

2010 CLC 1196

[Lahore]

Before Mian Shahid Iqbal and Nasir Saeed Sheikh, JJ

MUHAMMAD HANIF and others---Appellants

Versus

RAMZAN BIBI and others---Respondents

R.F.A. No. 405 of 2004, heard on 3rd May, 2010.

Specific Relief Act (I of 1877)---

---Ss. 12 & 19---Contract Act (IX of 1872), S.73---Civil Procedure Code (V of 1908), O.XVII, R.3---Suit for specific performance of agreement to sell and recovery of damages---Trial Court closed defendant's right to produce evidence, decreed the suit for specific performance but dismissed the claim of damages---Appeal was dismissed by High Court for being time-barred---Plaintiff contended that defendant having failed to execute registered sale-deed by revoking general power of attorney in favour of his nominee, entrusted with execution of registered sale-deed, was liable to pay damages eleven times the sale price of suit-land as per penal clause of the agreement---Defendant controverted plaintiff's averment maintaining that both specific performance and penalty could not be granted to plaintiff---Validity---Plaintiff was entitled to compensation under S.73 of Contract Act, 1872 if he established loss caused by non fulfilment of contractual obligation by vendee of the agreement to sell but no such loss was proved to have occurred by the plaintiff during trial---In order to seek compensation for the loss caused by non-performance of the contract, plaintiff had to serve a notice upon the vendor and raise a demand of compensation for breach of the agreement but no such notice was, admittedly, served by plaintiff---Plaintiff could either seek specific performance of the agreement or enforcement of penalty clause, if any, incorporated in the agreement---Damages were claimed by plaintiff on the ground of cancellation of power of attorney in favour of his nominee but the same having been cancelled only after three years, since the execution of the agreement, could not be termed a violation of the agreement leading to enforcement of penalty clause---Cancellation of power of attorney, by itself; did not constitute refusal to perform agreement to sell---Plaintiff could not prove any specific monetary loss equivalent to the amount claimed in the plaint---Impugned judgment and decree of Trial Court did not suffer from any illegality---Appeal was dismissed in circumstances.

Danishmand v. Syed Rashid Afzal 1986 MLD 141 and Mrs. Mussarat Shaukat Ali v. Mrs. Safia Khatoon 1994 SCMR 2189 distinguished.

Hakim Ghulam Rasool v. Sh. Imdad Hussain and another PLD 1968 Lah. 501 rel.

Mian Muhammad Rafiuddin for Appellants.

Mian Muhammad Ayub for Respondents.

Date of hearing: 3rd May, 2010.

JUDGMENT

NASIR SAEED SHEIKH, J.---The respondents entered into an agreement to sell dated 22-1-1995 with the appellants for the sale of land measuring 19 kanals, 4 marla situated in village Hadali, District Sialkot for a sum of Rs. 300,000. At the time of the execution of the agreement to sell, the possession of the subject property was also handed over to the appellant by the respondents after receiving the entire sale price. The respondents also executed general power of attorney on the same day in favour of Muhammad Sadiq a nominee of the appellant, for completion of the transaction of sale in favour of appellant. The respondents in the year 1998 revoked the general power of attorney executed in favour of Muhammad Sadiq, nominee and the execution of registered sale in favour of the appellant could not take place. Resultantly a suit for specific performance of the agreement to sell dated 22-1-1995 as well as for the recovery of Rs.38 lacs as damages was instituted by the appellant before the learned Senior Civil Judge, Sialkot on 22-2-1999.

2. This suit was contested by the respondents. The learned Civil Judge framed the following issues out of the divergent pleadings of the parties:--

1. Whether the defendants entered into a sale agreement with the plaintiffs on 22-1-1995 for the sale of suit property? OPD
2. If the above issue is proved, then whether the plaintiffs are entitled to the decree of specific performance against the defendants and recovery of Rs.38,00,000 as damages as prayed for? OPP
3. Whether the plaintiffs have no cause of action? OPD
4. Whether the suit is barred by time? OPD
5. Whether the plaintiffs have come to the court with unclean hands? OPD
6. Whether the suit of the plaintiffs is liable to be dismissed.
7. Relief

3. The appellant produced oral as well as documentary evidence. The respondents failed to produce their evidence during the trial and their right to produce evidence was closed by invoking the penal provisions under Order XVII Rule 3 of C.P.C. and vide judgment and decree dated 7-5-2004 the learned Civil Judge 1st Class granted a decree for specific

performance in favour of the appellants. The relief claimed by the Appellants in the suit with respect to the recovery of Tawaan/damages of Rs.38,00,000 was however rejected. It is also admitted by the respondents that an R.F.A. No.275/05 was preferred against the judgment and decree dated 7-5-2004 passed by the Civil Judge, which R.F.A. was dismissed by this Court on 16-5-2006 on the ground of being barred by time.

4. Through the instant R.F.A. the refusal of the learned Civil Judge, the relief of recovery of Tawaan/damages of Rs.38,00,000 has been challenged by the appellant.

