

P L D 2022 Lahore 313

Before Anwaarul Haq Pannun and Abid Hussain Chattha, JJ

AHMAD WAQAS and others---Appellants

Versus

ISHTIAQ ALI and others---Respondents

R.F.A. No. 114 of 2017, heard on 20th September, 2021.

(a) Transfer of Property Act (IV of 1882)---

---S. 53A---Constitution of Pakistan, Arts. 5 & 24---Civil Procedure Code (V of 1908), S. 144---Penal Code (XLV of 1860), S. 441---Respondent's suit for recovery of possession and mesne profit was concurrently decreed---Said suit was preceded by dismissal of appellant's suit for specific performance by High Court in appellate jurisdiction---Appellant contended that they were in possession of the suit property since long on the basis of agreement to sell; that suit of the respondents was hit by the principle of acquiescence; that their appeal with regard to the suit property was pending before the Supreme Court; and that possession of the appellants over the suit property was protected on the basis of equitable doctrine of part performance---Validity---Agreement to sell on the basis of which appellants sought transfer of title over the suit property was not accepted by High Court being invalid and accordingly their suit (for specific performance) was dismissed---Since the said disputed agreement itself remained legally unproved, therefore, appellants were not entitled to claim the benefit under the same document and no protection as envisaged by S.53A of Transfer of Property Act, 1882, could be extended to their possession---If there was no sale, then S.53A of Transfer of Property Act, 1882, would not be helpful---Causing annoyance by retaining possession over a property owned by others without any lawful excuse would amount to committing a continuous offence--Appellants had no authority or claim to retain possession of property merely on the ground that they had filed an appeal before the Supreme Court wherein no injunctive order had been passed in their favour---Section 144 of Civil Procedure Code, 1908 was the complete answer to the submission/apprehension as to 'irreparable loss' in delivering possession of suit property--Obedience to the Constitution and law is the inviolable obligation of every citizen---Appeal was accordingly dismissed.

Abdul Khaliq v. Muhammad Asghar Khan and 2 others PLD 1996 Lah. 367; Noor Muhammad v. Abdul Ghani 2002 CLC 88 and H. M. Fazil Zaheer v. Kh. Abdul Hameed and others 1983 SCMR 906 rel.

(b) Transfer of Property Act (IV of 1882)---

---S. 53A-Part performance---Possession---Section 53A of the Transfer of Property Act, 1882, will come into play for protection of the buyer only when the buyer had performed his commitments substantially and was willing to perform the remaining part of his promise, if any---No other way existed in which the buyer could be considered to have committed breach or there was indication of the buyer breaching his promises required to be met as per contract--Benefit of the part performance doctrine was not available to a person who sought to acquire a valid title to the property dealt with under a transaction which remained inchoate.

Muhammad Yousaf v. Munawar Hussain and 5 others 2000 SCMR 204 rel.

(c) Constitution of Pakistan---

---Art. 24---Protection of property---Remedies against violation---Scope---No person should be deprived of his property save in accordance with law---Creating hindrances in the way of owner of the property debarring him from enjoying the benefits with regard to possession/use of the property amounts to clear breach of Art. 24 of the Constitution---Owner of property had right not only to recover possession of the property through Civil Court but also to seek the offender punished for committing such continuous offence by setting the machinery of criminal law into motion.

Watan Party and another v. Federation of Pakistan and others PLD 2011 SC 997 rel.

(d) Penal Code (XLV of 1860)---

---S. 441---"Annoyance"---Connotation---Word "annoyance" means "nuisance" and has been defined as "a condition that interferes with the use or enjoyment of property, especially a non-transitory condition or persistent activity that either injures the physical condition of adjacent land or interferes with its use or with the enjoyment of easements on the land or of public highways".

Black's Law Dictionary, 9th Edition rel.

(e) Penal Code (XLV of 1860)---

---Ss. 268 & 441---"Nuisance" and "trespass"---Distinguished---General distinction between a nuisance and a trespass is that the trespass flows from a physical invasion and the nuisance does not.

