

2011 C L C 876

[Lahore]

Before Nasir Saeed Sheikh, J

Miss AMY J. KING and another----Petitioners

Versus

KHALID AZIZ and 23 others----Respondents

Civil Revision No.2499 of 2003, decided on 24th January, 2011.

(a) Specific Relief Act (I of 1877)---

---S. 12---Civil Procedure Code (V of 1908), O.XVII, R.3---Suit for possession through specific performance---Trial Court closed plaintiff's right to produce evidence and dismissed the suit---Appellate Court dismissed appeal---Validity---Court under S.115, C.P.C., could look into enforcement of an agreement sought to be performed through the suit . for specific performance--Trial Court allowed sufficient opportunities to plaintiffs to produce their evidence---Plaintiffs were not in possession of any portion of suit land---Facts narrated in the plaint did not raise any possibility of enforcement of the agreement in favour of plaintiffs, therefore, remanding the case and forcing the parties to again start the proceedings would not be just and appropriate---Revision was dismissed in circumstances.

(b) Civil Procedure Code (V of 1908)---

---S. 175---Specific Relief Act (I of 1877), S.12---Revisional jurisdiction---Scope---Court, in exercise of jurisdiction under S.115, C.P.C., could look into enforcement of an agreement sought to be performed through the suit for specific performance.

Javaid Akhtar Nawaz v. Mehr Kabir 1990 CLC 1122 distinguished.

Qutab-ud-Din v. Gulzar and 2 others PLD 1991 SC 1109; Mst. Ghulam Hamid v. Kh. Abdul Rehman 2010 SCMR 334 and *Burmah Eastern Ltd. v. Burmah Eastern Employees, Union and others* PLD 1967 Dacca 190 ref.

Maulvi Abdul Aziz Khan v. Mst. Shah Jahan Begum and 2 others PLD 1971 SC 434 and *Abdul Shakoor and others v. Province of the Punjab and 4 others* 2005 SCMR 1673 fol.

Ch. Ali Muhammad for Petitioners.

Ch. Mushtaq Ahmad Khan and Abid Hassan Minto for Respondents.

Date of hearing: 18th January, 2011.

JUDGMENT

NASIR SAEED SHEIKH, J.--- The petitioners Nos.1 and 2 along with Mrs. Maneck J. King widow, are the legal representatives of late Jivanji F. King. The petitioners Nos.1 and 2 along with Mrs. Maneck J. King instituted a suit for possession through specific performance of an agreement dated 31-7-1970 with a prayer of permanent injunction before the Senior Civil Judge, Lahore on 5-2-1983. The original defendant No.1 Aziz-ur-Rehman and the original defendant No.7 Maryam Khatoon died during the pendency of the litigation and respondents Nos. 1 to 7 and 11 to 21 are the L.Rs. of the deceased defendants Nos. 1 and 7 respectively and have been impleaded. The respondent No.24 Shakeel Ahmed is however a subsequent vendee of the property subject-matter of the controversy and was impleaded in the suit in that capacity. The original plaintiff No.1 Mrs. Maneck J. King also died and was succeeded by the plaintiffs Nos.2 and 3 of the original suit and thus the litigation continued in the name of the present petitioners No.1 and 2 only. The original suit was instituted with the following prayer:---

"It is therefore, most respectfully prayed that a decree for possession through Specific Performance of the agreement dated 31-7-1970 be passed in favour of the plaintiffs and against the defendants qua portion 'C' shown red in the site plan of property No.S-50-R-33, Lakhshmi Mansion, Hall Road, Lahore for the consideration already received by the defendants and against a sum of Rs.40,000 paid by the defendants to the Settlement Authority on behalf of the plaintiffs for the transfer of the property in dispute."

A permanent injunction was also sought by the plaintiffs restraining the defendants from interfering into the possession of the plaintiffs in the portion of the subject property as claimed by the plaintiffs.

