

HCJDA-38

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

RSA No. 02 of 2013

Sardar Muhammad Boota

versus

Jaffar Ali (deceased) through LRs and Others

JUDGMENT

Date of hearing	07.10.2024
Appellant by	Mr. Iftikhar Ahmad Chohan, learned Advocate.
Respondent No. 2 by	Rana Muhammad Anwar and Muhammad Gulzar Khan, learned Advocate.
Respondents No. 1(i to iii), 3, 4(i) to 4(vii), 4(vii-a(i) to vii-b), 5(i to iv), and 6.	<i>Ex-parte.</i>

SULTAN TANVIR AHMAD, J:- This appeal, filed under section 100 of the Code of Civil Procedure-1908 (**‘CPC’**), is directed against judgment and decree dated 22.11.2012 passed by learned Additional District Judge, Depalpur as well as judgment and decree dated 14.03.2011 passed by learned Civil Judge, Depalpur.

2. The facts, necessary for the decision of this appeal, are that Sardar Muhammad Boota (**Boota**) filed suit No. 255 of 2010 (the **‘suit’**) against Jaffar Ali (**Jaffar**) and

others for specific performance of agreement dated 17.02.2000 / Exh. P1 (the '*agreement*') while stating that land measuring 172-*kanals* 15-*marlas*, as further detailed in the *suit*, was agreed to be sold by Jaffar to Boota and one Muhammad Akram in equal share against consideration of Rs. 1,079,687/-, out of which Rs. 784,487/- were paid; that the litigation between Muhammad Akram and Jaffar went upto the Honourable Supreme Court of Pakistan and as a consequence of the same, Muhammad Akram got his share in the aforesaid land, whereas, Jaffar refused to accept remaining consideration and pass on the title of the 50% share of the above said land (the '*suit land*').

3. The *suit* was dismissed as withdrawn on 11.11.2002 when Jaffar and Boota gave the statement that one Syed Afzaal Ali Gillani has been appointed as an arbitrator. After dismissal of the *suit* as withdrawn the *suit land* was sold by Jaffar through deeds and documents which are on record as various exhibits (the '*subsequent transactions*') and on the strength of the same, Shoukat Ali / respondent No. 2 became beneficiary. On 23.04.2003 an application was filed by Boota for restoration of the *suit*. Jaffar never filed any reply to this application for restoration or revival of the *suit*. Somehow, vide ex-parte order dated 27.01.2004 the *suit* was restored. Thereafter, the subsequent purchasers including Shoukat Ali /

respondent No. 2 were impleaded in the array of parties and amended suit was filed. The *suit* was also contested by the said parties. Since amendments were made and parties were arrayed as defendants, the learned trial Court framed issues on two different dates i.e. 23.02.2005 and 24.07.2006. The framed issues are as under:-

Issues framed on 23-02-05

1. Whether this suit is false and frivolous and defendant is entitled to special costs U/S 35-A C.P.C.? OPD
2. Whether defendant entered into an agreement to sell With plaintiff regarding suit property and received Rs; 784487/- as earnest money? OPP
3. Whether plaintiff is entitled to a decree for specific performance of disputed agreement to sell? OPP
4. Relief.

Issues Framed on 24-07-06

1. Whether the plaintiff and defendant NO1 are collusive and suit has been filed with malafide, hence, plaintiff is not entitled to any relief? OPD-2
2. Whether the defendant NO:2 is bonafide purchaser of suit land and is owner in possession of suit land, hence statement of defendant NO:1 dated 23-02-2006 and 18-03-06 in favour of the plaintiff are illegal, void and ineffective upon the rights of defendant NO:2? OPD-2
3. Relief.

From the plaintiff-side six witnesses were produced and about ten documents were made part of the record as exhibits. From the defendant-side, DW-1 to DW-10 appeared and Exh. D1 to Exh. D11 were produced in course of

evidence. The learned trial Court gave issue-wise findings and the prayer in the *suit* was declined vide judgment and decree dated 14.03.2011. However, Boota was held entitled for the reimbursement of Rs. 539,843/- from Jaffar. The parties were left to bear their own costs. Dissatisfied from the same, civil appeal No. 69 of 2011 was filed which was dismissed vide judgment and decree dated 22.11.2012. Being aggrieved, the same has been challenged by Boota through this second appeal.

