

Stereo. H C J D A 38.
JUDGMENT SHEET
LAHORE HIGH COURT
RAWALPINDI BENCH RAWALPINDI
JUDICIAL DEPARTMENT

RSA No.694/2021

JUDGMENT

Date of Hearing:	27.11.2024
Appellant by:	Mr. M. Taimur Malik and Raja Gul Zaman Advocates.
Respondents No.1(a) & 1(b) by:	Mr. Gulzar Mehdi, Advocate.
Respondent No.2:	Ex-parte <i>vide</i> order dated 20.01.2023.

Anwaar Hussain, J. This Regular Second Appeal, under Section 100 of the Code of Civil Procedure, 1908 (“CPC”), is directed against impugned judgment and decree dated 02.11.2020, by virtue of which the appeal preferred by the respondents was accepted and judgment and decree dated 28.02.2019 passed by the Trial Court, whereby suit of the appellant for specific performance of agreement to sell dated 04.07.2008 (“**the agreement**”) was decreed, has been upended.

2. By way of factual background, it has been noted that the appellant instituted a suit for specific performance of the contract based on the agreement, which was contested by the respondents with averments that the agreement is forged; that the predecessor of respondents No.1(a) and 1(b) (“**the respondents**”) was not owner of the suit property when it was purportedly sold in the year 2008 and only obtained ownership of the same through an exchange, in the year 2010 *albeit* to the extent of 10-Marla, with respondent No.2. After

recording of evidence, the suit was decreed and when appeal was jointly preferred by the respondents as also respondent No.2, the former findings were upset.

3. Learned counsel for the appellant submits that findings of the Courts below are at variance and well-reasoned judgment of the Trial Court has been upended by the Appellate Court below, without appreciating the factual matrix and evidentiary resume of the case. Adds that in order to prove the agreement, the appellant produced its marginal witnesses, notary public, as well as scribe of the agreement and the appellant herself also appeared, which testimony has been ignored for extraneous grounds that are alien to the applicable law inasmuch as the appeal of the respondents has been accepted while dismissing the suit of the appellant on the ground that there is no stipulation in the agreement that the respondents will execute the registered sale deed in favour of the appellant. Further submits that the possession of the appellant over the suit property was acknowledged, which gives further traction to the fact that the agreement was executed and complete sale price was received by the predecessor of the respondents.

4. Conversely, learned counsel for the respondents has supported the impugned judgment. He states that Abdul Qayyum Baig (deceased), the purported vendor, completely denied the execution of the agreement since he was not owner of the suit property in the year 2008 when the agreement was executed, and became owner in the year 2010 by effecting exchange mutation, to the extent of 10-Marla only, with respondent No.2. Further contends that the evidence of the scribe as also the notary public was rightly disbelieved by the Appellate Court below as name of the former was not reflected in the agreement, as scribe, whereas the notary public did not produce the relevant register. He further contends that the stamp paper used for agreement was issued

in favour of husband of the appellant i.e., Muhammad Ghaus Baig, who did not appear as witness in support of the claim of the appellant and hence, adverse inference needs to be drawn. Further contends that the stamp vendor was also not produced, which is fatal to the case of the appellant as held in case reported as "Syed Abdur Rashid (deceased) through legal heirs v Rana Muhammad Anwer" (**2023 YLR 309 Lahore**). Concludes that exact description of the suit property is not given in the agreement, hence, the impugned decree could not be passed.

5. Arguments heard. Record perused.

6. The substantial question of law requiring opinion of this Court was formulated, *vide* order dated 09.05.2023, which reads as under:

“Whether a decree can be passed in a suit for specific performance of contract, based on a written agreement to sell that does not contain a stipulation regarding registration of a sale deed in respect of the immovable property forming subject matter of the sale?”

7. Before proceeding further, it will be appropriate to reproduce the issues framed by the Trial Court and also analyze the evidentiary resume of the case. Following issues were framed:

- “1. Whether defendant executed an agreement to sell dated 04.07.2008 regarding the suit house with the plaintiff and defendant also received the consideration amount Rs.5,75,000/- in presence of witnesses? OPP
2. Whether plaintiff is entitled to the decree as prayed for? OPP
3. Whether suit is liable to be dismissed? OPD
4. Whether defendant is entitled to special costs? OPD
5. Relief.”

