

JUDGMENT SHEET

ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

RSA No.05/2019

Capital Development Authority through its Chairman

versus

Muhammad Multan & 08 others

Appellant by: Mr. Amir Latif Gill, Advocate.

Respondents by: Mr. Muhammad Tanvir Khalid Awan,
Advocate for Respondent No.1.
Mr. Nazir Ahmed Bhutta, Advocate for
Respondents No.2 to 9

Date of Hearing: 03.03.2021.

MOHSIN AKHTAR KAYANI, J: Through the instant regular second appeal, the appellant has called in question judgment and decree of the learned Additional District Judge, dated 19.03.2019, whereby appeal filed by the appellant against the judgment and decree dated 20.12.2017, passed by learned Civil Judge, Islamabad, has been dismissed on account of time barred.

2. Succinctly, Muhammad Multan (respondent No.1) entered into an agreement to sell with Muhammad Younas (respondent No.2), predecessor-in-interest of respondents No.3 to 9, with respect to purchase of residential plot measuring 22 Kanals, situated in Mouza Bhekar Akku and Bhekar Fata Baksh, Golra Sharif, Islamabad (*suit plot*), which is acquired by the Capital Development Authority (*CDA / appellant*). However, after the demise of respondent No.2, respondents No.3 to 9 being legal heirs of respondent No.2 were unwilling to transfer the suit plot, which compelled Respondent No.1 to file a suit for specific performance of sale agreement, mandatory and permanent injunction. The

suit was decreed ex-parte vide judgment and decree dated 20.12.2017. Feeling aggrieved thereof, the CDA preferred an appeal, which was dismissed on account of time barred vide impugned judgment and decree dated 19.03.2019. Hence, instant regular second appeal.

3. Learned counsel for appellant contended that the suit plot in respect of which the agreement was executed does not exist and had not been allotted at the time of execution of agreement, therefore, same is incapable of performance and a decree of specific performance with respect to such contract is neither legal nor capable of execution; that unprofessional conduct of the counsel should not be made a reason to affect the valuable rights of the CDA; that the order of the first Appellate Court dismissing the appeal filed by the CDA being hit by limitation is against the principle settled by the superior Courts.

4. Conversely, learned counsel for respondent No.1 contended that the CDA had properly been arrayed as defendant in the suit, as such, the CDA was represented through a counsel, as reflected from order sheet dated 29.03.2016, but even then the CDA had not pursued the matter, which compelled the learned trial Court to decree the suit ex-parte, per se, filing of appeal against the ex-parte decree after two years is not justiciable, hence, the learned first Appellate Court has rightly dismissed the appeal filed by the CDA having being time barred.

5. Arguments heard, record perused.

6. Perusal of record reveals that the entire matter revolves around the ex-parte judgment and decree, dated 20.12.2017, whereby suit filed by Muhammad Multan (respondent No.1) for specific performance of

agreement to sell, dated 07.12.2004 (Exh.P2), executed with late Muhammad Younas (presently represented through respondents No.3 to 9) has been decreed. To elucidate the subject matter of the suit, the contents of sale agreement (Exh.P2) are reproduced as under:

AND WHEREAS that the 1st Party is affectee of Mauzah Bhaikkar Akku & Bhaikkah Fateh Bakhsh, P.O. Golra Sharif Islamabad, total land measuring 22 Kanals (Twenty Two Kenals) acquired by CDA, Islamabad, plot which is to be allotted by the CDA, Islamabad, and has agreed to SELL the same to the 2nd Party and that the 2nd Party have also agreed to Purchase the said residential plot (which is to be allotted by CDA, Islamabad, against above mentioned acquired BUP) from the 1st Party, against total consideration of Rs.12,50,000/-. (Rupees Twelve lacs & Fifty thousand only)

AND WHEREAS that the 1st Party has been received Rs.10,00,000/- (Rupees Ten lacs only) from the 2nd Party on dated 7.12.2004, in cash. That the same amount received by the 1st Party from the 2nd Party in the presence of following witnesses, and in the presence of Mr. Ghulam Shabbir son of Muhammad Younis (real son of 1st Party / Seller).

AND WHEREAS, that the balance amount Rs.2,50,000/- (Rupees Two lacs Fifty thousand only) will be paid by the 2nd Party at the time of transfer of residential plot (which to be allotted by CDA, Islamabad against above mentioned acquired land) in the name of 2nd Party or his nominee. In case that the 1st Party fail to transfer of said residential plot in the name of 2nd Party or his nominee, or delay after allotment of above mentioned plot in the name of 1st Party then the 2nd Party have right to take possession residential plot / house of the 1st Party or that the 1st Party will bound to pay TRIPLE amount of received amount to the 2nd Party."

