

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

CFA No. 96/2006

Reserved On: 9th of November, 2023
Pronounced On: 24th of November, 2023.

Mohammad Yousuf Magray, Age: 82 Years
S/O Gh. Mohammad Magray
R/O Bazar Batmaloo, Srinagar.

... Appellant(s)

Through: -

Mr Manzoor Ahmad Dar, Advocate.

V/s

1. **Zaffar Iqbal Khan**
S/O Ab. Rehman Khan
R/O Bazar Batmaloo, Srinagar.

... Contesting Respondent

2. Farida Bano
W/O Abdul Rehman Parray
R/O Bazar Batmaloo, Srinagar.

... Proforma Respondent

Through: -

Mr M. Sultan, Advocate for R-1.

Clubbed with:

**CONC No. 120/2014 in
CIA No. 38/2014**

Mohammad Yousuf Magrey, Age: 82 Years
S/O Ghulam Mohammad Magrey
R/O Bazar Batmaloo, Srinagar.

... Appellant(s)

Through: -

Mr Manzoor Ahmad Dar, Advocate.

V/s

1. **Zaffar Iqbal Khan**
S/O Ab. Rehman Khan
2. Farida Bano
W/O Ab. Rehman Parray

Both Residents of Bazar Batmaloo, Srinagar.

... Respondents

Through: -

Mr M. Sultan, Advocate for R-1.

CORAM:**HON'BLE MR JUSTICE M. A. CHOWDHARY, JUDGE****(JUDGMENT)**

01. The Appellant has directed this appeal against the Judgment and preliminary decree dated 16th of November, 2006 passed by the Court of learned 1st Additional District Judge, Srinagar in Civil Original Suit No. 71/N titled '**Zaffar Iqbal Khan v. Farida Bano & Anr.**', whereby the Suit filed by the Plaintiff/ Respondent No.1 against the Appellant and Respondent No.2 was decreed, thereby holding the Plaintiff/ Respondent No.1 and the Defendant No.1/ Respondent No.2 entitled to half share each out of the land measuring 1569 sqfts under Survey Nos. 392 and 293 situate at Village Batamaloo, Srinagar as well as the house property raised thereon and the Plaintiff/ Respondent No.1 herein was held entitled to the half portion of the Suit property. Further, the receipt executed by the Plaintiff/ Respondent No.1 herein with regard to an agreement to sell with respect to property in question in favour of the Defendant No.2/ Appellant herein was declared as fraudulent and illegal, not binding upon him with a further direction to partition the Suit property on spot by a Court appointed Commissioner, namely, Mr Farhat Zia Soharwardy, by metes and bounds before 29th of November, 2006.

02. The factual matrix of the case is that the Plaintiff-Zaffar Iqbal Khan/ Respondent No.1 herein, by way of filing a Suit for partition by metes and bounds and declaration, sought to declare the receipt executed by the Plaintiff as fraudulent and not binding on him, asserting therein that the Suit property which was described in Paragraph No. 01 of the Plaint had devolved upon the Plaintiff, namely, Zaffar Iqbal Khan and Defendant No.1-Fareeda Bano in equal shares by virtue of a gift deed dated 9th of September, 1971, registered on 10th of September, 1971 by the learned Sub Registrar, Srinagar; that, in addition to the property described in Paragraph No. 01, the land underneath and appurtenant thereto, the structures

mentioned in Paragraph No.01, measuring 4404 sqfts in total, also constituted the part of the gift deed; that an area of 1569 sqfts of land was retained by the donee at the time of gift of the aforesaid properties; the Plaintiff in his Suit claimed that he is entitled to two shares out of the land measuring 1569 sqfts as the parties are governed by the Muslim Personal Law in the matter of succession and inheritance, asserting that the Plaintiff and the Defendant No.1 were in the relationship of brother and sister and, that after the death of their mother, the Defendant No.1 declined to partition the property and that the husband of Defendant No.1, in league with the Defendant No.2, namely, Mohammad Yousuf Magrey, entered into a secret transaction and persuaded the Plaintiff to sell the property at a throw-away price and obtained his signatures on a receipt purporting to have been executed in pursuance of the sale of the house which is fraudulent and illegal, due to the secret manipulation and design of Defendant No.1 with Defendant No.2 and, therefore, the Suit was filed.

