

SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE JAMAL KHAN MANDOKHAIL
MR. JUSTICE SHAHID WAHEED

Civil Appeal No.1121 of 2018

(On appeal against the judgment dated 11.07.2018 passed by the Islamabad High Court, Islamabad in R.F.A.No.138 of 2014)

Ijaz ul Haq

... Appellant

VERSUS

Mrs. Maroof Begum Ahmed
& others

... Respondents

For the Appellant : Ch. Mushtaq Hussain, ASC
Syed Rifaqat Hussain Shah, AOR

For Respondent No.1 : Ex-Parte

For Respondent No.2 : Mr. Niazullah Khan Niazi, ASC

For Respondent No.3 : Ch. Riasat Ali Gondal, ASC
Ghulam Qadir, Asst. CDA

Date of Hearing : 16.08.2023

JUDGMENT

Shahid Waheed, J. The variant decree drawn by the Islamabad High Court has impelled the plaintiff to appeal before us to restore the decree issued to him by the trial Court in his suit for specific performance of the contract.

2. It will conduce to analytical clarity of the questions to be determined by us, if we relate the facts giving rise to them, and to do so, we deem it appropriate to make it clear that we will refer to the parties by their array in the trial Court, and secondly, since this appeal excites two questions, one of which does not ordinarily arise, while the

other is a standard feature of such suits and the answer to it helps to determine the entitlement of the plaintiff to get a decree in his favour, we will bifurcate the facts into two sets, as to find out a clear and a definite answer to the questions.

3. The first question, to be decided by us, will automatically come to the fore on stating the relevant facts, which are not in dispute, so without further ado, we proceed to the facts. The plaintiff, who is appellant before us, was interested to purchase the property (i.e. industrial plot No.88, measuring 2444.41 Sq. Yds, Industrial Area, I-9, Islamabad), owned by Mrs. Zahida Parveen Ahmed, who was, at all the relevant points of time, a non-resident Pakistani living in the United Kingdom, but for the affairs of her property, including its sale, had authorized her mother, namely, Begum Maroof Ahmed through a registered Power of Attorney dated 15th of November, 2002 [Ex.D-4(1)]. The plaintiff therefore negotiated the sale with the Attorney. As a result of negotiations, on 18th of December, 2002, the Attorney through a written contract (Ex.P.3) agreed to sell the property to the plaintiff for a consideration of Rs.7,100,000/- (seventy one lac rupees only). Out of this consideration, a sum of Rs.250,000/- (two lac fifty thousand rupees only) was paid by the plaintiff to the Attorney in presence of the witnesses and it was agreed that the balance amount would be payable on or before 18th of March, 2003, but it was not paid and this led to a dispute between the parties. On 15th of September, 2003, the plaintiff brought his suit before the trial Court seeking specific performance of the contract (Ex.P.3). In his suit he joined the Attorney, namely, Begum Maroof Ahmed as defendant No.1 and the Capital Development Authority as defendant No.2. These two defendants resisted the suit by filing their separate written statements. On the pleadings, the trial Court by order dated 24th of January, 2004, framed issues and called upon the parties to adduce their evidence. The statement of the plaintiff's two witnesses, i.e. PW.1 & PW.2 was recorded on 24th of January, 2007. At this stage the plaintiff realized his

omission and thought it necessary to implead the property owner as a defendant. He therefore applied to the trial Court on 11th of October, 2007, under Order I, Rule 10 of the CPC to implead the owner as a defendant, so as to avoid any formal defect in the proceedings. The trial Court allowed the plaintiff to amend the plaint by adding the property owner. Needless to indicate here that the owner of the property being a party to the contract through her Attorney was a necessary party to the suit for the specific performance of the contract¹ because in her absence no decree could be passed, and as such, she ought to have been included in it. In light of this position of law, the trial Court was justified in allowing the plaintiff to bring the owner of the property on record. The order of the trial Court was dated 25th of October, 2007, and in pursuance thereof, an amended plaint was filed on 30th of October, 2007, making the owner named Zahida Parveen Ahmed as defendant No.1-A. Upon filing of the amended plaint by the plaintiff, notices were ordered to be issued to the newly added defendant No.1-A. A memo was filed before the trial Court by the counsel of defendant No.1-A, on 24th of November, 2007, which provided that she was residing in England and sought time to submit a duly attested power of attorney. However, she failed to do so, even after given several opportunities, and therefore, was proceeded against ex-parte by the trial Court and her defence was struck off.

