

Judgment Sheet

**IN THE LAHORE HIGH COURT, LAHORE.
JUDICIAL DEPARTMENT**

Civil Revision No. 432 of 2017.

Robina Kausar. v. Muhammad Latif.

JUDGMENT

Date of hearing: 03.12.2024.

Petitioners by: Mr. Muhammad Anwar Basit, Advocate.

Respondent by: Mr. Muhammad Mumtaz Faridi, Advocate
assisted by Ali Ahmad Sabir, Advocate.

Shujaat Ali Khan, J: - Unnecessary details apart, the petitioner-mortgagor covenanted to mortgage land measuring 6-Kanals, falling in Square No.37, Killa No.21, Chak No.317-GB, Toba Tek Singh, in favour of the respondent-mortgagee, *vide* agreement, dated 01.12.2006, in lieu of Rs.2,00,000/-, for a period from 01.12.2006 to 03.11.2008. In the agreement it was also incorporated that if the petitioner-mortgagor fails to repay the mortgaged amount, she would get the said land transferred in the name of the respondent-mortgagee. Since the petitioner-mortgagor failed to repay the mortgaged amount, within prescribed period, the respondent-mortgagee filed suit *inter-alia* seeking specific performance of agreement, dated 01.12.2006 with the averments that since petitioner-mortgagor had failed to

repay the mortgage money, decree for specific performance be issued in his favour. Though, initially petitioner-mortgagor joined proceedings of the suit by filing Written Statement but subsequently disappeared, as a result she was proceeded against ex-parte and after recording *ex-parte* evidence the learned Civil Judge, Toba Tek Singh (**learned Trial Court**), decreed the suit *vide* ex-parte judgment & decree, dated 13.12.2013 against which the petitioner-mortgagor filed an appeal but without any success as the same was dismissed by the learned District Judge, Toba Tek Singh (**learned Appellate Court**) *vide* judgment, dated 23.01.2015; hence this revision petition.

2. Learned counsel for the petitioner-mortgagor submits that while deciding the matter both the courts below failed to consider that as per section 60 of the Transfer of Property Act, 1882 mortgagor can move for redemption of mortgaged property within the prescribed period of limitation irrespective of any penal clause mentioned in the mortgage deed; that section 23 of the Contract Act, 1872 determines as to which considerations are lawful and those are not acknowledged by the law as valid and according to the said provision any condition put against the parent law on the subject, is not sustainable; that as a matter of fact, suit of the respondent-

mortgagee was not maintainable rather he could sue against the petitioner for recovery of mortgage money in terms of section 68 of Transfer of Property Act, 1882 but said important aspect of the matter escaped notice of the courts below; that even if the agreement is admitted to be valid, marginal witnesses of the said agreement having not been produced, no decree could be passed in favour of the respondent-mortgagee; that the respondent-mortgagee could move the civil court asserting his right in terms of section 67 of the Transfer of Property Act, 1882 but suit for specific performance was not maintainable. To fortify his contentions, learned counsel has relied upon the cases reported as Mst. Naseem Akhtar and others v. Abdul Tawab and others (2012 SCMR 1526), Abdul Haq v. Ali Akbar and others (1999 SCMR 2531), Abdul Sattar v. Mst. Sardar Begum and 12 others (1992 SCMR 417), Khushi Muhammad and others v. Muhammad Ashfaq and others (PLD2014 LHR 26), Muhammad Akhtar v. Mst. Siani (2011 CLC 1218), Abdul Lateef v. Ashique Ali and others (PLJ 2006 Karachi 127), Abdul Haq v. Ali Akbar and 12 others (1998 CLC 129) and Suleman and 3 others v. Custodian, Evacuee Property, West Pakistan, Lahore and 2 others (PLD 1971 LHR 77).

3. Conversely, learned counsel appearing on behalf of the respondent-mortgagee, while defending the impugned decisions

of the courts below, submits that when the petitioner-mortgagor, while filing written statement, admitted the execution of agreement between the parties, there was no compulsion for the respondent-mortgagee to produce its marginal witnesses; that *mala-fide* conduct of the petitioner-mortgagor is evident from the fact that she filed application before the erstwhile Deputy District Officer (Revenue), Toba Tek Singh seeking permission to repay the mortgage money and redemption of mortgaged land but the same was dismissed due to her failure to deposit the said amount; that even during proceedings before the learned Trial Court the petitioner-mortgagor offered to repay the mortgage money but after filing written statement she disappeared and ultimately *ex parte* proceedings were initiated against her; that not only this petition has been filed beyond prescribed period of limitation but no court fee thereon has been affixed, thus, this petition is not proceedable rather deserves to be dismissed on that score alone and that concurrent findings of facts, recorded by the courts below, cannot be upset by this Court in exercise of its revisional jurisdiction.

