

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE AMIR HANI MUSLIM
MR. JUSTICE IJAZ AHMED CHAUDHRY

CIVIL APPEAL NO. 794 OF 2006

(On appeal against the judgment dated
2.6.2005 passed by the Lahore High Court,
Lahore in Civil Revision No. 1340/1994)

Syed Hussain Naqvi and others

... Appellants

VERSUS

Mst. Begum Zakara Chatha (decd) through her LRs and others

... Respondents

For the Appellants: Mr. Abid Hassan Minto, Sr. ASC

For Respondents (1(a,b): Syed Ali Zafar, ASC

For Respondents (1(c,d): Malik Muhammad Qayyum, Sr. ASC

For the Applicants: Mr. M.A. Ghaffar ul Haq, ASC
(In CMA No. 3420/2010)

Date of Hearing: 14.04.2015

JUDGMENT

IJAZ AHMED CHAUDHRY, J.- Through this appeal by leave of the Court the appellants have challenged the judgment of the Lahore High Court whereby the Civil Revision filed by them was dismissed and the judgments of the two courts below decreeing the suit filed by the predecessor-in-interest of the respondents No. 1 (a to d) were affirmed.

2. Brief facts / background of the case as mentioned in the judgment of Lahore High Court are as under:-

“On 25.11.1987, respondent No. 1 (Mst. Zakara Chatha) filed a suit against respondent No. 2 (Muhammad Hussain Shah) and the petitioners (appellants herein). In the plaint it was stated that the suit land described in the plaint was allotted to respondent No. 2 in the year 1961 under Tubewell Scheme. He agreed to sell the suit land to

respondent No. 1 for a consideration of Rs.22000/-. He received a sum of Rs.105000/- and executed an agreement dated 11.5.1967. Balance was to be paid upto 30.6.1967. Possession was delivered and a general power of attorney was executed in her favour and registered on 16.5.1967. The balance amount was paid and on 27.7.1967, respondent No. 2 executed another agreement acknowledging the entire amount of consideration, delivery of possession and promising to transfer the land upon conferment of proprietary rights. Respondent No. 2 changed his mind soon thereafter. He cancelled the power of attorney by means of an 'Abtaal Nama' registered on 4.11.1968. He also served a notice on the same date. She replied on 18.11.1968 informing that the authority is coupled with interest and he is not competent to cancel the power of attorney. She took possession of the land which was Banjar. She then stated that she is highly educated lady and retired from government service. She was holding high offices in the education department. She left her abode in Model town, Lahore and with a lot of efforts and expenses made the land cultivable. Means of irrigation were arranged. She remained so in possession for about 11 years. When the land stood improved respondent No. 2 started making attempts to disposes her. She resisted the attempts. Litigation started. Respondent No. 2 filed a suit against her. His application for grant of temporary injunction was dismissed on 1.2.1978. His appeal was dismissed by learned District Judge on 19.2.1978. He was, however, granted injunction by the Lahore High Court in Civil Revision on 21.10.1978. In the garb of the said injunction he dispossessed her tenant namely Muhammad Ayyub on 28.12.1978. A criminal case was registered. However, respondent No. 2 managed to take possession. Proprietary rights have been conferred and a sale deed has been executed by the Provincial Government in favour of respondent No. 2 on 9.10.1985 and registered

