JUDGMENT-SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ-Petition No. 2665 of 2022

Hamid Nasrullah Ranjha

Versus

The Civil Judge Islamabad-West etc.

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Petitioner By : Mr. Aziz Ahmad Wajahat, Advocate

Respondents By :Ch. Sajid Abdullah Sraa Advocate

Date of Hearing : 09.03.2023:

ARBAB MUHAMMAD TAHIR, J: Listed writ-petition emanates from order dated 11.06.2022, passed by the Civil Judge 1ST Class Islamabad-West, whereby application under section 12(2) CPC ('**the application**') filed by the petitioner namely *Hamid Nasrullah Ranjha,* ('**the petitioner**') was dismissed.

2- Tersely, on 02.03.2021 respondent No.3 namely *Awais Razzaq* ('**the plaintiff'**)filed suit for specific performance of agreement-to-sell dated 15.02.2004 against respondent **No.** 2 *Syed Nazaqat Ali Shah* ('**the defendant**') and respondent No.4(*Secretary, Supreme Court Employees Co-operative Housing Society, Islamabad*) regarding plot measuring 1000 sq. yards, situated in the Supreme Court Employees Co-operative Housing Society (SCECHS), Sector G-17/1, Islamabad ('**the Society**'). In response to notice, none appeared on behalf of respondent No.4, therefore, said respondent was proceeded against ex-parte while the defendant No.1 appeared in person before the Court on 16.03.2021, tendered affidavit, Ex. D/1 and got recorded statement to the effect that he had no objection if the suit of the plaintiff is decreed. In view of said statement, the Trial Court vide its order dated 12.10.2021 decreed the suit in following terms:-

> "In this view of the matter **when defendant admits the claims of plaintiff, no option left but to decree the suit of the plaintiff**, hence, suit of the plaintiff decreed as prayed for, subject to fulfillment of all, codal formalities, all Government dues, Tax etc. of Society defendant No.2. **However, this order has no effect on third person right, if any, in respect of the suit property**. **Plaintiff should deposit relevant court fee, within 30 days, failure of which suit will be considered dismissed.** There is no order as to costs. Decree sheet be prepared accordingly."

3- After passing of the order & decree *ibid*, the petitioner on 10.01.2022 filed the application under Section 12(2) CPC on the grounds of fraud, collusion and misrepresentation i.e. *agreement-to-sell dated 15.11.2004 inter-se respondents 2&3 is a forged document, prepared in back date to frustrate his agreement-to-sell dated 13.04.2006*, that *he is in possession of the original title documents of the plot-Original Provisional Offer of Allotment Order dated 26.01.2004, two receipts dated 03.01.2004 and 24.01.2004, an attested affidavit dated 13.04.2006 and three specific signatures of the defendant-original allottee*, that *at the relevant time, plot could not be transferred due to ban on transfer by the Society* and that *he had already paid entire sale consideration of the plot amounting to Rs. 1,950, 000/-*. Both, the plaintiff and the defendant resisted the application by filing their respective written replies wherein they controverted the allegations by denying the execution of agreement-to- sell dated 13.04.2006 by the defendant with the petitioner. The Trial Court after hearing the parties dismissed the application vide order dated 11.06.2022, being impugned through the instant writ petition.

4- The learned counsel argued that the allegations contained in the application filed by the petitioner explicitly indicate elements of misrepresentation and fraud, allegedly played by the plaintiff and the defendant in collusion with each other to frustrate his valuable right, it was incumbent upon the Trial Court to allow the parties to lead evidence and then to decide the application on merits; that the Trial Court even in

case of consent by the defendant is under obligation to appreciate the authenticity of the claim, set by the plaintiff, in the light of law on the subject but no such exercise was carried out, that the entire proceedings right from the passing of the order and decree till passing of the impugned order are contrary to the documents and the pleadings of the parties and that the impugned order together with order and decree being sketchy, arbitrary and against the law on the subject are liable to set aside. The learned counsel relied upon case laws reported as **2002 SCMR 2003, 1996 SCMR 1524 and 1993 SCMR 662.**

5- On the other hand, learned counsel for the plaintiff and the defendant repelled the above submissions by contending that the allegation of preparing forged agreement-to-sell was without any substance; that the agreement-to-sell inter se the plaintiff and the defendant was prior in time; that the defendant-original allottee specifically denied the execution of agreement-to-sell with the petitioner which is, otherwise, an unregistered document, therefore, there was no justification to record evidence and then to decide the application and that the application was rightly dismissed in these circumstances, therefore, instant petition deserves the same treatment.