Core issue was issue No.1. Burden of proof was on the appellant. In support of her contentions, the appellant appeared as PW-3 and produced one Syed Zafar ul Hassan Bukhari, Advocate as PW-1, Ch. Muhammad Saleem, Advocate, as PW-2, marginal witness of the

agreement, namely, Muhammad Yaqoob as PW-4, Muhammad Sarwar as PW-5 and Nazar Muhmmad as PW-6. In documentary evidence, the agreement was produced as Ex.P1, Register Record of Right for the year 1999-2000 as Ex.P2, copy of Mutation No.24 as Ex.P3, copy of mutation No.3614 as Ex.P4, copy of plaint of the suit titled "Abdul Qayyum v Walayat Baig, etc." as Ex.P5, copy of judgment alongwith decree sheet as Ex.P6, copy of statement of PW-1 as Ex.P7, copy of amended memorandum of appeal as Ex.P8, copy of the judgment alongwith decree sheet as Ex.P9, copy of the suit for permanent injunction as Ex.P10, copy of stay order as Ex.P11 and Electricity bill as Ex.P12.

8. Conversely, respondent No.1(a), namely, Atlas Bibi appeared as DW-1 and produced present respondent No.2, namely, Muhammad Sadiq as DW-2 and also produced documentary evidence i.e., copy of mutation No.2722 as Ex.D1, copy of mutation No.3137 as Ex.D2, copy of mutation No.3226 as Ex.D3, copy of mutation No.3614 as Ex.D4, attested copy of *Fard Badar* No.164 as Ex.D5 and copy of Register Record of Rights for the year 1999-2000 as Ex.D6.

9. The Trial Court decreed the suit, whereas, when the evidence was re-appraised by the Appellate Court below, the impugned judgment was passed and the findings of the Trial Court were upended on the ground that the stamp vendor did not appear, who issued the stamp paper used for the purpose of preparing the agreement; the stamp paper was issued in favour of Muhammad Ghaus Baig, who also did not appear; and most importantly, decree for specific performance of contract cannot be passed as there was no specific stipulation to this effect agreed between the parties, under the agreement. Operative part of the impugned judgment reads as under:

"13. *The plaintiff Fareeda Khanum as PW3 in her cross-examination also admitted that the Iqrarnama Ex-P1 does not contain stipulation of execution of*

Registered Sale Deed or the mutation. Thus even if the subject Sale Agreement/Iqrarnama is considered to be executed between the parties, it does not contain the stipulation, the specific performance of which is prayed by the plaintiff. The plaintiff has relied upon a written contract/Iqrarnama alleged to be made between the parties. It is a well-settled principle of interpretation that nothing can be read more than what is written in the subject written agreement. The plaintiff cannot seek the specific performance of a term/stipulation which is not narrated therein. Thus the plaintiff is not entitled to the decree as prayed for by her in the plaint. For all what has been discussed above findings of the learned trial court upon issues No.1, 2 and 3 are reversed.”

(Emphasis supplied)

The above-mentioned operative part forms the basis of substantial question of law, which primarily requires determination. Before addressing the same, I would like to analyze the other two grounds on the basis of which findings of the Trial Court were upended by the Appellate Court below.

10. The law envisages production of two marginal witnesses of an agreement, to prove its execution, in terms of Article 17 read with Article 79 of the Qanun-e-Shahadat Order, 1984 (“QSO”). In present case, both the marginal witnesses were produced. In addition, notary public also appeared as PW-1, who also supported the stance of the appellant. PW-2 is scribe of the agreement *albeit* his name is not recorded in the agreement. Learned counsel for the respondent has not pointed out any legal requirement to the effect that scribe must reflect his name in the agreement or a litigant must specify so in his pleadings. Similarly, production of the stamp vendor who deposes in favour of a party can be taken as supporting evidence but his non-appearance cannot be considered as fatal in view of the fact that marginal witnesses of the agreement were produced, who despite lengthy cross-examination remained firm with respect to their respective deposition. Therefore, reliance placed on case of “Syed Abdur Rashid (deceased) through legal heirs supra is misplaced on

