IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:
MR. JUSTICE MUSHIR ALAM
MR. JUSTICE FAISAL ARAB
MR. JUSTICE MUNIB AKHTAR

CIVIL APPEAL NO. 1178 OF 2008
(On appeal against the judgment dated 03.11.2006 passed by the High Court of Balochisan, Quetta in REA Nos. 26 & 27/1999)

Haji Baz Muhammad Khan & Haji Dad Muhammad Khan
... Appellants

VERSUS

Noor Ali and Shakil Ahmed
... Respondents

For the Appellants: Mr. Kamran Murtaza, Sr. ASC

For the Respondent (1): Mr. Zulfiqar Khalid Maluka, ASC

For the Respondent (2): Ex-parte

Date of Hearing: 24.05.2018

JUDGMENT

FAISAL ARAB, J.- The respondent No. 1 was tenant of respondent No. 2 in a shop bearing Municipal No. 4-24/14 situated in Liaqat Bazar, Quetta. In the year 1992, the respondent No. 2 orally agreed to sell this shop to respondent No. 1 for a sale consideration of Rs.3,10,000/-. The terms of the oral agreement that have come in evidence were that respondent No. 1 paid a sum of Rs.50,000/- as advance and the balance amount of Rs.260,000/- was required to be paid within a period of three months. When respondent No. 1 failed to make payment within the stipulated time, the time to complete the transaction was enhanced by a period of 1/2 years. However, even within such extended period, respondent No. 1 did not fulfill his contractual obligation. Subsequently, a dispute arose between the parties who then

agreed to refer the matter to arbitrators for settlement. The arbitrators gave their award on 26.09.1995, in terms whereof respondent No. 1 was to vacate the shop under his tenancy and hand it over to respondent No. 2 by 26.10.1995 and in consideration thereof respondent No. 2 was to pay a sum of Rs.1,400,000/- to respondent No. 1. This decision rendered by the arbitrators was not challenged by any of the parties in any legal proceedings. As respondent No. 1 did not handover the possession of the shop, the respondent No. 2 thereby also did not pay him the amount determined by the arbitrators. Respondent No. 2 then sold the shop to the appellants, who filed eviction proceedings against respondent No. 1 after which respondent No. 1 on his part filed a suit for specific performance of the contract in 1996 on the basis of the oral agreement to sell arrived at in 1992. It is this suit, which is the subject matter of the present proceedings. The suit was decreed in favour of respondent No. 1 vide judgment dated 02.04.1999. The appellants and respondent No. 2 filed their respective appeals in the Balochistan High Court but the same were dismissed vide the impugned judgment. Hence, this appeal with leave of the Court.

2. The legal effect of the arbitrators' decision, which remained unchallenged was that the respondent No. 1 gave up both his right to seek specific performance of the contract under the oral agreement as well as his tenancy rights on the condition of receiving Rs.1,400,000/- from respondent No. 2, the original owner of the shop in question. In such circumstances, the respondent No.1 could not have sought specific performance of the oral

agreement that stood novated on terms reflected in the arbitrators' award signed and acknowledged by both the parties. Once a party novates a contract then enforcement of the earlier agreement cannot be sought in terms of Section 62 of the Contract Act unless it is expressly stipulated in the fresh agreement that his rights in the original agreement will not be prejudiced. Thus the oral agreement to sell came to an end and in consequence thereof the respondent No. 1 was only entitled to receive Rs.1,400,000/- and handover the possession of the shop to respondent No. 2. Thus the suit for specific performance was not maintainable. The key principle of such an effect is discussed in the case of Habib Ahmad Vs. Meezan Bank Ltd (2016 CLC 351) whereby it was held as under:-

> *"Novation would mean and be construed when contract already in existence is extinguished and a new contract is created where-under new rights emerge in favour of the parties. Unless the rights under the old contract are explicitly relinquished, no new contract comes into force. The procrastination by a party to abide by terms of the contract, which in the present context appears to gain benefit out of it, would not mean novation of the contract; it comes about where parties to the contract mutually agree to substitute it with the new contract. Therefore if a party alleges novation of a contract, it has to establish these prerequisites. For reliance the case of Mrs. Mussarat Shaukat Ali v. Mrs. Safia Khatoon, etc. reported in NLR 1995 SCJ 19 is referred to."*

3. We, therefore, vide our short order directed respondent No. 2 to deposit Rs.1,400,000/- in this Court within a period of sixty days which shall then be paid to respondent No. 1. We have already mentioned in our short order that there shall be no

extension in time for any reason whatsoever and failure to deposit the amount within this period shall result in dismissal of this appeal and the respondent No. 1 shall be entitled to retain the possession of the shop in his capacity as tenant of the appellants who are the successor-in-interest of respondent No. 2. Within fifteen days of such deposit, the respondent No. 1 was required to handover vacant peaceful possession of the property to the appellants. If the respondent No. 1 fails to do so, the appellants shall be at liberty to file an application before Executing Court, which shall issue writ of possession without notice and put the appellants in possession of the property. The respondent No. 1 shall be entitled to receive the amount deposited in this Court after the possession of the property is handed over to the appellants.

4. The above are the detailed reasons of our short order of even date vide which we allowed this appeal and set aside the impugned judgment.

JUDGE

JUDGE

JUDGE

Islamabad, the
24th of May, 2018
Approved For Reporting
Khurram