

2024 C L C 1379

[Lahore]

Before Ch. Muhammad Iqbal, J

MUHAMMAD TANVIR---Petitioner

versus

MUHAMMAD RAMZAN ASAD and others---Respondents

Civil Revision No.19654 of 2022, heard on 3rd May, 2024.

(a) Registration Act (XVI of 1908)---

---S.50, proviso (1) & (2)---Transfer of Property Act (IV of 1882), S.53-A---Specific Relief Act (I of 1877), Ss. 12 & 39---Suit for specific performance and cancellation of mutation---Execution of agreement to sell, denial of---Agreement to sell prior in time---Scope and effect---Appellate Court decreed the suit of the plaintiff, while setting aside judgment of Trial Court whereby it ordered the defendant to return double amount of earnest money to the plaintiff---Contention of the petitioner/defendant was that the owner of suit land (vendor/respondent/defendant) had conceded his (petitioner's) claim (prior agreement to sell) as well as relevant mutation having been entered in his favour whereas said owner (as a defendant in suit-in-question) had denied the execution of agreement to sell in favour of respondent/plaintiff---Validity---Evidence produced by the respondent / plaintiff revealed that one of the witnesses produced by him, during cross-examination, deposed that the mutation (sought to be cancelled) was already entered in respect of the petitioner and admitted it correct that suit-property had been transferred by owner in his (petitioner's) favour---Even, the respondent / plaintiff while appearing as witnesses admitted that prior to him, the petitioner / defendant had purchased the suit land from the real owner of the suit land (respondent/defendant) and it showed that the respondent / plaintiff knew the execution of agreement to sell by respondent/owner in favour of the petitioner---Where an agreement is admitted, possession is delivered and receipt of major portion of payment is also admitted then any subsequent agreement or even registered document, if any, cannot be considered as a superior document to that of the earlier agreement---Furthermore, under Proviso (1) & (2) to S. 50 of the Registration Act, 1908, if an unregistered document is prior in time that would be entitled to the rights under Section 53-A of the Transfer of Property Act, 1882---High Court set aside the judgment and decree passed by the Appellate Court and the judgment and decree passed by the Trial Court was upheld---Civil revision filed by the defendant was allowed. [pp. 1383, 1386] A & E

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Nawab Khan v. Raira Begum and others 2003 SCMR 1498; Mst. Jaiwanti Bai v. Messrs Amir Corporation and others PLD 2021 SC 434; Sardar Arshid Hussain v. Mst. Zenat un Nisa and another 2017 SCMR 608 and Mst. Rehmat and others v. Mst. Zubaida Begum and others 2021 SCMR 1534 ref.

(b) Registration Act (XVI of 1908)---

---S. 50, proviso (1) & (2)---Transfer of Property Act (IV of 1882), S. 53-A---Specific Relief Act (I of 1877), Ss. 12 & 39---Suit for specific performance and cancellation of mutation---Execution of agreement to sell, denial of---Agreement to sell prior in time---Burden of proof---Initial burden was on the respondent/plaintiff to prove the factum that he had no knowledge of prior agreement in favour of the petitioner / defendant, whereas in his cross-examination he admitted that he knew the same ; thus, he was not entitled for any relief. [p. 1385] B

Gulzar Ahmad others v. Muhammad Aslam and others 2022 SCMR 1433 ref.

(c) Transfer of Property Act (IV of 1882)---

---S. 53-A---Subsequent vendee, responsibilities of---A subsequent vendee is required to make inquiry as to the nature of possession or title or further interest if any of original purchaser over the suit-property at time of entering into sale transaction. [p. 1385] C

Bahar Shah and others v. Manzoor Ahmad 2022 SCMR 284 ref.

(d) Specific Relief Act (I of 1877)---

---Ss. 22 & 12---Suit for specific performance---Discretion / power of the Trial Court---Scope---Under S.22 of the Specific Relief Act, 1877, the grant of decree for specific performance comes within the sole discretionary power of the court which can refuse to grant the relief on the principle of equity even if the person filing the suit has proved the case. [p. 1385] D

Sheikh Akhtar Aziz v. Mst. Shabnam Begum and others 2019 SCMR 524; Muhammad Miskeen v. District Judge Attock and others 2020 SCMR 406 and Nazim-ud-Din and others v. Sheikh Zia-ul-Qamar and others 2016 SCMR 24 ref.

Usman Nasir Awan for Petitioner.

Zafar Iqbal Chohan for Respondents.

