

2021 M L D 1313

[Islamabad]

Before Aamer Farooq, J

MUHAMMAD IMRAN and another---Petitioners

Versus

MULTAN and 5 others---Respondents

C.R. No.97 of 2018, decided on 2nd April, 2021.

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

----S.12---Civil Procedure Code (V of 1908), O.VI, R.17 & O.VII, R.11---Suit for specific performance---Amendment in pleadings---Rejection of plaint---Scope---Petitioners, in the presence of an agreement to sell between respondent and vendor, purchased the suit property, as such, they were arrayed as defendants in the suit for specific performance---Petitioners filed application for rejection of plaint whereas respondent filed application for amendment of plaint to incorporate the plea for cancellation of transfer letters---Trial Court accepted the application of respondent whereas dismissed that of petitioners---Validity---Petitioners, in view of S.27 of Specific Relief Act, 1877, had to show that they were bona fide purchasers for consideration without notice of earlier contract and once it was done, the onus would be on the respondent that such was not the case---Plea of respondent could only succeed if the petitioners failed to prove that they were bona fide purchasers for value without notice---Factum of transfer of property having come to light after filing the suit, therefore, plaint was rightly allowed to be amended---No jurisdictional error was committed by the Trial Court---Revision petition was dismissed.

Mst. Ghulam Bibi and others v. Sarsa Khan and others PLD 1985 SC 345 ref.

Muhammad Ashraf v. Ali Zaman and others 1992 SCMR 1442 rel.

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

----S.19---Award of compensation in certain cases in lieu of specific performance---Scope---If in a case, where any person is suing for the specific performance of a contract and seek compensation and the court is of the opinion that specific performance ought not to be granted, the court may hold the plaintiff to be entitled to compensation for that breach.

Kashi Prasad and others v. Baiju Paswan and others AIR 1953 Patna 24; Shakuntla Devi and another v. Harish Chandra and another AIR (39) 1952 Allah. 602; N. Thippu Sultan v. T. Krishnaswami Naidu and others AIR 1955 Madras 591 and Messrs Nigar Pictures, Karachi v. Messrs United Brothers, Lahore and 6 others PLD 1970 Kar. 770 rel.

Zulfiqar Ali Abbasi and Shahid Munir for Petitioners.

M. Wajid Hussain Mughal and Ghulam Qasim Bhatti for Respondent No.1.

Usman Rasool Ghumman for C.D.A.

Ex parte for Respondents Nos.2 to 4 and 6.

Date of hearing: 2nd April, 2021.

JUDGMENT

AAMER FAROOQ J.----Respondent No.1 filed a suit for specific performance of agreement between him and respondent No.2. In the referred suit, the petitioners were arrayed as defendants Nos.4 and 5 along with respondents Nos.2 to 5; subsequently; respondent No.6 was also arrayed as a defendant. The basis, for claim of respondent No.1, was that he purchased Plot No.306-C, Sector F-11/2, Islamabad from Mst. Nasim Akhtar and Muhammad Jan. The total consideration price settled was Rs.1,70,00,000/-. The property was transferred in the name of respondent No.2 being nominee of respondent No.1; the referred transferee paid Rs.80,00,000/- to respondent No.1 out of total sale consideration of Rs.1,70,00,000/-. It is also averred in the plaint that when respondent No.1 demanded balance payment, two cheques were

handed over to him by respondent No.2, which when presented for payment, were dishonoured. The parties then entered into an agreement dated 25.01.2016, whereby respondents Nos.2 and 3 agreed to either repay balance amount or transfer Plot No.2-AC, Margallah Town, Islamabad, which agreement again, was not adhered to by respondent No.2 and he sold the property to respondent No.6, who in turn, transferred the same to the petitioners. Respondent No.6, in her written statement, took categorical plea that she purchased the property from the lawful owner namely respondent No.2 and likewise, petitioners also took the same plea. Respondent No.1 moved an application under Order VI, Rule 17, C.P.C. for amendment in the plaint seeking to incorporate the plea for cancellation of transfer letters in favour of respondent No.6 and the petitioners. The petitioners filed an application under Order VII, Rule 11, C.P.C. for rejection of plaint on the fact that prayer, for specific performance, cannot be allowed, as no cause of action is divulged and the suit is barred by law. Learned trial court, vide impugned order dated 05.03.2018, accepted the application under Order VI, Rule 17, C.P.C. filed by respondent No.1 and dismissed application of petitioners; hence the Civil Revision.

