

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT
JUDGMENT

C.R.No.49148/2020

Malik Zulfiqar Ahmad etc. **VS.** Mosaddaq Parvaiz etc.

Date of hearing:	21.02.2023
Petitioners by:	Mr. Muhammad Shehzad Shaukat and Taha Shehzad Shokat, Advocates
Respondent No.1 by:	Mr. Mehmood Ahmad Bhatti, Maqsood Ahmad Bhatti, Zaigham Mumtaz Bhatti and Zaeem Mumtaz Bhatti, Advocates

Ch. Muhammad Iqbal, J:- Through this civil revision the petitioners have challenged the validity of the judgment & decree dated 24.09.2020 passed by the learned Additional District Judge, Sialkot who accepted the appeal of the respondent No.1, set aside the judgment & decree dated 21.10.2019 passed by the learned Civil Judge, Sialkot and decreed the suit for specific performance of agreement alongwith permanent injunction filed by the respondent No.1.

2. Brief facts of the case are that Musadaq Parvez, respondent No.1/plaintiff filed a suit for specific performance of contract alongwith permanent injunction against the petitioners/defendants No.3 to 5 and Malik Muhammad Sarfraz, predecessor-in-interest of the respondents No.3 to 7 and contended that he purchased land measuring 02 Kanal 11 Marla, fully described in paragraph No.1 of the plaint, from respondent

No.2/Muhammad Majeed against consideration of Rs.17,85,000/- through written agreement to sell dated 07.02.2004. That total consideration was paid. That it was settled that if defendant No.1 did not fulfill his part of the contract then he would be liable to pay three time of consideration i.e. Rs.53,55,000/-. That the sale deed was to be executed after the decision of a matter by the Executive District Officer (Revenue) as the injunctive order was in field. The respondent No.1/defendant No.1 filed contested written statement, denied the execution of the alleged agreement to sell stating that he had already alienated the suit land to petitioners/defendants through mutation No.939 dated 13.11.2004. The petitioners/defendants were impleaded as defendants in the suit through an application but they did not appear, upon which ex-parte proceedings were initiated against them. After recording ex-parte evidence, the learned trial Court turned down the request of the respondent No.1/plaintiff to the extent of specific performance of contract, however, decreed the alternate claim for recovery of Rs.53,55,000/- against respondent No.2/defendant. The respondent No.1/plaintiff challenged the said judgment & decree through an appeal which was dismissed by the learned appellate Court vide judgment & decree dated 26.03.2011. The respondent/plaintiff assailed the said judgments & decrees through appeal [R.S.A No.120/2011] which was accepted by this Court on 26.03.2019 with the concurrence of the parties. The petitioners/defendants No.2 to 5 were granted permission to file written statement and learned trial Court was directed to decide the matter afresh.

In post-remand proceedings, the petitioners/defendants filed contested written statement. The learned trial Court framed following issues:

1. Whether the plaintiff is entitled to get decree for specific performance of contract alongwith possession and grant of permanent injunction as prayed for? OPP
2. Whether the defendants No.2 to 5 are bona fide purchaser without notice and consideration and they are owner in possession of suit property through mutation No.939 dated 13.11.2004? OPD to 5
3. Whether plaintiff has no cause of action against defendants No.2 to 5, and they filed this suit just to harass and blackmail the defendants? OPD-2 to 5.
4. Whether the suit is liable to be dismissed with special costs u/s 35-A of CPC? OPD

And recorded pro and contra evidence of the parties and finally turned down the request of the respondent/plaintiff regarding specific performance of the agreement, however, decreed his claim for recovery of an amount of Rs.53,55,000/-. Being dissatisfied, the respondent No.1/plaintiff filed an appeal which was allowed by the learned appellate Court vide judgment & decree dated 24.09.2020 and by setting aside the judgment & decree dated 21.10.2019 passed by the learned trial Court, the suit of the respondent No.1/plaintiff was decreed as prayed for. Hence, this civil revision.

3. I have heard the arguments of learned counsels for the parties and have gone through the record with their able assistance.

