

2016 C L C Note 102**[Lahore]****Before Amin-ud-Din Khan, J****JAVED IQBAL and others---Appellants****Versus****BASHIRAN BEGUM and others---Respondents**

R.S.A. No. 75 of 2005, heard on 19th November, 2012.

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

---S. 12---Qanun-e-Shahadat (10 of 1984), Arts.117 & 120---Specific performance of agreement to sell---Execution of agreement---Onus to prove---Plaintiffs sought specific performance of agreement to sell executed by attorney of original owner--- Trial Court dismissed the suit but Lower Appellate Court allowed appeal and decreed suit in favour of plaintiffs---Validity---Original owner got power of attorney cancelled on the basis that it was a fake document---If power of attorney was treated as a genuine document, which was dated 10-5-1982, even before that, the original owner had transferred suit property in favour of defendants through written sale deed dated 13-2-1982---When original owner till his last breath under the sale deed owned transfer of suit property in favour of defendants and if power of attorney was valid attorney of the original owner, even then he was not competent to enter into agreement to sell the property on behalf of his father again, which had already been transferred and admitted by the owner---Decree in suit for specific performance was a discretion with the court, if plaintiff had proved the agreement without any shadow of doubt---Evidence led by plaintiffs did not entitle them to a decree for specific performance in their favour---Refusal by Trial Court was in accordance with law and reversal of findings by Lower Appellate Court on the basis of which decree for specific performance had been granted, was not only against evidence on file but also against principles of law---Plaintiffs were not entitled to decree for specific performance, therefore, High Court reversed findings recorded by Lower Appellate Court granting decree for specific performance, as suit property was not available for transfer at the time of agreement to sell by the attorney---High Court set aside judgment and decree passed by Lower Appellate Court and restored that of Trial Court---Second appeal allowed in circumstances. [Paras. 7 & 9 of the Judgment]

(b) Civil Procedure Code (V of 1908)---

---S. 12(2)---Application under S. 12(2), C.P.C.---Locus standi---Where plaintiff has no locus standi to challenge decree under S. 12(2), C.P.C. unless declaration for his right is made through another decree, in that eventuality, independent application under S. 12(2), C.P.C. cannot be filed by that person. [Para. 8 of the Judgment]

S. M. Masud for Appellants.

Taqi Ahmad Khan for Respondents Nos.2-3 and 5-6.

Rana Liaquat Ali Khan for Respondents Nos.7 and 11 to 13.

Date of hearing: 19th November, 2012.

JUDGMENT

AMIN-UD-DIN KHAN, J.---Through this appeal, the appellants-defendants have challenged the judgment and decree dated 22.02.2005 passed by the learned Addl: District Judge, Sialkot, whereby the appeal filed by the respondents-plaintiffs was accepted and the judgment and decree dated 06.05.2004 passed by the learned Civil Judge 1st Class, Sialkot, dismissing the suit filed by the respondents-plaintiffs, were set aside.

2. Briefly, the facts as leading to this appeal are that Muhammad Tufail, predecessor of respondents Nos.1 to 6 on 23.11.1988 filed a suit for possession of suit shops through specific performance and also prayed for cancellation of sale deed in favour of defendant No.3 by defendant No.1. The plaintiff claimed the specific performance of agreement to sell dated 23.05.1988 by defendant No.2, general attorney, through registered general power of attorney No.367 registered on 11.05.1982 on behalf of defendant No.1 (the owner) and the father of general attorney.

3. The defendants Nos.1 and 3 contested the suit by filing written statements, whereas defendant No.2 filed consenting written statement. Initially the issues were framed on 12.05.1990 and issues Nos.6-A and 6-B as additional issues were framed on 24.06.1998. The parties were directed to produce their respective evidence. Both the parties adduced oral as well as documentary evidence in support of their claims. After the close of trial, the suit was decided vide judgment and decree dated 06.05.2004 by learned Civil Judge 1st Class, Sialkot, the concluding paragraph of which is as under:

"In view of my findings on above issues the suit of the plaintiffs is decreed against the defendants Nos.1 to 5, in the manner that sale deed dated 21.09.1988 being void is cancelled. The plaintiffs are entitled to recover Rs.200000/- along with interest from defendants Nos.1 to 5. The suit to the extent of defendants Nos.6 to 15 is dismissed. No order as to costs."

