

# IN THE HIGH COURT OF SINDH AT KARACHI

High Court Appeal 106 of 2018

Present: **Muhammad Ali Mazhar** and **Agha Faisal, JJ.**

Hamad Illahi

vs.

Abdul Hussain Mohsin Jawad Sajwani

For the Appellant : Mr. Mushtaq A. Memon, Advocate

For the Respondent : Mr. Yousuf Moulvi, Advocate

Dates of Hearing : 16.10.2018, 28.11.2018 & 11.12.2018

Date of Announcement: 15.02.2019

## JUDGMENT

**Agha Faisal, J:** The present appeal was filed assailing the judgment dated 26.03.2018 ("**Impugned Judgment**"), delivered by a learned Single Judge of this Court in Suit 1154 of 2014 ("**Suit**"), whereby the appellant's suit for specific performance was dismissed.

2. Mr. Mushtaq A. Memon, advocate argued on behalf of the appellant and submitted that the appellant had entered into an oral agreement with the respondent for the sale of property, being Bungalow No.55/1, 3<sup>rd</sup> Street, Phase-V, Khayaban-e-Badban, DHA, Karachi ("**Property**"). It was submitted that the agreed sale price was Rs.43,800,000/- and in respect certain amounts were progressively paid. Per learned counsel, while the Property belonged to the deceased wife of the respondent, the oral agreement was entered into with the respondent, who had allegedly represented himself to be acting on behalf of all the legal heirs of the deceased. Learned counsel demonstrated from the record that a receipt was issued by the respondent acknowledging having received an aggregate amount of

Rs.1,650,000/- from the appellant in such regard. Learned counsel submitted that the respondent was required to procure the execution of the conveyance documentation by himself and the remaining legal heirs, being the children of the respondent and his deceased wife. However, the respondent failed to honour the sale agreement and hence the appellant was constrained to file the Suit there against. The learned Single Judge of this Court was pleased to dismiss the Suit vide the Impugned Judgment, therefore, the appellant preferred the present appeal seeking to have the Impugned Judgment set-aside and to have the Suit decreed as prayed with costs.

3. Mr. Yousuf Moulvi advocated the case for the respondent and submitted that the Impugned Judgment had rightfully dismissed the Suit, as the same was prima facie devoid of merit. It was submitted that the Property belonged to the late wife of the respondent and that the respondent had entered into a conditional arrangement with the appellant whereby the transfer/sale of the Property was always subject to the consent of the remaining legal heirs. Since the remaining legal heirs, being the children of respondent and his deceased wife, refused to part with the Property, hence, the respondent advised the appellant accordingly that their arrangement was not possible to conclude on account of the condition precedent attached thereto having not been satisfied.

4. We have heard the arguments advanced by the respective learned counsel and have also appreciated the documentation and authorities arrayed before us. The primary point for determination before us is as follows:

*“Whether the conclusion of the learned Single Judge stipulating the absence of a contract was sustainable in view of the evidence on record.”*

5. The controversy in the Suit was succinctly encapsulated in the issues framed and findings were rendered thereupon by the learned Single Judge. The primary issue was the determination of whether a valid enforceable contract existed and the remaining issues were expressly predicated upon the findings upon the said issue; which was decided in the negative. The preliminary objection raised by the appellant was that while five issues had been framed; the Impugned Judgment was prima facie predicated upon the determination of the first issue and the remaining issues were not dealt with in elaborative detail. In such regard it is noted that while there were five issues framed it is apparent that the subsequent issues were predicated upon the decision of the first issue as it is clearly apparent from the first issue that the subsequent four issues were only to be addressed if the first issue was answered in the positive. It is manifest from the Impugned Judgment that the first issue was answered in the negative, therefore, it was reasonable that the learned Single Judge had no occasion to enter into detailed deliberations upon the consequential issues.