7. The above referred terms clearly spell out that there was no plot even allotted by the CDA to late Muhammad Younas against his claim of being an affectee of Mouza Bhekar Akku and Bhekar Fata Baksh, Golra Sharif, Islamabad, even no provisional allotment, offer of allotment or any document has been referred to ascertain that some plot was meant to be allotted to late Muhammad Younas.

8. The respondents to defend the suit had produced PW-1 Mehboob, who on oath has specifically stated in his evidence that:

جیکہ محکمہ CDA میں فائل برائے الاٹمنٹ تکمیل ہو چکی، جسکی رپورٹ بطور Mark-A (تین پرت پیش) کرتا ہوں۔ متوقع پلاٹ متعوی کو اسکی ایکواڑشدہ زمین کے عیوض الاٹ ہوتا۔

9. The above referred statement of PW-1 further confirms the stance of CDA that suit plot was neither in existence at the time of execution of agreement to sell nor at the time of recording of evidence or as of today.

10. In view of above legal position, the plaintiff / decree-holder is required to prove the existence of subject matter at the time of execution of agreement or even at the time of recording of evidence, especially when the entire superstructure built in this case is based on rehabilitation benefit accrued in favour of late Muhammad Younas but, surprisingly the record is silent qua the eligibility of any rehabilitation benefit in favour of late Muhammad Younas.

11. The perusal of record divulged that the subject property was neither in existence at the relevant time nor had any future benefit been agreed by the CDA, even the same is not matured in any manner, therefore, the very basis of alleged agreement to sell perishes and such kind of agreement hits by the doctrine of frustration, per se, it should be considered as

impossibility to perform in future in terms of Section 56 of the Contract Act, 1872, which provides the following essentials conditions for application of doctrine of frustration:

- i. Valid and subsistence contract formulated between the parties;
- ii. There must be some part of contract performed;
- iii. Contract, after it is entered, becomes impossible to be performed or unlawful;
- iv. the impossibility to perform is caused by an event which is beyond the control of both the parties;
- v. If non-performance is proved in the knowledge of promisor, he must compensate promisee for the lost sustained;
- vi. The impossibility of performance of contract by intrusion or occurrence of an unexpected event or change of circumstances beyond the parties' contemplation.

12. The above referred factors have been highlighted in the case reported as 1999 CLC 483 Karachi (State Life Insurance Corporation of Pakistan v. M/s Bibojee Services Ltd.), and as such, the contract, if at all, agreed between the parties, is considered to be void in terms of the Specific Relief Act, 1877.

13. Undeniably, Article 117 of the Qanun-e-Shahadat Order, 1984, burdens respondent No.1 / plaintiff to prove the due execution of agreement to sell together with its contents as required under Article 17 read with 76 of Qanun-e-Shahadat Order, 1984 but, surprisingly only

single witness i.e. PW-2 has been produced in the Court to the agreement to sell. Manifestly, failure to produce second witness to the agreement to sell establish that execution of agreement to sell as well as its content have not been proved, therefore, while relying upon PLD 2011 SC 241 (Hafiz Tassaduq Hussain v. Muhammad Din through legal heirs, etc.), 2017 YLR Note 33 Lahore (Abdul Majeed v. Kishwar Nasim, etc.) and 2018 CLC Note 21 Lahore (Falak Sher v. Muhammad Rafique through legal heirs), whereby, it was held that if second witness of the agreement is not produced before the Court, such kind of suit will fail on this score alone. But, surprisingly, the learned Trial Court has not applied its judicial mind while considering this well established legal proposition within the four corners of law.

14. The Trial Court is duty bound to verify the record qua the eligibility or entitlement of the seller in respect of the suit property, if available on record, however if those documents are not produced, adverse inference should be drawn in terms of Article 129(g) of the Qanun-e-Shahadat Order, 1984.