on 21.12.1985. However, it contains a condition that respondent No. 2 will not be able to transfer the land without prior permission of the government till five years after the date of execution. However, instead of performing his part of contract, respondent No. 2 proceeded to transfer the land to the present petitioners (appellants herein) through his general attorney Syed Al-e-Hassan vide sale deed registered on 30.7.1986. Mutation No. 52 was rejected on 12.6.1986. Thereafter permission was obtained from Board of Revenue and it was attested on 28.7.1987. She stated that the petitioners were fully aware of the agreement in her favour as she had been in possession and litigating with respondent No. 2 and in the entire area the said lot is known as lot of Begum Zakira. According to her litigation was being sponsored and perused by the petitioners. With these averments she sought a decree for specific performance of the said agreement. Respondent No. 2 filed written statement on 14.6.1986, stating that he has not agreed to transfer the land to the respondent No. 1 and had not received any consideration. He denied all the contents of the plaint. The petitioners filed written statement on 28.5.1988. Their contention was that they are bonafide purchasers for consideration and without notice having purchased the land after checking the revenue records. Agreement was stated to be illegal. The suit was stated to be collusive. The factum of litigation as detailed in the plaint, however, was admitted. It was further stated that Syed Al-e-Hassan was lawfully appointed as attorney by respondent No. 2 and it was the attorney who executed the sale deed and got it registered and then obtained post facto sanction on 28.7.1987. Issues were framed. Evidence of the parties was recorded. Learned Trial Court decreed the suit vide judgment and decree dated 1.10.1992. Learned Additional District Judge, Lodhran dismissed the first appeal filed by the petitioners on 11.10.1994. The Civil

Revision was dismissed by the Lahore High Court vide judgment and decree dated 7.2.2000. The petitioners (appellants) filed C.P. No. 524-L/2000 before this Court (Supreme Court), which was converted into appeal and allowed vide judgment dated 21.12.2004 and the case was remanded back to the learned High Court. Hence this appeal by leave of the Court.

3. Learned counsel for the appellants contends that the agreement to sell relied upon by the predecessor-in-interest of the respondent Nos. 1 (a to d) was void as the pre-conditions for entering into sale, gift etcetera required the consent of the Commissioner and Section 19 of the Colonization of Government Lands (Punjab) Act, 1912, clearly prohibits the sale of the land by a tenant when he had not attained proprietary rights; that as respondent No. 2 was allottee of the land he could not have entered into agreement to sell and the same could not create any kind of encumbrance on the said property. He added that the two documents i.e. Ex.P1 and Ex.P3 are violative of Section 19 and are void and the decree could not have been passed on the basis of the said documents against the appellants; that the respondent No. 2 could only sell the land after the proprietary rights are conferred upon him; that the power of attorney was cancelled in the year 1968 by means of an 'Abtaal Nama' and the same has attained finality as it was never challenged; that *mala fide* on the part of respondent No. 1 has been borne out; that possession of the property was admittedly taken back by respondent No. 2 from predecessor-in-interest of respondent Nos. 1 (a to d) and when she filed suit, she was not in possession. Learned counsel further added that the plaint itself discloses that respondent No. 2 by his

acts refused the performance, firstly by cancelling power of attorney on 4.11.1968, thereafter by filing a suit on 15.12.1977 and then by dispossessing the respondent No. 1 on 28.12.1978 and according to him the suit having not been brought within three years of any of the said dates, is barred by time; that the judgments and decrees of the Courts below are based on surmises and conjectures. He further added that the appellants are *bona fide* purchasers in terms of Section 27-B of the Specific Relief Act, 1877, and they were not aware of the sale of the property. In support of the contentions raised, learned counsel relied on Ghulam Rasul Vs. Muhammad Anwar (1969 SCMR 254), Hakim Ali vs. Ali Muhammad (1981 SCMR 993 at 996)

4. Syed Ali Zafar, learned counsel for the respondent Nos. 1(a & b) contended that the documents Ex.P1 and Ex.P3 are not void under Section 19 of the Colonization of Governments Land Act as it was a contingent agreement and could only be executed after the respondent No. 2 attained proprietary rights; that this fact has been mentioned in the agreement to sell and when respondent No. 2 had obtained the proprietary rights and permission for sale of the property from the concerned authorities, the respondent filed the suit immediately thereafter; that Ex.P3 is not sale but agreement to sell; that these types of documents do not fall under Section 19 of the Colonization Act; that the respondent No. 1 was dispossessed by the respondent No. 2 in the year 1978 whereafter a suit was filed by the respondent No. 2 and his application for grant of temporary injunction was dismissed on 1.2.1978; that there is sufficient evidence brought on record by respondent No. 1 as she had produced Khasra Girdawries from the year 1967-68 which

showed that she was in possession of the suit land during the said period and the said Khasra Girdawries were never challenged by the respondent No. 2; that though respondent No. 2 had denied the execution of the said document but the said document has been proved on record; that the appellants were not *bona fide* purchasers as in the written statement submitted by them they had admitted the factum of entering into agreement in para 6 and para 9 of the written statement and they were aware of the fact that respondent No. 1 was litigating with respondent No. 2; that issue No. 10 has consistently been decided by all the courts below in favour of respondent No. 1. Learned counsel in support of his contentions has relied upon Abdul Jabbar Vs. Mst. Maqbool Jan (2012 SCMR 947) & Muhammad Anwar Vs. Muhammad Aslam (2012 SCMR 345)

