

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE UMAR ATA BANDIAL, HACJ
MR. JUSTICE MUNIB AKHTAR
MR. JUSTICE MUHAMMAD ALI MAZHAR

CIVIL APPEAL NO. 1005 OF 2019

(Against the Order of Lahore High Court, Lahore dated 20.10.2017 passed in R.S.A. 167 of 2009)

Gulzar Ahmad, etc.

... **Appellants**

Versus

Muhammad Aslam, etc.

... **Respondents**

For the Appellants : Ch. Afrasiab Khan, ASC

For the Respondent : Sh. Tariq Mehmod, ASC
LRs. No.(1-2)

LRs. of Respondent : Ex-Parte.
No. 3.

Date of Hearing : 20.08.2021

JUDGMENT

MUHAMMAD ALI MAZHAR, J:- This Civil Appeal has been brought to challenge the judgment dated 20.10.2017 passed by Lahore High Court in RSA No.167/2009 whereby the appeal was dismissed and the judgment passed by Additional District Judge Gojra on 12.12.2009 in C.A.No.78-13/2007 was maintained.

2. The short-lived facts of the case are as under:-

The Respondent No.1 and 2 filed a suit for Specific Performance against the appellants and Respondent No.3 on the premise that respondent No.3 (Mst. Kalsoom Begum) entered into an agreement to sale with the plaintiffs (Muhammad Aslam & Ali Akbar) in respect of land measuring 26 kanals 14 marlas situated at Chack No. 298/JB, Gojra in total sale consideration of Rs.474000/- and received Rs.50,000/- earnest money pursuant to

agreement to sell dated 27.06.2000. The cut-off date for the transfer of property was 5.10.2002 but the defendant No.1 (Kalsoom Begum) before expiry of stipulated timeline, transferred the aforesaid land in favour of appellants (defendants No.2 to 4 in the suit) on 12.8.2002 vide mutation entry in the record of rights against the sale consideration of Rs.6,50,000/-. On filing suit for specific performance, the trial court settled the issues, recorded evidence and dismissed the suit, however in view of stipulation in the agreement, the plaintiffs were found entitled to the refund of earnest money of Rs.50,000/- and Rs.100,000/- as penalty from defendant No.1. The plaintiffs filed C.A.No.78-13/2007 and learned appellate court after considering the pros and cons, set aside the impugned judgment and decreed the suit as prayed subject to deposit of balance sale consideration of Rs.4,24,000/- within thirty days. This appellate order was challenged by the present appellants through RSA in the Lahore High Court, Lahore which was dismissed. During pendency of appeal, the respondent No.1 and 3 expired and vide Amended Memo, the legal heirs of respondent No.1 and respondent No.3 were brought on record.

3. On 2nd April, 2019, leave to appeal was granted in the following terms:-

"The learned counsel for the petitioners states that the suit for specific performance filed by respondents No.1 and 2 was dismissed by the learned trial Court, whereas, the appellate court reversed the finding and decreed the suit, which was maintained through the impugned judgment dated 20.10.2017 of the learned High Court. According to the learned counsel, the petitioners are bona fide purchasers without notice and transfer was effected in their favour through mutation No.2176 dated 21.08.2002 on payment of the entire consideration and possession was handed over. He further stated that the plea of the petitioners that they are bona fide purchasers without notice was not displaced and merely on assumption and conjecture the finding was reversed. It is further stated that in terms of the agreement relied upon by the plaintiffs/respondents the agreement was to be performed on or before the cut-off date failing which the agreement would be rescinded and vendor will be within his right to transfer the property which he exercised in accordance with section 21 of the Specific Relief Act. The points noted above do call for examination, therefore, leave to appeal is granted.

4. The learned counsel for the appellants articulated that the impugned judgment is based on misreading of evidence. Both the courts below failed to consider that the appellants are transferees for value who paid money in good faith and without notice of the original agreement to sell hence they are entitled to the benefit of Section 27 of the Specific Relief Act. The plaintiffs in suit failed to prove the knowledge of earlier agreement by the subsequent

vendees. He further avowed that in view of the condition jot down in the agreement, the trial court rightly dismissed the suit and directed the defendant No.1 to refund the earnest money with penalty to the plaintiffs.

