

2015 C L C 994**[Lahore]****Before Muhammad Khalid Mehmood Khan and Abdus Sattar Asghar, JJ****FAKHAR-UD-DIN through L.Rs.----Appellants****versus****MUHAMMAD IQBAL and others----Respondents**

Regular First Appeal No.917 of 2011, decided on 4th December, 2014.

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

---S. 42---Transfer of Property Act (IV of 1882), S.54---Qanun-e-Shahadat (10 of 1984), Art.103---Registration Act (XVI of 1908), S.60---Suit for declaration---Sale-deed---Expression 'in exchange of a price'--- Sale--- Ingredients--- Vendor an old and sick person alleging fraud or deceit--- Undue influence--- Effect--- No consideration amount was paid by the vendees to the vendor---Sale-deed was invalid for want of consideration and same was result of deceit and undue influence practised on the vendor---Possession of suit land was never delivered to the vendees by the vendor---If any of the ingredients of sale was missing, transaction would not fall within the definition of "sale"---Expression 'in exchange for a price' used in S.54 of Transfer of Property Act, 1882 was very significant---Price was an essential ingredient in a sale and no transaction of sale could be said to be completed in the eye of law unless price was fixed or paid or part paid and part promised---Any fact might be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law---False acknowledgment of receipt of price by a recital in a deed did not estop the seller from giving evidence as against the buyer that he had not received payment---Where a sale was effected through registered sale-deed wherein amount of consideration was mentioned, same could not be construed to be a "sale without consideration"---Party who had acknowledged the receipt of consideration in the sale-deed could show that he did not receive the same---Where vendor had admitted that he had executed sale-deed but alleged that same was under influence and without consideration, evidence to prove the same would be admissible---Rule of extrinsic evidence did not apply in such cases rather evidence to show the true nature of transaction was admissible---Vendor, in the present case, was suffering from high blood pressure and cardiac diseases and he was not having any independent advice at the time of alleged transaction of sale-deed---When there was allegation of fraud or deceit by an old man who had no independent advice and had been deprived of his valuable property by a document, onus would automatically shift upon the beneficiary to prove its contents---Court was not divested of powers to scrutinize the reasons and

justifications for the impugned transaction of sale---Element of undue influence was not restricted to an illiterate Parda Nasheen lady rather it could prevail even on men in the particular circumstances of a case---Sale-deed in favour of defendants was got executed without consideration and under undue influence---Presumption of correctness was attached to the certificate endorsed on the sale-deed by the Registration Officer only for the purpose of proving that document had been duly registered---Presumption of correctness with regard to receipt of consideration by the vendor could only arise out of the admission made by him/her which could be contradicted by independent evidence---Vendees had failed to establish the payment of consideration amount and valid acknowledgement of its receipt in the sale-deed---Impugned sale was a sham and void transaction as not proved in accordance with law--
-Issues in civil cases had to be resolved on preponderance of evidence---Trial Court had failed to appreciate the evidence in its true perspective---Impugned judgment and decree passed by the Trial Court were based on misreading and non-reading of evidence, against law and fact, untenable and were liable to be set aside---Judgment and decree were set aside and suit was decreed---Appeal was accepted in circumstances.

Muhammad Shafi and others v. Allah Dad Khan PLD 1986 SC 519; Shah Lal Chand v. Indarjit (1900) 22 All. 370; Qazi Altaf Hussain v. Ishfaq Hussain 1986 SCMR 1427; Wahid Bakhsh v. Muhammad Shafi PLD 1976 Lah. 1069; Dharm Singh v. Kirpal Singh and others AIR 1923 Lahore 31(2) and Parshotam Das v. Yar Ali AIR 1928 Oudh 439 rel.

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

----S. 54---"Sale"---Ingredients.

A valid sale transaction is constituted when the following essential elements are provided by the vendee:---

- (i) The valid sale agreement;
- (ii) The parties to the sale transaction;
- (iii) The sale consideration fixed and paid; and
- (iv) The subject matter of the sale transaction.

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

----S. 54---"Sale"---Meaning---Sale was a transfer of ownership in exchange for a price paid or promised or part paid and part promised.

Malik Noor Muhammad Awan for Appellants.

Ch. Irshad Ullah Chatha for Respondents.

Date of hearing: 4th December, 2014.