(f) Constitution of Pakistan---

---Arts. 186 & 188---Injunction/restraint order to be express---Mere filing of appeal/revision would not operate as stay order---Prohibition/restraint could not be implied but must be clearly expressed/communicated.

Messrs Agro Dairies (Pvt.) Limited through Director and 2 others v. Messrs Agricultural Development Bank of Pakistan through Branch Manager and 3 others 2004 CLD 232 rel.

Muhammad Naveed Farhan for Appellants.

Muhammad Farooq Warind and Dr. Malik M. Hafeez for Respondents.

Muhammad Javed Khan, Civil Judge 1st Class/Research Officer, Lahore High Court, Legal Assistance.

Date of hearing: 20th September, 2021.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---Through this Regular First Appeal, the judgment and decree dated 28.07.2017 passed by the learned Civil Judge 1st Class, Khanpur decreeing the suit for recovery of possession along with mesne profits filed by the respondents/ plaintiffs against the appellants/defendants has been assailed. It is pertinent to mention here that the appeal filed by the appellants before the learned appellate court below was returned because of lack of pecuniary jurisdiction.

2. The facts of this case in brief are that the respondents filed a suit for recovery of possession along with mesne profits with the averments that they handed over possession of their property (suit property) to one Muhammad Afzal on lease, but one Farooq Ahmad, the predecessor-in-interest of the appellants, in collusion with the said lessee after taking over the possession of the suit property, not only managed to forge an agreement to sell dated 08.05.1986 but also instituted a suit for specific performance against the respondents, which was decreed by the learned trial court on 15.12.1996; the respondents filed an appeal against the said judgment and decree, which was dismissed by the learned lower appellate court on 19.02.2004; they filed second appeal before this Court, which was accepted on 04.06.2015 resulting in dismissal of the suit for specific performance of agreement to sell filed by the predecessor-in-interest of the appellants, whereupon the suit for recovery of possession was filed by the respondents that since possession of the appellants over the suit property is illegal after dismissal of their suit for specific performance on the basis of a forged/fictitious agreement to sell, therefore, they be put into possession of the property. The appellants contested the suit by filing their written statement mainly on the ground that they are in possession of the suit property since 1986 on the basis of agreement to sell and suit of the respondents is hit by the principle of law of acquiescence; further that their appeal with regard to the suit property is pending before the Hon'ble Supreme Court of Pakistan. On the basis of divergent pleadings of the parties, requisite issues were framed and evidence was recorded by the learned trial court. Consequently, as stated earlier, the suit of the respondents was decreed by the learned trial court. Hence, this appeal. It is worth mentioning here that allegedly a civil

appeal has been filed by the appellants before the Hon'ble Supreme Court of Pakistan against the judgment dated 04.06.2015 passed by this Court, as mentioned above, in R.S.A. No.02 of 2004 relating to the suit for specific performance of agreement.

3. Arguments heard. Record perused.

4. The only ground on which the judgment and decree of the learned court below is sought to be set aside is that possession of the appellants over the suit property is protected on the basis of equitable doctrine of part performance i.e. existence of agreement to sell the property and the transferees were put in possession of the property in part performance of the agreement, as embodied in section 53-A of the Transfer of Property Act, 1882 (hereinafter referred to be "the Act, 1882). We are afraid, the essence of handing over the possession as contemplated in section 53-A of the Act, 1882 lies not merely in handing over possession but lies in the intention of the transferor to transfer the ownership rights of the property for consideration in favour of the transferee. 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 v. Munawar Hussain and 5 others* (2000 SCMR 204). In the instant case, the agreement to sell on the basis of which the appellants seek transfer of title over the suit property was not accepted by this Court being invalid and accordingly their suit was dismissed vide judgment dated 04.06.2015, meaning thereby payment of sale consideration and delivery of possession under the agreement to sell has not been proved and even the disputed agreement to sell itself remained legally unproved, therefore, under the law, the appellants certainly are not entitled to claim the benefit under the said document and no protection as envisaged by Section 53-A of the Act, 1882 can be extended to their possession. In this context, reference is made to the judgments reported as *Abdul Khaliq v. Muhammad Asghar Khan and 02 others* (PLD 1996 Lahore 367) and *Noor Muhammad v. Abdul Ghani* (2002 CLC 88). Moreover, Article 24(1) of the Constitution of Islamic Republic of Pakistan, 1973, envisages that no person shall be deprived of his property save in accordance with law. Needless to observe that creating hindrances in the way of owner of the property debarring him from enjoying the benefits with regard to possession/use of the property amounts to clear breach of Article 24 of the Constitution of Islamic Republic of Pakistan, 1973. Reliance is placed on the judgment reported as *Watan Party and another v. Federation of Pakistan and others* (PLD 2011 SC 997).