5. Quite the opposite, the learned counsel for the respondent No.2 and legal heirs of respondent No.1 contended that neither the condition of refunding the earnest money in the event of default along with certain amount of penalty creates any impediment or obstruction against the vendee to file suit for specific performance nor it precludes the court not to decree the suit. He further argued despite sufficient evidence concerning the execution of agreement with time frame, the defendant No.1 with mala fide intention as well as to fetch more money violated the agreement without any default committed by plaintiffs.

6. Heard the arguments. The trial court settled the issues and parties were also allowed to lead evidence. It is clearly reflected from the evidence that the execution of agreement between respondent No.1 and respondent No.3 was an admitted document. In order to prove its authenticity and genuineness, the witnesses were also produced and they firmly testified and corroborated its execution. The respondent No.3 agreed to sell out the property in the sum of Rs.4,74,000/-and also received Rs.50,000/- as an earnest money. The land was to be transferred in favour of the vendee on 5.10.2002, but before cessation of cut-off date, she transferred the property thru mutation entry No.2176 in favor of appellants on 12.8.2002. The appellants pleaded to have purchased the property in the sum of Rs.6,50,000/- as a bona fide purchaser for the value without notice of previous agreement. It is unequivocally reflected from the judgment of the trial court that agreement to sell was considered a valid piece of evidence but much emphasis was also made on penalty clause which was to be triggered in case of violation.

7. Compliant with Section 100 CPC, the second appeal only lies in the High Court on the grounds that the decision is being contrary to law; failure to determine some material issue of law, and substantial error or defect in the procedure provided by the Code

or law for the time being in force which may possibly have emanated an error or slip-up in the determination or decisiveness of the case on merits. Meaning thereby, it does not lie to question the findings on facts. In the case of **Madan Gopal vs. Maran Bepari (PLD 1969 SC 617)**, this court held that if the finding of fact reached by the first appellate court is at variance with that of trial court, such a finding by the lower appellate court will be immune from interference in second appeal only if it is found to be substantiated by evidence on the record and is supported by logical reasoning, duly taking note of the reasons adduced by the first court which have been disfavored in the contrary finding. It was further held that interference would be justified if the decision of the lower courts is found to be contrary to law or some usage having the force of law has failed to determine some material issue of law. Whereas in another case reported as **Amjad Ikram vs. Mst. Asiya Kausar (2015 SCMR 1)**, the court held that in case of inconsistency between the trial court and the appellate court, the findings of the latter must be given preference in the absence of any cogent reason to the contrary as has been held by this court in the judgments reported, as **Madan Gopal and 4 others v. Maran Bepari and 3 others (PLD 1969 SC 617) & Muhammad Nawaz through LRs. v. Haji Muhammad Baran Khan through LRs. and others (2013 SCMR 1300)**.

8. The demeanor of the defendant No.1 divulges that in order to fetch more money, she sold out the property before the cut-off date. Neither appellants produced any agreement to sell nor proved any due diligence before acquiring property through mutation entry. The vendor's conduct demonstrates that just to deprive the first vendee to buy out the property in the agreed sale consideration mentioned in the agreement, she transferred the property surreptitiously before cut-off date on the basis of mutation entry in receipt of better price. Nothing attributed against the first vendee (plaintiffs) that they violated the terms and conditions of the sale agreement or the date mentioned in the agreement was elapsed due to their default or conduct. This court

in the case of **Ghulam Rasool vs. Muhammad Hussain (PLD 2011 SC 119)** held as under:-

