IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI
MR. JUSTICE MUHAMMAD ALI MAZHAR
MR. JUSTICE SHAHID WAHEED

CIVIL PETITION NO.1133-L OF 2016
(Against the judgment dated 15.02.2016 passed by Lahore High Court, Lahore in Civil Revision. No. 997/2010)

Rao Abdul Rehman (deceased) through legal heirs ...Petitioner

Versus

Muhammad Afzal (deceased) through legal heirs and others ...Respondents

For the Petitioner: Agha Muhammad Ali, ASC

For the Respondents 2 to 5: Mr. Jam Khursheed Ahmed, ASC

Date of Hearing: 16.01.2023

JUDGMENT

MUHAMMAD ALI MAZHAR, J. This civil petition for leave to appeal is directed against the judgment dated 15.02.2016 passed by the learned Lahore High Court, Lahore in Civil Revision No.997 of 2010 whereby the revision application filed by the petitioner was dismissed.

2. The transient features of the case are that Muhammad Feroz (deceased) and Muhammad Afzal (respondent No.1) were the owners of 10 Marlas according to Khewat No. 621, Khatuni No.579, Qilla Numbers 15/3, 16/2/2/, 16/3/1 in the land situated at village Bherowal, Tehsil Phalia, District Mandi Baha-ud-Din. ("**Suit property**"). On 19.03.2008, the petitioner filed Civil Suit No.59/2008 for declaration with an alternate prayer for decree of specific performance of an agreement to sell dated 30.11.1993. In the aforesaid suit the petitioner pleaded that he entered into an agreement to sell with Muhammad Feroz (decd.) for the aforesaid property in lieu of sale consideration amounting to Rs.1,60,000/- out of which Rs.70,000/- was paid in the presence of witnesses as earnest money while the

remaining amount was agreed to be paid on 18.01.1994, subject to which the sale deed would be executed. It was further alleged that on 17.01.1994 the respondents received the remaining consideration, thus completing the sale and executed another agreement on the same date i.e. 17.01.1994 with the condition that a registered deed and/or mutation in favour of the petitioner would be executed at the petitioner's desire. The petitioner demolished the old structure constructed on the property. It was further contended that after the death of Muhammad Feroz (vendor) his heirs resiled from the agreement to sell, hence the petitioner filed a civil suit. The suit was contested by the respondents and they filed written statements to the effect that both the agreements to sell are forged and the suit is also time-barred. On the contrary, the evidence led by the respondent No.2 divulges that due to registration of FIR against the respondents in a murder case, they left the village and during their absence, the petitioner encroached upon the plot. After recording the evidence, the Trial Court decreed the suit to the extent of declaration, but declined the relief of specific performance of the alleged agreements. The respondents filed an Appeal which was accepted by the Appellate Court and as a consequence thereof, the judgment of the Civil Court was set aside. Being aggrieved, the petitioner filed a Civil Revision in the Lahore High Court which was dismissed *vide* Judgment dated 15.02.2016.

3. The learned counsel for the petitioner argued that the transaction was completed after the vendors had received the sale consideration and handed over the possession of the suit property to the vendee and since then the petitioner was in peaceful possession of the property in dispute. It was further contended that the learned Additional District Judge as well as the learned High Court failed to appreciate the evidence. He further argued that the non-signing of the agreement by the vendee was of no consequence when the agreement was signed by the vendor. It was further contended that the sale agreements were proved in evidence despite the fact that the marginal witnesses had died, but the Appellate Court and High Court ignored the evidence available on record. Finally, the learned counsel averred that the learned High Court relied on the dictum laid down by this Court in the case of Farzand Ali & another Vs. Khuda Bakhsh & others (PLD 2015 SC 187), which was subsequently revisited by this Court in the case of Muhammad Sattar and others Vs. Tariq Javaid and others (2017

SCMR 98), hence the reliance placed by the learned High Court on Farzand Ali case was ill-founded.

4. The learned counsel for the respondents, while supporting the judgment of the learned Appellate Court and High Court, argued that the judgment and decree passed by the learned Trial Court was against law and facts. He further argued that the learned Trial Court failed to appreciate the evidence, including the documents of Mutations No. 2301 and 130 dated 23.02.2008 and 18.04.1974. He further argued that due to the registration of a criminal case, the respondents were out of the village and also denied having handed over possession of the suit property to the petitioner. He further argued that when the respondents had run away from the vicinity, then the question of receiving the remaining sale consideration did not arise. He further argued that no agreement was signed by the respondent No.1 who is a co-owner of the property in question, hence in his absence the alleged agreement was otherwise not enforceable and the learned Trial Court itself declared that the agreements were not proved, but under misconception of law granted the declaratory decree which was rightly set aside by the learned Appellate Court.

