JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

R.F.A. No.103 of 2020

Mst. Albeena Babar and another
Versus
Muhammad Bilal Khan and others

Appellants by	:	Rana M. Irshad Khan, Advocate.
Respondent No.1 by	:	Barrister Ahsan Jamal Pirzada, Advocate.
Dates of Hearing	:	18.04.2022, 12.05.2022, 24.05.2022, 30.06.2022, 06.09.2022, 03.10.2022 and 28.10.2022

ARBAB MUHAMMAD TAHIR,J.:- This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (hereinafter referred to as "C.P.C.") is directed against judgment and decree dated 08.02.2020 passed by the learned Senior Civil Judge-I-West, Islamabad, by means of which, the learned Civil Court decreed the suit for specific performance and permanent injunction which was instituted by Muhammad Bilal Khan (respondent No.1). The relief sought by respondent No.1 in the said suit was as follows:-

> *"It is, therefore, respectfully prayed that a decree for specific performance of contract / agreement dated: (no date mentioned) directing the defendants to perform their part of contract dated 31.12.2003, 8.3.2011, 4.5.2011 transferring shop No.1 (Corner Front Side)_ Ground Floor Al-Babar Centre F-8 Markaz Islamabad in favour of the plaintiff through registered sale deed and for permanent injunction restraining the defendants from selling/transferring the suit shop or interfering with the possession of the plaintiff on the said shop in any manner whatsoever may be passed in favour of the plaintiff against the defendants with costs.*

02. Khurram Ali Khan and his father Nasihat Ali Khan (respondents No.2 and 3) were summoned through all modes even through the Court of the concerned learned Senior Civil Judge,

Rawalpindi but no one turned up on their behalf, whereafter in the interest of justice, again notices were issued to them. This time again, they have not been served due to the reason of being them abroad.

03. The facts forming background of the present appeal are that appellant No.2 (Zaheer-ud-Din Babar) being the owner of shop No.1 (corner front side), ground floor, Al-Babar Centre, F-8 Markaz Islamabad (hereinafter referred to as "the suit shop"), appointed his wife, appellant No.1 (Mst. Albeena Babar) as his lawful general power of attorney who entered into an agreement to sell dated 31.12.2003 with respondent No.2 (Khurram Ali Khan), whereby she agreed to sell the suit shop to respondent No.2 for a total sale consideration of Rs.57,50,000/-. The said agreement dated 31.12.2003 was entered into between appellant No.1 (being attorney of appellant No.2) and respondent No.2 (Khurram Ali Khan) through respondent No.3 (his father/attorney). Subsequent thereto, respondent No.3 (Nasihat Ali Khan) being the attorney of his son i.e. respondent No.2, entered into a further sale agreement on 08.03.2011 with respondent No.1 for a total sale consideration of Rs.1,37,00,000/- which amount was duly received by respondent No.3 on behalf of respondent No.2 and possession of the suit shop was delivered at the spot. That respondent No.1 approached respondents No.1 to 3 with a request to transfer the suit shop in his name, but they did not accede to the request of respondent No.1, therefore, respondent No.1 was constrained to institute a civil suit for specific performance and permanent injunction, which stood decreed in favour of respondent No.1. Hence, this appeal.

04. Learned counsel appearing on behalf of the appellants contended that respondent No.2 was not the real owner of the suit shop hence, the agreement to sell dated 08.03.2011 executed by him, was of no legal consequence; that the appellants were bereft of the knowledge as to the execution of the said agreement; that the

suit instituted by respondent No.1 was erroneously decreed by the learned Civil Court; that the impugned judgment and decree are based on non-reading and mis-reading of the evidence available on the record; that the impugned judgment and decree are not based on the correct appreciation of law and facts; that the learned Civil Court erred in law by not applying its judicial mind that for a document which contains financial obligation, is to be proved through evidence of two attesting witnesses thereto in terms of Articles 17 and 79 of the Qanoon-e-Shahadat Order, 1984; that the learned Civil Court did not appreciate the evidence produced on behalf of the appellants; that respondent No.1 during his cross-examination had candidly admitted that he had not paid a single penny to the appellants as a sale consideration in respect of the suit shop; that the impugned judgment and decree are against the canons of natural justice, concluded the learned counsel for the appellants. Learned counsel prayed for the setting aside of the impugned judgment and decreed dated 08.02.2020.