"The rule of discretion in the specific enforcement cases should not be arbitrarily applied rather it should be invoked to promote fairness and equity. The respondents-plaintiffs have established on record to have entered into an agreement for the purchase of the suit land and the payment of Rs.5,000 as earnest money to the vendor. It is not established, if they were delinquent or failed to perform any of their obligation under the sale agreement and thus are disentitled to the equitable relief; only for the reason that the appellants had made full payment to the vendor but when they have not established to be the bona fide purchasers, the discretionary relief should not be withheld from the plaintiffs, otherwise it would tantamount to giving undue premium to the subsequent vendee, who though has purchased the property with the notice of the prior agreement to sell and is found disentitled by the courts to the protection under section 27(b) of the Specific Relief Act, which is the only provision in law to safeguard his rights, yet he be given guerdon and rewarded and the plaintiffs who otherwise have proved their case and are not at fault in any manner whatsoever must be non-suited. This shall be sheer arbitrariness, which is sworn foe of discretion".

9. Though the relief of specific performance of an agreement is discretionary but the discretion cannot be exercised arbitrarily or unreasonably. Section 12 of the Specific Relief Act inter alia expounds specific performance of contract when their exist no standard for ascertaining the actual damage caused by non-performance of the act agreed to be done; when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief and when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done. Attached explanation also provides that unless and until the contrary is proved, the court shall presume that the breach of contract to transfer immoveable property cannot be adequately relieved by compensation in money and that the breach of the contract to transfer moveable property can be thus relieved. The party approaching the court has to show that he was ready and willing to perform its part of the contract and the other side was avoiding or had refused to perform his part of contract. Where the terms and condition of the agreement are expressed in clear terms, an inference can be drawn that the parties after due diligence with proper application of mind entered into a valid, lawful and a concluded contract. According to Section 19 the Specific Relief Act,

person suing for specific performance of contract may also ask for compensation for its breach either in addition to or in substitution for such performance. If court decides that specific performance ought not to be granted, it may grant compensation and in case, the court decides that specific performance ought to be granted but not sufficient to satisfy the justice of the case then court may also grant compensation.

10. In the present controversy, the niceties of Section 20 are also very crucial which elucidate that a contract otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in the case of its breach and the party in default willing to pay the same. In this backdrop a party to a contract for the sale of immovable property should not be allowed to evade specific performance merely because the agreement provides the penalty to be paid on default. In the same context, this court rendered the judgment in the case of **Syed Arif Shah vs. Abdul Hakeem Qureshi (PLD 1991 SC 905)** and held as under:-

".... there is legal presumption in view of Explanation to section 12 that the breach of a contract to transfer an immovable property cannot be adequately relieved by compensation in money. This initial presumption is not dislodged by the factum that under the sale agreement, a sum is named as the amount of liquidated damages in case the contract is not performed. The burden to dislodge the above legal presumption is on the person who avers contrary to it. It was further held that the jurisdiction to decree specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful. However, the discretion of the Court is not arbitrary but sound and reasonable and is to be guided by judicial principles which are amenable to correction by a Court of appeal".

Halsbury's Laws of England, Second Edition, Volume XXXI, Part-II "Limits of the Jurisdiction", Paragraph 373 also enlightened the *raison d'être* of penalty clause as under:-

"373 Where the contract contains a stipulation that in the event of non-performance a certain sum of money shall be paid, that fact is not in itself decisive in considering whether or not specific performance should be granted. Nor does the distinction between penalty and liquidated damages (q) affect the answer to this question (r). The answer is to be found by considering the

intention of the parties, that is, whether the party bound to performance has an alternative choice given to him by the contract, to perform or to pay the agreed sum, or whether he is bound to do a certain thing with a penal sum or sum by way of liquidated damages attached as security (s). In the latter case the Court, notwithstanding the penal clause, enforces performance if the contract be such that without the penal clause it would have been proper for specific performance."