5. Heard the arguments. The gist of the evidence led in the Trial Court reflects that the petitioner adduced evidence as PW-1 and produced Muhammad Abdullah and Matloob Ahmad as PW-2 and PW-3. The alleged agreements were produced as Ext.P/1 and Ext.P/2 along with some other documents, including a copy of the Khasra Girdawari as Ex.P/9 and a copy of the record of rights from 2004-2005 as Ex.P/10, whereas from the respondents'/defendants' side, Zafar Iqbal appeared as DW-1 and Sultan Ali as DW-2. They produced Mutation No.130 dated 18.04.1974 as Ex.D/1 and Mutation No.2361 dated 23.02.2008 as Ex.D/2, along with a copy of the record of rights from 2004-2005 as Ex.D/3. The learned Trial Court decreed the suit with regard to declaration alone but declined the decree of specific performance. The property in question was measured as 10 Marlas and was jointly owned by Muhammad Feroz and Muhammad Afzal in equal shares. The petitioner in his evidence admitted that the agreement was entered into 1993, but he did not know who the owner of the entire property was and did not check whether Muhammad Feroz was the absolute owner of the property measuring 10 Marlas, but it was an admitted fact that Muhammad Feroz was the owner of 5 Marlas only.

It is also a matter of record that the petitioner claimed to be unaware that the respondents were proclaimed offenders but admitted that they had slipped away. The Civil Suit was filed after 13 years of the execution of the agreements, and at least two years after it came into the knowledge of the petitioner that the whole property was not owned by Muhammad Feroz (decd.). The learned Appellate Court after scanning and reevaluating the entire evidence, rightly reached the conclusion that the agreements were not proved and, in addition, it was further observed that the co-owner Muhammad Afzal never signed the agreements mainly for the reason that the respondents were involved in a murder case, hence they had escaped from Bherowal and during that period, the petitioner illegally occupied the property without ascertaining the proper description of the property as well as its ownership and maintained silence for more than thirteen years. The learned counsel for the petitioner failed to identify any mis-reading or non-reading of evidence or any other material defect in the impugned judgment.

6. It is clear from the chronology of the case that in order to effectively implement or execute the agreements dated 30.11.1993 and 17.01.1994, the petitioner filed the suit for declaration and in alternate decree for specific performance on 19.03.2008, at which point Muhammad Feroz (vendor) had already died. Neither any legal proceedings were initiated by the petitioner during the life time of Muhammad Feroz for properly transferring the title of the property pursuant to the alleged sale agreements, nor did he offer any plausible reason which may justify his act or omission of not approaching a court of law for the implementation of the agreements at the relevant time. According to Section 54 of the Transfer of Property Act 1882, “sale” means the transfer of ownership in exchange for a price paid or promised or part paid and part promised which is made in the case of tangible immovable property of the value of one hundred rupees and upwards or in the case of a reversion or other intangible thing, can be made only by a registered instrument with further rider that a contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties but it does not, of itself, create any interest in or charge on such property. Whereas under Section 42 of the Specific Relief Act 1877, a person entitled to any legal character or to right as to any property, may institute a suit against any person denying, or interested to deny, his

title to such character or right and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief, but according to the attached proviso, no Court shall make any such declaration where the plaintiff, being able to seek further relief than mere declaration of title, omits to do so. The expression "legal character" has been understood to be synonymous with the expression status. A suit for mere declaration is not permissible except in the circumstances mentioned in Section 42 of the Specific Relief Act. The claim of mere declaration as to alleged title does not suffice. It is clear that in the present *lis*, the petitioner was claiming the title merely on the strength of the agreement to sell by one co-owner while the other co-owner never signed any such agreement so it is quite strange that the learned Trial Court, though it dismissed the suit for specific performance on the ground that agreements to sell were not proved, but concomitantly decreed the suit to the extent of declaration which is on the face of it a glaring and patent legal and factual error that was rightly corrected by the learned Appellate Court. On the basis of a sale agreement, no legal character or right can be established to prove the title of the property unless the title is transferred pursuant to such agreement to sell, but in case of denial or refusal by the vendor to specifically perform the agreement despite the readiness and willingness of the vendee, a suit for specific performance may be instituted in the court, but suit for declaration on the basis of a mere sale agreement is not the solution for appropriate relief. This Court in the case of Muhammad Yousaf Vs Munawar Hussain and others **(2000 SCMR 204)**, held that the agreement to sell by itself cannot confer any title on the vendee because the same is not a title deed and such agreement does not confer any propriety right, and thus, it is obvious that the declaratory decree as envisaged by section 42 of the Specific Relief Act cannot be awarded because declaration can only be given in respect of a legal right or character. The only right arising out of an agreement to sell is to seek its specific performance.