JUDGMENT

ABDUS SATTAR ASGHAR, J.--- This Regular First Appeal under section 96 of the C.P.C. is directed against the judgment and decree dated 19-10-2011 passed by learned Civil Judge Ist Class Daska whereby appellant's suit for declaration and cancellation of registered sale-deed was dismissed.

2. Succinctly facts leading to this appeal are that on 16-2-2005 Fakhar ud Din plaintiff (deceased represented by legal heirs) filed a suit for declaration of his ownership and possession in the suit land and cancellation of registered sale-deed dated 27-4-2004 allegedly executed in favour of respondents Nos.1 to 6 against law and facts, without consideration, outcome of fraud and undue influence, ineffective and inoperative as against his rights. Suit was resisted by the respondents Nos.1 to 6 by filing contesting written statement raising preliminary objection with regard to its maintainability and on facts contending that they are bona fide purchasers with consideration and that the plaintiff executed and completed the sale-deed dated 27-4-2004 before the Sub-Registrar Daska under attestation of a Pattidar namely Muhammad Ali alias Mehdi son of Muhammad Ismail as a marginal witness and made over the physical possession of the suit land to the vendees at the spot; that Fakhar ud Din in fact had left his house being sick of the conduct of his family members and was living with one of his friends of his volition when he completed the sale in favour of vendees in accordance with law and that his assertion with regard to alleged ailment is nothing but a malicious afterthought to deny their lawful ownership in the suit land. Learned trial Court framed following issues arising out of the divergent pleadings of the parties:---

- (1) Whether the registered sale-deed dated 27-4-2004, executed in favour of defendants Nos.1 to 6 was result of fraud, deception and blackmailing, therefore, the same is void and ineffective against the rights of the plaintiff, hence it is liable to be cancelled? OPP
- (2) Whether the plaintiff is entitled to obtain the decree of the declaration of rights along with permanent injunction regarding the suit property as prayed for? OPP
- (3) Whether the suit is under valued for the purpose of jurisdiction and court-fee, if proved positively, then its effect? OPD
- (4) Whether the suit is not maintainable in its present form? OPD
- (5) Whether the plaintiff has not come to the court with clean hands? OPD
- (6) Whether the suit is not maintainable under section 42 of the Specific Relief Act? OPD
- (7) Whether the plaintiff has no cause of action and locus standi to file the instant suit, hence liable to be dismissed? OPD

(8) Whether the purchaser of the suit land are bona fide purchasers with consideration, if so, its effect? OPD

(9) Relief.

During the course of evidence Rana Muhammad Zahid (one of the legal representatives) son of Fakhar ud Din appeared in the witness-box as PW-1 and also produced Muhammad Akbar (PW-2) and Muhammad Imran (PW-3). He also produced documentary evidence i.e. copy of record of rights for the year 2006-2007 (Exh.P1), copy of khasra gardawari for the year 2009-2010 (Exh.P2), copy of death entry of Fakhar ud Din (Exh.P3), copy of private criminal complaint in Illegal Dispossession Act, 2005 (Exh.P4), copy of writ petition (Exh.P5), copy of application for correction of gardawari (Exh.P6). On the other hand respondents produced Muhammad Azhar Hameed Advocate as DW-1, Waqas Arshad Registry Moharrar as DW-3, Muhammad Ali son of Ismail as DW-4 and Muhammad Iqbal one of the respondents deposed as DW-2. Respondents also produced documentary evidence i.e. original sale-deed (Exh.D1), special power of attorney (Exh.D2), copy of registered sale-deed No.852 (Exh.D3), copy of FIR (Exh.D4), copy of mutation (Exh.D5), copy of application (Exh.D6), copy of statement of Fakhar ud Din and order dated 12-6-2004 (Exh.D7), copy of order dated 25-5-2004 (Exh.D8), copy of Petition No.7895 of 2004 (Exh.D9) copy of order dated 7-7-2004 (Exh.D10), copy of writ petition (Exh.D11), copy of order sheet and Petition No.16858 of 2004 (Exh.D12), copy of order dated 20-2-2006 (Exh.D13), copy of Petition No.937 of 2004 and order dated 30-8-2004 (Exh.D14), copy of revision petition (Exh.D15) and copy of order dated 22-6-2004 (Exh.D16).

3. Learned counsel for the appellant argues that respondents have miserably failed to prove a valid sale in their favour; that learned trial Court proceeded on wrong assumption of law and facts; that impugned judgment and decree is against law and facts and based on misreading and non-reading of evidence therefore liable to set aside.