05. On the other hand, learned counsel appearing on behalf of respondent No.1 has opposed the contentions advanced by the learned counsel for the appellants by submitting that the agreement dated 08.03.2011 was validly executed by respondent No.3 on behalf of respondent No.2 with respondent No.1; that respondent No.3 received the sale consideration in relation to the suit shop; that it was specifically provided in the said agreement to sell dated 08.03.2011 that the suit shop will be transferred in the name of respondent No.1 in due course of time; that when respondent No.1 approached appellant No.1 to transfer the suit shop in his name, appellant No.1 agreed to do so and asked respondent No.1 to prepare the sale deed; that appellant No.1 further showed her willingness that she will get her statement recorded before the Joint/Sub-Registrar; that as per the instructions of appellant No.1, respondent No.1 purchased a stamp paper and asked appellant No.1 to honour her commitment, but she resorted to delaying

tactics and finally refused to transfer the suit shop in the name of respondent No.1; that appellant No.1 concealed the material facts from the learned Court below inasmuch as she executed another agreement to sell dated 05.05.2011 demonstrating an amount of Rs.57,50,000/- as a sale consideration regarding the suit shop; that the judgment and decree passed by the learned Court below are based on correct appreciation of the material available on the record before the learned Civil Court; that the impugned judgment does not suffer from any illegality calling for interference by this Court; that the learned Civil Court after reading the evidence put forth by the parties, reached at a righteous conclusion by decreeing respondent No.1's suit, concluded the learned counsel for respondent No.1. Learned counsel prayed for the appeal in hand to be dismissed with costs. In concluding his arguments, learned counsel relied upon the judgments reported as 2019 SCMR 524, 2015 CLC 994, 2020 YLR 711, 2019 SCMR 711, AIR 1963 Mad. 24, 2015 SCMR 959, 1962 PLD 756, PLD 2015 SC 212.

06. Heard the contentions advanced at the bar and perused the record with able assistance of the learned counsel for the parties.

07. A careful perusal of the record reflects that a suit for specific performance and permanent injunction was instituted on 29.06.2013 by respondent No.1 with respect to the contracts emanating from agreements dated 31.12.2003 and 08.03.2011 in relation to the suit shop. On 31.12.2003, appellant No.1 entered into a sale agreement with respondent No.2, whereby she being the attorney of appellant No.2 (Zaheer ud Din Babar), agreed to sell the suit shop to respondent No.2 (Khurram Ali Khan) in return of sale consideration of Rs.57,50,000/-. This agreement to sell dated 31.12.2003 was not exhibited in evidence by either party before the learned Civil Court however, a copy of the same is available on lower Court's record. The said suit was contested by the appellants by

way of filing their joint written statement. Needless to mention that the written statement filed on behalf of the appellants was not signed by them rather the same was signed by their counsel. In the said written statement, certain preliminary objections with respect to the competence of the civil suit were taken. One of such objections was as follows:-

> *"that the answering defendants have not signed/executed any agreement to sell with the plaintiff hence he has no suit against the answering defendants even or otherwise agreement to sell has no value in the eyes of law hence the suit of the plaintiff is liable to be dismissed throughout with costs".*

08. The parties to the suit adduced their respective evidence and the divergence in the pleadings of the contesting parties was summed up by the learned Civil Court on 15.05.2014 into the following issues:-

1. *Whether the plaintiff is entitled for specific performance of the agreement and permanent injunction as prayed for? OPP*
2. *Whether the plaintiff has no cause of action to file the instant suit? OPD*
3. *Whether the suit is not maintainable? OPD*
4. *Whether he suit is false and frivolous and is liable to be dismissed? OPD*
5. *Relief.*