Date of hearing: 3rd May, 2024.

JUDGMENT

CH. MUHAMMAD IQBAL, J.----Through this civil revision, the petitioner has challenged the validity of the judgment and decree dated 22.02.2022 passed by the learned Additional District Judge, Jhang who accepted the appeal of the respondent No.1, set aside the judgment and decree dated 07.11.2018 passed by the learned Civil Judge, Jhang and decreed the suit for specific performance filed by the respondent No.1 as prayed for.

2. Brief facts of the case are that the respondent No.2/Ghulam Shabbir was owner of land measuring 17 Kanal 16 Marla situated in Moza Kot Dewan, Tehsil and District Jhang. The respondent No.2 executed an agreement to sell dated 14.11.2006 in respect of the suit land in favour of the petitioner and target date was fixed as 14.11.2007. The petitioner filed a suit for specific performance against the respondent No.2 wherein the respondent No.2 filed conceding written statement.

The respondent No.1/plaintiff filed a suit on 27.11.2007 for specific performance on the basis of an agreement to sell dated 09.04.2007 against respondent No.1/defendant. The respondent No.2/owner of the suit land denied the execution of the agreement to sell in favour of the respondent No.1/plaintiff as well as receiving of consideration.

The trial Court consolidated both the suits on 31.11.2010. The respondent No.2 transferred the suit property through sale mutation No.4043 dated 30.09.2010 in favour of the petitioner. After the sanction of the mutation, the petitioner withdrew the suit on 13.11.2012 on the plea that there remains no cause of action. The respondent No.1 later on filed amended plaint by arraying the petitioner and defendant and prayed for cancellation of mutation No.4043. The trial Court recorded evidence of the parties and dismissed the suit vide judgment and decree dated 31.03.2014. The respondent No.1 filed an appeal which was allowed by the appellate Court vide judgment and decree dated 28.03.2018 and by setting aside the judgment and decree dated 31.03.2014 passed by the trial Court, the suit case was remanded to the trial Court for fresh decision. In post-remand proceedings, the trial Court partially decreed the suit to the extent of return of double amount of earnest money i.e. Rs.800,000/- by the respondent No.1 to the respondent No.2. The respondent No.1 assailed the said decision through an appeal which was allowed by the appellate Court vide judgment and decree dated 22.02.2022 and by setting aside the judgment and decree dated 07.11.2018, the suit of the respondent No.1 was decreed as prayed for. Hence, this civil revision.

3. I have heard learned counsel for the parties and have gone through the record.

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4. Main controversy involved in this case is centered upon issues Nos.1 to 3 which are reproduced as under:

"1. Whether the plaintiff entered into an agreement to sell with the defendants dated 09.04.2007 of the property in question for consideration of Rs.13,00,000/- and earnest money Rs.400,000/- was paid through receipt of payment dated 09.04.2007 to the defendant No.1? OPP

2. Whether it was settled through an agreement to sell in question that after termination of civil litigation the remaining sale price Rs.900,000/- be paid by the plaintiff and possession of the property in question is to be transferred to the plaintiff by the defendants? OPP

3. Whether it was settled that if defendant No.1 would not transfer the property in question to the plaintiff he would return double of received earnest money to the plaintiff and successors of the parties were also bound down for the same conditions? OPD"

Respondent No.1/plaintiff appeared as P.W.4 and during cross examination he deposed that:

"غلام شبیر ایک مربع اراضی کا مالک تھا۔ کھاتہ متدعوئیہ میں تقریباً 09 ایکڑ کا مالک غلام شبیر تھا۔ اس نے اراضی متدعوئیہ تنور کو فروخت کر دی۔ کچھ رقبہ کھاتہ متدعوئیہ میں غلام شبیر کا باقی پڑا ہے۔۔۔۔۔ تنور 7/8 کیلے بر قابض ہے۔۔۔۔۔ تنور اراضی متدعوئیہ بطور مالک کاشت کرتا ہے۔ مجھے علم نہ ہے کہ تنور نے اراضی متدعوئیہ کتنی رقم کی خریدی ہے۔ اس نے 2 ایکڑ اراضی متدعوئیہ دس لاکھ روپے میں خریدی ہے۔ اراضی متدعوئیہ پر ناصر ولد چراغ کا قبضہ ہے۔ وہ رقبہ کاشت کرتا ہے۔۔۔۔۔ پیداوار تنور لیتا رہتا ہے۔۔۔۔۔ غلام شبیر موضع کا نمبر دار تھا۔ اس نے فوت ہونے سے پہلے نمبر داری چھوڑ دی تھی۔۔۔۔۔ یہ درست ہے کہ 3 سال پہلے تنور نے غلام شبیر سے ایک ایکڑ رقبہ خرید کیا ہے۔ میرے علم میں نہ ہے کہ تنور نے 12 ایکڑ رقبے کا انتقال بھی غلام شبیر سے کروایا تھا۔۔۔۔۔ 10 ایکڑ اراضی غلام شبیر نے خرید کی۔ اپنے خود کہا کہ 12 ایکڑ اراضی تنور اور اسکے ماموں کے خریدنے کے بعد غلام شبیر نے میرے ساتھ اقرار نامہ کیا۔ یہ درست ہے کہ اقرار نامہ معاہدہ بیچ محررہ 14.11.2006 سے متعلق ایک دعویٰ تکمیل معاہدہ مختص زیر سماعت رہا ہے۔۔۔۔۔ یہ غلط ہے اور پھر کہا کہ یہ درست ہے کہ تنور کے معاہدہ کی تکمیل کے لئے غلام شبیر نے انتقال بیچ بھی کر دیا۔۔۔۔۔ یہ درست ہے کہ غلام شبیر نے اپنے جواب دعویٰ میں تنور کے اقرار نامے کو تسلیم کیا اور میرے اقرار نامے سے انکار کیا۔"

(emphasis supplied)

Muhammad Rizwan (P.W.5) during cross-examination deposed that the mutation was entered in respect of Tanvir in 2010 and admitted it correct that the suit property has been transferred by Ghulam Shabbir in favour of Tanvir.

5. Admittedly, the respondent/plaintiff while appearing as P.W.4 admitted that prior to him, petitioner/defendant had purchased the suit land from the respondent No.2/real owner of the suit land and it shows that the respondent No.1 knew the execution of agreement to sell by respondent No.2 in favour of the petitioner. The respondent No.2 has alienated the suit land through mutation in favour of the petitioner. It is settled law that where an agreement is admitted, possession was delivered and receipt of major portion of payment is also admitted then any subsequent agreement or even registered document, if any, could not be considered as a superior document to that of the earlier agreement. Furthermore, under Provisos (1) and (2) to Section 50 of the Registration Act, 1908 if an unregistered document is prior in time that would be entitled to the rights under Section 53-A of the Transfer of Property Act, 1882. For ready reference, Provisos (1) and (2) to Section 50 of the Act *ibid* are reproduced as under:

"Provided that the person in possession of the property under an unregistered document prior in date, would be entitled to the rights under Section 53-A of the Transfer or Property Act, 1882 (IV of 1882). if the conditions of that Section are fulfilled:

Provided further that the person in whose favour an unregistered document is executed shall be entitled to enforce the contract under the unregistered document in a suit for specific performance against a person claiming under a subsequent registered document, subject to the provisions of clause (b) or Section 27 of the Specific Relief Act, 1877."

The Hon'ble Supreme Court of Pakistan in a case titled as Nawab Khan v. Raira Begum and others (2003 SCMR 1498) has held as under :

"7. So far as the question of benefit under sections 41 and 53-A of Transfer of Property Act is concerned, we have given our considered thought to the legal proposition involved and have come to the conclusion that such benefit cannot be extended to a party whose entire claim is based on fraud, intrigue and misrepresentation. Rather, the benefit under section 53-A, in view of the proviso thereof, is available to the present respondents whose predecessor-in-interest Muhammad Younas Qureshi had entered into agreement, dated 31-5-1966 which was much prior in time and who at the time of such agreement was

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not aware of any rights of of Nawab Khan which, in view or the facts mentioned above, were non-existent as well as unknown for being concealed at the relevant time and brought to light dishonestly only through a suit, dated 22-10-1966 that stood subsequently dismissed as withdrawn."

(emphasis supplied)

In another judgment titled as Mst. Jaiwanti Bai v. Messrs Amir Corporation and others (PLD 2021 SC-43A) it has been held by the apex Court as under:

"18. However, it may be noted that provisos to subsection (1) to Section 50 of the Registration Act, 1908 in stated condition, nullifies the privilege enjoyed by the registered instrument, with regard to the rights and interests where immovable property is concerned. A protection is provided to the transferee, who establishes to be in occupation and possession of the property, claiming rights and interests in the property on the basis of unregistered instrument, in part performance thereof, from any the transferor, or any person claiming under him. The implications of two provisos to subsection (1) of section 50 of the Registration Act, 1908 which, for ready reference, are reproduced below:-

Provided that the person in possession of the property under an unregistered document prior in date, would be entitled to the rights under Section 53-A of the Transfer of Property Act, 1882 (IV of 1882), if the conditions of that Section are fulfilled:

Provided further that the person in whose favour an unregistered document is executed shall be entitled to enforce the contract under the unregistered document in a suit for specific performance against a person claiming under a subsequent registered document, subject to the provisions of clause (b) of Section 27 of the Specific Relief Act, 1877.