account of distinguishable facts. More particularly, the unequivocal admission of predecessor-in-interest of the respondents/vendor, namely Abdul Qayyum Baig, in a suit for partition filed, *inter alia*, against one Walayat Baig and others, is of considerable relevance and persuasion. In the said suit for partition, predecessor of the respondents categorically admitted that he has sold the suit property i.e., house (*albeit* comprising 08-Marla) to the appellant. Insofar as non-appearance of Muhammad Ghaus Baig in whose favour stamp paper was issued is concerned, suffice to observe that said Muhammad Ghaus Baig is husband of the appellant/plaintiff and his non-appearance does not have any bearing on the validity of the agreement.

11. At this juncture, it is also imperative to observe that the objection of the respondents that predecessor of the respondents only obtained 10-Marla out of the 14-Marla suit property, in exchange, in the year 2010 whereas the agreement was executed in the year 2008 and hence, the decree to the extent of house constructed over 14-Marla land is not enforceable, is also of no help to the respondents inasmuch as both the Courts have disbelieved this ground as no one from the same *Khata/Khewat* in which the suit property is situated came forward during the pendency of the suit followed by the appeal, to lay challenge to the agreement, as well as the excess possession of the appellant, if any, over the suit property, which is house constructed by the respondents themselves. Even otherwise, any defect and/or shortcoming in the title of the vendor-predecessor-in-interest of the respondents in respect of the suit property, at the time of execution of the agreement was cured subsequently when he acquired the interest in the suit property after the exchange took place. Hence, the agreement having been proved, the decree in suit for specific performance of the said agreement is operative against the respondents to the extent of interest in the suit property in terms of

principle of “**feeding the grant by estoppel**” envisaged under Section 43 of the Transfer of Property Act, 1882 (“**the Act 1882**”), which reads as under:

“43. Transfer by unauthorized person who subsequently acquires interest in property transferred.— Where a person fraudulently or erroneously represents that he is authorized to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Noting in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.”

(Emphasis supplied)

The above quoted provision of the Act, 1882 governs the transfers of immovable property where the transferor (predecessor of the respondents in present case), to begin with, had no authority to transfer the property on account of lack of title and/or interest in said immovable property, yet he entered into the agreement with a misrepresentation in respect of his title to the property, making the other party—the appellant in present case, act on the same and then acquired a good title in the property. In such cases, if the transferee does not repudiate the contract, the transferee has the option to go ahead and seek specific performance of the contract to the extent or the interest which the transferor obtained in the property. Willingness or otherwise of the transferor to go ahead with the transfer is immaterial. Thus, it does not lie in the mouth of the respondents to deny their own title in respect of the suit property, regarding which their predecessor himself instituted a suit for partition against the co-owners of the entire *khata* in which the suit property was situated, got recorded a statement that the suit property has been sold to the

appellant before this Court *albeit* taking contradictory stance in respect of his own entitlement as well as the sale of the suit property and none of the co-sharers objected to entitlement of the suit property.

12. When the evidentiary resume of the case is holistically examined, it is well evident that the agreement stood proved and the Appellate Court below has taken a jaundiced view of the evidentiary resume of the case when the appeal was preferred, by the respondents. The Appellate Court below erred in discarding the evidence in general and admission on the part of predecessor-in-interest of the respondents/vendor that he has sold the property to the appellant in particular, by concluding that specific performance of a term (i.e., decree to execute a registered sale deed) cannot be passed since the said term is not stipulated in the agreement, which takes this Court to the legal question formulated hereinabove.

13. The respondents want this Court to hold that since the appellant and predecessor of the respondents did not agree by incorporating a specific stipulation in the agreement that the latter will execute a registered sale deed in favour of the former-the appellant, a decree cannot be passed directing the respondents to execute a registered sale deed/conveyance in favour of the appellant as no such stipulation exists in the agreement, the specific performance whereof could be decreed. The argument is flawed and the reasoning put forth by the Appellate Court below is against the law.

