

JUDGMENT SHEET
LAHORE HIGH COURT, MULTAN BENCH,
MULTAN

JUDICIAL DEPARTMENT

C. R. No. 828-D / 2014

Mst. Shamim Akhtar (deceased) through Legal Heirs and others

Versus

Abdul Hameed & 04 others

JUDGMENT

Date of Hearing:	12.11.2024
Petitioners By:	Syed Tajammal Hussain Bukhari, Advocate Mr. Amjad Hussain Sargana, Advocate Mr. Muhammad Ali, Advocate
Respondents No. 1 By:	Mr. Ghulam Shabbir Surani, Advocate
Respondents No. 2-5 By:	Proceeded <i>ex-parte</i> .

ABID HUSSAIN CHATTHA, J: This Civil Revision is directed against the impugned Judgments and Decrees dated 21.09.2011 and 29.03.2014 passed by Civil Judge and Additional District Judge, Multan, respectively, whereby, suit for declaration of the Petitioners was concurrently dismissed.

2. Proforma Respondents No. 2 to 5 were served, who have not entered appearance till date and are proceeded *ex-parte*, accordingly.
3. The brief facts of this case are that Mst. Shamim Akhtar and Ghulam Mustafa (the “Petitioners”) instituted a suit for declaration on 18.12.2002 against Abdul Hameed / Respondent No. 1 (the “Respondent”) claiming therein that the Petitioners are owners of the suit property fully described in the headnote of the plaint on the basis of registered sale deeds which are still intact, however, possession of the same is with the Respondent in his capacity as tenant. By way of background, the Petitioners

disclosed that the suit property devolved from grandfather of the Petitioners to one of his legal heirs, namely, Sher Muhammad as per Court decision. Sher Muhammad died in the year 1978. The Petitioners are his legal heirs along with Muhammad Rafique, Nazir Ahmad, Perveen Akhtar and widow of Sher Muhammad. The other legal heirs sold the suit property to the Petitioners through registered sale deeds in 1983. Two days ago, the Respondent as tenant started to demolish the suit property in order to build a new house thereon and when he was stopped, he claimed that Sher Muhammad had executed a sale agreement dated 30.10.1977 (the "**Agreement**") regarding the suit property, as such, he was owner in possession of the same. This assertion of the Respondent is not tenable since the suit property was disputed at the relevant time and even Sher Muhammad was not owner of the same at the time of execution of the Agreement. Subsequently, Sher Muhammad was declared owner of the suit property pursuant to an order of the Court, whereafter, the Petitioners became part owners of the suit property and the same got completely vested in them through registered sale deeds executed by other legal heirs in the year 1983. Moreover, the Respondent never contacted the Petitioners for execution of the sale deed based on the Agreement although he was in possession of the suit property and had good relationship with their predecessor-in-interest. In this context, it was stated that the Respondent is in unlawful possession of the suit property and the Agreement is result of fraud, thus ineffective qua rights of the Petitioners. The suit was valued at Rs. 400/- and as such, no Court Fee was paid. Accordingly, it was prayed that a decree of declaration in favour of the Petitioners and against the Respondent be passed by permanently restraining him from claiming ownership of the suit property, demolishing the house built thereon and transferring possession thereof to any other person. Importantly, the Petitioners did not specifically pray for a declaration of ownership on the basis of registered sale deeds or for cancellation of the Agreement of the Respondent. The Petitioners also did not claim specific relief of possession over the suit property.

4. The Respondent by filing contesting written statement, raised a number of preliminary objections, whereas, on merits asserted ownership and possession of the suit property based on the Agreement from the date of its execution claiming that the suit property was lawfully transferable on the basis of the Agreement by Sher Muhammad after receiving full sale consideration of Rs. 20,000. The Respondent further stated that at the time of taking possession in 1977, the suit property was in dilapidated condition and he spent more than Rs. 200,000/- at that time for its reconstruction. Hence, prayed for dismissal of the suit.

5. The Trial Court out of divergent pleadings of the parties framed the following issues:-

1. Whether the suit is time barred? OPD
2. Whether the plaintiffs have got no cause of action and *locus standi*? OPD.
3. Whether the defendant has spent Rs. 200,000/- on reconstruction of the disputed property, if so with what effect? OPD
4. Whether the court fee has not been affixed according to the law? OPD
5. Whether the defendant is entitled to special costs U/s 35-A of CPC? OPD
6. Whether the disputed property was sold by the legal heirs of deceased Sher Muhammad to the plaintiffs through sale deeds? OPP
7. Whether the defendant is tenant of the disputed property? OPP
8. Whether the plaintiff is entitled to the decree as prayed for? OPP
9. Relief.