4. Given the circumstances stated above, the first question, for our consideration, is whether the suit to the extent of owner of the property, who was subsequently added as defendant No.1-A, was within time, and if not, could it be maintained against the other defendants. The answer to the first part of this question is not difficult to find and we do not even need to wade through the various provisions of the law. Be it noted that the suit in which defendant No.1-A was added was for the specific performance of the contract dated 18th of December, 2002 (Ex.P.3), which had fixed a date of

¹ Section 27 of the Specific Relief Act, 1877

18th of March, 2003, for the performance. As such, according to Article 113 of the first schedule to the Limitation Act, 1908, the plaintiff had a period of three years from the said date of performance to bring a suit against Zahida Parveen Ahmed, defendant No.1-A. She was not included as a defendant in the original plaint, however, since she was a necessary party being an owner of the property and party to the contract, the importance of adding her was felt during the recording of evidence, and to rectify this omission, permission was sought from the trial Court, and it was granted on 25th of October, 2007, and accordingly amended plaint adding her was filed on 30th of October, 2007. Now, in terms of Section 22 of the Limitation Act, 1908, the suit would, as regards defendant No.1-A, be deemed to have been instituted from the point of time when she was so made a party, and that would come to 30th of October, 2007. Undoubtedly by that date a period of three years, computing it from the date of performance of the contract, that is, 18th of March, 2003, had expired and therefore the suit, to her extent was not within time.²

5. We now enter upon the later part of the first question, whether the plaintiff could maintain a suit against the Attorney for specific performance of the contract, particularly when it was not within time to the extent of the necessary party, that is to say, the owner of the property (defendant No.1-A). It is not denied that defendant No.1-A had authorized her mother, who is defendant No.1, through a registered power of attorney [Ex.D-4(1)], to sell her property. It is now well recognized that a power of attorney is the creation of the agency whereby the grantor (the principal) authorizes the grantee (the agent) to do the acts specified therein on behalf of the grantor (the principal), which, when executed will be binding on the grantor (the principal) as if done by him.³ As such, it is ordinarily the function and the duty of an agent in his contractual dealings for his principal

² Hayat and others v. Amir (PLD 1982 SC 167)

³ Section 2 of the Power of Attorney Act, 1882

to act not only for and on account of his principal, but in the principal's name. The recitals of the contract (Ex.P.3) and the evidence brought on record suggest that defendant No.1, acting as an agent/attorney, had disclosed the identity of her principal (defendant No.1-A) and intended to impose the obligations of the contract (Ex.P.3) upon defendant No.1-A and also secured its advantages to her. Defendant No.1 had no beneficial interest in the contract (Ex.P.3). It is a general rule that where a contract is made for and on account of the principal and in his name, and the agent has no beneficial interest in the contract, the right of action upon the contract is in the principal alone and the agent neither can sue and be sued upon it.⁴ This principal is also embedded in Section 230 of the Contract Act, 1872. We, therefore, are poised to conclude that defendant No.1, as an agent/attorney, acted for and on behalf of defendant No.1-A and thus suit for specific performance of the contract was not maintainable against her, especially when the plaintiff had added defendant No.1-A after the prescribed period of limitation,⁵ and secondly, her status in it, at best, could only be regarded as a proper party and, in terms of Section 27 of the Specific Relief Act, 1877, specific performance of the contract (Ex.P.3) also could not be sought against her.

6. We will now touch upon the second question involved in this case, whether the plaintiff had been able to prove that at all material time he had been ready and willing to perform his obligations arising out of the contract (Ex.P.3). Such a question is a standard feature of the suit seeking a decree for the specific performance of the contract, and the answer to it not only contributes to determine the parties' rights but also provides a base for the Court in exercising its equitable jurisdiction. Determination of the readiness and willingness to perform the obligations emanating from the

⁴ Morton V. Stone (39 Minn 275), Denver Produce Co V. Taylor (73 Miss 702), Buckbee v. Brown [(21 Wend. (NY) 110 & (1)] & Angbats Aktiebolaget Bohuslanska Kusten, Sweden and (2) Bird & Co. (Pakistan) Ltd., Chittagong v. Central hardware Stores, Chittagong (PLD 1969 SC 463)

⁵ Muhammad Khan v. Abdul Khaliq Khan (PLD 1981 SC 155)

contract is a calculus for ascertaining the *bona fide* of the parties. As the initial burden is always on the plaintiff, he must first state in his plaint the facts demonstrating his readiness and willingness to perform his part of the contract and then prove it by producing convincing and reliable evidence. Mindful of these prefatory observations, we move on to the facts relating to this second question and the evidence on record. Before going any further, we wish to say that since this question is diverse, we will deal with it in three parts.