2. All the defendants contested this suit by filing their respective written statements. Out of the pleadings of the parties the learned Civil Judge framed the following issues:---

Issues

- (1) Whether the agreement in suit is enforceable in law through specific performance? OPP
- (2) Whether proper court-fee has been affixed on the plaint? OPP
- (3) Whether the plaintiffs are entitled to claim discretionary relief on the facts of the suit? OPP
- (4) Whether the attorney of the defendants Nos.3, 5, 6, 7 and 8 was legally authorised to execute the agreement in suit? OPP
- (5) Whether the Civil court has jurisdiction to grant any relief in respect of the agreement in suit? OPP

- (6) Whether there is any cause of action in favour of the plaintiffs to bring the present suit?
OPP
- (7) Whether the plaintiffs have come to this learned court with clean hands? OPP
- (8) Whether on the principle of reciprocity the agreement in dispute has become unenforceable? OPP
- (9) Whether the present suit is not maintainable on the agreement dated 31-7-1970? OPD
- (10) Whether the agreement in 'dispute is void, vague and uncertain and as such is not enforceable through specific performance? OPD
- (11) Whether the predecessor-in-interest of the plaintiffs failed to perform his part of agreement? OPD
- (12) Whether this court has no jurisdiction to entertain the present suit, on account of PTD having been issued in the name of defendants? OPD
- (13) Whether the plaintiffs, have no cause of action to bring the present suit? OPD
- (14) Whether the agreement dated 31-7-1970 is not enforceable after the death of predecessor-in-interest of the plaintiffs? OPD
- (15) Whether the plaintiffs are entitled to the specific performance of the agreement dated 31-7-1970, if so, on what terms and conditions?
- (16) Relief.

3. The plaintiffs of the suit were allowed a number of opportunities by the learned Civil Judge/Trial Court to produce their evidence after the framing of the issues and ultimately the defendants Nos.1, 2 and General Attorney of the defendants Nos.3 and 8 moved an application dated 20-10-2000 for invoking provisions of Order XVII, Rule 3 read with section 151 of C.P.C. for deciding the suit forthwith on account of failure of the plaintiffs to produce their evidence. The learned Civil Judge/trial Court sought reply of the application from the plaintiffs and vide order dated 28-11-2000 the application moved by the above defendants was accepted by the learned Civil Judge and the right of the plaintiffs to produce evidence was closed under Order XVII, Rule 3-of C.P.C. and vide a separate judgment and decree dated 28-11-2000 passed by the learned Civil Judge, the suit of the plaintiffs was dismissed.

4. The petitioners preferred an appeal against the judgment and decree passed by the learned Civil Judge which appeal came up for hearing before a learned Additional District Judge, Lahore and was dismissed vide judgment and decree dated 28-3-2003.

5. The instant Civil Revision has been instituted by the, petitioners for setting aside the impugned judgments and decrees passed by the two courts below.

6. The learned counsel for the petitioners has addressed his arguments solely on the ground that the provisions of Order XVII, Rule 3 of C.P.C. have been illegally applied upon the instant case and relied upon the judgments reported as *Javid Akhtar Nawaz v. Mehr Kabir* 1990 CLC 1122 and *Qutab-ud-Din v. Gulzar and 2 others* PLD 1991 SC 1109. The learned counsel for, the petitioners prayed for setting aside of the impugned judgments and decrees passed by the two courts below and remand of the case back to the trial Court for allowing the petitioners sufficient opportunities for producing their evidence. On a question put by the Court as to whether the petitioners are now in possession of any portion of the subject property, the learned counsel for the petitioners after consulting his clients replied in the negative, which fact was also confirmed by the learned counsel for the respondents in the Court by stating that the petitioners are not in possession of any portion of the subject property.

7. The Civil Revision has been seriously opposed by the learned counsel for the respondents. It has been argued on behalf of the respondents that the issues were framed as long as back on 23-6-1983 thereafter the matter was remained lingering on for the disposal of miscellaneous matters and ultimately from 22-1-1998 the case was being regularly got adjourned by the plaintiffs for seeking opportunities to produce their evidence and from 22-1-1998 to 2-5-1998 the case was adjourned at the instance of the plaintiffs for recording of evidence with specific fixing of time by the learned trial Court/Civil Judge directing the plaintiffs to produce their evidence when the plaintiffs once again started moving different miscellaneous applications and ultimately the learned trial Court was forced to close the evidence of the plaintiffs/petitioners vide order dated 28-11-2000 on an application under Order XVII, Rule 3 of C.P.C. moved by the defendants as noted above. The learned counsel for the respondents after relying upon the case-law *Maulvi Abdul Aziz Khan v. Mst. Shah Jahan Begum and 2 others* PLD 1971 SC 434 and *Abdul Shakoor and others v. Province of the Punjab and 4 others* 2005 SCMR 1673 argued that the plaintiffs/petitioners not only do not have any case on merits but have been afforded a number of opportunities at their instance to produce their evidence by the learned Civil Judge/ trial Court and ultimately on an application moved by the respondents/ defendants the learned trial Court was left with no alternative but to invoke the provisions of Order XVII, Rule 3 of C.P.C. by closing the evidence of the plaintiffs/petitioners therefore no interference is called for in the impugned judgments passed by the two courts below.