6. Pursuant to order dated 16.04.2005, the Petitioners were allowed by the Trial Court to insert relief of possession in the plaint. Vide order dated 26.01.2007, the Trial Court determined value of the suit property at about Rs. 31,000/- and directed the Petitioners to affix Court fee of Rs. 2,325/- by the next date of hearing which was accordingly paid on 26.02.2007.

7. The Trial Court recorded respective evidence of the parties. Issues No. 1, 2 and 5 were answered in favor of the Petitioners and are not

pressed before this Court. Issues No. 3, 4, 7 and 8 were decided in favor of the Respondent by holding that the Respondent had spent Rs. 200,000 on reconstruction of the suit property; Court fee of Rs. 15,000 was payable by the Petitioners; the Respondent was not the tenant of Sher Muhammad or the Petitioners; and the Respondent has proved the Agreement, therefore, the Petitioners are not entitled to relief. Ironically, issue No. 6 was decided in favor of the Petitioners with the observation that suit property was transferred to the Petitioners through registered sale deeds. However, no definite finding was rendered as to the status of the sale deeds existing in the names of the Petitioners vis-à-vis the Agreement in favor of the Respondent which is in apparent contradiction to the findings that the Respondent is owner in possession of the suit property and is not tenant of the Petitioners. The suit was dismissed and the appeal preferred by the Petitioners also met the same fate. Hence, this Civil Revision.

8. It is pertinent to mention that during pendency of the suit for declaration of the Petitioners, the Respondent instituted a separate suit for specific performance of the Agreement on 07.11.2008 which was tried simultaneously by the Trial Court along with suit for declaration and decreed *ex-parte* on 21.09.2011. The Petitioners preferred two separate appeals which were dismissed on 29.03.2014 by the same Appellate Court. The Petitioners only filed the titled Civil Revision assailing the Judgments and Decrees passed in suit for declaration of the Petitioners and did not challenge the Judgments and Decrees passed in suit for specific performance of the Respondent which has attained finality. Nevertheless, record was requisitioned by this Court vide order dated 26.03.2024.

9. Learned counsel for the Petitioners while interpreting the impugned Judgments submitted that Trial Court committed material irregularity by not fixing a timeframe for the Petitioners to pay Court fee. He further stated that Court fee amounting to Rs. 2,325/- had earlier been paid pursuant to order dated 26.01.2007 which was not taken into consideration. As such, suit of the Petitioners was dismissed for deficiency in payment of

Court fee, although the Courts below concurrently found that sale deeds qua the suit property in favor of the Petitioners are intact, therefore, the impugned Judgments are liable to be set aside. Moreover, the Respondent instituted a separate suit for specific performance based on the Agreement on 07.11.2008 which should have been consolidated with suit of the Petitioners but the needful was not done by the Trial Court resulting into passing of *ex-parte* decree against them on 21.09.2011 followed by dismissal of their appeal on 29.03.2014. However, notwithstanding the fact that the said Judgments and Decrees have attained finality, they are null and void qua rights of the Petitioners emanating from registered sale deeds which being registered documents take precedence over the decree of specific performance existing in favour of the Respondent in terms of Section 50 of the Registration Act, 1908, particularly, in view of the fact that decree for specific performance merely declares a right in favour of the Respondent which does not mature unless the same is implemented through sale deed. He relied upon case titled, "Muhammad Ishaq v. Muhammad Siddique" (**PLD 1975 Lahore 909**). Hence, the impugned Judgments are not sustainable.

10. Learned counsel for the Respondent submitted that this Civil Revision is incompetent for the reasons that the Petitioners till date have not paid the deficient Court fee and the impugned decision of the Appellate Court dated 29.03.2014 appended with the instant Civil Revision is in fact the Judgment and Decree passed by the Appellate Court with reference to suit for specific performance of the Respondent. He explained that not only the Petitioners concealed the fact of filing Ejectment Petition against the Respondent which was dismissed throughout but also during pendency of the defective suit for declaration of the Petitioners, he instituted a separate suit for specific performance based on the Agreement. The Petitioners did not file reply to the application filed by the Respondent for consolidation of both suits, rather, deliberately disassociated themselves from the proceedings of suit for specific performance of the Respondent after their appearance therein and resultantly, the same was *ex-parte* decreed against