4. Learned counsel for the respondents contended that deceased plaintiff has admitted receipt of consideration amount and delivery of possession of suit land in their favour at the time of registration of impugned sale-deed therefore he has no case to plead otherwise; that the learned trial Court has rightly appreciated the controversies on law and facts in the light of evidence produced by the parties and dismissed the suit through impugned judgment and decree dated 19-10-2011 which do not suffer from any factual or legal infirmity and that the appellant has no case to agitate in this appeal which is liable to dismiss.

5. Arguments heard. Record perused.

6. In this case Fakhar ud Din vendor and executor of the impugned sale-deed has categorically averred in the plaint that the impugned sale-deed dated 27-4-2004 was without consideration and outcome of fraud and undue influence. The suit was filed on 16-2-2005. Fakhar ud Din unfortunately died on 18-8-2008 during the pendency of the suit. He was represented by his legal heirs. His real son Rana Muhammad Zahid appeared in the witness-box as PW-1 and reiterated the assertions as set forth in the plaint.

7. In the impugned registered sale-deed (Exh.D1) amount of consideration is mentioned as Rs.45,00,000. Although in the sale-deed (Exh.D1) Fakhar ud Din has acknowledged the receipt of consideration amount however he has categorically denied the receipt of consideration in the averments of the plaint alleging that the execution of sale-deed is an outcome of fraud and undue influence. In the sale-deed delivery of possession of suit land to the vendees has also been mentioned whereas the same is denied by Fakhar ud Din in the plaint. On the other hand respondents/vendees in their written statement categorically contended that the sale-deed was executed after payment of full consideration and that possession of suit land was also delivered in their favour at the time of registration of the sale-deed. It is obvious on the record that no consideration amount was paid by the vendees to the vendor Fakhar ud Din at the time of registration of sale-deed before the Sub-Registrar. It is not mentioned in the impugned sale-deed that when, where and how the consideration was paid by the vendees to the vendor. Even the contents of the written statement do not bear any such details regarding payment of the consideration amount by the vendees to the vendor. Muhammad Azhar Hameed Advocate (DW-1) the alleged scribe of sale-deed (Exh.D1) in his examination in chief has not uttered even a single word with regard to the amount of consideration or its payment or mode of payment. He is not witness to payment of any consideration amount by the vendees to the vendor. Muhammad Iqbal (DW-2) one of the respondents in his personal capacity as well as special attorney of the other respondents for the first time in his testimony stated that out of consideration amount of Rs.4500000 he had paid Rs.3,00,000 to the vendor about fifteen days before the registration of the sale-deed and had further paid Rs.42,00,000 before two days of the registration of the sale-deed. He did not mention that in whose presence the said payments were made by him to the vendor. It is noteworthy that no separate receipts with regard to the part or final payment of said consideration was got scribed by the vendees from the vendor. Muhammad Iqbal (DW-2) respondent in his testimony has failed to mention that when and where and in whose presence the deal of impugned sale-deed was struck between the parties. Muhammad Ali (DW-4) the marginal witness of sale-deed (Exh.D1) while appearing in the witness box has simply stated that respondents Muhammad Iqbal and others had purchased the suit land from Fakhar ud Din and that deal of the sale was struck in his presence and that remaining consideration amount was also paid in his presence. He did not mention that when and where the deal of sale was struck. It is no where mentioned by him that how much advance or balance consideration amount was paid in his presence. It is important to note that mode of payment of consideration amount was neither mentioned in the sale-deed (Exh.D1) nor contended in the written statement therefore subsequent statement of Muhammad Iqbal (DW-2) in this regard amounts to an afterthought and travel beyond the pleadings and thus of no avail to the respondents in the absence of any sufficient oral or documentary proof.

8. Although it is mentioned in sale-deed (Exh.D1) that possession of subject matter was delivered to the vendees and respondents have further contended so in their written statement however fact remains that Muhammad Iqbal DW-2 one of the respondents in his testimony did not state that the possession of the suit land was ever delivered to them. During the course of cross-examination he admitted that possession of the suit land is with the legal heirs of Fakhar ud Din deceased. During cross-

examination he stated that possession of the suit land was delivered by Fakhar ud Din to them and it remained with them for 19/20 days but he failed to explain that if the possession was delivered to them how they lost the possession. Admittedly respondents had lodged a private complaint under Illegal Dispossession Act, 2005 (Exh.P4) before the learned Sessions Judge which was dismissed as withdrawn vide order dated 6-1-2007. There is nothing on the record to show that respondent had ever made any effort with regard to recovery of possession in accordance with law. It is important to note that Muhammad Ali (DW-4) during cross-examination admitted that possession of suit land was not obtained by the respondents at the time of alleged registration of sale-deed. It is therefore obvious that possession of the suit land was never delivered to the vendees by the vendor.

