

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE QAZI FAEZ ISA
MR. JUSTICE YAHYA AFRIDI

Civil Petition No. 2597 of 2019

*(Against judgment & decree dated 07.05.2019
passed by Lahore High Court, Multan Bench,
Multan in RSA No.21/2005)*

Muhammad Yousaf.

...Petitioner

Versus

Allah Ditta and others.

...Respondents

For the Petitioner:

Mian M. Ismail Thaheem, ASC.
Chaudhry Akhtar Ali, AOR

For Respondent Nos. 1-5:

Mian Shah Abbas, ASC.
Syed Rifaqat Hussain Shah, AOR

For the Respondent No. 6:

Nemo.

Date of Hearing:

08.06.2021

ORDER

Qazi Faez Isa, J. Notices in this petition were issued and the original record was also summoned, therefore, we proceeded to hear the matter. The admitted facts are that Abdul Ghafoor (respondent No. 6) was the owner of 35 *kanals* and 3 *marlas* of land and entered into an agreement for sale dated 17 July 1986 with Khan Muhammad father of Allah Ditta (respondent No.1) for the sale of the said land for a total sale consideration of two hundred forty-two thousand and five hundred rupees, out of which five thousand rupees was paid as earnest money. The last date to pay the balance sale consideration, mentioned in the agreement, was 15 September 1986. On 1 November 1986 Allah Ditta (respondent No. 1) filed a suit seeking specific performance of the contract alleging that Abdul Ghafoor was not performing his part of the contract. Abdul Ghafoor filed his written statement in which he stated that since the balance sale consideration was not paid to him he had sold the property to Muhammad Yousaf (the petitioner herein) for three hundred thousand rupees and the entire sale consideration was

received by him. Consequently, Muhammad Yousaf was arrayed as a defendant in the suit who claimed protection afforded to him under section 41 of the Transfer of Property Act, 1882 (**'the Act'**) and under section 27(b) of the Specific Relief Act, 1877 (**'the Specific Relief Act'**).

2. The suit was dismissed on 18 December 2000 and against the decision Allah Ditta filed an appeal before the learned Additional District Judge (**'ADJ'**), who *vide* judgment dated 15 March 2005 allowed the appeal and decreed the suit of Allah Ditta and directed him to deposit the balance sale consideration, of one hundred and forty-nine thousand and five hundred rupees, within thirty days. The regular second appeal was dismissed by the High Court through the impugned judgment.

3. The learned counsel representing the petitioner states that Abdul Ghafoor, the owner of the said land, supported the petitioner and admitted having sold it to him and that he had received the entire sale consideration from the petitioner and delivered to him the possession of the said land; also witnessed by the *Khasra Girdawari* for the year 1986-87-Kharif (exhibit D-5). The sale was recorded by the revenue authorities on 13 October 1986 and the *Patwari* recorded the execution of the sale transaction on 26 October 1986, and this took place before the filing of the suit on 1 November 1986. Therefore, the petitioner's title to the land would not be affected by section 52 of the Act. It is further contended that the petitioner was a *bona fide* purchaser for value without notice and as such was also protected by the provisions of section 41 of the Act read with section 27(b) of the Specific Relief Act. It is alternatively submitted that Allah Ditta was not entitled to the specific performance of contract since he did not demonstrate his own readiness and ability to perform his part of the transaction, which was to tender the balance sale consideration before the stated date of 1 September 1986 and in this regard has also referred to the judgment of this Court in the case of *Hafiz Tassaduq Hussain v Lal Khatoon* (PLD 2011 Supreme Court 296).

4. The learned Mian Shah Abbas, representing Allah Ditta (the respondent No. 1), states that the learned ADJ had rightly decreed the suit and such judgment was upheld in the regular second appeal by the

learned Single Judge of the High Court, and both these concurrent judgments are in accordance with law. He further states that Abdul Ghafoor had admitted receipt of a total amount of ninety-seven thousand and five hundred rupees and as such the balance amount of sale consideration which was payable to him was only one hundred and forty five thousand rupees. He next contends that the learned ADJ was correct in holding that since Abdul Ghafoor and the petitioner belonged to the same *baradari* (clan) it was rightly presumed that they had colluded to circumvent the sale agreement with Allah Ditta and to deprive him of his rights there under. The learned counsel submits that the learned ADJ was correct not to extend to the petitioner the protection of section 41 of the Act and section 27(b) of the Specific Relief Act. It is further contended that clause 3 of the agreement dated 17 July 1986 stipulated that the seller, Abdul Ghafoor, was required to give notice to the buyer, Allah Ditta, before seeking specific performance of the agreement and only if the notice did not solicit the desired result could he forfeit the money paid to him. Concluding his submissions, the learned counsel states that mutation No. 388 in favour of the petitioner was sanctioned on 30 July 1987, which was after the filing of the suit, and that the referred to *Khasra Girdawari* shows his possession only from *Rabi-1987*.

