

Stereo. H C J D A 38.
Judgment Sheet
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

W.P No.3264/2020

Mst. Nadara Parveen etc.
Versus
Additional District Judge etc.

J U D G M E N T

Date of Hearing	04.05.2023
Petitioners By:	Maher Khizar Hayat Khan Sargana, Advocate.
Respondent No.3 By:	M/s Summair Jabbar and Bilal Ahmad, Advocates.

Anwaar Hussain J: The dispute relates to the property left by one Khursheed Sherwani, who admittedly died issueless on 10.11.2008 and at the time of her death, was owner of double storey house, bearing No.18/352 measuring 05 *Marlas*, situated in *Mohallah Dera Araiyan*, Sialkot (“**the house**”). The petitioners are children of one Mumtaz Begum, who was admittedly real sister of the deceased Khursheed Sherwani. Respondent No.2, namely, Munsaf Khan (now deceased) was married to the deceased Khursheed Sherwani. Munsaf khan sold 1/2 (half) of the house, that constitutes the suit property, to respondent No.3, namely, Khalid Javed, through an agreement to sell dated 03.02.2012 (“**the agreement**”). It finds mention in the agreement that the entire sale price was paid and possession of the said share was given to respondent No.3 but the sale deed was not executed in time for which suit for specific performance of the agreement was instituted by respondent No.3, against Munsaf Khan. The suit was *ex-parte* decreed in favour of respondent No.3, *vide* judgment and decree dated 19.12.2013, whereafter the execution petition was filed by respondent No.3. During the execution proceedings, *Sultani Baynama* was registered. It is the case of respondent No.3 that formal possession of the suit property i.e., 1/2

(half) share out of the house was given, to respondent No.3, during the execution proceedings by raising a wall and in the remaining portion of the house, the petitioners are, admittedly, residing as the legal heirs of the deceased Khursheed Sherwani.

2. The petitioners approached the learned Trial Court, by filing an application, under Section 12(2) of the Code of Civil Procedure, 1908 (“**the CPC**”), laying challenge to the *ex-parte* judgment and decree dated 19.12.2013, passed in suit for specific performance of contract instituted by respondent No.3 against Munsaf Khan, *inter alia*, on the ground that Munsaf Khan got married with the deceased Khursheed Sherwani but the said marital knot had been dissolved when the latter was divorced by the former in the year 1980. Therefore, Munsaf Khan was not entitled to any share/claim, in the house, as legal heir of the deceased Khursheed Sherwani. In support of their contentions, the petitioners relied upon the suit for declaration titled “Munsaf Khan v. Public at large etc.”, instituted by Munsaf Khan in the Civil Court, Sialkot, on 30.07.2010, in which Munsaf Khan claimed himself as widower of the deceased Khursheed Sherwani and also arrayed mother of the petitioners namely, Mumtaz Begum along with another sibling and nieces of the deceased Khursheed Sherwani, as legal heirs of the latter, and sought declaration in respect of the house. The petitioners along with others contested the claim of Munsaf Khan with the averments that he had divorced the deceased Khursheed Sherwani. Issues were framed and the said suit was dismissed with costs, *vide* judgment and decree dated 28.03.2013, under Order XVII, Rule 3 of the CPC, as Munsaf Khan was unable to lead any evidence regarding subsistence of his marriage with the deceased Khursheed Sherwani, till her death and the said judgment and decree dated 28.03.2013 attained finality as the same was not assailed at any higher forum by Munsaf Khan. Reply to the application under Section 12(2) of the CPC, filed by the petitioners, was obtained by the learned Trial Court. Only respondent No.3 contested the application by filing reply

whereas Munsaf Khan, once again, opted not to appear before the learned Trial Court. Respondent No.3, in his reply, pleaded to be *bonafide* purchaser of the suit property. Having framed the issues and recorded the evidence, the learned Trial Court dismissed application of the petitioners, *vide* order dated 13.05.2019 and the revision petition filed by the petitioners against the said order had also been dismissed, *vide* order and decree dated 26.10.2019. The concurrent findings of the learned Courts below have been assailed through the present constitutional petition.