4. In order to prove the asserted stance in the plaint as well as to dissipate the onus of the issue No.1, respondent No.1 / plaintiff Musaddaq Parvez (P.W.1) has deposed that he purchased land measuring 2 Kanal 11 Marla out of which land measuring Marla 03 Marla is situated in Mahal Adha and 2 Kanal 8 Marla is situated in Bheer; that Abdul Majeed was owner of the suit property; that on 10.03.2003 on the basis of an oral sale agreement he paid Rs.700,000/- through cheque which was got enchashed and agreement was written on 07.02.2004; that another amount of Rs.35,000/- in cash and Rs.50,000/- through

cheque were paid; that agreement (Exh.P.1) was written by Majeed in which he acknowledged the receipt of Rs.700,000/-; that agreement was written by Bashir Deed Writer on the request of Majeed; that stamp paper was purchased by Majeed himself; that first of all Majeed signed the agreement and also imposed his thumb impression; Muhammad Mushtaq Mehar, Imtiaz Ahmad Gondal and Muzammal Hussain signed as marginal witnesses; that as per agreement an amount of Rs.10,00,000/- was outstanding which he paid through cross-cheque on 05.11.2004 and in this way total amount was paid; that on the day of writing of the agreement, Majeed informed him that Executive District Officer (Revenue) Sialkot had issued an injunctive order regarding the suit land and on vacation of the stay order he would execute the sale deed; that he paid the amounts through cheques; that the account of defendant No.1 is in HBL Ada Branch; Manager HBL also issued certificate (Exh.P.3) regarding credit of the said amount to the account; that on 19.04.2010, Majeed himself got recorded his statement before the Court; that defendants no.2 to 5 were aware about the agreement; that he himself informed defendants No.2 to 5 as he had business relations with them; that defendants No.2 to 5 did not pay any consideration to defendant No.1 and the mutation was entered just to cause loss to him; that defendants No.2 to 5 lodged an FIR (Exh.P.5) against defendant No.1 in which they admitted the execution of the agreement. He deposed during cross examination that defendant No.1 got recorded conceding statement in the Court in respect of a compromise but he has not affected any compromise with him; that he recorded statement on his own. During cross examination on behalf of petitioners/defendants No.2 to 5 he deposed that he stated in respect of oral agreement to sell dated 10.12.2003 in the suit; that the oral agreement was made in the office of Mian Ghulam Farooq Advocate who was present at the time of agreement; that

Muhammad Rafiq, the brother of defendant No.1, he (plaintiff) and his three witnesses were also present; that the target date was fixed as February; that on the demand he gave *fard* which contained an injunctive order regarding suit land; that thereafter the target date was fixed in agreement as 30.11.2004; that he never sent written notice to the defendant No.1; that it is correct that initially he filed suit only against defendant No.1 who submitted written statement; that during pendency of suit, he came to know that defendants No.2 to 5 had purchased suit land; that he came to know about the defendants No.2 to 5 before recording of statement by defendant No.1; that it is correct that on 19.04.2010 when defendant No.1 recorded statement, he was not owner of the suit property as he had already alienated suit property through the sale mutation. Muzammil Hussain (P.W.2), one of the marginal witnesses, deposed that Muhammad Majeed is owner of suit land who sold it to Musadq Pervez; that initially oral agreement was made on 10.12.2003 in the presence of plaintiff, defendant No.1, Mushtaq Ahmad Mehar and Imtiaz Ahmad Gondal; that earnest money Rs.700,000/- was paid through cheque and agreement was written on 07.02.2004; that the deed writer read over the agreement to both the parties. Majeed signed and imposed thumb impression on agreement (Exh.P.1); that in the agreement earlier paid amount of Rs.700,000/- is also mentioned; that at the time of agreement, an amount of Rs.35,000/- was paid in cash and Rs.50,000/- paid through cross cheque and remaining amount Rs.10,00,000/- was paid through cheque on 15.11.2004 in the presence of witnesses; that sale deed could not be executed due to pendency of partition application before EDOR wherein injunctive order was passed; that defendants No.2 to 5 were fully aware of the agreement with Musaddaq; that defendants No.2 to 5 on the basis of mala fide intention without consideration got incorporated mutation. which

