IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE MUSHIR ALAM
MR. JUSTICE QAZI MUHAMMAD AMIN AHMED

CIVIL APPEAL NO.108 OF 2015
Against the judgment dated 22.4.2014 passed by High Court of Sindh Circuit Court, Hyderabad in 2nd Appeal No.02 of 1990

Mst. Rehmat & others ...Appellant(s)

VERSUS

Mst. Zubaida Begum & others ...Respondent(s)

For the Appellant(s): Mr. Muhammad Munir Paracha, ASC
Syed Rifaqat Hussain Shah, AOR
Syed Tahir Hussain, Husband of Appellant No.3

For Respondent No.1(LRs): Mr. M. Ishtiaq Ahmad Raja, ASC

Date of Hearing: 25.8.2020

JUDGMENT

MUSHIR ALAM, J.- Admitted facts giving rise to the instant Civil Appeal, arising out of leave granting order dated 9.2.2015, are that one, Mst. Ashfaq Jehan[1] being owner of the suit property, through her attorney Hamid Hussain Khan, entered into sale agreement dated[2] April 1973 (Ex.91) with Mst. Zubaida Begum[3] for a total sale consideration of Rs.45,000/, out of which Rs.500/- was paid as earnest money at the time of execution of the agreement. Balance

[1] since decease (through her LRs) Appellant No.2 herein /Defendant No.1
[2] Pages No.127 to 129 of the paper book CA No. 08/2015
[3] since deceased through LRs/ Respondent No.1 herein/ Plaintiff

consideration was agreed to be paid before the registrar at the time of execution of sale deed. In terms of clause 4 of the sale agreement the vendor took upon herself, responsibility to obtain: i*) Income Tax certificate; ii). NOC from Excise and Taxation Authority, Hyderabad, Certificate/receipts showing payment of electricity and Water charges; and iv) Mutation in the City survey record kept in the city survey Office, Hyderabad,* required to execute the sale deed.

2. It was admitted by *Shaikh Muhammad Shariff DW-1*[4] on behalf of the Ashfaq Jehan that at her request, further sum of Rs.25,500/- and another sum of Rs.10,000/- were paid to the vendor, through her daughter in law, Mrs. Salma Waris, on 31.5.1973 and 11.12.1973 respectively through Cheques [5] being part payment towards balance sale consideration and, on payment of last-mentioned amount through cheque, Mst. Zahida Begum the vendee was put in possession of the subject property thereof.

3. From the record, it appears that instead of coming forward to execute sale deed, Shaikh Muhammad Sharif[6], despite being aware of the sale transaction, executed sale deed in respect of suit property in favour of his wife Ms. Rehmat (since deceased)[7]. On coming to know such facts, the Plaintiff/Respondent No.1 filed a FC suit No.144 of 1977 for specific performance of an agreement to sell dated April 1973, and for cancellation of a registered sale deed dated 24th February 1977[8] executed by the attorney of said Ashfaq Jahan the Appellant No.2 in favour of his wife Appellant No.1 with respect to thc suit property.

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[4] Cross examination of DW-1 paper book in CA No. 108/2015 page 123
[5] Bank Certificate Ex.92 and 93 respectively ibid.
[6] the attorney of legal heirs of Mst, Ashfaq Jahan (since deceased)
[7] Trough LRs Appellant 1 (i) to (v) herein
[8] Pages No.144 to 147 ibid

4. The said FC Suit No.144 of 1977 was partially decreed by the learned trial court on 21st July 1988 by observing that Mst. Ashfaque Jehan (defendant No.1 of the suit) was liable to pay the sum of Rs.36.000/- received from respondent No.1 as part of sale consideration[9]. The judgment of the learned trial court dated 21st July 1988 was assailed by respondent No.1 before the Court of Additional District Judge Hyderabad, who *vide* his judgment dated 22nd November 1989[10] set aside the judgment and decree of the learned Trial Court and decreed the suit in favour of respondent No.1. The decision of the learned Additional District Judge was impugned by the appellant No.1 before the learned High Court in Second Appeal No.2 of 1990, which *vide* its short order dated 11th December, 2000 and detailed judgment dated 26th January, 2001[11], set aside the judgment dated 22nd November, 1989 of the 1st Appellate Court. The said judgment was assailed by respondent No.1 in Civil Appeal No.2111 of 2001 before this Court and *vide* Order dated 02.04.2007[12], with the consent of parties, the judgment dated 26th January, 2001 was set aside and the case was remanded back to the learned High Court for re-consideration of the controversial questions of law and facts in the light of evidence on record. The learned bench of the High Court of Sindh, Circuit Court, Hyderabad *vide* its judgment dated 22.4.2014[13] impugned before us in this Civil Appeal No.108 of 2015 upheld the judgment dated 22.11.1989 passed by the 1st Appellate Court dismissing the Appeal No.2 of 1990.