3. Learned counsel for the petitioners submits that both the learned Courts below have erred in appreciating the fact that there was no valid declaration in favour of Munsaf Khan regarding his right to inherit 1/2 share of the house that constitutes the suit property. Adds that since Munsaf Khan had no title to the suit property, he could not transfer a better title to respondent No.3. Further contends that even if respondent No.3 is a *bonafide* purchaser, he can only lay claim for recovery of the sale price, if any, paid by him to Munsaf Khan.

4. Conversely, learned counsel for respondent No.3 submits that respondent No.3 is a *bonafide* purchaser, of the suit property, who dealt with Munsaf Khan on the strength of the *nikahnama* as well as the death certificate of Khursheed Sherwani inasmuch as the latter document clearly reflects the name of Munsaf Khan as husband of the deceased Khursheed Sherwani and the said certificate was never challenged by the petitioners. Whereas Munsaf Khan expired during these proceedings and resultantly, his legal heirs were arrayed as respondents No.2-A to 2-C, however, despite service, they too opted not to appear before this Court and were proceeded *ex-parte*, *vide* order dated 08.03.2023.

5. Arguments heard. Record perused.

6. The present case, revolving around the property left by the deceased Khursheed Sherwani, with the above referred factual matrix, necessitates the determination of the following questions:

- (i) Whether respondent No.3 carried out due diligence regarding the title of the house so as to justify his claim of being a *bonafide* purchaser of the suit property?
- (ii) Whether respondent No.3 was justified in treating the death certificate of the deceased Khursheed Sherwani, depicting name of Munsaf Khan as her husband, to be sufficient evidence conferring title of the suit property upon Munsaf Khan?

7. Before rendering an opinion on the above stated points of determination, it is apt to note that this Court is fully cognizant of the well settled legal position that by operation of law a Muslim's estate legally and juridically vests immediately on his death in his or her heirs and their rights respectively come into existence forthwith. In this regard, case cited as "Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi" (PLD 1990 SC 1) is referred. Thus, the right of legal heirs to the estate of a deceased comes into being immediately on the death of propositus and the same does not hinge upon any overt or covert act to be performed. The legal position that the estate of deceased immediately vests in the legal heirs on the death of the deceased is an ineluctable position, but the fact as to whether a particular person is a legal heir or not is required to be determined and declared by a Court of competent jurisdiction, particularly when the status of the legal heir as such is disputed. Once the Court makes such declaration in favour of the legal heirs, their names can be added as the title holder in the relevant record maintained by the regulatory authorities such as the Revenue, Excise or Settlement Departments, etc. In order to obtain such declaratory decree, the legal heirs have to prove before the Court that they are the only legal heirs of the propositus.

8. Having the above analysis regarding legal position pertaining to the rights of legal heirs of a deceased (in present case, Khursheed Sherwani) in sight, the evidentiary resume and factual matrix of the case needs to be analyzed. This Court finds that admittedly after the death of Khursheed Sherwani, Munsaf Khan approached the learned

Civil Court, Sialkot, by instituting the suit, seeking declaration of his rights as legal heir of the deceased Khursheed Sherwani and was unsuccessful when the petitioners contested his claim with averments that Munsaf Khan had divorced the said deceased before the latter expired. The suit was dismissed with costs, *vide* judgment and decree dated 28.03.2013, under Order XVII, Rule 3 of the CPC for want of evidence and the said decree has not been further challenged and still holds the field. Moreover, relevant record related to the house maintained by the Registering Authorities such as Excise and Taxation Office was not amended in favour of Munsaf Khan, to confer any title upon him. In the presence of the decree dated 28.03.2013, holding the field, whereby the suit of Munsaf Khan was dismissed, he had no title in respect of the suit property and hence, was not empowered to alienate the same in favour of anyone, including respondent No.3. It is settled principle of law that a person cannot transfer a better title than he himself has as envisaged in terms of the *latin* maxim **‘Nemo dat quod non-habet** (‘no one can give what they do not have). Therefore, on this ground alone the agreement fails and the learned Courts below have misread the evidence and ignored the judgment and decree dated 28.03.2013 and relied upon death certificate of the deceased Khursheed Sherwani, hence, erred in law and fact while dismissing the application of the petitioners, under Section 12(2) of the CPC, as a death certificate or a *nikahnama* cannot be considered as documents conferring title of the house.