(q) For an explanation of this distinction, see titles Bonds, Vol.III., p.110; Damages, Vol.X., pp.141 et seq., see also titles Building Contracts, Engineers and Architects, Vol.III., PP.279 et seq., 292, 293; Master and Servants, Vol. XXII., pp.161, 162; Shipping and Navigation, Vol. XXX., p.361 (Charter-party). (r) *London City v. Pugh* (1927), 4 Bro. Parl. Cas.395; 17 Digest 404, 2134; *Webb v. Clark* (1782), 1 Fonblanque, Treatise of Equity, 154; 2 Digest 19, 112; *French v. Macale* (1842), 2 Dr. & War. 269; 42 Digest 446, 180 i, *Coles vs. Sims* (1854), 5 De. G.M. C.1; 17 Digest 402, 2116; *Carden v. Butler* (1832), Hayes & Jo.112; *Bird v. Lake* (1863), 1 Hem. & M.111; 17 Digest 365, 1757; *Bray v. Fogarty* (1870), 4 I.R.Eq.544; 17 Digest 149, p. (s) *French v. Macale*, Supra; *Coles v. Sims*, Supra; *Roper v. Bartholomew*, *Butler v. Bartholomew* (1823), 12 Price, 797, 821; 17 Digest 402, 2114; and see titles Deeds and Other Instruments, Vol.X., pp.325-327; Equity, Vol.XIII., pp.189, 190.

In the case of **Ranger v. Great Western Rail Co.**
[Reported as 5 H.L. Cas. 72; 24 L.T.O. S. 22; 18 Jur. 795; 10 E.R.824], Lord Cranworth held as under:-

"There is no doubt that where the doing of any particular act is secured by a penalty, a court of equity is in general anxious to treat the penalty as being merely a mode of securing the due performance of the act contracted to be done and not as a sum of money really intended to be paid. On the other hand, it is certainly open to parties who are entering into contracts to stipulate that, on failure to perform what has been agreed to be done, a fixed sum shall be paid by way of compensation. Whether a sum so fixed is to be considered as merely in the nature of liquidated damages, is often a question of great nicety and difficulty. I am not sure that benefits has, on the whole, resulted from the struggles which courts, both of law and equity have made to relieve contracting parties from payments which they have bound themselves to make by way of penalty. Such a course may have been very reasonable and useful where the damage resulting from the violation of the contract is capable of being exactly measured, but whenever the quantum of damage is in its nature uncertain and the due performance of it has been secured, or purports to have been secured, by a penalty, it might, perhaps, have been safer and more convenient to have always understood the parties as meaning what their language imports namely, that on failure to perform the contract, the stipulated penalty should be paid. But this has not always been the doctrine of the courts. The distinction between a penalty and a sum fixed as the conventional amount of damages is too well established to be now called in question, however difficult it may be to say in any particular case under which head the stipulation is to be classed. I shall presently have occasion to state that the sums in this contract, made payable under the name of penalties, are to be treated as liquidated damages, and not as penalties to secure something unliquidated."

11. The constituent of a supplication as bona fide purchaser against a valuable consideration without notice is coupled with a strict proof. According to Article 117 of Qanun-e-Shahadat Order, 1984, a person desires any court to give judgment as to any legal right or liability, burden lies on him to prove that those facts exist. Whereas under Article 119 of QSO the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. It is most relevant for us to discuss the nomenclature and classification of Section 27 of the Specific Relief Act which is hooked up and connected to the relief of specific performance against parties and persons claiming under them by subsequent title. Consistent with this section, specific performance of a contract may be enforced against any person claiming title subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract. Mere denial by the subsequent vendee that he had no knowledge of the prior agreement would not enough to discharge his burden of proof. It is also to be proved by the subsequent vendee that he acted in good faith and after due diligence entered into an agreement to sell. The **9th Edition of Black's Law Dictionary** (page 1355) defines a ***"bona fide purchaser"*** as *"one who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims"*.

12. A subsequent vendee avowing bona fide intention cannot be absolved from making some cursory investigation to the title of the vendor which may include but not limited to invite public objections through public notices in order to articulate that there was no deception or fouled intention to move in the transaction and he acted in good faith or with bona fide intention without knowledge or notice of earlier sale agreement at the time of his transaction. He proceeded as a man of ordinary prudence in

making inquiries anticipated as purchaser before acquiring a title of the property. In the case of **Hafiz Tassaduq Hussain v. Lal Khatoon (PLD 2011 SC 296)**, this court held as under:-

"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.