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[9] Pages No. 67 to 82 of CA No.108/15
[10] Pages No. 57 to 66 of CA No.108/15.
[11] Pages No. 93 to 116 of CA No.108/15
[12] Pages 51 of CMA 2694
[13] Pages 20-46 of CA No.108/15.

5. We have heard counsels for both the parties before us and perused the record with their able assistance. The learned counsel for the Mst. Rehmat, Appellant No.1 argued that time was the essence of the contract to sell, executed between Mst. Ashfaq Jahan the Appellant No.1 and Mst. Zubaida Begum respondent No.1 was rightly rescinded and revoked as the respondent No.1 failed to perform her part of contract within time. He emphasized that the appellant No.1 purchased the suit property worth Rs.60,000/- after serving legal notice through registered post dated 02.12.1975 as well as publicized the notice through newspaper dated 11.12.1975 upon the respondent No.1. He further argued that before purchasing the suit property, the appellant No.1 procured the clearance certificate through her son from the Sub-Registrar Hyderabad on 18.12.1976; and thereafter, the sale deed was duly registered through Sheikh Muhammad Sharif as Attorney of the vendor on 24.02.1977. He contended that the appellant No.1 being the *bona fide* purchaser of the suit property rightly got the sale deed registered in her name after fulfilling all the legal formalities as such the impugned judgment of the learned bench of the High Court suffers from legal infirmities and liable to be set aside.

6. Conversely, the learned counsel for the respondents vehemently argued that the respondent No.1 purchased the suit property *vide* agreement executed in the year, 1973 and paid a sum of Rs. 36,000/- of the total sale consideration of Rs.45,000/-. He further argued that the remaining sum of Rs.9,000/- was payable on fulfilling the contractual obligations as mentioned in clause 4 of the agreement to sell dated April 1973, which Mst.Ashfaq Jahan failed to perform till date. He highlighted that the respondent No.1 was handed over the physical possession of the suit property on payment of further

consideration of Rs.35,000/- as noted above and in part performance thereof on 11.12.1973 by her attorney. He contended that the learned 1st Appellate Court had taken care of all the factual and legal aspects of the case in its judgment dated 22nd November, 1989 and the same was rightly upheld by the learned bench of the High Court *vide* the impugned judgment.

7. It transpires from the record that the litigation with respect to the suit property arose between the parties when Mst. Zubaida Begum respondent No.1[14], Mst. Rehmat Bibi appellant No.1[15] and appellant No.2 Hamid Hussain, son of appellant No.2 and attorney of Mst. Ashfaq Jahan in agreement dated April, 1973 and Mohammad Sharif Sheikh husband and attorney of Mst. Rehmat Bibi appellant No.1 in registered sale dated 24th February, 1977 were all alive. The seller as well as the original and subsequent purchasers of the suit property appeared through their respective attorneys before the Trail Court. One Muhammad Idrees the attorney and husband of Mst. Zubaida Begum, appeared as *PW-1*[16] and exhibited the agreement dated April, 1973 and other documents as Ex-91 to 103 in the Trial Court. Sheikh Muhammad Sharif, duly constituted attorney of Mst. Ashfaq Begum, Appellant No.2, appearing as *DW-1*[17] in the Trial Court specifically admitted the factum of sale transaction between the respondent No.1 and Mst. Ashfaq Jehan by deposing in cross examination that:

> *"Mst. Zubeida plaintiff had given cheques of Rs. 25,500 on 25.05.1973 and cheque of Rs.10,000 on 11.12.1973. It is a fact that these cheques were given towards the part payment of consideration of sale." (Page No.123 of paper book No. CA 108 of 2015).*

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[14] Plaintiff in FC Suit No. 144 of 1977
[15] Defendant No.2 in FC Suit No. 144 of 1977
[16] Pages 117-120 of CA No.108/15
[17] Pages 122 -123 of CA No.108/15