4. I have heard learned counsel for the parties at considerable length and have also gone through the documents,

annexed with this petition, as well as the case-law, cited at the bar.

5. Firstly, taking up the objection raised by the respondent-mortgagee against maintainability of this petition on the point of limitation, I have observed that initially the petitioner-mortgagor filed instant revision petition, on 22.04.2015, *vide* Diary No.41228. The Office raised multiple objections against maintainability of the said petition and ultimately fixed the case before the Court on 20.05.2015 as Objection Case when the Office Objection was sustained and matter was ordered to be filed. Later on, the petitioner-mortgagor filed two applications (C.M. Nos.1/C and 2/C of 2016), one for extension of time to remove the objection and second for condonation of delay in filing C.M. No.1/C of 2016. The said applications were allowed by this Court, *vide* order, dated 24.01.2017, which, for convenience of reference, is reproduced herein below: -

“24.01.2017. Mr. M. Anwar Basit, Advocate for applicant.

*OFFICE OBJECTION
IN C.M.No.1-C and 2-C of 2016.*

This is an application for extension of time for affixing the requisite court fee. Alongside this application, an application under Section 5 of the Limitation Act has also been filed.

2. Learned counsel for the applicant submits that at the time of passing of order dated 20.05.2015, whereby office objection qua affixing the requisite court fee was upheld and the matter was filed, neither any intimation was sent to the petitioner or her counsel, nor an opportunity of hearing was afforded to them, therefore, the order is not sustainable. He has placed reliance on order dated 08.11.2016 passed by this Court in Office Objection in C.M.No.01-C/2016, in which in identical circumstances, the applicant was allowed enlargement of time for affixing the court fee.

3. In view of the above, in order to maintain consistency, these applications are allowed; as a sequel to which applicant is granted 10 days' time to affix the requisite court fee. Once the needful is done, office shall number this petition and fix the same on the judicial side."

After acceptance of aforesaid applications, the Office allotted number to this revision petition. On 06.02.2017, pre-admission notice was issued to the respondent-mortgagee. Further, through order, dated 17.04.2019, this petition was admitted to regular hearing, which order, for facility of reference, is also reproduced herein below:-

"17.04.2019 Mr. M. Anwar Basit, Advocate for the petitioner.

Mr. Qadeer Ahmad Rana, Advocate for the respondent.

This petition in terms of Section 115 of the Code of Civil Procedure (V of 1908) calls in question the judgment and decree dated 23rd January, 2015, whereby the learned District Judge, Toba Tek Singh, while dismissing the appeal filed by the petitioner affirmed the judgment and decree dated 13th December, 2013 passed by the learned Civil Judge Class-1, Toba Tek Singh.

2. Learned counsel for the petitioner *inter alia* contends that the respondent instituted a suit for specific performance on the basis of a mortgage deed. Maintains that suit was not maintainable. Adds that the petitioner was proceeded *ex- parte* and suit was ultimately decreed as such vide judgment dated 13th December, 2013. Contends that the appeal was though filed before the learned District Judge but certain material aspects escaped notice of the learned Appellate Court. Submits that appeal was dismissed by way of impugned judgment and decree, which is not tenable under the law. Learned counsel on the strength of Section 60 of the Transfer of Property Act, 1882, contends that right of the petitioner under the mortgage deed cannot be extinguished in any circumstances. Emphasizes that the respondent could not claim any proprietary rights on the basis of a mortgage deed and as such suit was wrongly decreed by the courts below.

3. The contentions of learned counsel for the petitioner has been seriously refuted by the latter, who submits that the suit was rightly decreed by the courts below and the appeal as well as revision is barred by time.

4. In view of respective contentions of learned counsel for the parties, this petition is admitted for regular hearing subject to question of limitation.

5. Notice. Latter accepts notice, so there is no need of issuance of any formal notice to this effect. Relist on 14.06.2019.

C.M. No.1-C of 2017

6. Subject to notice for the aforesaid date, the respondents shall not further alienate the property in question, in the meanwhile.