09. The parties to the suit were directed to submit their certificate of readiness and list of witnesses within a period of seven days and the matter was posted for respondent No.1's evidence. The evidence produced by the parties culminated in the passing of the impugned judgment and decree dated 08.02.2020 in favour of respondent No.1 and against the appellants, *vires* whereof are being challenged in the appeal at hand primarily on the ground that respondent No.2 was not the owner of the suit shop, and that the agreement to sell dated 08.03.2011 executed by respondent No.2 through respondent No.3 with respondent No.1 was invalid and of

no legal consequence. The point in issue primarily pertains to two different agreements i.e. sale agreement dated 31.12.2003 (hereinafter referred to as "the first agreement") which was executed between appellant No.1 (Mst. Albeena Babar) with respondent No.2 (Khurram Ali Khan) and subsequent sale agreement dated 08.03.2011 (hereinafter referred to as "the second agreement") which was executed by respondent No.2 through respondent No.3 (Nasihat Ali Khan) with respondent No.1 (Muhammad Bilal Khan). The appellants assert that respondent No.2 was not the owner of the suit shop hence his execution of second sale agreement with respondent No.1 was illegal and of no legal effect.

10. Perusal of the record reflects that the first agreement was not tendered in evidence by either party before the learned Court below. However, in order to prove the fact that appellant No.2 (Mst. Albeena Babar) had in fact sold the suit shop to respondent No.2 (Khurram Ali Khan), respondent No.1 appeared as PW-1 and produced certified copy of the plaint in the suit for declaration, cancellation of documents and recovery of Rs.5,50,000/- as arrears from total sale consideration, mandatory and permanent injunction (i.e. civil suit No.1142/2013 titled Mst. Albeena Babar Vs. Muhammad Bilal Khan and others (Exh.P-11) which was filed on 20.04.2013, the contents whereof were also verified on oath. A combined reading of paragraphs No.1 and 2 of the plaint in the said suit makes it conspicuous that the suit shop was purchased by respondent No.2 from appellant No.1 in return of sale consideration amounting to Rs.57,50,000/-. Coupled with the said fact is also an admission on the part of appellant No.1 to the effect that respondent No.1/Muhammad Bilal Khan, is in possession of the suit shop. Furthermore, it has been admitted in the said suit that respondents No.1 and 2 are enjoying the proprietary rights of the suit shop without making full payment to appellant No.1. For ease of reference, it would be apposite to reproduce paragraphs No.1 and 2 of the said suit, which read thus:-

"1. That the plaintiff as per letter No.CDA/M-27(2396)/94/475 dated 02.02.1995 has the lease hold rights of Plot No.07, measuring 3533.33 Sq. Yds situated in Sector F-8, Markaz, Islamabad and at present the said plot is fully constructed and comprising upon shops, offices and flats, now the same is known as Al-Babar Center, Islamabad ***and the defendant No.2 (i.e.respondent No.2 in he said appeal) purchased a Shop No.1, (Corner Front Side) from the plaintiff vide its Agreement to Sell Dated 01.10.2003 against total sale consideration of Rs.57,50,000 out of which 5,50,000 is outstanding yet against the defendant No.2*** *so, hereinafter both (Shop) and (Agreement to Sell) will be called as suit Shop and suit Document."*

2. ***That the defendant No.2 is residing in the same street and of the same Scheme i.e. Chakala Scheme No.III Rawalpindi where the plaintiff is residing due to this reason and relation the plaintiff executed the above said Agreement to Sell/suit documents concerning to the suit Shop without receiving full sale consideration and there is 5,50,000 outstanding / arrears from the complete sale consideration and the plaintiff constantly requested to the defendant No.2 that he may kindly pay the suit amount and the plaintiff severally requested in writing through legal notices and verbally too but vain/ineffective. It is not out of place to mention here that the plaintiff executed another (sic) sale deed No.3633 dated 23.06.2007 in favour of the defendant No.2 and there from Rs.3,00,000/- is outstanding and is arrear yet in the part of defendant No.2 and the plaintiff has instituted her another separate suit for the cancellation of the said Sale Deed it is further fit to write here that the defendant No.2 sold out the suit shop to the defendant No.1 and at present the defendant No.1 is in possession of the suit shop on the basis of agreement to sell to agreement to sell (sic) and without obtaining any title etc. from the plaintiff or otherwise.***

