IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision No. S – 09 of 2007

Muhammad Asghar Arain v.

Atta Muhammad Wagan (deceased) through his Legal Heirs and others

Civil Revision No. S – 10 of 2007

Muhammad Asghar Arain v.

Atta Muhammad Wagan (deceased) through his Legal Heirs

Date of hearing: **28-02-2022**

Date of decision: **28-02-2022**

Mr. Sardar Akbar F. Ujjan, Advocate for the Applicant.
Mr. Najeebullah Jalbani, Advocate for Respondents No.1(a) & 1(b).

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J U D G M E N T

Muhammad Junaid Ghaffar, J. **–** Both these Civil Revision Applications have impugned a common judgment of the Appellate Court dated 10-11-2006 passed in Civil Appeals No.40 and 50 of 2006, whereby the consolidated judgment of the Trial Court dated 27-02-2006 in F. C. Suit Nos.123 of 1996 and 82 of 2002 has been reversed and the Applicant's Suit has been dismissed; whereas, that of the Respondents has been decreed.

2. Learned Counsel for the Applicants has contended that the Appellate Court has erred in law and facts in allowing the Appeal; that no case for performance of the agreement in question was made out; that the Applicant had a valid registered sale deed; that possession was handed over to the Applicant by the seller / respondent No.2, which was then taken over by Respondent No.1 forcefully; that the Applicant was a bona fide purchaser for consideration; hence, both the Revisions be allowed and the impugned judgment of the Appellate Court be set-aside and that of the trial Court be restored.

3. On the other hand learned Counsel for Respondent No.1 has argued that the judgment of the Appellate Court is correct in law and facts; that the Applicant had no locus standi to challenge execution of the agreement as he was not a party; but a stranger to the said agreement; that the sale deed was forged and managed; that possession was never handed over to the

Applicant; that he was not a bona fide purchaser as claimed inasmuch as the agreement was recorded before the concerned revenue authority with objections; hence, it was always in public knowledge; that both the Revisions are liable to be dismissed.

4. Heard learned Counsel for the parties and perused the record.

5. It appears that earlier these Civil Revision Applications were decided through a judgment dated 18-04-2011, whereby both the Civil Revision Applications were disposed of with certain directions. The operative part of the said judgment reads as under:

> **"***Case of the applicant Muhammad Asghar is that after purchase of 50% share in the disputed survey numbers 309 and 310/A on 15-11-1995, possession was handed over by the original owner Ghulam Muhammad to him and he was then subsequently dispossessed in the year 1996 when he cultivated cotton crop. However, with regard to his dispossession, he has not specified as to on what date he was dispossessed. Admittedly, he did not take any legal action in 1996 and upto the filing of his suit in 2002 by complaining that he has been dispossessed by Atta Muhammad. In fact, in evidence he has stated that wheat crop which he alleged that he had cultivated after purchase in November, 1995, Atta Muhammad received his share in the wheat crop. This implies that entire survey numbers 309 and 310/A was in possession of Muhammad Asghar, but in absence of any specific allegation of dispossession, it becomes apparent that Muhammad Asghar was never in possession and it was Atta Muhammad who was in possession of entire survey numbers 309 and 310/A prior to the execution of sale deed dated 15-11-1995 and continued his possession even thereafter. When a property is in possession of a person other than the real on the real owner and the third party intends to purchase the same from the real owner then it is necessary for such purchaser to confirm from the person in possession as to in what capacity he is occupying the land. The person in possession could be a Hari, tenant, illegal occupant, Makatedar or he may be a person who might have entered into a sale agreement with the real owner. This due diligence on the part of buyer is necessary in order to establish that he is a bona fide purchaser for value without notice of any other claim to the property. Ghulam Muhammad was admittedly owner of 50% share in 1995. He on his part has not alleged that he was dispossessed by Atta Muhammad. The subsequent purchaser Muhammad Asghar also failed to establish that he was dispossessed by Atta Muhammad after he entered into sale deed in 15-11-1995. He filed his suit for possession as late as in 2002 though he was holding a registered sale deed since 1995. In absence of evidence that Atta Muhammad at some point of time forcibly dispossessed Muhammad Asghar and occupied 50% share in the disputed land establishes that there already existed a transaction between Ghulam Muhammad and Atta Muhammad with regard to sale of land and for this reason Atta Muhammad came in possession of the disputed survey numbers. In the circumstances, it appears that Ghulam Muhammad after entering into transaction with Atta Muhammad again sold out disputed land to Muhammad Asghar*

