

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Qazi Faez Isa
Mr. Justice Sardar Tariq Masood

Civil Petition No. 2547/2019

*(On appeal against the judgment dated
11.02.2019 passed by Peshawar High Court,
Bannu Bench in C.R. No. 319-B of 2012)*

Inayatullah Khan & others ... *Petitioners*

Versus

Shabir Ahmad Khan ... *Respondent*

For the Petitioners: Malik Salahuddin, ASC
Mr. Mehmood Ahmed Sheikh, AOR.

For the Respondent: Mr. Tariq Javed Qureshi, ASC
Mir Aurangzeb, AOR (Absent).

Date of Hearing: 10 March 2021.

ORDER

Qazi Faez Isa, J. We had issued notice to the respondent, subject to limitation, since the petition was filed after fifty-four days of the prescribed period. Through CMA No. 6838 of 2019, the delay is sought to be condoned on the ground of illness. In support of the application, outpatient receipts issued by the District City Hospital Lakki Marwat and slips showing medicines prescribed by the said hospital have been attached; the documents attached with the application are not controverted. Therefore, the delay in filing the petition is condoned.

2. The respondent had filed a suit seeking specific performance of a document titled '*Receipt/Agreement*' dated 10 March 2007 (exhibit PW 2/1), hereinafter referred to as '**the said document**'. The said document is written out on a plain piece of paper and purports to sell-buy land jointly owned by Inayatullah Khan and his sister, Mst. Taj Bibi, but is purportedly signed by Inayatullah Khan alone. The said document states that an amount of thirty

thousand rupees has been received by Inayatullah Khan, as part sale consideration of land sold at the rate of nine thousand rupees per *kanal*, but does not mention the area of the land nor the total sale consideration. It also does not mention the balance sale consideration which is required to be paid. Therefore, from the said document, the area of the land which is to be sold-bought cannot be ascertained. The said document is witnessed by Rasheed Ahmed Khan (PW-3) and Yousaf Khan (PW-4).

3. Though the said document does not mention the area of land sought to be sold-bought nor its description, the learned counsel representing the respondent, states that the description of the land is mentioned in another document (p.142-143 of the paper book, which does not bear an exhibit number), hereinafter '**the page**'. It is not clear whether *the page* is an attachment to the said document, or written on its reverse or constitutes a separate document. Inayatullah Khan and the attesting witnesses have not signed *the page*. The said document also does not refer to *the page*.

4. The suit filed by the respondent sought specific performance of the said document and alleged that nine *kanals* and one *marla* of land ('**the said land**') was agreed to be sold-bought and arrayed Inayatullah Khan and his sister, Mst. Taj Bibi (petitioner Nos. 1 and 2 respectively) as defendant Nos. 1 and 2 and Gul Nawaz Khan, Mir Ahmed Khan and Nawroz Khan, who had been sold the said land, as defendant Nos. 3, 4 and 5 (herein petitioner Nos. 3, 4 and 5, '**the contesting petitioners**'). The contesting petitioners bought from petitioner Nos. 1 and 2 thirty-five *kanals* and four *marlas* of land *vide* sale mutation No. 511, attested on 11 July 2007, and three *kanals* and nine *marlas* of land *vide* sale mutation No. 512, attested on 15 June 2007; the said land comprised a part thereof. The respondent also sought cancellation of these sale mutations.

5. The suit was partially decreed by the learned Judge of the Trial Court, to the extent of Inayatullah Khan's share in the said land, but dismissed in respect of Mst. Taj Bibi's share in the said

land, because she had not signed the said document. The respondent was directed to make payment of the balance sale consideration to the extent of Inayatullah Khan's share in the said land *vide* judgment and decree dated 29 May 2010. Both sides filed appeals and the learned Judge of the Appellate Court was pleased to decree the suit in its entirety in favour of the respondent and his decision was maintained by the learned Judge of the High Court, the judgment whereof has been impugned herein.

