

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

**Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Jawad Akbar Sarwana**

(1)

High Court Appeal No. 34 of 2023

Dr. Nafees Zubair
Versus
Saeeda Bano & others

(2)

High Court Appeal No. 35 of 2023

Dr. Nafees Zubair
Versus
Saeeda Bano & others

(3)

High Court Appeal No. 44 of 2023

Uzma Amjad Ali & another
Versus
Dr. Nafees Zubair & another

Date of Hearing: 16.11.2023
Date of short order: 16.11.2023
Date of Reasons: 29.11.2023

Appellant in HCA 34 and 35 of 2023: Through Mr. M. Arshad Tayebaly along with Mr. Talha Javed Advocates.

Respondents No.2 and 3 in HCA 34 and 35 of 2023: Through M/s. Ikram Ahmed Ansari and Ayaz Ahmed Ansari Advocates.

Appellant in HCA 44 of 2023: Through M/s. Ikram Ahmed Ansari and Ayaz Ahmed Ansari Advocates.

Respondents in HCA 44 of 2023: Through Mr. M. Arshad Tayebaly along with Mr. Talha Javed Advocates.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- These three appeals involve two suits; one filed for cancellation of the agreement to sell dated 11.02.2005 whereas the other suit seeks performance of the same agreement. Since more or less facts are common, we propose their disposal by this common judgment. High Court Appeal No.34 of 2023 is taken up as leading appeal and hereinafter we refer the parties in line with this appeal.

2. We have heard learned counsel appearing for the parties and perused material available on record.

3. In suit for cancellation of agreement filed by respondents No.2 and 3 their primary consideration was that their mother (respondent No.1) also as defendant in the suit, was only benami/ostensible and that for all intent and purposes they (daughters) are real owners of the property and the agreement was not liable to be performed; whereas in the suit for performance appellants pleaded that on the strength of title documents i.e. Form-A lease and Form-B lease, she (defendant No.1/ mother) is the only owner under the law and that after obtaining latest search certificate (at the relevant time), public notice was issued and cut of date of 30.04.2005 was set as performance date in the sale agreement, sale consideration of which was agreed at Rs.3 Crores out of which Rs.60 lacs was paid in advance to the Respondent No.1/ mother.

4. A legal notice for performance of the agreement was issued to respondent No.1 on 19.04.2005 wherein the appellant had also disclosed that her daughters have filed suit for cancellation, referred above. While the suit for cancellation was pending, appellant also filed suit for performance after above notice and sought injunctive order.

5. The injunction in the suit for cancellation of agreement was granted on 26.03.2005 however balance sale consideration was not offered by the appellant, either at the time of ad-interim order or on the day of its confirmation i.e, 04.09.2006.

6. Appellant's contention that she should not have suffered if the court had not directed her to deposit the balance consideration, is not inspiring in view of facts of case as even the respondents should not have suffered. It is for appellant to have moved an application and/or urged to deposit such amount. However since performance is equity

based, court is obliged to perform equity as performance is not vested right.

7. Appellant thus enjoyed the amount that remained unpaid out of the total sale consideration, whereas now in the year 2023 she intends to seek performance of an agreement, after a delay of almost 18 years by offering to pay what she agreed to pay 18 years before. She had though, enjoyed the balance unpaid amount that remained with her and has not been deposited or paid to the respondents or secured one way or the other while seeking injunctive order, but now also intends to enjoy the enhanced value of the property, which is by now exceeds to many folds and according to the appellant's own statement it now worth about Rs.18 Crores or above.

8. The performance however was declined in view of conclusion drawn by the learned Single Judge on different counts that there was an oral gift executed by the mother (respondent No.1) in favour of her two daughters/respondents No.2 and 3 (plaintiffs of suit for cancellation). We would not approve that such an oral gift in the presence of valid and subsisting title in the shape of lease-A and B in favour of Respondent No.1 (mother), could form an obstacle in seeking performance against her, with whom an agreement was entered into by the appellant. In order to clarify the effects, we may observe that an oral (unregistered) gift alone, or any private communication between donor and donee, would not be an obstacle in seeking performance against the title holder being a last registered instrument.

9. As we have noticed in the impugned judgment, the performance of agreement was declined on the basis of oral gift (unregistered) executed by the owner in favour of two daughters and the Deed of Redemption since the property was mortgaged by respondent No.1. The conclusion drawn in the impugned judgment is that the obligation to

make the due diligence in respect of the official record was not performed. Admittedly, the gift relied upon by the respondent No.1 favouring respondents No.2 and 3 was an unregistered gift. In fact an affidavit was sworn to the extent that the gift was executed. The affidavit is available at page-485 to 487 of High Court Appeal No.34 of 2023. How this unregistered affidavit could be traced in the office of sub-registrar, is inconceivable. Similarly, Deed of Redemption is nothing but release of documents to three individuals, as “during mortgage” it was desired (as disclosed) by the mortgagor Mst. Saeeda Bano (Respondent No.1) that she intends to gift the property to her daughters. For appellant this correspondence is extraneous. All that was required and advised by bank against the request of gift, is to mark lien if at all “valid gift” is to be executed and consequently the documents were released on payment of outstanding loan. This Deed of Redemption is no doubt claimed to be a registered instrument however this Redemption Deed is just a privileged document between the mortgagor and the mortgagee but the Redemption Deed itself does not confer title to the two daughters. The title was always with the respondent No.1 Mst. Saeeda Bano on the strength of lease-A and lease-B available at pages-273 and 283 respectively and this is also highlighted by the lessor/ DHA.