03. The Defendants resisted the Suit of the Plaintiff on the ground that the Suit is liable to be dismissed for want of correct valuation and required Court fee and also that the Suit for declaration cannot be granted by the Court. The Defendants denied the relationship of brother and sister between the Plaintiff and Defendant No.1 and also contended that since the Plaintiff was not related to the donor by blood, as such, the Plaintiff had no title over the land measuring 1569 sqfts mentioned in Paragraph No.02 of the Plaint, which exclusively belongs to the Defendant No.1. The Defendants claimed that the Plaintiff and the Defendant No.1 had executed an agreement to sell the house and the land underneath and appurtenant thereto situated at Batamaloo to the Defendant No.2 vide agreement of sale dated 7th of October, 2000, signed by the Defendant No.1, Plaintiff and the Defendant No.2 in presence of respectable witnesses, amongst them one being Mr Nazir Ahmad Khan, Advocate; that the Defendant No.2 had paid Rs.20,000/- to the Plaintiff and Defendant No.1. It was further pleaded that the Defendant No.1, being in exclusive ownership of the house of the Suit property, the possession thereof had been delivered by the Defendant No.1 in favour of the Defendant No.2 after the receipt of the consideration

amount within the time stipulated in the agreement of sale; that the Plaintiff was also offered the consideration amount as agreed between the parties to the agreement of sale, but he refused the same. The Defendants also raised an objection with regard to the maintainability of the Suit in view of the agreement for sale and delivery of possession by the Defendant No.1 in favour of Defendant No.2 in relation to half of the Suit property in pursuance of the agreement for sale dated 7th of October, 2000.

04. The learned trial Court, vide Order dated 13th of August, 2002, framed the following issues for the trial of the case:

1. Whether the Plaintiff and Defendants are related as brother and sister and by virtue of a gift deed executed on 9.9.1971 registered on 10.9.1971 by Sub-Registrar Srinagar they have obtained half share each out of the properties specified in para I, II and III of the Plaint? OPP;
2. Whether the land underneath and appurtenant thereto the structures specified in para I, II and III of the plaint measuring 4404 sqfts constitutes part of the gift property? OPP;
3. Whether an area of 1596 sqfts of land covered under Survey No. 392 and 293 situated at Batamaloo, Srinagar had been retained by the donee at the time of gift in question and the plaintiff is entitled to two shares out of this property? OPP;
4. Whether the husband of defendant No.1 in league with defendant No.2 have fraudulently and illegally obtained signature of plaintiff on its receipt purporting to be executed in pursuance of sale of suit house? OPP;
5. Whether the entire suit property described in the plaint has been sold by the plaintiff and defendant No.1 to defendant No.2 vide agreement of sale dated 7.10.2001? OPD;
6. Whether the defendant No.1 has delivered part possession of her share to defendant No.2, but later on refused to receive balance consideration, while as defendant No.2 is prepared to execute the sale deed? OPD;
7. Whether said property having been sold cannot be partitioned? OPD; and
8. Relief?

05. The Plaintiff, Zaffar Iqbal Khan, besides himself, examined Mohammad Arif Khan, Ghulam Mohammad Khan and Farooq Ahmad

Khan as his witnesses, whereas the Defendants-Fareeda Bano and Mohammad Yousuf Magray, besides themselves, had examined Abdul Rehman Parray as their witness.

06. The learned Trial Court, after appreciating the evidence brought on record, decided all the issues in favour of the Plaintiff and against the Defendants, as such, the Suit was decreed and the receipt executed by the Plaintiff was declared as fraudulent and not binding upon the Plaintiff. The Plaintiff and Defendant No.1 were held entitled to half share each out of the land measuring 1569 sqfts under Survey Nos. 392 and 293 situated at village Batamaloo, Srinagar and, by way of a preliminary decree, the property was ordered to be partitioned by a Court appointed Commissioner, by or before 29th of November, 2006.

07. The Defendant-Fareeda Bano did not challenge the Judgment and decree passed by the learned Trial Court against the Defendants, however, the co-Defendant/ Mohammad Yousuf Magray, in whose favour the agreement to sell had been allegedly executed, has challenged the Judgment and preliminary decree passed by the learned Trial Court in this Civil First Appeal, *inter alia*, on the grounds that the learned trial Court has based its findings on illegal assumptions and surmises while appreciating the evidence on record; that the learned Trial Court has not adverted to the material portion of the evidence, especially the statement of Defendant No.1-Fareeda Bano/ proforma Respondent in the present appeal, who has, in unequivocal terms, accepted the execution of agreement *vis-à-vis* sale of the property and has also admitted that the amount of Rs.10,000/- had been received by her in *lieu* of sale of the property in question and also admitted execution of receipt for the said amount, which has been ignored by the learned trial Court; that the learned Trial Court lacked pecuniary jurisdiction, as such, the impugned Judgment and preliminary decree has inherent defects; that the learned Trial Court has given its own appreciation of facts and has not given any reason for discarding the evidence of the Appellant/ Defendant; that there have been glaring defects/ errors committed by the learned trial Court, so much so that the preliminary decree has not been framed, which was required to be framed once the