9. The term 'sale' is defined under section 54 of the Transfer of Property Act, 1882 as under:---

"Sale is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised."

Bare reading of the above definition manifests that a valid sale transaction is constituted when the following essential elements are provided by the vendee:---

- (i) The valid sale agreement;
- (ii) The parties to the sale transaction;
- (iii) The sale consideration fixed and paid; and
- (iv) The subject matter of the sale transaction.

In case any one of afore mentioned ingredients is found missing the transaction would not fall within the definition of sale. The expression 'in exchange for a price' used in section 54 of the Transfer of Property Act, 1882 is very significant. It manifests that price is an essential ingredient in a sale and no transaction of sale can be said to be completed in the eye of law unless price was fixed or paid or part paid and part promised.

10. Learned counsel for the respondents has vehemently argued that impugned sale-deed being a registered document has a presumption of truth execution whereof is not denied by Fakhar ud Din which cannot be defeated with the help of oral evidence. Perhaps learned counsel for the respondents is misconceived. In this regard it will be expedient to reproduce the provisions of Article 103 of the Qanun-e-Shahadat Order, 1984 which reads below:---

"103. Exclusion of evidence of oral agreement.--- When the terms of any such contract grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last Article, no evidence of any oral agreement or statement shall be admitted, as between the parties to an

instrument or their representative in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1). Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law .."

Article 103 of Qanun-e-Shahadat Order, 1984 is corresponding provision of section 92 of the repealed Evidence Act, 1872. There is no cavil to the principle laid down in the provision of Article 103 of the Qanun-e-Shahadat Order, 1984 however fact remains that this is subject to the provisos. Proviso (1) supra clearly manifests that any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law. In effect to the above quoted proviso therefore where a case is one when the validity of sale-deed is itself in question either because of misrepresentation, fraud or non-payment of consideration, the evidence could be led not to alter the terms of document but to prove its invalidity. Reliance be made upon Muhammad Shafi and others v. Allah Dad Khan (PLD 1986 Supreme Court 519).

11. It is well-settled that a false acknowledgement of receipt of price by a recital in a deed does not estop the seller from giving evidence as against the buyer that he has not received payment. The Privy Council in *Shah Lal Chand v. Indarjit* (1900) 22 All. 370) said that it was settled law, that notwithstanding an admission in a sale-deed that the consideration has been received, it is open to the vendor to prove that no consideration has been actually paid, if it was not so, facilities would be afforded for the grossest frauds.' But such a recital may give rise to a presumption of payment. It is an established principle of law that where a sale was effected through registered sale-deed in which amount of consideration was mentioned same could not be construed to be a sale without consideration though it could altogether be a different matter whether payment of that consideration was made or not. However the party who has acknowledged the receipt of consideration in the sale-deed can show that he did not receive it.

12. Needless to say that proviso (1) of Article 103 of Qanun-e-Shahadat Order, 1984 opens the door for the Courts to inquire into real nature of transaction between the parties. Article 103 of Qanun-e-Shahadat Order, 1984 merely prescribes rule of evidence. It does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances. Where a vendor admits that he had executed sale-deed but alleged that the same was under influence and without consideration it is an established principle that evidence to prove such a condition is admissible and does not violate provision of Article 103 of Qanun-e-Shahadat Order, 1984. In such cases rule of extrinsic evidence does not apply rather evidence to show the true nature of transaction is admissible.