was attested with the collusiveness of defendant No.1. During cross examination, he deposed that the bargain was completed in the office of Mian Ghulam Farooq Advocate; that at the time of bargain he accompanied the plaintiff; that when defendant No.1 brought *fard*, stay was entered on it; that due to stay, sale deed could not be executed; that stay was granted by the EDOR. Imtiaz Ahmad Gondal (P.W.3) has deposed that the suit land is owned by Muhammad Majeed who sold it to Musadaq Parvez against Rs.35,000/- per Marla and total consideration was fixed as Rs.17,50,000/-; that on 10.12.2003 oral bargain was completed and at the time of oral bargain, plaintiff, defendant No.1, he, Mushtaq Mehar and Muzammal Hussain were present; that the oral bargain was duly reduced into written shape on 07.02.2004 which agreement is Exh.P.1 which was written by Bashir Ahmad Deed Writer on the request of Muhammad Majeed which was read over by Deed Writer in the presence of all the parties; that after admitting the agreement (Exh.P.1) as correct, Muhammad Majeed signed and imposed thumb impression on the said agreement and Majeed also imposed thumb impression on the register of Deed Writer; that after signatures of Muhammad Majeed, the witnesses also signed the agreement; that defendants No.2 to 5 were fully aware about the agreement (Exh.P.1) which was executed by Muhammad Majeed; that when agreement (Exh.P.1) was written, Musaddaq Parvez paid Rs.35,000/- in cash and Rs.50,000/- through cheque; that in agreement (Exh.P.1), the amount Rs.700,000/- earlier paid through cheque was also mentioned; that sale deed was not executed due to stay order issued by EDOR; that defendants No.2 to 5 despite knowledge of the payment of complete consideration amount and existence of agreement in favour of the plaintiff, procured a sale mutation in collusiveness with defendant No.1 only to cause loss to the

plaintiff. During cross examination he deposed that bargain was completed in the office of Mian Ghulam Farooq Advocate.

5. Conversely, Malik Zulfiqar Ahmad appeared has as sole witness as D.W.1 who deposed that the suit land measuring 02 Kanal 08 Marla situated in Moza Bheer was purchased by him from defendant No.1 Muhammad Majeed on 13.11.2004 against consideration of Rs.200,000/-; that the possession was taken before the agreement but he could not remember the date; that mutation was entered in their names and all the four brothers on the basis of equal share; that an old structure of house was existing at the site which was demolished and the land was used for a factory. During cross examination, he deposed that on 13.11.2004 an agreement was executed between the parties and Ashiq Hussain and Zafar Iqbal were the witnesses of the said agreement. He further deposed that:

"یہ درست ہے کہ میں کسی دیگر مدعا علیہ کا مختار نہ ہوں۔۔۔ مجھے علم نہ ہے کہ ریاض نے کوئی FIR مورخہ 19.10.2005 درج کروائی تھی جو کہ Exh.P.5 ہے۔۔۔ یہ غلط ہے کہ ریاض مدعا علیہ آج اس لئے خود عدالت میں بیان دینے نہ آیا ہے کہ اس نے اپنی Exh.P.5 FIR میں یہ لکھوایا تھا کہ مجھے سے پہلے مجید اراضی متدعو یہ مذکور فروخت کر کے بذریعہ چیک ہائے مکمل رقم وصول کر چکا ہے۔"

6. The case of the petitioners/defendants is that they are bona fide purchasers of the suit land for value without notice of the earlier agreement between respondents No.2/defendant and respondent No.1/plaintiff, thus transaction in their favour is protected by Section 27(b) of The Specific Relief Act, 1877 and same cannot be interfered with. As such, it would be expedient to reproduce the Proviso of Section 27 of the Act ibid which is as under:

"27. Relief against parties and persons claiming under them by subsequent title.— Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against—

(a) either party thereto;

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has

paid his money in good faith and without notice of the original contract.”

As per sub-Clause b of Section 27 of the Act *ibid*, the petitioners have to establish through affirmative and corroborative evidence that they purchased the suit land with good faith and without notice of the earlier original contract but as per attested copy of FIR dated 18.10.2005 which was lodged by petitioner No.2/Malik Muhammad Riaz against respondent No.2/defendant No.1 (brought on record by the respondent No.1/plaintiff as Exh.P.5) wherein he alleged that the defendant No.1 had committed fraud with them as he had already sold the suit land to respondent No.1/plaintiff after receiving the consideration. For reference, relevant portion of the contents of the FIR (Ex.P-5) are reproduced as under:

"بخدمت جناب ڈسٹرکٹ پولیس آفیسر DPO صاحب ضلع سیالکوٹ درخواست برائے کئے جانے کاروائی ضابطہ برخلاف محمد مجید ولد نور حسین ذات ارائیں ساکن بیڑھ تحصیل ڈسکہ ضلع سیالکوٹ جس نے اپنی زرعی جائیداد مظہر سائل کے نام بذریعہ انتقال بیع زبانی منتقل کردی ہوئی ہے اور مظہر کے نام بیع انتقال تصدیق ہونے سے قبل مدعا علیہ مجید نے یہ رقبہ بدست مصدق پرویز ولد محمد بشیر ذات ارائیں ساکن محلہ حاجی پورہ نزد فیض عالم ڈسپنری سیالکوٹ بروئے اقرار نامہ معاہدہ بیع محررہ مورخہ فروری 2004 بالعوض مبلغ 1785000 روپے بیع و فروخت قطعی کر دیا ہوا ہے اور مصدق پرویز سے 7 لاکھ روپے بذریعہ چیک نمبری 871660 آف پرائم کمرشل بینک ڈسکہ روڈ حاجی پورہ برانچ مورخہ 10.12.03 کو وصول کیا، مبلغ 50000 روپے بذریعہ چیک نمبر 871673 آف پرائم کمرشل بینک ڈسکہ روڈ حاجی پورہ برانچ سیالکوٹ مورخہ 23.04.04 کو وصول کیا۔۔۔ جناب عالی مظہر سائل نے ازاں محمد مجید ولد نور حسین مذکور اسکی زرعی اراضی بروئے بیع زبانی انتقال خرید کی اور اسکو زر بیع ادا کر دیا ایک چیک مبلغ دس لاکھ روپے بھی بحق محمد مجید جاری کیا جو بعد تسلی حالات و واقعات کیش کروانے کا وعدہ کیا مگر جب پتہ چلا کہ محمد مجید نے یہ اراضی پہلے ہی 2/3 جگہ مختلف مشتریان کے ہاتھ بروئے اقرار نامہ جات بیع و فروخت کردی ہوئی ہے اسکی ادائیگی روک دی اور محمد مجید سے پچائیگی طور پر فیصلہ کرنے کی بابت کہا مگر وہ آج تک لیت و لعل سے کام لیتا چلا آ رہا ہے۔"

(emphasis supplied)

Admittedly, FIR (Exh.P.5) was got registered by the petitioners' side by describing their own stance regarding existence of fraud in the transaction in their favour. Ex.P-5 is an attested copy of FIR and it is settled law that presumption of genuineness is

attached to the attested copies of the public record if not rebutted otherwise. Reliance is placed on Chaudhary Inayat Ali v. Province of Punjab through D.O.R. (Collector) and another (2016 MLD 1870). The contents of the FIR amounted to admission on the part of the petitioners/defendants that they knew the fact of agreement to sell between respondents No.1 & 2 prior to the transfer of the suit land in favour of the petitioners/defendants through alleged mutation. It is settled law that admitted facts need not to be proved. Reliance is placed on the case cited as Mst. Rehmat and others Vs. Mst. Zubaida Begum and others (2021 SCMR 1534).

The Hon'ble Supreme Court of Pakistan in a judgment cited as Hafiz Tasadduq Hussain Vs. Lal Khatoon and others (PLD 2011 SC 296) has held that initial onus is on the shoulder of a subsequent vendee to prove that his case falls within the purview and parameter of Section 27 of the Act *ibid* and that he is a transferee of the land for value, the consideration has been paid in good faith and that he had no notice of the earlier contract of the property. But in this case, the petitioners/defendants have failed to prove that their case falls within the purview and parameter of Section 27 *ibid* as they entered into sale transaction of the suit land with the respondent No.2 despite having knowledge of his agreement to sell with the respondent No.1/plaintiff.

7. Malik Zulfiqar (D.W.1) stated in his cross examination that an agreement was written on 13.11.2004 in presence of Ashiq Hussain and Zafar Iqbal and the sale deed was executed subsequently but the petitioners/defendants neither produced said alleged agreement nor the marginal witnesses of the said agreement. Furthermore, said Malik Muhammad Riaz, who lodged FIR against the respondent No.2/defendant No.1 did not appear as witness. The petitioners/defendants also did not

produce the witnesses of the mutation, the Patwari and Tehsildar concerned and non-production of such material witnesses is amounted to withholding of the best evidence and it would be legally presumed that had the said witnesses produced in the evidence, they would have deposed against the petitioners/defendants, as such presumption under Article 129 (g) of Qanun-e-Shahadat Order, 1984 clearly does not give them any favour. Reliance is placed on the case of Sughran Bibi Vs. Mst. Aziz Begum & 4 Others (1996 SCMR 137) and Jehangir Vs Mst. Shams Sultana & Others (2022 SCMR 309).

8. In paragraph No.3 of the written statement, respondent No.2/defendant No.1 admitted the very bargain, receiving of earnest money as well as execution of agreement to sell in favour of respondent No.1/plaintiff. The respondent No.1/plaintiff produced bank certificate (Exh.P.2) issued by the bank in respect of the encashment of cheques. At the time of presentation of the said document, no objection was raised on behalf of the petitioners/defendants, thus validity and authenticity of the bank certificate (Ex.P-2) could not be questioned subsequently. It is established from the record that the petitioners/ defendants have knowledge of the earlier transaction of sale of the suit land by the respondent No.2 in favour of respondent No.1/plaintiff, as such the subsequent transaction of sale by way of incorporating oral sale mutation in the revenue record by the respondent No.2 in favour of the petitioners/defendants cannot supersede the earlier agreement.

