

PLJ 2025 Lahore 905 (DB)
[Bahawalpur Bench, Bahawalpur]

Present: AHMAD NADEEM ARSHAD AND SYED AHSAN RAZA KAZMI, JJ.

MUHAMMAD IRSHAD--Appellant

versus

MUHAMMAD RAMZAN and 2 others--Respondents

R.F.A. No. 206 of 2023, decided on 24.4.2025.

Specific Relief Act, 1877 (I of 1877)--

----S. 42--Transfer of Property Act, 1882 (IV of 1882), S. 53-A--Qanun-e-Shahadat Order, 1984 (10 of 1984), Art. 79--Sale agreement--Earnest money was paid--Delivery of possession--Defaul in payment of remaining sale consideration--Legal notice--Non raising of objection regarding non-framing of specific issue at trial Court and appeal--Burden of proof--Non-fulfillment of contractual of obligations--Challenge to--The appellant did not raise any objection regarding non-framing of specific issue during trial or even while filing instant appeal--It is well settled law that non-framing of issues on specific point becomes inconsequential once evidence has been concluded, as parties are well aware of controversy or dispute between them--Despite order of trial Court as well as order passed by High Court directing appellant for submission of balance sale consideration, he remained failed to demonstrate his readiness to fulfil his obligations--It is trite law that a person executing a part of agreement is granted benefits and relief under Section 53-A, only if it can be proven that he is ready and well-prepared to perform his part of agreement--**Appellant** never raised any objections regarding alleged deficiency in land area until trial Court proceedings--During cross-examination, appellant conceded that he was put into possession of land mentioned after paying earnest amount, which undermines his claim of not receiving possession and appellant conceded that nowhere mentions that respondent was responsible for obtaining any conversion or clearance certificate from relevant department, thereby undermining his own argument-- As per Article 79 of Qanun-e-Shahadat Order, 1984, burden of proof shifted to appellant, who failed miserably in producing two attesting witnesses of--Respondent's son was only authorized to receive balance sale consideration and lacked power to amend or alter any conditions in Agreement to Sell--No illegality, irregularity or perversity of reasoning has been pointed out that requires any interference in impugned judgment and decree which was found to be well reasoned and in consonance with law--Appeal dismissed. [Pp. 909, 911, 913 & 914] A, B, C, D, E & F

2015 SCMR 1; 1985 SCMR 1; 2004 SCMR 1130; 1993 SCMR 2018; PLD 2022 Lahore 313 & 2000 SCMR 204 ref.

Mr. Muhammad Aslam Khan Dhukkur, Advocate for Appellant.

M/s. Muhammad Farooq Warind, Irfan Ali Warind and Muhammad Farooq, Advocates for Respondent No.

1.

Date of hearing: 3.3.2025.

JUDGMENT

Syed Ahsan Raza Kazmi, J.--This Regular First Appeal under section 96 of the Code of Civil Procedure, 1908 (CPC) is directed against the judgment and decree dated 13.10.2023 passed by the learned Civil Judge Ist Class, Rahim Yar Khan whereby the suit of the plaintiff for declaration was decreed.

2. Brief facts of the case are that the plaintiff/Respondent No. 1 (**respondent**) being lawful owner of the agricultural land measuring 48 kanals situated in Khata Nos. 134/133,122/121,142/140 & 130/129 of Mouza Nizam Abad, Tehsil & District Rahim Yar Khan (**Property**) *vide* register record of rights for the year 2015-16 entered into a sale agreement with appellant/Defendant No. 1 (**appellant**) through a registered agreement to sell dated 16.11.2019 against the sale consideration of Rs. 12,00,00,000/-, out of which, Rs. 20,00,000/- was paid as earnest sale amount whereas remaining sale consideration amount of Rs. 11,80,00,000/- was to be paid by the appellant as per payment schedule described in the agreement and the possession of the suit property was also delivered to the appellant; that the appellant did not pay the remaining sale consideration amount willfully and deliberately as per terms and conditions of the agreement to sell, upon which, a legal notice was sent to him asking to pay the balance amount; that the appellant is illegally and unlawfully retaining the possession of the suit land to which he has no legal right whereas the respondent is entitled to recover mesne profits from the appellant at the prevailing rate of rent alongwith interest at KIBOR rate and is also entitled to obtain the vacant possession of the suit land. On the other hand, the appellant filed his written statement wherein he raised certain legal as well as factual objections. Out of the pleadings of the parties, the following issues were framed:-

