

2023 C L C 2019

[Peshawar]

Before Syed Arshad Ali, J

SAHIB GUL and 3 others----Petitioners

Versus

SOUCHA GUL and others----Respondents

Civil Revision No.384-P of 2019 with C.M. NO.647-P of 2021, decided on 5th May, 2023.

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

---Ss. 12, 42 & 54---Transfer of Property Act (VI of 1882), S. 53-A---Suit for specific performance of agreement to sell, declaration and permanent injunction--- Specific enforcement of an agreement to sell, grant of---Possession of suit-property having been delivered to the vendee/plaintiff---Effect---Balance consideration, non-payment of---Claim of the plaintiff was that part payment of consideration remained unpaid owing to absence of the vendors/defendants being involved in criminal case---Trial Court passed conditional decree in favour of the plaintiff by directing him to pay the balance amount, which judgment and decree were maintained by the Appellate Court---Contention of the petitioners/defendants was that the suit-property was given on rent to the respondent /plaintiff---Validity--- There was no evidence` on record that petitioners / defendants had raised any objection or had filed any criminal proceedings against the respondent/plaintiff for usurping their property---Even otherwise, the contention of the petitioners/defendants was beyond their pleadings because the same was never asserted in the written-statement that the respondent/plaintiff was in possession of suit-property being their tenant---Grant of specific performance of an agreement to sell pertaining to immoveable property had always remained a discretionary relief and even in the cases where the agreement to sell was established before the Court, the relief of specific performance was refused on equitable consideration, however, the Court was not denuded of the authority to consider the conduct of parties to the agreement and balance of convenience and inconvenience of the parties while adjudicating the enforceability of an agreement, subject-matter of the lis---Plaintiff was in permissive possession of the suit-property and was running his ice-factory on the same---During the period when he was installing factory at the premises, the petitioners/defendants never objected---Balance consideration of the agreement, having been executed more than twenty years ago, had remained unpaid---High Court modified the decree to the extent of balance consideration by holding that respondent / plaintiff was bound to compensate the petitioners/ defendants by paying amount according to the present market value (of that portion of property for which the consideration remained unpaid); and that said amount would be ascertained by the Executing Court---Revision was disposed of accordingly.

Farzand Ali and another v. Khuda Bakhsh and others PLD 2015 SC 187 ref.

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

---Ss. 12, 42 & 54---Transfer of Property Act (VI of 1882), S. 53-A---Suit for specific performance of agreement to sell, declaration and permanent injunction---Consensus ad idem, element of---Possession of suit-property delivered to the vendee/plaintiff---Effect---Agreement not signed by vendors---Inconsequential---Trial Court passed conditional decree in favour of the plaintiff by directing him to pay the balance amount, which judgment and decree were maintained by the Appellate Court---Claim of the plaintiff was that part payment of consideration remained unpaid owing to absence of the vendors/defendants being involved in criminal case---Validity---Evidence adduced in the present case showed that agreement-in-question was not signed by the petitioners/defendants but facts and circumstances of the case, more particularly the transfer of possession of the suit-property to the respondent/plaintiff, installation of ice factory, obtaining of electricity connection etc by him (respondent/plaintiff), clearly showed that the said transaction (execution) was, although executed by someone else (defendant other than the petitioners) but with the approval of the petitioners---Even the respondent/plaintiff was able to establish the part-payment to one of the petitioners by producing two marginal witnesses---In such circumstances, non-signing of agreement by all the petitioners/defendants was of no consequence when the respondent/plaintiff was able to establish 'consensus ad idem' between the parties being the basic inherent element relating to execution of agreement, thus there was clarity regarding the disputed property and its consideration---High Court modified the decree to the extent of balance consideration by holding that respondent/plaintiff was bound to compensate the petitioners/defendants by paying amount according to the present market value (of that portion of property for which the consideration remained unpaid more than twenty years ago); and that said amount would be ascertained by the Executing Court---Revision was disposed of accordingly.

Messrs Jamal Jute Baling & Co., Dacca v. Messrs M. Sarkies & Sons, Dacca PLD 1971 SC 784 ref.

Zia ur Rehman for Petitioners.

Abdul Hafeez for Respondents.

Date of hearing: 20th March, 2023.

