

P L D 2012 Lahore 125

Before Muhammad Ameer Bhatti, J

MUHAMMAD AFZAL---Appellant

Versus

MUHAMMAD ZAMAN and others---Respondents

R.S.A. No.15 of 2004, decided on 25th July, 2011.

(a) Pardanashin lady---

---Execution of document by pardanashin or old or illiterate lady---Burden of proof---Scope stated.

Every illiterate woman, whether she is parda-observing or not, is protected unless circumstances suggest that she was of an exceptional character and able to manage her affairs independently. The protection has been extended on the consideration that parda-observing, old and illiterate women can easily swallow the bait and cautious approach is required when the parties happen to be close relatives. Old and illiterate ladies would be entitled to the same protection, which is available to the parda-observing ladies. Burden of proof lies heavily on person relying upon a document to prove that the executant of her own free will, full understanding of the implications entered into the transaction in his favour especially when such person being close relative of the lady was in a position to attain her confidence.

1981 CLC 1055; PLD 1959 Lah. 932; 1984 CLC 2826; PLD 1969 Kar. 324 and 1989 CLC 1584 rel.

(b) Specific Relief Act (I of 1877)---

---S. 12---Suit for specific performance of sale agreement---Execution of agreement denied by defendant (an old and illiterate lady)---Proof---Evidence on record showed that defendant was a simpleton (seedi saadhi) and Pendoo Aurat of 60/65 years of age at the relevant time; and that she was having healthy husband and grown up male children, but none was present at the time of execution of agreement---Validity---Plaintiff was duty bound to associate sons and husband of defendant before entering into agreement with her---Suit transaction might have been ostensibly made by defendant, but possibility of influence exercised by plaintiff (being her close relative) could not ruled out as the moment she was relieved of plaintiff's influence, she refused to honour same---Mere reading over agreement to defendant by scribe after being written would not fulfil requirement of law in absence of proof to the effect that same was substantially understood by her and subject to her free and intelligent act ---Plaintiff being beneficiary of such agreement must have to prove that defendant had an independent advice---Plaintiff had failed to prove that defendant was not a pardanashin, old and illiterate lady and she had alienated suit land with her free consent and with independent advice of her living sons and husband---Relief of specific performance of agreement being discretionary could be refused by the court even if its execution was proved---Suit was dismissed in circumstances.

1988 CLC 2456, 1984 SCMR 890; PLD 1975 SC 295; PLD 1963 SC 191; 1977 SCMR 280 and PLD 1980 SC 642 ref.

Muhammad Tufail and 4 others v. Akbar Ali and 4 others 2004 SCMR 1370; Ch. Muneer Hussain v. Mst. Wazeeran Mai @ Mst. Wazir Mai PLD 2005 SC 658; PLD 1990 SC 642; 1994 SCMR 1194; 1998 SCMR 1354; 2004 UC 458; 2002 YLR 2466 and 2004 SCMR 1370 rel.

(c) Specific Relief Act (I of 1877)---

---Ss. 12 & 27---Suit for specific performance of agreement---Scope---Relief of specific performance being discretionary, which discretion could be exercised on equitable terms---Court could refuse to grant such relief even if execution of agreement was proved.

1994 SCMR 111 rel.

A.K. Dogar and Ch.Liaquat Ali Sial for Appellant.

Saeed-uz-Zafar Khawaja and Basharat Ali Janjua for Respondents.

Dates of hearing: 15th and 18th July, 2011.

JUDGMENT

MUHAMMAD AMEER BHATTI, J.---Through this regular second appeal, the appellant has challenged the judgment and decree passed by the learned First Appellate Court dated 15-1-2004 whereby while reversing the judgment of the learned Trial Court dated 9-5-2003, dismissed the suit for possession through specific performance.

2. The brief facts of the case are that an agreement to sell has been executed between the parties for a consideration of Rs.8,00,000/- out of which Rs.50,000/- were paid as earnest money on 26-6-1996. Since the respondent refused to perform the agreement to sell, the present appellant was compelled to file the suit for possession through specific performance on 17-7-1996.

3. The suit was contested by the respondent by disputing the facts of the case and taking the specific stand that the agreement to sell was a forged and fictitious document, and being an illiterate and parda-observing lady, the plaintiff was making an effort to usurp the land of the defendant through this forged agreement to sell as neither any agreement has been executed by her nor she has received any consideration thereof.