them on the same date and by the same Trial Court vide Judgment and Decree dated 21.09.2011 when their suit for declaration was dismissed. The Petitioners, however, preferred an appeal against the said *ex parte* Judgment and Decree which was dismissed by the same Appellate Court on the same date when their appeal in suit for declaration was dismissed. The Petitioners, thereafter, did not further assail the said Judgment and Decree passed in the suit for specific performance which accordingly attained finality. Since the prior Agreement in favor of the Respondent has been proved, therefore, the Petitioners cannot claim title on the basis of subsequently registered sale deeds as the foundation of the same has collapsed. Hence, the subsequently registered sale deeds of the Petitioners have become null and void.

11. Arguments heard and record perused.

12. The first aspect of the case is as to whether suit of the Petitioners was dismissed for non-payment of Court fee and the titled Civil Revision is incompetent on this score. Initially, the suit was valued at Rs. 400/- and no Court fee was paid. Later, pursuant to order dated 16.04.2005, the relief of possession was allowed to be inserted in the prayer clause, whereafter, an amended plaint was filed. The Trial Court vide order dated 26.01.2007 determined tentative value of the suit property at about Rs. 31,000/- and directed the Petitioners to affix Court fee of Rs. 2,325/- by the next date of hearing which was accordingly paid on 26.02.2007. However, while conclusively deciding the suit held under issue No. 4 that Court fee of Rs. 15,000/- was payable. Neither any timeframe was fixed for payment of deficient Court fee nor any adverse consequence was stated. Therefore, contention of learned counsel for the Petitioners that suit was dismissed on this score is completely misconceived. The Petitioners should have paid the deficient Court fee before availing the remedy of appeal. It may, however, be noted that the Petitioners despite candid finding of the Trial Court have not paid deficient Court fee till date, rather, they preferred appeal and this Civil Revision by affixing Court fee of Rs. 2,325/-, respectively. The deficiency in payment of Court fee apparently went unnoticed until the titled

Civil revision was finally argued. Ideally, the Appellate Court and this Court should have allowed time to the Petitioners to make good the deficient Court fee and proceed further, thereafter. However, as the case has been pending since 2014 and has been heard on merits today, this Court is not inclined to either postpone the hearing or pass any adverse order against the Petitioners on this count except directing them to pay deficient Court fee throughout the proceedings within one month from the date of this Judgment keeping in view the principles enunciated in cases titled, “Syed Zahid Hussain Shah v. Mumtaz Ali and others” (**PLD 2023 Supreme Court 470**); and “Kh. Muhammad Fazil v. Mumtaz Munnawar Khan Niazi (deceased) through L.Rs. and another” (**2024 SCMR 1059**).

13. Another objection qua competency of this Civil Revision is that it has been instituted by appending certified copy of the Judgment and Decree passed by the Appellate Court in the suit for specific performance instituted by the Respondent instead of the Judgment and Decree passed by the Appellate Court in suit for declaration instituted by the Petitioners. The objection is tenable, however, since this Court has examined this Civil Revision on its merits and record had previously been requisitioned by this Court, therefore, considering the peculiar fact that the appeals with reference to the respective suits of the Petitioners and the Respondent were dismissed by the same Appellate Court on the same date, the act of appending wrong Judgment and Decree with the titled Petition may have been an inadvertent human error, the mistake is condoned in the interest of justice, particularly, as certified copy of the impugned Judgment and Decree of the Appellate Court has been provided at the time of arguments.

14. On merits, essentially dispute between the parties is as to whether the Petitioners are owners of the suit property on the basis of subsequently registered sale deeds executed by other legal heirs of Sher Muhammad and as such, entitled to its possession or conversely, the Respondent is owner-in-possession of the suit property on the strength of prior unregistered Agreement executed by Sher Muhammad himself. The

possession of the Respondent since the date of the Agreement is admitted. The Petitioners conveniently concealed that initially, they filed an Ejectment Petition on 14.09.1991 against the Respondent which was dismissed vide order dated 26.05.1994 (Ex. D-3) against which they preferred an appeal which was also dismissed with costs on 06.07.1998 (Ex. D-5). It was conceded by learned counsel for the Petitioners that the said proceedings have attained finality. It is also established that the Respondent defended himself in the ejectment proceedings based on the Agreement and his possession over the suit property since the date of the Agreement. Notwithstanding the said fact, the Petitioners instituted suit for declaration claiming that the Respondent was their tenant over the suit property although the plea of tenancy had already been discarded in the previous round of litigation. The Respondent proved due execution of the Agreement against payment of entire sale consideration, more precisely in his suit for specific performance. Conversely, the Petitioners failed to prove that the Agreement in favour of the Respondent was forged or fraudulent and thus, ineffective qua their rights.

