

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.R.No.142/2016

Mst. Parveen Akhtar

Versus

Mian Salah ud Din and others

Date of Hearing:	13.12.2018
Petitioner by:	Syed Hamid Ali, Advocate.
Respondents by:	Mr. Manzoor Hussain Malik, Advocate. Mr. Rizwan Shabbir Kayani, Advocate. Ms. Sitwat Jehangir, learned Assistant Attorney-General.

MIANGUL HASSAN AURANGZEB, J:- Through the instant civil revision petition, the petitioner (Mst. Parveen Akhtar) impugns the judgment and decree dated 14.01.2016, passed by the Court of the learned Additional District Judge (West), Islamabad, whereby respondent No.1's appeal against the judgment and decree dated 25.04.2011, passed by the Court of the learned Civil Judge, Islamabad, was allowed and the suit for specific performance of the agreements dated 05.06.1991 and 29.07.1991, instituted by respondent No.1 (Mian Salah-ud-Din), was decreed. Vide the said judgment and decree dated 25.04.2011, the learned Civil Court had turned down respondent No.1's prayer in the said suit regarding specific performance of the agreement to sell but had granted the alternate relief of the recovery of an amount of Rs.13,50,000/-.

2. The facts essential for the disposal of the instant revision petition are that vide letter dated 23.05.1990 (Exh.P/5), respondent No.3 (Federal Government Employees Housing Foundation) provisionally allotted a category-VI house to be constructed on plot No.1033, Sector G-11/2, Islamabad, measuring 111.11 square yards ("the suit property"), to respondent No.2 (Syed Muhammad Ali). The house was not transferable until respondent No.3's dues had been cleared and a formal transfer deed was issued in respondent No.2's favour.

3. On 05.06.1991, an agreement to sell (Exh.P/1) was executed between respondent No.2 and respondent No.1,

whereby the former agreed to sell the suit property to the latter for a total sale consideration of Rs.4,50,000/-, out of which Rs.50,000/- was paid as earnest money and the remaining amount of Rs.4,00,000/- was to be paid by 20.07.1991. It was also agreed that respondent No.2 would transfer the suit property to respondent No.1 or his nominee by 20.07.1991 when the remaining sale consideration is paid. Neither was the remaining sale consideration paid nor was the suit property transferred within the time stipulated in the said agreement.

4. On 29.07.1991, a sale agreement (Exh.P/2) was executed between respondent No.2 and respondent No.1, whereby the former agreed to sell the suit property to the latter for a total sale consideration of Rs.4,50,000/-. In this agreement, it had been acknowledged that respondent No.2 had received an amount of Rs.3,10,266/- out of the sale consideration from respondent No.1, whereas the remaining amount of Rs.1,39,734/- was stated to have been deducted by respondent No.1 for further payment as construction charges to respondent No.3 on behalf of respondent No.2. It was clearly mentioned in the said agreement that there was nothing outstanding against respondent No.1 towards the suit property. Possession of the suit property was stated to have been handed over to respondent No.1. The suit property was non-transferable until the completion of the house on plot No.1033. It was clearly mentioned in the said agreement that respondent No.2 had executed two general power of attorneys in favour of respondent No.1, authorizing the latter to construct a house on the said plot. After the completion of the construction of a house on the said plot, respondent No.2 was placed under an obligation to transfer the suit property to respondent No.1 or his nominee without any delay. It was also agreed that if respondent No.2 refused the deal or revoked the general power of attorneys or did not transfer the suit property in favour of respondent No.1 or his nominee, respondent No.2 would pay *“triple amount of entire sale consideration”* to respondent No.1. Additionally, respondent No.1 was also given

the right to have the suit property transferred in his favour through a Court of law.

5. Simultaneously with the execution of the sale agreement dated 29.07.1991, respondent No.2 executed two general power of attorneys (Exh.P/3 and Exh.P/4) in favour of respondent No.1. Under Exh.P/3) respondent No.1 was authorized *inter-alia* to take possession of Plot No.1033 and to construct a house thereon “*at his own expenses*”. The said power of attorneys are registered documents. When the abovementioned agreements and general power of attorneys were executed, a house had not been constructed on plot No.1033.

6. The petitioner claims to have purchased the suit property from respondent No.2’s attorney, namely Bashir Ahmed, through sale agreement dated 07.07.1996 (Mark-A) for a total sale consideration of Rs.6,75,000/-. It may be mentioned that Bashir Ahmed happens to be respondent No.2’s son. The construction of the house on plot No.1033 is said to have been completed on 10.05.1996. On 15.08.1996, the suit property was transferred in the petitioner’s name in the records of respondent No.3 as well as respondent No.4 (Capital Development Authority).

7. On 29.08.1996, respondent No.1/plaintiff filed a suit for specific performance of the agreements dated 05.06.1991 and 29.07.1991 before the learned Civil Court at Islamabad. When the said suit was instituted, the petitioner had not been arrayed as a defendant therein. The petitioner was subsequently impleaded as defendant No.4 in the suit.

8. Respondent No.2 (as defendant No.1 in the suit) and the petitioner (as defendant No.4 in the suit) contested the said suit by filing their separate written statements. The position taken by respondent No.2 in his written statement was that after paying Rs.50,000/-, respondent No.1 had not made any further payment to respondent No.2. It was also pleaded that respondent No.2 had not executed a sale agreement with respondent No.1, and that since the suit property was lying vacant, respondent No.1 had forcibly and unlawfully taken the same into his possession.