19. On bare perusal of above, it is clear that in terms of 1st and 2nd provisos to subsection (1) of the Registration Act, 1908, if it is established on record that a person is in part performance of an unregistered document prior in time and is in possession of the property, such person, in terms of exception provided under first proviso "is entitled to the rights under section 53-A of the Transfer of Property Act, 1882". Further, in terms of exceptions carved out in the 2nd proviso to subsection (1), they shall be entitled to enforce the contract under the unregistered document in suit for specific performance against a person claiming under

a subsequent registered document, subject to the provisions of clause (b) of section 27 of the Specific Relief Act, 1877."

20. The rights of a person, having established that they are equipped with an unregistered instrument, which is prior in time and are in possession of property in part performance of such instrument, would rank superior even against the subsequent registered instrument. Such position in law was considered with approval in the cases cited as Faza v. Mehr Dia and 2 others, Mushtaq Ahmad and others v. Muhammad Saeed and others, which was recently affirmed in the case of Sardar Arshid Hussain v. Mst. Zenat un Nisa. It may be observed that as a subsequent registered instrument was not brought on record, the Appellant cannot be provided the protection under the proviso of section 50 of the Registration Act, 1908 read with section 53-A of the Transfer of Property Act, 1882."

Further reliance is placed on cases cited as Sardar Arshad Hussain v. Mst. Zenat un Nisa and another (2017 SCMR 608) and Mst. Rehmat and others v. Mst. Zubaida Begum and others (2021 SCMR 1534).

6. Even otherwise, initial burden was on the respondent No.1/plaintiff to prove the rectum that he has no knowledge of the prior agreement in favour of the petitioner wherein in his cross examination he admitted that he knew the same. Thus, he is not entitled for any relief. Reliance in this regard is placed on a judgment of the Hon'ble Supreme Court of Pakistan titled as Gulzar Ahmad others v. Muhammad Aslam and others (2022 SCMR 1433). Further, a subsequent vendee is required to make inquiry as to the nature of possession or title or further interest if any of original purchaser over the property in question at time of entering into sale transaction. Reliance is placed on a case titled as Bohar Shah and others v. Manzoor Ahmed (2022 SCMR 284).

7. Even otherwise, under Section 22 of the Specific Relief Act, 1877 the grant of decree for specific performance comes within the sole discretionary power of the court which can refuse to grant the relief on the principle of equity even if the suitor has proved the case, as settled by the Hon'ble Supreme Court of Pakistan in its judgment titled as Sheikh Akhtar Aziz v. Mst. Shabnam Begum and others (2019 SCMR 524) wherein it is held as under:-

16. Finally, there is no cavil with the proposition that relief of specific performance is discretionary in nature and despite proof of an agreement to sell, exercise or discretion can be withheld if the Court considers that grant of such relief would be unfair and inequitable."

And similar principle has been reiterated in the case titled as Muhammad Miskeen v. District Judge Attock and others (2020 SCMR 406).

8. For what has been discussed above, the trial Court rightly partly decreed the suit of the respondent No.1/plaintiff whereas the findings of the appellate Court on issues Nos.1. to 3 being against the record, are hereby reversed and the findings of the trial Court on these issues are upheld.

9. From the above, it is established that the trial Court after discussing the evidence and record rightly partially decreed the suit of the respondent/plaintiff whereas the appellate Court by committing misreading and non-reading of evidence passed the impugned judgment and decree by decreeing the suit of the respondent/plaintiff as prayed for, which suffers from patent illegality and irregularity, as such the same is liable to be set-aside. Reliance is placed on the case of Nazim-ud-Din and others v. Sheikh Zia-ul-Qamar and others (2016 SCMR 24).

10. Resultantly, this civil revision is allowed, the judgment and decree dated 22.02.2012 passed by the appellate Court is hereby set aside and the judgment and decree dated 07.11.2018 passed by the trial Court is upheld. No order as to costs.

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Revision allowed.