

Judgment Sheet  
**IN THE ISLAMABAD HIGH COURT, ISLAMABAD.**  
Judicial department.

**“Civil Revision No.42 / 2017”**

Bakht Baidar  
Vs  
Ghulam Nabi and others.

Petitioner by: Muhammad Habib Ullah Khan, Advocate.  
Respondent No.1 by: Mr. Khalid Pervaiz, Advocate.  
Respondent No.2 by: Malik Javaid Iqbal Wains, Advocate.  
Respondent No.3 by: Mr. Najam Hanif Sheikh, Advocate.

Date of Hearing: 20.08.2020.

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**GHULAM AZAM QAMBRANI, J.:-** Through the instant Civil Revision petition, the petitioner has challenged impugned Judgments & decrees dated 13.06.2011 & 06.10.2016 passed by learned Civil Judge & learned Additional District Judge-West, Islamabad, respectively whereby his suit as well as appeal were dismissed.

2. Briefly stated facts of the instant petition are that the petitioner filed a suit for specific performance, permanent & mandatory injunction against respondent No.1 with regard to plot No.17, Street No.486, Sector G-13/1, Islamabad, claiming that respondent No.1 was provisionally allotted plot and he sold the same to the petitioner through an agreement to sell dated 25.07.2001 against consideration of Rs.4,97,500/- and allegedly handed over the original documents and also changed address providing residential address of petitioner/plaintiff in FGEHF records; that final allotment letter was received by the petitioner from respondent No.2 at the given address, thereafter the petitioner approached respondent No.1 for execution of the relevant documents to finally transfer the suit plot in favour of the petitioner, but respondent No.1 refused to transfer the plot in favour of the petitioner; that the petitioner filed a

suit against the respondents before the learned Senior Civil Judge-West, Islamabad wherein respondent No.1 did not appear and he was proceeded against ex-parte whereas the suit was contested by respondent No.2 by filing written statement, but thereafter respondent No.2 got recorded his statement before the Civil Court that he has no objection on decree of suit in favour of the petitioner, as such, the suit of the petitioner was decreed vide judgment and decree dated 27.03.2004; that subsequently respondent No.1 appeared and filed an application for setting aside the judgment and decree dated 27.03.2004 which was allowed and he contested the suit by filing written statement. In the meantime, respondent No.3 appeared and filed an application under Section 12(2) CPC which was allowed and he was impleaded as defendant No.3 in the suit; he filed his written statement with the averments that he is bonafide purchaser of the suit plot for value and he is in possession of the said plot.

3. Out of the pleadings of the parties, the learned Trial Court framed the following issues;

1. *Whether the plaintiff is entitled to the decree for specific performance of contract as prayed for? OPP*
2. *Whether the plaintiff has no cause of action and locus standi to file the instant suit? OPD*
3. *Whether the suit is barred by law? OPD*
4. *Whether the plaintiff has not come to the Court with clean hands? OPD*
5. *Whether the plaintiff is estopped by his words and conduct to file the instant suit? OPD*
6. *Whether the suit is false and frivolous, hence the defendants are entitled to special costs under Section 35-A of C.P.C? OPD*
7. *Relief.*

After impleading respondent No.3/defendant No.3, additional Issue No.6-A was framed on 05.06.2010;

- 6-A *Whether defendant No.3 is bonafide purchaser of suit plot for value, without notice of the previous sale, hence his rights are protected ?OPD -3*

4. After recording evidence of the parties, the learned Trial Court dismissed the suit filed by the petitioner vide judgment & decree dated 13.06.2011. The petitioner feeling aggrieved from the said judgment, filed an appeal before the learned Court of Additional District Judge-West, Islamabad, which was accepted vide Judgment & decree dated 08.02.2014. Respondent No.1 being aggrieved of the said judgment and decree filed a Civil Revision No. 151/2014 whereas respondent No.3 also filed Civil Revision No. 117/2014 before this Court. The Civil Revision petition filed by respondent No.1 was dismissed and the Revision Petition filed by respondent No.3 was allowed and the case was remanded for re-hearing of the case to the learned Additional District Judge-West, Islamabad. On remand, the appeal of the petitioner was dismissed vide judgment and decree dated 06.10.2016, hence the instant Revision Petition.

