

Stereo. H C J D A-38.

JUDGMENT SHEET

IN THE LAHORE HIGH COURT AT LAHORE

JUDICIAL DEPARTMENT

R.S.A. No. 70 of 2004

Manzoor Ahmad etc. Vs. Muhammad Anwar Khan etc.

J U D G M E N T

Date of hearing	<u>14.1.2011.</u>
Appellants by	<u>S.M.Tayyab, Advocate</u>
Respondents No.1 & 2 by	<u>Sh. Naveed Shahryar, Advocate</u>
Respondent No.4. by	<u>Mr. Yasir Islam Sheikh, Advocate</u>

NASIR SAEED SHEIKH, J:- This RSA is directed against the judgment and decree passed by the learned Civil Judge Hafizabad dated 11.09.2001 in a suit for specific performance instituted by respondents No.1 & 2 decreeing the suit in favour of the said respondents and the judgment and decree dated 15.4.2004 passed by the learned Additional District Judge Hafizabad whereby an appeal against the judgment and decree of the learned trial Court dated 11.9.2001 was dismissed.

2. Briefly stating the facts of the case are that the respondents No.1 & 2 claimed an agreement to sell dated 26.6.1995 Exh.PW3/2 in their favour of land total measuring 55 kanals 1 marla owned by the respondents No.3 & 4 in the manner that Masood Akram respondent No.3 was owner of land measuring 20 kanals 9 marlas whereas Mst. Saleem Begum respondent No.4 was owner of 35 kanals 12 marlas situated in village Wani, Tehsil and District Hafizabad (at that time). The respondents No.1 & 2 instituted a suit on 4.12.1995 for specific performance of the agreement dated 26.6.1995 against the respondents No.3 & 4 before the learned Civil Judge Hafizabad.

3. It was pleaded by the respondents No.1 & 2 that they had purchased land through agreement to sell dated 26.6.1995 for a

consideration of Rs.609,500/- out of which sale price an amount of Rs.50,000/-has been paid as earnest money and that in spite of repeated requests the respondents No.3 & 4 are not executing sale deed in their favour therefore the suit for specific performance be decreed. Respondents No.1 & 2 further claimed the relief of possession of the subject land as well in the same plaint. The present appellants Manzoor Ahmad, Abdul Ghafoor and Noor Ahmad claimed to be subsequent vendees of the subject land through two mutations No.639 & 640 Exh.P7 & P8 respectively which mutations were incorporated in the revenue record admittedly on 05.12.1995. During the pendency of the suit, these subsequent vendees moved an application under Order 1 Rule 10 CPC for being impleaded and they were accordingly impleaded as defendants No.3 to 7 by the learned trial Court. Present appellants submitted written statement dated 24.2.2001 contesting the suit on a number of legal as well as factual grounds. The respondents No.3 & 4 also contested the suit and submitted a separate written statement. The learned Civil Judge framed the following issues:-

ISSUES

1. *Whether the plaintiffs abode by the terms and conditions of the disputed agreement to sell and they were ready and willing to perform the part of contract on their part?OPP*
2. *If issue No.1 is proved in affirmative, whether the plaintiffs are entitled to the relief of specific performance of the contract of sale?OPP*
- 2-A.*Whether the plaintiffs are also entitled to the decree for possession of the disputed land as consequent relief?OPP*
3. *Whether the plaintiffs have no cause of action for this suit?OPD*
4. *Whether the plaintiffs are estopped by their words and conduct to bring this suit?OPD*
5. *Whether the plaintiffs have come to the court with unclean hands and they are not entitled to the discretionary relief?OPD*
6. *Whether the suit is frivolous and vexatious and the defendants are entitled to special costs, if so, to what extent?OPD*
7. *Relief.*

4. The parties produced their respective evidence. The learned Civil Judge while deciding the controversy passed a decree in favour of the respondent No.1 & 2 vide judgment and decree dated

11.9.2001. The respondents No.3 & 4 opted not to appeal against the judgment and decree passed by the learned Civil Judge and it is only the appellants, subsequent vendees who preferred an appeal against the judgment and decree of the Trial Court which came up for hearing before the learned Additional District Judge and was dismissed vide judgment and decree dated 15.4.2004.