5. Mr. Malik Muhammad Qayyum, learned Sr. ASC for respondent Nos. 1 (c & d) has contended that the case relied upon by learned counsel for the appellants i.e. 1969 SCMR 254 was considered by this Court and this Court has overruled the same. Learned counsel relied upon Shamir Vs. Faiz Elahi (1993 SCMR 145) in support of his contention that the agreement was not a sale and mere entering into first agreement to sell was not prohibited under Section 19 of the Colonization Act. He further contended that under Section 54 of the Transfer of Property Act agreement to sell does not confer any right. Learned counsel also relied upon Commissioner Multan Division vs. Muhammad Hussain (2015 SCMR 58).

6. We have heard learned counsel for the appellants as also learned counsel for the respondents and have gone through the available record.

7. The issues involved in this appeal are four fold. Firstly, whether there was any agreement to sell between respondent No. 1 and respondent No. 2. Secondly, whether the suit filed by predecessor-in-interest of respondent Nos. 1 (a to d) was barred by time. Thirdly, whether the appellants were *bona fide* purchasers and fourthly, whether the transaction in question was hit by Section 19 of the Colonization of Government Lands Act, 1912 or not?

8. To prove the first issue as to whether there was any agreement to sell or not, respondent / plaintiff had produced agreement dated 16.5.1967 Ex.P1, registered power of attorney Ex.P2 and agreement dated 27.7.1967 Ex.P3. These documents were scribed by one Abdul Hameed PW-1 and were attested by Muhammad Ishfaq PW-2 and Muhammad Rafiq Lamberdar. PW-1 had candidly stated that he wrote agreement Ex.P1 on the instructions of respondent No. 2 Muhammad Hussain Shah in favour of predecessor-in-interest of respondent Nos. 1 (a to d) Mst. Zakara in respondent No. 2's presence. He also stated that amount was paid in his presence. General power of attorney Ex.P2 was also scribed on the same day by him and on 27.7.1967 Ex.P-3 agreement was scribed. According to PW-1 the witnesses had signed in his presence and respondent No. 2 received an amount of Rs.11500/-. Muhammad Ishaq PW-2 had also admitted that all the three documents were attested by him and respondent No. 2 had signed in his presence. PW-1 and PW-2 were cross-examined at

length but nothing favourable to the appellants could be brought on record. Muhammad Hussain respondent No. 2 though denied the execution of these documents but he never got his signatures verified by hand writing expert. On the other hand, Mst. Zakara had applied for comparison of his signatures before the learned Trial Court. The said application was admitted on 2.10.1990 but the signatures could not be verified because the attendance of respondent No. 2 could not be procured. The learned High Court has rightly relied upon the entries made in register khasra girdawri Ex.P15 and observed that the possession of predecessor-in-interest of respondent Nos. 1 remained till the year 1977. The learned High Court has also rightly relied upon Ex.P10 and Ex.P11 i.e. suit filed by the respondent No. 1 for ejectment of tenant from a portion of the suit land which was decreed on 23.12.1976, Ex.P12 which is copy of an order whereby the suit filed by Muhammad Hussain respondent No. 2 against A.C. and the respondent No. 1 was dismissed for non-prosecution on 16.9.1979, Ex.P13 which is copy of an order whereby the suit for declaration filed by respondent No. 2 against respondent No. 1 regarding the suit land was dismissed as withdrawn and Ex.P14 which is copy of judgment of this Court dated 11.11.1980 in the matter of temporary injunction in the suit land and has held that the respondent No. 2 had agreed to sell the land to respondent No. 1 and agreed amount of consideration was paid, possession was delivered and change of possession took place in Rabi 1978. In view of the above, it is established that there was an agreement to sell and payment of consideration was paid to respondent No. 2.