JUDGMENT

SYED ARSHAD ALI, J.---Soucha Gul, the respondent No.1/plaintiff on 26-4-2004 had filed a suit bearing No.291/1 Neem of 2004 seeking therein a decree for declaration permanent injunction and specific performance of agreement dated 3-3-2001 ("Agreement"). It is averred in the plaint that the suit property belonged to the legal heirs of Mian Gul, who are defendants Nos.1 to 4 and through intervention of defendant No.5 Muhammad Yousaf, Agreement was executed between the parties wherein the price of land per marla was fixed as Rs.19,000/- and total sale

consideration of the entire land was fixed as Rs.1,520,000/-. An amount of Rs.210,000/- was paid upfront and later Rs.450,000/- was paid to defendant No.5 for onward payment to defendant No.4, who is the mother of defendants Nos.1 to 3. An amount of Rs.50,000/- was paid to defendant No.1 Sahib Gul before the target date i.e. 4-11-2001 and thus the total amount of Rs.710,000/- was paid. Since defendants Nos.1 to 3 were absconding in criminal case, therefore, when they were released, the plaintiff had requested them for execution of the deed but to no avail. The plaintiff has further averred that he obtained possession of the disputed property and had also installed an Ice factory on the same which was in running condition and had also obtained electricity/telephone connections for the said Ice factory.

2. Defendants Nos. 1 to 4 contested the suit through their written statement and denied the execution of any deed between the parties. Defendant No.5 who had allegedly brokered the execution of Agreement between the parties filed separate written statement wherein he has confirmed the execution of the Agreement between the parties and payment of part of sale consideration. The learned trial Court from divergent pleadings had framed various issues, however, the essential issue before the Court was execution of Agreement.

3. The bone of contention between the parties is the execution of Agreement. Agreement was produced before the Court as Ex.PW.5/1 and according to the Agreement, it was executed on behalf of legal heirs of Mian Gul, namely, Niaz Gul, Sahib Gul, Nawaz Khan and Mst. Khybaro through Muhammad Yousaf son of Haji Said Khan. According to Agreement, Muhammad Yousaf had undertaken that he represents all the owners and the sale consideration was fixed as Rs.19,000/- per marla and the total consideration was Rs. 1,520,000/-. Muhammad Yousaf has acknowledged receipt of an amount of Rs. 210,000/- as earnest money whereas an amount of Rs. 550,000/- was payable by or before 05.04.2001 and the remaining amount was payable within eight months i.e. by 04.11.2001. The plaintiff in support of his case has produced the following evidence.

Multan Khan Patwari Halqa appeared before the Court as PW-01 and has produced the revenue record in the form of Jamabandi for the year, 2001-2002 and 2005-2006 (Ex.PW.1/1 and Ex.PW.1/4). In cross-examination, he has also produced Goshwara Milkiat (Ex.PW1/3 and Ex.PW 1/5) of the owner of the property.

Noorul Amin Khan Commercial Assistant of the PESCO appeared before the Court as PW-02, who produced the relevant record relating to obtaining of electricity connection by the plaintiff for which he had applied on 19-3-2001 and accordingly the electricity was connected/energized to the premises.

Hafeezullah Senior Clerk Town IV, Peshawar appeared before the Court as PW-03. This witness has produced a licence which was issued in favour of the plaintiff for establishing Ice factory by the Local Government and exhibited as Ex.PW.3/1 and Ex.PW.3/2. The licence was renewed over period of time on annual basis.

Muhammad Aslam Sub-Divisional Officer PTCL appeared before the Court as PW-04, who has produced the relevant record whereby a telephone connection was connected to the premises and exhibited as Ex.PW.4/1.

Fazal Hussain one of the marginal witness of the Agreement appeared before the Court as PW-05, who in his testimony has confirmed the contents of the Agreement, the part payment of sale consideration and transfer of possession to the plaintiff.

Azeemullah is another witness of the Agreement, who appeared before the Court as PW-06 and has also confirmed the contents of the Agreement.

Hazrat Nabi appeared before the Court as PW-07. This witness has confirmed the receipt of an amount of Rs. 50,000/- to defendant No.1 Sahib Gul, however, in cross-examination he has confirmed that documentary evidence.

Haji Munawar Khan is the other witness of the said transaction who appeared before the Court as PW-08.

Soucha Gul, the plaintiff himself appeared before the Court as PW-09 and supported the contents of the plaint, Agreement and part payment of the sale consideration.

The deed writer Mukhtiar Ali appeared before the Court as PW-10 and has stated that he scribed the Agreement which was produced in the Court as EX.PW.5/1.

Nawaz Khan one of the legal heirs of Mian Gul appeared before the Court as DW-01 and stated that they had constructed a boundary wall around the disputed property measuring 02 kanal for the last twenty years and had also installed a saw machine. However, they were booked in a criminal case FIR No. 43 dated 18.01.2001 and later they were allowed bail by the High Court. During the said period, the property was given on rent to the plaintiff, however, later he had denied the title of the plaintiff over the suit property. He has denied execution of any Agreement between the parties, however, in his cross-examination, he has confirmed that the plaintiff is in possession of the property and he has installed an Ice factory on it. The defendants in support of their claim have also produced Hayat (DW-02) and one Taj Muhammad (DW-03), who have supported the statement of defendant No.1 regarding the installation of saw machine in the suit property and renting it to the plaintiff.

