

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.R.No.146/2014

Amjid Ali Abbasi

Versus

Muhammad Buksh Jumani and others

Date of Hearing:	18.01.2019
Petitioner by:	Mr. Tahir Mehmood Abbasi, Advocate.
Respondents by:	Mr. Shakir Javed, Advocate for respondent No.1.
	Mian Abdul Razzaq, Advocate for respondent No.6.
	Mr. Musharaf Khan, Advocate for respondent No.5.

MIANGUL HASSAN AURANGZEB, J:- Through the instant civil revision petition, the petitioner, Amjid Ali Abbasi, impugns the judgment and decree dated 31.01.2014, passed by the Court of the learned Additional District Judge, Islamabad, whereby his appeal against the order and decree dated 06.04.2011, passed by the Court of the learned Civil Judge, Islamabad, was dismissed. Vide the said order and decree dated 06.04.2011, the learned Civil Court had rejected the plaint in the petitioner's suit for specific performance of the agreement dated 28.08.2003 and permanent injunction, by invoking the provisions of Order VII, Rule 11 of the Civil Procedure Code, 1908 ("C.P.C.").

2. In this judgment, respondent No.1 (Muhammad Bukhsh Jumani) shall be referred to as "Jumani"; respondent No.2 (Malik Muhammad Mumtaz) as "Mumtaz"; respondent No.3 (Taaj Muhammad Baig) as "Taaj"; respondent No.6 (Muhammad Khaleeq) as "Khaleeq"; and the petitioner (Amjid Ali Abbasi) as "Amjid"

3. The facts essential for the disposal of the instant revision petition are that on 28.08.2003, an agreement to sell was executed between Jumani and Amjid, whereby the former agreed to sell to the latter Flat No.14, Top Floor, Block 2-A, Street No.1, Sector I-8/1, Islamabad ("the suit property") for a total sale consideration of Rs.8,00,000/- out of which an amount of

Rs.1,42,000/- was paid as earnest money and the balance Rs.6,58,000/- was payable within a period of one week of the signing of the said agreement and at the time of the transfer of the suit property in the records of the Capital Development Authority ("C.D.A."). Under clause 5 of the said agreement, Jumani was bound to present the original allottee of the suit property in the C.D.A.'s office so that the said property could be transferred to Amjid or his nominee.

4. When the said agreement dated 28.08.2003 was executed, the C.D.A. records showed Taaj (respondent No.3) as the owner of the suit property. It appears that the suit property was originally allotted on 18.11.1980 to Mian Mahmood Ahmed who had sold it to Taaj. On 13.08.1991, the suit property was transferred in the C.D.A. records in favour of Taaj. On 17.05.2003, Taaj entered into an agreement for the sale of the suit property to Mumtaz. On 19.08.2003, Mumtaz entered into an agreement for the sale of the suit property to Jumani. On 28.08.2003, Jumani entered into an agreement for the sale of the suit property to Amjid.

5. On 07.09.2004, Jumani had instituted a suit for specific performance of the agreement to sell dated 19.08.2003 against Mumtaz and Taaj. This suit was dismissed for non-prosecution on 02.03.2010, and was restored on 20.05.2013. On 03.05.2011 (i.e. prior to the restoration of Jumani's said civil suit), Taaj sold the suit property to Khaleeq. Ownership of the suit property was transferred in Khaleeq's favour on 03.05.2011 in the C.D.A. records. On 13.05.2011, Khaleeq filed a suit for possession against Amjid and Jumani. On 28.01.2008, Amjid had filed a suit for specific performance of the agreement to sell dated 28.08.2003 against Jumani, etc.