6. The learned counsel, representing the petitioners, states that the said document did not constitute a contract under the Contract Act, 1872 ('**Contract Act**') as it was inchoate because it did not provide the requisite particulars, including, the description of the land, its area, the total sale consideration, the date for payment of the balance sale consideration and when the sale had to be completed. He further states that the respondent had stated in the plaint that the contesting petitioners had purchased the said land from petitioner Nos. 1 and 2, but it was not alleged that the purchase was fraudulent, collusive or a mere paper entry to deprive the respondent of the said land. He submits that the equities too were not in favour of the respondent because the balance sale consideration was neither tendered nor deposited in Court before the case was decided. He next states that the contesting petitioners are also protected by section 41 of the Transfer of Property Act, 1882 ('**Transfer of Property Act**') as they were bona fide purchasers for value without notice, having purchased the land from the ostensible owners as per the revenue records. He submits that the principle of *lis pendens* is also not applicable because the suit was filed on 3 December 2007, after the contesting petitioners had already bought the said land. He also states that one of the attesting witnesses of the said document, namely, Rasheed Ahmed Khan (PW 3), had known of the sale to the contesting petitioners since he had himself filed a pre-emption suit against them, which he later withdrew. Concluding his submissions, learned counsel states that the

respondent had stood idly by and let the contesting petitioners buy the said land without any objection.

7. On the other hand, the learned counsel representing the respondent relies on the impugned judgment and that of the Appellate Court. He submits that the respondent had established the execution of the said document by Inayatullah Khan, who did so for himself and also on behalf of his sister. With regard to late submission of balance sale consideration, he says that it was deposited after the judgment of the Trial Court with regard to Inyatullah Khan's share and the sale consideration in respect of the share of Mst. Taj Bibi was deposited after the decision of the Appellate Court. Reliance is placed on *the page* to contend that the requisite ingredients of a contract are provided, if it is read together with the said document.

8. We have heard the learned counsel for the parties and with their assistance, examined the documents on record. The petitioner Nos. 1 and 2 owned the said land which they had admittedly sold to the contesting petitioners through the aforesaid two sale mutations; the petitioner Nos. 1 and 2 support the contesting petitioners. Therefore, the main contest is between the contesting petitioners and the respondent.

9. The said document does not describe the land, its area, the total sale consideration and when the balance of the sale consideration was payable and the transaction to be completed. Such a document does not constitute a contract to sell land. Therefore, it would be void for uncertainty in terms of section 29 of the Contract Act, which provides that, '*Agreements, the meaning of which is not certain, or capable of being made certain, are void*'. In the case of *Rauf Ahmed Ghori*¹ it was held, that:

22. This, however, does not conclude the matter. It is settled that an agreement is not a binding contract if it lacks certainty due to vagueness or because its terms

¹ *Rauf Ahmed Ghori v. Managing Director, Cholistan Development Authority*, 1998 CLC Lahore 1464, p. 1485.

cannot be ascertained. (See law of Contract by G.H. Trietel at page 47 International Student Edition 1995 by Sweet and Maxwell). Necessarily, an agreement comes into being with the consent of the parties. It must be certain, unambiguous or be made certain. This rule of common law was embodied in section 29 of the Contract Act (IX of 1872). It clearly postulates that agreement, the meaning of which is not certain or capable of being made certain, is void. This provision was considered in weekly Law Reports (Volume I) page 1025 in *Harvey v. Pratt*. In this case there was uncertainty in contract with regard to the period of lease, rate of rent and its commencement. It was held therein that agreement was uncertain and incapable of enforcement. This rule was followed in Indian cases Volume LXIII page 49. *Barkat Ram v. Anant Ram* (AIR 1915 Lahore 328) and *Bishop & Baxter LD* (Law Reports 1944 page 12). Seen on this touchstone, it is clear that Shahi Muzara Scheme was enforced to colonize Crown waste land which was unmeasured and unsettled.

A receipt (similar to the present one) was considered by this Court in the case of *Akhtar Aziz*² and it was held that it may constitute an agreement, provided it contains certain basic ingredients:

13. ... For a receipt to be termed and treated as a contract, if on going through the receipt four basic components can be spelt out without ambiguity namely:

- i) Identity of seller and purchaser
- ii) The amount of sale consideration
- iii) Identity and accurate description of the property agreed to be sold
- iv) Parties to the agreement to sell an immovable property are at consensus ad idem.

It is clear and obvious to us that the first, third and fourth ingredients were missing from the receipt. As such it was correctly not treated as an agreement. Further, the receipt envisages execution of a proper agreement to sell. Such agreement was never executed, there was never an agreement in existence whose specific performance could be sought. In order to succeed in a suit for specific performance of a contract, the plaintiff has to assert that a valid and enforceable contract existed between him and the other side besides specifically and clearly pleading the

² *Akhtar Aziz v. Shabnam Begum*, 2019 SCMR 522, p. 530.

terms and conditions on the basis of which the contract was executed which he desired to be specifically performed. Where the requisites of a contract are found to be deficient, the plaintiff cannot seek specific performance of a contract. Even otherwise, the decree for specific performance is a discretionary relief which can be refused in case the Court is not satisfied either on the merits or on equities of the case.

