

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

134/22

PRESENT:

MR. JUSTICE SARDAR TARIQ MASOOD
MR. JUSTICE AMIN-UD-DIN KHAN

(AFK)

C.P.L.A. No.1517 OF 2022

(Against the judgment dated 24.03.2022 passed by
Peshawar High Court, Peshawar in Civil Revision
No.714-P/2018)

***Muhammad Ghaffar (deceased) through
LRs and others***

...Petitioners

Versus

Arif Muhammad

...Respondent

For the petitioners:

Mr. Agha Muhammad Ali Khan, ASC.
Syed Rifaqat Hussain Shah, AOR.

For the respondent:

Mr. Abdul Sattar Khan, ASC.
Mufti Irshad Ahmed, Mohtamim
Madrassa Taleem ul Quran, village
Murghaz, Swabi.

Date of Hearing:

27.10.2022

J U D G M E N T

AMIN-UD-DIN KHAN, J:- Through this petition filed under Article 185(3) of the Constitution of Islamic Republic of Pakistan, 1973 leave has been sought against the judgment dated 24.3.2022 passed by the learned Single Judge of the Peshawar High Court, Peshawar whereby Civil Revision No. 714-P of 2018 filed by the petitioners was dismissed.

2. On 20.09.2022, after hearing the learned counsels for the petitioners we issued notice to the respondents, and it was ordered that status-quo be maintained. On 18.10.2022 we heard the case at length, however, the learned counsels for the parties requested for an adjournment to resolve the controversy amicably. With the mutual consent of the learned counsel for the parties, the matter was adjourned till 21.10.2022. On 21.10.2022 the learned counsels for the parties informed to the Court that matter of amicable resolution is in

progress, therefore, prayed for another adjournment and case was adjourned for today i.e., 27.10.2022. It was informed that Mufti Irshad Ahmad, Mohtamim Madrassa Taleem-ul-Quran, village Murghaz, Swabi and seven other persons were appointed as members of "Jirgah" to resolve the matter. Mufti Irshad Ahmad, who is present in the Court, stated that the constituted "Jirgah" after sitting in the Mosque resolved that the respondent should pay further amount of Rs:40000000/- (Rupees four crore only) and the land in accordance with the agreement be given to him and stated that parties agreed that they will accept the decision of the "Jirgah" as well as Mufti Irshad Ahmad.

3. The learned counsel for the respondent stated that this decision of the "Jirgah" or Mufti Irshad Ahmad is not acceptable to the respondent and respondent is willing to pay double of the amount as mentioned in the agreement to sell on the basis of which suit has been filed. In these circumstances, when parties have not reached to an amicable settlement, we proceeded to hear to the case in hand.

4. We have heard the arguments of the learned counsels for the parties and with their able assistance thoroughly examined the record, evidence produced by the parties and the findings recorded by the three fora below. The learned counsel for the petitioners has relied upon sections 12, 22 and 27 of the Specific Relief Act, 1877 as well as the judgments reported as "Nazar Hussain and another versus Syed Iqbal Ahmad Qadri (deceased) through his L.Rs and another" (2022 SCMR 1216), "Mst. Noor Jehan and another versus Saleem Shahadat" (2022 SCMR 918), "Muhammad Shafiq Ullah and others versus Allah Bakhsh (deceased) through LRs and others" (2021 SCMR 763), "Mst. Samina Riffat and others versus Rohail Asghar and others" (2021 SCMR 7), "Messrs Kuwait National Real Estate Company (Pvt) Ltd and