9. The petitioner, in her written statement, pleaded *inter-alia* that she was a *bonafide* purchaser of the suit property for valuable consideration without prior knowledge of the agreements. Furthermore, it was pleaded that the petitioner had purchased the suit property from respondent No.2 through his attorney, Bashir Ahmad. She also claimed to be in possession of the suit property. The petitioner's case is that she is entitled to protection under Section 27(b) of the Specific Relief Act, 1877 ("the 1877 Act") and Section 41 of the Transfer of Property Act, 1882 ("the 1882 Act").

10. From the divergent pleadings of the contesting parties, the learned Trial Court framed the following issues:-

- "1. Whether the plaintiff has no cause of action? OPD
2. Whether the parties entered into agreement of suit house against sum of Rs.4,50,000/- and defendant No.1 has received the same? OPP
3. Whether the plaintiff is entitled to the decree as prayed for? OPP
4. Relief."

11. It may be mentioned that on 04.10.1999, respondent No.2 was proceeded against *ex-parte* by the learned Civil Court. At no material stage, did respondent No.2 file an application for the recall of the said order.

12. Respondent No.1 gave evidence as PW.2, whereas Iqbal Rafi, who was one of the marginal witnesses of the agreement to sell dated 05.06.1991, appeared as PW.1. Abdul Khaliq, who was one of the marginal witnesses of the power of attorneys given by respondent No.2 in favour of respondent No.1, appeared as PW.3. What is most intriguing is that respondent No.2 appeared as PW.4 and gave testimony in stark contrast to his pleadings in his written statement. As mentioned above, respondent No.2, in his written statement, had pleaded *inter-alia* that he had only received token money amounting to Rs.50,000/- from respondent No.1; that respondent No.1 had taken possession of the suit property forcibly and illegally; and that the remaining sale consideration had not been paid by respondent No.1. Respondent No.2 subsequently took a volte-face by appearing as PW.4 and admitted the execution of the agreement to sell dated

05.06.1991 (Exh.P/1), sale agreement dated 29.07.1991 (Exh.P/2), irrevocable general power of attorney dated 29.07.1991 (Exh.P/3), and general power of attorney dated 29.07.1991 (Exh.P/4). Furthermore, respondent No.2, in his examination-in-chief, deposed that he had given the original documents regarding the allotment of the suit property to respondent No.1. More importantly, respondent No.2 also deposed that he had received sale consideration from respondent No.1 and handed over to him possession of the suit property. In his cross-examination, respondent No.2 denied giving a power of attorney to Bashir Ahmad. He also denied knowledge as to the transfer of the suit property in the petitioner's favour.

13. The petitioner entered the witness box as DW.1 and deposed that she had purchased the suit property from Bashir Ahmad for a total sale consideration of Rs.6,75,000/- and that the suit property had been transferred in her name in the C.D.A. records on 15.08.1996.

14. Vide judgment and decree dated 25.04.2011, the learned Civil Court dismissed respondent No.1's suit to the extent of the prayer for specific performance of the agreements regarding the suit property but granted his alternate prayer of recovery of three times the amount of Rs.4,50,000/- along with costs.

15. Aggrieved by the said judgment and decree, respondent No.1 preferred an appeal before the Court of the learned Additional District Judge, Islamabad. Vide judgment and decree dated 14.01.2016, the learned Appellate Court allowed respondent No.1's appeal by setting aside the judgment and decree passed by the learned Civil Court, and as a result, respondent No.1's suit for specific performance was decreed. The said judgment and decree passed by the learned Appellate Court has been assailed by the petitioner in the instant appeal.

CONTENTIONS OF THE LEARNED COUNSEL FOR THE PETITIONER:-

16. Learned counsel for the petitioner, after narrating the facts leading to the filing of the instant petition, submitted that the

judgments and decrees passed by the learned Courts below are at variance; that the judgment and decree passed by the learned Appellate Court suffers from misreading and non-reading of evidence; that the petitioner was the *bonafide* purchaser of the suit property without notice of the earlier agreements between respondents No.1 and 2, and therefore, she is entitled to the protection envisaged under Section 27(b) of the 1877 Act and Section 41 of the 1882 Act; that the petitioner had purchased the suit property prior to the institution of the suit by respondent No.1; that respondent No.1 was well aware as to the sale of the suit property in the petitioner's favour prior to the institution of the suit; that even after the petitioner's application for impleadment as a defendant in the suit had been allowed and a written statement had been filed by her, respondent No.1 did not amend the suit to challenge the sale agreement dated 07.07.1996 in the petitioner's favour; that the learned Appellate Court erred by not appreciating that under the terms of the sale agreement dated 29.07.1991, respondent No.2 was liable to return triple the amount of the entire sale consideration in the event respondent No.2 refused the deal or revoked the power of attorneys given to respondent No.1; and that the learned Appellate Court also erred by not appreciating that respondent No.1 in his suit had also prayed for the grant of the alternate relief for the recovery of Rs.13,50,000/- from respondent No.1.

17. Learned counsel for the petitioner further submitted that respondent No.2 was the owner of the suit property when the petitioner purchased the same through sale agreement dated 07.07.1996; that the suit property had been purchased from Bashir Ahmad to whom respondent No.2 had given a power of attorney; that the judgment and decree passed by the learned Civil Court did not suffer from any legal infirmity; that vide judgment and decree dated 25.04.2011, the learned Civil Court had granted respondent No.1 his alternate prayer for recovery of Rs.13,50,000/-; and that the judgment and decree passed by the learned Appellate Court is not sustainable. Learned counsel for the petitioner prayed for the revision petition to be allowed by

setting-aside the judgment and decree passed by the learned Appellate Court and by restoring the judgment and decree passed by the learned Civil Court. In making his submissions, learned counsel for the petitioner placed reliance on the judgments reported as Shah Nawaz through LRs Vs. Abdul Ghafoor (2008 SCMR 352), Jamil Akhtar and others Vs. Las Baba and others (PLD 2003 SC 494), Binyameen and others Vs. Chaudhry Hakim and another (1996 SCMR 336) and Vinod Kumar Vs. Aroza (AIR 1987 SC 2179).

