

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Qazi Faez Isa
Mr. Justice Muhammad Ali Mazhar

Civil Appeal No.176 of 2016

*(Against the judgment dated 26.11.2015 passed by
Lahore High Court, Multan Bench, Multan, in
C.R.675/2001)*

AND C.M.A. No.9246 of 2015

(stay application)

Muhammad Afzal Khan ...Appellant

Versus

Muhammad Aslam (decd.) thr. LRs. ...Respondents

For the Appellant: Mrs. Fakhar-un-Nisa Khokhar, ASC
Qari Abdul Rashid, ASC
Mr. M. Sharif Janjua, AOR

For the Respondents: Mr. Zulfikar Khalid Maluka, ASC

Date of Hearing: 17.05.2022

JUDGMENT

Qazi Faez Isa, J. Learned counsel for the appellant states that a suit was filed on 27 November 1996 seeking specific performance of an agreement to sell dated 4 May 1966, coupled with a power of attorney executed by the seller, Muhammad Aslam, on the same day. The suit was decreed by the learned Civil Judge, and the learned Appellate Judge upheld the decision. However, in revision the learned Judge of the High Court set aside the two concurrent judgments of the subordinate courts on what learned counsel states was a wrong interpretation of the law, that is, by holding that an agreement not signed by the purchaser is not enforceable, because it was held otherwise by a five-Member Bench of this Court in the case of *Muhammad Sattar v Tariq Javaid* (2017 SCMR 98). Learned counsel states that the other point which prevailed with the learned Judge of the High Court was that since two witnesses of the agreement were not produced in terms of Article 79 of the Qanun-e-Shahadat, 1984 the execution of the agreement was not proved, which, learned counsel submits, was not correct since the agreement was of the year 1966, well before the Qanun-e-Shahadat, 1984 was enacted. It is submitted that the judgments of the

subordinate courts were correct, therefore, the learned Judge of the High Court had incorrectly exercised powers of revision under Section 115 of the Code of Civil Procedure, 1908 (**'the Code'**). Concluding her submissions the learned counsel states that the execution of the said agreement was not denied by the respondent (the defendant in the suit).

2. The learned Mr. Zulfiqar Khalid Maluka, representing the purported seller, Muhammad Aslam's legal heirs (the respondents herein), submits that, though the High Court had allowed the revision on the said points, there were also other substantial and incontrovertible legal points on which the same should also have been allowed. In this regard he submits that the appellant had sold the land which was the subject matter of agreement dated 4 May 1966 (**'the said land'**) in the year 1973 to his two brothers, namely, Haq Nawaz and Zulfiqar Ali (**'the brothers'**) and the brothers had filed a declaratory suit against the appellant before the Civil Judge, Sahiwal, which was decreed by consent and consequently, sale mutation No. 144 dated 22 July 1977 was entered into the revenue record; but in such suit Muhammad Aslam was not separately arrayed as a party. Therefore, the appellant, by his own showing, was left with no interest in the said land. Nonetheless, the appellant filed a suit for specific performance in respect of the said land against Muhammad Aslam, and did not array the brothers therein as parties.

3. The learned Mr. Maluka next submits that Muhammad Aslam had filed a declaratory suit against the appellant and the brothers in the year 1977, which was initially dismissed by the Trial Court, but was later decreed by the Appellate Court *vide* judgment dated 10 November 1986 (**'the unchallenged judgment'**). And, that no challenge was made to this unchallenged judgment, it attained finality, and the matter of ownership of Muhammad Aslam to the said land stood unquestionably established in his favour. He further states that the appellant had filed the subject suit in the year 1990 and withdrew it in 1992, with permission to file a fresh suit, which he then filed in the year 1996. The appellant, according to the learned counsel, could not file the said suit because the dispute stood decided, and the principle of *res judicata* enunciated in section 11 of the Code came to apply. He further submits that the suit was also time-barred, and the appellant having withdrawn it in 1992, and then having filed a fresh one in 1996, would not extend the prescribed period for filing a suit. In this regard learned counsel also refers to Order XXIII Rule 2 of the Code,

