adduce evidence in support of such claim. Even if the matter is proceeded ex-parte, the court is under an obligation to determine the claim in accordance with law which would entail affording the party an opportunity to adduce evidence in relation to issues of fact that determine the matter. Even if the trial court comes to the right conclusion but while coming to such conclusion it denies due process rights to the parties before it, the decision suffers from legal infirmity. In the instant case the learned trial court has given findings of fact against the appellant without framing any issues and affording him an opportunity to adduce evidence in support of his claim.

7. Order XIV of the Code of Civil Procedure, 1908 **("CPC")** does not impose a straight-jacket on the court and does not require

the court to mechanically frame issues in each case. Order XIV states the following:

> *1.-(1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.*
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> *(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.*
>
> *(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.*
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> *(4) Issues are of two kinds :*
> *(a) issues of fact,*
> *(b) issues of law.*
> *(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.*
>
> *(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.*
>
> *2. Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.*
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> *3. The Court may frame the issues from all or any of the following materials-*
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> *(a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties;*

(b) allegations made in the pleadings or in answers to interrogatories delivered in the suit;

(c) the contents of documents produced by the either party.

4. Where the Court is of opinion that the issues cannot be correctly framed without the examination of some person not before the Court or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day, and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process.

5-(1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit,. And all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

6. Where the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter, into an agreement in writing that, upon the finding of the Court in the affirmative or the negative of such issue-

(a) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement;

(b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct; or

(c) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute.

7. Where the Court is satisfied, after making such inquiry as it deems proper –

(a) that the agreement was duly executed by the parties;

(b) that they have a substantial interest in the decision of such question as aforesaid, and

(c) that the same is fit to be tried and decided, it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court; and shall, upon the finding or decision on such issue, pronounce judgement according to the terms of the agreement; and, upon the judgment so pronounced, a decree shall follow.

Further Order XV Rules 1 and 3 of CPC state the following:

1. Parties not at issue. Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment.

3. Parties at issue.__ (1) Where the parties are at issue on some question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit:

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects.

> *(2) Where the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such further argument as the case requires.*

8. In the event that a court comes to the conclusion that the issue in dispute before the court is one of law and can be determined without recording evidence it is not necessarily obliged to frame issues and conduct a full-fledge trial. However, where a court is determining a fact against a party, before doing so, it must afford to such party an opportunity to adduce evidence in support of his claim.

9. In the present case the claim of the appellant has been rejected on the basis that the suit property does not belong to respondents No. 1 and 2 and instead belongs to Mian Akbar Ali and that as none of the respondents can claim title to the suit property, they were devoid of legal character to alienate the same. The court could thus frame the question of title as a preliminary issue and if satisfied on the basis of evidence produced that the respondents did not possess title to the suit property it could render decision on such basis. However, in the event that the learned civil Court came to the conclusion that it needed to decide other questions of fact that would form part of the reasoning of its judgment such as whether respondents No.3 to 17 were legal heirs of the owner of the suit property and had any vested interest in such property which they could dispose of, or whether they entrusted the suit property to respondents No. 1 and 2 through a valid power of attorney, or whether the agreement sought to be specifically performed was a valid one, or whether sale consideration had been

paid by the appellant in lieu thereof and whether the suit was of collusive nature etc., it needed to frame appropriate issues and then allow the parties to lead evidence to discharge the onus placed on them. This the learned civil court has not done and consequently its judgment and decree suffer from material illegality.

10. In view of the above, the impugned judgment and decree is set aside and the matter is remanded back to the learned Civil Court. The learned Civil Court may frame any preliminary issue or detailed issues in its discretion in accordance with law to decide the suit afresh after affording the parties an opportunity to adduce evidence in support of their case. This appeal is **allowed** and the matter is accordingly remanded back to the learned Civil Court.

(BABAR SATTAR)
JUDGE

Saeed.