13. In this case there is ample evidence on the record to establish that Fakhar ud Din being unhappy on account of disobedience of his family members had parted himself

and during that period he was somehow enticed and captured by the respondents. Record reveals that Muhammad Ashraf son of Fakhar ud Din one of the appellants had lodged a case under section 364, P.P.C. on 21-5-2004 at Police Station City Daska against the respondents and Muhammad Ali son of Ismail (DW-4) marginal witness of sale-deed (Exh.D1). Although Fakhar ud Din during the said period while associating the respondents denied his abduction however while filing the plaint in this suit he categorically contended that respondents had got executed the impugned sale-deed from him under undue influence and without consideration. It is on the record that at the time of alleged registration of sale-deed Fakhar ud Din was an old man. Muhammad Ali (DW-4) marginal witness of sale-deed while facing cross-examination has not denied the suggestion that Fakhar ud Din was suffering from high blood pressure and cardiac diseases. Besides it is obvious on the record that at the time of alleged registration of the impugned sale-deed Fakhar ud Din was not having any independent advice. When there is allegation of fraud or deceit by an old man who had no independent advice and has been deprived of his valuable property by a document onus automatically shifts upon beneficiary to prove its contents. Needless to say that courts are not divested of the powers to scrutinize the reasons and justifications for the impugned transaction of sale so that no un-justice is done to the rightful owner. Needless to say that element of undue influence is not restricted to an illiterate parda-nashin lady rather it could prevail even on men in the peculiar circumstances of a case. In this case it is on the record that Fakhar ud Din had been living apart for some time being unhappy and angry with his family members and during the said period his relative Muhammad Ali (DW-4) marginal witness of sale-deed (Exh.D1) being connived with the respondents had got executed the sale-deed (Exh.D1) from Fakhar ud Din in favour of respondents Nos.1 to 6 without consideration and under undue influence.

14. Learned counsel for the respondents has laid much emphasis on his argument that presumption of truth is attached to the certificate of registration recorded by Sub-Registrar on the impugned registered sale-deed (Exh.D1) and that nothing contrary to the same could be pleaded by the executant Fakhar ud Din who has not denied the execution of sale-deed. In this regard we are benefited with the dictum laid down by the Hon'ble Supreme Court of Pakistan in the case of Qazi Altaf Hussain v. Ishfaq Hussain 1986 SCMR 1427 where it was held that under section 60 of the Registration Act a presumption of correctness is attached to the certificate endorsed on the sale-deed by the Registration Officer only for the purpose of proving that the document has been duly registered. But as regards the receipt of consideration by the vendor, only a presumption arises out of the admission made by the vendor which could be contradicted by independent evidence as that relates to want of consideration and exercise of undue influence. In another other case titled Wahid Bakhsh v. Muhammad Shafi (PLD 1976 Lahore 1069) this Court has held that the endorsement of the Registrar as to the receipt of the consideration is rebuttable, and it is always open to the vendor to refute it on the ground that the amount shown therein is fictitious. In the case titled Dharm Singh v. Kirpal Singh and others (AIR 1923 Lahore 31(2)) it was held that a formal recital as to the price having been received is a very weak piece of evidence between the parties to the deed. This is so because there is only a presumption attached to it which can be refuted. In the case of Parshotam Das v. Yar Ali (AIR 1928 Oudh 439) it was laid down that mere registration of sale-deed does not

operate to pass the title to the vendee or to pass any interest in the property purported to have been sold to him where there is no proof of the transfer of possession of the property nor of the payment of consideration.

15. In this case the contention of the respondents that consideration was paid to the vendor in two installments of Rs.3,00,000 and Rs.42,00,000 is not substantiated through any ocular or documentary evidence available on the record. Muhammad Iqbal respondent/vendee was also unable to satisfactorily explain as to wherefrom he arranged such heavy amount of Rs.42,00,000 and paid to the vendor at a place where no one else was present and no receipt was taken then and there by him from vendor. Respondents therefore have failed to establish the payment of consideration amount of Rs.45,00,000 and valid acknowledgment of its receipt in the sale-deed. Since passing of consideration in lieu of sale is not established on the record therefore impugned sale was a sham and void transaction as not proved in accordance with law.

16. For the reasons given above we have no hesitation in reaching the conclusion that the impugned sale-deed was invalid for want of consideration and further that Fakhar ud Din was duped to execute it as a result of deceit and undue influence practised on him. It is an established principle of law that in civil cases issues are resolved on preponderance of evidence. Learned trial Court thus failed to appreciate the evidence in its true perspective. The impugned judgment and decree passed by learned trial court therefore is based on misreading and non-reading of evidence, against law and facts, untenable and liable to set aside.

17. For what has been said above this appeal is allowed. Impugned judgment and decree dated 19-10-2011 is set aside and the suit lodged by the appellants is decreed as prayed for in their favour against the respondents.

18. Parties are left to bear their own costs.

AG/F-2/L Appeal allowed.

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