ISSUES

1. *Whether the Defendant No. 1 Irshad Ahmed has committed default regarding remaining sale price and as such he had violated the terms & conditions of agreement to sell dated 16.11.2019? OPP.*
2. *Whether on account of default in payment, legal notice dated 02.04.2021 was sent to the defendant, Muhammad Irshad to pay remaining sale price with interest as per KIBOR? OPP.*

3. *Whether the default of payment of remaining sale price, the agreement to sell dated 16.11.2019 has become inoperative and plaintiff Muhammad Ramzan is entitled to the recovery of possession from the Defendant No. 1 alongwith mesne profit as requested by the plaintiff? OPP.*
4. *Whether the defendant, Irshad Ahmed had/have available remaining sale price for the fulfillment of agreement to sell dated 16.11.2019 and he delayed the payment on the reason that measurement 06-Acre? OPD.*
5. *Whether there was any terms & conditions of the agreement dated 16.11.2019 that before getting ownership/title of the suit property, the defendant Muhammad Irshad will convert the agricultural land/into commercial scheme without acquiring approval of said conversion and NOCs from concerned department? OPD.*
6. *Whether the suit is barred by law U/O VII rule 11 read with Section 151 CPC? OPD.*
7. *Whether the plaintiff has no cause of action and locus standi to file this suit, hence, the same is liable to be dismissed? OPD.*
8. *Whether the suit is false, frivolous and vexatious and defendant is entitled for special costs U/S. 35-A CPC? OPD*
9. *Relief.*

The parties adduced their oral as well as documentary evidence and the learned trial Court decreed the suit *vide* its judgment and decree dated 13.10.2023.

3. The learned counsel for the appellant contends that the suit of the respondent was not maintainable before the learned trial Court in view of Section 39 of Specific Relief Act, 1877; that the learned trial Court has not followed the provisions of sections 53-A & 54 of the Transfer of Property Act, 1882; that the learned trial Court has misread and misunderstood the evidence of the witnesses; that the appellant has spent a huge amount for the development of the property and also paid Rs. 3,97,75000/- to Respondent No. 1 and his son Muhammad Afzal through both cheque and cash but this aspect has not been considered by the learned trial Court and lastly argued that the learned trial Court failed to frame proper issues.

4. On the other hand, learned counsel for Respondent No. 1 has supported the impugned judgment and decree. He submits that the appellant has violated the terms and conditions of the agreement to sell and submits for dismissal of instant Regular First Appeal.

5. We have heard the arguments of learned counsel for the parties at length and have perused the record with their able assistance.

6. Prior to delving into the merits of the case, we have observed that the appellant has consistently failed to comply with the directives of this Court and the trial Court issued during the civil suit proceedings to produce bank statements/balance sale consideration essential to demonstrate his capacity to fulfill his contractual obligations. This omission unequivocally suggests that the appellant lacks the capacity to fulfill his contractual obligations. A well-established legal principle dictates that in suits seeking specific performance of a contract or cancellation of an agreement to sell, the party seeking relief must demonstrate its readiness to perform its contractual obligations, particularly when it alleges that the other party is evading its commitments. By ordering the party to deposit the sale consideration or outstanding balance in Court, the Court aims to verify that the party possesses the necessary capacity and willingness to fulfill its obligations under the agreement. This is a condition precedent for seeking the relief of specific performance.

7. Turning to the merits of the case, we have observed that the grounds now sought to be argued before us were neither raised before the trial Court nor they were included in the memorandum of appeal. It is a well-established principle of law that parties are bound by their pleadings, and new grounds cannot be introduced at the appellate stage. This ensures that parties do not unfairly expand or alter their case on appeal, and that the opposing party is not taken by surprise. In this respect, reliance is placed on the case of *Shafi Muhammad vs. Khanzada Gul* (2007 SCMR 368). However, in the interest of justice, we consider above grounds.

8. We find no merit in the appellant's contention regarding the non-framing of a specific issue. The trial Court, after reviewing the parties' pleadings, correctly framed the issue in accordance with Order 14 of the CPC. Notably, the appellant himself did not raise any objection regarding the non-framing of the specific issue during the trial or even while filing the instant appeal. It is well settled law that the non-framing of issues on specific point becomes inconsequential once evidence has been concluded, as parties are well aware of the controversy or dispute between them. Consequently, they present their evidence with the controversy in mind, rendering the omission to frame issues on certain points immaterial. The Hon'ble Supreme Court in an identical matter reported as *Amjad Ikram vs. Mst. Asiya Kausar and 2 others* (2015 SCMR 1) held that:--