Reference may also be made to the case of *Saindino Khan*³ where vagueness and uncertainty were held to render a contract unenforceable.

10. The learned counsel representing the respondent has asked us to read the said document with *the page*. Even if we assume that *the page* was written on the reverse of the said document, this would not make a difference because the said document does not refer to it and does not state that the particulars of the land/transaction are mentioned on the reverse of the said document. *The page* is also not signed. Therefore, *the page* has no evidentiary value and cannot be read as part of the said document and/or to overcome the deficiencies in the said document and to constitute a contract.

11. For arguments sake, if it be presumed that the said document and *the page* can be read together and constituted a contract, then too such *contract* could not be specifically enforceable because the respondent had filed the suit after the said land had already been conveyed to the contesting petitioners. Moreover, the plaint did not state, nor was it established, that the sale to the contesting petitioners was fraudulent or collusive. Therefore, the sale to the contesting petitioners could not be defeated by placing reliance on section 52 of the Transfer of Property Act since *transfer of property* was not done when the suit was *pending*, but had already taken place.

³ *Saidino Khan v Zaibunissa*, 1991 SCMR 972.

12. There is another aspect to consider, which is the defence of the contesting petitioners taken pursuant to section 41 of the Transfer of Property Act, with regard to the transfer by ostensible owners for consideration. In the case of *Officer on Special Duty*,⁴ it was held that on no discoverable principle can bona fide purchasers be penalized for any fraud or misrepresentation by their predecessors-in-title unless they are *pari delicto* with their vendors. In *Kanwal Nain*⁵, this Court held that the principle underlying section 41 is that, '*whenever one of the two innocent persons has to suffer by the act of a third person he who has enabled the third person to occasion the loss must sustain it.*' In *Muhammad Jamil*,⁶ it was held that where the transferor was the ostensible owner, the transfer was made by consent express or implied of the real owner, the transfer was for consideration, the transferee acted in good faith and took reasonable care to ascertain that the transferor had power to transfer, he would be entitled to statutory protection under section 41 of the Transfer of Property Act. The same principle was affirmed in the cases of *Muhammad Nawaz Khan*,⁷ *Abdul Ghafoor Khan*⁸ and *Muhammad Shamim*.⁹

13. A decree for specific performance may also not be issued in respect of transferees for value who paid the sellers in good faith and without notice of a pre-existing contract as per section 27(b) of the Specific Relief Act 1877 ('**Specific Relief Act**'). In the case of *Khair-ul-Nisa*,¹⁰ this Court clarified that, '*under section 27 (b) of the Specific Relief Act negative is to be proved by the subsequent transferee. If he appears in Court and states on oath that he had no knowledge of the transfer that would be quite sufficient to discharge the burden and the onus will then shift to the plaintiff to prove that the subsequent transferee had the notice of the original contract.*' This principle was affirmed in the case of *Pak United Housing*

⁴ *Officer on Special Duty v. Bashir Ahmad*, 1977 SCMR 208.

⁵ *Kanwal Nain v. Fateh Khan*, PLD 1983 SC 53.

⁶ *Muhammad Jamil v. Lahore Development Authority*, 1999 SCMR 2015.

⁷ *Muhammad Nawaz Khan v. Muhammad Khan*, 2002 SCMR 2003.

⁸ *Abdul Ghafoor Khan v. Ghulam Sadiq*, PLD 2007 SC 433.

⁹ *Muhammad Shamim v. Nisar Fatima*, 2010 SCMR 18.

¹⁰ *Khair-ul-Nisa v. Muhammad Ishaque*, PLD 1972 SC 25.

Enterprise.¹¹ Section 27(b) was ably examined by Sabihuddin Ahmed, J (as he then was) in the case of *Karachi Raees Amrohvi Foundation*.¹²

17. Having carefully considered the judgments cited at the bar and the relevant statutory provisions I am of the view that there is a distinction between the requirement of section 27(b) of the Specific Relief Act and section 41 of the Transfer of Property Act, it may be pertinent to quote the aforesaid Provisions, which read as under:

"Section 27(b). Any other person claiming under him by a title against subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract."

"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 authorised 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."