9. The next issue is as to whether the suit filed by the predecessor-in-interest of the respondents No. 1 was barred by time or not. A bare perusal of Ex.P1 and Ex.P3 i.e. 'Iqrar Nama' clearly indicates that the alleged amount of consideration had been paid to the respondent No. 2, possession had been delivered and land was to be transferred in favour of the respondent No. 1 by respondent No. 2 upon execution of sale deed or attestation of mutation in his favour by the Provincial Government. No specific date for the performance of the contract was mentioned in the agreements. It is on record that respondent No. 2 acquired proprietary rights through sale deed Ex.P6 which was executed in his favour on 9.10.1985 and was registered on 21.12.1985. According to condition No. 27(A) the vendee was debarred from alienating the land by sale or otherwise within a period of five years from the said date without previous consent in writing of the Government. The land was subsequently alienated in favour of the appellants through registered sale deed dated 30.6.1986 Ex.D3. It was incumbent upon the allottee to perform his part of contract after acquiring the proprietary rights but he failed and thereafter the cause of action accrued to the plaintiff Mst. Zakara and as such the suit instituted by her was well within time.

10. So far as the question regarding the *bona fide* of the appellants is concerned, we have noted that the appellants were aware of the litigation between respondent No. 1 and respondent No. 2, as in reply to para 9 of the plaint, they had admitted the litigation. As the appellants were aware of the earlier contract, they should have restrained themselves from entering into subsequent

agreement with respondent No. 2. In such circumstances, they are not *bona fide* purchasers.

11. The last question and the point on which leave was granted in the main petition is as to whether the transaction in question is hit by Section 19 of the Colonization of Government Lands (Punjab) Act, 1912 or not? To appreciate the issue, it would be in order to reproduce the said Section 19, which reads as follows:-

"19. Transfers of rights to be void.---Except as provided in section 17, none of the right or interest vested in a tenant by or under the Government Tenants (Punjab) Act, 1893, or this Act, shall, without the consent in writing of the (Executive District Officer (Revenue), or of such officer as he may by written order empower in this behalf, be transferred or charged by any sale, exchange, gift, will, mortgage or other private contract, other than a sub-lease for not more than one year in the case of a tenant who has not acquired a right of occupancy, and seven years in the case of a tenant who has acquired a right of occupancy, any such transfer or charge made without such consent in writing shall be void, and if (after the commencement of this Act) the transferee has possession, he shall be ejected under the orders of the Collector:

Provided that the right of sub-letting conferred by this section shall not release any tenant from a condition requiring him to reside in the estate in which his tenancy is situated."

12. In Sher Muhammad Khan Vs. Ilam Din (1994 SCMR 470) land in question was situated in Colony area and the transferor had agreed to sell the corpus of land in question and had received full amount and had also delivered possession of the property. Dealing with the question as to whether the transfer in question was in violation of Section 19 of the Colonization of Government Lands (Punjab) Act, 1912, this Court, while discussing the earlier case law, has specifically held as follows:-

"Now, if the document Exh.P3 is read in the light of the above definition coupled with the express words of section 19 of Colonization of Government Lands (Punjab) Act of 1912, by no stretch of imagination it can be termed as a sale deed. Its very recital starts with the words and concludes with.

Though Jiwan had received the full sale consideration in respect of the suit land and its possession delivered to respondent No.1 but still its contents do not give an inkling that the document Exh.P3 is a sale-deed. Through the said document Jiwan did not transfer his tenancy rights but had only agreed to sell the corpus at the hands of respondent No.1. Therefore, the said transfer was not in violation of section 19 of Act of 1912. A similar question came for consideration before the Full Bench of this Court in Civil Appeal No.216 of 1978 decided on 16-6-1981 where in para 12 it was held:--

"On the facts of the case we are clear that the document was merely an agreement to sell the specific performance of which was postponed to a date when the grantee had acquired proprietary rights. Such a reservation in- the deed itself showed the awareness of the prohibition and recognition of its legal effect and effort op the part of contracting parties to keep this sale within the confines of the law and to act in accordance with the requirements of the law. Such an agreement to sell cannot be said to be violative of either the express provision of section 19 of the Act or of the public policy behind such a statutory provision."