10. Requirement of Section 123 of the Transfer of Property Act, 1882 is strict as far as passing of the title is concerned. A “transfer” could only be effected in pursuance of a gift of any immovable property by registering an instrument duly signed by or on behalf of the donor and attested by at least two witnesses. In Allah Diwaya case¹ while dismissing the appeal, the Bench of Supreme Court in para-6 observed as under:-

¹ PLD 2008 SC 73 [Allah Diwaya v. Ghulam Sher and others].

6. *The determination of learned appellate court was upheld by the learned High Court vide judgment impugned which cannot be reversed without any cogent reasoning and lawful justification which are lacking in this case. It would be a futile exercise to examine as to whether the gift was got registered or not for the simple reason that its execution could not be proved. There is, however, no cavil to the proposition that the gift deed was compulsorily registerable under section 17 of the Registration Act and without getting it registered the title of the property in question could not have been conferred upon². The dictum as laid down in Maulvi Abdullah's case (supra) cannot be made applicable in this case because the facts in both the cases are quite distinguishable.*

11. Similarly, in the case of Muhammad Farrukh Iqbal³ while declining to grant leave, the Bench of Supreme Court in para-6 observed as under:-

6. *Section 17(a) of the Registration Act, 1908 requires that gifts of immovable property made by or through written documents require registration. Therefore, the gift document required registration. It would also require stamping pursuant to the Stamp Act, 1899. In the absence of the statutory requirement of registration of the gift document it could not be used to transfer the property to the petitioner.*

12. Here the primary concern is to ascertain valid title and in the absence of oral gift's registration, the performance cannot be declined on the execution of oral gift and that due diligence was not made. Performance could only be sought against title holder. If these "oral gifts" are allowed to come in the way of performance, then no suit for performance could succeed. Even Defence Officers Housing Authority [DHA] vide their letter exhibit P/5 maintained that it was required to be registered and stamped to confer title under transfer of property act when parties approached for transfer.

Evaluation of evidence

13. In evidence also to a question that the oral gift deed does not pass on the title of the property to the respondents No.2 and 3, it was

² Emphasis added.

³ 2021 SCMR 1341 (Muhammad Farrukh Iqbal v. Mrs. Ayesha Iram and others].

answered in affirmative. The cross-examination of the appellant (alleged buyer) by the counsel of the plaintiffs/respondents No.2 and 3 (daughters) is very material which is at page-671 of High Court Appeal No.34 of 2023. Counsel for the plaintiffs/ respondents No.2 and 3 suggested the witness that they went for the negotiations over the sale of the property through the property dealer Dr. Naveedul Haq Siddiqui, who was a medical doctor and that at the relevant time the respondent No.1 and her daughter (plaintiff of the suit) were present (page-673). It was also suggested by the Counsel for the plaintiff/respondents No.2 and 3 that the date in the agreement (Exhibit D/19) was 20.04.2005 and the correction was made as 30.04.2005 which correction was made by the plaintiff (daughter) in her own hand, though there was no signature or initial of her (daughter). It was also suggested by the Counsel for the plaintiff/respondents No.2 and 3 that the buyer checked all the title documents of the suit property and that the last search certificate disclosed the name of the respondent No.1. It was also admitted in the cross-examination dated 26.02.2013 at page-683 of High Court Appeal No.34/2023 that the appellant met the husband of the respondent No.1 at his residence when he was on the first floor and on the second visit he came down to meet. It was also admitted that though it was not signed as a witness but it is also suggested in the cross-examination that exhibit P/11 and 19 i.e, agreements were not signed as witness by the plaintiff (daughters) or by Amjad Ali, whereas, it was suggested by their own counsel that they were present at that time.

14. With this kind of deposition, we would sum-up these appeals that though the execution of the earlier gift on the strength of an affidavit and deed of redemption executed by the Bank in favour of the mortgagors would not materially affect the title of the respondent No.1 and hence should not be a basis of drawing the conclusion of transfer of

title and declining the performance, however, since the performance of an agreement of an immovable property is an equitable relief and based on equity, the appellant in High Court Appeals No.34 and 35 had to show that they have performed equity to claim equity from the court. However, they have failed in discharge of this burden since they have not paid or deposited the balance sale consideration at the time when the suit was filed, hence it would not be an equity if appellant is allowed the performance realizing the no efforts were made to deposit the balance amount at the time when injunction was sought and/or when suit was filed, since doctrine of lis pendence is also an obstacle for seller. We would thus agree with the conclusion for our own reasons.

15. Insofar as the amount that was extended/paid at the time of execution of the agreement is concerned, since agreement was not disputed, it was rightly ordered to be returned along with profit accrued thereon i.e. an additional amount of Rs.4 Million as damages and compensation extended to the appellant, which discretion was lawfully exercised by learned Single Judge. Respondent No.1 retained the amount for a number of years hence the court was justified to compensate the appellant in this regard.

16. Conclusion drawn in the High Court Appeals merits no consideration and are dismissed along with pending applications.

17. Above are the reasons of our short order dated 16.11.2023.

Dated: 29.11.2023

J U D G E

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Ayaz Gul