5. It may be appropriate to observe that to safeguard the very precious rights conferred upon a citizen under the above referred Article, remedies are available to owner of the property on civil as well as criminal side and he has the right to recover possession of the property by having a resort not only to the Civil Court but can also seek the offender punished for committing this continuous offence by setting the machinery of law into motion on criminal side. It may not be out of context to refer the provisions of section 441 of Pakistan Penal Code, 1860, which read as under:--

"Criminal trespass. Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or, having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit "criminal trespass".

It may be observed that causing annoyance by retaining possession over a property owned by others without any lawful excuse, amounts to committing a continuous offence. The word "annoyance" according to the Black's Law Dictionary, Ninth Edition, is meant for "nuisance" and has been defined as "A condition that interferes with the use or enjoyment of property, especially a non-transitory condition or persistent activity that either injures the physical condition of adjacent land or interferes with its use or with the enjoyment of easements on the land or of public highways". It has further been defined that the general distinction between a nuisance and a trespass is that the trespass flows from a physical invasion and the nuisance does not.

6. Since in the instant case, the alleged agreement to sell on the basis of which the appellants claim that they had been handed over possession of the property as part performance has since been found to be not enforceable for the reasons recorded in the judgment of this Court, therefore, in sum and substance the appellants have no authority or claim to retain possession of the property merely on the ground that they have filed an appeal before the Hon'ble Supreme Court of Pakistan wherein no injunctive order has been passed in their favour. Moreover, the reservation expressed by the learned counsel for the appellants that in case by way of execution of the judgment under challenge, possession of the suit property is delivered to the respondents and the Hon'ble Supreme Court of Pakistan decides the matter in favour of the appellants, they shall suffer irreparable loss. Suffice it to say that there exists no occasion for any harm or loss to the appellants in case the decree under execution is reversed or the suit for specific performance filed by the appellants regarding which the appeal has been filed by the appellants is decreed, as in order to cater both the eventualities the law has provided a remedy in the shape of Section 144 of the Code of Civil Procedure, 1908, which is the complete answer to the above submission and apprehension made by the learned counsel, and reads as under:--

"Application for restitution.--- (1) Where and in so far as a decree is varied or reversed the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under subsection (1)."

Moreover, a successful vendee can be put into possession of the suit property after passing of the decree for possession through specific performance of a contract.

7. The appellants at the moment have no right whatsoever to retain their possession over the disputed property as required by Article 5(2) of the Constitution of Islamic Republic of Pakistan, 1973, which ordains that obedience to the Constitution and law is the inviolable obligation of every citizen wherever he may be and of every other person for the time being within Pakistan. Moreover, admittedly no injunctive order has been issued by the Hon'ble Supreme Court of Pakistan in the appeal filed against the judgment of this Court dated 04.06.2015. In the dictum reported as H. M. Fazil Zaheer v. Kh. Abdul Hameed and others (1983 SCMR 906), the Hon'ble Supreme Court of Pakistan has held that mere filing of appeal or revision does not operate as stay order and prohibition or restraint cannot be implied but must

be clearly expressed and communicated. In the judgment reported as Messrs Agro Dairies (Pvt.) Limited through Director and 2 others v. Messrs Agricultural Development Bank of Pakistan through Branch Manager and 03 others (2004 CLD 232) it has been observed that mere filing or pendency of petition/appeal before the Hon'ble Supreme Court does not operate as a stay or restraint order.

8. In view of all above, no case for interference by this Court in this appeal is made out and the same is accordingly dismissed.

ZH/A-118/L Appeal dismissed