6. As regards the suit for specific performance of the agreement to sell dated 28.08.2003 instituted by Amjid against Jumani, etc., the plaint in the said suit was rejected under Order VII, Rule 11, C.P.C. by the learned Civil Court vide order dated 06.04.2011. It is pertinent to bear in mind that when the said order was passed, Jumani's suit for specific performance against

Mumtaz (which had been dismissed for non-prosecution on 02.03.2010) had not been restored. This furnished the basis for the rejection of the plaint of Amjid's suit for specific performance against Jumani. For the purposes of clarity, paragraph 6 of the said order dated 06.04.2011 is reproduced herein below:-

"6. The suit of the plaintiff is based upon the specific performance of the agreement to sell, existing in between the defendants No.1 and 2 but record shows that suit for specific performance of the agreement filed by the defendant No.1 against defendant No.2 and 3 titled as "Muhammad Bakhsh Jamani versus Malik Mumtaz" has been dismissed for non-prosecution, hence plaintiff was having no cause of action to file the instant suit, for specific performance of the agreement to sell dated 28.8.03, rather he can claim the damages from the defendant No.1 who had entered into an agreement to sell, the flat, which was not owned by him."

7. The said order dated 06.04.2011 was assailed by Amjid in an appeal before the Court of the learned Additional District Judge, Islamabad. Vide judgment dated 31.01.2014, the said appeal was dismissed. It ought to be borne in mind that by the time the said judgment dated 31.01.2014 was passed by the learned Appellate Court, Jumani's suit for specific performance against Mumtaz had been restored by the learned Civil Court. As mentioned above, Jumani's suit for specific performance against Mumtaz had been restored by the learned Civil Court vide order dated 20.05.2013. The learned Appellate Court while dismissing Amjid's appeal was cognizant of the fact that Jumani's suit for specific performance against Mumtaz had been restored by the learned Civil Court. Nevertheless, the learned Appellate Court took the view that since the suit property had not been transferred in Jumani's favour through a deed of transfer executed and attested on the order of the Court, he could not have been considered as the owner of the suit property and could not have entered into an agreement to sell the same to Amjid. The operative part of the said judgment dated 31.01.2014 is reproduced herein below:-

"...The law is very much clear that even a decree for specific performance of the contract cannot bestow a title to a decree holder unless and until a deed of transfer is executed and attested on the order of the court, so in this state of affairs as the alleged vendor i.e. respondent No.1 – Muhammad Baksh Jamani, whose suit for specific performance of the contract against the

other respondent is still pending, he cannot be considered as owner of the suit flat and he cannot enter into an agreement to sell the suit flat to the appellant. Hence the appeal in hand is dismissed with no order as to costs., he may seek remedy regarding the payment allegedly paid by him to respondent No.1...”

8. The said judgment dated 31.01.2014 passed by the learned Appellate Court has been impugned in the instant civil revision petition before this Court.

9. Learned counsel for the petitioner, after narrating the facts leading to the filing of the instant revision petition, submitted that the learned Appellate Court erred by not appreciating that Jumani's suit for specific performance of the agreement to sell dated 19.08.2003 against Mumtaz, which was dismissed for non-prosecution on 02.03.2010, had been restored by the learned Civil Court on 20.05.2013; that by the time the appellate judgment dated 31.01.2014 was passed, Jumani's suit had already been restored; that since the learned Civil Court had rejected the plaint in Amjid's suit only on the ground that Jumani's suit had been dismissed for non-prosecution, the learned Appellate Court ought to have allowed Amjid's appeal and remanded the matter to the learned Civil Court; that even though the suit property had not been transferred in Mumtaz's name in the C.D.A. records, he did not suffer from any legal disability in entering into an agreement to sell the suit property with Jumani; that the execution of the agreement to sell dated 17.05.2003 between Taaj and Mumtaz had created valuable proprietary rights in the latter's favour, including the right to sell the suit property to a third party; that back to back agreements are permissible under the law and create valuable legal rights; that the learned Appellate Court erred by not appreciating that under the law of assignment, such back to back agreements were permissible; and that the learned Appellate Court erred by not appreciating that possession of the suit property had been handed over by Jumani to Amjid when the agreement to sell dated 19.08.2003 was executed between the said parties. Learned counsel for the petitioner/Amjid prayed for the revision petition to be allowed and for the order and decree

dated 06.04.2011, passed by the learned Civil Court, as well as the judgment and decree dated 31.01.2014, passed by the learned Appellate Court, to be set-aside.