7. Under Section 22 of the Specific Relief Act, the exercise of jurisdiction by the Court for decreeing the suit for specific performance of contract is discretionary in nature in which the Court is not bound to grant such relief, but in tandem the discretion is not to be exercised arbitrarily but should be based on sound legal principles after analyzing and gauging the circumstances, *inter alia*, whether the

contract is such which gives an unfair advantage to the plaintiff over the defendant or the performance of the contract encompasses some hardship on the defendant which he could not foresee or whether its non-performance would embroil some hardship to the plaintiff and whether the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance. The person seeking specific performance has to establish that he is enthusiastic and vehement to act upon his obligations as per the contract but the opponent is refusing or delaying its execution. So far as the limitation period for the institution of a lawsuit against non-performance is concerned, the starting point of limitation under Article 113 of Limitation Act, 1908 for institution of legal proceedings enunciates two limbs and scenarios. In the first segment, the right to sue accrues within three years if the date is specifically fixed for performance in the agreement itself whereas in its next fragment, the suit for specific performance may be instituted within a period of three years from the date when plaintiff has noticed that performance has been refused by the vendor but in both scenarios, the right to sue has not been left open ended. In the present case, according to the petitioner the cause of action accrued when legal heirs of Muhammad Feroz declined to acknowledge the alleged agreements signed by their predecessor, therefore, the suit was not time barred. Obviously, the first part of Article 113 of the Limitation Act refers to the exactitudes of its application when time is of the essence of the contract, which means an exact timeline was fixed for the performance of obligations arising out of the contract/agreement hence, in this particular situation, the limitation period or starting point of limitation will be reckoned from that date and not from date of refusal, however, if no specific date was fixed for performance of agreement and time was not of the essence, then the right to sue will accrue from the date of knowledge about refusal by the executant. Ref: Khudadad Vs Syed Ghazanfar Ali Shah alias S. Inaam Hussain and others **(2022 SCMR 933)**.

8. It is also translucent from the impugned judgment of the learned High Court dated 15.2.2016 that while taking into consideration all relevant facts and evidence led in the Trial Court, including the finding of the Appellate Court, the learned High Court has also referred to the judgment in the case of Farzand Ali and another Vs Khuda Bakhsh and others **(PLD 2015 SC 187)** (two member bench) rendered by this

Court on 01.01.2015, which was at the relevant time in field as a binding precedent under Article 189 of the Constitution of Pakistan 1973 which enunciated a principle of law vis-à-vis the doctrine of contract. Indeed in the case of Farzand Ali, while placing reliance on the judgment of Mst. Gulshan Hamid v. Kh. Abdul Rehman and others (2010 SCMR 334) (three members bench), this Court held that in a suit for specific performance, the agreement to sell cannot be enforced if the vendee has not signed the agreement and such unilateral agreement not signed by plaintiff-vendee was not mutually enforceable, whereupon no decree could be passed. However, the subsequent judgment rendered by the five member bench of this Court on 11.11.2016 in the case of Muhammad Sattar and others Vs Tariq Javaid and others **(2017 SCMR 98)** depicts that during the course of arguments before a five member bench of this Court, profound reliance was laid down on the dictum of *Farzand Ali* (supra) with an attempt to persuade the bench to hold that an agreement to sell not signed by the vendee was not enforceable in law. While expatiating all factual and legal issues embroiled in the *lis* and under the dominion of judicial review, this Court eventually reached the conclusion that an agreement to sell not signed by one of the parties, if proved to have been accepted and acted upon, would be a valid agreement to sell and enforceable in law. It was further held that the proposition that where an agreement to sell pertaining to immovable property is not signed by one of the parties thereto is, in each and every eventuality, invalid and not specifically enforceable is fallacious and contrary to the law. The existence and validity of the agreement and it being specifically enforceable or otherwise would depend upon the proof of its existence, validity and enforceability in accordance with the Qanun-e-Shahadat Order, 1984, the relevant provisions of the Contract Act, 1872, the Specific Relief Act, 1877, and any other law applicable thereto.