"The learned trial Court has framed a composite issue regarding merits of the case, which has been reproduced hereinabove and when the said issue is examined in the context of the pleadings of the parties, more particularly, Para No. 2 of the written statement on merits, there can be no manner of doubt, as to the real matter in controversy, which required adjudication by the Court. Throughout the trial, the parties were fully cognizant of the real matter in controversy and the facts, which were required to be proved by them in support of their perspective stands and led evidence accordingly. In such an eventuality, the contention of the learned counsel qua the non-framing of issues pales into insignificance. Such is not only settled law but also

has been consistently held by this Court, including the judgment, reported as “*Mehr Din (represented by his Legal Heirs) vs. Dr. Bashir Ahmed Khan and 2 others* (1985 SCMR 1).”

The Hon’ble Supreme Court further held that:

“Even otherwise, during the course of proceedings before the learned trial Court, neither any effort was ever made by the appellant to claim any further issue nor such contention was raised before the learned High Court. Thus, such contention cannot be entertained at this belated stage before this Court.” Further reliance can be sought from the cases of *Muhammad Akram alias Raja vs. Muhammad Ishaque* (2004 SCMR 1130), *Eada Khan vs. Mst. Ghanwar and others* (2004 SCMR 1524) and *Fazal Muhammad Bhatti and another vs. Mst. Saeeda Akhtar and 2 others* (1993 SCMR 2018).”

9. The appellant contends that his possession over the suit property is protected under the doctrine of part performance as he was put in possession of suit property in furtherance of the agreement to sell and his possession is protected under Section 53-A of the Transfer of Property Act, 1882 (Act). It is advantageous to reproduce the Section 53-A of the Act:

S. 53-A. Part performance.--Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof or the transferee, being already in possession continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

Bare reading of above mentioned section postulates the following conditions for invoking Section 53-A:

- (a) There is a contract in writing by the transferor for transfer for consideration of any immovable property signed by him or on his behalf, from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty.
- (b) The transferee has, in part-performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract.
- (c) The transferee has done some act in furtherance of the contract and **has performed or is willing to perform his part of the contract.**

Willing to perform his part of the agreement is the last, but very crucial ingredient to be fulfilled for establishing protection under Section 53-A of the Act. If the transferee does not claim that he or she performed the terms of the contract and is unable to convince the Court that he or she is willing to fulfil the obligation as provided under the contract, then the doctrine of part performance as embodied under Section 53-A of the Act is not applied.

In the instant matter, we have observed that despite the order of learned trial Court as well as order passed by this Court directing the appellant for submission of balance sale consideration, he remained failed to demonstrate his readiness to fulfil his obligations as enumerated in agreement to sell. It is trite law that a person executing a part of the agreement is granted benefits and relief under Section 53-A, only if it can be proven that he is ready and well-prepared to perform his part of the agreement. It is necessary that the transferee be completely and unconditionally ready and willing. A person who refuses to uphold his contractual commitments cannot receive the benefits of the provision. Reliance can also be placed on case law of *Ahmad Waqas and others vs. Ishtiaq Ali and others* (PLD 2022 Lahore 313), wherein it has been held that:

“Section 53-A of the Act, 1882 is to protect interest of a buyer of the property who has satisfied his commitments and is also willing to honour his commitments, and in that eventuality the transferor cannot go against him and take back possession or cancel the sale. In case the buyer has made defaults or from his conduct it appears that he will not fulfill his promises which are required to complete the sale then the buyer may not get protection of Section 53-A of the Act, 1882 and the seller can cancel the sale and repossess the property. In other words, it can be said that Section 53-A of the Act, 1882 will come into play for protection of the buyer only when the buyer has performed his commitments substantially and is willing to perform the remaining part of his promise, if any, and there is no other way in which the buyer can be considered to have committed breach or there is indication of the buyer breaching his promises when required to be met as per contract. If there is no sale, then Section 53-A of the Act, 1882 will not be helpful. The benefit of the doctrine of part performance is not available to a person who seeks to acquire a valid title to the property dealt with under a transaction which remains inchoate. Reliance is placed on the dictum reported as *Muhammad Yousaf vs. Munawar Hussain and 5 others* (2000 SCMR 204).”

10. Furthermore, the additional ground raised by the appellant before this Court pertaining to Section 39 of the Specific Relief Act, 1877 is misplaced. Learned counsel for the appellant failed to convincingly demonstrate the applicability of the Section to the present dispute, leaving us unpersuaded by his arguments.