4. Mr. Iftikhar Ahmad Chohan, learned counsel for the appellant has stated that *subsequent transactions* are hit by principle of *lis pendence* as the matter between Jaffar and Boota was before the arbitrator. He has submitted that since the *subsequent transactions* have taken place during the pendency of the *suit* and / or the arbitration, therefore, heavy burden was on Shoukat Ali / respondent No. 2 to prove his *bona fide*. He has referred to various judgments including cases titled “Bahar Shah and Others Versus Manzoor Ahmad” (2022 SCMR 284) “Rao Abdul Rehman (Deceased) through legal heirs Versus Muhammad Afzal (Deceased) through legal heirs and Others” (2023 SCMR 815) and “Muhammad Ashraf Butt and Others Versus Muhammad Asif Bhatti and Others” (PLD 2011 Supreme Court 905) and stated that section 52 of the Transfer of Property Act-1882 (the ‘Act’)

applies to the *subsequent transactions*.

5. On the other hand, Rana Muhammad Anwar, learned counsel for Shoukat Ali / respondent No. 2 has vehemently opposed this appeal and he has stated that restoration of the *suit* as well as subsequent statements dated 23.02.2006 and 18.03.2006 clearly show the collusiveness between Boota and Jaffar, therefore, the rule of *lis pendence* is not attracted. He has further stated that withdrawal of the *suit*, so-called reference to arbitrator and then the restoration of the *suit* are result of fraud committed in the Court; that it was never intended to get the matter resolved through arbitration but to give effect to the plan of manipulation and it is an attempt to cheat innocent buyer(s). He has added that there is no provision in law permitting to restore a suit which was dismissed as withdrawn, unconditionally but somehow the *suit* was restored on 27.01.2004; that the same was never challenged by Jaffar, deliberately and Shoukat Ali / respondent No. 2 became party much later when there was no chance left to raise challenge to this illegality.

6. I have heard the arguments and very carefully gone through the record with the able assistance of learned counsel for the parties.

7. Section 52 of the *Act* provides that *during the pendency in any Court..... of any suit or proceeding which is*

not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose. It embodies the rule of *lis pendence*, which are both available in Equity and Common Law. The legislature has provided a clear exception to applicability of this rule in the cases where collusive action is involved. In case titled “Muhammad Zafar-uz-Zaman and 4 Others Versus Faqir Muhammad through Legal Heirs” (PLD 2001 Supreme Court 449), the Honourable Supreme Court has ruled that true scope of section 52 of the *Act* does not prevent the vesting of title in transferee in a sale *pendent lite* but only makes it subject to rights of other parties as decided in the suit. It will be advantageous to reproduce the following extract of the said judgment:-

“The true scope of section 52 of the Transfer of Property Act, therefore, is that it does not prevent the vesting of title in a transferee in a sale pendente lite but only makes it subject to the rights of other parties as decided in the suit. In other words, the effect of section 52 is not to wipe out a sale pendente lite altogether, but to subordinate it to the rights based on the decree in the suit As between the parties to the transaction, however, it is perfectly valid, and operates to vest the title of the transferor in the transferee.”

In case titled “Fazal Karim through Legal Heirs

and Others Versus Muhamamd Afzal through Legal Heirs and Others (PLD 2003 Supreme Court 818) the Honourable Supreme Court of Pakistan has observed that the exception of collusiveness or fraud is not only applicable to the commencement of proceedings but the parties are precluded to have benefit of section 52 of the *Act* if this collusiveness is made during the proceedings or a decree is obtained by collusion, which otherwise, or initially started with *bona fide*. I would like to reproduce paragraphs No. 12 and 13 of this judgment:-

“12. We are also confronted with another phenomenon that at times the judicial proceedings do not commence with collusion or fraud but subsequently the parties resort to collusion as well as fraud in order to jeopardize the right or interest of a third party. The proceedings may not be collusive from the very inception but collusion, if resorted to subsequently, is as good a collusion as that intended from the very beginning. In Periamurugappa Asari v. Manicka Chetty AIR 1926 Madras 50, Venkatasubba Rao, J. observed, also with reference to a compromise, that a decree passed in pursuance of a compromise does not exclude the application of section 52 provided that such compromise is not tainted with fraud or collusion. A genuine compromise is a normal conduct of the parties and is not taken to be collusive but a compromise entered into by collusion or fraud excludes the application of section 52 of the Transfer of Property Act. It is altogether immaterial as to whether the proceedings were collusive from the very inception or they became so at some subsequent stage. A suit may be collusive even at its very inception or a decree may be obtained by collusion in a suit which had initially started bona fide.