15. During pendency of the suit for declaration, the Respondent instituted a separate suit for specific performance against the Petitioners based on the Agreement. The Petitioners alongwith other legal heirs of Sher Muhammad appeared in the said suit but later disassociated themselves from the proceedings which led to initiation of *ex parte* proceedings against them and resultantly, *ex parte* Judgment and Decree was passed against them. Suit for declaration of the Petitioners and suit for specific performance of the Respondent were tried separately but by the same Trial Court side by side and as such, suit for specific performance was fully in knowledge of the Petitioners who could have defended their claimed title based on registered sale deeds and could have established that the Agreement was fake and fabricated. However, for reasons best known to the Petitioners, they preferred not to contest suit of the Respondent and allowed the decree to be passed in his favour. The Petitioners then preferred an appeal which was also dismissed by the same Appellate Court and on the same date when their

appeal qua suit for declaration was dismissed. Admittedly, Judgment and Decree passed by the Appellate Court with reference to suit for specific performance of the Respondent was never further assailed by the Petitioners and as such, attained finality, the execution whereof is now pending with the Executing Court.

16. The contention of learned counsel of the Petitioners that subsequent registered sale deeds in favor of the Petitioners shall prevail over prior unregistered Agreement in favor of the Respondent is not tenable for the reason that there is a valid and existing decree of specific performance passed by the Court regarding the suit property in favor of the Respondent which has attained finality. The Supreme Court of Pakistan in case titled “Muhammad Sadiq v. Muhammad Ramzan and 8 others” (**2002 SCMR 1821**) held that the registered document will have precedence over the unregistered document, if it was executed earlier in time because title is determined from the date of execution and not from the date of registration of the document. In the said case, title based on unregistered prior sale deeds was recognized over subsequently registered sale deed.

17. The last aspect of the case is as to what is the status of subsequently registered sale deeds in favor of the Petitioners? Once the Respondent proved his prior unregistered Agreement executed by Sher Muhammad in his lifetime against payment of the entire sale consideration, there was no question of devolving of the suit property to the legal heirs of Sher Muhammad. Since the suit property did not form part of the estate left behind by Sher Muhammad, there was no occasion for some of the legal heirs to get the sale deeds registered in favor of other legal heirs i.e. the Petitioners. Moreover, the decree of specific performance having attained finality, the execution whereof is admittedly pending, operates as *res judicata* to the claim of ownership of the Petitioners based on subsequent sale deeds. It is a well settled principle of law that if the foundation of any building collapses, the super structure built thereon would also fall to ground. As such, once the prior Agreement of the Respondent was validated,

the subsequent sale deeds became illegal and void, thus stood cancelled. The case law relied upon by learned counsel for the Petitioners is not attracted to the facts and circumstances of the present case as execution of the decree of specific performance is prerogative of the Executing Court, if required. Reliance is placed on case titled, “Muhammad Essa v. Government of Sindh through District Coordination Officer and 6 others” (**2014 YLR 2452**). For further reference, also see cases titled, “Maharaj Singh & others v. Karan Singh (dead) through LRs. & others” decided on 09.07.2024 (**2024 INSC 491**)¹; and “P. Ramasubbamma v. V. Vijayalakshmi & others” decided on 11.04.2022 (**2022 INSC 413**)². Hence, the concurrent finding of fact against issue No. 6 rendered by the Courts below stand modified, accordingly.

18. For the reasons recorded above, this Civil Revision is **dismissed**. No order as to costs.

(Abid Hussain Chattha)
Judge

Approved for Reporting.

Judge

Waqar

¹ https://api.sci.gov.in/supremecourt/2010/30100/30100_2010_6_1501_53551_Judgement_09-Jul-2024.pdf

² https://api.sci.gov.in//pdfdate/index1.php?dt=2022-04-11&dno=259862021&filename=supremecourt/2021/25986/25986_2021_12_1501_34894_Judgement_11-Apr-2022.pdf