

46/19

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE SH. AZMAT SAEED
MR. JUSTICE IJAZ UL AHSAN

(AFR)
8. Civil Petition No.1728-L of 2018

Against judgment dated 27.06.2018 of Lahore High Court,
Bahawalpur Bench, Bahawalpur, passed in Civil Revision
No.347-D of 2006.

Naveed Akram, etc.

...Petitioner(s)

Muhammad Anwar.

Versus

...Respondent(s)

For the petitioner(s): Sh. Usman Karim-ud-Din, ASC.

For the Respondent: Moulvi Anwar-ul-Haq, ASC.
Syed Rafaqat Hussain Shah, AOR.

Date of Hearing: 26.04.2019.

ORDER

IJAZ-UL-AHSAN, J.- The petitioners seek leave to appeal against a judgment of the Lahore High Court, Bahawalpur Bench, Bahawalpur, dated 27.06.2018. Through the impugned judgment, a Revision Petition (*Civil Revision No.347-D of 2006*) filed by the petitioners was dismissed.

2. The brief facts necessary for disposal of this petition are that Muhammad Akram, predecessor-in-interest of the petitioners, was the owner of suit property measuring 100 *Kanals*, situated in Chak No.93/Fateh, Tehsil Chishtian, District Bahawalnagar. The Respondent on 13.06.1994 filed a suit for specific performance of a contract. He alleged that on 07.02.1994 Muhammad Akram had entered into an agreement to sell with him regarding the suit property for a

consideration of Rs.10,000,00/- . A sum of Rs.1,00,000/- was paid as earnest money against a duly executed receipt. As per terms of the agreement to sell, the date for payment of the remaining amount and execution of the sale deed was fixed as 30.04.1994. The said Muhammad Akram failed to perform his part of the contract. Further, in order to defeat the right of the Respondent he transferred the property in favour of his two sons namely, Naveed Akram and Nacem Akram (*petitioners herein*) through an antedated gift mutation. The trial Court, after framing issues and recording evidence proceeded to decree the suit in favour of the Respondent, subject to deposit of balance amount of Rs.9,00,000/- which was accordingly deposited by him. The petitioners filed an appeal which was dismissed by the learned Additional District Judge, Chishtian vide judgment dated 08.04.2006. However, the Revision Petition filed by the petitioners was allowed and the judgments and decrees of the lower *fora* were set aside. The Respondent approached this Court which set aside the High Court's judgment and remanded the matter to it for decision afresh on merits.

3. In post remand proceedings, the High Court by the impugned judgment dismissed the Revision Petition and upheld the judgments and decrees of the lower *fora*. Hence this petition.

4. The main argument advanced by learned counsel for the petitioners is that none of the lower *fora* noticed or

gave effect to Section 22 of the Specific Relief Act, 1877. He submits that the relief of specific performance is discretionary. However, the conduct of the Respondent was such that the lower *fora* should have noticed the same and declined the relief of specific performance. He further maintains that the petitioners were ready and willing to return the earnest money together with an additional sum of Rs.100,000/- which would have been sufficient to compensate the Respondent. He finally argues that value of the suit property has multiplied manifold. Relying on Muhammad Abdur Rehman Qureshi v. Sagheer Ahmed (2017 SCMR 1696), the learned counsel maintains that the suit property needs to be re-valued and if at all specific performance of the contract is required to be granted, the petitioners should in all fairness be adequately compensated.

5. The learned counsel for the Respondent on the other hand has supported the impugned judgment.

6. The learned counsel for the parties have been heard and record of the case examined with their assistance. The basic document in a suit for specific performance is the agreement to sell. The onus to prove the same was on the Respondent. He produced the marginal witnesses who deposed that the bargain was struck between the parties and the terms and conditions of the agreement to sell were read to Muhammad Akram who signed the same in their presence. They further deposed that one of the petitioners who is the

son of Muhammad Akram also signed the agreement and a sum of Rs.1,00,000/- was paid as earnest money against a duly executed receipt. Other witnesses including the Stamp Vendor were produced who proved that the stamp paper was purchased by Muhammad Akram and the agreement to sell as well as the receipt of earnest money were executed in their presence. The Notary Public who had attested the document also appeared and deposed that he made entries of the documents in his Register. Surprisingly enough, Muhammad Akram did not appear in the witness box in his defence. However, his son Naveed Akram, petitioner No.1, appeared and denied the agreement to sell and receipt of earnest money as well as attestation of the agreement and receipt. During cross-examination, he conceded that during pendency of the suit his family offered to return the earnest money and pay an additional sum of Rs.100,000/- to the Respondent in order to end the litigation.