others versus Messrs Educational Excellence Ltd. and another" (2020 SCMR 171), "Hamood Mehmood versus Mst. Shabana Ishaque and others" (2017 SCMR 2022), "Adil Tiwana and others versus Shaukat Ullah Khan Bangash" (2015 SCMR 828) and "Muhammad Yaqub versus Muhammad Nasrullah Khan and others" (PLD 1986 Supreme Court 497) whereas learned counsel for the respondent has relied upon the judgments reported as "Mst. Rehmat and others..vs..Mst. Zubaida Begum and others" (2021 SCMR 1534) "Inayatullah Khan and others..vs..Shabir Ahmad Khan" (2021 SCMR 686) "Muhammad Shafiq Ullah and others...vs..Allah Bakhsh through LRs and others" (2021 SCMR 763) "Muhammad Yousaf..vs..Allah Ditta and others" (2021 SCMR 1241) "Muhammad Asif Awan..vs..Dawood Khan and others" (2021 SCMR 1270) "Sri Manmatha Nath Kuri..vs..Moulvi Muhammad Mokhlesur Rehman and another" (PLD 1969 Supreme Court 565) "Badrul Haque Khan..vs..THE ELECTION TRIBUNAL, DACCA and others" (PLD 1963 Supreme Court 704) "Syed Arif Shah..vs..Abdul Hakeem Qureshi" (PLD 1991 Supreme Court 905) "Muhammad Yaqub..vs..Muhammad Nasrullah Khan and others" (PLD 1986 Supreme Court 497) "Messrs KUWAIT NATIONAL REAL ESTATE COMPANY (PVT.) LTD and others...vs....Messrs EDUCATIONAL EXCELLENCE LTD. and another" (2020 SCMR 171).

5. Briefly, on 21.8.2008, Respondent/plaintiff filed a suit for specific performance on the basis of an unregistered agreement to sell, Stamp paper bearing No. 1399 written on 20.10.2007 (Agreement) for a land measuring 47 kanals. It is pleaded that the rate of land was agreed as Rs: 1,50,000/- per Kanal and an amount of Rs:20,00,000/- (two million only) was received by the owners i.e. Petitioners/defendants and possession was delivered to the plaintiff. It is pleaded that plaintiff is ready to pay the remaining consideration amount, defendants refused to transfer land one month ago from the

filing of the suit, hence, the suit. On 19.09.2008 written statement was filed wherein defendants denied the execution of Agreement with the plaintiff. The learned trial court framed the issues and invited the parties to produce their respective evidence. After full trial the learned trial court was pleased to decree the suit vide judgment and decree dated 19.9.2011 for a suit land measuring 47 kanals as prayed for without any order of deposit of remaining consideration amount and without ascertaining the actual transferrable land as per agreement to sell. Since, the suit was filed without payment of court fee, therefore, the payment of court fee was ordered. Record shows that thereafter Regular First Appeal before the High Court was filed by the petitioners-defendants but subsequently it seems that due to enhancement of pecuniary jurisdiction of the District Courts the same would have been sent to learned District Judge, which was ultimately decided and dismissed by the learned Additional District Judge-III, Swabi. Civil Revision filed by the petitioners before the Peshawar High Court also met with the same fate vide judgment dated 24.3.2022. However, the plaintiff was directed to deposit the remaining amount of sale consideration before the learned Executing Court as and when the execution petition is filed.

6. It has been practice of this Court not to interfere with concurrent findings of facts of the courts below. However, we observe that there are serious factual and legal issues which have not properly been addressed by the courts below, if overlooked will lead to miscarriage of justice. The petitioners/defendants have out rightly denied the execution of the said Agreement in their written statement. While the evidence regarding payment of earnest money is oral form, which is in contradiction to the Agreement. Specificity of the subject matter/land under agreement is uncertain and the dates regarding execution of agreement and notarization are also suspicious.

Therefore, we would like to re-evaluate the evidence available on record to arrive at a just and fair conclusion.

7. It may be noted that Said Pir Shah PW-2 (Scribe of the said agreement) during cross-examination admitted that Abdul Ghaffar (one of the vendors) did not affix his thumb mark upon the agreement in his presence. He explained that for marking his thumb impression the respondent/plaintiff took the agreement to sell to Mauza Manai for the said purpose and volunteered that he was not present at that time and place. This very statement of the Scribe creates serious doubts to the integrity of the execution process of the aforesaid agreement. The said witness further admitted that the agreement did not reflect the Identity Card Number of Abdul Ghaffar as well as the witnesses. Anwar Khan PW-3 is a Record Keeper from the office of DOR who produced the record of the sale of stamp paper. The statement of the said witness as to the authenticity of record becomes doubtful when read with the statement of PW-2 to the extent that Abdul Ghaffar didn't sign the agreement in his presence. It remains unexplained how did the said party to the agreement affixed thumb impression in registered so produced by PW-3.