8. Mr. Mushtaq Ahmad Khan, Advocate learned counsel who also argued the case on behalf of the respondents in support of the learned senior counsel Mr. Abid Hassan Minto, Advocate just raised one point after relying on *Mst. Ghulam Hamid v. Kh., Abdul Rehman* 2010 SCMR 334 and *Burmah Eastern Ltd. v. Burmah Eastern Employees, Union and others* PLD 1967 Dacca 190 that the alleged agreement dated 31-7-1970 sought to be specifically performed by the plaintiffs/petitioners did not bear the signature of any of the defendants therefore no liability was created against the defendants, of the suit and specific performance of such an agreement cannot be legally enforced and the plaintiffs have no cause of action at all to pray for the relief claimed by them in the suit and that the learned trial Court has rightly exercised the provisions of Order XVII, Rule 3 of C.P.C. for closing the right of the petitioners to produce the evidence after giving them sufficient opportunities for the purpose and no interference is called for in the impugned judgments and decrees in peculiar circumstances of the case.

9. I have considered the arguments of the learned counsel for the parties and have perused the record.

10. Although the facts of the case are a bit chequered and complicated one but only one factor needs to be highlighted which is paragraph No.4 of the plaint in which clause 6 of the agreement dated 31-7-1970 has been reproduced by the plaintiffs/petitioners. This is relevant and is reproduced:---

"(6) The first part hereby undertakes to surrender in favour of second party the rest of portion "C" as described in order dated 16-3-1970 of the Settlement Commissioner, Lahore. In case the Association of Mr. Aslam Hayat is cancelled by Deputy Settlement Commissioner or any other higher Settlement Authority or Court and this portion is restored to party No.1 a separate agreement and an agreement of Association shall be executed by party No.1, within two days of the final order and will be submitted immediately for approval of the Settlement Authorities. In case, however, this portion is not restored to party No.1, Party No.2 will be at liberty to fight out its case independently in respect of the disputed portion as against party No.1 and Mr. Muhammad Aslam Hayat. This however, will not effect in any manner the terms and conditions with regard to surrender of portion ABCD by first party in favour of second party and with regard to the delivery of possession of the northern portion, marked ADEF to Mr. Abdul Mannan of party No.1, by Mr. Fazal-e-Mahmud, Advocate who is holding this portion as Trust for the purpose of faithful implementation of this agreement. The first party, however, undertakes to faithfully and diligently pursue litigation against Muhammad Aslam Hayat in case the disputed portion "C" between party No.1 and Muhammad Aslam is restored to party No.1, the latter shall surrender the same to party No.2 by separate agreement and deed of Association."

11. A reading of the above mentioned clause-6 of the alleged agreement dated 31-7-1970 which was sought to be specifically enforced through the suit by the petitioners highlights that through clause-6 an undertaking was attributed to the Party No.1 of the agreement to execute a further agreement in favour of Party No.2 within two days of the final order to be passed by the Settlement Authorities on the agreement of association submitted before the Settlement Authorities. This factor raises serious question about the specific enforceability of the agreement dated 31-7-1970 in the eye of law as to whether a suit for specific performance for such an agreement which only postulates an undertaking to execute a further agreement in favour of the other executants of the agreement creates any right in favour of the plaintiffs for seeking specific enforcement of the agreement in question or not?