CONTENTIONS OF THE LEARNED COUNSEL FOR RESPONDENT NO.1:-

18. On the other hand, learned counsel for respondent No.1 submitted that even though the petitioner claims to have purchased the suit property through respondent No.2's attorney namely, Bashir Ahmad yet the latter was not produced as a witness; that the power of attorney executed by respondent No.2 in favour of Bashir Ahmad was not tendered in evidence by the petitioner but by her counsel as Exh.D/1; that even the original sale agreement dated 07.07.1996 was not tendered in evidence and only its copy was produced as Mark-A; that the execution of the said sale agreement had not been proved by producing its two attesting witnesses; that the petitioner does not come within the meaning of a *bonafide* purchaser of the suit property; that respondent No.1 had been in possession of the suit property ever since the execution of the sale agreement dated 29.07.1991; that since possession of the suit property was already with respondent No.1 when the sale agreement dated 07.07.1996 was allegedly executed between the petitioner and Bashir Ahmad, it was incumbent upon the petitioner to have taken precautionary measures before entering into the said agreement; that although the agreement to sell dated 05.06.1991 and the sale agreement dated 29.07.1991 were neither registered documents nor compulsorily registerable, the two power of attorneys dated 29.07.1991 were registered documents; that had the petitioner taken the necessary precautionary measures before entering into the sale agreement

dated 07.07.1996, she would have discovered the creation of respondent No.1's interest in the suit property through the said registered documents; that even otherwise, upon registration the petitioner was deemed to have been in the knowledge of the said power of attorneys; that even if respondent No.2's evidence is discarded, the judgment and decree passed by the learned Appellate Court in respondent No.1's favour is sustainable; that the petitioner had given evidence as DW.1 and had not produced any document in support of her testimony; that the documents Exh.D/1 to Exh.D/8 were produced by respondent No.1's counsel; and that no plausible explanation had been given for the petitioner's failure to produce the said documents.

19. Learned counsel for respondent No.1 further submitted that the mere fact that the petitioner had not assailed the judgment and decree dated 25.04.2011 passed by the learned Civil Court means that she admitted the execution of the earlier agreements dated 05.06.1991 and 29.07.1991 between respondent No.1 and respondent No.2; that the learned Civil Court had granted the relief for the recovery of Rs.13,50,000/- in respondent No.1's favour by recognizing the fact that the said agreements had been executed between respondent No.1 and respondent No.2; and that it was in furtherance of the terms and conditions of the agreement dated 29.07.1991 that the learned Civil Court had granted the relief for the recovery of the said amount in respondent No.1's favour. Learned counsel for respondent No.1 prayed for the revision petition to be dismissed. In making his submissions, learned counsel for respondent No.1 placed reliance on the judgments reported as Hafiz Tassadaq Hussain Vs. Lal Khatoon etc (PLD 2011 SC 296), Haji Abdul Majeed & others Vs. Amjad Khan (2012 CLC 1483), Mushtaq Ahmed & another Vs. Jaffar & others (2008 SCMR 1018), Niamat Ali Vs. Hassan Muhammad etc (1987 MLD 30), Haji Akram Rehman Vs. Noor Ahmed & others (PLD 1974 Baghdad-ul-Jadid 25), Vidhyadhar Vs. Mankikarao (AIR 1999 SC 1441), Kishore Singh Vs. Barij Bihari Singh (AIR 1993 Patna 122), and Ramdeni

Singh and another Vs. Gumani Rut and another (AIR 1929 Patna 300).

20. I have heard the contentions of the learned counsel for the contesting parties with great interest and keenness and perused the record with their able assistance.

21. The facts leading to the filing of the instant revision petition are set out in sufficient details in paragraphs 2 to 15 above and need not be recapitulated.

22. The entire edifice of the petitioner's case is built on the plea that she was a *bona fide* purchaser of the suit property for value without notice of the earlier agreements between respondent No.1 and respondent No.2. The petitioner seeks protection given to such a purchaser by Section 27(b) of the 1877 Act and 1882 Act.

WHETHER THE PETITIONER IS ENTITLED TO THE PROTECTION UNDER SECTION 27(b) OF THE SPECIFIC RELIEF ACT, 1877:-

23. Section 27 of the 1877 Act provides *inter-alia* that specific performance of a contract may be enforced against (a) either party thereto; and (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract. In the case of Hafiz Tassaduq Hussain Vs. Lal Khatoon (PLD 2011 SC 296), it has been held that a subsequent vendee has to discharge the following onus:-

- (1) that he acquired the property for due consideration and thus is a transferee for value, meaning thereby that his purchase is for the price paid to the vendor and not otherwise;
- (2) there was no dishonesty of purpose or tainted intention to enter into the transaction which shall settle that he acted in good faith or with bona fide;
- (3) he had no knowledge or notice of the original sale agreement between the plaintiff and the vendor at the time of his transaction with the latter.