9. In the aforesaid perspective, the doctrine of prospective overruling is also quite relevant which originated in the American Judicial System. The literal meaning of the term 'overruling' is to overturn or set aside a precedent by expressly deciding that it should no longer be a controlling law. Similarly 'prospective' means operative or effective in the future. According to the dictum laid down in the case of Pakistan Medical and Dental Council & others vs. Muhammad Fahad Malik & others **(2018 SCMR 1956)** the judgments of this Court (Supreme Court) unless declared otherwise operate prospectively. More or less,

similar findings that the law laid down by this Court is prospective which cannot be doubted have been recorded in the case of Sakhi Muhammad and another vs. Capital Development Authority, Islamabad **(PLD 1991 S.C 777)** and Pir Bakhsh and others vs. The Chairman, Allotment Committee and others, **(PLD 1987 S.C. 145).**

10. Another crucial aspect is what constitutes a valid contract between the parties for which undoubtedly one of the essential conditions is *consensus ad idem* for settling all the terms of the contract but, upon perusal of the alleged agreements to sell, we have found that no proper description or even exact location was mentioned to identify the suit property, instead the description of the suit property was jotted down by the petitioner in the plaint rather than in the alleged agreements. Fundamentally the phrase "*consensus ad idem"* in the law of contract connotes and epitomizes a meeting of the minds inured to describe the intention of the parties. This also speaks of the set of circumstances where there is a reciprocal understanding in the manifestation of the contract. Section 10 of the Contract Act, 1872 does not exclude an oral contract from being enforced, although in the case of an oral contract the clearest and more satisfactory evidence would be required by the Court. Admittedly the co-owner, Muhammad Afzal (respondent No.1), had neither signed the alleged agreement, nor he was privy to the alleged sale agreements. It is also an admitted position that the property was not partitioned by metes and bounds which means that no specific portion of the property was earmarked for signifying the specific share or location which could be dealt with independently, including the sale of an individual share out of the joint property. On this score or count also there was no valid contract for the whole property and the agreements were defective with inherent lacunas. According to Black's Law Dictionary (5th Edition), a 'contract' is "an agreement between two or more persons which creates an obligation to do or not to do a particular thing. Its essentials are competent parties, subject matter of a legal consideration, mutuality of agreement and mutuality of obligations." Anson has defined the word contract in the following words: "A contract consists in an actionable promise or promises. Every such promise involves two parties, a promisor and promisee, and an expression of a common intention and expectation as to the act or forbearance promised". Ref: Anson's Law of Contract, 23rd Edition,

by A.G. Guest, 1971, p. 23. According to Treitel, “A contract is an agreement giving rise to obligations which are enforced or recognized by law. The factor which distinguishes contractual from other legal obligations is that they are based on agreement of the contracting parties. This proposition remains generally true, in spite of the fact that it is subject to a number of important qualifications.” Ref: G.H. Treitel, The Law of Contract, Tenth Edition (1999) by Sir Guenter Treitel, Sweet & Maxwell (1999), p. 1. (Source: Moitra’s Law of Contract & Specific Relief, Fifth Edition). No doubt to constitute a valid contract one of the conditions is “*consensus ad idem*” which must exist with regard to the terms and conditions of the contract and, in case of any ambiguity, it may adversely reflect on its very existence. In fact it is a Latin term in the law of contract that means the existence of meeting of minds of all parties involved which is the elementary constituent for the enforcement and execution of a contract and in case of no *consensus ad idem* there shall be no binding contract and in case of any palpable inexactitude or obliviousness in the settled terms and conditions then there shall be no probability to get a hold of any outcome of such defective agreement. Where an effective and enforceable contract is not structured by the parties, it is not the domain or province of the Court to make out a contract for them but the *lis* would be decided on the basis of terms and conditions agreed and settled down in the contract. The decree for specific performance may not be passed if the substratum of the contract suffers from shortcoming or legal infirmities which renders the contract unacceptable and unenforceable.

