

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE MUHAMMAD ALI MAZHAR

CIVIL APPEAL NO.389 OF 2015

(Against the judgment dated 23.12.2014
passed by Lahore High Court, Multan Bench
in R.S.A. No.37 of 2014)

Bahar Shah and others

...Appellants

VERSUS

Manzoor Ahmad

...Respondent

For the Appellants: Mr. Zahoor-ul-Haq Chishti, ASC

For the Respondent Mr. M.Ishtiaq Ahmad Raja, ASC

Date of Hearing: 14.10.2021

JUDGMENT

MUHAMMAD ALI MAZHAR, J. This Civil Appeal is directed against the judgment passed by the learned Lahore High Court, Multan Bench, on 23.12.2014 in Regular Second Appeal No.37/2014 whereby the appeal was dismissed.

2. The transient facts of the case are that the respondent instituted a suit for specific performance of a contract dated 04.09.2008 executed by the appellant No.2 in his favour for sale of land measuring 4-Kanal 18-Marlas, situated in Khata No.413, Mouza Wahni-wal, Tehsil & District Layyah. During subsistence of aforesaid agreement, the appellant No.2 transferred the land in question through oral sale, vide mutation dated 26.04.2005 in favour of the appellant No.1 who is real brother of the appellant No.2. After recording evidence, the suit was dismissed by the Trial Court. On an appeal filed by the respondent, the Appellate Court reversed the finding of trial Court and decreed the suit. Being aggrieved, the appellant filed Regular Second Appeal in the Lahore

High Court, which was dismissed and the judgment passed by first Appellate Court was maintained.

3. Leave to appeal was granted vide order dated 07.05.2015 in the following terms:-

"Leave is granted, inter alia, to consider whether the learned Appellate as also the learned High Court has misread and non-read the evidence on the record and has also not properly appreciated and applied the principle of bona fide purchaser in determining whether petitioner No.1 was such a purchaser; the respondent had not been able to prove valid execution of the agreement to sell on account of the discrepancies in the evidence led by him qua the contents of his plaint; the respondent has neither been able to prove payment of earnest money nor the delivery of possession of the suit property with exactitude as was averred in the plaint".

4. The learned counsel for the appellants argued that the findings of both Appellate Courts are based on non-reading and misreading of evidence. The respondent failed to prove his case through trustworthy evidence. Both the Courts below failed to consider that the appellant No.1 was a bona fide purchaser against valuable consideration without notice that was established through credible evidence. The finding of learned High Court is set up on presumption that earlier transaction was very much in the knowledge of the appellant No.1 who is real brother of the appellant No.2. According to the learned counsel there were some serious discrepancies in the evidence, which were ignored by both the learned Appellate Courts.

5. The learned counsel for the respondent argued that the both learned Appellate Courts perfectly appreciated the evidence led by the parties and after considering evidence passed the judgments. The appellant No.1 throughout the proceedings failed to prove that he was a bona fide purchaser against value without notice of earlier agreement.

6. Heard the arguments. On scanning and scrutinizing the evidence led by the parties in the Trial Court, it is manifesting beyond any ambiguity that an agreement to sell was executed against consideration but the appellant No.2 dubiously and

distrustfully transferred the land in question in the name of her real brother (appellant No.1) by means of an alleged oral sale and mutation entry dated 26.04.2005. Though in the written statement, the appellant No.2 disavowed the execution of agreement with respondent but when she appeared in the witness box, she deposed divergently that her husband took her thumb impression on blank papers. Nothing added more as to what legal action was taken by her against her husband, who allegedly secured the thumb impression on blank papers by fraudulent and deceitful means. The respondent produced witnesses to testify the execution of agreement to sell who were fully firmed and supported the version of the respondent in the aid of proving the execution of agreement to sell and payment of sale consideration. It is a matter of record that the first agreement was executed by the appellant No.2 with respondent on 04.09.2008 but after few days, she transferred the land in question on 19.9.2008 in favour of appellant No.1. It is incredible, rather far-fetched that being real sister and brother (the appellant No.1 and appellant No.2), the appellant No.1 was so ignorant or unacquainted of earlier agreement. According to the agreement with the respondent, the cutoff date for the payment of balance sale consideration and conveyance deed was to be registered on 20.10.2008 but before expiry of cutoff date, the appellant No.2 transferred the land on 19.9.2008 in favour of appellant No.1. The conduct of appellants demonstrate that mutation entry was a sequel of an attempt to deprive and exasperate the deal finalized with the respondent and hasty and abrupt transfer of property through mutation entry was effected to bring in an unconvincing plea of bona fide purchaser in anticipation of lawsuit of the respondent. The respondent proved his case of specific performance through trustworthy and reliable evidence whereas the appellant No.1 failed to establish his plea as a bona fide purchaser through any credible evidence.