Judgment is passed by the Court amounted to a decree and that the Trial Court seems to be under a misconception of law that no decree was required to be framed, as the application moved by the Appellant to frame the decree had also been rejected; that the learned Trial Court had assumed the powers of an expert, while observing about the signatures marked on the agreement and receipt, when the Trial Court was under a legal duty to have called the scribe and attesting/ marginal witnesses, while reaching the conclusion in order to do substantial justice, as such, the learned trial Court has, in no way, adopted the procedure and has also not given ample opportunity to the Appellant/ Defendant No.2 to prove his case by examining the scribe and the attesting witnesses; that the learned trial Court has not given issue-wise findings, while passing the impugned Judgment and preliminary decree.

08. It has been further pleaded, while assailing the impugned Judgment and preliminary decree, that the Appellant was also been prejudiced since the Suit of the Appellant was contested by Mr M. H. Lone, Advocate, who had been ailing for some time and, as such, the Appellant, being ignorant of the niceties of law, could not lead the evidence, i.e., scribe of the agreement and other attesting witnesses; that the findings of the learned Trial Court, as is apparent from the conclusion drawn that the agreement of sale and receipt had not been formally proved, but the evidence adduced by the Appellant/ Defendant, was entirely insufficient; that the learned trial Court has not appreciated the Written Statement filed by the Appellant, where he had raised the issue of Court fee which was ignored by the Court; that the learned trial Court had also misdirected itself by not framing the issue with regard to gift deed dated 9th of September, 1971 and whether the parties were governed by Muslim Personal Law in the matter of succession and inheritance in contravention of Order XIV Rule V of the Code of Civil Procedure; and that the Appellant, not being sure with regard to the maintainability of the appeal, had also craved for treating the same as revision in view of the glaring illegality committed by the Trial Court, as the Appellant had been deprived of his statutory right of appeal in absence of failure to frame a preliminary decree.

09. Mr Manzoor Ahmad Dar, the learned Counsel appearing for the Appellant, while reiterating the pleadings in the memorandum of appeal, argued that the Respondents herein, who are brother and sister, had entered into an agreement to sell with the Appellant herein on 7th of October, 2000 against a consideration amount of Rs.10.40 lacs for the sale of two storeyed house and the land underneath and appurtenant thereto, comprising of Survey Nos. 392 and 293 situate at Batamaloo, Srinagar and that, at the time of the execution of the agreement to sell, the amount of Rs.20,000/- was received in equal shares by the Respondents as an advance amount, which was acknowledged by them in the agreement to sell under their signatures in presence of witnesses and later the Appellant paid an amount of Rs.3.90 lacs to Respondent-Farida Bano and Rs.2.00 lacs to Respondent-Zaffar Iqbal Khan, however, the Respondent-Zaffar Iqbal Khan, on 12th of February, 2001, filed a Suit for partition and injunction with regard to the property in question and declaration to the nullification of the agreement allegedly having been executed on the basis of a fraud. He further argued that the Appellant and the Respondent No.2 opposed the Suit filed by the Plaintiff/ Respondent No.1 and the Respondent/Defendant-Farida Bano admitted the contents of the agreement in the Written Statement filed before the trial Court. After leading of evidence by both the sides on the issues framed by the learned Trial Court, the impugned Judgment and preliminary decree was passed granting the Suit for partition between the Respondents and also declaring the agreement to sell/ receipt with regard to the sale of the Suit property between the Appellant and the Respondents on 16th of November, 2006.

10. Mr Dar has also argued that the Appellant had filed the Suit for specific performance of contract, which remained pending till the year 2011 and, based on the statement of the learned Counsel for the Defendants that due to the pendency of this appeal before this Court, the trial Court had consigned the Suit to records till disposal of the appeal. It was alleged that on 14th of March, 2014, the nature of the property was changed and the Appellant moved an application for appointment of a Commissioner, but by that time the Trial Court had also passed the final decree, which has also

been challenged by the Appellant belatedly by filing CIA No. 38/2014, along with an application for condonation of delay which has been clubbed with this appeal. Learned Counsel for the Appellant has also argued that the Trial Court had decided issue Nos. 1, 2 and 3 holding that the Respondents are entitled to hold the Suit property in equal shares and the Trial Court, without the requisite pleadings, had devised many things in the Judgment, inasmuch as, against no pleadings it has been observed in the Judgment that the signatures of the Plaintiff had been obtained on a blank paper and that the agreement had been secretly executed, whereas the Plaintiff had, in his statement, admitted that he had acknowledged the receipt as per the agreement to sell in presence of witnesses.

