

Stereo.HCJDA-38
JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

C.R. No.19540 of 2021

Zafar Ali and others
v.
Rashid Ahmad and others

JUDGMENT

Dates of hearing	18.10.2023
Petitioners by	Muhammad Sharif Khokhar, Advocate.
Respondents by	Syed Zaheer-ul-Hassan Shamsi and Mian Javed Zafar, Advocates.

Rasaal Hasan Syed, J. This judgment will decide the instant civil revision as well as civil revision No.21353 of 2021 against consolidated judgment and decree dated 04.3.2021 of the learned Addl. District Judge, Kot Radha Kishan, District Kasur, wherein by allowing appeals of the respondents against consolidated judgment and decree dated 22.4.2016 of the learned Civil Judge, suit for specific performance of the petitioners was dismissed while the suit for declaration, cancellation and injunction filed by the respondents was decreed.

2. Facts material for the disposal of these petitions are that the predecessor of petitioners instituted a suit for specific performance titled Barkat Ali v. Ramzan, etc. to enforce agreement of sale dated 31.7.1996 while the respondents filed a suit for declaration, cancellation and injunction titled

Rasheed Ahmad v. Barkat Ali, etc.. The suits were contested by the respective parties, consolidated issues were framed, oral and documentary evidence pro and contra was produced, whereafter the learned Civil Judge, Kot Radha Kishan, District Kasur vide judgment and decree dated 22.4.2016 dismissed the suit for declaration filed by the respondents and decreed the suit of the petitioners for specific performance against the respondents except the minor defendant (defendant No.4 in the suit). Two appeals were filed against the consolidated judgment which were allowed by the learned Addl. District Judge, Kot Radha Kishan, District Kasur in terms whereof the petitioners' suit for specific performance was dismissed in toto while the suit of the respondents for declaration with consequential relief was decreed. In the instant petitions, the consolidated judgment of the learned Addl. District Judge has been assailed.

3. Petitioners' learned counsel submits that the judgment of the appellate court was based on misconception of law and facts; that the learned Civil Judge partly decreed the suit for specific performance and dismissed the suit for declaration filed by the respondents for sound legal reasons while the appellate court illegally and by misreading the record reversed the findings of trial court; that the execution of agreement was proved beyond doubt by oral evidence and also the admissions of witness of respondents in cross-examination

were illegally ignored and that non-appearance of attesting witnesses of the agreement was not fatal in the peculiar circumstances of case; and that the impugned judgment of the appellate court is without jurisdiction. In response the learned counsel for the respondents supported the impugned judgment and submitted that the suit for specific performance was rightly dismissed as the petitioners could not prove the execution and genuineness of any sale agreement and that the oral and documentary evidence proved beyond doubt that the petitioners were lessee in the property which was leased out for ten years and who were bound to return the possession and that the learned Addl. District Judge correctly analyzed the evidence and rightly held that the petitioners could not prove the sale transaction and that the suit of the petitioners was justifiably dismissed.

4. Points raised by the learned counsel for the parties pro and contra have been given due consideration in the light of pleadings and evidence annexed with the petitions. Facts as are discernible therefrom are that petitioners' predecessor instituted a suit for specific performance for enforcement of agreement of sale dated 31.7.1996 against the respondents claiming that the respondents executed an agreement of sale in his favour in respect of the suit land whereby the land was agreed to be sold for Rs. 83,125/-; a sum of Rs. 78,125/- was paid as earnest money; it was settled that sale deed would be