6- In order to appreciate the submissions made by the learned counsel for the parties at-bar, the record made available on the instant file and that of the Trial Court has been gone through carefully

7- On 02.03.2021 the plaintiff filed suit for specific performance of **agreement-to-sell dated 15.02.2004** against the defendant and the Society. It was mentioned in the title of the plaint, in its paragraph-01 and in the prayer clause that the plaintiff sought specific performance of agreement-to-sell dated 15.02.2004 while, in fact, the referred agreement is dated **15.11.2004 and not 15.02.2004**. Thus, not only the title of the plaint but its contents and prayer clause were defective and none of the parties, either the plaintiff or the defendant, highlighted this

important defect. It is significant to note that the order and the decree also contain the same title as '**suit for specific performance of agreement-to-sell dated 15.02.2004**' which means that the order and the decree had been passed for specific performance of the agreement dated 15.02.2004 and not for the agreement-to-sell dated 15.11.2004. This aspect reflects that the Trial Court while passing the order and the decree proceeded with the suit in a mechanical manner without going through the crucial documents particularly the agreement-to-sell dated 15.11.2004.

8- Record reveals that after filing of suit by the plaintiff, the defendant opted not to file any contesting written statement instead filed affidavit Ex. D/1 and got recorded consenting statement. In the affidavit Ex. D/1 and in statement of the defendant, there is no mention at all about the agreement-to-sell dated 15.11.2004. The defendant in his statement has not uttered a single sentence about entering into the stated agreement with the plaintiff. This important aspect, too, went unnoticed by the Trial Court while passing the order and the decree.

9- Another important aspect that gleans out of record is that the Trial Court in the impugned order in paragraph-09 observed that the "*Applicant filed subject application on the basis of agreement to sell dated 13.04.2006, however, remained under hibernation till the decree dated 12.10.2021 passed in favour of respondent No.2.*"The petitioner was held guilty of approaching the Court with inordinate delay by overlooking the provision of Article 181 of the Limitation Act, which provides maximum timeframe of three years to challenge the validity of a judgment, decree or order on the plea of fraud, misrepresentation or want of jurisdiction through an application in terms of Section 12(2) CPC. The order & decree was passed on 12.10.2021 while the petitioner filed the application on 10.01.2022 i.e. within three months of passing of the order and decree. The petitioner in the application has raised substantial questions falling within the scope of Section 12(2), CPC, which permit a party to challenge any decision, judgment or decree on the basis of fraud, misrepresentation of facts or want of jurisdiction. On

the contrary, the fact that the plaintiff filed the suit in March, 2021 for specific performance of an agreement that statedly entered into between the plaintiff and the defendant in the year 2004 i.e. after about 17 years, was not taken into consideration.

10- The Trial Court while rejecting the application of the petitioner also observed that "*applicant solely relied upon unregistered agreement to sell.*"The two agreements i.e. one inter-se the plaintiff and the defendant dated 15.11.2004 and the second between the petitioner and the defendant dated 13.04.2006 are un-registered documents but the Trial Court omitted to take into consideration this important aspect and only held the petitioner guilty of relying upon unregistered document.

11- The authenticity of the documents relied upon by the parties particularly the two agreements-to-sell and the allegations of fraud and misrepresentation leveled by the petitioner were the questions that could not be resolved without affording the parties a chance to adduce their respective case/plea in a proper manner. It was also for the reason that while passing the original order and decree in favour of the plaintiff, no effort was made to assess validity and authenticity of the documents, made basis to claim decree for specific performance of the agreement. The suit of the plaintiff was decreed as prayed for without assessing or even discussing the material made basis to seek decree while, on the other hand, the petitioner was penalized for relying upon unregistered document. The course adopted by the Trial Court was thus offensive to principles of natural justice, equity and fair trial envisaged in Article 10-A of the Constitution.

12- The suit inter-se the plaintiff and the defendant had been for seeking decree of specific performance of the agreement-to-sell dated 15.02.2004 (*actually it was agreement-to-sell dated 15.11.2004*). The plaintiff brought the suit after about 17 years of the stated agreement to sell. Under Article 113 of the Limitation Act, 1908 the right to sue accrues within three years if the date is specifically fixed for performance in the

agreement itself and in case no specific date was fixed and time was not of the essence, then the right to sue will accrue from the date of knowledge about refusal by the executant. This important aspect was also not taken into consideration by the Trial Court while passing the order-in-original and the decree. In this respect, reliance is placed upon judgment dated 16.01.2023 passed by the Supreme Court of Pakistan in the case of "*Rao Abdul Rehman (deceased) through legal heirs and others v. Muhammad Afzal (deceased) through legal heirs and others*" (**CP No. 1133-L of 2016**) and "*Khudadad v. Syed Ghazanfar Ali Shah alias S. Inaam Hussain and others*" (**2022 SCMR 933**). Moreover, the exercise of jurisdiction by the Court in terms of Section 23 of the Specific Relief Act for decreeing the suit for specific performance of contract is discretionary in nature in which the Court is not bound to grant such relief, but in tandem the discretion is not to be exercised arbitrarily but should be based on sound legal principles after analyzing and gauging the circumstances. Reliance is placed upon case of ***Rao Abdul Rehman supra.***