8. For the grant of a decree plaintiff has not only to prove the agreement to sell by producing two marginal witnesses but also the receipt/proof of payment of the consideration amount (averred to be paid). When the evidence of payment of earnest money/partial consideration amount is in oral form which is in contradiction to the Agreement, it should have been pleaded so, it must be proved through strong and consistent with the other documentary evidence on record. In the instant case, where the execution of the document has categorically been denied by the vendors then it was obligatory upon the plaintiff party to seek the signatures/thumb impression

comparison, which was never requested. This Court has already held in the case of "Khudadad v. Syed Ghazanfar Ali Shah" (2022 SCMR 933) that when the evidence brought forward by a party to prove the execution of a document is contradictory or paradoxical to the claim lodged in the suit, or is inadmissible, such evidence would have no legal sanctity or weightage.

9. Moreover, PW-4 is Niaz Ahmad s/o. Ali Gohar Khan, he is not a cited witness to the Agreement, but it seems that as a star-witness, plaintiff has produced this witness whereas there are three witnesses mentioned in the Agreement namely Said Rehman son of Satara Khan, Shah Zaman Khan son of Muhammad Aslam Khan and Abdul Ghaffar Khan son of Munir Khan. The statements of the said witnesses, to the extent of execution of agreement is not consistent of with the statement of scribe. Moreover, Niaz Ahmed PW-4 stated that the bargain was struck through him, and Abdul Ghaffar Khan witness mentioned in the agreement between the parties. He stated that Rs:10 lac was given to the defendants on the Dera of Abdul Ghaffar in Manaie whereas remaining Rs:10 lac was paid to the defendants at their Dera. In cross-examination he stated that no receipt was prepared for payment of the money. He denied the suggestion that the bargain of the suit land by the defendants was struck with Aman Sher and showed ignorance about the fact that defendants are in possession of the suit land. Stated that he was not present at the time of writing of the stamp paper i.e. agreement to sell nor the parties thumb marked the stamp paper in his presence. This witness admitted his signatures on Exh. PW-4/D.1 the stamp paper and further stated that **defendant No. 2 Abdul Ghaffar was not present at the time of writing of the impugned agreement to sell.** Arif Muhammad plaintiff appeared as his own witness as PW-5. He stated that defendants are owner of 47 kanals whereas approximately upon 7 kanals of land there

is residential construction which was excluded from the agreement; that he paid Rs:20 lac to Abdul Ghaffar son of Munir Khan for further payment to the defendants; that upon Exh.PW-2/1 (the agreement) the parties as well as the witnesses signed and thumb marked, thereafter, we went to village of Abdul Ghaffar defendant No. 2 where he thumb marked the impugned agreement. In cross-examination stated that the stamp paper Exh.PW-2/1 was written on my instructions. The possession of the suit land was delivered, and it is with me. The pleadings with regard to delivery of possession are correct whereas in the agreement the fact about non-delivery of possession is wrong. Stated that he had given Rs:20 lac to Abdul Ghaffar son of Munir who on the day of writing of stamp paper No. 1399 paid Rs:10 lac to the defendants. Further on his own stated that Rs:10 lac were paid on the next day. Abdul Ghaffar son of Munir Ahmad, marginal witness to the agreement was produced as PW-6. He stated that we paid money to the defendants. In cross-examination stated that Rs:10 lac was paid at my Dera at the time of agreement whereas the rest of Rs:10 lac was paid on the next day. On his own stated that after the agreement the possession was delivered to the plaintiff.

10. PW-7 is Said Rehman, the other marginal witness, who stated that the payment was not made to the defendants in his presence. Stated that Peer Shah stamp vendor thrice inquired from the defendants that Rs:20 lac have been paid, they admitted in my presence that the same have been paid. However, Said Pir Shah Pw-2 himself admitted that not a single penny was paid to the vendors by the vendee in his presence. One of the defendants appeared as his own witness and produced other witnesses, some bank officials to plead their case that actually the bargain was struck with one Aman Sher which was subsequently cancelled and the agreement, subject matter

of suit, was prepared fraudulently to take undue advantage of illiteracy of defendants.