C.M. No.2-C of 2016

7. This application in terms of Section 5 of the Limitation Act, 1908 seeks condonation of delay.

8. Notice for the aforementioned date.”

From the afore-quoted order, it is clear that C.M. No.2/C of 2016 was treated as pending whereas said application having been allowed on 24.01.2017, was not open to fixation/hearing, thus, notice issued in said application, *vide* order, dated 17.04.2019, seems to be result of some inadvertence. The Apex Court of the country, while dealing with a question relating to re-filing of a matter after removal of objection with reference to limitation, in the case of Mst. Sabiran Bi v. Ahmad Khan and another (**2000 SCMR 847**), has *inter-alia* observed as under: -

"10. Thus, in view of above discussions we are inclined to hold that once a suit, appeal or revision has been presented before the authorised officer of the Court within the prescribed period of limitation, it cannot be treated barred by time for the reason that the office has noted defects in the proceedings which have not been removed by the concerned party or his Advocate, and in such-like situation the Presiding Officer of the Court at the best can consider the maintainability of proceedings in view of the provisions of Order VII, Rule 11 or identical provisions available in the Code of Civil Procedure or the law under which the proceedings were instituted. It is also important to note that parties/Advocates are also not absolved from their duty to remove the office objections within the stipulated period prescribed by the concerned authorised officer subject to the condition that specific notice has been served upon the party or Advocate to do the needful. Even if after notice the defect is not removed the case shall be listed for non-prosecution before the Presiding Officer who may in his discretion allow time to comply with objections of office."

The aforesaid view was also followed by a learned Division Bench of this Court in the case of Shazia Munawar v. Punjab

Public Service Commission through Secretary, Lahore (PLD 2010 Lahore 160) by *inter-alia* observing as under: -

"13. In view of the aforesaid dictum of the Honourable Supreme Court of Pakistan it is clear and obvious that the appeal at hand having been filed within the prescribed period cannot be held to be barred by limitation. The Office should have placed the same before the Court to be dealt with in accordance with law. Even otherwise, the appellants cannot be accused of being contumacious or negligent, as the time taken for removal of the unclear objection was only 2/3 days more than the time allowed specially when it is not on record as to when or if notice in this behalf was issued to the appellant nor when and if the list of objection case was actually displayed by the Office. In view of the above, we have no hesitation in holding that I.-C.A. No.518 of 2008 is not barred by limitation and has been filed within time."

If the objection raised by the respondent-mortgagee is seen in the light of the afore-referred judgments, there leaves no ambiguity that the date of filing of this petition is to be treated as 22.04.2015 for the reason that all the subsequent proceedings (*prior to allocation of proper number to this petition*) revolved around the Office Objection. In the given circumstances, the time consumed, while dealing with Office Objection, cannot be attributed to the petitioner especially when this Court allowed applications seeking extension of time to remove Office Objection and that for condonation of delay in filing application for extension of time.

6. There is no cavil with the fact that a party is bound to remove objection within time prescribed by the Office but no penal action can be taken against it without issuing notice to the party concerned or to establish that the party concerned failed to do the needful despite having been put to notice. As far as the case in hand is concerned, suffice it to note that no notice was issued to the petitioner asking her to remove the office objection within specified period. Moreover, as discussed earlier, when the application of the petitioner-mortgagor seeking extension of time to remove the Office Objection was accepted and she removed the Office Objection, it does not lie in the mouth of the respondent to raise objection against the maintainability of this petition on the point of limitation.

7. Considering from another angle, irrespective of the fact as to whether any application for condonation of delay has been filed or not, this Court, while deciding a revision petition, has to see validity of the decisions impugned before it and if the same are found to be untenable the question of limitation assumes secondary status. In this backdrop, the objection raised by learned counsel for the respondent-mortgagee against maintainability of this petition on the point of limitation is spurned.

8. Now taking up the second objection of the respondent's side against maintainability of this petition on account of non-affixation of court fee, I am of the view that though initially the Office raised objection against maintainability of this petition *inter-alia* on account of non-affixation of court fee but subsequently the petitioner-mortgagor provided the same after getting the same issued from the Treasury on 30.01.2017, thus the objection, under discussion, being without any substance cannot be given any weightage.

9. Now reverting to merits of the case, I have noted that it is admitted position between the parties that the agreement (Exh.P/1) was executed in relation to mortgage of property described above. There is no cavil with the fact that an owner can mortgage his property but mortgagee has no right to get transferred the mortgaged property in his name through a decree for specific performance. If the mortgage money was not being returned by the petitioner-mortgagor, the respondent-mortgagee could resort to remedy provided under section 67 of the Transfer of Property Act, 1882, which reads as under: -

"67. Right to foreclosure or sale. In the absence of a contract to the contrary, the mortgagee has at any time after the mortgage money has become due to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage money has been paid or deposited as hereinafter provided, a right to obtain from the Court a decree that the mortgagor shall

be absolutely debarred of his right to redeem the property, or a decree that the property be sold.

A suit to obtain a decree that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.....”