24. Assuming that there was no dishonesty on the petitioner's part while purchasing the suit property for due consideration, it was obligatory upon the petitioner to prove that she had no notice of the earlier agreements with respect to the suit property

between respondent No.1 and respondent No.2, in order to be given protection under Section 27(b) of the 1877 Act. Notice contemplated by Section 27(b) of the 1877 Act is not confined to actual notice but also includes constructive notice. In this regard, Section 3 of the 1882 Act provides that a person is said to have “notice” of a fact when he actually knows that fact, or when, but for willful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it. Explanation-II to Section 3 of the said Act provides that any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof. Where a subsequent transferee of an immovable property acquires it without making any inquiry as to the title of the person in possession, he takes the property subject to the rights and title of the person in possession. When a person purchases property from an owner knowing that it is in the possession of another, he is under a duty to inquire into the nature of that possession and, in the absence of such inquiry, knowledge of title under which possession is held should be attributed to the purchaser.

25. Since in the case at hand, possession of the suit property was with respondent No.1 since 1991, the petitioner was bound to enquire about the nature of respondent No.1’s possession of the suit property when she entered into the agreement to sell dated 07.07.1996. There is nothing on the record to show that prior to the execution of the said agreement, the petitioner met respondent No.1 or made enquiries regarding the nature of the latter’s possession over the suit property. Due to the petitioner’s willful abstention from making such an enquiry or search, she may have been unable to gain actual knowledge of the earlier agreements between respondent No.1 and respondent No.2. However, assuming that the petitioner did not have actual notice of the agreements between respondent No.1 and respondent No.2 regarding the suit property, she shall be deemed to have constructive notice of the said agreements and of respondent

No.1's interest in the suit property by dint of Explanation-II to Section 3 of the 1882 Act. Since it cannot be held that the petitioner did not have notice of the agreements between respondent No.1 and respondent No.2 regarding the suit property, I am of the view that the subsequent transaction of sale of the suit property by respondent No.2's attorney in favour of the petitioner cannot take precedence over the earlier agreements between respondent No.1 and respondent No.2. In taking this view, I derive support from the law laid down in the following judgments:-

- (i) In the case of Abdul Jabbar Vs. Mst. Maqbool Jan (2012 SCMR 947), the Hon'ble Supreme Court held that the appellant, claiming to be a *bona fide* purchaser for value without notice, was not entitled to the protection under Section 27(b) of the 1877 Act since the land purchased by the appellant was in possession of a person other than the one from whom it was purchased and no enquiry had been made by the appellant as to the nature of possession of such a person. Paragraphs 18 and 19 of the said report are reproduced herein below:-

"18. It is established from the record that the respondents were in possession of the land in question, cultivating the same, thus the appellants ought to have made an inquiry prior to purchasing the land in question, whether the same encumbrance in any manner and how the respondents are cultivating the land instead of the person from whom they are purchasing the same.

19. Specific performance can be ordered against every transferee from the promisor except a bona fide purchaser under section 27 of the Specific Relief Act. In the case of Daniels v. Davison, (1809) 10 RR 171, Baburam Beg and another v. Madhab Chandra Pally and others, (AIR 1914 Calcutta 333) and Magil Brahma v. Bholi Das (19 CLJ 352), it was held that possession is tantamount to notice of title of the party in possession and the purchaser ought to have enquired the nature and extent of interest, which burden has not been discharged by the appellants to protect the title as bona fide purchaser."

- (ii) In the case of Hafiz Tassaduq Hussain Vs. Lal Khatoon (PLD 2011 SC 296), it was held as follows:-

"[T]he subsequent vendee is not obliged to run from the

pillar to post in conducting rowing and fishing inquiries, to ascertain if a third party has any interest etc. in the property which otherwise is visibly lacking. But if there exist some overt, prominent and conspicuous indicators about the third party interest, which are so patently noticeable and manifest that those could not and should not be missed and ignored by a purchaser, such as the possession not with the vendor but with someone else, who if approached or its nature investigated would lead to discover such interest, the purchaser is obliged to probe about it, otherwise he may not be able to take resort of the noted equitable rule.

(Emphasis added)

- (iii) Similarly, in the case of Ghulam Rasool Vs. Muhammad Hussain (PLD 2011 SC 119), it was held as follows:-

“7. As far as the plea of the appellants regarding bona fide purchasers of the suit-land and, thus, having the protection of section 27(b) of the Specific Relief Act is concerned, suffice it to say that again there are concurrent findings of three Courts, which are not shown to be the result of any misreading or non-reading of the evidence. The respondents-plaintiffs were admittedly in possession of the suit-land and, this was a sufficient notice to the appellants to have thoroughly inquired about their possession, which was not so probed by them as they have failed to produce any independent witness for this.”

(Emphasis added)

- (iv) In the case of Rasool Bakhsh Naich Vs. Syed Rasool Bakhsh Shah (2010 SCMR 988), the factum as to possession of the property in question by a person who was not the seller was held to be sufficient notice to a subsequent purchaser that there was a prior lien and charge over the property. Consequently, it was held that the subsequent purchaser was not entitled to protection under Section 27(b) of the 1877 Act.
- (v) In the case of Mrs. Mussarat Shaukat Ali Vs. Mrs. Safia Khatoon (1994 SCMR 2189), it was held as follows:-

“If a property sold is in occupation of the vendor, the onus to prove that the purchaser had no notice of the prior agreement of sale between the vendor and a third party is normally discharged, if the subsequent purchaser appears before the Court and states on oath that he was unaware of the previous agreement of sale between the vendor and the third party. The onus in such a case to prove that the subsequent purchaser had the notice of earlier agreement of sale between vendor and the third party then shifts on the person who has prior agreement of sale in his favour. However, where the property sold is

not in possession of the vendor but is occupied by a third party, the burden of proving that the subsequent purchaser had no notice of the earlier agreement of sale between the vendor and third party cannot be discharged by mere appearance of the subsequent purchaser before the Court and making a statement on oath that he had no notice of the earlier agreement of sale between vendor and the third party, in view of Explanation II to section 3. Explanation II to section 3 embodies the well-known principle, that possession is a prima facie title to the property and declares that where a person acquires an immovable property he shall be deemed to have notice of the title, if any, of the person for the time being in possession of that property."

