IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

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

CIVIL APPEAL NO. 2084 OF 2016
(On appeal against the judgment dated 29.06.2016 passed by the High Court of Sindh, Karachi in IInd Appeal No. 85/2011)

Hafiz Muhammad Iqbal

... Appellant

VERSUS

Gul-e-Nasreen etc.

... Respondents

For the Appellant: Mr. Shahid Anwar Bajwa, ASC

For Respondents (1 & 2(c): Mr. Jawad S. Sarwana, ASC

Date of Hearing: 28.06.2019

JUDGMENT

FAISAL ARAB, J.- Being in the service of Pakistan Army, respondent No. 2 was entitled to buy a residential and a commercial plot in Defence Housing Authority, Karachi (DHA for short). On the basis of such entitlement, she applied to DHA for a 2000 square yard residential and a 200 square yard commercial plot which were allotted to her in December, 1973. All dues and charges for such allotments were cleared by 1983 and the plots were transferred in her name. In the same year she got the 2000 square yards residential plot bifurcated, which were assigned plot Nos.57/1 and 57/2 having an area of 1000 square yards each. She retired from service in the same year i.e. in 1983.

2. In 1986 respondent No.1, who is younger sister of respondent No.2, filed a suit against respondent No.2 and sought

declaration that she is the real owner of the plots and respondent No.2 is only an ostensible owner i.e. a '*Benamidar'*. The basis to seek such a declaration was that as respondent No.2 was neither interested nor had funds to pay for the plots so respondent No. 1 offered that she would make all payments for the plots to DHA and became their owner to which respondent No.2 agreed. Based on such understanding, the respondent No.2 applied to DHA for the allotment of a residential and commercial plots for which the entire price was paid by respondent No. 1. It is also the case of the respondent No.1 that after respondent No.2 retired from service in 1983, she came to live with respondent No.1 at her Karachi residence and when asked to transfer the plots in respondent No.1's name she refused and thus the relations between them became estranged with the result that respondent No.2 left the house and went to reside with her old colleague. It was further stated in the plaint that in May, 1986 when respondent No.1 came to know that respondent No.2 has entered into a sale transaction with someone in relation to one of the residential plots and the process of transfer was pending with DHA, she got alarmed that gave her the cause to file the suit for declaration and permanent injunction. The respondent No.1 obtained injunctive orders from the Court against the respondent No.2 and the DHA in order to prevent alienation of the plots until her claim was decided in the suit.

3. During the pendency of the suit, the appellant, a stranger to the above mentioned controversy between the two sisters, interjected in the suit by filing an application under Order

1 Rule 10 CPC for his joinder as a defendant, on the strength of his claim that respondent No. 2 has entered into sale transaction for the residential plots with him. His application was allowed and the court joined him as a defendant. After recording of the evidence of the parties, the court held that respondent No.1 failed to establish that she is the real owner of the plot and dismissed the suit. Respondent No. 1 preferred first appeal which was also dismissed. She then filed second appeal in the High Court of Sindh, which was allowed vide impugned judgment. The High Court reversed the findings of the courts below after holding that respondent No. 1 has established in the evidence that there was an understanding between the two sisters that the payments for the plots would be made by respondent No.1 and become the real owner which was accordingly paid by her to DHA and respondent No.2 became just an ostensible owner.

4. The respondent No. 2 died during the pendency of the proceedings. Though her heirs were made party in the proceedings at the appellate stage, none of them came forward to challenge the decision of the High Court before this Court, hence insofar as respondent No.1's claim that her proprietary interest has been created in the suit property has attained finality, leaving the appellant to file appeal in this Court on the strength of his plea that he was a *bona fide* purchaser for valuable consideration.

5. Learned counsel for the appellant submitted that the trial court and the first appellate court, after examining the evidence adduced by the parties, rightly came to the conclusion

that respondent No. 2 was not a *'Benamidar'* and fully competent to deal with the plots as a real owner, such finding ought not to have been reversed by the High Court in second appeal, scope of which is very limited. As to the title document of plots coming in the hands of respondent No.1, he submitted that the address of respondent No. 1 was given to DHA only for the purpose of communication as she from time to time was posted in several parts of the country and on account of this fact the respondent No.1 came in possession of title documents of the plots which she was holding in trust for respondent No.2. Learned counsel maintained that merely coming in possession of title documents or demonstrating that payments have been made by her to DHA, which is otherwise not factually correct, would not make respondent No.1 real owner of the suit properties. Learned counsel lastly contended that the High Court also erred in holding that the appellant failed to establish that he is a *bona fide* purchaser for value when it has come in the evidence that he entered into sale transaction with respondent No.2 in whose name the open plots stood in her capacity as original allottee in the records of DHA and no steps were taken by respondent No.1 to get the plots transferred in her name.