(Emphasis supplied)

11. Apart from filing civil suit No.1142/2013, appellant No.1 filed yet another suit for declaration, cancellation of documents and recovery of Rs.3,00,000/- as arrears from total sale consideration mandatory and permanent injunction (i.e. civil suit No.1141/2013 dated 20.04.2013). It would be of paramount importance to mention that both the suits that were earlier filed by appellant No.1 were dismissed vide judgment dated 18.12.2018 passed by the learned

Civil Court since appellant No.1 did not bother to pursue her suits. Even otherwise, notice in terms of Order XVII, Rule 3 had also been issued to her, but to no avail. Eventually, appellant No.1's right to produce evidence stood closed. The operative part of the said judgment dated 18.12.2018 is reproduced as under:-

> ***"After framing of issues matter was fixed for evidence of plaintiff. Relevant to mention here that inspite of availing ample opportunities plaintiff remained failed to produce his evidence. Ultimately an absolute last opportunity alongwith notice U/O XVII Rule III CPC was granted vide order dated 17.06.2016 and matter was fixed for today. Even today matter was kept awaiting till rising hours of the court for the production of evidence notwithstanding, plaintiff remained failed to produce the evidence therefore, right of plaintiff to produce the evidence is hereby closed U/O XVII Rule III CPC."***
> ***(Emphasis supplied)***

12. Respondent No.2, who was defendant No.2 in the said suits was proceeded against *ex-parte* since despite exhaustion of procedure for effecting service onto him, his attendance could not be procured. Same was the situation in these proceedings.

13. It is an admitted position that appellant No.1 did not dispute the sale of the suit shop to respondent No.2, who had purchased the same from her through respondent No.3 (i.e. his father/attorney). Subsequently, through second sale agreement, respondent No.3 (respondent No.2's attorney) sold the suit shop to respondent No.1 against the return of sale consideration amounting to Rs.1,37,00,000/- (One Crore thirty seven lacs). The second sale agreement also makes mention of the fact that the seller/attorney had purchased the suit shop from appellant No.1 through the first agreement dated 31.12.2003. It would not be out of context to mention that Ghulam Mustafa Awan s/o Abdul Khaliq Awan had entered the witness box as DW-1 and had deposed that he was the special power of attorney of the appellants. In this regard, he produced special power of attorney dated 07.11.2016 (Exh.D-1)

authorizing him to get his statement recorded in the pending suit on the appellants' behalf. DW-1 had admitted the fact that respondent No.1 had purchased the suit shop from father of Khurram Ali Khan i.e. respondent No.3. He further admitted that appellant No.1 instituted a suit for cancellation of registry in the name of respondent No.2 since the latter did not pay the outstanding amount of Rs.3,50,000/-. Apparently, the appellants are not owners in possession of the suit shop rather the same is in possession of respondent No.1 since after execution of the second sale agreement, respondent No.1 executed lease agreements (Exh.P-5 to Exh-9) with various parties through which he rented out the suit shop to the parties mentioned in the said lease agreements. It is also an admitted position that the appellants filed two suits seeking *inter alia* the cancellation of the first as well as the second sale agreements coupled with recovery of arrears / outstanding amount, but the said suits were dismissed vide judgment dated 18.12.2018 by the learned Civil Judge, Islamabad. There is no denial to the fact that the value of immovable properties at Islamabad are at peak. It is perhaps for this very reason that the appellants chose to institute the suits for cancellation of the documents / cancellation of sale agreements and to sell the same at an exorbitant price. Had the appellants been vigilant enough in pursuing the proceedings in the said suits and had the appellants been able to get the said suits decreed in their favour, it could have been presumed that both the said agreements were either forged or were never executed thus, of no legal consequence. For the reasons best known to the appellants, they did not pursue the said suits which stood dismissed by the learned Court below. An adverse inference can be drawn against the appellants that they were not in possession of the suit shop since they had sold the same through first agreement to respondent No.2.