13. We, therefore, hold that in cases which are

collusive at the very inception and the cases where decree is obtained by collusion or fraud, section 52 of the Transfer of Property Act would not be applicable regardless of the fact, in the latter case, that the proceedings were initiated with honesty.”

(Emphasis supplied)

Much focus is made by Mr. Iftikhar Ahmad Chohan, learned counsel for the appellant, on “Bahar Shah and Others” and “Rao Abdul Rehman (Deceased) through legal heirs” cases (**supra**) while stating that the conduct of Shoukat Ali / respondent No. 2 lacks *bona fide* and the *subsequent transactions* were not with due diligence, however, he ignored that the said two judgments also recognize that *whether in a particular case a person acted with honesty or not will obviously depend on the facts of each case. The good faith entails righteous and rational approach with good sense of right and wrong which excludes the element of deceitfulness, lack of fair-mindedness and uprightness and or willful negligence.*

8. Now reverting to the facts of the case. Boota and Jaffar made statements on 11.11.2002 that they are referring the matter to Syed Afzaal Ali Gillani, the then minister of health, for resolution of the dispute. After recording their statements and at the request of Boota, the *suit* was dismissed as withdrawn. It is admitted that no arbitration took place and it appears to me that even the proceedings in arbitration never

commenced. Boota, after five months of dismissal of the *suit*, filed an application for restoration and for no reason Jaffar opted not to contest the same, resulting into restoration of the *suit*, which was dismissed as withdrawn without even permission to file afresh. The matter was required to be seen under Order XXIII of *CPC* and other relevant provisions of *CPC*. Learned counsel for the appellant had no answer when he was asked if the failure of arbitration could have been a fresh cause of action but Boota and Jaffar opted to get the dismissed suit restored; apparently to take benefit of the rule of *lis pendence* or section 52 of the *Act*.

9. It is very important in this case that initially Jaffar kept resisting the *suit*. He filed contested written statement upon which issues were framed but somehow he has not contested the application for restoration of the *suit* and after the order of restoration passed on 27.01.2004, he made statement on 23.02.2006 and 18.03.2006 in favour of Boota. I have no doubt in my mind about the collusiveness of Jaffar and Boota.

10. It is also significant that it was originally pleaded that the *agreement* was made in favour of two persons namely Boota and one Muhammad Akram; that thereafter, Muhammad Akram remained successful to obtain his land for which the litigation went up-till the Honourable Supreme

Court of Pakistan. However, Muhammad Akram never claimed his right under the *agreement*. This fact was conceded by Boota in his cross-examination when he appeared as PW-5 and he confirmed that it is correct that mutation No. 1419 in favour of Muhammad Akram is not passed in pursuance to the *agreement*. Boota produced only one marginal witness namely Nawaz. His witness Karamat Ali Sarwar / PW-1 also stated that he has no knowledge if any fraud was committed with Boota. Tufail Bhatti, scribe (PW-2) contradicted the statement of PW-1 as to the purchase of stamp paper (both stated contradictory to each other as to the person who purchased the stamp paper of Exh. P1). PW-3 and PW-4 are son-in-law and brother of Boota, respectively.

11. On the other hand, ten witnesses appeared from the defendant-side. I have noticed that maximum efforts were made, during the lengthy cross-examination of the said witnesses, to extract something adverse to the interest of the subsequent purchasers or Shoukat Ali / respondent No. 2. The evidence besides some minor infirmities remained coherent. Shoukat Ali / respondent No. 2 produced scribes of different deeds. DW-4 / Noor Muhammad stated that inquiry was made from *tehsildar* office as to any other agreement with respect to the *suit land*. He stated that no suit at the relevant time was pending in any Court, which even otherwise is an admitted fact

in this case. DW-6 / Ghulam Yasin stated that Jaffar and Boota in collusion with each other have maintained the *suit*.

12. After carefully going through the record, I am of the firm opinion that the learned two Courts below have not committed any mistake in reading the evidence led by two-sides and they have arrived to the correct conclusion, therefore, this regular second appeal having no merits is dismissed. No order as to costs.

(Sultan Tanvir Ahmad)
Judge

Announced in open Court on 28.11.2024.
Approved for reporting.

Judge