and executed registered sale deed along with survey numbers 361 and 301. On account of sale deed executed in his favour, Muhammad Asghar started claiming 50% share in the disputed survey numbers i.e. 309 and 310/A that was already sold by Ghulam Muhammad in favour of Atta Muhammad and handed over its possession as well. Nevertheless, Muhammad Asghar has paid valuable sale consideration to Ghulam Muhammad at the time of execution of sale deed on 15-11-1995, hence while dismissing the suit of Muhammad Ashghar against Atta Muhammad, the appellate Court ought to have granted decree of return of sale consideration which Ghulam Muhammad received from Muhammad Asghar. Let total amount which Ghulam Muhammad received from Muhammad Asghar under sale deed executed on 15-11-1995 be paid by Ghulam Muhammad to Muhammad Asghar along with 10% equalizer/mark-up from 15-11-1995 till its recovery. As to the suit for specific performance of contract filed by Atta Muhammad, the same stands decreed. Let balance sale consideration be deposited by Atta Muhammad in Court. Atta Muhammad is present in Court today and he was asked that as the balance sale consideration of Rs.25000/- has lost considerable valuable in 16 years, therefore, is he agreeable to deposit Rs.300,000/- (Rupees three lacs) before the trial Court within 60 days, to which he reluctantly agreed. This amount though is payable to Ghulam Muhammad, but shall be first adjusted against the claim of Muhammad Asghar against Ghulam Muhammad. Upon deposit of the amount of Rs.300,000/- by Atta Muhammad within stipulated period, sale deed shall be executed by Muhammad Asghar in favour of Atta Muhammad within 30 days. If he fails to do so then the Nazir of the trial Court shall execute before the Sub Registrar sale deed in favour of Atta Muhammad on behalf of Muhammad Asghar.

*Both Revisions Applications are disposed of in the above terms.***"**

6. The Applicant, being aggrieved, had preferred Civil Appeals No. 245-K and 246-K of 2011, which were disposed of by the Hon'ble Supreme Court vide order dated 26-12-2012 in the following terms:

"*After arguing the instant appeals at length, both the learned counsel have frankly conceded that in view of the conflicting judgments of the trial Court and the appellate Court, the learned High Court ought to have recorded its finding about the agreement of sale dated 30.07.1995, executed in favour of the respondents and the plea of bonafide purchasers of the appellants through a registered sale deed dated 15.11.1995 and further whether the respondents proved the execution of agreement of sale or not.*

*We have gone through the impugned judgment and noted that the learned High Court failed to take into consideration all these aspects of the matter in absence of which the appellants cannot be non-sited. Resultantly, the listed appeals are allowed; the impugned judgment is set aside and the cases are remanded to the High Court for decision afresh after hearing the parties.***"**

7. In view of the above observations / directions of the Hon'ble Supreme Court, now this Court is only required to give its finding about the sale

agreement dated 30-07-1995, of which Respondent No.1 had sought specific performance against Respondent No.2 and whether the plea of bona fide purchaser of the Applicant pursuant to a registered sale deed dated 15-11-1995 can be entertained or not.

8. Perusal of the record reflects that Respondent No.1 had filed its Suit for specific performance against Respondent No.2 seeking performance of agreement dated 30-07-1995, which according to the said Respondent, was executed by Respondent No.2 in its favour. Record further reveals that the Applicant on the premise that the said property was owned by him pursuant to a registered sale deed dated 15.11.1995, filed an application under Order I Rule 10 CPC, to be joined as a Defendant in the Suit of Respondent No.1, and apparently, the said application was allowed. Insofar as Respondent No.2 is concerned, he never seriously contested this Suit except as alleged by the Applicant that some affidavit was filed; however, the R & Ps of the said Suit reveals that one of the legal heirs of the said Respondent had filed a written statement and had supported the case of Respondent No.1, which was then consolidated with the Suit of Respondent No.1. Record further reflects that this Suit was pending for some unknown reasons and was never decided finally, when the Applicant filed his Suit No.82 of 2002 that is approximately after six years of the filing of Suit by Respondent No.1. The Applicant's Suit was in respect of declaration, possession, injunction and *mesne* profits and was only filed against Respondent No.1, whereas, Respondent No.2, the purported executant of the Sale deed was never joined as a Defendant.

