

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

Mr. Justice Qazi Faez Isa

Mr. Justice Sajjad Ali Shah

Civil Appeal No. 383 of 2013.

(Against the order dated 10.6.2011 passed by the
Lahore High Court Rawalpindi Bench in WP 1436/2011)

Muhammad Miskeen

... Appellant(s)

Versus

District Judge Attock, etc.

... Respondent (s)

For the Appellant (s) : Mr. Mazhar Masood Khan, ASC
Mr. Mehmood A. Sheikh, AOR

For the Respondent-3 : Sh. Ahsan ud Din, ASC
Ch. Akhtar Ali, AOR

For the Respondent-4 : Sh. Azmat Ali Bukhari, ASC

Date of Hearing : 26.11.2019

Judgment

Sajjad Ali Shah, J. Briefly, the respondent Firdos Khan on 1st November, 1999 entered into an agreement to purchase six marlas of land situated in Kamilpur Syedan Tehsil and District Attock from one Abdul Rehman. The agreement neither provided the description of land by metes and bounds nor identified it through specifying Khasra numbers, khewat numbers etc. The agreement even did not mention the sale consideration agreed between the parties but only narrated that an advance of Rs.50000/- was paid to the said Abdul Rehman. It appears that this agreement could not be materialized and consequently the respondent Firdos Khan, on 28.2.2000, filed a suit seeking specific performance of the stated agreement but somehow the other he, on his own, described in the plaint Khewat No. 255, Khasra Nos. 853, 854 & 855. That on being summoned, Abdul Rehman filed his written statement wherein he has categorically stated that since

Firdos Khan had failed to pay the balance sale consideration in terms of the agreement, therefore, he has sold his land and confiscated the advance in terms of the agreement.

2. Firdos Khan adduced evidence in support of his claim his witnesses were cross examined and it was suggested that the price was orally agreed at Rs.50,000/- per marla and Abdul Rehman repeatedly asked Firdos Khan to pay the balance sale consideration of Rs.250,000/- and get the sale deed executed in his favour but Firdos Khan avoided as he had no money. The defendant Abdul Rehman had no interest in the *lis* as he had already sold the land, therefore, he choose not to appear in the witness box and consequently the suit was decreed on 1.6.2001. It is very interesting that neither the agreement nor the plaint stated the total sale price but the Court on its own determined the total sale price as Rs.78,000/- i.e. Rs.13000/- Per Marla.

3. On the other hand, the record reflects that on 1.3.2000 the present appellant Muhammad Miskeen purchased six marlas of land bearing Khewat No. 198/326, Khasra Nos. 851 & 852 and Khewat No. 255, Khasra Nos. 854 & 855 situated in the revenue estate of Kamilpur Syedan Tehsil and District Attock through registered sale deed dated 1.3.2000 carrying mutation No.3200 from Mst. Razia Begum and Mst. Shabana who happened to be the real mother and sister of said Abdul Rehman. The possession of land was handed over to the present appellant Muhammad Miskeen who on 9.7.2001 got the construction plan sanctioned from Municipal Corporation Attock and excavated a well, raised boundary wall and installed gate thereon.

4. It appears that on 4.9.2001 respondent Firdos Khan, after depositing Rs.28000/- (the balance sale price in terms of decree) in government treasury, initiated execution proceedings, seeking execution of the conveyance deed. This was the first time appellant Muhammad Miskeen entered appearance in Court and on 8.10.2001 filed objections to the

execution proceedings in which he categorically disclosed that the subject property was owned by Mst. Razia Sultana and Shabana Bibi from whom he has purchased on 1.3.2000 through a registered conveyance deed. The trial Court vide its order dated 12.4.2002 dismissed the objection on the ground that the suit was filed on 28th February, 2000 and the conveyance deed was executed in favour of objector on 1.3.2000, therefore, the transaction was hit by principle of *lis pendens*.

5. The appellant Muhammad Miskeen filed an appeal against the said order and the learned Additional District Judge Attock vide its order dated 11.7.2002 set-aside the said impugned order of Civil Judge by holding that principle of *lis pendens* is inapplicable and directed to decide the application after framing of issues and recording of evidence. The trial Court after recording evidence of both the sides again vide its order dated 18.10.2006 dismissed the objection petition. The appellant again filed an appeal and the learned Additional District Judge vide its order dated 30.1.2008 this time dismissed the appeal on the ground that the appropriate remedy for the appellant was to file an application under section 12(2) CPC.

6. Soon after dismissal of the appeal, the executing Court issued a writ of possession in respect of the subject property in favour of Firdos Khan and consequently the Bailiff, on 4th February, 2008, in presence of Abdul Rehman handed over the peaceful vacant possession of the subject plot to Firdos Khan.