10. On the other hand, learned counsel for respondent No.6 (Khaleeq) submitted that Khaleeq had purchased the suit property from Taaj; that the said property had been transferred in Khaleeq's favour in the C.D.A. records on 03.05.2011; that Jumani had not purchased the suit property from Taaj but from Mumtaz; that Mumtaz had not filed a suit for specific performance against Taaj; that the agreement to sell dated 19.08.2003 was executed between Mumtaz and Jumani; that Taaj was neither a party to the said agreement nor had witnessed the said agreement; that although Jumani had also impleaded Taaj as a defendant in his suit for specific performance of the agreement dated 19.08.2003 against Mumtaz, but since there was no privity of contract between Taaj and Jumani, the said agreement could not be specifically enforced against Taaj; that it is well settled that a person cannot transfer a right or a title in a property which he does not have; that it is also well settled that an agreement to sell only creates a right in favour of the vendee to have the same specifically enforced through a Court of law but such an agreement does not invest the vendee in proprietary rights over the property which is the subject matter of such an agreement; and that since Amjid's suit for specific performance was bereft of any cause of action, the plaint in the said suit was correctly rejected by the learned Civil Court as well as the learned Appellate Court. Learned counsel for respondent No.6 prayed for the revision petition to be dismissed.

11. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

12. The facts leading to the filing of the instant petition have been set out in sufficient details in paragraphs 2 to 7 above and need not be recapitulated.

13. True, the learned Appellate Court was well aware that the suit for specific performance of the agreement to sell dated 19.08.2003 instituted by Jumani had been restored and therefore, the primary reason why the learned Civil Court had rejected the plaint in Amjid's suit had ceased to exist, the vital question that needs to be determined is whether the learned Appellate Court was correct in holding that Amjid's suit for specific performance was bereft of a cause of action.

14. It is an admitted position that Taaj who, in the C.D.A. records, had been entered as the owner of the suit property, had not executed any power of attorney in favour of Mumtaz or Jumani to sell the suit property. Even if it is admitted that vide agreement to sell dated 17.05.2003, Taaj had agreed to sell the suit property to Mumtaz, there is no denying the fact that at no material stage did Mumtaz file a suit for specific performance of the said agreement against Taaj.

15. Jumani asserts his rights over the suit property on the basis of the agreement to sell dated 19.08.2003 executed with Mumtaz. On 05.07.2006, Jumani had instituted a suit for specific performance of the said agreement. As mentioned above, the said suit was dismissed for non-prosecution on 02.03.2010 and was restored on 20.05.2013. On 28.08.2003, Jumani entered into an agreement to sell the suit property with Amjid. On 28.01.2008, Amjid filed a suit for specific performance of the said agreement against Jumani. In the said suit, Amjid had also impleaded Taaj and Mumtaz as defendants. Khaleeq was subsequently impleaded as a defendant in the said suit.

16. Now it is an admitted position that Amjid has no privity of contract with Taaj and Mumtaz. Jumani also does not have any privity of contract with Taaj. Proceeding on hypothesis, if it is assumed that Amjid's suit for specific performance against Jumani, etc is decreed, Jumani, not being the owner of the suit property, would not be in a position to transfer the same to Amjid. Furthermore, even if it is assumed that Jumani's suit for specific performance against Mumtaz, etc. is also decreed, Mumtaz, not

being the owner of the suit property, would also not be in a position to transfer the same to Jumani. A decree in the said suits can certainly not be passed against Taaj since he is not a party to the above mentioned agreements to sell dated 19.08.2003 and 28.08.2003, and had no privity of contract either with Jumani or Amjid.