9. The Applicant's case is that the Suit property was owned by him pursuant to a registered sale deed dated 15-11-1995 purportedly executed by Respondent No.2, who as noted, was never joined as a Defendant in the said Suit. It was further pleaded by the Applicant that the said Respondent No.2 after execution of the sale deed had handed over the possession; whereas, the same was forcefully taken over by Respondent No.1, and therefore, the Suit was only filed against Respondent No.1 and that too in respect of possession only.

10. Insofar as the first point, which needs to be addressed, as per the observations of the Hon'ble Supreme Court, is whether the agreement of sale was properly proved in accordance with law by Respondent No.1. To that, it may be observed, and this is notwithstanding the fact that the Applicant was permitted to be joined as a Defendant, in essence the agreement was either to be accepted or denied by the executant of the

agreement and not by the present Applicant. In a Suit for specific performance, any person, who is not a party or signatory to the agreement, apparently has no *locus standi* to at least put up a case either in favour or against the very execution of the agreement. This Court had confronted the Applicant's Counsel, and in response, it was argued that since the Applicant holds a sale deed in respect of the same property; hence, the Applicant was fully competent and had the *locus standi* to oppose the specific performance of the agreement in question. However, I am not inclined to accept the said contention. It is not in dispute that when the Suit was filed by Respondent No.1, Respondent No.2 was alive and as per the Applicant's case had even sworn some affidavit in support of the Applicant's case. To that, it has been responded by the Counsel for Respondent No.1 that in fact during pendency of the Suit the Respondent No.2 had expired and his legal heirs were brought on record and one of them had filed a written statement supporting the case of Respondent No.1. Therefore, it is word against word; whereas, as none of them had gone through the rigors of evidence and cross examination. Further, the said Respondent No.2 was never joined by the present Applicant in his Suit; nor his legal heirs, to justify and support the stance of the Applicant. As to the very agreement in question, one witness of the agreement was examined; whereas, no specific denial has come on record from the executant's side, and therefore, presumption would be that the agreement was executed. In fact, the written statement of Respondent No.2's legal heir is a matter of record, wherein he has even gone to the extent that his other brothers with lust and greed have connived with the Applicant in managing a forded sale deed on behalf of their father, whereas, his father had sold the property to Respondent No.1 against consideration duly received. As to the strict rule of proving an agreement in terms of Article 79 of the Qanoon-e-Shahadat, Order, 1984, it would suffice to observe that the same applies when the agreement is denied by the executant or parties to the said agreement. In such a situation, in view of the provision of Article 81 ibid, the rigor and rider of the law laid down to that extent would not be an obstacle in the way of the Respondent No.1[1]. The Applicant being stranger to the same, cannot deny the execution of the agreement merely on the ground that subsequently he had purchased the said property from the same seller. In view of such position, mere opposition from the Applicant on the ground that he holds a valid registered sale deed of the property, the agreement in question cannot be discarded when it is supported by various other attending circumstances including possession, Commissioner's

[1] Abbas Ali v Liaqat Ali (2013 SCMR 1600)

report and other documentary evidence on record. Hence, to that extent, the finding of the Trial Court was not proper; whereas, the Appellate Court has come to a correct conclusion.

11. As to the second limb of the Applicant's argument as recorded in aforesaid order of the Hon'ble Supreme Court regarding being a bona fide purchaser, again it is a matter of record that the sale deed of the Applicant is subsequent in time as against the agreement in question. This is coupled with the fact that the Applicant has miserably failed to establish that he was ever in possession and was subsequently dispossessed forcefully. To that it may be observed that the Applicant in his pleadings has miserably failed to state and establish as to on what specific date he was dispossessed. This is very crucial as Respondent No.1 was already an owner and in possession of the said property to the extent of his 50% share, before entering into agreement of sale with Respondent No.2, and then was also handed over possession of remaining 50% upon execution of the sale agreement in question. The Applicant has also failed to establish that after execution of sale deed he was put into possession by Respondent No.2, and was thereafter dispossessed by Respondent No.1. This assertion of being dispossessed also does not carry any weight when his conduct of filing of Suit in 2002 in respect of a cause of action accruing in 1996 is looked into, notwithstanding, and as contended, that the Suit was still within limitation. Here, in the given facts, it is not only limitation which is to be looked into; but in effect it is the conduct of the Applicant which matters more, especially when Respondent No.2 was never joined as a Defendant by him in his Suit. Secondly, it has come on record that Respondent No.1, after execution of the agreement, made efforts to get the sale deed executed, but failed due to one reason or the other and filed a Suit for specific performance. Immediately after execution of the agreement of sale, Respondent No.1 had approached the concerned authorities with a representation of caution that an agreement has been executed in respect of this portion of the property, and therefore, no further transactions ought to be recorded. This document is a matter of public record and was produced before the trial Court by way of statement dated 5.5.2004 filed by the Counsel for the Applicant himself which has an endorsement dated *7.8.1995* to the effect that "*received application from Atta Muhammad Wagan about purchase of the land on the basis of sale agreement dated 30.7.1995 therefore, no fard shall be issued until further orders*". This clearly shows that the execution of agreement was already on record of the concerned Revenue authorities much prior to the execution of sale deed in favor of the Applicant. In that case, how and in what manner the Applicant