18. It may be observed that under section 41 of the Transfer of Property Act when a person ostensibly being the owner of the property transfers the property for consideration to the transferee and such transfer is questioned on the ground that the transferor had no legal power to vacate the same, the transferee may be exempted from its consequences, provided, he establishes that he has taken reasonable care to ascertain the power of the transferor and has acted in good faith. This is known as the Caveat - emptor Rule and requires the transferee apart from acting in good faith to take all reasonable care to apprise himself of any defect in the transferor's title or clog on his power to effect the transfer. On the other hand, section 27-B, of the Specific Relief Act contemplates that equity of Specific Performance may not be enforced against a person who has subsequently purchased the property and paid his money in good faith and without notice of the original contract. It may be observed that the duty

¹¹ *Pak United Housing Enterprise v. Ramzan*, 1992 CLC Karachi 1678.

¹² *Karachi Raees Amrohvi Foundation v Muhammad Moosa*, 1999 CLC 296.

to ascertain contemplated by section 41 of the Transfer of Property Act is not stipulated in the Specific Relief Act. Apparently, there is rationale for this difference. Under the Transfer of Property Act the purchaser can, with reasonable diligence, discover a defect in the plaintiffs' title or a legal clog on his power of disposition by making an inquiry from relevant public authorities. However, it is not possible to do so in cases here only agreements are sought to be enforced because no public records of mere agreements to sell properties are available and such agreement can indeed be oral as well. Therefore, by the mandate of Legislature the burden on the transferee under the Specific Relief Act is less onerous and Specific Performance against him can be refused if it is shown that he acted in good faith and was not aware of a pre-existing equity in favour of some other person. Therefore, respectfully disagreeing with the view taken by the Lahore High Court and following the precedents of the Honourable Supreme Court and a Division Bench of this Court I am inclined to hold that the defendant No.6 was only required to prove that he was not aware of the agreement between the plaintiffs and the defendant No.3 at the time of execution of the sale-deed.

With regard to section 27(b), reference may also be made to the cases of *Jamil Akhtar v Las Baba*¹³ and *Tassaduq Hussain v Lal Khatoon*¹⁴ of this Court. In *Jamil Akhtar*, a three-member Bench held:

6. First of all, we would take up the question of bona fide purchase claimed by subsequent vendees. Though specifically the defendants have not mentioned section 41 of the Transfer of Property Act or section 27 of the Specific Relief Act, yet in their written statement they have taken the plea that the property was purchased by them considering it to be free of all encumbrances. In the circumstances of the present case, we have to see as to whether the subsequent vendees are entitled to any benefit under section 41 of the Transfer of Property Act or under section 27 of the Specific Relief Act.

7. All the three Courts have concurrently held that agreement to sell dated 2-6-1979 Exh.P.1 and general power of attorney dated 2-6-1979 Exh.P.2 are proved

¹³ *Jamil Akhtar v Las Baba*, PLD 2003 Supreme Court 494.

¹⁴ *Tassaduq Hussain v Lal Khatoon*, PLD 2011 Supreme Court 296.

to have been executed. We have noticed with concern that both the deeds have been executed on one and the same date still agreement to sell is not registered though on that very date the general power of attorney Exh.P.2 was duly registered. **The subsequent vendees could, therefore, at the most, in exercise of due diligence make a probe either into the Revenue Record or the Registration Office. In the Revenue Record the property was entirely in the name of Lab Baba.** In the office of Registrar there was a registered deed No.736 dated 2-6-1979 in existence. Even if scrutinised, this deed would not have provided any opportunity for becoming alert because it was a simple general power of attorney in favour of Rasheed Ali. The appointment of a general attorney is a matter of routine as well as requirement of the principal and is never indicative by itself of a sale or absolute sale on behalf of the principal; much less a sale in favour of the agent himself. **Thus the subsequent vendees had no occasion to become skeptical, more particularly, when the agent had neither initiated to get a mutation attested in his favour nor had he done any overt act towards furtherance of any transaction. ... The agreement to sell, therefore, was executed in such a manner that it could never put the subsequent vendees on guard. Rather, because of non-registration, even the notice thereof could not be taken by a third person.** [emphasis added]

8. ... In view of all such circumstances, we are of the view that despite the exercise of due diligence the subsequent vendees could not have known or supposed to have known the existence of any agreement to sell between Rasheed Ali and Las Baba. They are, therefore, bona fide purchasers for consideration and without notice, within the contemplation of section 27 of the Specific Relief Act, and no decree for specific performance could have been granted. The conclusion arrived at by the learned Civil Judge was, therefore, correct and was rightly endorsed by the High Court.