5. We have heard the learned counsel for the parties and with their assistance examined the documents on record and also those referred to by them from the original court files. We enquired from the learned Mian Shah Abbas when the respondent No. 1 tendered/deposited the balance sale consideration but the learned counsel could not assist us in this regard, despite examining the original record, and stated that it was paid after the judgment of the learned ADJ. However, the learned counsel representing the petitioner states that the balance amount was never paid/deposited, which is strongly refuted by Mian Shah Abbas.

6. The first question for consideration is whether the plaintiff (respondent No. 1) was entitled to a decree of specific performance of the contract. In the plaint the respondent No.1 had alleged that he had made payment of an amount of five thousand rupees and then of another thirty-seven thousand and five hundred rupees. The plaint did not assert that the respondent No. 1 was ready, able and willing to

tender the balance sale consideration. He also did not deposit the balance sale consideration in Court nor submitted to the Court an application to tender/deposit the balance sale consideration. The suit was dismissed by the learned Judge of the Trial Court but was decreed by the learned ADJ but this was done without discussing the delay of about twenty years in not making payment of the balance sale consideration, let alone as to why it was condoned. In our opinion courts cannot rewrite the terms of a contract, which was effectively done by the learned ADJ when he disregarded an essential term of the contract, which was by when the balance sale consideration would be paid. A suit seeking specific performance of contract for the sale of land is a simple suit wherein to succeed the plaintiff is required to demonstrate that he has performed his obligations under the contract or that he has been prevented to do so by the other side and if this be so to then demonstrate his ability and readiness to perform the commitment undertaken by him in the contract. The only obligation on the plaintiff (respondent No. 1) was to tender money to the seller and in case of the seller's refusal to receive it then to deposit the same in the Court or otherwise demonstrate his ability and readiness to make payment, which elements are entirely missing in the instant case. The respondent No.1 filed a suit seeking specific performance of a contract but did not at any stage demonstrate that he was ready, able and willing to perform his obligation there under, which was to tender/deposit the balance sale consideration. Therefore, there was no justification for the learned ADJ to decree the suit and to permit the buyer (respondent No. 1) to tender the balance sale consideration after a lapse of about twenty years. In this regard reference may also be made to the cases *Inayatullah Khan v Shabir Ahmad Khan* (2021 SCMR 686), *Muhamamd Shafiq Ullah v Allah Bakhsh* (2021 SCMR 763), *Mst. Samina Riffat v Rohail Asghar* (2021 SCMR 7), *Hamood Mehmood v Mst. Shabana Ishaque* (2017 SCMR 2022) and *Kuwait National Real Estate Company (Pvt.) Ltd. v M/s Educational Excellence Ltd.* (2020 SCMR 171).

7. The suit seeking specific performance of the contract filed by the respondent No. 1 could not succeed. Therefore, the question whether the subsequent purchaser (the petitioner) was a *bona fide* purchaser for value without notice no longer remains relevant, particularly when the seller (respondent No. 6) had confirmed that he had sold it to the

petitioner and stood by the sale. The learned ADJ was also impressed by the fact that the petitioner and the respondent No. 6 belonged to the same *baradari* (clan), which in our opinion was not in itself sufficient to dislodge the assertion of a person claiming to be a *bona fide* purchaser for valuable consideration without notice. We have also noted that the sale was recorded by the *Patwari* and the transaction between the seller and buyer stood finalized on 26 October 1986, which was before the suit was filed. The fact that the sale was subsequently sanctioned, when neither party thereto had repudiated the sale, would be of little significance as it was an administrative act of the revenue authorities, and one over which the buyer and seller had no control. The petitioner had demonstrated that the transaction stood completed and the entire sale consideration had been paid before the suit was filed on 1 November 1986 and he had also received possession of the land, therefore, he was entitled to the protection accorded to him by section 41 of the Act and section 27(b) of the Specific Relief Act. All these aspects of the case were not considered by the learned ADJ nor done so by the learned Judge of the High Court, who mostly relied upon the judgment of the learned ADJ.

8. Therefore, for the reasons mentioned above this petition is converted into an appeal and allowed by setting aside the impugned judgment and dismissing the suit filed by the respondent No. 1. However, the respondent No. 1 will be entitled to recover the amount paid by him to respondent No. 6, who was not entitled to forfeit the same as he did not follow the procedure specified in clause 3 of the agreement between them. The respondent No. 1 will also be entitled to receive back the amount deposited by him in court together with the profit/return, if any, accrued thereon. Since the petition is being allowed against two concurrent judgments, there shall be no order as to costs.

Judge

Judge

B-IV
Islamabad
08.06.2021
Rashid

Approved for Reporting