11. Learned Counsel for the Appellant further argued that Order VI Rule IV of the Code of Civil Procedure dealing with the pleadings envisages that the material facts are to be pleaded to prove the alleged fraud, which the Plaintiff had not pleaded in the Plaint, therefore, the Plaintiff was not entitled to the decree based on the alleged pleadings as he had failed to plead specific details, as are required to be pleaded in this behalf. He argued that the impugned Judgment is unsustainable in view of the fact that the Plaintiff had made only bald assertions in two lines of the Plaint and there was complete mismatch between the Plaintiff's Plaint, preliminary statement and his examination during trial and the admission made by the Plaintiff in his statement with regard to agreement was sufficient for the trial Court for rejection of the Suit. Moreover, the other author of the agreement to sell, i.e., Defendant No.1-Farida, had admitted with regard to execution of the agreement, as such, there was absolutely no scope for the passing of the impugned Judgment and decree. The learned Counsel has also argued that the learned Trial Court has not said anything about the agreement so as to accordingly declare the receipt as fraudulent, therefore, the Suit could not have been decreed. Mr Dar has finally argued that since the alleged fraud had not been specifically pleaded, therefore, the Plaintiff could not improve this fact in his Statement in absence of the pleadings, particularly when he had admitted the execution of the

agreement and acknowledged his signatures on the receipt and prayed that the impugned Judgment and decree be set aside.

12. Mr M. Sultan, the learned Counsel appearing for the contesting Respondent (Respondent No.1), submitted that the appeal has been filed by the Appellant against a preliminary decree, whereas he was not sure with regard to the maintainability of the appeal as he had prayed in his memorandum of appeal that the appeal can be treated as revision as well. He has also argued that the findings recorded by the Trial Court have not been challenged by the Appellant. Pointing towards the alleged agreement to sell, he has argued that the receipt (EXPW/1) was just a receipt and cannot be said to be an agreement to sell. He has further argued that the agreement to sell does not create any interest in the land nor does it amount to sale under Section 54 of the Code of Civil Procedure. It is further argued that the finding returned on Issue No.4 was *inter se* the Respondents and, as such, the Appellant, as Defendant, cannot be aggrieved of this finding recorded on issue No.4 as he had challenged the finding *inter se* other parties with regard to the partition of the property, etc. The learned Counsel further argued that the proforma Respondent-Farida Bano, who happens to be the sister of the contesting Respondent-Zaffar Iqbal Khan, had not challenged either the preliminary or the final decree granted in the Suit, therefore, the Appellant herein had no occasion to challenge the impugned Judgment and preliminary decree on behalf of the proforma Respondent.

13. Mr Sultan has further argued that, though the Suit had been valued for the purposes of jurisdiction at Rs.60,000/-, whereas the Appellant has valued the appeal at Rs.100/- only to avoid the payment of Court fee, which is also fatal for maintaining the appeal; that the Appellant had falsely pleaded that the preliminary decree had not been framed in the Suit as the facts reveal that the preliminary decree had been framed on the date of the impugned Judgment itself; that though the Appellant's Counsel has vehemently argued that the fraud has not been pleaded in the Plaint, but the statement of DW-Abdul Rehman Parray, husband of Defendant No.1, was sufficient enough to prove the fact that there was some fraud while drafting the agreement as he had stated that the agreement was drafted in a

hush-hush manner; that the averments with regard to fraud pleaded have been sufficiently proved by the Plaintiff which gets support from the statement of DW-Abdul Rehman Parray, husband of Defendant No.1, who was the man behind the mischief of executing the agreement to sell without taking into confidence the Respondent No.1, who was a co-owner of the property, along with Farida Bano W/O said Abdul Rehman Parray in equal shares; that PW-Mohammad Arif Khan had also stated that fraud was played with the Plaintiff/ Respondent No.1.

14. He further argued that there was also evidence with regard to sale of three kitchens in the house which was undivided between the parties and had been alleged to have been sold for an amount of Rs.80,000/- which was not divulged to the Plaintiff-Respondent at the time of execution of the impugned document in the Suit. Finally, it was prayed that the impugned Judgment and decree do not suffer from any illegality and prayed that the appeal, being frivolous, be dismissed.