- (vi) In the case of R.K. Mohammed Ubaidullah Vs. Hajee Abdul Wahab (AIR 2001 SC 1658), it was *inter-alia* held that when the subsequent purchaser was already aware of plaintiff as being in possession of suit property as a tenant for several years and if such purchaser would obtain a sale deed without making any enquiry whether plaintiff had any further interest in the property on the date of execution of the sale apart from that he was in possession of the property as a tenant, the subsequent purchaser cannot be said to be a *bona fide* one. While detailing the nature of enquiry which a subsequent purchaser must make to qualify for *bona fides*, the Indian Supreme Court held that he was obliged to enquire the status of the person in possession. If he did not make a proper enquiry, he would be deemed to have notice of the existing affairs and could not claim to be a *bona fide* purchaser.

WHETHER THE PETITIONER IS ENTITLED TO PROTECTION UNDER SECTION 41 OF THE TRANSFER OF PROPERTY ACT, 1882:-

26. Section 41 of the 1882 Act provides that where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith. Recently, in the case

of Ghulam Rasool Vs. Noor Muhammad (2017 SCMR 81), it was held that the four essential ingredients which must co-exist in order for a party to take the benefit of the equitable principle enshrined in Section 41 of the Transfer of Property Act, 1882, were as follows:-

- "(a) that the transferor was the ostensible owner;*
- (b) that the transfer was made by consent express or implied of the real owner;*
- (c) that the transfer was made for consideration; and*
- (d) that the transferee while acting in good faith had taken reasonable care before entering into such transaction."*

27. Protection of Section 41 of the 1882 Act is available to a transferee who purchased the property, after reasonable care. A subsequent purchaser seeking to take benefit of Section 41 of the 1882 Act must plead with clarity in his written statement that before purchasing the property reasonable care had been taken by making enquiries as to the title of the seller and the status of the person in possession of the such property. In the case at hand, there is no such pleading in the petitioner's written statement. Had the petitioner taken such care and made necessary enquiries she would have gained knowledge of the registered power of attorneys dated 29.07.1991 executed by respondent No.2 in favour of respondent No.1. Through the irrevocable general power of attorney dated 29.07.1991 (Exh.P/3), respondent No.2 (principal) had also authorized respondent No.1 (attorney) to sell plot No.1033. Consequently, this power of attorney could be termed as coupled with interest.

28. As mentioned above, the power of attorneys dated 29.07.1991 executed by respondent No.2 in favour of respondent No.1 were registered under the provisions of the Registration Act, 1908. The said Act was enacted with the intention of providing orderliness, discipline and public notice with regard to transactions relating to immovable property. Registration gives publicity and public exposure to documents pertaining to immovable properties. It provides information to the public at large as to the nature and extent of the rights and interests which persons may have in that property. It enables people to find out

whether any particular property with which they are concerned has been subjected to any legal obligation or liability and who is or are the person/s presently having right, title, and interest in the property. Since the said power of attorneys were registered documents, the petitioner would be deemed to have had knowledge thereof when she entered into the sale agreement dated 07.07.1996. Any reasonable person in the knowledge of such registered documents would be expected to have enquired from the attorney the reason why such documents were executed. Had the petitioner made such enquiries, she would also have discovered that respondent No.1's possession over the suit property was pursuant to the terms of the sale agreement dated 29.07.1991. Since the petitioner did not take reasonable care by making such an enquiry, she cannot be termed as a *bona fide* purchaser and considered entitled to protection of Section 41 of 1882 Act. In holding so, I place reliance on the law laid down in the following judgments:-

- (i) In the case of Noor Hassan Vs. Ali Sher (2015 SCMR 452), it was held that under section 41 of the 1882 Act, a sale transaction is protected if the ostensible owner, with the implied or express consent of the real owner, transfers the property to a third person for consideration, provided the transferee, after taking reasonable care to ascertain that the transferor had the power to make the transfer, has acted in good faith.
- (ii) In the case of Mst. Rubina Badar Vs. Messrs Long Life Builders (2012 SCMR 84), it was held that in order to avail the benefit of the equitable doctrine as contained in Section 41 of the 1882 Act which protects a subsequent transferee, it must be established by him that he had acted in good faith and taken reasonable care before entering into a transaction and that he had given valuable consideration for such transfer. This equitable doctrine is a deduction from the law of estoppel which must be pleaded clearly with specific facts to be relied upon in this regard. Naturally, the onus to prove that a

person is entitled to the benefit of Section 41 of the 1882 Act is always upon the person who pleads such protection.