This view has been followed in the case of Muhammad Iqbal and others v. Mirza Muhammad Hussain and others (PLD 1986 SC 70) relied upon by the " learned counsel for the respondents and we respectfully follow the same view. The authorities cited by the learned counsel for the appellants -are clearly distinguishable and thus not relied upon."

13. In Muhammad Anwar Vs. Muhammad Aslam (2012 SCMR 345) in similar facts, this Court has held as under:-

"13. In the present proceedings, it is an admitted fact that the respondent No.2 had acquired the proprietary rights on 12-8-1979. Prior to acquiring such rights, he had agreed under an oral agreement to sell the land to respondents Nos. 1, 3 and Haitam. The terms of oral sale agreement were affirmed by the parties by executing the Iqarname (Exh.P/1) in 1976. The contents of Exh.P/1 were merely an agreement to sell, specific performance of which was postponed to a date when the respondent No.2 was to acquire the proprietary rights. Such a reservation in the deed itself showed the awareness of the prohibition, the recognition of its legal effect and the effort on the part of the contracting parties to keep themselves well within the confines of law to act in accordance with requirements of law. Such an agreement to sell cannot be said to be violative of either the express provisions of section 19 of the Act or of the public policy behind such a statutory provision. We, for the aforesaid reasons, hold that oral agreement of sale and Iqarnama are not hit by the provisions of section 19 of the Act."

14. In Abdul Jabbar vs. Mabqool Jan (2012 SCMR 947) this Court while relying upon the earlier case law reported at Mst. Rehmat Bibi and others Vs. Mst. Jhando Bibi and others (1992 SCMR 1510) and Abdul Jabbar Vs. Abdullah (2006 SCMR 1541) has specifically held that "*Section 19 of the Act bar "sale" and not to an agreement of sale.*" In Nasir Ali Shah Vs. Ahmad Yar (2011 CLC 1566) the learned Lahore High Court in similar circumstances where vendor in prior agreement had undertaken to execute sale-deed in favour of plaintiff (prior purchaser) on grant of proprietary rights and had agreed to sell corpus of property to plaintiff, which would come into operation after grant of proprietary rights, has held that "*according to terms of such prior agreement, plaintiff was carrying a risk to loose his money, if proprietary rights were not granted to vendor. According to such prior agreement, in case of failure of vendor to execute sale-deed after grant of proprietary rights, he was bound to pay to plaintiff amount specified therein in addition to earnest money already paid. Such prior agreement did not necessitate obtaining of prior permission under Section 19 of Colonization of Government Lands (Punjab) Act, 1912.*" Same was the view of the learned Lahore High Court in Muhammad Aslam Vs. Muhammad Anwar (2006 YLR 2607) & Muhammad Aslam Vs. Ghulam Aslam (2002 MLD 1860) that such an agreement to sell did not fall within the mischief of Section 19 of the Colonization of Government Lands (Punjab Act), 1912 and that Provisions of Section 19 of the said Act do not debar vendors to execute agreement to sell with vendees.

15. There are concurrent findings of fact recorded by the learned courts below against the appellants. This Court in

Muhammad Shafi and others Vs. Sultan (2007 SCMR 1602) while relying on case law from Indian jurisdiction as well as from the Pakistani jurisdiction has candidly held that this Court could not go behind concurrent findings of fact "*unless it can be shown that the finding is on the face of it against the evidence or so patently improbable, or perverse that to accept it could amount to perpetuating a grave miscarriage of justice, or if there has been any misapplication of principle relating to appreciation of evidence or finally, if the finding could be demonstrated to be physically impossible.*" No such thing could be brought on record to warrant interference by this Court.

16. For what has been discussed above, we do not find any merit in this appeal, which is dismissed with no order as to costs.

JUDGE

JUDGE

Islamabad, the
14th of April, 2015
Approved For Reporting
Khurram