5. It is contended by the learned counsel for the appellant that in the agreement (Exh. P1) a specific condition was incorporated that if the respondents cancel the general power or attorney from the name of the nominee Muhammad Sadiq, then Tawaan/damages to the extent of eleven times of the sale price fixed in agreement shall be paid by the respondents to the appellant, thus the learned counsel for the appellant has argued that while granting the decree for specific performance of the agreement to sell (Exh.P1) the entitlement of the appellant for the recovery of Rs.38,00,000 was also made out keeping in view the contents of the agreement to sell (Exh.P1). Learned counsel for the appellant has relied upon the provisions of section 73 of Contract Act read with section 19 of Specific Relief Act to contend that in such like situation the appellant can pray for awarding of compensation in addition to the relief of specific performance in a suit for specific performance of the agreement. The learned counsel also relied upon the case law Danishmand v. Syed Rashid Afzal 1986 MLD 141 and Mrs. Mussarat Shaukat Ali v. Mrs. Safia Khatoon 1994 SCMR 2189 in support of his contentions.

6. Learned counsel for the respondents controverted the arguments of the learned counsel for the appellant and has contended that in order to invoke the provisions of section 73 of the Contract Act, it has to be established by the plaintiff that he has suffered some loss on account of the non fulfillment of the agreement to sell by the vendor and thus be compensated. The learned counsel relied upon Hakim Ghulam Rasool v. Sh. Imdad Hussain and another PLD 1968 Lahore 501, to contend that a plaintiff in a suit for specific performance can either claim for the relief of specific performance or for enforcement of the penalty clause mentioned in the agreement to sell. The learned counsel argued that both the reliefs simultaneously cannot be claimed by nor can be granted to the plaintiff and the Civil Judge has rightly declined the relief of recovery of damages to the appellant.

7. We have considered the arguments of the learned counsel for the parties and have perused the record.

8. The bare perusal of section 73 of Contract Act points out that plaintiff is entitled to compensation by invoking the provisions of the said section provided he establishes suffering of corresponding loss by him due to non fulfillment of contractual obligations by the vendee of the agreement to sell. Learned counsel for the appellant has candidly admitted before this Court during the arguments that no such loss has been either alleged or proved during the trial by the appellant. The learned counsel only pointed out that on account of the cancellation of the power of attorney by the respondents, executed in favour of the nominee Muhammad Sadiq, the sale-deed could not be executed in their favour and

civil suit had to be filed before the Civil Judge in order to seek the enforcement of the agreement to sell wherein a decree for specific performance was subsequently passed and therefore on account of this litigation the appellants have suffered huge loss. However on Court query, learned counsel for the appellant admitted that the specific loss of Rs.38,00,000 as claimed, has not been established through any positive evidence produced by the appellant.

9. The facts of the cited case 1986 MLD 141 point out that only Rs.10,000 was awarded by the Court on proof of specific loss in that case. The facts of the' said case are distinguishable from those of the present case. The second judgment cited by learned counsel for the appellant Mrs. Mussarat Shaukat Ali v. Mrs. Safia Khatoon and others 1994 SCMR 2189 also lays down the proposition that in order to seek compensation for the loss due to non performance of a contract, plaintiff has to serve a notice upon the vendor and raise a demand of compensation for breach of the agreement. The learned counsel frankly admitted that no such notice was served by the appellant upon the respondents alleging the accruing of some loss as claimed in the plaint. The facts of the case so cited by the learned counsel for the appellant are also not helpful to the case of the appellant.

10. The judgment PLD 1968 Lah. 501 cited by the learned counsel for the respondents is directly applicable to the facts and circumstances of the present case wherein the proposition of law has been laid down by a learned Division Bench of this Court that in a suit for specific performance the plaintiff can either seek specific performance of the agreement and if he opts for that relief then he is not entitled to the enforcement of the penalty clause, if any, incorporated in the agreement.

After applying mind to the facts of the instant case, we find that the appellant is claiming damages on the ground that the power of attorney as executed by the respondents in favour of nominee Muhammad Sadiq was cancelled on 28-10-1998, whereas, the agreement to sell was executed on 22-1-1995. The suit in the present case was instituted on 22-9-1999 and the respondents cancelled the power of attorney after the expiry of a period of three years from the date of execution of the agreement and it cannot be held that this act of the respondents be termed as a violation of the agreement to sell leading to the enforcement of the penalty clause. Moreover the cancellation of the general power of attorney from the name of the nominee Muhammad Sadiq does not itself constitute a circumstance that the respondents in fact refused to perform the agreement to sell as such. We are more persuaded to follow the law laid down as PLD 1968 Lahore 501 coupled with the fact that the appellant did not prove any specific monetary loss to the extent of the amount claimed in the plaint as compensation. Therefore, we do not find any illegality in the impugned judgment and decree passed by learned Civil Judge/Trial Court whereby the prayer with respect to the awarding of Tawaan/damages was declined by learned Civil Judge to the appellants.

11. In view of the above circumstances, there is no force in this RFA, which is dismissed with no orders as to costs.

A.R.K./M-312/L

Appeal dismissed.