4. Issues were framed and parties produced their respective evidence. Learned counsel for the appellant contends that the appellant has proved the agreement to sell without any doubt and this fact has been concurrently maintained by both the Courts below but even then, instead of upholding the decree of the learned Trial Court, the Appellate Court set aside the decree on the flimsy ground which is not sustainable in the eye of law and in the attending circumstances of the case. As such, the learned First Appellate Court has fallen in legal error while allowing the appeal of the respondent by giving the undue benefit of parda-observing and illiterate lady. Learned counsel for the appellant referred to various excerpts of the evidence produced by the parties to prove the fact that the lady/respondent who has been performing her social obligations and engaged in public dealing, is disentitled to the benefit extended to the parda-observing and

illiterate lady. He cited the part of evidence in which it is apparent on record that she herself used to fetch the share of produce from the tenants. She always dealt with tenants herself, filed the suit herself, engaged the counsel independently and visited the Lumberdar of the Village. When a lady is performing such-like social and professional activities, the principle of parda-observing lady does not apply. He has relied on 1988 CLC 2456, 1984 SCMR 890. The appellant has proved on record the payment of money received by the respondent/lady herself. It is also obvious from evidence that after execution of this agreement to sell, it was read over to the lady and this fact has been proved through the record of the case. He has relied on PLD 1975 SC 295, PLD 1963 SC 191 and 1977 SCMR 280.

5. On the other hand, learned counsel for the respondent in support of the judgment of the learned First Appellate Court has relied on judgments PLD 1980 SC 642, 1984 SCMR 890 and contends that the respondent being illiterate and parda-observing lady, is fully entitled to the principle laid down in the above noted judgments. Therefore, the second appeal of the present appellant is liable to be dismissed.

6. I have considered the arguments of both the parties and also gone through the record with the assistance of the learned counsel.

7. The learned counsel for the appellant stressed that the learned First Appellate Court while deciding the issue No.1 in favour of the appellant, has refused to allow the decree in favour of the appellant to hold the field as passed by the learned Trial Court on the ground that the lady/executant of the agreement was illiterate and parda-observing, hence by applying the principle for the protection of illiterate and parda-observing ladies, the suit could not be decreed. For this reason, it is not sustainable in the eye of law as before holding this fact that the learned First Appellate Court has failed to consider the evidence available on record which established that the respondent/lady was not parda-observing lady and the benefit of the principle of parda-observing lady as settled by Hon'ble Supreme Court cannot be tendered to the lady in this case on the irrefutable touchstone. To substantiate his arguments he has referred to pieces of evidence to demonstrate that the lady is performing function independently in every walk of life. For that matter learned counsel argued when the lady was receiving the share herself from the tenants, meeting with the Lumberdar, procuring the Jamabandi herself from the revenue office, how can she be considered for the benefit of pardanashin lady. Learned counsel further argued that every lady cannot be declared to be parda-observing unless it is not proved through positive evidence that she never went out for any work and not performed any work without the help of male partner. In this view of the matter, learned First Appellate Court was to determine from the available evidence whether she was a parda-observing lady or not only then, the benefit of principle can be extended and it is not the requirement of law that wherever any lady is involved in any transaction, the benefit has to be extended. It would be misuse of the principle laid down by the Hon'ble Supreme Court.

8. It is settled law that every illiterate woman whether she is parda-observing or not, is protected unless circumstances suggest that she was of an exceptional character and able to manage her affairs independently. The protection has been extended on the consideration that parda-observing, old and illiterate women can easily swallow the bait and cautious approach is required when the parties happen to be close relatives. 1981 CLC 1055, PLD 1959 Lahore 932, 1984 CLC 2826, PLD 1969 Kar. 324 and 1989 CLC 1584. Old and illiterate ladies would be entitled to the same protection which is available to the parda-observing ladies. Burden of proof lies heavily on person relying upon a document to prove that the executant of her own free will, full understanding of the implications, entered into the transaction in his favour--especially when such person being close relative of the lady was in a position to attain her confidence.

9. Since the exceptions are always there, the appellant has tried to get that benefit of exception by highlighting the pieces of evidence, to bring his case within the ambit of exception.

10. There is no evidence on record either oral or documentary so as to bring the case within exception. The extracts of evidence referred to by the learned counsel do not persuade this court to conclude that the case is exceptionable. Mere utterance of some words that the lady received the produce from the plaintiff on her own or she required the amount for the construction of her children's house, does not make any difference and cannot render the case of the distinguishable. Moreover in the presence of the admission made by the P.W.3/plaintiff

11. It has also been admitted by all P.Ws that Mst. Naziran was a simpleton (Seedi Sadhi). and PENDU AURAT and it has been admitted by the plaintiff that at the time of execution of agreement to sell, she was an elderly lady of 60/65 years, having healthy husband and grown up male children and no one was present at the time of this transaction. So, it was the duty of the appellant to first associate the other male members of the family like her son, husband and thereafter enter into the agreement. Viewed from this perspective, it transpires that transaction might have been ostensibly made by the lady but at that time the probability of influence exercised by the plaintiff party (being her close relatives) cannot be ruled out. This reinforces the impression that the moment she was relieved of their influence, she refused to honour that transaction. In such like situation, it has been held that the male members of her family like her sons and husband must have been present at the time of transaction. I would like to refer to the law laid down by the Hon'ble Supreme Court for ready reference.

Muhammad Tufail and 4 others v. Akbar Ali and 4 others (2004 SCMR 1370).