8. As to the possession, he admitted in his examination in chief that *'As Muhammad Idrees was my friend, therefore, I allowed him for temporary shelter but after two days; they backed out from their promises and have not yet vacated the house*[18]*'*. He further admitted in his cross-examination as DW-1 that *'It is a fact that since 1973 till today Mst. Zubeida is in possession, voluntarily says that possession is illegal*[19]*'*. These admissions of *DW-1* who is the attorney as well as the husband of appellant No.1 are sufficient enough to establish that the sale transaction was entered between Mst. Ashfaq Jehan and the Respondent No.1 in the year 1973 and the vendee paid a sum of Rs. 36,000/- in part performance of sale consideration while the possession was also delivered to her. It is an established principle of law that facts admitted need not be proved, reference can be made to Article 30 of the Qanoon-e-Shahadat Order 1984 and the case of *Nazir Ahmed versus M. Muzaffar Hussain*,[20], wherein Paragraph No.8 of the judgment this Court observed that:

> *8. So far as the execution of agreement is concerned, the appellant Nazir Ahmad who appeared as D.W.1 admitted the execution of the agreement for sale of the property in dispute for consideration of Rs.50,000 and the execution of the agreement was further testified by Allah Ditta Scribe of the document who appeared as D.W.4. The said witness appeared twice in the Court; firstly as P.W.1 and secondly as D.W.4 and admitted the thumb impression of Nazir Ahmad and signatures of Rashid Ahmad appellants on the agreement to sell (Exh.P.1). It means that the execution of agreement is admitted not disputed and it is well settled proposition of law that the admitted facts need not to be proved. The admission has been defined in Article 30 of the Qanun-e-Shahadat Order, 1984 which reads as under:-*
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> > *"30. Admission defined. An admission is a statement, oral or documentary, which suggests any inference as to any*

[18] Page No.123 of CA No.108/15
[19] Page No.123 of of CA No.108/15
[20] 2008 SCMR 1639

fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned."

9. The Appellant, under facts and circumstances of the case, can neither claim nor could substantiate, that she is *bona fide* purchaser without notice to the earlier transaction. In a case *Jaiwanti Bai v. M/s Amir Corporation,*[21] in paragraph 19 and 20 it was held *'that the right of a person having established that they were equipped with unregistered instrument, which were prior in time, and were in possession of property in part performance of such instrument, would rank superior even against the subsequent registered instrument'*. Therefore, in the instant case, the position of respondent No.1 being in possession of the suit house since 1973, having paid 80 % of the total sale consideration, much before time fixed in the sale agreement and much before performance of reciprocal obligations set out under clause 4 of the agreement, on the part of the Respondent No.2, is much stronger than that of the appellant No.1; more particularly the possession is specifically admitted by *DW-1* in his statement in view of the *Nazir Ahmed's* case *supra.*

10. The crucial question that now requires consideration of this Court is as to whether the time is essence of the agreement dated April, 1973. Perusal of the said agreement reveals that the vendor Mst. Ashfaq Jahan sold the suit property as an absolute owner to the respondent No.1 Mst. Begum in lieu of Rs.45,000/-(Rupees Forty-Five Thousand Only), whereof as sum of Rs.500/- was paid as earnest money as mentioned in clause (1) of the said agreement. Clause 2 of the said agreement mentioned that *'The balance of the said sale price*

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[21] PLD 2021 SC 434

that is, Rs.44,500/- (Rupees Forty Four Thousand and Five Hundred) only shall be paid by the SECOND PARTY to the FIRST PARTY in cash before the Registrar Hyderabad, at the time of registration of sale deed in respect of the said property or if the parties agree, at any time before registration[22]*.'* It is pertinent to mention here that no cut-off date was given in the sale agreement for the payment of remaining sale consideration as it was settled between the parties that the remaining sum could be paid at the time of registration of sale deed or at any time before registration. Clause 4 of the said agreement made it mandatory for the 'First Party' that is the vendor Mst. Ashfaq Jahan to obtain all documents necessary for registration of the suit property in the following terms:

> *"4) That the FIRST PARTY shall obtain all documents necessary for registration of the said property in the name of the SECOND PARTY, namely:-*
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> *i) Income Tax clearance certificate.*
>
> *ii) No objection certificate from the Excise & Taxation Authority, Hyderabad.*
>
> *iii) Certificate/Receipt showing payment of electricity and water charges.*
>
> *iv) Mutation in the City survey record kept in the City Survey office, Hyderabad. -----"*