2. Learned counsel for the petitioners inter alia contended that prayer made, in the suit, cannot be granted inasmuch as the property already stands transferred in name of petitioners, hence specific performance of agreement dated 25.01.2016 cannot be made; that since the prayer cannot be granted, the suit does not have any cause of action and plaint is liable to be rejected. It was further contended that in so far as amendments are concerned, they change the nature of the suit hence ought not have been granted. Reliance was placed on cases reported as 'Shah Muhammad v. Atta Muhammad' (2005 SCMR 969), 'Chaudhry Muhammad Sarwar through L.Rs. v. Mst. Aimna Bibi and 2 others' (2006 CLC 1110), 'Shaukat Ali v. Secretary, Industries and Mineral Development, Government of Punjab, Lahore and 3 others' (1995 MLD 123) and 'Raja Ali Shan v. Messrs Essem Hotel Limited and others' (2007 SCMR 741).

3. Learned counsel for respondent No.1 inter alia contended that prayer has been made against respondents Nos.2 and 3 for specific performance of agreement and in case, the same cannot be granted, compensation can be awarded to the plaintiff/respondent No.1. It was submitted that it is trite law that there cannot be piecemeal rejection of plaint. Reliance was placed on cases reported as 'Amir Karim v. Muhammad Asif and 10 others' (2014 MLD 1537) and Shahzad and another v. IVth Additional District Judge, Karachi (East) and 5 others' (PLD 2016 Sindh 26).

4. Arguments advanced by learned counsel for the parties have been heard and the documents, placed on record, examined with their able assistance.

5. The factual background, leading to filing of instant petition, has been mentioned hereinabove, hence need not be recapitulated.

6. It is pertinent to observe that since no one entered appearance on behalf of respondents Nos.2 to 4 and 6, they were ordered to be proceeded ex parte.

7. The petitioners are purchasers of the property mentioned above and they claim that they have purchased it through valid consideration from respondent No.6, who purchased the same from respondent No.2 for valid consideration.

8. The agreement dated 25.01.2016, between petitioners and respondent No.2, is not denied, however in presence of the same, the property was transferred to respondent No.6 initially and then the petitioners; at this juncture, respondent No.1 is seeking specific performance of agreement dated 25-01-2016, when the property already has changed hands. In such an eventuality, section 27 of Specific Relief Act, 1877 is relevant. Under the said provisions, specific performance of contract may be enforced against inter alia (b) any other person claiming thereunder by a title arising subsequently of the contract, except a bona fide transferee for valuable consideration, who has paid the money in good faith without notice of the original contract. In light of referred provision, petitioners as well as respondent No.6 have to show that they are bona fide purchasers for consideration without notice of earlier contract and once it is done, the onus would be on plaintiff/respondent No.1 that such is not the case. It is only if the petitioners and respondent No.6 fail to prove that they are bona fide purchasers for value without notice, that plea of respondent No.1 for specific performance may succeed. In this behalf, Hon'ble Supreme Court of Pakistan, in case reported as 'Muhammad Ashraf v. Ali Zaman and others' (1992 SCMR 1442), observed as follows:-

"S.27(b) Subsequent vendee for consideration without notice of original contract-Right

and remedy-Initial burden would be on person who wanted to take benefit of exception to subsection (b) of S.27, Specific Relief Act, 1877, to prove with positive evidence that he had no notice of first sale and had purchased property for consideration; Once such proof was finished by subsequent transferee, it was then for original/first purchaser to disprove such assertion by bringing any material as to displace contention of subsequent vendee. Subsequent vendees had been able to show that they had no notice of first sale and had purchased land for value and consideration in good faith. Person setting up original contract had failed to substantiate his claim and had failed to dislodge evidence of subsequent vendee; he even failed to serve any notice on subsequent vendee. Right of subsequent transferee for consideration, having no notice of original contract or of performance thereof, was not affected".