which provides that, '*In any fresh suit instituted on permission granted under last precedent rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted*'. The learned counsel by referring to Muhammad Aslam's written statement shows that these objections were specifically taken in the preliminary objections thereto. He also referred to the judgment of the learned Civil Judge in which he had referred to the unchallenged judgment (produced as exhibit D-8), but despite doing so the learned Judge neither attended to the issue of *res judicata* nor to that of limitation. These mistakes were also repeated by the Appellate Court. And, though the revision was allowed by the learned Judge of the High Court, he too overlooked these important points, which conclusively established the ownership of Muhammad Aslam to the said land and that the suit filed by the appellant was not maintainable, both on account of *res judicata* and having been belatedly filed. Addressing the objection of the learned Mrs. Khokhar with regard to section 115 of the Code, the learned counsel states that the revision was maintainable as all three sub-clauses of section 115 of the Code were attracted.

4. We have heard the learned counsel and examined the documents referred to by them. It is quite clear that the learned Judge of the High Court did not attend to the revision in the detail which it merited, and primarily allowed the revision by relying on the decision in the case of *Farzand Ali v Khuda Bakhsh* (PLD 2015 SC 187). Subsequently, this decision was distinguished and explained by a larger five-Member Bench in the case of *Muhammad Sattar* (above), and it was held that a buyer/vendee who had not signed the agreement of sale was not disentitled from filing a suit seeking its specific performance. The learned Judge also seems to have overlooked the fact that the purported agreement was of the year 1966, that is, well before the enactment of the Qanun-e-Shahadat, 1984, and as such it's referred to Articles 17 and 79 were not applicable.

5. The questions which also require our consideration are whether the appellant could have filed the said suit, whether it was not barred on account of *res judicata*, and whether the suit was filed within the period prescribed for filing a suit seeking specific performance. The appellant, by his own showing, had divested his purported interest in the said land (having statedly sold it to his brothers in 1973); he also did not array the brothers as parties in his suit filed in the year 1992, nor did so later. The brothers also did not come forward themselves to assert their purported

rights of ownership in the said land. However, Muhammad Aslam had arrayed the appellant and the brothers in his suit, which was decreed, and the unchallenged judgment with regard to the said land constituted *res judicata* in terms of section 11 of the Code. The unchallenged judgment refers to documents, including the said power of attorney dated 4 April 1996, and it attained finality as neither the appellant nor the brothers challenged it. The appellant was a party to Muhammad Aslam's suit, and was also aware of the unchallenged judgment, as it was exhibited in the appellant's suit as exhibit D-8; this also finds mention in the judgment of the learned Civil Judge. Muhammad Aslam had taken legal objections in his written statement stating that the suit was not maintainable on the ground of *res judicata* and as it was time-barred. As regards the point of limitation the appellant had filed the suit in the year 1992, seeking specific performance of a purported sale agreement dated 4 May 1966, that is, after a period of 26 years, which suit he then withdrew and filed the fresh suit in the year 1996, that is after 30 years. A suit seeking specific performance of a contract is required to be filed within three years, as per Article 113 of the First Schedule to the Limitation Act, 1908.

6. Without attending to the abovementioned legal objections, and issues, the learned Civil Judge decreed the appellant's suit, which decision the learned Judge of the Appellate Court upheld, but did so without considering the said legal objections. And, as stated above, the learned Judge of the High Court, while allowing the revision filed by Muhammad Aslam, also did not consider the same.

7. We repeatedly asked the learned counsel representing the appellant to attend to the said legal objections with regard to the maintainability of the appellant's suit, that is: (a) Whether the appellant could file a suit for specific performance when by his own showing, he had sold the said land to the brothers, the specific performance of which was sought. (b) Whether the suit was maintainable in view of the earlier unchallenged judgment, and the principle of *res judicata*. And, (c) whether the appellant's suit was filed within the prescribed limitation period. Learned counsel representing the appellant could not offer any explanation. Even if some plausible explanation was offered we would have remanded the case to the High Court to consider the same and to decide the revision afresh. However, in the given circumstances, no purpose would be served to remand it, particularly when the parties have remained embroiled in multiple litigation

for decades, and as we are quite clear that the suit filed by the appellant was not maintainable. Therefore, this appeal is dismissed, but we do so by holding that the appellant's suit was not maintainable. However, since the learned Judge had set aside two concurrent judgments of the subordinate courts the parties are left to bear their respective costs.

Judge

Judge

ISLAMABAD
17th May 2022
Mudassar/[☆]

"Approved for reporting"