- (iii) In the case of Abdul Rashid Vs. Muhammad Yaseen (2010 SCMR 1871), the Hon'ble Supreme Court interpreted Section 41 of the 1882 Act in the following terms:-

“8. Mere reading of the aforesaid provision of law clearly envisages that as per mandate of provisions of law if the transferee after taking reasonable care to ascertain that the transferor has acted in good faith, then his rights are protected. As mentioned above appellant/defendant did not mention a single word qua making any enquiry with regard to the status of the land in question before purchasing the land from Muhammad Yaqoob owner from whom respondent had purchased the land in question in 1967. It is a settled principle of law that a bona fide transferee while seeking protection of section 41 of the Act is required to prove on record that he entered into transaction of sale in good faith having believed that the transferor is the ostensible owner of the property in question. In other words section 41 of the Transfer of Property Act protects a transferee provided he acted in good faith and took reasonable care to ascertain that the transferor had power to make the transfer.”

- (iv) In the case of Habib Bank Ltd. Vs. Syed Muhammad Haroon (2009 CLD 140), the Hon'ble Lahore High Court held as follows:-

“It is settled law that before the equitable defence of bona fide purchaser under section 41 of the Transfer of Property Act can be accepted it must be established that such purchaser has exercised due care and diligence in ascertaining the clean vendible title of his transfer. It is equally settled law that search and reliance solely of the revenue record is not sufficient to attract section 41 of the Transfer of the Property Act.”

WHETHER DUE TO A PENALTY CLAUSE IN THE SALE AGREEMENT AND THE PRAYER FOR ALTERNATE RELIEF IN THE SUIT, THE RELIEF OF SPECIFIC PERFORMANCE OF THE SALE AGREEMENT COULD BE DENIED TO THE PLAINTIFF/RESPONDENT NO.1:-

29. Learned counsel for the petitioner did not question the factum as to the execution of the sale agreement dated 29.07.1991 between respondent No.1 and respondent No.2 but argued with vehemence that since the said sale agreement contained a term providing that if respondent No.2 failed to transfer the suit property to respondent No.1 or his nominee, the

former would have to pay triple the amount of the sale consideration to the latter and since respondent No.1, in his suit for specific performance, had prayed for the grant of the alternative relief of payment of compensation, the relief of specific performance could not have been granted to respondent No.1 by the learned Appellate Court.

30. Section 19 of the 1877 Act provides that any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to or in substitution for such performance. Furthermore, Section 20 of the 1877 Act provides that a contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.

31. Merely because a plaintiff in his suit for specific performance of an agreement to sell immovable property also prayed for the grant of compensation cannot be a ground to deny him the relief of specific performance. The mention of an amount in the agreement, which was to be paid by a seller in case of its breach, does not disable the purchaser from seeking the specific performance of such an agreement. If the presence of a liquidated damages clause or a penalty clause in an agreement to sell immovable property were to be considered enough to hold that the breach of such an agreement could be adequately compensated by the specified damages or penalty, Section 20 of the 1877 Act would certainly become meaningless.

32. Section 12(c) of the 1877 Act provides that the specific performance of any contract may, in the discretion of the Court, be enforced when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief. The Explanation to Section 12 of the said Act provides that unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer moveable property can be thus relieved.

33. Under Section 12 of the 1877 Act read with the Explanation to that Section, the presumption of law is that a breach of contract to transfer immovable property cannot be adequately relieved by compensation in monetary terms. The intention of the Legislature is that a party entering into a contract for sale of immovable property should not be allowed to avoid its performance to suit, his convenience by offering to pay damages and pleading that the other party to the contract might well be compensated thereby. The employment of the term “*unless the contrary is proved*” in the Explanation to Section 12 of the 1877 Act is to obligate a party opposing a suit for specific performance of an agreement to sell immovable property to not just plead in its written statement that the vendee could be adequately compensated in pecuniary terms but also produce evidence to that effect. In the proceedings before the learned Civil Court, the petitioner neither pleaded nor brought any evidence to prove that respondent No.1 could have been adequately compensated in monetary terms for respondent No.2’s failure to transfer the suit property to respondent No.1 or his nominee.

34. The conjoint reading of Section 12(c) read with the Explanation thereto, and Sections 19 and 20 of the 1877 Act, lead me to hold that a term in the sale agreement dated 29.07.1991 providing for payment of triple the amount of sale consideration by respondent No.2 to respondent No.1 in the event of the former’s failure to transfer the suit property to the latter or his nominee, and the alternate prayer for the grant of compensation in the suit for specific performance, did not pose as a legal impediment in the grant of a decree for specific performance of the said agreement. In holding so, I derive guidance from the law laid down in the following judgments:-

- (i) In the case of Mrs. Mussarat Shaukat Ali Vs. Mrs. Safia Khatoon (1994 SCMR 2189), the suit for specific performance of an oral agreement to sell was decreed despite the fact that the purchaser had demanded Rs.50,000/- from the seller as compensation for breach of

the agreement. On the strength of Section 19 of the 1877 Act, it was held that a person suing for specific performance of a contract can also ask for compensation for its breach either in addition to or in substitution for relief of specific performance. Furthermore, it was held that a purchaser, by serving notice on the seller demanding compensation for breach of the agreement, would not be considered to have given up his right for specific performance of a sale agreement.

- (ii) In the case of Abdul Karim Vs. Muhammad Sham (1973 SCMR 225), the Hon'ble Supreme Court rejected the argument that since the contract provided for payment of a specific amount on the vendor's failure to fulfill the contract and transfer the property to the vendee, no decree for specific performance of the contract could be granted. In the said report, Mr. Salahuddin Ahmed J. (as he then was) held as follows:-

“We are unable to accept this contention in view of the clear provisions of the Specific Relief Act which is applicable in this country. Section 12 provides that the specific performance of the contract may be enforced in the discretion of the Court. Explanation to section 12 of the Act clearly states that unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relived by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved. Section 19 provides that any person suing for specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance. Section 20 says that a contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same. Section 22 provides that the jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.