can claim benefit of being a bona fide purchaser in not understandable. In the case reported as ***Hafiz Tassaduq Hussain***[2], it has been held by the Hon'ble Supreme Court that the subsequent purchaser has to meet at least four ingredients to establish its case and the one is that he had no knowledge or notice of the original sale agreement between plaintiff (Respondent No.1 herein) and the vendor (his vendor i.e. Respondent No.2 herein) at the time of his transaction with the latter. This destroys the very argument of the Applicant's Counsel that the Applicant was a bona fide purchaser. Nothing more is required to be looked into as apparently the Applicant ought to have remained vigilant in purchasing the property, and the same was done subsequently when the agreement was already in field, and not only this, it had been recorded before the concerned authorities requesting a restraining order in respect of further transfers of the property. How and in what manner a sale deed could have been registered is a big question; however, since the same is not before this Court, it can only be observed that in view of the earlier agreement and proper intimation to the concerned authorities, the purported purchase of the property in question by the Applicant cannot be held to be a bona fide purchase, and therefore, this argument also goes against the Applicant.

12. As to the claim and protection of a party being a bona fide purchaser in terms of section 41 of the Transfer of Property Act, 1882, the same is already a settled proposition and one need not go into any further discussion; nonetheless, the Hon'ble Supreme Court very recently in the case of ***Bahar Shah***[3] has once again elucidated the same by making reference to earlier precedents in the following terms;

> 7. The presupposition of know-how or prior notice of earlier agreement of the same property stem from calculated abstention from an enquiry by the alleged bona fide purchaser. A conscious and purposive circumvention of an enquiry and due diligence which a buyer ought to have made would always communicate a presumption of definite notice. In a position taken as bona fide purchaser, it should be established by a fair preponderance of the evidence and the fact of notice may be inferred from the circumstances as well as proved by direct evidence. An honest buyer should at least make some inquiries with the persons having knowledge of the property and also with the neighbors. An equitable interest can be hammered or resisted by a bona fide purchaser for value without notice of the legal interest in the property but it is also significant that section 27(b) of the Specific Relief Act shields and safeguards the bona fide purchaser in good faith for value without notice of the original contract which is in fact an exception to the general rule. The doctrine of purchaser without notice embodies the maxim that "where equities are equal the law will prevail". Under Section 3 (Interpretation Clause) of Transfer of Property Act 1882, "a person is said to have notice" of a fact when he actually knows that fact, or when, but for willful abstention from an inquiry or search, which he ought to have

[2] Hafiz Tassaduq Hussain v Lal Khatoon (PLD 2011 SC 296)
[3] Bahar Shah v Manzoor Ahmed (2022 SCMR 284)

> made, or gross negligence, he would have known it. Explanation II, further expounds that "Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof".

13. As noted hereinabove, it has come on record that the Applicant has failed to establish that he was ever in possession, whereas, the learned trial Court had appointed a Court Commissioner for examining this aspect and the said Commissioner vide his report dated 16.9.1996 informed the Court that it was Respondent No.1 who was all along in possession. It is established from the record that respondents were in possession of the land in question, cultivating the same, thus the appellant ought to have made an inquiry prior to purchasing the land in question, whether the same encumbrance in any manner and how the respondents are cultivating the land instead of the person from whom they are purchasing the same[4]. Further reliance may also be paced on the case of ***Mst. Rubina Badar***[5].

14. In view of hereinabove facts and circumstances, no case is made out; hence, by means of a short order announced in the earlier part of the day, both these Civil Revision Applications were **dismissed** and these are the reasons thereof.

J U D G E

Abdul Basit

[4] Abdul Jabbar v Mst. Maqbool Jan (2012 SCMR 947)
[5] Mst. Rubina Badar v Long Life Builders (2012 SCMR 84)