15. The learned trial Court took up issue Nos. 1 and 2, being inter-linked, for return of findings together on both these issues. The issue No.1 related to the fact as to whether the Plaintiff and Defendant No.1 are related as brother and sister by virtue of a gift deed registered on 10th of September, 1971 before the learned Sub Registrar, Srinagar, as such, they had obtained half share each of the property specified in the Plaint, while as, issue No.2 related to the fact as to whether the land underneath and appurtenant to the house, along with the structures, measuring 4404 sqfts, constituted part of the gift property. The Plaintiff-Zaffar Iqbal Khan and his witnesses-Mohammad Arif Khan and Farooq Ahmad, with regard to the aforesaid issues, had deposed that the Suit property consisted of one house, three kitchens, compound and bathroom and was held by two shareholders viz. the Plaintiff and Defendant No.1; that the Plaintiff-Zaffar Iqbal Khan was the adopted son of donee, late Fazal Bibi, mother of Defendant-Farida Bano and that the donee had gifted away half of the house, kitchen and other Suit property to the Plaintiff; that the ground floor of the house is being held by Defendant-Farida, whereas the first floor of the house is being held by the Plaintiff, the staircase and bathrooms being used by them jointly. It has also

come on record that the Plaintiff and Defendant No.1 are related as cousins. The Defendant-Farida Bano deposed that she has raised the Plaintiff after his birth and that she and the Plaintiff have half share in the Suit property. The husband of the Defendant-Farida Bano, namely, DW-Abdul Rehman Parray also deposed that the Plaintiff and Defendant No.1 are the equal shareholders in the Suit property. The Defendant No.2-Mohammad Yousuf Magray (Appellant herein) also stated that the Suit property was in joint possession of the Plaintiff and the Defendant No.1 and is shared by them equally.

16. The learned Trial Court, therefore, based on the statements of the parties and their respective witnesses, reached to a conclusion that the whole of the Suit property was jointly held having equal shares by the Plaintiff-Zaffar Iqbal Khan and Defendant-Farida Bano, having been inherited from late Fazal Bibi based on inheritance and the gift. Both these issues were, thus, decided in favour of the Plaintiff. The learned trial Court does not seem to have committed any error by appreciating the evidence with regard to these two issues, wherein the parties themselves admitted in their statements that the Suit property, originally owned by one Fazal Bibi, had been devolved upon the Plaintiff-Zaffar Iqbal Khan and Defendant No.1-Farida Bano on the strength of adoption and gift in favour of the Plaintiff and Defendant-Farida Bano, being daughter of the said person, in equal shares.

17. The issue No.3 was with regard to an area of land measuring 1596 sqfts covered under Survey Nos. 392 and 293, which had been retained by the donee, Fazal Bibi, at the time of gift in question and whether the Plaintiff is entitled to two shares, out of this property. The learned trial Court came to the conclusion that the Plaintiff and Defendant No.1 are entitled to half share each of this land for the reason that, admittedly, Mst. Fazal Bibi, the adopted mother of the Plaintiff and the maternal grandmother of Defendant No.1, had left behind this land adjacent to the property specified as house and the land, underneath and appurtenant thereto, which devolved upon the Plaintiff and Defendant No.1. Although, the Defendant-Farida Bano had denied in the Written Statement that the

Plaintiff is her brother, pleading that she had no blood relations with the Plaintiff, but when she crossed the witness box, as her own witness, the Defendant-Farida Bano admitted in her statement before the Court that the Plaintiff and she inherited half share each, out of the properties left by the donee. The Defendant-Mst Farida Bano, having not disputed the entitlement of the Plaintiff with regard to his share in the land in question, had admitted that the Plaintiff had half share in the third kitchen over the Suit land which was retained by the donee at the time of the gift executed in the year 1971. The Defendant-Farida Bano, having not supported the preliminary objection raised in the Written Statement, had not, thus, supported her case. It was also observed that the Plaintiff had claimed two shares in this land, but during the arguments, Mr Sultan, the learned Counsel for the Plaintiff, had conceded that the Plaintiff and the Defendant No.1 were entitled to half of the said land each. The learned Trial Court, in view of the admission made by both the parties, i.e., Plaintiff and Defendant No.1, had rightly decided this issue holding that both these parties are entitled to half of the share in this part of the Suit property as well.

18. In the considered opinion of this Court, the learned Trial Court, while deciding issue Nos. 1 to 3, has correctly appreciated the facts in question holding that the Suit property, half of which had been donated by the erstwhile owner in favour of the Plaintiff and also that the property which was initially retained by her and after her death, had devolved upon the Plaintiff and Defendant, having been admitted by both these parties. There, thus, seems to be no illegality or perversity in the findings returned by the learned Trial Court on these issue Nos. 1 to 3.