The aforesaid provisions thus clearly empower the Court to decree a specific performance of the contract even though a sum be named in the contract as the amount to be paid in case of its breach.”

(iii) Just like in the case at hand, the plaintiff in the case of Messrs Pioneer Housing Society (Pvt.) Limited Vs. Messrs Babar & Company (PLD 1999 Lahore 193) had also sought the alternative relief of payment of compensation in its suit for specific performance. The Division Bench of the Hon'ble Lahore High Court spurned the objection taken by the defendant that since the plaintiff had sought payment of compensation, the relief of specific performance could not be granted, in the following terms:-

“As to the argument that the respondent had asked for the relief of compensation as an alternative relief, therefore, the specific performance should not be allowed, the argument is not well-founded. Under section 19 of Specific Relief Act, a person suing performance of the contract can also ask for the compensation of breach, either in addition to or in substitution for such performance and if the Court decides that specific performance might not be granted but the contract having been broken, the plaintiff is entitled to compensation for the breach thereof, it can award compensation accordingly. The suit was framed in accordance with the spirit of section 19 of the Act. The respondent did not forego his right of seeking enforcement of the agreement through specific performance but maintained that if the Court would feel difficulty in granting specific performance, the relief of compensation be granted. By doing so, the respondent did not render itself disentitled to the grant of specific performance of the contract. Under section 12 of the Specific Relief Act, the non-performance of an agreement pertaining to immovable property cannot be compensated in terms of money and, therefore, its enforcement cannot be refused unless it causes any extreme hardship to the other side which is not the case here. The respondent having proved existence of agreement, payment of earnest money, readiness to perform the contract and willingness to pay the balance price, there was no reason for declining relief in the discretionary jurisdiction, which of course, has to be exercised on sound judicial principles.”

(iv) In the case of Mst. Noor Jehan Vs. Muhammad Rafique (1995 CLC 43), the Division Bench of the Hon'ble Peshawar High Court held as follows:-

Admittedly, certain provisions of section 12 indicate that when the act agreed to be done is such that pecuniary compensation for its non-performance would serve as adequate relief then the contract shall not be specifically enforced. But, we also find that in the explanation of section 12 it is provided that unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved. In view of this legal position, a decree for specific

performance can be granted because the property involved is landed property and, therefore, the return of the earnest money alone would not be an adequate relief in this case.”

(v) In the case of Haji Abdul Kasim Vs. Builders Incorporated (1990 MLD 712), it was held by the Hon'ble High Court of Sindh as follows:-

“Mere fact that the appellant had also claimed damages in the suit could not give rise to the presumption that he was not interested in performance of the contract as by virtue of section 19 of Specific Relief Act, the plaintiff/appellant could claim damages in addition to the relief of specific performance of contract.”

(vi) In the case of Sh. Muhammad Riaz Diwana Vs. Sh. Muhammad Sharif (1989 MLD 3663), the agreement to sell contained a clause providing for double the amount of earnest money to be returned by the seller in case the seller failed to abide by the terms of the agreement. On the basis of the said clause, it was argued on behalf of the seller that the agreement could not be specifically enforced. Terming such an argument as fallacious, the Division Bench of the Hon'ble Lahore High Court held as follows:-

“The fallacy of this argument consisted in assuming that mere incorporation of such a clause in the agreement, brings the agreement within the mischief of section 21(a). This argument cannot be accepted without doing violence to the express provisions of Section 20 of the Act which provided that “a contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.”

Another ground on which the seller had opposed to the specific performance of the agreement to sell was that the plaintiff/purchaser had prayed for the grant of “any other relief”. This argument was also rejected in the following terms:-

“Faced with this situation learned counsel for the appellants next argued that in the suit filed by respondent No. 1 for specific performance of agreement he also made a prayer that any other relief may be granted to him, thereby by implication respondent No.1 admitted that he could be compensated by granting him any relief other than the relief of specific performance of agreement. This argument too is devoid of any force. While advancing this argument learned counsel for the appellants lost sight of the explanation in section 12 of the Specific Relief Act, according to which “unless and until the

contrary was proved, the Court shall presume that breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money". Apart from this section 19 of the Act permits a plaintiff in a suit for specific performance of agreement to claim compensation for its breach, either in addition to or in substitution for such performance. This section while conferring discretion on the Court to award compensation where specific performance is not to be granted, simultaneously empowers the Court that in addition to specific performance of agreement, the Court could also grant compensation for breach of agreement to meet ends of justice. Respondent No.1 as a plaintiff is bound under the law to ask for all the reliefs available to him under a cause of action whether in addition to or in alternative, of the main relief of specific performance, failure to ask which would have debarred him from suing for any other relief in case his suit for specific performance was dismissed. Section 29 of the Specific Relief Act, expressly enacts this rule of law. Apart from this there are provisions of Order II, Rule 2, C.P.C. in which the same rule has been enacted. After considering all these provisions of law it is explainably clear that merely because respondent asked for any other relief which the justice of the case permitted it did not amount to admission by him that any other relief was adequate compensation for non-performance of agreement."

Since the said judgment was authored by an Hon'ble Judge who rose to grace the Hon'ble Supreme Court, it deserves reverence and respect.

Law to the said effect has also been laid down in the cases of Fakhar-ud-Din Vs. Muhammad Feroze (2016 YLR 866), Muhammad Saleem Vs. Muhammad Shafi (2004 YLR 1882), Amanullah Vs. Sher Afzal (2003 MLD 1142), Abdul Aziz Vs. Maqsood Ahmed (2000 MLD 1875), Abdul Majeed Vs. Ghulam Shabbir (2000 CLC 643), and M. Saddique Vs. M. Saleem (2000 YLR 1663).