5. Learned counsel for the petitioner has contended that the petitioner entered into an agreement to sell dated 25.07.2001 with respondent No.1 with regard to plot situated in Phase-III Scheme in Sector G-13, Islamabad with the total consideration of Rs.4,95,000/- including cost of the land and that the petitioner has paid full and final payment of the said plot, but respondent No.1 failed to execute the relevant documents and finally transferred the said plot in favour of the respondent No.3; that respondent No.1 handed over the original provisional transfer letter as well as the final allotment letter to the petitioner, payment was made to respondent No.1, change of nominee is not denied by respondent No.2; that respondent No.1 was under obligation to transfer the suit plot in favour of the petitioner, but he failed to do so. He further submitted that the disputed plot was transferred during the pendency of the civil suit and in presence of injunctive order dated 07.05.2003; that the judgment passed by the learned Additional District Judge is patently illegal, resulted in mis-carriage of justice, based on surmises and conjecture, therefore, the same is liable to be set aside.

6. Conversely, learned counsel for respondent No.3 submitted that burden to prove issue No.1 was upon the petitioner/ plaintiff, but he failed to prove the same. He further submitted that respondent No.3 is a bonafide purchaser of suit plot and when he came to know about the judgment and decree dated 27.03.2004 which was obtained through fraud and mis-representation, he filed an application under Section 12(2) CPC which was accepted and the suit was restored; that through the oral as well as documentary evidence produced by respondent No.3, it is established that he is bonafide purchaser of disputed plot; that there is evidence on record that the petitioner through fraud and forgery managed to fabricate fake documents including the alleged agreement to sell dated 25.07.2001, but through the evidence, the petitioner failed to prove its execution. Further submitted that there are material contradictions in the statements of PWs with regard to said document; that the disputed plot has been transferred in the name of respondent No.3 and the competent authority has also issued possession letter in his favour, therefore, he has lawful rights, fully protected provided under Section 41 of Transfer of Property Act, 1882; that the petitioner failed to produce the stamp vendor as well as the author of the alleged agreement to sell in his favour; that Miskeen Khan PW.1 is neither a witness nor subscriber of the said document; that the learned Additional District Judge after evaluating the evidence on record, has rightly dismissed the appeal of the petitioner and maintained the judgment and decree dated 13.06.2011 passed by the learned Civil Judge Ist Class, Islamabad; that the instant petition is not maintainable and is liable to be dismissed.

7. Arguments of learned counsel for the parties have been heard and have perused the material available on record with their able assistance.

8. Perusal of record reveals that the petitioner filed a suit for specific performance, permanent, mandatory injunction and cancellation of allotment letter dated 30.05.2003 issued in the name of respondent No.3, which was contested by the respondents. Both

the parties led their oral as well as documentary evidence in support of their claim. In order to prove issue No.1, the petitioner produced his attorney namely Miskeen Khan PW.1 and also produced the marginal witnesses of the agreement to sell Ex.P2 namely Faqeer Muhammad PW.2 and Naeem Khan PW.3. It is the claim of the petitioner that he purchased the disputed plot from Ghulam Nabbi against sale consideration of Rs.4,97,500/- vide agreement to sell dated 25.07.2001 and that he had received all original documents of the disputed plot from Ghulam Nabi respondent No.1. The said documents were objected by the respondents on the ground that the same cannot be produced by PW.1 because he is neither the subscriber nor the witness of the said documents. On the other hand, respondent No.1 appeared through his real son namely Raja Noor Afzal DW.1, who negated the version of the petitioner stating that the original documents of the disputed plot were lost during travelling by his father in the year, 2013 and in this regard they have lodged a rappat mark "A" and also got published in the newspaper daily "Aousaf" and daily "Nawai Waqt". As such, there are two contradictory statements regarding the ownership of the disputed plot.