19. The issue Nos. 4 and 5, also being inter-linked, had been taken up together by the learned trial Court for adjudication. The issue No.4 related to the fact as to whether the husband of Defendant No.1 had, in league with the Defendant No.2, fraudulently and illegally obtained the signatures of the Plaintiff on a receipt purporting to be executed in pursuance of the sale of the Suit house, whereas the issue No.5 was related with the fact whether the entire Suit property described in the Plaint had been sold by the Plaintiff and Defendant No.1 to Defendant No.2 vide

agreement of sale dated 7th of October, 2001. The onus to prove issue No.4 was placed on the Plaintiff, whereas the onus to prove issue No.5 was placed on the Defendants. To me, these issues seem to be the core issues with regard to the controversy involved in the Suit as the Defendant No.2- Mohammad Yousuf Magray has challenged the impugned Judgment and decree, but had claimed to have entered into an agreement to sell with regard to the Suit property between other parties, i.e., the Plaintiff and Defendant No.1.

20. The Plaintiff-Zaffar Iqbal Khan had deposed that the Defendant No.1 tried to sell away the Suit house in favour of the Defendant No.2; that he was also called and his signatures were obtained on a plain paper and that he was given an amount of Rs.10,000/- and it is thereafter that he came to know about the fraud; that the deal with regard to the third kitchen of the Suit property, in which he had his share as well, had been fixed at Rs.80,000/-; that he was quoted one consideration price and the Defendant No.1 was quoted some other price and that the deal had been fixed by the Defendants between themselves; that in view of the dispute between the Plaintiff and the Defendant No.1, the Defendants tried to dispossess him, however, with the intervention of the locals, his possession was saved; that a fraud was committed by the Defendants upon him, who tried to deprive him from his share in the Suit property, especially in the third kitchen described in the Plaint; that the Defendants negotiated one price of the Suit property between themselves and another price was quoted to him, in order to defraud him. PW-Mohammad Arif Khan stated that the husband of the Defendant No.1 tried to fix up the deal with the Defendant No.2 in order to deprive the Plaintiff from his share in one kitchen and the said deal was concealed from the Plaintiff, however, when he came to know about the said deal, the Plaintiff did not agree to the said deal and the sale fixed by the husband of the Defendant No.1. PW-Ghulam Mohammad Khan deposed that the Suit property was unpartitioned and denied having any knowledge with regard to the agreement in question and that he had advised the parties to sell the Suit property only after the partition of the same.

21. Defendant-Mohammad Yousuf Magray, who is Appellant before this Court, deposed that the Plaintiff and Defendant No.1 executed a sale agreement with him, with regard to one residential house, three kitchens and the land underneath and appurtenant thereto for an amount of Rs.10.40 lacs and that, at the time of execution of the sale agreement, he paid Rs.10,000/- each to the Plaintiff and Defendant No.1 as earnest money in presence of Mr Nazir Ahmad Khan, Advocate and Abdul Rehman Parray, husband of Defendant No.1, besides other 2/4 persons. He also deposed that Abdul Rehman Parray, who happens to be the husband of Defendant No.1, had read the document-agreement to sell (EXPW/1) and that the parties had signed the same and admitted the contents thereof. He also deposed that, after the execution of the said document, the Defendant No.1 and Plaintiff had handed over the possession of one kitchen to him in which he stored some tin sheets and wood; that he had paid an amount of Rs.3,90,500/- to the Defendant No.1 and obtained a receipt for the same. He had also given a cheque for an amount of Rs.2.00 lacs to the Plaintiff, but he refused to receive the same. He, however, admitted that there was no mention of the delivery of possession with regard to one kitchen in the aforesaid document. He has also stated that how much amount was to be paid to the Plaintiff has not been mentioned in the agreement to sell (EXPW/1). He also admitted that the Plaintiff and Defendant No.1 have equal shares in the Suit property.