6. Adverting to the merits of the case, it is noted that while the appellant claimed to be aware that the Property was owned by the deceased wife of the appellant yet the appellant chose not to obtain the consent or concurrence of the remaining legal heirs in respect of the appellant's interpretation of the purported oral sale agreement. It is also noted that the remaining legal heirs were not even made party to the Suit and consequently are also not arrayed as party before us in the

present proceedings. We had asked the learned counsel for the appellant as to the reason why the remaining legal heirs were not arrayed in the Suit and in response thereto he submitted that while the appellant was aware that the Property would vest in the legal heirs of the deceased, the appellant was unaware of the names of the children and the same only came within the knowledge when the written statement was filed in the Suit. It is, however, noted that even if the said contention is accepted then even post having come into knowledge of the name of the remaining legal heirs/owners of the Property the appellant opted not to implead them in any proceedings. The receipt issued to the appellant by the respondent was at best on behalf of the respondent and could not be demonstrated to have been at the behest of all the legal heirs. The honorable Supreme Court has maintained in the *Allah Rakha vs. Muhammad Riaz* reported as 2009 SCMR 1045 that an acknowledgment in favor of a third party could not be permitted and accepted, unless it was endorsed and ratified by all the vendors.

7. It has been observed in the case of *Mohammad Ashraf and Another Vs. Mst. Kokab Benazir and Others* reported as 2008 CLC 1398 that a contract for the sale of a Property could not be specifically enforced against a person who did not have title to the suit property. The specific observation of the Court in such regard is reproduced herein below:

“Section 25 of the Specific Relief Act postulates that a contract for the sale or letting of Property whether movable or immovable, cannot be specifically enforced in favour of a vendor or lessor, who knowing himself not to have any title to the Property, has contracted to sell or let the same or that though he entered into the contract believing that he had a good title to the Property cannot, at the time tilted by the parties or by the Court for the completion of the sale or letting give the purchaser or lessee a title free from reasonable doubt, or who, the previous to entering into the

contract, has made a settlement though not founded on any valuable consideration, of the subject matter of the contract.

The scope of section 25 of the Specific Relief Act is very narrow which provides that the seller must be in knowledge that he possesses good title to dispose of the Property and unless the title of the Property devolves in him or he has been invested with specific powers to convey the said Property, he cannot dispose of the Property without proper title of the Property in question.”

8. The primary requirement for the Court to accept the interpretation advanced by the appellant in respect of the oral contract would be to conclude that the said contract, be it oral, existed with or on behalf of the six legal heirs. While the appellant has himself admitted knowledge that the Property was in the name of the wife of the appellant and that the said wife had expired prior to the purported arrangement between the parties, the appellant has been unable to demonstrate that there was any consent, express or implied, conveyed on behalf of all the legal heirs in whom the Property would now vest. The arguments on behalf of the appellant would raise another serious question that whether a father can unilaterally sign away the share of his children in Property belonging to their deceased mother. Learned counsel for the appellant had also argued that if the respondent was considered incapacitated to convey the entire Property then the Impugned Judgment should have considered the possibility of the respondent being able to convey his specific share of the Property. The learned counsel for the respondent had succinctly addressed the said query and submitted that the share of the respondent was indivisible and conjunctive with the share of the other legal heirs hence there was no question of transference thereof and in any event such an eventuality could only be deliberated upon if the appellants interpretation of the oral arrangement was upheld by the learned Single Judge.

9. The integral constituents of an oral contract have been deliberated upon time and time again by the superior Courts and a recent exhaustive pronouncement is in the *Aroma Travels Services (Private) Limited & Others vs. Faisal Al Abdullah Al Saud Al Faisal & Others* reported as 2017 YLR 1579, wherein one of us, Muhammad Al Mazhar, J, observed as follows:

“An oral contract is valid and enforceable but it requires strong and satisfactory evidence vis-a-vis its formation and contents. Where a party seeks to enforce an oral agreement, heavy burden lies on him to prove that a contract is concluded and the terms of oral contract were meant to be given effect to. Where a contract is said to be made orally, the ascertainment of its terms raises in the first place the pure question of fact what did the parties say? The conditions of essential validity are: (i) competent parties; (ii) existence of consent of parties; (iii) consent being free; (iv) existence of consideration; (v) consideration and object being lawful and (vi) the agreement not being expressly declared to be void. No rigid or tenacious stipulation is imparted or divulged under Section 10 of the Contract Act which may rationally exclude the existence of oral contract from being enforced although in the case of seeking enforcement of or specific performance of oral contract, more satisfactory evidence is required to be led. Agreement in writing is not necessary nor mandatorily required under the provisions of Contract Act. The making of the contract or its terms may be proved like any other fact by oral or documentary evidence. Whether a concluded contract has been made or not is a question of fact to be determined in each case by considering all relevant circumstance and facts. No doubt to constitute a valid contract the one of the conditions is "consensus ad idem" which must exist with regard to the terms and conditions of contract and in case of any ambiguity it may adversely reflect on its very existence. In order to convert a proposal or negotiation between the parties into a valid contract, the acceptance of proposal must be absolute and unqualified.”

10. It follows that certainty of parties is an essential and integral constituent in order to establish existence of a contract. In the present case, while the appellant admits the existence of Property, other than the appellant, who are vested with joint ownership of the Property, yet it is averred that the contract for the sale of such Property was only

entered into with the appellant. On this ground alone the touchstone prescribed hereinabove is not satisfied.

11. The learned Single Judge has expounded upon this issue and observed that the evidence led in the Suit, notwithstanding the weightage apportioned thereto, does not bear testament to the consent of the legal heirs being present and thus it was concluded that the appellant had failed to prove that the payments made thereby allegedly constituted an agreement qualified as a contract, liable for specific performance. Learned Single Judge, however, elaborated upon this and observed that the arrangement between the parties could at best constitute understanding to acquire consent of all the owners and not a contract in itself per se. We have found no cavil with the reasoning employed by the learned Single Judge to hold that the payments made by the appellant to the respondent did not constitute a contract.

12. It is further noted that the relief of specific performance is recognized as discretionary relief and cannot be claimed as of right (reliance is placed on the *Mehmooda Begum vs. Syed Hassan Sajjad* reported as *PLD 2010 Supreme Court 952*) since the question of whether there was an enforceable contract was answered in the negative there was no occasion for the Single Judge to consider whether the grant of a specific performance wholly or in part was to be considered or otherwise. The learned counsel for the appellant had argued that even if the consent of the remaining legal heirs was found absent, the learned Single Judge ought to have granted the prayer of specific relief to the extent of the share of the respondent herein. We find ourselves unable to concur with such an argument and are of the view, notwithstanding the fact that post maintaining that no contract was

proven the issue of specific performance became moot in any event, that even otherwise the no case was made out meriting the exercise of such discretion in favour of the appellant herein. The honorable Supreme Court has observed in the *Muhammad Sattar vs. Tariq Jawaid* reported as 2017 SCMR 98 that even if a contract was valid it may not be specifically enforced, however, in the present circumstances since no binding contract was found to exist hence its specific enforcement need not have been considered.

13. It was noted that while the Impugned Judgment dismissed the Suit it also required that all the amount received by the respondent from the appellant be returned to the appellant alongwith profit accrued thereon. It is noted that, vide order dated 14.12.2014, a learned Single Judge had recorded in the Suit that the respondent sought to return the entire sum of Rs.1,650,000/- to the appellant and had even made an application in such regard to enable him to do so. The Court had directed the respondent to deposit the said amount with the Nazir, who was instructed to invest the same in some profit bearing government saving scheme of Pakistan pending the Suit. This demonstrates that the amount paid by the appellant not only remained in the safe custody of the Nazir of this Court but has also been accruing profit thereon and by ordering the return of the aggregated amount to the respondent the Impugned Judgment has ensured that any financial detriment presumed by the appellant is mitigated in the circumstances. The question of loss of bargain need not be addressed as the same was not pleaded by the appellant in the Suit nor any claim was made in such regard at any stage whatsoever.



14. In view of the reasoning and rational contained hereinabove we are of the considered opinion that the learned Single Judge had appropriately determined the case there before by proper appreciation of the evidence and the finding regarding the absence of a contract was duly substantiated by the evidence on record, hence, the Impugned Judgment is hereby maintained and upheld. The present appeal, along with pending applications, is hereby dismissed with no orders as to costs.

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