35. The petitioner claimed to have purchased the suit property from respondent No.2's attorney, Bashir Ahmed. The sale agreement dated 07.07.1996 bears Bashir Ahmed's signature. For reasons best known to the petitioner, she chose not to produce or examine Bashir Ahmed (the executant of the said agreement) or its sole attesting witness. Her failure in this regard would give rise to a presumption under Article 129(g) of the Qanun-e-Shahadat Order, 1984, that the evidence which could but is not produced, would, if produced, be unfavourable to the person withholding it. This is yet another reason why the

petitioner cannot be termed a *bona fide* purchaser of the suit property.

CONDUCT OF RESPONDENT NO.2:-

36. Reference to respondent No.2's conduct in this twenty-two year long litigation is of utmost importance. Respondent No.2's pre and post-litigation conduct has been most deplorable. In the year 1991, respondent No.2 sold the suit property to respondent No.1. The sale agreement dated 29.07.1991 clearly mentioned that possession of the suit property had been handed over to respondent No.1 and that there was nothing outstanding against respondent No.1 towards the suit property. Taking undue advantage of the fact that the suit property could not be transferred until the completion of the house on plot No.1033, respondent No.2 executed an irrevocable power of attorney dated 10.07.1995 in favour of Bashir Ahmed, authorizing the latter to sell the suit property. Bashir Ahmed, through sale agreement dated 07.07.1996, sold the suit property to the petitioner. After respondent No.1 filed a suit for specific performance, respondent No.2 contested the said suit and in his written statement he accused respondent No.1 of forcibly taking possession of the suit property. Thereafter, respondent No.2 lost interest in the litigation and was proceeded against *ex-parte* by the learned Civil Court. The mere fact that respondent No.2 had been proceeded against *ex-parte* and did not remove him from the array of the parties. After being so proceeded, respondent No.2 resurfaced as PW-4 and gave evidence in stark contradiction to his pleadings in his written statement. Respondent No.2 deposed, on oath, that in the year 1991, he had sold the suit property to respondent No.1 and also handed over its possession to him. In short, respondent No.2, in his testimony, virtually conceded to respondent No.1's claim in the suit. In this way, respondent No.2's stance before the learned Civil Court oscillated like a pendulum. Since respondent No.2's pleadings in his written statement and his deposition as PW-4 were mutually exclusive and paradoxical, one of them was obviously tainted with lies. Such conduct on respondent No.2's part was abuse of

the process of the Court. Unscrupulous litigants such as respondent No.2 often resort to such tactics because seldom do the Courts meet them with punitive measures.

37. It is a matter of common experience that the Courts' otherwise scarce and valuable time is wasted in a large number of uncalled for cases. In the case at hand, but for respondent No.2's attempt to sell the suit property twice over, and had respondent No.2 fulfilled his obligations under the sale agreement dated 29.07.1991, this long drawn out acrimonious litigation could have been averted. Respondent No.2 has played a nefarious role in choking the judicial system of the country.

38. For all that is mentioned above, I find the learned Appellate Court's decision to be in accordance with the evidence and the propositions of law and there is no warrant for interfering with the same. Consequently, the instant petition is dismissed and the judgment of the learned Appellate Court is, accordingly, upheld.

39. I have not given credence to either respondent No.2's pleadings or his testimony in deciding to dismiss this petition. Respondent No.2's pleadings and testimony were not just inconsistent but contradictory. In the case of Sohail Ahmed Jan Vs. Siraj Ahmed Jan (2018 CLC 919), I had the occasion to hold that a witness's evidence which was in contradiction to his pleading in his written statement had been correctly discarded by the Courts below. In this regard, paragraph 29 of the said report is reproduced herein below:-

"29. Since there are marked contradictions between respondent No.4/DW-1's written statement and her evidence, the learned Courts below were correct in not giving credence to her testimony. Her pleadings in her written statement were not supported by her oral testimony, therefore, the veracity of such pleadings dwindled, and were not worthy of consideration. It is by now well settled that pleadings are treated as a foundation in civil matters and a point having not been taken regarding a factual position cannot be allowed to be taken at subsequent stage or during evidence. A party could not make a departure from its pleadings and was bound by the same. No evidence contrary to the pleadings could be permitted to be adduced by a party to the suit. Law to this effect has been laid down in the cases of Jannat Bibi Vs. Sher Muhammad & others (1988 SCMR 1696), Major (Retd.) Barkat Ali and others Vs. Qaim Din and others (2006 SCMR 562), Rehmatullah and others Vs. Saleh

Khan and others (2007 SCMR 729), and Muhammad Iqbal Vs. Mehboob Alam (2015 SCMR 21)."

COSTS:-

40. Under Section 35(1)(i) and (ii) of the Civil Procedure Code, 1908 ("C.P.C."), as amended by the Costs of Litigation Act, 2017 ("the 2017 Act"), the Court can award actual costs of litigation to the successful party. In addition to such costs, the Court has been empowered under Section 35(1)(iii) of the C.P.C. to award costs in its discretion. For the reasons mentioned in paragraphs 36 to 37 above, I feel obligated to exercise discretion to impose costs to the tune of Rs.10,00,000/- payable by respondent No.2 to respondent No.1 under Section 35(1)(iii) of the C.P.C., as amended by the 2017 Act.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

ANNOUNCED IN AN OPEN COURT ON _____/2019.

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**

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