11. The execution of the registered agreement to sell (Exh.D-2) and the appellant's possession of the suit property are admitted facts. The crux of the dispute between the parties revolves around a singular issue:

"whether the appellant failed to pay the balance consideration amount in accordance with the stipulated schedule, or whether the respondent failed to fulfill their obligations under the registered agreement to sell."

12. The respondent deposed in his evidence that the appellant failed to pay the balance amount in accordance with the agreed-upon schedule, despite repeated requests. As a consequence, the respondent served a legal notice on the appellant on 19.03.2021, directing him to pay the outstanding balance as per the schedule or face cancellation of the agreement to sell. In response to the respondent's evidence, the appellant himself testified as DW-1. During cross-examination, the appellant acknowledged that he had not paid the outstanding balance of Rs. 11,80,00,000 to the respondent, as stipulated in the agreement (Exh.D-2). However, the appellant advanced two specific defenses to justify withholding or delaying payment of the balance amount:

- i) The measured area of the suit property is less than 6 acres, allegedly deviating from the agreed-upon terms.
- ii) The respondent's failure to obtain a clearance certificate from the National Highway Authority (NHA), which the appellant claimed was a necessary prerequisite.

13. Considering the rival contentions and assertions of both the parties, the Agreement to Sell (Exh.D-2) emerges as the most crucial document to determine which party is at fault and to ascertain their respective obligations and liabilities. A bare perusal of the agreement to sell (Exh.D-2) depicts that the parties have entered into a sale agreement regarding the land measuring 48 kanals against the total sale consideration of Rs. 1200,00,000/-, out of which, the appellant had paid an amount of Rs. 20,00,000/- as earnest amount and balance consideration amount of Rs. 11,80,00,000/- was to be paid in four installments. The first installment of Rs. 1,00,00,000/- was to be paid on 30.01.2020, the second installment of Rs. 4,00,00,000/- on 30.11.2020, the third installment of Rs. 4,00,00,000/- on 30.11.2021, whereas the fourth and last installment of Rs. 2,80,00,000/- was to be paid on 30.06.2022.

14. Although the appellant alleged that the respondent failed to hand over possession of the entire 48 kanals of land, but he failed to corroborate this claim with evidence or supporting documents. Notably, the appellant himself admitted that after taking possession, he invested a substantial amount in the land, including construction of a market. Significantly, he never raised any objections regarding the alleged deficiency in land area until the trial Court proceedings. Furthermore, during his cross-examination, the appellant conceded that he was put into possession of the land mentioned in Exh.D-2 after paying the earnest amount, which undermines his claim of not receiving possession of the entire 48 kanals.

15. The appellant's second contention is that the respondent failed to obtain a clearance certificate from the National Highway Authority (NHA) after converting the land from agricultural to commercial use. However, the trial Court aptly observed that this condition is conspicuously absent in the Agreement to Sell (Exh. D-2). Furthermore, during his cross-examination, the appellant himself

conceded that Exh.D-2 nowhere mentions that the respondent is responsible for obtaining any conversion or clearance certificate from the relevant department, thereby undermining his own argument.

16. The appellant, relying on receipts Exh.D-3 to Exh.D-7, claimed to have paid Rs. 3,75,00,000 to the respondent's son, who allegedly undertook to obtain the clearance certificate from the relevant department. However, the respondent's son, while testifying as a witness, categorically denied the appellant's claim. As per Article 79 of the Qanun-e-Shahadat Order, 1984, the burden of proof shifted to the appellant, who failed miserably in producing the two attesting witnesses¹¹ of Exh.D-3 to Exh.D-7. It is noteworthy that the respondent's son was only authorized to receive the balance sale consideration and lacked the power to amend or alter any conditions in the Agreement to Sell (Exh.D-2).

17. The appellant challenged the grant of mesne profits to the respondent but did not argue this point during the hearing. Regardless, based on previous discussions, we agree with the trial Court's decision to grant mesne profits to the respondent.

18. We find the trial Court's judgment and decree to be correct and uphold it, declining to interfere with the decision. No illegality, irregularity or perversity of reasoning has been pointed out that requires any interference in the impugned judgment and decree which is found to be well reasoned and in consonance with law. In view of what has been stated above, we find no merits in this appeal, which is hereby dismissed.

(Y.A.) Appeal dismissed

¹¹. Sana Ullah and another v. Muhammad Manzoor and another (PLD 1996 SC 256) and Qasim Ali v. Khadim Hussain (deceased) through Legal representatives and another (PLD 2005 Lahore 654).