17. It is well settled that an agreement to sell immovable property neither creates nor purports to create any right or interest in such property. The execution of such an agreement does not *ipso facto* transfer ownership of the immovable property in the vendee's favour. An agreement to sell does not even create a charge on an immovable property. The execution of an agreement to sell only confers a right for the enforcement of such an agreement and a right to obtain another document conferring title in respect of the immovable property in question. An agreement to sell is not a document of title and cannot form the basis for the grant of a declaration under Section 42 of the Specific Relief Act, 1877. An agreement to sell is never treated as an alienation. A reference in this regard may be made to the law laid down in the cases of Muhammad Ibrahim Vs. Fateh Ali and others (2005 SCMR 1061), Shah Muhammad Vs. Atta Muhammad (2005 SCMR 969), Mst. Rasheeda Begum and others Vs. Muhammad Yousaf and others (2002 SCMR 1089), Sher Muhammad Khan and others Vs. Ilam Din and others (1994 SCMR 470), Sh. Manzoor Ahmad and others Vs. Mst. Iqbal Begum and others (1989 SCMR 949) and Shamoon and others Vs. Ahmad and others (1986 SCMR 888).

18. It could be argued that once title in the suit property is transferred in Jumani's favour, Amjid would have a good cause of action for the enforcement of his agreement to sell with Jumani. However, in the case at hand, there is a missing link, which is the non-filing of the suit for specific performance by Mumtaz against Taaj. Jumani ought to have been vigilant by not executing an agreement to sell dated 19.08.2003 with Mumtaz who had not even acquired ownership in the suit property. By entering into

such an agreement, Jumani exposed himself to a risk that the suit property may not at any point in time in the future be transferred in Mumtaz's favour. Jumani did not even exercise caution by making Taaj (the original owner) a party to the agreement to sell dated 19.08.2003 or asking him to witness the said agreement. Had Taaj been a party to the said agreement or had witnessed the same, it would have shown that the said agreement between Mumtaz and Jumani had been entered into with his consent. Jumani, in his suit for specific performance, had not even pleaded that the agreement to sell dated 19.08.2003 had been entered into with Taaj's consent. Furthermore, there is no such pleading in the suit for specific performance instituted by Amjid. In the case of Abdul Hafeez Vs. Muhamamd Ali Khan (2005 CLC 1377), it was held *inter-alia* that the first vendee's contractual right under the first agreement might, with his consent, be transferred to a second vendee, however the first agreement might not be assignable without the vendor's consent if it were a personal contract. In paragraph 5 of the said report, it was observed as follows:-

"It is common for commercial transactions to be concluded through a string of agreements; such arrangements are not unknown to legal jurisprudence. Back to back agreements can create effective legal relations between a series of parties provided the essential links of consent by and knowledge of the relevant persons remain present through the transactions. This is the area covered by the law of assignment. On this point the law makes a distinction based on knowledge and consent."

(Emphasis added)

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

20. It is an admitted position that presently possession of the suit property is with Amjid on the basis of the agreement to sell dated 28.08.2003. Since Khaleeq has instituted a suit for possession against Amjid and Jumani, it would not be appropriate for me in these proceedings to express my opinion on the legality or validity of Amjid's possession over the suit property. This

matter is to be decided by the learned Civil Court uninfluenced by the observations made herein.

21. At best, Amjid's cause of action regarding specific performance of the agreement to sell dated 28.08.2003 was only against Jumani. Even though Mumtaz, Taaj and Khaleeq were the defendants in Amjid's suit, he had no privity of contract with them. As mentioned above, it has not even been pleaded in Amjid's suit that the agreement to sell dated 28.08.2003 had been executed with the consent and concurrence of either Mumtaz, or Taaj. Therefore, I do not find any jurisdictional infirmity in the appellate judgment dated 31.01.2014 dismissing Amjid's appeal against the order dated 06.04.2011, whereby the plaint in Amjid's suit for specific performance was rejected under Order VII, Rule 11 C.P.C.

22. In view of the above, the instant petition is dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON ____/2019.

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**

Uploaded By: Engr. Umer Rasheed Dar