9. Adverting to question whether respondent No.3 is entitled to seek protection of *bonafide* purchaser for value, suffice to observe that one of the essential components of defence of *bonafide* purchaser is to establish that there was no dishonesty of purpose or tainted intention to enter into the transaction. In addition, it is also required to be established that due diligence as to the title was carried out prior to purchase of the property in question. Case reported as “Hafiz

Tassaduq Hussain v. Lal Khatoon and others” (PLD 2011 SC 296) is referred in this regard.

10. The plea of respondent No.3 as *bonafide* purchaser is devoid of any persuasive force on the ground that his vendor (Munsaf Khan) had no title to the house as examined and held in the preceding paragraphs. What adds to it is that respondent No. 3 failed to establish the absence of dishonesty of purposes and tainted intention, which is evident from the fact that the contents and recitals of the agreement between Munsaf Khan and respondent No.3 reveal that Munsaf Khan claimed exclusive ownership of the house left by the deceased Khursheed Sherwani and respondent No.3 relied on the same on the strength of an entry in death certificate of Khursheed Sherwani. It belies logic that respondent No.3 by, merely, examining the death certificate and *nikahnama* of the deceased Khursheed Sherwani and Munsaf Khan reached the conclusion or had drawn an inference that the former died issueless and Munsaf Khan has 1/2 (half) share in the house left by the deceased Khursheed Sherwani, without making a necessary probe as required under Section 41 of the Transfer of Property Act, 1882 (“**the Act**”) as to who are the legal heirs having claim to the remaining 1/2 (half) share in the house more so when it is his claim that he was put in possession of 1/2 (half) share of the house by Munsaf Khan, upon receipt of entire sale price by the latter, when the agreement was executed. Therefore, even if respondent No.3, in good faith, believed that Munsaf Khan was entitled to 1/2 (half) share in the house left by the deceased Khursheed Sherwani, there is no explanation why the recitals of the agreement contemplates to the effect that Munsaf Khan is the exclusive owner of the house. Admittedly, the petitioners were in possession of the house. Had respondent No.3 acted with honest and *bona fide* motivation and genuinely been put in possession of undivided part of the house, constituting suit property as alleged in the agreement, he would have easily got knowledge of the defect in title of Munsaf Khan. The stance

of respondent No.3 is otherwise so contradictory and capricious as to be on two diagonally opposite directions and positions. On the one hand, it has been narrated in the agreement that the possession was handed over to respondent No. 3 by Munsaf Khan at the time of execution of the agreement; and on the other hand, the execution was filed and the possession was obtained through the intervention of the bailiff, at the direction of the learned Executing Court. Such contradictory stance of respondent No.3 alone blow up the *bona fides* of respondent No.3 given the fact that during the cross examination, specific suggestion was put to AW/1 in the following manner:

”درست ہے کہ خالد جاوید نے بذریعہ عدالت قبضہ لیا ہے۔
درست ہے کہ بیلف کے ساتھ پولیس بھی موجود تھی۔ بیلف
27 رجب اور 27/28 اپریل 2016 کو گیا تھا۔ دن کے وقت گیا
تھا۔ اس وقت صرف نشاندہی ہوئی اور رقبہ بھی دلا دیا۔
درست ہے کہ خالد جاوید نے قبضہ قانونی طریقہ سے بذریعہ
بیلف لیا تھا۔“

The suggestion depicts that the possession was taken through bailiff during the execution of the decree and also exhibits the contradiction in stance of respondent No.3 in relation to possession of the house as analyzed above. Therefore, this Court is of the view that it clearly borne out from the judicial record that respondent No. 3 was not in possession of the 1/2 (half) of the house at the time of filing of the suit for specific performance and obtained the possession only through bailiff appointed by the learned Executing Court, once *ex-parte* decree was passed in favour of respondent No.3 against Munsaf Khan, whose address given in the suit for specific performance was that of Khushab and not Sialkot, where the house is situated that further shows that Munsaf Khan was not even in possession of the remaining 1/2 (half) of the house, which he purportedly had not sold after claiming to be the exclusive owner of the house as per the agreement. It also belies logic that respondent No.3 paid entire sale price to Munsaf Khan under the agreement and neither got the sale deed registered nor got the possession of the suit property forming part of the house, through

proper partition or settlement with the co-sharers, whereas the agreement narrates that possession of the house was obtained at the time of the execution of the agreement, which is refuted by the record as discussed hereinabove.