executed on acquisition of proprietary rights as the property at that time was vesting in the Provincial Government and that the possession was delivered under the sale and that despite repeated requests matter pertaining final sale was avoided on different pretexts; thereafter the respondents refused to honor their commitments, in result, the suit was filed for enforcement of agreement through the indulgence of the Court. As against this, the respondents denied the claim and also filed a suit for declaration, cancellation and perpetual injunction titled Rasheed Ahmad v. Barkat Ali, etc. seeking annulment of the document i.e. agreement of sale dated 31.7.1996. The defence taken was that in point of fact the land was leased out for ten years in favour of late Barkat Ali and that he in collusion and in conspiracy with the stamp-vendor/deed-writer fabricated a sale agreement instead of lease agreement and that the respondents never executed any agreement of sale. Both suits were consolidated on 20.10.2015, consolidated issues were framed; parties led their evidence. Barkat Ali plaintiff testified as P.W.1, Muhammad Hayat son of Ameer Khan appeared as P.W.2 and Muhammad Ilyas son of Ameer Khan deposed as P.W.3. Documentary evidence comprised sale agreement as Ex.P-1, mutation No. 1960 as Ex.P-2, mutation No. 1958 as Ex.P-3, mutation No. 1959 as Ex.P-4 and copy of entry at serial No. 28 of the stamp-vendor's register as Ex.P-5. Respondents produced

Rasheed Ahmad son of Shahada as D.W.1, Bashir Ahmad son of Muhammad Hayat as D.W.2 and Salamat Ali son of Mehtab Khan as D.W.3. Documentary evidence produced included attested copy of mutation No. 1203 as Ex.D-1, attested copy of mutation No. 1958 as Ex.D-2, attested copy of mutation No. 1959 as Ex.D-3 and attested copy of mutation No. 1960 as Ex.D-4. The learned Civil Judge decreed the suit for specific performance filed by the petitioners against respondents except Mst. Umran minor daughter of Hafeezan Bibi (defendant No.4 in the suit and respondent No.4 in the first appeal) and dismissed the suit for declaration filed by the respondents by consolidated judgment and decree dated 22.4.2016 which was challenged in two separate appeals: one filed by Rasheed Ahmad respondent titled Rasheed Ahmad v. Barkat Ali, etc. and the other filed by Ramzan, etc. titled Ramzan, etc. v. Barkat Ali, etc. These appeals were accepted by the learned Addl. District Judge, Kot Radha Kishan, District Kasur vide impugned judgment dated 04.3.2021, in result, the judgment and decree of the trial court were set aside, suit for specific performance filed by the petitioners was dismissed while the suit for declaration and cancellation of agreement filed by the respondents was decreed.

5. In view of the fact that the judgments of the courts below were at variance, the entire evidence as also the reasoning recorded by two courts were minutely analyzed.

Admittedly, the petitioners' predecessor Barkat Ali filed a suit on 03.2.2011 for specific performance of an agreement dated 31.7.1996 i.e. after approximately 15 years, wherein it was claimed that respondents had entered into an agreement to sell suit property for Rs. 83,125/-, executed the agreement in the presence of witnesses, received the earnest money of Rs.78,125/- and committed to execute the sale deed after acquiring proprietary rights from the Provincial Government. As against this the defence taken in the written statement as well as in the suit for cancellation of document was that no sale agreement was ever executed; that they had never agreed to sell their property to the petitioners' predecessor and that the document had been fabricated by fraud in collusion and conspiracy with the stamp-vendor/deed-writer and that the land was leased out for ten years and on the expiry thereof the same had to be returned to the respondents and that the land was inherited by the respondents. Later some of the respondents transferred their share in favour of Rasheed Ahmad respondent/plaintiff in suit titled Rasheed Ahmad v. Barkat Ali, etc. vide mutation Nos. 1958, 1959 and 1960 dated 30.6.2008 and that the petitioners were only tenant in the property.

6. Since the petitioners filed the suit for specific performance of agreement dated 31.7.1996 and claimed a sale purchase arrangement with respondents and prayed for

the relief of specific performance to enforce the said agreement through the indulgence of court, which plea was denied by the respondents, it was for the petitioners/plaintiffs to prove the existence and execution of sale agreement, the settlement of terms and conditions of the sale and other prerequisites in terms of Articles 17 and 79 of Qanun-e-Shahdat Order, 1984 which mandated to the effect that if a document is required by law to be attested it shall not be used as evidence until two attesting witness at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive and subject to the process of the court and capable of giving evidence. Perusal of the agreement Ex.P-1 shows that the marginal witnesses who attested the same were Chanan Din son of Chohr Ali and Shahtab Khan, Lumberdar. It was mandatory for the petitioners to produce them as witnesses to prove the document. Perusal of the agreement Ex.P-1 shows that the alleged bargain of sale and execution of document including transfer of possession allegedly took place in the presence of the marginal/attesting witnesses named supra and no other person was claimed to be present either at the time of settlement of bargain or at the time of execution of document, therefore, the production of these two persons cited as marginal witnesses was necessary. They were not produced as such Ex. P-1 could not be deemed to be admissible in