9. In the written statement, the petitioners/defendants neither disclosed the lodging of FIR nor mentioned / proved purchasing of suit land with due care and caution as required under the principle of caveat emptor. Since the petitioners/defendants did not take reasonable bonafide care while entering into sale/purchase transaction through sale mutation. The

petitioners/defendants have the notice of the agreement to sell executed in favour of respondent No.1/plaintiff by respondent No.2/defendant No.2 and despite knowledge of earlier agreement they allegedly purchased the land in question from respondent No.2, as such they are not bona fide purchasers and they are not entitled for protection under Section 27 of the Act *ibid* as well as Section 41 of the Transfer of Property Act. Reliance in this regard is placed on cases cited as Abdul Rashid Vs. Muhammad Yaseen and another (2010 SCMR 1871) and Noor Hassan and others Vs. Ali Sher and others (2015 SCMR 452).

10. As regard the stance of the petitioners/defendants that a penalty clause is available in the agreement to sell of the respondent/plaintiff who while filing the suit prayed for grant relief of specific performance of the contract or as in alternate the implementation of penalty clause, as such the relief of specific performance of the alleged agreement to sell cannot be granted. As per Section 19 of The Specific Relief Act, a person who files a suit for specific performance may also ask for compensation for breach of contract and he can add to or in substitution for such performance. Section 20 of Act *ibid* also provides that the amount may be claimed as compensation in case of default of the contract. The respondent/ plaintiff in his suit for specific performance also prayed for grant of the amount of compensation, as such this prayer cannot be termed as withdrawal of claim from specific performance of the contract. Reliance is placed on judgments cited as Abdul Karim Vs. Muhammad Shafi and another (1973 SCMR 225) and Mrs. Mussarat Shaukat Ali Vs. Mrs. Safia Khatoon (1994 SCMR 2189).

11. The respondent No.1/plaintiff filed suit for specific performance on the basis of written agreement to sell dated (Exh.P.1), appeared in the witness box and reiterated his stance as taken in the pleadings, produced both the marginal witnesses

whose deposition despite lengthy cross examination could not be shattered. In this way, it can safely be held that the respondent/plaintiff proved his case through credible, trustworthy & corroborative oral as well as documentary evidence that his agreement to sell with the respondent No.2/defendant No.1 was prior in time and the petitioners/defendants despite having knowledge of the earlier transaction, got alienated suit land in their favour through oral sale mutation which is not sustainable and is liable to be cancelled. Reliance in this regard is placed on an order dated 10.01.2023 passed by the Hon'ble Supreme Court of Pakistan in **Civil Petition No.1481 of 2019** titled as Mst. Parveen Akhtar Vs. Mian Salah ud Din & others wherein it is held as under:

4. The findings of the learned trial court that the power of attorney by the original owner i.e. respondent No.2 in favour of his son Bashir Ahmad being subsequent in time, therefore, the said power of attorney superseded the power of attorney in favour of plaintiff/ respondent No.1. We are afraid that these findings are not in accordance with law. Further admittedly the plaintiff /respondent was in possession and is in possession of the suit property till today. Petitioner when appeared as her own witness as DW-1, she does not claim delivery of possession under sale by the Attorney of the original owner in her favour. In cross-examination she stated that Bashir Ahmad handed over the keys of the house and she has not visited the house and not entered the house. In these circumstances, we are unable to disagree with the findings recorded by the learned High Court. Learned Counsel failed to make out a case for grant of leave. Resultantly, leave to appeal is refused and this petition stands dismissed.

12. The learned trial court has failed to appreciate the legal and factual aspects of the case and dismissed the suit of the respondent No.1/plaintiff to the extent of specific performance whereas the learned appellate court after discussing the facts as well as evidence of the parties, through a well-reasoned judgment & decree has rightly allowed the appeal of the respondent No.1

and decreed the suit as prayed for. It is well settled law that in the event of conflict of judgments of the Courts below, findings of appellate Court are to be preferred and respected, unless it is shown from the record that such findings are not supported by evidence and record. Reliance is placed on the case reported as Muhammad Hafeez & Another Vs. District Judge, Karachi East & Another (2008 SCMR 398).

13. Resultantly, this revision petition is hereby dismissed being devoid of any force. No order as to costs.

(Ch. Muhammad Iqbal)
Judge

Approved for reporting.

Judge

Abdul Hafeez