12. The jurisdiction to be exercised by this Court under section 115 of C.P.C. is wide enough to look into the aspect of the possibility and enforceability of the agreement sought to be performed through the suit for specific performance by a plaintiff. The litigation in the instant case commenced in the year 1983. The issues were framed as long as back on 23-6-1983. The matter remained kept pending on one pretext or the other for the disposal of miscellaneous matters and particularly from 22-1-1998 to 2-5-1998, the plaintiffs were allowed a number of opportunities by the learned Civil Judge at their instance and requests to produce the evidence. The order dated 7-2-1998, 20-2-1998, 21-3-1998 and 11-4-1998 are sufficient prove of the anxiety of the learned

trial Court to accommodate the plaintiffs/ petitioners to produce their evidence. The order dated 2-5-1998 is relevant and is reproduced:

"Atif Amin, counsel for the plaintiff has placed on the file a medical certificate of Behram J. King, one of the plaintiffs in the certificate it has been written that Behram J. King is advised to take complete bed rest for two weeks from 30th April to 14th May, 1998. Atif Amin, learned counsel for the plaintiff is stating at bar that he wants to produce only one witness on behalf of the plaintiff and the witness Behram J. King is ill and therefore, the case may be adjourned. The plaintiff No.2 is present in the Court but learned counsel for the plaintiff does not want to examine her as witness. As mutually agreed between the parties and in view of the medical certificate of Behram J. King, now to come up for recording of evidence of the plaintiff/ statement of Behram J. King only on 16-5,-1998. It is again mentioned here that in this case repeated adjournments are granted with a view that next date will be considered as the last date for recording of evidence of the parties but on each date, it has not been recorded due to certain problems as is evident from the order sheet. Now on the next date it is presumed and expected that statement of Behram J. King shall be recorded at 9 a. m. The date has been fixed with the mutual consent of the learned counsel for the parties, keeping in view their availability and convenience.

Learned counsel for the parties therefore, shall ensure by themselves their availability at the fixed time and date."

13. The learned trial Court thus apart from dealing with the miscellaneous matter raised at different stages of the litigation allowed sufficient opportunities to the petitioners with specific dates at specific time to produce their evidence and the plaintiffs failed to avail of these opportunities. A number of last and final opportunities were also noted by the learned trial Court in the interim orders which the plaintiffs failed to avail of.

14. The case-law relied upon by the learned counsel for the petitioners is distinguishable. In the judgment *Javaid Akhtar Nawaz v. Mehr Kabir* 1990 CLC 1122, the case was adjourned on various dates at the request of the defendant of the suit and it was closed on the date on which the case was not adjourned at the request of the defendant. The adjournment in the present case for producing evidence was given at the instance of the plaintiffs and the last order dated 2-5-1998 clearly indicates the application of mind by the learned Civil Judge in this context and ultimately the defendants Nos.1, 2 and General Attorney of the defendants Nos.3 and 8 were forced to move an application under Order XVII, Rule 3 of C.P.C. for closing the right of the plaintiffs to produce their evidence and for the immediate decision of the suit and after hearing the arguments in view of facts and circumstances of the case learned Civil Judge closed the evidence of the plaintiffs/petitioners. The other case-law *Qutab-ud-Din v. Gulzar and 2 others* PLD 1991 SC 1109 cited by the learned counsel for the petitioners is also distinguishable on its own facts and does not support the case of the petitioners.

15. The case-law relied upon by the learned counsel for the respondents as well as by the learned Additional District Judge in his judgment dated 28-3-2003 reported as *Maulvi Abdul Aziz Khan v. Mst. Shah Jahan Begum and 2 others* PLD 1971 SC 434 and *Abdul Shakoor and*

others v. Province of the Punjab and 4 others 2005 SCMR 1673 sufficiently support the case of the respondents. In exercise of my jurisdiction under section 115 of C.P.C., I also find that no purpose will be served by setting aside the impugned judgments and decrees passed by the two courts below in the light of clause (6) produced by the petitioners/plaintiffs in paragraph No.4 of the plaint. The parties have been litigating for the last 17 years the plaintiffs are not in possession of any portion of the subject land and the forum of the suit is also rendered materially defective and it would not be just and appropriate to force the parties to start the proceedings once again after remanding the matter when the facts and circumstances of the instant case as narrated in the plaint do not sufficiently make out the existence of any possibility of the enforceability of the agreement in question in favour of the petitioners.

16. Thus I am not inclined to interfere in the matter in peculiar circumstances of the instant case and find no merits in the instant Civil Revision which is dismissed with no orders as to costs.

A.R.K./A-40/L

Revision dismissed.