7. The appellant Muhammad Miskeen, in consequence to the observations of the Additional District Judge, on 26.2.2008 moved an application under Section 12(2) CPC. The Court framed issues on 26.7.2008 and thereafter two witnesses were examined one from Building Department of TMA Attock who produced the plan which was got approved by Muhammad Miskeen appellant for the construction of his house on the subject property whereas the other witness Razia Begum stated that her earlier statement recorded on the application resisting the execution may be

treated as her statement. It appears that thereafter on 27.1.2010 the respondent Firdos Khan moved an application seeking rejection of application under Section 12(2) CPC on the ground that it was barred by time and the Court after hearing the parties vide its order dated 25.2.2010 rejected the application by holding the application to be barred by time. The appellant thereafter filed a revision petition before the learned District Judge who vide its order dated 3.5.2011 dismissed the same by affirming the view of the Civil Judge. The appellant thereafter approached the Lahore High Court by invoking its writ jurisdiction and the High Court too, vide its impugned order, maintained the concurrent findings that the application under Section 12(2) CPC was barred by time.

8. Leave was granted by this Court on 9.10.2017 in terms of order dated 7.9.2011 to examine that since the appellant, who had purchased the subject property through registered sale deed, had been diligently pursuing his remedy and thus as to whether his application under Section 12(2) CPC could have been dismissed on the ground of limitation. We, while hearing this appeal, on 20.11.2019 added the following additional points in the leave granting order not only to put the counsel on notice of the points which during their submission had come to our attention but to solicit their assistance:-

- i) *Whether the agreement of sale deed dated 11th April, 1999, which did not mention the particulars of the property and consideration, is compliant with section 29 of the Contract Act, 1872;*
- ii) *Whether the plaint complied with the provisions of Order VII Rule 3 of the Code of Civil Procedure; and*
- iii) *The consequences in respect of error or mistake committed by a court”.*

9. Counsel for the appellant contended that since the sale agreement neither provided the description of the property nor the sale consideration, therefore, it was void and could not have been enforced

through a suit for specific performance. It was next contended that the executing Court without determining the title/entitlement of Abdul Rehman to sell and without giving finding on the registered conveyance deed in favour of the appellant Muhammad Miskeen, could not have executed the decree by issuance of writ of possession as Abdul Rehman was not the owner of the property. It was further contended that the appellant has suffered on account of the mistake committed by the Court by enforcing a void agreement which needed to be corrected. It was lastly contended that the plaint did not specify the subject property by metes and bounds in terms of Order VII Rule 3 CPC, therefore, was in-executable in itself but the Court without there being anything on record dispossessed the appellant and handed over the possession of his property to respondent Firdos Khan.

10. On the other hand, counsel for responded Firdos Khan fairly and frankly conceded that the agreement of sale neither specifies khasra numbers or khewat numbers etc. nor describe the property by metes and bounds. He also admits that there was no sale consideration fixed but contends that since this dispute has already been adjudicated rightly or wrongly and this Court has only to consider as to whether the application under Section 12(2) CPC was rightly dismissed on account of being barred by time or not. However, he further states his no objection for condoning the delay in filing application under Section 12(2) CPC and submits that the trial Court may be directed to record the evidence on the appellant's application under section 12(2) CPC and then to pass appropriate orders in accordance with law.

11. We have heard the arguments of learned counsel for the respective parties and have minutely perused the record.

12. Section 22 of the Specific Relief Act clearly lays down that the jurisdiction to decree a suit for specific performance is purely discretionary and the Court is not bound to grant such relief merely because its lawful to do so and further that such discretion of the Court is not arbitrary but is

based on sound and reasonable judicial principles. In our opinion the Courts below have totally ignored the law on the subject while decreeing the suit on the basis of an agreement which neither specified the property under sale by metes and bounds nor provided for the sale consideration. The agreement merely states that a sum of Rs.50,000/- was paid in advance towards an unspecified sale price in respect of six marlas of land situated in Kamilpur Syedan Tehsil and District Attock without specifying Khasra numbers, khewat numbers etc. The plaint filed by the respondent Firdos Khan though has prescribed the khasra numbers (without any supporting documentary evidence showing the ownership of the seller in respect of land claimed) but is totally silent regarding the agreed sale consideration. The trial Court without framing any issue to find out the veracity of the plaintiff's claim regarding the claimed land or the title of the seller believed the statement of plaintiff/respondent No.1 and decreed the suit. The other failure on the part of the trial Court was to fix the total sale price of the plot on its own ignoring the fact that neither the agreement nor the plaint prescribed the sale price. The trial Court allowed the plaintiff/respondent Firdos Khan to build a case which was even not pleaded in the plaint. The Court even did not feel it necessary to frame an issue to find out the sale price and placed reliance on totally extraneous documents. In these circumstances, the trial Court ought to have given convincing reasons for decreeing the suit by allowing specific performance and for ignoring all the deficiencies in the agreement as well as in the plaint specially when the relief was discretionary.