11. The petitioner in the Trial Court pleaded that he was not aware that the subject property was a joint property. Here the doctrine of *Caveat emptor* (“let the buyer beware”) also applies which is based on a Latin phrase and for all intents and purposes lays down an obligation on buyers to rationally and intelligently scrutinize status including the clear title of the property before embarking into the transaction of sale. This is a rudimentary doctrine stuck between vendor and vendee in all contractual relationships and arrangements. According to Broom’s Legal Maxims (Tenth Edition), Chapter IX, (page 528), the maxim *caveat emptor* applies, with certain specific restrictions, not only to the quality of, but also to the title to land which is sold, the purchaser is generally bound to view the land and to inquire after and inspect the title-deeds, at his peril if he does not. He does not use common

prudence, if he relies on any other security. The ordinary course adopted on the sale of real estates is that the seller submits his title to the inspection of the purchaser, who exercises his own judgment, or such other as he confides in, on the goodness of the title; and if it should turn out to be defective, the purchaser has no remedy, unless he take special covenant or warranty, provided there be no fraud practiced on him to induce him to purchase. Whereas under Black's Law Dictionary (Sixth Edition), page 222, this maxim summarizes the rule that a purchaser must examine, judge, and test for himself. This maxim is more applicable to judicial sales, auctions, and the like, than to sales of consumer goods where strict liability, warranty, and other consumer protection laws protect the consumer-buyer. *Caveat emptor, qui ignorare non debuit quod jus alienum emit*. Let a purchaser beware, who ought not to be ignorant that he is purchasing the rights of another. Let a buyer beware; for he ought not to be ignorant of what they are when he buys the rights of another. While the Words and Phrases (Permanent Edition), Volume 6A (Pages 8 & 9), describes the doctrine of caveat emptor as a rule of law that the purchaser buys at his own risk. Wood v. Ross, Tex.Civ.App., 26 S.W. 148, 149. Under the rule purchaser takes all the risks, being bound to examine and judge for himself as to title of land purchased unless he is dissuaded from so doing by representations of some kind. Kain v. Weitzel, 50 N.E.2d 605, 607, 72 Ohio App. 229. The maxim is used with reference to sales of property with respect to which the buyer must use proper diligence to inform himself as to its quality, and, in the case of real estate, as to its location. The quality of land on which its value depends, and which is too various for a market standard, the purchaser can see, if he will but look. No action lies against the vendor of real estate for false and fraudulent representations as to the location of lands. Land is not like a ship at sea; it has a known location and can be approached, and, even should it be necessary to purchase the land unseen, covenants may be inserted respecting the quality as well as seisin or title. Sherwood v. Salmon, 2 Day, 128, 136. He must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He may not shut his eyes or his ears to the inlet of information, and then say he is a bona fide purchaser without notice. Burwell's Adm'rs v. Fauber, Va., 21 Grat. 446, 463. Whereas the Major Law Lexicon (Fourth Edition), (page 6035-see page number,) the 'rule of *caveat emptor*' means that the buyer is bound to

see that, what he buys, he buys after satisfying himself that there is good title. If a person chooses to buy a property without looking into title he does so at his own and the law will not help him to get rid of the bargain. Gour Kishan v. Chunder Kishore, per Gart T CJ, (1876) 25 SUTH WR 45 (46). In the case of Bahar Shah and others Vs Manzoor Ahmad **(2022 SCMR 284),** this Court held that an honest buyer should at least make some inquiries with the persons having knowledge of the property and also with the neighbors. Whether in a particular case a person acted with honesty or not will obviously depend on the facts of each case. The good faith entails righteous and rational approach with good sense of right and wrong which excludes the element of deceitfulness, lack of fair-mindedness and uprightness and or willful negligence. The purchaser is required to make inquiry as to the nature of possession or title or further interest if any of original purchaser over the property in question at time of entering into sale transaction.

12. In the case of Amjad Ikram vs. Mst. Asiya Kausar **(2015 SCMR 1),** the court held that in case of inconsistency between the Trial Court and the Appellate Court, the findings of the latter must be given preference in the absence of any cogent reason to the contrary as has been held by this court in the judgments reported, as Madan Gopal and 4 others v. Maran Bepari and 3 others (PLD 1969 SC 617) & Muhammad Nawaz through LRs. v. Haji Muhammad Baran Khan through LRs. and others (2013 SCMR 1300).

13. We did not find any infirmity or perversity in the impugned judgment warranting our interference, therefore leave to appeal was declined and the Civil Petition was dismissed by our short order dated 16.01.2023. Above are the reasons of our short order.

Judge

Judge

Judge

ISLAMABAD
16th January, 2023
Khalid
Approved for reporting