14. It is well settled that the conduct and intention of the parties to a contract must be looked at so as to determine the

existence of the contract. In order for a sale of immovable property, certain pre-requisites are to be proved, which are as follows:-

> *i. Payment of the sale consideration and/or a commitment to pay the same by the buyer to the seller;*
> *ii. Taking/handover of the immovable property.*
> *The facts as to the sale/purchase and possession of the immovable property may well be ascertained from the contents of the agreement, which is executed between the seller and the purchaser. Such an agreement forms part of a valid agreement, which can be directed to be performed provided the Court so directs in exercise of its inherent discretion.*

15. This Court in the case titled ***"Ghulam Ahmed Chaudhry through legal heirs Vs. Akbar Hussain (deceased) through legal heirs and 2 others*** has held as follows:-

> *"The sale in terms of Section 54 of the Transfer of Property Act, 1882 requires four specific ingredients i.e.*
> *(a) agreement,*
> *(b) parties to the sale transaction,*
> *(c) sale consideration (fixed or paid) and*
> *(d) subject matter of the sale transaction.*
> *All these ingredients have also been highlighted and appreciated by the superior Court in case reported as 2015 CLC 994 Lahore (Fakhar-ud-Din v. Muhammad Iqbal). Similarly, the most essential element for sale of immovable property is payment of sale price of the property as held by the apex Court in case reported as 2019 SCMR 524 (Sheikh Akhtar Aziz v. Mst. Shabnam Begum). If any of the ingredients referred above is missing, the sale in such circumstances is not proved as held in case reported as 2012 SCMR 1522 (Atta Muhammad v. Muhammad Afzal).*

16. In the case titled ***"Dr. Muhammad Javaid Shafi Vs. Syed Rashid Arshad (PLD 2015 SC 212),*** it was observed by the august Supreme Court as follows:-

> *"Where a person was aggrieved of a fact, he had a right, rather a duty to object thereto to safeguard his right, and if such a person did not object, he shall be held to have waived*

*his right to object and subsequently shall be estopped from raising such objection at a later stage---**Person was estopped by his own conduct, if he though was aware of certain fact(s), which was likely to cause harm to his rights and adversely affect him and was prejudicial against him, avowedly or through some conspicuous act or by omission, intentionally permitted and allowed another person to believe a thing to be true and act on such belief without taking any steps to controvert or nullify such adverse fact and instead he slept over the matter**--- Such waiver or estoppel may arise from mere silence or inaction or even inconsistent conduct of a person."*

17. In the case titled ***"Sheikh Akhtar Aziz Vs. Mst. Shabnam Begum and others (2019 SCMR 524)***, it was *inter alia* held as follows:-

*12. It is settled law that a contract is an agreement having a lawful object, entered into voluntarily by two or more parties each of whom intends to create one or more legal obligations between them. **The basic requirements of a valid and enforceable contract are offer, acceptance, exchange of consideration and mutuality of obligations. Further, a fundamentally important ingredient of a valid contract is that it should be between the parties who are competent to contract. The intention of the parties to a contract must be looked at to determine where a contract has come into existence. The essential elements for sale of immovable property are (a) payment of sale price of the property or promise to pay the same by the buyer to the seller, and (b) delivery of possession of the property. In case, these two essential terms of sale of immovable property can be determined on the basis of contents of the agreement between the parties, with certainty, it may constitute a valid agreement of sale between the parties which, subject to discretion of the Court, can be directed to be specifically performed. The basic test for resolving whether the parties had reached consensus ad idem for concluding a contract is to ascertain where the parties had consensus on all material points at the time the said agreement was executed between the parties.***

(Emphasis supplied)

18. In the case titled ***"the State Vs. Mian Muhammad Latif and others" (PLD 1962 Karachi 756),*** it was *inter alia* held as follows:-