11. It may also be noted that there is a consistent inconsistency from the contents of agreement to the plaint and the statements of witnesses regarding the total area of land and the transferable area under the agreement. As per the agreement it was about approximately 40 kanal of land owned by the petitioners-defendants whereas they are owner of area measuring 47 and rest of the land is residential property which is not part of the agreement to sell. It is further clarified in Para No. 1 of the agreement that only the cultivable land is part of the agreement and after excluding the residential land after its measurement the possession will be delivered to the vendee which will be the part of the sale. Whereas the suit has been filed for the whole of land measuring 47 Kanal. While Azam Khan Patwari Halqa (PW-1) submits that the petitioners defendants are the owner of area measuring 44 Kanal 15 Marla and 5 Sirsai. Muhammad Arif respondent/defendant while appearing as PW-5 deposed that land measuring 7 Kanal is Abadi and not transferrable. There is nothing on record to suggest the exact measurement of the land transferrable under the agreement in question. When property is not specific no decree can be passed in the light of section 21 of the Specific Relief Act, 1877 which reads asunder: -

21:- Contract not specifically enforceable. The following contracts cannot be specifically enforced;

- a)
- b)
- c) a contract the terms of which the Court cannot find with reasonable certainty.

This Court, in the case of "Haji Saindino Khan and another v. Mst. Zaibunnissa through Legal Heirs and another" (1991 SCMR 972)

refused to specifically enforce a contract where it suffered from uncertainty.

12. Term No. 6 of the agreement is very relevant which is reproduced:-

” کتابی فروخت اراضی کا تعین بعد از پیمائشی اراضی برائے مکانات کے ہوگا اور اس سے زر بیع کا تعین ہوگا۔ “

13. As we have noted the relevant parts of the statements of the plaintiff as well as all his witnesses, when same are read in conjunction with the plaint and the agreement to sell, it smells fishy. It is axiomatic principle of law that for the grant of a decree for specific performance on the basis of an agreement to sell it is a discretionary relief and the court, for just and equitable reasons, can withhold the same even if the agreement is proved. It is a commonplace observation that it is the vendor who takes plea that the actual settlement between the parties was otherwise than written in the agreement as they were orally agreed and they try to prove the case pleaded by them but astonishingly in this case it is the plaintiff who wants to prove his case other than the written in the agreement as well as pleaded by himself. Learned counsel for the respondent frankly admitted that it was wrongly mentioned in the plaint that possession was delivered to the plaintiff-respondent. Argues that Mufassil Lawyer has not pleaded the case with full care and as per the learned counsel for the respondent Mufassil lawyers are not so expert to draft the case carefully in accordance with the agreement as well as law. This plea of the learned Counsel for the respondent is not legally conceivable.

14. We are further astonished to hear these arguments as in our experience the Mufassil Lawyers' pleadings are very comprehensive at least in line with the document i.e. the agreement or

the revenue record or any other document which is relied by the learned counsel for drafting such pleadings. In our times the lawyers were very hardworking and used to do their job with full care and caution. Case pleaded by a party in the pleadings binds the party to accept that pleading up to this Court and further when plaintiff appeared as his own witness as PW-5 when he was making statement on oath, he has stated the case pleaded by his counsel with regard to transfer of possession is correct whereas in the agreement Exh. PW-2/1 the noting in the agreement that possession will be delivered at the time of transfer of the property is incorrect. Plaintiff further admitted that in the Iqrar Nama it is written that defendants have received Rs:20 lac today in the presence of the witnesses. The witnesses of the plaintiffs have falsified the terms of Agreement Exh. PW-2/1 and even plaintiff himself. We have noted that even in the trial court the plaintiff-respondent has contested the matter of possession by filing an application for grant of temporary injunction etc. Now learned counsel admits that possession is with the petitioners and it was never transferred, therefore, in the execution petition he has prayed for possession of the suit property also. None of the witnesses produced by the plaintiff as well as plaintiff himself stated that the payment was made at the time of agreement as is written in the agreement that payment is being made lump sum (یکمشت) at the time of agreement. The Scribe of the alleged agreement stated that nothing was paid in his presence. PW-4 Niaz Ahmad stated that he was not present at the time of writing of the agreement, therefore, agreement does not contain his signatures. Plaintiff stated that he has paid Rs:20 lac to Ghaffar Khan PW-6 for onward payment to the defendants-petitioners. Further stated that Rs:10 lac was paid on the day of writing of agreement whereas remaining Rs:10 lac was paid on the next day which means that the story mentioned in the agreement

with regard to payment is absolutely false. PW-7 also stated that nothing was paid in his presence. Against the story narrated by the plaintiff this witness has not stated that he has paid earnest money to the defendants. In this view of the matter, neither the agreement is proved nor the payment of earnest money under the agreement is proved and neither the witnesses are truthful. Further their statements are in contradiction with the agreement to sell.