11. Clause 4, of the agreement as reproduced above, reveals that the appellant No.2 while acting as an attorney of his mother Mst. Ashfaq Jahan was required to procure all the documents noted therein, before the execution of sale deed. These conditions manifest that the agreement dated April 1973 contained reciprocal promises on the part of vendor as well vendee and both the parties were required to perform their respective part of the contract in order to accomplish the sale

[22] Page No. 127 of CA No.108/15

transaction; however, the vendor failed to perform her part of reciprocal obligations and did not procured requisite documents, except the Income Tax Clearance Certificate; which is also apparent from the perusal of notices Ex.91, Ex.116, Ex. 118[23]. As the vendor Mst. Ashfaq Jahan herself failed to perform her part of contract, therefore, she could not rescind and revoke the agreement dated April 1973, after the delivery of possession of the suit property to the respondent No.1 and the receipt of a sum of Rs.36000/= i.e 80% of the total sale consideration in part performance of performance of sale transaction. It can safely be concluded that the time was never the essence of the agreement dated April 1973 and the failure on the part of the promisor/vendor to perform her part of contract could not put her into a position of rescinding or revoking the contract in terms of Section 51 of the Contract Act, 1872. Moreover Section 54 of the Contract Act, 1872 even makes the promisor liable to make compensation to the promisee for any loss suffered by him due to non-performance of a reciprocal promise on the part of promisor. Section 54 reads as follows:

> *"54 Effect of default as to that promise which should be first performed. - In contract consisting of reciprocal promises. When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last-mentioned fails to perform it, such Promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract."*

[23] Pages No. 130 to 137 of the paper book No. CA108/2015

12. We fully agree with the findings of the learned bench of the High Court given in paragraphs No 29 t0 31 of the impugned judgment to this effect and the case laws mentioned therein. It may be observed that while granting leave on 9.2.2015, it was noted that the appellant on execution of sale deed dated 24.4.1977 in her favour by the attorney of the appellant No.2 had filed a suit for possession under section 8 of the Specific Relief Act, and question that required resolution was, which of the party was entitled to equitable relief under sections 8 and 27 of the Specific Relief Act, 1877, if any. It is noted that this Court on 15.4.2020 also directed the parties to file concise statement to show whether respondent No.1 had deposited balance sale consideration or otherwise.

13. CMA Nos.2694 of 2015 and 4737 of 2020 was filed by the learned counsel for the Appellant No.1 and Respondent No.1 respectively, which show that suit No.99 of 1997[24] was filed by the Appellant No.1, Mst. Rehmat Bibi, for possession under section 8 of Specific Relief Act,1877 on the strength of sale deed dated 24.2.1977, which suit remained pending for over seven years and eight months and, on failure of the plaintiff in suit to lead any evidence, it was dismissed under Order 9 Rule 8 CPC *vide* reasoned order dated 16.4.1986.[25] It was pointed out by the learned counsel for the Respondent No.1 that after dismissal of her suit and during pendency of proceedings in the instant matter, Appellant No.1 dishonestly executed sale deed dated 20.12.2000 in favour of appellant No.3 Mst. Khurshid Jehan, who was later added as a party and being proceeded *ex-parte*. The earlier sale deed was executed by her husband (Sheikh

[24] Page 11 of CMA 4737/2020
[25] Pages 14-15 of CMA 4737/20.

Muhammad Sharif) as an attorney of the Vendor (Mst. Ashfaq Jahan). The appellant No.1 was fully aware of earlier transaction and delivery of possession to the Respondent No.1 in part performance of the agreement to sell. The conduct of the Appellant No.1, since deceased, smack foul, as during pendency of instant proceedings, she further executed sale deed dated 22.12.2000[26] in favour of Appellant No.3 Khursheed Jehan, more so when there is nothing on record to show that appellant No.3-Khurshid Jahan had paid sale consideration to the Vendor at the time of obtaining sale deed in her favour. Said Respondent No.3 also filed a suit for possession under Section 8 of the Specific Relief Act, fate of which is not known. It may be observed that suit No. 99/1977[27] filed by the Appellant No.1 under Section 8 of the specific Relief Act was dismissed under Order 9 Rule 8 CPC on 16.4.1986[28], to which no exception was taken by the Appellant, Respondent No.3 having stepped into shoes of the Appellant No.1 cannot claim better right and title than what was possessed by the Appellant No.1 and cannot be allowed to circumvent the consequence of dismissal of earlier suit by her predecessor as provided for under Order 9 Rule 9 CPC, which bars fresh suit in respect of same cause of action.