From the above, it is crystal clear that the mortgagee can approach the Civil Court claiming that mortgagor be absolutely debarred of his right to get the mortgaged property redeemed or it can pray for decree for sale of the property but the recitals of the suit filed by the respondent-mortgagee speak otherwise. Further, section 12 of the Special Relief Act, 1877 deals with the cases wherein decree for specific performance can be granted. Insofar as the case in hand is concerned, admittedly, the respondent-mortgagee filed suit on the basis of penal clause in the mortgage agreement that if the petitioner-mortgagor fails to return the mortgage money, she would be bound to get transferred the mortgaged land in favour of respondent-mortgagee. In my humble view, a suit for specific performance can be filed for enforcement of an agreement to sell but the same is not maintainable on the basis of a penal clause in an agreement, which otherwise does not fulfill the standards set for an agreement to sell. While dealing with question as to whether any penal clause in the agreement is enforceable, in a suit for specific performance, this Court in the case of *Qari Muhammad Hanif v. Ihsan Ullah Khan (2010 CLC 706)* while dealing with

the proposition, under discussion, has *inter-alia* observed as under: -

"10. Provision of section 74 of the Contract Act deals only with the rights to receive from the party who has broken a contract, a reasonable compensation and in absence of any contract, the mere fact that the appellant-defendant did not make payment of the amount within the time limit fixed by the suitor would not entitle him to attract the provisions of penal clause and claim the penalty. A penalty to claim double amount in fact, is not enforceable at law because the document Exh.P.1 and Exh.D.1 give a definite impression that these arrangements were made simply to recover the amount and nothing else, outstanding against the appellant-defendant....." (emphasis provided)

If findings of the courts below are considered in the light of the afore-referred judgments there leaves no ambiguity that respondent-mortgagee was not entitled for decree for specific performance on the basis of penal clause in the mortgage deed.

10. A cursory glance over the mortgage deed (Exh.P/1) shows that though it was executed in lieu of Rs.2,00,000/- but the same was not got registered despite the fact that the same was compulsorily registerable in terms of section 17 of the Registration Act, 1908. The Apex Court of the country in the case reported as Allah Diwaya v. Ghulam Fatima, Represented by Ahmad Sher and others (PLD 2008 SC 73) has held that when a document is compulsorily registerable and party concerned fails to do so, such document does not confer any

right and such document is not enforceable under the law. Insofar as the case in hand is concerned, without registration of the mortgage deed *inter-se* rights and duties of the parties could not be enforced until and unless the mortgagee provided the requisite fee which was payable against registration of said document along with any penalty. Though the safer course for the learned trial court was to impound the mortgage deed and refuse to proceed further till the payment of requisite fee along with penalty (if any) but neither the trial court nor the appellate court attended to the said important aspect of the matter, thus the decisions rendered by them do not qualify the test set for a judicial decision.

11. While assisting the Court, learned counsel appearing on behalf of the respondent-mortgagee put much emphasis on the fact that since the petitioner-mortgagor failed to repay the amount, even during pendency of proceedings before the Deputy District Officer (Revenue), Toba Tek Singh, in the application filed by her as well as during proceedings before the learned Trial Court, no interference is called for in these proceedings. In this regard, I am of the view that irrespective of any lapse on the part of the petitioner-mortgagor, the respondent-mortgagee was bound to establish that he was entitled for decree of specific performance on the basis of penal

clause in the mortgage deed. Further, rights of the respondent-mortgagee were to be governed under the relevant law, which in my humble estimation does not permit a mortgagee to bring a suit for specific performance on the basis of a penal clause in the mortgage deed/agreement.

12. There is no denying the fact that concurrent findings of facts recorded by the courts below are rarely interfered with by this Court in exercise of its revisional jurisdiction but when the decisions of the *fora* below are arbitrary or suffer from material illegality, same cannot not be considered sacrosanct rather this court should not feel shy to undo the same. Reliance in this regard is placed on the case reported as Muhammad Aslam (deceased) through L.Rs. and another v. Molvi Muhammad Ishaq (deceased) through L.Rs and others (2024 SCMR 1390).

13. For what has been noted above, I see no hesitation to hold that the suit filed by the respondent-mortgagee for specific performance on the basis of penal clause in the mortgage deed was not maintainable. Consequently, this revision petition is **accepted** and impugned judgments & decrees rendered by both the courts below are **set aside**. Resultantly, the suit filed by the respondent-mortgagee shall stand dismissed. No order as to costs.

14. Before parting with this judgment, it is observed that dismissal of suit of respondent-mortgagee would not debar him to file legal proceedings before the appropriate forum under the relevant provisions of law.

Judge

APPROVED FOR REPORTING

Judge

G.R.*