22. Defendant-Farida Bano deposed that the Plaintiff and she had settled with the Defendant No.2 that they will dispose of the Suit property in his favour for an amount of Rs.10.00 lacs and that they had executed an agreement in this behalf in presence of some respectable persons of the locality and both of them had signed the said agreement in presence of some local people, however, thereafter, the Plaintiff refused to sell the property. She, however, denied as to how much amount she had received from the Defendant No.2, as per the agreement among them; that she had received an amount of Rs.10,000/- from the Defendant No.2, but did not remember as to how much money was received by the Plaintiff from the Defendant No.2. She also deposed that she is bound to sell her share of the

said property in favour of the Defendant No.2, after the Suit property is partitioned. She further deposed that with regard to the receipt of consideration amount, her husband must be in know of the said fact and that she received only Rs.10,000/- from the Defendant No.2 and executed a receipt for the said amount after signing the same. She also deposed that they had not asked the Plaintiff to think-over the said deal and then decide as to whether he would be ready to execute the agreement of sale, but the agreement was finalized then and there with the Defendant No.2. She also deposed that she had not delivered the possession of her share in favour of the Defendant No.2.

23. The Defendants had also examined Abdul Rehman Parray as their witness, who happens to be the husband of Defendant No.1. He has stated that the Plaintiff and Defendant No.1 owned and possessed the Suit property in equal shares and that the Suit property consisted of one residential house, two kitchens, land underneath and appurtenant thereto, which had been partitioned some 20 years back between the Plaintiff and the Defendant No.1. The ground floor of the house had fallen in the share of Defendant No.1, whereas the first floor in the share of the Plaintiff with one kitchen also in the share of each of them; that the parties were inclined to dispose of the Suit property and then they decided to sell the same to Defendant No.2 for an amount of Rs.10.40 lacs; that the Defendant No.2 paid Rs.10,000/- to each of the Plaintiff and the Defendant No.1 and the document (EXPW/1) was executed by them and he had also attested the same as a witness. He admitted the contents of the agreement to sell. The Plaintiff had not been paid any of the amount, except Rs.10,000/- paid in advance, whereas the Defendant No.1 had received Rs.4.00 lacs out of her share from the Defendant No.2. The property was joint in the revenue records. Interestingly, he has deposed that the agreement to sell was prepared on spot in a haste as the Plaintiff and Defendant, who are brother and sister, would change their mind off and on with regard to the sale of the Suit property and that he was negotiating the said deal of the sale between the parties. He did not remember how much consideration amount was

quoted initially by the Defendant No.2. He had been negotiating the deal among the Defendants.

24. From the aforesaid statements of the witnesses examined with regard to both these issues, particularly of the Defendant No.2/ Appellant herein and DW-Abdul Rehman Parray/ the husband of Defendant No.1, it is crystal clear that the Plaintiff in the case before the learned trial Court had been taken for a ride by the Defendants, particularly with the intervention of DW-Abdul Rehman Parray, husband of Defendant-Farida Bano, who had played a pivotal role in striking the so-called deal with regard to the sale of the Suit property in favour of the Appellant herein. It is sufficiently apparent from his statement that the Plaintiff and Defendant No.1, owners of the property in question, were reluctant with regard to the sale of the property and that he had prepared an agreement to sell in favour of Defendant No.2/ Appellant herein in a hush-hush manner and obtained the signatures thereon of both the owners. His statement strengthens the contention of the Plaintiff that he was not given time to think over the matter and his signatures were obtained in a haste, without disclosing him the actual contours of the deal. He has also stated that the total consideration amount was not recorded in the agreement to sell and, therefore, this agreement is found to be shrouded in mystery. An owner of a property cannot be expected to be kept so aloof, while striking a deal with regard to sale of his property.

25. The learned trial Court, on the basis of the statements of the witnesses examined on both sides, particularly in the face of statement of DW-Abdul Rehman Parray, husband of Defendant-Farida Bano, one of the owners of the Suit property and the statement of the Defendant-Mohammad Yousuf Magray, Appellant herein, in whose favour the agreement was alleged to have been executed, that the details with regard to sale agreement had neither been disclosed in the agreement nor to the Plaintiff-Zaffar Iqbal Khan, has, thus, rightly recorded the findings on these issues holding its satisfaction that the agreement to sell (EXPW/1) was the outcome of the manipulation on the part of Defendant No.2 and husband of Defendant No.1, inasmuch, as even the Defendant No.1 was not in know of the total

sale consideration of the Suit property and the agreement having been prepared in haste without any site plan and without apportioning the Suit property between the owners before acting upon the said agreement.

26. The contention of DW-Abdul Rehman Parray that the Plaintiff and Defendant No.1 would off and on refuse to sell the Suit property lends credence to the stand of the Plaintiff that his signatures were obtained on a blank paper, which was, thereafter, converted into an agreement to sell at his back, fraudulently by the husband of the Defendant No.1 and that it has, all along, been the husband of the Defendant No.1 and the Defendant No.2 who have been in league with each other in order to fix the sale of the Suit property belonging to the Plaintiff and Defendant No.1, without any knowledge thereof to the real owners of the property. The agreement dated 7th of October, 2000, having been established to have been the outcome of a shady deal between the Defendant No.2 and the husband of Defendant No.1, thus, was rightly held to be not a *bonafide* and legal one and an outcome of the manipulation of the Appellant/ Defendant No.2, with the husband of Defendant No.1.