5. The instant RSA has been instituted against the judgments and decrees passed by the two courts below.

6. It is contended by the learned counsel for the appellants that they are bonafide purchasers in good faith for value and that they had no notice of the first agreement to sell entered between the respondents No.1 & 2 and the respondents No. 3 & 4 respectively. The learned counsel for the appellants has also raised objection on the maintainability of the suit on the ground that the agreement to sell was executed by the respondents No.3 & 4 in favour of three persons respondents No.1 & 2 as well as one Amjad Ali who admittedly had died before the institution of the suit and that the suit was instituted without impleading the legal heirs of the said Amjad Ali therefore the suit as instituted by the respondents No.1 & 2 was legally defective and is liable to be dismissed. The learned counsel for the appellants has relied upon the judgments reported as Messrs AMAN ENTERPRISES, SIALKOT Vs. Messrs RAHIM INDUSTRIES PAKISTAN LTD. SIALKOT and another (PLD 1993 SC 292), MUHAMMAD YOUSAF and others Vs. ALLAH YAR and others (1993 CLC 2337), MEHMOOD ALI and 4 others Vs. Mst. NAZIRAN BIBI and 10 others (PLJ 2004 Lahore 771), ATTA HUSSAIN KHAN Vs. MUHAMMAD SIDDIQUE KHAN AND OTHERS (1979 SCMR 630), HASHWANI HOTELS LIMITED Vs. GOVERNMENT OF PAKISTAN through Secretary Ministry of Finance and others (2007 scmr 1131), ABDUL MATEEN and others Vs. Mst. MUSTAKHIA (PLJ 2006 SC 230), Haji MUHAMMAD DIN Vs. Malik MUHAMMAD ABDULLAH (PLD 1994 SC 291) and ABDUL QAYUM through Legal heirs Vs. MUSHK-E-ALAM and another (2001 SCMR 798).

7. This appeal has been contested by the learned counsel for the respondents No.1 & 2 whereas the learned counsel for the

respondents No.3 & 4 did not opt to contest the appeal. It is argued by the learned counsel for the respondents No.1 & 2 that the present appellants do not have any *locus standi* to challenge the judgment and decree passed by the learned Civil Judge as well as the judgment and decree passed by the District Judge, on the grounds that the judgment and decree passed against the respondents No.3 & 4 has attained finality because the said respondents No.3 & 4 elected not to file any appeal against the judgment and decree passed by the learned Civil Judge.

8. The learned counsel for the respondents No.1 & 2 further argued that the present appellants did not raise a plea that they are *bonafide* purchaser without notice of the subject land in the written statement nor did they claim the framing of an issue on this plea. The learned counsel for the respondents No.1 & 2 further argued that the appeal of the appellants is hit by the principles of *lis-pendens* as narrated u/s 52 of the Transfer of Property Act 1882 and therefore they cannot raise any objection either on legal or factual basis on the maintainability of the suit in any form. Reliance has been placed on judgment reported as MUHAMMAD SHARIF VS. MST. FATEH BANO and others (2004 SCMR 813). The learned counsel for the respondents No.1 & 2 has further argued that the mutation incorporated in the revenue record takes effect from the date of its incorporation and admittedly in the instant suit the agreement to sell dated 26.6.1995 Exh.PW3/2 was not denied to have been executed by the respondents No.3 & 4 and the appellants were fully in the knowledge of this fact that the agreement to sell has been executed and that the said agreement to sell was not cancelled by the vendees-respondents No.3 & 4 through any legally recognized method of cancellation of the agreement, therefore, they are prohibited by the provisions of section 52 of the Transfer of Property act 1882 to enter into any transaction of disposing of the subject property during the pendency of the suit which was instituted on 4.12.1995 by the respondents No.1 & 2. It was further argued by the learned counsel that even in the statement as DW2 got recorded by the defendant/appellant Abdul Ghafoor it is crystal clear that the appellants did not take any reasonable steps to

enquire from the respondents No.1 & 2 of the fate of the agreement to sell dated 26.6.1995 before purchasing the subject land.

9. The learned counsel for the respondents No. 1 & 2 thus argued that the plea of bonafide purchasers without notice is not available to the appellant in view of the peculiar circumstances of the instant case.

10. I have considered the arguments of the learned counsels for the parties and have perused the record with their able assistance.