4. The perusal of the aforesaid evidence would show that defendants Nos. 1 to 4 are owners of the property and their possession is recorded in the column of cultivation. The Agreement was executed on behalf of defendants Nos. 1 to 4 by Muhammad Yousaf, who has also received part of the sale consideration. However, the crucial evidence in this case is the transfer of possession of the suit property to the plaintiff, installation/establishment of Ice factory by the plaintiff in the suit premises which at the relevant time was in running condition. However, the Agreement is neither signed by defendants Nos. 1 to 4 nor there is any evidence which could suggest that Muhammad Yousaf had paid the part of sale consideration to defendant Nos. 1 to 4. Much reliance of the plaintiff beside oral evidence is on section 53-A of the Transfer of Property Act, 1882 that pursuant to Agreement the plaintiff had obtained possession of the suit property. There is no evidence on record that the defendants have raised any objection nor has filed any criminal proceedings against the plaintiff for usurping their property. Though defendant No.1 while appearing in the Court has stated that the suit property was given on

rent to the plaintiff when they were released by this Court on bail, however, this plea/evidence is beyond pleading because it was never asserted in the written statement that the plaintiff is in possession of the suit property being their tenant, therefore, this evidence is not worth consideration being beyond the pleading. Grant of specific enforcement of an agreement to sell pertaining to an immovable property has always remained a discretionary relief and even in the cases where the agreement to sell was established before the Court, the Court may refuse to allow the relief of specific performance of agreement on equitable consideration. Farzand Ali and another v. Khuda Bakhsh and others (PLD 2015 Supreme Court 187). However, the Court is not denuded of the authority to consider the conduct of parties to the agreement and the balance of convenience and inconvenience of the parties while adjudicating the enforceability of an agreement, subject-matter of the lis.

5. The close perusal of the entire evidence would show that though Agreement was not signed by defendants Nos.1 to 4 but the other facts and circumstances of the case more particularly the transfer of possession of the suit property to the plaintiff, installation of Ice factory, obtaining of electricity connection etc would clearly show that the said transaction was though executed by Muhammad Yousaf but with the approval of defendants Nos. 1 to 4. Even the plaintiff was able to establish the part payment to defendant No.1 by producing two marginal witnesses, namely, Fazal Hussain and Azeemullah. In such a circumstance, non-signing of Agreement by defendants Nos. 1 to 4 is of no consequence when the plaintiff was able to establish 'consensus ad idem' between the parties being the basic inherent element relating to execution of Agreement. There is clarity regarding the disputed property and its consideration. Messrs Jamal Jute Baling & Co., Dacca v. Messrs M. Sarkies & Sons, Dacca (PLD 1971 Supreme Court 784). This Court is conscious of the fact that admittedly, the plaintiff had not paid the entire sale consideration within the stipulated period nor even during proceedings before the Court has opted to deposit the said amount in the Court in order to exhibit his willingness to perform the Agreement, however, the evidence would show that the plaintiff has invested huge amount of money by installing an Ice factory in the premises. This fact is even admitted by the defendants in their evidence, however, there is no concrete evidence regarding the quantum of investment, however, one fact is very clear that the plaintiff is in permissive possession of the disputed property and running his business on the same. During the said period when the plaintiff was installing Ice factory in the premises, the defendants have never objected to it. Both the courts below while appreciating the evidence has held that the evidence produced by the plaintiff inspires confidence and thus have decreed the suit in favour of the plaintiff. This Court in its limited jurisdiction has very less jurisdiction to interfere in the said findings.

6. The learned courts below have passed a conditional decree in favour of the plaintiff by directing him to pay the balance amount of Rs.810,000/-, however, in my humble understanding, the said direction requires little bit interference. The Agreement was executed in the year, 2001, therefore, the consideration fixed in the year, 2001 which remained unpaid till date is not reasonable because the prices of the properties for the last twenty years have increased many fold. Since the

defendants have not received the consideration in time, therefore, the plaintiff is bound to compensate the defendants by paying the present market value of the property (that portion of the property for which the consideration remained unpaid). The said amount shall be determined by the Executing Court within one month from the date of judgment of this Court and after determination of the said amount, the plaintiff shall deposit the same within a period of one month, failing which, the conditional decree passed in favour of the plaintiff would stand revoked and as a consequence thereof, the suit of the plaintiff would stand dismissed.

The Civil Revision disposed of accordingly.

MQ/193/P Order accordingly.

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