9. Miskeen Khan while appearing as PW.1 deposed that he was appointed as attorney of the petitioner/ plaintiff on 26.02.2004, whereas the stance of the petitioner is that he entered into sale agreement with respondent No.1- Ghulam Nabi on 25.07.2001, which shows that Miskeen Khan was not the attorney of the petitioner before 26.02.2004. Record further shows that Miskeen Khan PW.1 has given his address as Flat No.10, Sector G-10 Markaz, Islamabad, which is the mailing address allegedly provided by Ghulam Nabi in his application to the Housing Foundation, whereas in his statement as PW.1, Miskeen Khan admitted that the application was submitted to respondent No.2 by him and Ghulam Nabi was not accompanying him to the said office. As per petitioner, he entered into an agreement to sell with respondent No.1, but why he did not mention his own address as Chak No.103-GB Barnala,

Post Office Khas, Tehsil & District Faisalabad. Further perusal of the agreement to sell reveals that it was not got issued by respondent No.1, rather it was issued through Faheem Sabir son of Ali Ahmad Sabir and moreover, the stamp on the said stamp paper shows that it was issued from the area of F-10-Markaz, Islamabad, which is business area of Miskeen Khan. Faqir Muhammad and Naeem Khan, PW-2 and PW-3 the alleged marginal witnesses of the agreement to sell, are closely related with PW-1, as they are nephew and son of PW-1, who in their statements showed their ignorance about the presence of the petitioner and respondent, in this way, alleged agreement to sell becomes doubtful. The said PW-1 further deposed that he repeatedly requested Ghulam Nabi for transfer of the disputed plot but in his evidence as PW-1 he failed to state as to where he met Ghulam Nabi and requested him to transfer the plot in his name. Keeping in view all these contradictions, it can be gathered that the stance of respondent No.1 is true that he had not entered into any agreement to sell with the petitioner.

10. DW-1, Raja Noor Afzal in his statement deposed that the titled documents of the disputed plot were lost by his father during his travel in the year 2003 and in this regard, a rapat was lodged with the concerned police station and also a publication was made in the newspapers. This statement finds support when Raja Noor Afzal submitted an application for provision of duplicate copy of the said documents in the office of the Housing Foundation on 11.04.2003. Further, stance of respondent No.1 is that he transferred the disputed plot to Ch. Muhammad Yaqoob on 19.05.2003 vide sale deed against sale consideration of Rs.19,60,000/- who is also enjoying its peaceful possession and in this regard, after the competent authority issued the possession letter in his favour, hence his lawful rights are protected as a bonafide purchaser, as provided under Section 41 of the Transfer of Property Act. He has also produced Iqrarnama Mark-H, whereas the record shows that the Housing Foundation received stay order from the civil court on 25.10.2003 after about five months, which shows that at the time of

transfer of plot by respondent No.1 in favour of respondent No.3, no litigation was pending at all about the said disputed plot, hence it is proved that respondent No.3 was a bonafide purchaser at value of the disputed plot without having notice of the earlier alleged sale agreement between the petitioner and respondent No.1, as such, his right is protected and the provision of Section 27 (b) of the Specific Relief Act is not applicable. For ready reference Section 27 (b) of the Act *ibid* is reproduced hereunder:-

*"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."*

Proviso of Section 41 of the Transfer of Property Act, 1882 protects the rights of the bonafide purchaser even from the ostensible owner. For ready reference Proviso of Section 41 of the Transfer of Property Act, 1882, is reproduced hereunder:-

**"41. Transfer by ostensible owner.**----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.

**Bona fide purchaser.** Broad guiding principles for determination of bona fide purchaser are that the transferor is the ostensible owner; that he is so by the consent; express or implied of the real owners; that the transfer is for consideration and that the transferee has acted in good faith taking reasonable care to ascertain that the transferor has power to transfer. If transferee after taking reasonable care to ascertain that transfer has acted in good faith, then his rights are protected."