7. The presupposition of know-how or prior notice of earlier agreement of the same property stem from calculated abstention from an enquiry by the alleged bona fide purchaser. A conscious and purposive circumvention of an enquiry and due diligence which a buyer ought to have made would always communicate a

presumption of definite notice. In a position taken as bona fide purchaser, it should be established by a fair preponderance of the evidence and the fact of notice may be inferred from the circumstances as well as proved by direct evidence. An honest buyer should at least make some inquiries with the persons having knowledge of the property and also with the neighbors. An equitable interest can be hammered or resisted by a bona fide purchaser for value without notice of the legal interest in the property but it is also significant that Section 27 (b) of the Specific Relief Act shields and safeguards the bona fide purchaser in good faith for value without notice of the original contract which is in fact an exception to the general rule. The doctrine of purchaser without notice embodies the maxim that "where equities are equal the law will prevail". Under Section 3 (Interpretation Clause) of Transfer of Property Act 1882, "a person is said to have notice" of a fact when he actually knows that fact, or when, but for willful abstention from an inquiry or search, which he ought to have made, or gross negligence, he would have known it. *Explanation II*, further expounds that "Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof".

8. The burden of proof of good faith is on the subsequent buyer, who moves forward a plea that he is an innocent purchaser. Here the vendor and subsequent vendee are real brother and sister so it was not difficult at all to make some due diligence, on the contrary, it appears that the entire move was ventured to conceive an artificial plea of bona fide purchaser. If the subsequent buyer failed to take routine cautionary and preventive measure, which an ordinary purchaser will have to take, then his conduct cannot be considered bona fide or acted with fairness and uprightness. Whether in a particular case a person acted with honesty or not will obviously depend on the facts of each case. The good faith entails righteous and rational approach with good sense of right and wrong which excludes the element of deceitfulness, lack of fair-mindedness and uprightness and or willful negligence. 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"*.

9. In the case of Hafiz Tassaduq Hussain v. Lal Khatoon (**PLD 2011 SC 296**), this Court held that the subsequent vendee thus has to discharge the initial onus (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 notice of the original sale agreement between the plaintiff and the vendor at the time of his transaction with the latter. It was further held that 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". Reference of a judgment rendered in the case of Nannu Mal v. Rani Chander (**AIR 1931 All 277**) was also given that good faith 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. In the case of R. K. Mohammed Ubaidullah and Ors. Vs. Hajee C. Abdul Wahab (D) By Lrs. and Ors. (**AIR 2001 SC 1658**), it was held that purchaser was required to make inquiry as to the nature of possession or title or further interest if any of original purchaser over the property in question at time of entering into sale transaction.

10. Now we would like to pay attention to the niceties of a right to file Second Appeal provided under Section 100 of C.P.C, which can be set into motion only when the decision is 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. 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 Appellate Court. In another case reported as Amjad Ikram vs. Mst. Asiya Kausar (**2015 SCMR 1**), this 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.

11. The first Appellate Court thoroughly evaluated and mull over the evidence adduced by the parties and reached to a just and proper conclusion that the appellants failed to prove and justify their defence pleas and judgment of Trial Court was not based on correct exposition of law and facts, whereas the learned High Court in second appeal has also gauged and assessed the overall evidence perfectly and rightly maintained the judgment of first Appellate Court.

12. In the wake of above discussion, we do not find any good or valid ground to disturb or interfere with the impugned judgment. Consequently the appeal is dismissed.

Judge

Judge

Islamabad, the
14.10.2021
Approved for reporting