7. We find that petitioner No.1 who had signed the agreement did not dispute his signatures. Further absence of Muhammad Akram from the witness box was fatal to the petitioners' case. In terms of Article 129 of the Qanoon-e-Shahadat Order, 1984 there was a strong presumption against Muhammad Akram for withholding the best evidence. The agreement to sell stood established in accordance with law through overwhelming evidence. The testimony of the witnesses produced by the Respondent withstood the test of

cross-examination and was found to be credible. Further, transfer of the property by way of gift in favour of his sons by Muhammad Akram was obviously a device to deprive the Respondent of his right that has accrued to him by reason of execution of the agreement to sell and payment of earnest money. Even otherwise, the gift could not be proved. Neither the date of attestation nor the name or place when the oral gift was made could be established. Further, no witness in whose presence the oral gift was made was examined. The mere fact that gift mutation was entered is insufficient to establish a valid gift which could have the effect of defeating the rights of the Respondent. Even otherwise, the lower *fora* correctly found that the mutations were undertaken under questionable circumstances which also involved tempering and antedating for which no plausible or legally sustainable explanation was forthcoming. Even otherwise, the gift and the resultant mutation need to be independently proved. In the instant case, there was complete failure on the part of the petitioners to prove the oral gift through production of credible witnesses.

8. As far as the argument of the learned counsel for the petitioners relating to Section 22 of the Specific Relief Act, 1877 is concerned, the same is misconceived. We find that the Respondent acted diligently and promptly by filing a suit a few months after Muhammad Akram refused to execute a sale deed in his favour. He proved execution of the agreement

to sell by producing confidence inspiring evidence. He deposited the balance amount within the time allowed by the Court.

9. Compared to that, the petitioners have been blowing hot and cold in the same breath. They first denied the agreement to sell and receipt of the earnest money and then tried to get out of the deal by offering to return the earnest money and paying an additional sum of Rs.100000/- by way of penalty. Attempts were made to defeat the rights of the Respondent by manipulating official records and claiming that a gift was orally made by Muhammad Akram in favour of his sons which was never proved. Therefore, the conduct of the petitioners themselves was neither fair nor forthcoming. Thus, an argument coming from the petitioners that the Respondent had not deposited the entire sale consideration in Court despite there being no specific order in this regard does not hold much water.

10. As far as reliance of the learned counsel for the petitioners on the case of Muhammad Abdul Rehman Qureshi (*supra*) is concerned, the facts and circumstances of both cases are clearly distinguishable. In the present case, a suit for specific performance was promptly filed, there was no effort on the part of the Respondent to prolong or delay finalization of the matter and he deposited the balance amount as and when directed by the trial Court. This was clearly not the case in the matter of Muhammad Abdur

Rehman Qureshi *supra*, which was based on a different set of facts and circumstances. Further, the delay in finalization of the present matter is clearly attributable to the petitioners. In our view, the law as well as equity in the present case leans towards the Respondent rather than the petitioners.

11. The learned counsel for the petitioners has not been able to show us that there was any legal, procedural or jurisdictional defect, error or flaw in the impugned judgment that may require grant of leave by this Court. The judgments of the lower *fora* which are concurrent are well reasoned, cover all material and factual aspects and do not require any interference by this Court by way of grant of leave to appeal.

12. For reasons recorded above, we do not find any merit in this petition. It is accordingly dismissed. Leave to appeal is refused.

ISLAMABAD.

26.04.2019.

ZR/*

'Not Approved For Reporting'

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