9. Section 19 of Specific Relief Act, 1877 provides for awarding compensation in certain cases. Under the said provision, if in any case, where any person is suing for the specific performance of a contract and seeks compensation and the court is of the opinion that specific performance ought not to be granted, the court may hold the plaintiff to be entitled to compensation for that breach. Indian High Court of Patna, in case reported as 'Kashi Prasad and others v. Baiju Paswan and others' (AIR 1953 PATNA 24), decided as follows:-

Held the suit was essentially one for specific performance of contract. The right to possession sprang out of the contract of sale and when the Court was asked to give relief by giving possession, such a relief was comprised in the relief for specific performance of the contract of sale. The addition of the prayer for possession made no difference. The fact that the defendant second party was not a party to the contract made no difference in law because he derived title from the defendants first party under a sale-deed executed subsequently to the contract. The cause of action for delivery of possession was not different from the cause of action for the specific performance of the contract itself. The defendant second party could defeat the suit only, on the ground that he was a bona fide purchaser for value without notice. The case fell under section 7(x)(a) and not under section 7 (v)(c)".

Likewise, in case reported as 'Shakuntla Devi and another v. Harish Chandra and another' [AIR (39) 1952 Allahabad 602], it was observed as follows:-

"The words 'such suit' occurring in the second para of the section do not refer to a suit for specific performance of a contract in which compensation for its breach has been asked either in addition to or in substitution for such performance. Accordingly, where the Court finds that a contract has been entered into, and there has been a breach of that contract and that it is not possible or desirable to order specific performance of that contract but it is just and proper to award compensation, the Court can make an order allowing compensation to the aggrieved party even without a specific prayer in the plaint".

In case reported as 'Athar Jamath Majith by its president, Mohamed Jamesha Rowther and by its secretary 'N. Thippu Sultan v. T. Krishnaswami Naidu and others' (AIR 1955 Madras 591), it was observed as follows:-

"In a suit for specific performance, the wide discretion a Court has in granting relief to the two parties to the contract is incapable of strict definition and must depend on the facts of each case. Thus, even though the suit for specific performance brought by a vendee is dismissed, yet the Court may in its discretion order the vendor to return the amount deposited with him by the vendee, through the vendee has not prayed for it".

In case reported as 'Messrs Nigar Pictures, Karachi v. Messrs United Brothers, Lahore and 6 others' (PLD 1970 Karachi 770), it was observed as follows:-

"Contrary to the terms of the mortgage deeds in the judgment cited, not only does section 29 of the Specific Relief Act prohibit the plaintiff from filing separate suits for specific performance and for damages, but section 19 of the said Act further prescribes that "any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for such performance". It also empowers the Court to grant damages in lieu of or in addition to decree for specific performance. In view of the express provisions of section 19 learned counsel's argument that the plaintiff could not have sued both for specific performance and for damages in the first suit is totally devoid of merit".

10. In view of above judgments, it is clear that even if the prayer for compensation has not

been made, the court can still grant compensation under section 19 of Specific Relief Act, 1877, where it decides that specific performance ought not to be granted but the contract is admitted and the plaintiff is to be compensated, hence the argument by the petitioners that compensation cannot be granted, is not legally correct.

11. In so far as application for amendment of the plaint by respondent No.1 is concerned, the plaintiff (respondent No.1) seeks to incorporate the plea that allotment letters, in favour of petitioners and respondent No.6, be cancelled. The cause of action or the basis of this plea originates from original cause of action, which plaintiff/respondent No.1 has against respondents Nos.2 and 3. Since the factum of transfer of property came to light after filing the suit, hence amendment in the pleadings/plaint. The referred amendments do not change nature of the suit, as they stem from the agreement between respondent No.1 and petitioners. Reliance is placed on case reported as 'Mst. Ghulam Bibi and others v. Sarsa Khan and others' (PLD 1985 SC 345).

12. Learned trial court, while dismissing application filed by petitioners and allowing the one filed by respondent No.1, has not committed any jurisdictional error warranting interference.

13. For what has been stated above, instant petition is without merit and is accordingly dismissed.

SA/120/Isl.

Petition dismissed.