Therefore, the sale deed in favour of defendant No.3 was cancelled. The decree for specific performance was refused. The earnest money paid by the plaintiff was directed to be recovered from defendants Nos.1 to 5. The suit to the extent of defendants No.6 to 15 was dismissed. The plaintiffs feeling aggrieved by the judgment and decree passed by learned trial court, preferred an appeal before the lower appellate forum, which was accepted by the learned Additional District Judge, Sialkot, vide judgment and decree dated 22.02.2005. Hence, this regular second appeal.

4. Learned counsel for the appellants argues that there was a sale deed (Ex.D-2) in favour of the appellants dated 13.02.1982, though it was not registered one but was notarized and when it was produced in the suit filed by the appellants for declaration, copy of the plaint thereof is Ex.D-6, whereupon the requisite stamp duty required for the sale deed as well as penalty was paid under the orders of the court, which has been endorsed upon this document and in this regard a certificate was issued by the District Officer (Revenue)/District Collector, Sialkot and on the basis of this document a decree for declaration of title was passed by learned trial court on the statement of original owner, Muhammad Bashir son of Umer-ud-Din on 03.09.1992 and the same was never challenged through any permissible mode before any forum. Further states that admittedly on the basis of part performance of this sale deed, the possession was delivered to the appellants, which is admittedly with them till today. It has been further argued that this Ex.D-2 is a sale deed and for cancellation of this sale deed, plaintiff has never prayed; that the plaintiff has prayed for cancellation of the sale deed in favour of defendant No.3, which has been cancelled through the judgment and decree of learned trial court and defendant No.3 has never challenged that judgment and decree any further; that in accordance with section 54 of the Transfer of Property Act, 1882 the sale was complete and learned civil court had granted a decree for declaration in favour of the appellants, which decree has not been challenged in any forum; that under section 53-A of the Specific Relief Act, 1877 the appellants are entitled to retain the possession of suit property, as under the sale possession was delivered to them and that if the plaintiffs were aggrieved of the decree in favour of appellants, they were bound to challenge the same under section 12(2) of the C.P.C.

5. On the other hand, learned counsel for respondents Nos.2, 3, 5 and 6 argues that a valid agreement to sell on the basis of general power of attorney by defendant No.2, the son of original owner, was entered with the plaintiff through Ex.P-3; that as the suit in which the decree has been passed in favour of the appellants was filed during the pendency of suit in hand, therefore it cannot adversely effect the rights of the respondents; that the respondents have challenged the decree in favour of appellants in their suit; that as Ex.D-2 was unregistered sale deed, therefore in accordance with Section 49 of the Registration Act, 1908 it has no value. Learned counsel further argues that the impugned sale deed at the most can be termed as an agreement and on the basis of agreement his suit for specific performance could have been filed and no suit for declaration was competent, therefore prayed for dismissal of the appeal.

Learned counsel appearing on behalf of respondents Nos.7, 11 to 13 has supported the arguments advanced by learned counsel for the appellants.

6. I have heard the learned counsel for the parties at full length and also gone through the record with their able assistance.