> *The arrangement was that on the sale of the property any gain or profit over the purchase price would be for the benefit of the sellers namely the ship builders. It was urged before the House of Lords that in view of this arrangement the property in the goods had not passed to the buyers and there was no complete sale of the ship. Their Lordships repelled this contention. Lord Selborne in this respect observed as under at page 604 :-*
>
> > *"My Lords, I cannot say that I find in this evidence any very clear or satisfactory proof of a positive agreement having been at any time made for that purpose, although I do find something sufficient to shew that there was a sense of moral obligation, at all events on the part of the purchasers, so to act, and that it was their apparent intention so to act. It may be that what happened between them may arise that, beyond moral obligation, into a legal or equitable obligation, which the Courts would enforce; and that certainly, I think, appears to have been the opinion of the learned Judges in the Court below. I will assume, for the present purpose, that there might be sufficient grounds for that conclusion, but al the most it can come to nothing more than this-that this being in intention expressly a contract of sale, there is a bye-agreement, a collateral agreement, not in the form of a regular back bond, but of that nature, by reason of which, when the property purchased is realized by a subsequent sale, something will be done between the parties to adjust the mutual rights or equities which they have consented to establish between them. That appears to me not only not to destroy the sale as a sale, but really to proceed upon the contract as its foundation and basis, and to be something growing out of that contract which the parties, according to the hypothesis, agreed to do. Therefore, it appears to me that there is no ground whatever for treating this otherwise than as a sale."*

19. In the case at hand, it is also an admitted fact that the appellants *after* dismissal of their earlier two suits on 18.12.2018, did not opt to challenge the said judgment before an appropriate forum. It has almost been four years that the appellants came to

this Court by clandestinely seeking the same relief as had been sought by them in their earlier suits (*supra*). It is my view that a party which failed in getting similar relief or which did not pursue the earlier legal proceedings/litigation, cannot seek the same very relief at a belated stage so as to project an expression that such a party does not seek the earlier relief rather the relief sought by it is in fact a different one from the earlier one. This is not in fact the case at hand. Although the appellants tried to cover up the lacuna on their part by not challenging the said judgment dated 18.12.2018 passed by the learned Court below, whereby their suits were dismissed, but such an attempt remained unsuccessful. In holding so, I am fortified by the law laid down by the august Supreme Court in the case titled ***"State Bank of Pakistan through Governor and another Vs. Imtiaz Ali Khan and others" (2012 SCMR 280),*** wherein it was held as follows:-

> ***"It is well settled law that party once approaching the Court for seeking relief shall seek all the relief to which it thinks is entitled to and if such relief, even if available but not asked for, cannot be claimed by filing a subsequent legal proceedings as it would fall within the mischief of constructive res judicata.*** *On this ground as well the respondents were not entitled to any relief as it has been handed down to them through the impugned judgment."*
> ***(Emphasis supplied)***

20. Likewise, in the case titled ***"Jameel Ahmed Vs. Pakistan Telecommunication Company Limited through General Manager and 3 others" (2022 PLC (C.S.) 481),*** it was *inter alia* held as follows:-

> *"We are of the view that the petitioner approached this Court through C.P. No.D-7054/2019 which was dismissed vide common judgment dated 04.12.2019.* ***His review application was also dismissed vide order dated 05.10.2020. therefore, similar relief cannot be claimed by filing subsequent legal proceedings as it would fall within the mischief of constructive res-judicata."***
> ***(Emphasis supplied)***

21. With respect to the conduct of the party which enters into an agreement, it was held in the case titled ***"Devani Vs. Wells" (2019 SCMR 711),*** whereby after making reference to a judgment of Lewison LJ, the Court held as follows:-

> *"Lawyers frequently speak of he interpretation of contracts (as a preliminary to the implication of terms) as if it is concerned exclusively with the words used expressly, either orally or in writing, by the parties. As so, very often, it is.* ***But there are occasions, particularly in relation to contracts of a simple, frequently used type, such as contracts of sale, where the context in which the words are used, and the conduct of the parties at the time when the contract is made, tells you as much, or even more, about the essential terms of the bargain than do the words themselves."***
> ***(Emphasis supplied)***

22. In sequel to what has been discussed above, I do not find any illegality in the impugned judgment and decree dated 08.02.2020 which is on sound reasons thus calling for no interference by this Court. Consequently, the instant appeal being devoid of any merit, is accordingly **dismissed** with no order as to the costs.

(ARBAB MUHAMMAD TAHIR)
JUDGE

Announced in an open Court on _____12.2022.

JUDGE

ISLAMABAD |_____.12.2022
APPROVED FOR REPORTING.

//Kamran//