In *Tassaduq Hussain*, which was also decided by a three-member Bench, it was held that:

4. ... In the cases pertaining and relating to the protection under section 27(b) of the Specific Relief Act, 1877, undoubtedly, it is the subsequent vendee who asserts and avows in the defence that his case falls within the purview and parameter of the noted section i.e. he is a transferee for value; the money (consideration) has been paid in good faith; and that he had no notice of the original (earlier) contract between the plaintiff and the vendor. In other words that he is a bona fide purchaser without notice. Obviously the existence of the facts aforementioned and the ascertainment thereof is an issue between the parties which requires resolution from the Court. It is therefore in such like cases by applying the rules regarding burden of proof as emerging from the noted Articles, especially 117 and 118, the initial onus to prove the same is on the shoulder of the subsequent vendee. It may be pertinent to point out that in civil disputes the onus to prove a fact however does not remain constant or stagnant, thus once the initial onus on a proposition of fact has been discharged by the side upon whom it was originally placed, it would shift over to the other party for the rebuttal thereof or for the proof otherwise.

5. Be that as it may, the subsequent vendee thus has to discharge the initial onus as follows:

(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 the notice of the original sale agreement between the plaintiff and the vendor at the time of his transaction with the later.

From the above it is depicted that the section merely enacts the English equitable rule which allows later legal title to prevail over an equitable interest in case of bona fide purchaser for value without notice (emphases supplied). And this principle has to be kept in view by the Courts while analyzing and appreciating the evidence on the record for the discharge of the requisite burden.

14. The contesting petitioners had purchased the land from the ostensible owners thereof, that is from petitioner Nos. 1 and 2, and did not know that they, or either one of them, had entered into a

contract with the respondent for the sale of the said land to him. Incidentally, the contesting petitioners had purchased other lands too, as mentioned in the aforesaid sale mutations, which is an additional factor showing their bona fide. The revenue record also did not disclose any interest of the respondent in the said land nor disclosed that the sellers (petitioner Nos. 1 and 2) had any restriction placed on them to sell their land. The contesting petitioners having purchased the property for valuable consideration, in good faith and having acted honestly and without knowledge of the purported contract between the sellers and the respondent could not be deprived of the said land.

15. There is yet another aspect which goes against the issuance of a decree of specific performance to the respondent which is his failure to perform his own part of the contract, that is, tender the amount of sale consideration to the sellers (petitioner Nos. 1 and/or 2), and if they had refused to receive it, to tender it in court. The purported balance sale consideration was only deposited after the Trial Court had decreed the suit with regard to petitioner No. 1 and after the Appellate Court had decreed the suit with regard to petitioner No. 2. A person seeking the specific performance of a contract must first show that he is ready, able and willing to perform his obligations under the contract, but this the respondent had failed to do. The law does not require that the balance sale consideration must be tendered or deposited in court, but such tender/deposit helps establish that the buyer was not at fault. The respondent's learned counsel's contention that only after the court directs the deposit of the sale consideration, is it to be deposited, is misplaced. We may also take judicial notice of the fact that invariably the value of money depreciates over time and that of land appreciates. Courts adjudicating such cases should not be unmindful of this reality and should endeavor to secure the interest of both parties. In a suit for specific performance of land, if the seller/vendor has refused to receive the sale consideration, or any part thereof, it should be deposited in court and invested in some government protected security (such as Defence or National

Savings Certificates); in case the suit is decreed the seller would receive the value of money which prevailed at the time of the contract and in case the buyer loses he can similarly retrieve the deposited amount.

16. We are dismayed that the learned Judges of the Subordinate Courts as well as the learned Judge of the High Court completely disregarded the aforesaid points, and were unmindful of the interest of the contesting petitioners, who had demonstrated that they were bona fide purchasers for value without notice. Therefore, their judgments are not sustainable in fact or in law, which are set aside by converting this petition into an appeal and allowing it, consequently, the suit of the respondent filed against petitioner Nos. 2, 3, 4 and 5 is dismissed. However, the respondent may seek to recover any money which was paid by him to petitioner No. 1 and also seek the return of any money deposited by him in court. There shall be no order as to costs since we have set aside all the judgments.

Judge

Judge

Bench-III
Islamabad
10 March 2021
(Atif)

Approved for Reporting