7. It is not denied that the original owner was Muhammad Bashir. He has owned Ex.D-2, the sale deed in favour of the appellants dated 13.02.1982 and also consented for passing a decree in the suit for declaration filed by the appellants in previous round of litigation against him. This document, sale deed, was impounded

by the trial court and in compliance of the order the requisite stamp duty was paid and also penalty was paid upon this document, which was received and endorsed by the District Officer (Revenue)/District Collector, Sialkot, who is also Registrar under the Registration Act. He has endorsed with regard to the payment of the stamp duty. Therefore, the registration of a document after that remains only a formality and when on the basis of this document, learned trial court through a decree declared Sheikh Nazir Haider and Rana Muhammad Rashid, the owner of suit property and there is a record of property tax register, which has been produced as Ex.D-3 and Ex.D-4 in favour of the appellants, plaintiff cannot say that on the basis of oral agreement to sell the decree for declaration was passed in favour of the appellants. Even otherwise, it is admitted by learned counsel for the respondents that the appellants are in possession of the suit property since before the filing of their suit and even till today they are in possession. At the time of entering into agreement to sell by the plaintiffs-respondents it was their duty to inquire from the appellants that under which capacity they are in possession of suit property, as they are going to enter into an agreement to sell with the Attorney of the original owner. The file is also silent about the fact that why the plaintiffs did not enter into agreement to sell with regard to the suit property with the original owner, when he is the resident of Sialkot. I have further observed that Ex.P-1 is a general power of attorney in which no specific property has been mentioned. This power of attorney is general with regard to various urban as well as rural properties. Even otherwise, afterwards it was got cancelled by the original owner Muhammad Bashir on the basis that it is a fake document. If this power of attorney be treated as a genuine document which is dated 10.05.1982, even before that, the original owner has transferred the suit property in favour of appellants through a written sale deed dated 13.02.1982 and when the original owner till his last breath under this sale deed has owned transfer of the suit property in favour of the appellants and if defendant No.2 was a valid attorney of the original owner, even then he was not competent to enter into agreement to sell the property on behalf of his father again, which has already been transferred and admitted by the owner. A decree in the suit for specific performance is a discretion with the court to decree the suit, if plaintiff proves the agreement without any shadow of doubt. The reason given in Ex.P-1 for giving power of attorney is advanced age of the owner for administration of the various properties, when the owner is available and even if there is any valid attorney, the person claiming agreement to sell through attorney is also bound to advance and prove the reason that why he entered into an agreement to purchase the property of the owner through the attorney, when original owner is available. In these circumstances, the evidence led by the plaintiffs-respondents does not entitle them to a decree for specific performance in their favour. The refusal by learned trial court was in accordance with law. The reversal of the findings of learned trial court by the first appellate court and on the basis on which the decree for specific performance has been granted, is not only against the evidence on the file but also against the principles discussed supra. The respondents-plaintiffs were not entitled to the decree for specific performance. Therefore, the findings recorded by learned first appellate court for granting the

decree for specific performance are reversed, as the suit property was not available for transfer at the time of agreement to sell by the attorney.

8. I do not agree with the argument of learned counsel for the appellants that a decree in their favour was only challenge-able through an application under section 12(2) of the C.P.C. and through this suit in hand the decree cannot be challenged. As in a case where the plaintiff has no locus standi to challenge a decree under section 12(2) of the C.P.C. unless a declaration for his right is made through another decree, in that eventuality I am of the view that an independent application under section 12(2) of the C.P.C. cannot be filed by that person. In case in hand, the respondents-plaintiffs were not having locus standi to challenge the decree in favour of the appellants unless a decree for specific performance is not passed in their favour, therefore challenging the decree in favour of the appellants by the respondents-plaintiffs in this suit was competent. It is another aspect whether they successfully challenged the same or not. In this view of the matter, on the basis of evidence and record available on the file in shape of previous proceedings of the suit in which the decree has been passed in favour of the appellants, the respondents failed to show any misrepresentation, fraud or jurisdictional defect in passing of that decree, therefore they failed to successfully challenge the decree for declaration in favour of the appellants.

9. In the light of what has been discussed above, this appeal is allowed. The impugned judgment and decree dated 22.02.2005 passed by learned Additional District Judge Sialkot, are hereby set aside. The result would be the suit filed by the respondents-plaintiffs shall stand dismissed with costs throughout.

MH/J-26/L Appeal allowed.

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