11. Admittedly the agreement to sell dated 26.6.1995 Exh.PW3/2 has been executed between the parties i.e. respondents No.1 & 2 on the one side and the respondents No.3 & 4 on the other side. This agreement to sell dated 26.6.1995 has not been denied by the respondents No.3 & 4 in their written statement but only plea raised by them in the written statement is that the period prescribed in the agreement to sell for performance of the respective obligations of the contracting parties elapsed therefore the agreement to sell dated 26.6.1995 lost its legal efficacy and that the said respondents No.3 & 4 were in need of money and resultantly they sold away the subject land in favour of the present appellants. The present appellants did not take the plea in their written statement that they are bonafide purchasers without notice. Section 41 of the Transfer of Property Act 1882 gives some protection to bonafide purchasers in the circumstances mentioned in the section 41 which is reproduced below:-

41. Transfer by ostensible owner.- - Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it.: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

12. The perusal of the written statement submitted by the appellants as well as the statement of the DW2 leaves no doubt in the mind of the Court that the present appellants were in the earlier knowledge of agreement to sell between the respondents No.1 & 2 on

the one side and the respondents No.3 & 4 on the other hand before purchasing the subject land. Although in the examination in chief the defendant No.2 has stated that he went to the office of Sub Registrar Lahore as well as to the District Courts to find out as to whether any sale deed has been registered in favour of the respondents No.1 & 2 by the respondents No.3 & 4 but he did not find any such fact available there and that is the only circumstance pleaded in the evidence by the defendant No.2 to prove making of bonafide effort for satisfying the appellant that there was no legal bar for the respondents No.3 & 4 in selling the subject land to the appellant but the reading of the examination in chief of the DW2 clearly points out that he even did not allege that any effort was made by the appellants to contact the vendees of the agreement to sell dated 26.6.1995 i.e. respondents No.1 & 2 before purchasing of the land through the mutations Exh.P7 & P8 dated 5.12.1995. The appellant did not raise the plea in the written statement that they are bonafide purchasers without notice nor they stated in their evidence that they had no notice of the agreement to sell dated 26.6.1995 prior to their purchase therefore the protection made available to a subsequent vendee u/s 41 Transfer of Property Act 1882 is not extendable to the present appellants.

13. The honourable Supreme Court of Pakistan in the judgment reported as MUHAMMAD SHARIF VS. MST. FATEH BANO and others (2004 SCMR 813) has laid down the law that a vendee hit by the principle of lis-pendens cannot be allowed to argue that the suit instituted for specific performance by the vendee of the original agreement to sell is hit by bar of limitation and is liable to be dismissed. The law laid down by the honourable Supreme Court is explicit on the point that the appellants who are admittedly hit by the principle of lis-pendens purchased the subject land on 5.12.1995 whereas the suit was instituted on 4.12.1995 by the respondents No.1 & 2 therefore they cannot be allowed to raise any objection to the maintainability of the suit instituted by the respondent No.1 & 2 particularly that the judgment and decree passed by the learned Civil Judge has not been assailed by the respondents No.3 & 4. However I have examined the paragraph No.3 of the plaint instituted by the

respondents No.1 & 2 wherein they have stated that third vendee of the agreement to sell dated 26.6.1995 Amjad Ali was the real brother of the other two vendees the respondents No.1 & 2 and he had died without leaving any wife or children as his legal heirs and it is the respondents No.1 & 2 who are the legal heirs of the said Amjad Ali which assertion made by the respondents No.1 & 2 in paragraph No.3 of the plaint have not been seriously disputed by the contesting respondents No.3 & 4.

14. Needless to say that the effectiveness of a mutation incorporated in the revenue entries commences from the date the mutation is attested and reliance is placed upon judgment reported as ZULFIQAR and others Vs. SHAHDAT KHAN (PLD 2007 SC 582). The case law relied upon by the learned counsel for the appellants is not relevant on the proposition argued which are decisive in the controversy involved herein and distinguishable on their respective facts.

15. The two courts below have recorded concurrent finding of facts against the appellants and have decided the matter in accordance with law.

16. I do not find any merit in this RSA which is accordingly **dismissed** with no orders as to costs.

(Nasir Saeed Sheikh)
JUDGE.

APPROVED FOR REPORTING.

AMJAD