14. In this regard, it is imperative to understand the law governing execution of the contract in general and the agreements related to immovable property in particular. The provisions of the Contract Act, 1872 read with Section 55 of the Act 1882 contain the answer to the core controversy in this case. Section 55 of the Act 1882 contemplates certain rights and obligations of the buyer and the seller. These obligations, imposed by the sanction of law, are covenants and are in the nature of statutory obligations, the breach whereof confers a right

on either party to take legal recourse, which, *inter alia*, includes, the duty of the seller “to execute the proper conveyance”. The relevant clause of Section 55 of the Act 1882 reads as under:

“55. Rights and liabilities of buyer and seller.–

In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:

- (1) The seller is bound–
 - (a)
 - (b)
 - (c)
 - (d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place;”

(Emphasis supplied)

Perusal of the above quoted provisions indicates that *in the absence of contract to the contrary, it is the duty of the seller-the respondents in present case, to execute the proper conveyance*, on the payment of the amount due in respect of the price. Conveyance means the transfer of ownership that is done by signing of the sale deed. Here it will be appropriate to understand the meaning and scope of the term “contract to the contrary”. It is a significant concept in various legal contexts, particularly in relations to the transfer of property allowing the parties to deviate from the statutory provisions through explicit agreements. It refers to an agreement that explicitly contradicts statutory provisions or established legal principles, in present case clause (d) of subsection (1) of Section 55 of the Act 1882, quoted hereinabove. However, such contracts to the contrary must be clear and unambiguous to effectively override the statutory obligations. Without

an express term to the contrary, the statutory obligations envisaged under the law remain operative. While the contracts to the contrary can be implied, they must be sufficiently clear to indicate an intention to deviate from statutory provisions and the ambiguity may lead to the enforcement of the statutory provisions instead. Thus, in the absence of contract to the contrary, the rights and corresponding liabilities of seller and buyer envisaged under the law are to be read as part and parcel of the agreement(s) executed by them respectively.

15. Having above legal position in respect of the statutory obligations of the parties in a contract of sale of immovable property in sight, it has been noted that the agreement between the parties brought on record by the appellant as Exh.P1 does not contain any such deviation from the statutory obligation of the respondents to execute a conveyance/sale deed. Even otherwise, the Courts will not enforce contracts that are contrary to the public policy, even if they are treated as the contracts to the contrary. Therefore, this Court is of the opinion that the Appellate Court below erred in upending the findings of the Trial Court on the ground that a decree cannot be passed in a suit for specific performance of contract, based on a written agreement to sell that does not contain a stipulation regarding registration of a sale deed in respect of the immovable property forming subject matter of the sale.

16. The matter can be examined from another angle. During the course of arguments, few pointed questions were asked to learned counsel for the respondents as to how the suit property i.e., house could be constructed by predecessor of the respondents when he was not the owner of the suit property, in the year 2008, and only exchanged the land with respondent No.2 in the year 2010; and the reasons why the possession was handed over to the appellant, who was admittedly a complete stranger to predecessor of the respondents. There was complete silence on the part of learned counsel for

respondents, however, he submitted that that possession was illegally obtained by the appellant. He was then confronted with statement of respondent No.1(a)/Atlas Bibi (DW-1), who acknowledged that the suit property was given for residence, without any assertion *qua* any illegality committed by the appellant, which implies that the transfer of the possession of the suit property was lawful and pursuant to the agreement executed between the appellant and predecessor of the respondents. In fact, the respondent side has taken contradictory stance regarding the possession of the suit property with the appellant and their case falls under the clutches of maxim "*Allegans Contraria Non Est Audiendus*" - A person who alleges things contradictory to each other is not to be heard, hence, disentitling the respondents from any relief.

17. In view of the above discussion, the present appeal merits acceptance and is allowed. As a corollary, the impugned judgment passed by the Appellate Court below is set aside and that of the Trial Court is restored. No order as to costs.

(ANWAAR HUSSAIN)
JUDGE

Approved for reporting

JUDGE

Tahir Noor