"It has been consistently held that strong proof should be given that she had the advice of her relatives in such-like cases such as husband and sons but the petitioners had failed to prove the same."

Similarly, in Ch. Muneer Hussain v. Mst. Wazeeran Mai @ Mst. Wazir Mai (PLD 2005 SC 658).

"Court has to be very careful in recording findings as to the execution of any agreement by such ladies and it would not be sufficient to show that the document was read over to the parda-observing lady but it must further be proved that she understood its nature and effect---Where the evidence had not established that the documents in question were executed by such a lady or that they were executed by her voluntarily out of her own free will and that at the time of execution of the documents she had an independent advice of her close relatives and that the contents of the documents were read over to her and nature of the transaction was explained to her, onus was on the beneficiary of the document which he failed to discharge in the present case."

12. It is also case of the appellant that the document/deed, after being reduced into writing, had been read over to her as is clear from the evidence of the P.W.2. The argument of the learned counsel has no force as the P.W.2 who is marginal witness simply stated that after being written, the scribe read it over to her but that does not fulfil the requirement of the law laid down by the Hon'ble Supreme Court reported as PLD 1990 SC 42.

"(a) Pardahnashin lady-

---Question whether a lady is a pardanashin lady is a question of fact---Burden of proof in respect of a document purported to have been executed by a pardanashin lady affecting her right or interest in the immovable property is on the person claiming the right or interest under the document and it is for him to establish affirmatively that it was substantially understood by the lady and it was really her free and intelligent act, and if she is illiterate, it must have been read over to her---Rule is also applicable to ignore and illiterate women."

Similarly, it has been held in PLD 2005 SC 658,;

"Where the evidence had not established that the documents in question were executed by such a lady or that they were executed by her voluntarily out of her own free will and that at the time of execution of the documents she had an independent advice of her close relatives and that the contents of the documents were read over to her and nature of the transaction was explained to her, onus was on the beneficiary of the document which he failed to discharge in the present case."

So, it has been held that not only it has to be read over it but must be proved that it was substantially understood by the lady and it would be subject to her free and intelligent act mere assertion that it was read over to the lady does not fulfil the requirement.

13. Now the proposition has developed up to this extent that not only other requirement as explained above be fulfilled but the beneficiary must also prove that she had an independent advice. Reliance is placed on 1994 SCMR 1194 and 1998 SCMR 1354.

"In such circumstances, it was necessary that the appellant should have proved that Mst. Rehmon had the opportunity to have the counsel, advice and assistance of her near relations and that she had executed the sale deed of her free-will and consent. All these factors are lacking. It is well-settled that where any sale deed is executed by an illiterate lady, it is for the purchaser to establish that she had executed it of her own free will under independent advice from her relations and fully knowing the nature of the transaction. The witnesses produced by the appellant do not prove these facts. So far consideration is concerned, only Rs.1000/- was paid before the registrar while Rs.29,000/- is alleged to have been paid to Mst. Rehmon from time to time for which no receipt was obtained. All these circumstances make the entire transaction shady and suspicious. The learned counsel has not been able to point out how the ingredients necessary for proving the bona fide transaction with an illiterate lady of advanced age as laid down in Mst. Janat Bibi v. Sikander Ali and others (PLD 1990 SC 642), Mst. Badshah Begum v. Ghulam Rasool and others (PLD 1991 SC 1140) and Ghulam Ali and 2 others v. Ghulam Sarwar Naqvi (PLD 1990 SC 1) have been satisfied. The learned Additional District Judge in his judgment has discussed the evidence and while appreciating it came to the correct conclusion that Mst. Rehmon was not aware of the contents of the sale deed and that the consideration was also not proved to have been paid to her. In these circumstances, we dismiss the appeal with costs."

2004 YLR 1122, 2002 YLR 2466, 2004 SCMR 1370, PLD 2005 SC 658.

14. The contention of the learned counsel for the appellant that it has proved and concurrently held by both the Courts below that agreement was executed by the respondent in favour of the appellant and such findings have not been challenged by the respondent and it has attained finality and question is only whether suit even can be refusal to decree. It is settled law that suit can be refused to decree even if the agreement has been proved as its discretionary relief and on this discretion can be exercised on equitable terms. Since it is discretionary relief and in the present circumstances, same can be refused as law laid down by the Hon'ble Supreme Court 1994 SCMR 111.

"Grant of specific performance of agreement being discretionary relief, can be refused even if execution of agreement was proved."

15. In the light of above exhaustive discussion, the appellant/ plaintiff has failed to prove on record that the executant of agreement to sell was not a pardahnashin, old, illiterate lady and she with her free consent had alienated the land through a document purported to have been executed by the lady who had no independent advice of her living relatives like husband and sons. Hence the suit is not liable to be decreed as it is discretionary relief and can be refused in such-like circumstances.

16. Consequently, this second appeal is dismissed with no order as to costs.

S.A.K./M-316/L

Appeal dismissed.