7. The second ingredient "good faith" is the term which reflects the state of mind and according to section 3(20) of the General Clauses Act, 1897 "a thing shall be deemed to be done in 'good faith' where it is in fact done honestly, whether it is done negligently or not". While interpreting this, it was held in *Nannu Mal v. Rani Chander* (AIR 1931 All 277 (FB)) that good faith as defined above is equivalent to honesty of dealing and does not entail upon the purchaser the necessity of searching the registry, even assuming that there were facts indicative of negligence in investigating title, that by itself was not predicative of a lack of bona fides. Therefore, the second condition shall stand settled if the subsequent vendee has acted as a man of ordinary prudence in making inquiries expected from a purchaser who wants to acquire a good title for the price/value he is paying. This may include the checking of the Revenue Record or obtain the copies thereof to verify about the title of the vendor or any third party in right, interest or charge over the property or any endorsement in such record about any pending litigation or an injunctive order etc; this may be a good and adequate exercise of investigative process, in case of rural/agriculture property. And for the same purpose, regarding urban property, the Excise and Taxation record may be examined coupled with the verification and obtaining the original documents of title from the vendor, if those are available. However, the subsequent vendee is not obliged to run from the pillar to post in conducting rowing and fishing inquiries, to ascertain if a third party has any interest etc. in the property which otherwise is visibly lacking. But if there exist some overt, prominent and conspicuous indicators about the third party

interest, which are so patently noticeable and manifest that those could not and should not be missed and ignored by a purchaser, such as the possession not with the vendor but someone else, who if approached or its nature investigated would lead to discover such interest, the purchaser is obliged to probe about it, otherwise he may not be able to take resort of the noted equitable rule."

13. At this moment, we would also like to accentuate on Section 55 of the Transfer of Property Act which germane to the rights and liabilities of buyer and seller. According to this section, the seller is inter alia bound to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto but here the entire deal seems to be collusive and the conduct shows that subsequent vendee enticed the vendor with better offer and the vendor under the temptation to realize better price, violated the previous agreement and transfer the land through mutation in a hurried manner without waiting the cut-off date mentioned in the previous agreement. The subsequent buyer/appellants though pleaded the transfer on the basis of mutation entry but in trial court they failed to put forward any evidence of inviting any objections before deal either through public notice/announcement or any other inquiry or verification made by them as part of due diligence. On the other hand, the evidence led in the trial court reveals that Muhammad Siddique (PW-3) was in cultivating possession of the suit land. Gulzar Ahmed (DW-1) admitted in his cross examination that when they purchased the suit land it was being cultivated by Muhammad Siddique (PW-3) and the land was adjacent to their poultry from. The person Muhammad Siddique was also witness to the agreement to sell. Nothing said for any verification if made. Where a person claims to be a transferee for the value without notice of the original contract the burden lies upon him to prove that he fulfills that character. The question of good faith is always a question of fact which depends upon the facts and circumstances of each case. The utmost important ingredient of Section 27 (b) is the lack of knowledge or the notice of the subsequent vendee about the original contract. The initial onus is on the subsequent vendee and once it is discharged, then burden will shift on the plaintiff to prove that the subsequent vendee had the notice of

his sale agreement; the subsequent transaction is without passing of the due consideration; it is a colourable or a fraudulent transaction with dishonesty by the vendor and the subsequent vendee in order to cause prejudice his rights under the sale agreement. The first appellate court conscientiously considered the evidence where the appellants failed to prove their plea as bona fide purchaser for value without notice and the high court in second appeal has also gauged and evaluated the entire evidence properly and rightly maintained the judgment of first appellate court.

14. As a result of above discussion, we do not find any justification to interfere in the impugned judgment. The civil appeal is dismissed.

ACJ

JUDGE

JUDGE

Islamabad, the
20th August, 2021
Approved for reporting.