15. The concept of performance of agreement to sell has to be considered in terms of Section 21 of the Specific Relief Act, 1877, whereby the Court has to see the enforceability of the agreement. Simultaneously, the Court is also under obligation to take into consideration Section 21 of the Specific Relief Act, 1877 in such type of inconclusive agreements, where the rights of the promisor or transferor have not yet been accrued, to determine as to whether such kind of contracts are specifically

enforceable or otherwise. Per se, clause (c) of Section 21 of the Specific Relief Act, 1877 reads that *a contract, the terms of which the Court cannot find with reasonable certainty*, whereas clause (h) enunciates that, *a contract of which a material part of the subject-matter, supposed by both parties to exist, has before it has been made, ceased to exist*. All these provisions of law have not been considered in its true perspective by the learned Trial Court, even there is not a single document available on record to resolve as to whether the agreement ever executed between the parties and what were terms settled therein. As such, it is trite law that when there is uncertainty in an agreement, the same could not be specifically enforced. Reliance is placed upon 2008 CLC 418 Karachi (Anwer Hussain Surya v. Sumair Builders).

16. Furthermore, the Court has to see the principle for certainty in terms of description, which enables the Court to determine with certainty the subject matter of contract and in case of absence of such certainty of subject matter, specific performance could not be made. Reliance is placed upon 2002 CLC 1339 Lahore (Fida Hussain v. Jalal Khan). This Court is also guided by the principle settled by the apex Court in case reported as 1987 SCMR 624 (Muhammad Saleem v. Hameeda Begum), that where identity of land agreed to be sold is uncertain, no decree for specific performance could be granted. Reliance is placed upon.

17. The Civil Courts, admittedly, can exercise the jurisdiction in terms of Section 22 of the Specific Relief Act, 1877 but, the same is discretionary and the Court is not bound to grant such relief because it is lawful to do so, especially in cases where agreement executed between the parties lacks the

basic description of subject matter or based on incomplete description of the property or non-existence of subject matter, whereupon the Court can decide whether discretion in terms of Section 22 of the Specific Relief Act, 1877 is to be exercised qua the specific performance or not. Reliance is placed upon PLD 2014 SC 506 (Liaqat Ali Khan vs. Falak Sher). As such, the contract could not be considered performed in any manner, especially on the basis of reasons recorded by the learned trial Court in the impugned judgment and decree dated 20.12.2017, which are in violation of law and not justified.

18. Lastly, respondent No.1 / plaintiff raised question on the filing of a time barred appeal by the CDA against the judgment and decree of the learned trial Court, dated 20.12.2017, having been filed with the delay of approximately two years. It appears from the record that the CDA authorities remained silent for malafide reason, which otherwise discloses the conduct of CDA officials, who are hand in glove with the parties in order to deprive the CDA of its asset by playing a fraud. Hence, the analogy on the question of limitation is to be considered relevant, if the decree has been passed outside the four corners of law. It is well established principle by now that where suit for specific performance lacks the basic ingredients to accomplish a decree, the same could not be decreed, though if such suit has been decreed, the same has to be considered void on appeal and such appeal could not be dismissed on the ground of limitation. Reliance is placed upon 2000 YLR 1054 Lahore (Muhammad Saleem vs. Barkat Ali). As such, under the garb of a void

decree, a public property could not be allotted at the whims and caprice of the parties having been in league with the CDA authorities to achieve their ulterior motives and rights on the public property. The Courts are bound to protect, preserve and defend the title and right of public property in accordance with law being its bounden duty, per se, the limitation period in filing of appeal against a void decree has to be condoned. Reliance is placed upon 2007 SCMR 1574 (Government of Baluchistan through Secretary Board of Revenue vs. Muhammad Adeeb).

19. While taking into account the entire anecdote, the CDA has rightly raised the substantial question of law in terms of Section 100 of the Code of Civil Procedure, 1908 as to whether the decree for specific performance could be passed under Specific Relief Act, 1877 if subject matter of the agreement is not in existence or the agreement to sell has not been proved in accordance with standards enunciated in the Qanun-e-Shahadat Order, 1984 or even when the agreement to sell is uncertain. In this backdrop, if the specification of suit property with its details qua plot, street or sector is not available from any document, the Courts are bound to take objectivity of agreement and it is settled that without existence of suit property, the performance could neither be claimed nor even a legal enforcement be given. Reliance is placed upon 2018 CLC 648 Islamabad (Saeed Ullah Khan v. Muhammad Khalid).

20. In view of above settled position, the instant regular second appeal is hereby ALLOWED, the impugned judgments and decrees, dated 20.12.2017 and 19.03.2019, passed by the learned Trial Court and learned

Additional District Judge, respectively, are hereby SET ASIDE, and, accordingly, the suit filed by Muhammad Multan / respondent No.1 is hereby DISMISSED. Decree sheet be drawn, accordingly.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 12th March, 2021.

JUDGE

Khalid Z.