14. Since the Plaintiff was put in possession on 11.12.1973[29] on payment of 80% of the sale consideration in part performance of the sale agreement dated April 1973, Specific Performance is an equitable relief, Respondent No.1, since represented by LRs, cannot be absolved of their obligations to pay the remaining balance sale consideration of

[26] Pages 17-22 of CMA 4737/20
[27] Page 11-13 of CMA No. 4737/2020
[28] Page 14-15 ibid
[29] When Rs. 10,000/ was paid through Cheque dated 11.12.1973 (making total consideration of 36000/- out of 45,000/-)

Rs.9000/=,(being 20% of the total sale Consideration) which they were obliged to pay within reasonable time from the date of sale agreement or at the latest on filing suit for specific performance. Contention of learned counsel for respondent No.1 that neither the appellate Court nor the High Court made any direction to deposit balance sale consideration. It may be observed that, a vendee seeking specific performance of an agreement to sell is essentially required to demonstrate that he is and was always ready and willing to perform his reciprocal obligation to pay balance sale consideration. If balance consideration is not offered or paid earlier, best time to demonstrate such "*readiness and willingness to perform*"[30] is offering balance sale consideration at the time of filing suit for specific performance. In cases where contract consist of reciprocal promise such that one of them cannot be performed or that its performance cannot be claimed till the other has been performed[31]. Indeed in this case obligation to pay balance sale consideration was dependent and would occur on discharge of the obligation on the part of the Mst. Ashfaq Jahan/ vendor to procure documents as mentioned in clause 4 of the agreement, noted in paragraph 10 above, which apparently were not performed till filing of the suit. Since the respondent had paid 80% of the sale consideration before contingency agreed in the agreement to sell and was put in possession in part performance may not be entitled to claim compensation in terms of section 19 of Specific Relief Act read with section 54 of the Contract Act, Property subject matter of Sale Agreement Ex 91, being (Eastern Portion) of House No. 08, C.S No. A-34/27-28, Amil Colony, Hyderabad is now in the heart of City,

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[30] See section 51 of the Contract Act

[31] Section 54 Contract Act and implication for non performance of reciprocal obligation, in a sequence required to be performed

falls within category 1[32] Respondent/Plaintiff is enjoying possession since on 11.12.1973,[33] withholding 20% of the balance sale consideration cannot be justified, it would just and equitable to direct the Respondent No.1 to deposit 20% of the balance sale consideration as per value of the suit property in accordance with the prevalent valuation table in respect of suit property issued by the Federal Board of Revenue and or Authority, within a period of 30 days from the date of such determination by the learned Executing Court, on deposit of the amount and, which may be disbursed to the LRs of Mst. Ashfaq Jahan/vendor/defendant No.1 in suit(since deceased) on determination and deposit of such amount, sale deed be executed in favoaur of legal heirs of respondent No.1 in accordance with Order 21 Rule 32 CPC.

15. For what has been discussed above, the instant Civil Appeal No. 108 of 2015 stands dismissed with no order as to costs. The findings given by the learned bench of the High Court in the impugned judgment, subject to above are upheld with the observation that any sale transaction with respect to the suit property after the agreement in April, 1973 stands annulled and any subsequcnt transaction in respect of suit property from appellant No.1 is also hit by the principle of *lis pendens* and has to sink and swim with the appellant No.1 Mst. Rehmat Bibi; needless to observe that the Appellant No.1 and or

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[32] S.R.O. 0^3(I)/2019.- In exercise of the powers conferred by sub-section (4) of section 68 of the Income Tax Ordinance, 2001 (XLIX of 2001) and in supersession of its Notification No. S.R.O. 116(I)/2019 dated the 1st February, 2019 and or any other current valuation table in vogue on the date of this judgement,

[33] When Rs. 10,000/ was paid through Cheque dated 11.12.1973 (making total consideration of 36000/- out of 45,000/-)

Appellant No.3 may well be within their right to claim damages for wrongful transaction from their respective vendors.

Judge

Judge

Announced at Islamabad on 19-7-2021

Judge

"Approved for Reporting"