27. The Defendants had not examined Mr Nazir Ahmad Khan, Advocate, who was also shown to have been present and attested the agreement to sell. There is also a contradiction between the statements of the Defendant-Farida Bano and Defendant-Mohammad Yousuf Magray/ Appellant herein with regard to handing over of the possession of the Suit property in favour of Defendant No.1, as the Defendant-Farida Bano stated that the possession was never handed over to the Defendant No.2, whereas the Defendant No.2 claims that possession had been handed over to him of one portion of the property, i.e., one kitchen, where he had dumped some tin sheets and wood. The learned Trial Court has rightly come to the conclusion that the Defendant No.2 and husband of Defendant No.1 were two active actors to manipulate the so-called agreement to sell (EXPW/1).

28. The issue No.6 is with regard to the fact that whether the Defendant No.1 had delivered possession of her share to the Defendant No.2, but later on refused to receive the balance consideration, while as the

Defendant No.2 is prepared to execute the sale deed. The learned trial Court, on the basis of the evidence led by the parties, observed that the Defendant No.2, though claimed that the Defendant No.1 had refused to receive the balance consideration amount, is not supported by any evidence on the file, ocular or documentary, instead the Defendant No.1 has stated before the Court that she is committed to sell her share of the Suit property in favour of Defendant No.2 and that she could do it only after partition of the Suit property. The learned trial Court has, thus, rightly decided this issue as well, which does not call for any interference by this Court.

29. The issue No.7, which pertained to the fact as to whether the Suit property cannot be partitioned, was held to have become redundant in view of the findings returned on all other issues.

30. The Appellant had valued the appeal for jurisdiction at Rs.100/-, as against Rs.60,000/- in the Suit. Therefore, the appeal, on this count, also fails. The Appellant had also filed a Suit for Specific Performance, when he could not succeed in the Suit wherein the impugned Judgment was passed. This also suggests that the Appellant was reconciled to the findings returned in the impugned Judgment. The contention of the learned Counsel for the Appellant that the material facts, so as to constitute fraud or misrepresentation, had not been pleaded is also incorrect as there are sufficient pleadings in the Plaint in Paragraph Nos. 5 and 6, wherein it has been pleaded that he was persuaded to sell the property at a throw-away price and his signatures were obtained on a receipt purporting to have been executed in pursuance of sale of the house, which was fraudulent and illegal and in a secret manipulation. The aforesaid pleadings are requisite in terms of Order VI Rule IV of the Code of Civil Procedure with regard to pleadings and the character of evidence compatible to the pleadings was also present as were required in terms of the law laid down by the Apex Court in Judgments reported as **AIR 1968 SC 1083**, **AIR 1976 SC 163**, **AIR 1976 SC 712** and **(2004) 8 SCC 588**.

31. In view of the preceding analysis, I do not find any illegality or perversity in the impugned Judgment and decree passed by the learned trial

Court, perfectly in accordance with the law. Accordingly, the instant appeal fails and is, therefore, **dismissed**, along with the connected CM(s). Interim direction(s), if any subsisting as on date, shall stand vacated.

32. No order as to costs.

CONC No. 120/2014 c/w CIA No.38/2014:

33. This is an application filed on behalf of the Applicant/Appellant seeking condonation of delay in filing the appeal against the final Judgment and decree dated 7th of August, 2007, passed by the Court of learned 1st Additional District Judge, Srinagar in case titled '**Zaffer Iqbal Khan v. Farida Bano & Anr.**'.

34. Learned Counsel, appearing on behalf of the Applicant-Appellant, submits that since the Appellant has not succeeded in his appeal against the Judgment and preliminary decree, the Applicant/ Appellant does not wish to press the Condonation of Delay application moved along with the CIA against the Judgment and final decree. The application is, thus, **dismissed**. As a result, the CIA is also **dismissed**, accordingly.

35. Registry to place a copy of this Judgment on both these connected files. The Trial Court record shall be sent down, along with a copy of this Judgment for information/ record.

(M. A. CHOWDHARY)
JUDGE

SRINAGAR

November 24th, 2023

"TAHIR"

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|-----|------------------------------------|------|
| i. | Whether the Judgment is speaking? | Yes. |
| ii. | Whether the Judgment is reporting? | Yes. |