7. It would be appropriate first to examine how the plaintiff discharged his pleading burden. The law governing this aspect of the matter is provided in Form No.47 and 48 in Appendix-A of the First Schedule to the Code of Civil Procedure, 1908. According to para-2 of Form 47, the plaintiff was to state in the plaint that he had applied to the defendants specifically to perform the contract on their part, but the defendants had not done so. Similarly, per para-2 of Form 48, the plaintiff was required to state in his plaint that on such and such date, he tendered an amount to the defendants and demanded a transfer of the property.⁶ Thus, in his suit for specific performance, the plaintiff ought to have pleaded and proved his readiness and willingness to perform his obligations under the contract (Ex.P.3). There is no denying that according to contract conditions, the plaintiff was to pay the balance of Rs.6,850,000/- to the defendants on or before 18th of March, 2023, subject to the registration/completion of property transfer documents by the defendants in his favour. The plaintiff did not pay this amount. The plaintiff's stance was that he had been ready to pay the balance, but, defendant No.1 procrastinated the matter and delayed the completion of the transfer documents, which led him to institute the suit. A perusal of the evidence suggests that the plaintiff could not prove his

⁶ Mst. Waris Jan and another v. Liaqat Ali and others (PLD 2019 Lah 333), Muhammad Riaz and Ors. v. Badshah Begum and Ors. (2021 SCMR 605) & M/s DW Pakistan (Private) Limited, Lahore v. Begum Anisa Fazl-i-Mahmood and others (2023 SCMR 555)

narrative. His witness PW.3, namely, Abdul Raoof, who was UDC in the Estate Management Department of the Capital Development Authority [(CDA)/defendant No.2], in his cross-examination, admitted that all CDA's formalities for issuance of completion certificate had been complied with and as regards the property there was no failure on the part of defendants No.1 and 1-A. It alludes that it was not the defendants but the plaintiff who was negligent in performing his duty. It is one way of looking at the plaintiff's default in fulfilling his part of the obligation under the contract (Ex.P.3).

8. Notwithstanding the above, there is another facet of the second question that provides us additional ground to decline the plaintiff's appeal. There was no doubt that the plaintiff had to prove that he was always ready and willing to perform his obligations in terms of the contract, so it was also necessary for him to go into the witness box and give evidence that he had all along been ready and willing to perform his part of the contract, and would even subject himself to cross-examination on that issue. On the contrary, in this case, the plaintiff did not appear as a witness but instead produced his Attorney, Tasawar Hussain, as PW.2. This was a material irregularity which vitiated the plaintiff's claim. The plaintiff could not examine in his place, his Attorney who did not have personal knowledge about his readiness and willingness. His attorney was also irrelevant to the issue because he was neither involved in the negotiations culminated into the contract (Ex.P.3), nor signed the contract nor was he a witness to it. What is more, readiness and willingness refer to the state of mind and conduct of the vendee, as also his capacity and preparedness on the other. One without the other is not sufficient. Therefore, the Attorney (PW.2), who had no personal knowledge, could not give evidence about plaintiff's readiness and willingness to perform the obligations in terms of the contract (Ex.P.3). In the wake of the above, the Attorney's evidence must be excluded from consideration. If we do so, we do not find any

other piece of evidence to accept the claim of the plaintiff that he had been ready and willing to perform obligations in terms of the contract. This, indeed, is fatal to the plaintiff's suit.

9. From whatever angle we examine this case, we do not find anything on which we can base the plaintiff's claim as valid. Even if we ignore the pitfalls mentioned earlier, one more remain and that too is deadly. In a suit for specific performance, the vendee also has to prove that at the appointed time, he had sufficient money with which he could pay the balance amount, or if he did not have such money, he made such arrangements, with the help of which, he could pay as promised. In this case, the contents of the plaintiff's plaint and the evidence brought by him on record are completely silent on this essential element of the suit for specific performance of the contract. In other words, the plaintiff had failed to prove his readiness to perform his obligations of the contract, therefore, his claim could not be allowed, and as such, we think, the High Court has rightly dismissed it.

10. Having regard to our above findings, the plaintiff is bound to fail in this appeal. We, therefore, dismiss this appeal and maintain the decree of the High Court.

Judge

Judge

Judge

B-II
Islamabad, the
16.08.2023
"Approved for reporting"
Sarfraz Ahmad & Agha M. Furqan, L/C