evidence or have been proved as the said provisions of law being mandatory no exception could be taken thereto. Petitioners produced Muhammad Hayat and Muhammad Ilyas sons of Ameer Khan as P.W.2 and P.W.3 in an attempt to prove the transaction of sale and also the execution of agreement but in view of the peculiar facts of this case their testimony was inadmissible apart from being a false concoction. Perusal of the plaint in suit for specific performance reveals that the case of the petitioner in paragraph 2 thereof was that "*the bargain of sale by the defendants was settled for Rs. 83,125/-; the alleged agreement dated 31.7.1996 was executed; earnest money of Rs. 78,125/- was received in the presence of marginal witnesses and possession of land was delivered to the plaintiff; that the agreement was read over in the presence of marginal witnesses and same was thumb marked in their presence*". No other person was claimed to be present or involved in the deal or alleged to have knowledge of the transaction. The assertions in paragraph 2 of the plaint supra were in line with the contents of the document Ex.P-1. In this view of the matter the statement of these two witnesses namely Chanan Din and Shahtab Lumberdar were most essential in this case to prove the settlement of transaction/bargain, payment of alleged earnest money, transfer of possession and execution of the document. No effort was made to produce these two

witnesses instead Muhammad Hayat and Muhammad Ilyas sons of Ameer Khan were produced as P.W.2 and P.W.3 who did not find mention either in the agreement of sale Ex.P-1 or in the pleadings/plaint. It is settled rule that on the facts neither pleaded nor incorporated in the plaint, no evidence shall be allowed to be led to prove such facts and that the evidence can be led on facts founded in the pleadings only. It is also a rule that no party can be permitted to lead evidence different from the facts mentioned in the plaint and even if such evidence comes on record the same could not be considered or looked into being inadmissible and against the rule *secundum allegata et probata*. Reference can be made to Muhammad Ghaffar (deceased) through LRs and others v. Arif Muhammad (2023 SCMR 344), Messrs Chaudhry Brothers Limited, Sialkot v. The Jaranwala Central Co-operative Bank Ltd, Jaranwala and others (1968 SCMR 804), Mst. Jannat Bibi v. Sher Muhammad and others (1988 SCMR 1696) and Major (Retd.) Barkat Ali and others v. Qaim Din and others (2006 SCMR 562). In view of the rule supra the statements of P.W. 2 and P.W.3 raising a plea which had no foundation in the plaint was inadmissible and could not be looked into. Even otherwise P.W.2 and P.W.3 could not prove their presence at the time of alleged agreement by reference to the document itself or any other correspondence between the

parties. Their statements, as such, smacked of concoction and being so were unworthy of consideration.

7. Another important fact in respect of Ex.P-1 was that the petitioners' stance was that it was a "transaction of sale" and that it was not a "lease" while the respondents' defense was that it was a "lease" which was agreed between the parties and that the petitioners in conspiracy with the stamp-vendor/deed-writer concocted the plea of sale in the document taking benefit of the illiteracy of the respondents. In this view of the matter, it was the statement of stamp-vendor/deed-writer which was necessary to unfold the events as they took place and to depose as to the nature of the transaction agreed between the parties. To succeed in their case for enforcement of sale agreement the petitioners were required as a matter of law to produce the deed-writer/stamp-vendor in their evidence as they were beneficiary of the agreement and would obviously fail if material evidence is withheld particularly when some of the executants of the alleged documents were claimed to be females and belonged to rural area and were also illiterate. No explanation whatsoever could be given for non-production of the witnesses who were most material to establishing the case which raises serious adverse presumption against the petitioners.