13. The other important fact which was not taken care by the trial Court or the respondent Firdos Khan was that Abdul Rehman in his written statement had clearly mentioned that he had sold the subject property despite no efforts were made to implead the purchaser before decreeing the suit.

14. The matter does not end here. It appears that when the respondent Firdos Khan filed execution application on 4.9.2001, the appellant Muhammad Miskeen filed objections which in the first round were dismissed on the ground of *lis pendens* and on remand by the appellate Court to decide the objection after framing issues. It appear that the Court thereafter framed issues and allowed the parties to lead evidence and even one of the issues was:-

"Whether decree has not passed by fraud and collusion"

15. Thereafter the objection petition was dismissed and in appeal the appellate Court without looking into this aspect that the trial Court has already allowed the parties to adduce evidence and giving his finding on this particular issue, rejected the appeal by making an observation that the proper remedy was to file an application under section 12(2) ignoring the fact that the trial as well as the executing Court were one and the same. The appellant Muhammad Miskeen, thereafter filed another application under Section 12(2) CPC which till the High Court was dismissed being barred by time. Though Mr. Sheikh has conceded that the delay in filing of application under section 12(2) could be condoned and the matter may be remanded to the trial Court so that the parties could adduce evidence. However, we have found that such plea of fraud and misrepresentation was taken in the first application on which an issue was framed regarding fraud and misrepresentation and thereafter parties were allowed to lead evidence. Therefore, it would be totally unfair to again throw the parties at the mercy of litigation for another 20 years as the present round of litigation has almost consumed two decades.

16. We have also found from the record that on first objection petition, not only a challenge to decree on the ground of fraud was thrown but as observed a specific issue, to this effect, was framed. Appellant Muhammad Miskeen had appeared in the witness box, he was cross-examined by the counsel for respondent Firdos Khan and thereafter

respondent Firdos Khan appeared, adduced his evidence and was cross-examined by counsel of appellant Muhammad Miskeen. Firdos Khan further produced Shabana Begum, Razia Begum and one Muhammad Safdar Qureshi as his witnesses and were duly cross examined and interestingly the trial as well as the executing Court were the same.

17. We note with great concern that though both applications filed by the appellant first before the executing Court objecting the execution of decree against his property and second before the trial Court under section 12(2) CPC challenging the decree by pleading fraud, misrepresentation and lack of jurisdiction, were competently filed and were wrongly dismissed. The first application was competent for the reason that the appellant had placed title documents before the executing Court in respect of Khewat No.198 (326), Khasra Nos. 851 and 852 which did not form part of the decree and, therefore, could have been validly objected to under Order XXI Rule 58 or under other provisions of Code of Civil Procedure whereas the second application under Section 12(2) was also competent as the respondent Miskeen had obtained a decree in respect of Khewat No.255, Khasra Nos. 854, 855 for which the appellant was holding registered conveyance deed and unless such conveyance deed would have been cancelled, no fresh decree regarding ownership of the said property could not have been passed. We have noticed that the sole defendant namely, Abdul Rehman in his written statement has disclosed the sale of the said property and it has come in evidence subsequently in execution proceedings that the parties were known to each other or there was a *jirga*, (the veracity whereas we cannot vouch) reflects that the respondent Firdos Khan was aware of the sale, therefore, he ought to have joined the appellant in the proceedings.

18. Though it is a fit case where this Court could go beyond what was appealed in order to do a complete justice between the parties, however, while exercising restraint, we would set-aside all orders passed on appellant's application under Section 12(2) CPC as we have noticed that the

Courts below have not followed the rules or procedures provided in the Code of Civil Procedure by accepting stances and documents which did not form part of the pleadings and have conducted the proceedings as there are no rules which regulate the proceedings before the trial Court while exercising the civil original jurisdiction. The objection to the decree as well as to the execution proceedings would be deemed to be pending before both the Courts and the already recorded evidence as we have noticed in para 16 above would be valid for the purposes of both the proceedings as we have found commonality in both the proceedings. None of the orders on record would come in the way of trial as well as executing Court to adjudge the dispute but strictly on the basis of pleadings. However, the parties would be at liberty to adduce any fresh evidence in support of their pleadings and the trial Court should ensure that the application under Section 12(2) CPC is decided within 60 days and in case the judgment and decree could not be sustained then restitution of property in terms of Section 144 should also be considered. In case any of the Court is fell vacant, the District Judge would ensure that the matter is transferred to the next nearest Court having the jurisdiction to try the matter.

19. The appeal is allowed in the above terms leaving the parties to bear their own costs.

Judge

Islamabad, the

Judge

Announced on **15.01.2020.**

A. Rehman

Approved for Reporting.