6. Learned counsel for the respondent No. 1 in rebuttal submitted that his client has sufficiently established in evidence that based on the understanding between the two sisters she alone paid the entire amount for both the plots in the name of the respondent No.2 and was also given possession of the original title documents thereby disentitling the respondent No. 2 from

subsequently claiming to be the real owner. He next contended that the burden to prove that the appellant was a *bona fide* purchaser was on the appellant, which he failed to discharge as in absence of examining the original title documents of the plots, which were with respondent No.1, he paid the entire sale consideration to respondent No.2.

7. After the High Court reversed the findings of the courts below and declared respondent No.1 to be the real owner and respondent No.2 merely a '*Benamidar'* no appeal has been preferred by any of the heirs of respondent No.2 after her demise before this Court though they were made party in the first Appellate Court as well as in the High Court. Notwithstanding the finding of the High Court, which creates proprietary interest of the respondent No. 1 in the suit plots, the fact remains that the plots were allotted to respondent No.2 only for the reason that she was in service of Pak Army. This entitlement for allotment of plots by itself has its own value, apart from the price that is paid to DHA. Had the plots in question been purchased by respondent No.1 from the open market, the price would have been much higher than what was actually paid. Therefore, irrespective of the fact that it was held by the High Court that respondent No. 1 paid the entire amount to DHA for both the plots from her own source, as held in second appeal, the fact remains that the plots were allotted, not at their full market value but at concessionary price only for the reason that respondent No.2 was in the service of Pak Army. In this peculiar circumstance, the monetary contribution made by respondent No.1 cannot be regarded as the true reflection of the

entire value of the suit property and hence cannot be regarded as sufficient to treat respondent No.1 full owner of the suit property though she paid the entire price. Therefore, in our assessment, respondent No. 1's share in the plots on account of her financial contribution cannot be considered more than half and the remaining half has to be attributed purely to respondent No. 2 on account of the privilege which she enjoyed in seeking allotment from DHA at much lower rate than the true market value. Based on such distinction, respondent No.2 was entitled to sell one of the two residential plots. She in fact got the original residential plot bearing No. 57 bifurcated into two in 1983 i.e. plot No.57/1 and 57/2 and entered into sale transaction with regard to plot No.57/1 in 1986. The respondent No.2 in equity was justified in entering into sale transaction with the appellant for the first plot i.e. plot No.57/1.

8. As regards the sale transaction relating to plot No. 57/2, the appellant has claimed that he purchased plot No.57/2 and sale consideration was shown to be Rs.250,000/- paid through pay order No. AO/C192426 dated 05.05.1986. If the sale consideration of Rs.250,000/- had already been settled for plot No. 57/2 on or before 05.05.1986 then it is surprising that the agreement which was executed for this plot on 06.05.1986 neither refers to any pay order nor the price that was settled was printed with the remaining text of the agreement as the consideration of Rs.250,000/- for plot No.57/2 is written in a handwriting after erasing the printed matter whereas in the same situation, the consideration of Rs.425,000/- settled for plot No.57/1 in the first agreement executed on the same date i.e. 06.05.1986 was printed

along with the remaining text. Secondly, there is a marked difference in the sale consideration of both the plots as well i.e. Rs.425,000/- for plot No.57/1 and Rs.250,000/- for plot No.57/2. This casts some doubt as to the genuineness of the agreement relating to plot No.57/2 and probably the deal for plot No.57/2 was belatedly came up to defeat the claim of respondent No.1 as the factum of two separate agreements is neither mentioned in the application filed by the appellant for joinder under Order 1 Rule 10 CPC application nor in his written statement and in the first instance respondent No.2 in her counter affidavit to injunction application also denied sale transaction with regard to plot No.57/2. Even otherwise, ample discretion lies with the Court to deny the relief to a purchaser of an immovable property keeping in view the circumstances of each as he cannot claim specific performance of a contract as a matter of right even where it is lawful to do so. In this regard, reliance can be placed on the judgments of Ghulam Nabi Vs. Muhammad Yaqoob (PLD 1983 SC 344), Sirbaland Vs. Allah Loke (1996 SCMR 575) Muhammad Sharif Vs. Nabi Bakhsh (2012 SCMR 900), Farzand Ali Vs. Khuda Bakhsh (PLD 2015 SC 187), Adil Tiwana Vs. Shaukat Ullah Khan Bangash (2015 SCMR 828) and Muhammad Abdur Rehman Qureshi Vs. Sagheer Ahmad (2017 SCMR 1696) where this principle has been laid down by this Court.

9. For what has been discussed above, the impugned judgment is modified to the extent that the appellant is entitled to plot No.57/1 whereas the respondent No.1 has become entitled to plot No.57/2 and 50% share in the 200 yards commercial plot. The

remaining 50% in the commercial plot shall devolve upon the heirs of respondent No.2 in accordance with law of inheritance, which include respondent No.1 being one of the heirs of respondent No.2.

10. This appeal was partly allowed vide short order dated 28.06.2019 and the above are the reasons for the same.

JUDGE

JUDGE

Karachi, the
28th of June, 2019
Not Approved For Reporting
***K**hurram*