The essential ingredients for the application of section 41 *ibid* would be (a) that the transferor was the ostensible owner; (b) the transfer was made by consent express or implied of the real owner; and (c) the transfer was for consideration, and (d) the transferee while acting

in good faith had taken reasonable care before entering into the transaction. These four imperative ingredients must co-exist in order for a person to take the benefit of the equitable principle. The property in dispute in the instant case was purchased by respondent No.3 for consideration from its ostensible owner and so far the condition relating to his acting in good faith and taking reasonable care is concerned, the same has been proved through cogent evidence. Attorney of the respondent No.3 while appearing as DW-2 stated on oath that Ch. Yaqoob purchased the plot from respondent No.1 for sale consideration of Rs.19,60,000/- and before purchasing the disputed plot, they checked the record of the Housing Foundation and it was found that the said plot was in the name of respondent No.1; that total sale consideration was paid in the office of the Housing Foundation and after completing all the legal formalities, the said plot was transferred in the name of respondent No.3 on 30.05.2003 before the notice of status quo order was received in the Housing Foundation on 25.10.2003 and Transfer Certificate was also issued in his favour; thereafter, all the development charges were also paid by him, whereafter, the possession slip was issued in favour of respondent No.3. He further deposed that they had no knowledge about the earlier agreement, wherein the vendor had agreed to sell the disputed plot in favour of the petitioner. In this way, it is proved on record that respondent No.3 discharged Issue No.6-A, the burden to prove of which was on him showing that he purchased the disputed plot without knowledge of the prior agreement to sell in between the petitioner and respondent No.1, as such, it is proved on record that respondent No.3 was a bonafide purchaser of the disputed plot without notice of any prior agreement to sell between the petitioner and respondent No.1. All these facts and circumstances show that provision of Section 27(b) of the Specific Relief Act, 1877 is not applicable; therefore, the learned trial Court after properly evaluating the evidence brought on record by the parties has rightly dismissed the suit filed by the petitioner. Reliance in this regard is placed upon the



cases reported as "Ghulam Rasool and others Vs. Noor Muhammad and others" (2017 SCMR 81) and "Muhammad Nawaz Khan Vs. Muhammad Khan and two others" (2002 SCMR 2003).

In the latter case (2002 SCMR 2003), it has been held as under:-

*"The property in dispute in the present case was purchased by the petitioner for consideration from its ostensible owner and so far the condition relating to his acting in good faith and taking reasonable care is concerned, the same being a question of fact cannot be properly assessed and determined without recording evidence. We may observe that unless it is found that the transaction was not in good faith; the petitioner was not bona fide purchaser and he did not take reasonable care regarding the power of transferor to transfer the property, he could not be denied the protection provided, under section 41 of the ibid Act. The transfer made pendente lite would not ipso facto become void rather such transfer could not affect the right of the other parties in the suit and thus a sale because of lis pendens would not be regarded as nullity, either it is voluntary or involuntary."*

As far as the contention of learned counsel for the petitioner that all the transactions between the petitioner and respondent No.1 were anti-dated is concerned, the record shows that in this regard, the witnesses produced by respondent No.3 were not put any suggestion during cross-examination; as such, the same is not proved through solid evidence. Further, alleged agreement to sell neither bears signatures or thumb impressions of the vendor or the vendee at the back of the stamp paper, whereas perusal of the stamp paper reveals that it was purchased through Faheem Sabir son of Ali Ahmad Sabir, who is admittedly nephew of the Miskeen Khan PW-1. Record further transpires that the petitioner also failed to produce the scribe of the said agreement to sell and also that one of the marginal witnesses of the said agreement to sell is Naeem, who is admittedly son of the Miskeen Khan. The said witness while appearing as PW-3, in his cross-examination stated that he has no knowledge, in whose name the said stamp papers have been purchased. He admitted that there are no signatures or