11. The above referred analysis leads to ineluctable inference that had respondent No.3 conducted a probe into the status of the house, as part of due diligence required by a buyer of an immovable property before purchasing the same in good faith, he should have inquired about the status of the occupants of the same i.e., the petitioners, which could have easily revealed to him about the dispute between Munsaf Khan and the petitioners and other successors-in-interest of the deceased Khursheed Sherwani; the filing of suit for declaration by the former; and its dismissal, *vide* judgment and decree dated 28.03.2013. There is also no explanation why Munsaf Khan was not asked to provide a declaratory decree in his favour in respect of his share in the house, to respondent No.3, establishing the entitlement thereof before paying the entire sale price and obtaining possession of the suit property. So even if it is assumed that the agreement was executed with *bona fides*, the only reason why the execution of the sale deed was postponed despite purportedly paying the entire sale price appears to be absence of a clear title in favour of Munsaf Khan. When confronted with a pointed question by this Court in this regard, there was no plausible explanation available with learned counsel for respondent No.3. It is hard to disagree that the contents of a death certificate cannot be treated as an instrument, under the law, conferring entitlement of share in the house as analyzed hereinabove. The above discussion leads to the conclusion that respondent No.3 cannot seek protection of being *bonafide* purchaser as he failed to take appropriate steps as was required under Section 41 of the Act to satisfy himself in relation to the entitlement of Munsaf Khan to the suit property, as legal heir of the deceased Khursheed Sherwani. Cases reported as “Abdul Hameed through L.Rs and others v. Shamsuddin

and others” (PLD 2008 SC 140) and “Mosam Khan v. Sarfraz Khan through L.Rs and others” (2012 CLC 1944) are referred in this regard.

12. There is yet another aspect of the matter. Admittedly, the suit property forms undivided part of the house, measuring 05 Marlas. There was no description as to which part of the house was sold by Munsaf Khan to respondent No.3 and possession thereof was purportedly given at the time of execution of the agreement although respondent No.3 could not prove such possession to have been delivered at the time of the execution of the agreement. The law in this regard is settled to the effect that an undivided share of a co-sharer can be a subject matter of sale/transfer, but the possession cannot be handed over to the vendee unless the property is partitioned by metes and bounds, either by the decree of a Court in a partition suit, or by settlement among the co-sharers. Therefore, even if Munsaf Khan had a valid title (which he had not as examined hereinabove), respondent No.3 could have been entitled only for ‘symbolic possession’ and thereafter, he should have approached the Court of competent jurisdiction for partition of the joint property as per law, which has not been done. This also shows that the *ex-parte* decree, on the basis of the agreement, was obtained through fraud and the same was got executed with dishonest intention. Therefore, this Court is of the opinion that respondent No.3 failed to establish absence of dishonesty of purpose or tainted intention while entering into the agreement that is *sine qua non* to seek protection of *bonafide* purchaser in terms of Section 41 of the Act. Both the learned Courts below have erred by not appreciating the matter in its proper perspective and merely non-suited the petitioners on the ground that they could not prove divorce between Munsaf Khan and the deceased Khursheed Sherwani, which was otherwise not relevant when it was clearly borne from the judicial record, having sanctity attached to it, that Munsaf Khan’s suit for declaration as legal heir of the deceased

W.P No.3264/2020

Khursheed Sherwani was dismissed for want of evidence and the said judgment and decree dated 28.03.2013 still holds the field that cannot be brushed aside and death certificate of the deceased Khursheed Sherwani and her *nikahnama* with Munsaf Khan cannot be preferred over the said judgment and decree.

13. In view of the above, the present petition is **allowed**. The judgments of the learned Courts below are set aside and the application filed by the petitioners under Section 12(2) of the CPC is accepted. As a natural corollary, *ex-parte* judgment and decree dated 19.12.2013 passed in favour of respondent No.3 is also set aside and the suit of respondent No.3 for specific performance shall be deemed to be pending that shall be decided afresh after impleading the petitioners as necessary party. No order as to costs.

(Anwaar Hussain)
Judge

Approved for reporting

Judge