13- It is also noticed that after recording statement of the defendant, the Trial Court without putting the case of the plaintiff to judicial scrutiny on the touchstone of the principles on the subject straightaway proceeded to observe that after the statement of the defendant, **it had left with no option but to decree the suit of the plaintiff**. These observations, on the fact of it, are contrary to law on the subject as even in case of conceding statement, it was obligatory for the Court toappreciate the veracity of the claim of the plaintiff particularly when the latter prays for specific performance of an agreement of the year 2004 in the year 2021 i.e. after about seventeen years. The Supreme Court of Pakistan in the case of "*Misbah Khanum v. Kamran Yasin and another*" (**2022 SCMR 1629**) in the matter of dismissal of application under section 12(2) CPC against the consent decree in suit for specific performance of agreement vide judgment dated **26.10.2021** held that *"**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*."

14- Another important aspect of the matter is that the order and decree-in-original was passed without recording of evidence. In such eventuality, it was incumbent upon the Trial Court to allow the petitioner to produce evidence in support of allegation of fraud, collusion and misrepresentation. Reliance is placed upon case of "*Lahore Development Authority v. Arif Manzoor Quireshi" (***2006 SCMR 1530**).In the referred case, the decree was passed without recording evidence of parties. The application under section 12(2) CPC for setting aside such decree on the grounds of fraud, collusion and misrepresentation was dismissed. The dismissal of application summarily by the Trial Court was upheld in revision and by the High Court in constitution petition. The Supreme Court of Pakistan allowed the appeal by observing that the Trial Court ought to have framed issues and record evidence of parties, particularly when decree had also been passed without recording evidence of parties. Reliance is also placed upon case law *Mrs. Anees Haider v S. Amir Haider* (**2008 SCMR 236)**

15- Lastly, the decree was conditional i.e. subject to deposit of relevant court fee within 30 days and the record is silent as to whether the court fee was deposited within the stipulated time period. It was also specifically mentioned therein that **the order shall have no effect on third person right**, therefore, in case of contest by the third person, the order by operation of its own term would become redundant particularly when the petitioner came up with claim of having agreement to sell regarding the same subject matter with allegations of fraud, collusion and misrepresentation and the fact that he retains original title documents and that earlier the suit was not decided on merits after recording the evidence but was decreed on the basis of statement of the defendant. Proper course, in the circumstances, had been to allow the petitioner to contest the suit and to adduce his version. The suit was decreed as prayed for without appreciating the fact that when the

defendant admits claim of the plaintiff without any contest, then what impediment had been in the way of the plaintiff that promoted him to bring the matter before the Court for seeking decree of specific performance of an agreement that statedly entered into between the parties about 17 years ago before filing of the suit.

16- Having examined the case from every angle it is held that the Trial Court while passing the order& decree and the impugned order proceeded with the case in a mechanical manner without taking into consideration the following important aspects:-

i- Whether Provisional Offer of Allotment Order retains status of a title document;

ii- Whether an agreement to sell can be made on the basis of Provisional Offer of Allotment Order.

iii- Theconsequence of the defective plaint, affidavit Ex.D/1 and the statement of the defendant which did not contain the details of the stated agreement;

iv- The worth of the unregistered agreement to sell inter-se the plaintiff and the defendant dated 15.11.2004;

v- The allegations of fraud and misrepresentation in presence of defective plaint, affidavit, statement of the plaintiff and the fact of delay in approaching the court by the plaintiff for seeking decree of specific performance of an agreement could not be resolved without affording the parties a chance to adduce their respective case/plea in a proper manner;

vi- The claim in suit for specific performance of agreement to sell is to be assessed on the touchstone of Article 113 of the Limitation Act, 1908;

vii- The period of limitation for filing application under section 12(2) CPC is to be assessed in terms of Article 181 of the Limitation Act, 1908;

viii- The exercise of jurisdiction by the Court in terms of Section 23 of the Specific Relief Act for decreeing the suit for specific performance of contract is discretionary in nature and the discretion is not to be exercised arbitrarily but should be based on sound legal principles after analyzing and gauging the circumstances;

ix- 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;

x- In case of contest by the third person, the order & decree by operation of its own term would become redundant particularly when there is allegation of fraud and misrepresentation.

17- In view of above,the impugned order and the order and decree-in-original are not legally sustainable. Consequently, the instant writ petition is **allowed,** impugned order dated 11.06.2022 is set-aside, in result whereof, the application of the petitioner is allowed and the order & decree dated 12.10.2021 are set aside. The main suit shall be deemed pending at the stage where it had been prior to passing of the order & decree and the petitioner is afforded an opportunity to join the proceedings in suit in terms of Order-I, Rule 10(2) CPC, being necessary and proper party.

(ARBAB MUHAMMAD TAHIR)
JUDGE

Announced in an open Court on ___03.2023.

JUDGE

A.R.Ansari

APPROVED FOR REPORTING