8. As regards the nature of possession of land, the petitioner as P.W.1 admitted in cross-examination that his

entry in the revenue record was that of a lessee and did not claim to be an intending buyer. The witness P.W.3 Muhammad Ilyas also admitted that in the revenue record the status of the petitioner was recorded as tenant. Petitioners claimed transfer of possession under the sale but could not produce any document from the revenue hierarchy to show that the entry in the revenue record was not as a lessee but as an intending buyer i.e., possession as *baa-tasawar baee*.

9. Another important fact is that the agreement was claimed to have been executed by defendant No.4 Mst. Umran daughter of Hafeezan Bibi who was a minor and against whom the suit was dismissed by both the courts below. Perusal of the agreement Ex.P-1 shows that her name was inserted as “Mst. Umran walda Hafeezan Bibi” which creates a doubt as to whether the agreement was being executed by Mst. Umran or by Hafeezan Bibi. Same name was also inserted in the title of plaint where she was reflected as “Mst. Umran walda Hafeezan Bibi” defendant No. 4. However, later the plaint was amended after the filing of written statement and her proper particulars were given and reflected as Mst. Umran minor daughter through mother Hafeezan Bibi. The contract of sale by a minor being legally untenable to cover up the fraud, the petitioners in the evidence raised a new plea to the effect that the mother of minor had promised to get the sale deed concluded by getting a guardianship

certificate which was not the plea in the plaint or in the agreement and was thus inadmissible. This factual state of affairs also supported the version of the respondents in defense to the effect that the thumb-impressions were obtained on a blank paper which were affixed being simple minded and having trust upon the petitioners and that this trust was misused to insert sale. The learned Civil Judge did not accept the plea of the petitioners qua defendant No.4 and dismissed the suit to the extent of the minor.

10. Another noteworthy fact is that suit was brought after about fifteen years i.e. on 03.2.2011, as the agreement was statedly executed on 31.7.1996. No correspondence was produced or claimed to have been made during this period with the respondents for the transfer of property. The inaction of the petitioners for such a long period raises serious doubts about the case set up in the plaint and was therefore, rightly disbelieved. Even otherwise the respondents produced documentary evidence Ex.D-1 to Ex.D-4, which are copies of mutation of inheritance and sale. Ex.D-1 is the mutation of inheritance dated 16.12.1993 whereby the land was mutated in the name of respondents as successors of Shah Muhammad alias Shahrah (Sardar alias Shahra). Ex.D-2 to Ex.D-4 which were also produced in evidence as Ex.P-2 to Ex.P-4 by the petitioners/plaintiffs as share of the female respondents, purchase and transfer in favour of respondent No.1/Rasheed

Ahmad and mutation attested on 30.6.2008. The fact that the sale of rights was permissible would show that if there had been any agreement of sale with the predecessor of the petitioners, he could have pressed for the enforcement thereof. His silence over the matter for more than 14 years supports the stance of respondents when they alleged that the “lease” was for ten years and that on the expiry of the “lease” the petitioners were asked for the vacation of property who made lame excuses and thereafter refused to return the property and concocted the story of sale for filing a frivolous suit.

11. As regards the argument of alleged admission in the statement of D.W.3, the same is devoid of any substance. It appears that in response to the misleading suggestion in cross-examination the witness responded as to the agreement between the parties but at the same time he clarified that it was a “lease” and that the amount paid was “lease money” for ten years. It is a settled rule that the statement of the witness has to be read as a whole for proper construal and in this case careful reading of the entire statement of D.W. 3 leaves no doubt that the witness stated about the agreement of lease and payment of lease money and vehemently controverted the plea of sale. The objection therefore is misconceived and untenable.

12. The circumstances noted supra establish beyond doubt that the findings recorded by the court of first appeal in the

impugned judgment, are based on correct analysis of evidence and are in accordance with law and no misreading or nonreading of any specific part of evidence could be pointed out. The conclusions drawn in the impugned judgment are legally justified and no ground is made out for interference therein.

13. Resultantly, the instant revision petition as well as civil revision No.21353 of 2021 titled Zafar Ali and others v. Ramzan and others are hereby **dismissed**.

**(RASAAL HASAN SYED)
JUDGE**

ANNOUNCED IN OPEN COURT ON **17.11.2023**.

JUDGE

APPROVED FOR REPORTING

JUDGE