thumb impression of Ghulam Nabi on the back side of the stamp paper. He further showed his ignorance about presence of Bakht Baidar and Ghulam Nabi at the time of execution of agreement to sell Ex.P2. Record shows that the petitioner did not appear before the Court to show his presence, thus the inference runs contrary to the petitioner. In view of the same, the petitioner has failed to prove his case on the basis of the agreement to sell Ex.P2 as it is established on record that neither the agreement to sell bears the signatures nor thumb impressions of the vendor or the vendee at the back of the stamp papers, rather the record reveals that the said stamp papers were purchased by one Faheem Sabir son of Ali Ahmad Sabir, who is admittedly nephew of the Miskeen Khan. Further, the said document is also not verified by the Oath Commissioner, Notary Public, Stamp Vendor and further the scribe of the said document has also not been examined and the only marginal witness of the same is Naeem, who is admittedly son of PW-1, who as mentioned above, showed his ignorance about presence of Bakht Baidar and Ghulam Nabi at the time of execution of the said agreement to sell. It is a settled law that each and every case is to be decided on its own peculiar facts and circumstances. It is a settled law that grant of specific relief is always discretionary in character and the Court is not always bound to decree the suit of specific performance in cases where the agreement is proved. It is a settled law that Court has to exercise discretion judicially and not arbitrarily. Section 22 of the Specific Relief Act, 1877 clearly provides that in such circumstances, the discretion is not to be exercised in favour of the plaintiff. It would be in the fitness of circumstances to reproduce Section 22 (clause-I) here:

*"22. Discretion as to decreeing specific performance.---  
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 following are cases in which the Court may properly exercise a discretion not to decree specific performance:

1. *Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part.*
2. *Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.*
3. *Where the plaintiff has done substantial acts or suffered losses in consequences of a contract capable of specific performance."*

In the case of "Arif Shah v. Abdul Hakeem Qureshi" (PLD 1991 SC 905) it has been held that the illustrations, given in S.22 are a few instances where discretion should not be exercised in favour of specific performance. Rather, these, illustrations were held to be not exhaustive and the Courts were at liberty, in the circumstances of each case, to visualize any other circumstances as falling within the purview of S.22 of Specific Relief Act. So far as the case in hand is concerned, it is directly and squarely hit by illustration I of Section 22. In this regard, I am also fortified by the law laid down in "Sheikh Akhtar Aziz Versus Mst. Shabnam Begum and others" (2019 SCMR 524) wherein it has been held as under:-

*"Finally, there is no cavil with the proposition that relief of specific performance is discretionary in nature and despite proof of an agreement to sell, exercise of discretion can be withheld if the Court considers that grant of such relief would be unfair or inequitable."*

11. In the case in hand, both the Courts below had refused to exercise discretion in favour of the petitioner with cogent reasons. It is a settled law that this Court does not normally go beyond the concurrent findings of fact recorded by the Courts below, unless it is shown that the findings on the face of it are against the evidence or so patently improbable, or perverse that to accept could amount to

perpetuating a grave miscarriage of justice or if there has been any misapplication of evidence, or, finally if the finding could be demonstrated to be physically impossible. This being the practice and the rule of the Court in civil revisions, burden lies rather heavily on the petitioners to show that the concurrent findings recorded by the courts below are not sustainable on the record and should be interfered with by this Court. It is also a settled law that this Court does not meddle with the findings of fact reached by the Courts below when it is satisfied that the findings of the Courts below are on the whole reasonable and are not arrived at by disregarding any provision of law or any accepted principle concerning the appreciation of evidence. Reliance in this regard is placed upon the case reported as "Shahbaz Gul and others Versus Muhammad Younas Khan and others" (2020 SCMR 867).

In view of the above, learned counsel for the petitioner has not been able to point out any illegality or irregularity in the concurrent findings of the learned Courts below. Resultantly, this civil revision has no merits and the same is hereby **dismissed**.

**(GHULAM AZAM QAMBRANI)**  
**JUDGE**

Announced in Open Court, on this 04<sup>th</sup> day of September, 2020.

**JUDGE**

**"Approved for reporting."**

S.Akhtar