15. Needless to observe that a party can only prove the case pleaded by it. The rule of *secundum allegata et probata*, not only excludes the element of surprise, but also precludes the party from proving what has not been alleged or pleaded. This Court, in the cases of "Government of West Pakistan (Now Punjab) through Collector, Bahawalpur v. Hail Muhammad" (PLD 1976 SC 469), "Messrs Choudhary Brothers Ltd., Sialkot v. The Jaranwala Central Co-operative Bank Ltd., Jaranwala" (1968 SCMR 804), "Binyameen and 3 others v. Chaudhry Hakim and another" (1996 SCMR 336) and "Major (Retd.) Barkat Ali and others v. Qaim Din and others" (2006 SCMR 562), held that no party can be allowed to lead evidence on a fact which has not been specifically pleaded nor can any evidence be looked into which is outside the scope of pleadings. It is established on record by the evidence of the plaintiff himself that agreement was not signed/thumb marked by the parties to agreement as well as witnesses in one sitting. It is further proved that consideration amount was not paid at the time of agreement.

16. We have further noticed that stamp paper of impugned agreement was issued on 20.1.2007. The agreement was written on the same day. All the other endorsements are of 20.1.2007 whereas astonishingly the stamp of Hakim Khan Farooqi, Notary Public, District Courts, Swabi shows that he has notarized this document on

19.1.2007 at his register No. 1925 which is at Page 105 of the instant paper book. In these circumstances, when agreement is for approximately 40 kanals which was not specifically proved that in accordance with the agreement how much is the suit property. The suit was filed for 47 kanals and learned trial court blindly granted decree for 47 kanals. Learned trial court as well as learned first appellate court has referred statement of one of the defendants got recorded as DW-3 that he has admitted the receipt of advance amount. These findings of both the courts below are absolutely wrong and result of misreading of evidence. This witness is referring receipt of advance money under agreement with one Aman Sher and not by the plaintiff. Another fact is very astonishing in this case, the learned trial court while granting a decree did not bother to ask the plaintiff to deposit the remaining consideration amount nor during the pendency of the suit he was ordered to deposit nor the learned appellate court has asked the plaintiff to deposit the remaining consideration amount nor the learned High Court bothered to ask the plaintiff/deGREE-holder to deposit the remaining consideration amount. Another astonishing fact is that while dismissing Revision of the vendors/defendants in the last paragraph following direction was made:-

“However, the respondent/plaintiff is directed to deposit the remaining sale consideration before the learned Executing Court as and when execution petition is filed.”

It is a novel case whereby a decree for specific performance on the basis of agreement dated 20.1.2007 was sought when suit was filed on 21.8.2008 and the learned trial court granted the decree on 19.9.2011. The learned High Court after about 11 years of passing of decree is asking the plaintiff-respondent to deposit the remaining consideration amount before the learned Executing Court when the execution petition is filed. Ordinarily, for filing execution petition if

impugned order of appellate court remains in field 3 years after the final determination of the lis. Even plaintiff/decreed-holder never offered or requested the Court to grant permission for deposit of consideration amount.

17. In the circumstances, the case law cited by the learned counsel for the respondent has no relevance and is not applicable to the facts of this case and need not to refer and discuss the same. Same is the position of the law referred by the learned counsel for the petitioner when we are dismissing the suit of the plaintiff-respondent, therefore, there is no need to discuss the law cited by the learned counsel for the petitioner. In this view of the matter, plaintiff failed to prove the execution of Agreement to sell on the basis of which suit is filed in accordance with law and also failed to prove the payment of earnest money under the Agreement to sell to the defendants.

18. In this view of the matter, we convert this petition into appeal and allow the same. The judgment and decree passed by the learned Peshawar High Court as well as the learned trial court and the appellate court not being sustainable in the eye of law are set aside. The resultantly, the suit filed by the plaintiff/respondent stands dismissed. Parties to bear their own cost.

Announced in open Court on 22-11-2022

JUDGE

Islamabad, the
27th October, 2022
(Mazhar Javed Bhatti)

APPROVED FOR REPORTING.