

JUDGMENT SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD.

IInd Appeal No. 11 of 2016.

Date of Hearing: 23.05.2022.
Date of order: 23.05.2022.

Appellant: Abdul Aziz Qureshi through Mr. Ayatullah Khowaja
Advocate.

Respondent No.6 to10: Mst. Rasheeda Begum & others through Mr. Aqeel
Ahmed Siddiqui Advocate.

Mr. Allah Bachayo Soomro A.A.G. Sindh.

J U D G M E N T

MUHAMMAD SHAFI SIDDIQUI, J.- I have heard both learned counsels
and perused the material available on record.

2. There was a dispute between one Syed Afzal Ahmed Shah [respondent
No.2] and his brothers, sisters and mother hereinafter referred as respondents
6 to 10. It is a case of these respondents No.6 to 10 who filed a suit No.67 of
2007 against Syed Afzal Ahmed Shah that by fraud he acquired all rights in the
property through a registered sale deed and has eventually disposed it off to
one Abdul Karim [respondent No.1] in the year 2000, who at that time was a
sitting tenant of the premises. Present appellant acquired rights from last
transferee [respondent No.1].

3. Before notices of the aforesaid suit in the year 2004 could have been
issued, the property was disposed of and purchased by appellant through a
registered sale deed in the year 2003. Although a pauper suit was filed in the
year 2003, but ultimately notices were issued to the parties when a pauper suit
was registered, in the year 2004, as alleged.

4. The respondents 6 to 10 Mst. Rasheeda and others then moved an
application to implead the appellant as party and consequently he was arrayed
as defendants and an amended title was filed, but neither any specific relief
sought against this appellant nor any evidence led to overcome defence of

appellant as he claimed protection under section 27 of the Specific Relief Act read with Section 41 of the Transfer of property Act. It had to be proved independently through independent and impartial evidence that the appellant is purchaser of the property having knowledge of such dispute and has purposely entered into such transaction to deprive the respondents No.6 to 10 from their lawful shares.

5. On the strength of the available evidence the appellate court came to the conclusion that the suit was liable to be decreed although the trial court dismissed the suit. Not only that the appellate court jumped to a conclusion contrary to finding of trial court but reached a further conclusion that even the appellant's title does not hold authority and would collapse automatically on account of annulment of sale deed of Syed Afzal Ahmed Shah.

6. I am afraid that such sale deed of appellant as being enjoyed by appellant cannot be set-aside automatically as the defence of the appellant is protected being buyer without notice of any dispute. As stated above it has to be proved independently through impartial evidence failing whereof the aforesaid provisions of law would protect the title of appellant. Section 27(b) is for enforcing performance against those who acquired title with knowledge of previous agreement/contracts, whereas section 41 of Transfer of Property Act protect title for those who acquired title without knowledge of previous litigation. Since it is a case of cancellation of sale deed I am of the view that section 41 of Transfer of Property Act is more appropriate for its application and is reproduced as under:

“41. Transfer by ostensible owner. Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.”

7. Buying property without public notice may be an irregularity but cannot always be kept at par with malafide. In 1999 CLC 296 [Messrs RAEES

AMROHVI FOUNDATION (REGD) v. MUHAMMAD MOOSA and others learned Single Judge [Mr. Justice Sabihuddin Ahmed] held as under:-

“18. It may be observed that under section 41 of the Transfer of Property Act when a person ostensibly being the owner of the property transfers the property for consideration to the transferee and such transfer is questioned on the ground that the transferor had no legal power to vacate the same, the transferee may be exempted from its consequences, provided, he establishes that he has taken reasonable care to ascertain the power of the transferor and has acted in good faith. This is known as the Caveat - emptor Rule and requires the transferee apart from acting in good faith to take all reasonable care to apprise himself of any defect. In the transferor's title or clog on his power to effect the transfer. On the other hand, section 27-B, of the Specific Relief Act contemplates that equity of Specific Performance may not be enforced against a person who has subsequently purchased the property and paid his money in good faith and without notice of the original contract. It may be observed that the duty to ascertain contemplated by section 41 of the Transfer of Property Act is not stipulated in the Specific Relief Act. Apparently, there is rationale for this difference. Under the Transfer of Property Act the purchaser can, with reasonable diligence, discover a defect in the plaintiffs' title or a legal clog on his power of disposition by making an inquiry from relevant public authorities. However, it is not possible to do so in cases here only agreements are sought to be enforced because no public records of mere agreements to sell properties are available and such agreement can indeed be oral as well. Therefore, by the mandate of Legislature the burden on the transferee under the Specific Relief Act is less onerous and Specific Performance against him can be refused if it is shown that he acted in good faith and was not aware of a pre-existing equity in favour of some other person. Therefore, respectfully disagreeing with the view taken by the Lahore High Court and following the precedents of the Honourable Supreme Court and a Division Bench of this Court I am inclined to hold that the defendant No.6 was only required to prove that he was not aware of the agreement between the plaintiffs and the defendant No.3 at the time of execution of the sale-deed.

19. The defendant No.6 stated on oath that he was not aware of any such agreement and the seller i.e. the defendant No.1 has also stated the same. Learned counsel for the plaintiffs relied upon the deposition of the defendant No.4 who contended that he had informed the defendant No.6 about the agreement and by the agreement, dated 24-7-1985 the said defendant had undertaken to settle plaintiffs' claim. This agreement (Exh.6/2), however, was made on 24-7-1985 i.e. after the execution of the sale-deed and does not show that the defendant No.6 had notice of the agreement, prior to the execution of the sale-deed.”

8. Prima facie there is no evidence that appellant had knowledge of title dispute between his predecessors. I therefore, in view of above deem it appropriate to set-aside the judgment and decree of the appellant court however, since the observation/findings of the appellate court, to the extent of aforesaid provisions of law is not available, I remand the case to it [appellate

court] for re-hearing and for passing a speaking order specifically with reference to referred law and all other relevant documents, evidence and exhibits that has come on record of the trial court, without prejudice to any observation in this order.

9. The question of limitation as applicable to a suit, challenging first sale deed being registered instrument, may also be taken into consideration by the appellate court as it is claimed that registration of a document itself is a notice and knowledge to the respondents No.6 to 10. It is expected that the appeal be decided after hearing the parties and / or their counsel in a period of four [04] months.

JUDGE

A.