Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

REGULAR SECOND APPEAL NO. 26 OF 2015

Mussarat Nazneen Jafari and others

Vs

Syed Mumtaz Ali Shah, etc.

APPELLANTS BY:	Mian Abdul Razzaq, Advocate.
RESPONDENTS BY:	M/s Muhammad Amin Farooqi and Noman Amin Farooqi, Advocates for respondent No.1. Mr. Ishtiaq Ahmed Rana, Advocate for respondent No.2. Mian Ghaffar, Advocate for respondent No.3.
DATE OF HEARING**:**	07.07.2021.

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BABAR SATTAR, J.- This is a Regular Second Appeal against the judgment and decree of the learned Civil Judge dated 23.02.2015 and the judgment and decree of the learned Additional District Judge dated 05.09.2015.

2. The facts in brief are that predecessor-in-interest of the appellant executed an agreement dated 21.10.1999 for the sale of residential plot in phase 3 of Sector G-13 to the respondent. The said plot was to be allotted to the predecessor-in-interest of the appellants as a Federal Government employee. The respondent paid an amount of Rs.200,000/- out of total sale consideration of Rs.545,000/- and only an amount of Rs.136,000/ was outstanding and liable to be paid by the respondent on behalf of predecessor-in-

interest of the appellants to the Federal Government Employees Housing Foundation. After demise of the predecessor-in-interest, the appellant refused to perform a contract which resulted in the suit from which the instant appeal has arisen. The learned trial court decreed the suit for specific performance and also directed the respondents to deposit an amount of Rs.1,61,447/- in the court in lieu of payment made by the appellants to the Federal Government Employees Housing Foundation in lieu of last payment for allotment of the plot. The learned Additional District Judge upheld the findings of the learned trial court but enhanced the remaining consideration amount payable by respondent No.1 to the in lieu of the amount paid by the appellants to the Federal Government Employees Housing Foundation, keeping in view the devaluation of currency since payment was made. Consequently, the respondents were ordered to deposit with the court an amount of Rs.500,000/-.

3. Learned counsel for the appellants has made three legal submissions:

> (i) One of the legal heirs of the deceased predecessor-in-interest of the appellant i.e. Syed Raza Hussain was not impleaded by the respondents in the suit filed and consequently the judgments and decrees passed by both the courts are liable to be set aside for having been passed in the absence of a necessary party. He relied on *Mujahid Wali and others Vs. Mst. FELEELI and others* (2020 CLC 1472) and Metropolitan Corporation of Lahore Vs Syed Bhais (Pvt.) Limited through Managing Director and 5 other *(2004 MLD 1395)* for his argument of legal infirmity due to non impleadment of necessary party.

(ii) The agreement to sell did not include the specification of the plot and being an uncertain document, its specific performance could not be ordered.

(iii) That the suit was filed on 20.04.2009 even though the agreement to sell was executed on 21.10.1999 and consequently the suit was time barred having been filed beyond the period of three years from section of the agreement to sell. He relied on *United Bank Limited and others Vs. Noor-un-Nisa and others (2015 SCMR 380)*, Abdul Sattar Vs. Zohra Bibi *(2015 YLR 1964)* in support of his argument of limitation.

4. Learned counsel for the respondents submitted that none of the grounds raised by the appellants fell within the grounds admissible under section 100 of the Code of Civil Procedure, 1908 ("CPC") and the impugned decisions are not contrary to law. That the learned courts did not fail to determine a material issue of law and there was no procedural error that resulted into an erroneous decision. For this proposition he relied on *Mst. Zeshan Zehra Vs. Muhammad Abdul Salam and 5 others (2012 CLC 612)* and *Messrs Texzone Vs. The Additional Collector of Customs, Export Collectorate Customs House, Karachi and another (2006 CLC 1434).* He submitted that given the concurrent findings of fact backed by evidence and settled principles of law, the judgments and decrees passed in favour of the respondents were unexceptional. He contended that the agreement, performance of which had been ordered, was certain and admitted. He further stated that suit was not time barred as there was no period of performance mentioned in the agreement to sell. That the agreement had been performed when the respondents paid compensation in lieu thereof. The suit in question was not time barred as limitation would run from the time

of refusal to perform the agreement and the appellants neither raised the issue of limitation before the learned trial court and the learned appellate court nor laid any evidence to prove that the suit was filed at least three years after refusal of the appellants to perform the agreement. He further stated that it is settled law that in an agreement with regard to immovable property time is not of the essence. For this proposition he relied on *Abdul Qadir Vs. Mrs. Ameer Zadi and 8 others (2020 MLD 213)*, *Abdul Hameed Vs. Ghulam Muhammad and* others *(1987 SCMR 1005) and Seth Essabhoy Vs. Saboor Ahmed (PLD 1973 SC 39)*. In response to the argument of the learned counsel for the appellants re non-impleadment of necessary party, the learned counsel submitted that it is settled law that a suit cannot be dismissed for misjoinder or non-joinder of parties and a party could be impleaded at any stage in the proceedings. He relied on *Sadar Din Vs. Government of Punjab and others (1985 MLD 1537)*, *Syed Hassan Vs. Khalid Mian, Additional District Judge, Lahore and 3 others (1999 YLR 2559)*, *Muhammad Yaqub and 5 others Vs. Abdul Aziz and another (2003 MLD 1612)* and *Mobin Rafique and another Vs. Rashid Ahmed and 2 others (PLD 2012 Sindh 449).* He further submitted that the party in question is the brother of respondents No. 2 and 3, and the successor-in-interest of Syed Sabir Hussain Naqvi who had executed the agreement performance of which has been ordered by both the courts. He contended that the appellants neither raised the issue of non-impleadment of their next-of-kin at any stage before the learned trial court or the learned appellate court, nor does the person in question have an independent capacity to set up a different defence in relation to the suit for specific performance

given that he can only be deemed to be a necessary and proper party for being a successor-in-interest of his father Syed Sabir Hussain and cannot set up a better or different defence than that available to the appellants. Given that the learned trial court and the learned appellate court ordered that the amount to be reimbursed to the appellant is to be deposited in the court, the non-impleadment of one successor-in-interest of Syed Sabir Hussain made no difference and caused no prejudice to anyone as he was recognized as a successor-in-interest of Syed Sabir Hussain Naqvi and would collect his share of the amount deposited with the court.

5. Through C.M No. 634 of 2018, the respondents filed an application to implead Syed Raza Hussain Navvi as a necessary and proper party in the proceedings before this Court, which application was not opposed by the appellants and Syed Raza Hussain Naqvi was impleaded as respondent No.3.

6. The learned counsel for respondent No.3 appeared before the Court and argued that in the suit filed by respondent No.1 he appointed Syed Ali Aamir Abbas Shah as special attorney by special power of attorney dated 04.07.2012 for purposes of civil suit titled "Syed Mumtaz Ali Shah Vs. Musarat Nazneen Jafari and others", and consequently Syed Ali Aamir Abbas Shah was not authorized to adduce evidence in the suit in which the impugned judgments have been passed.

7. Respondent No.1 through C.M No. 648/2021 filed another power of attorney in favour of Syed Ali Aamir Abbas Shah and admitted that the special power of attorney dated 04.07.2012 had

mistakenly referred to the suit titled "Hina Tabsassum Vs. Muhammad Shafi" and consequently respondent No.1 wished to now ratify all actions of the said Syed Ali Aamir Abbas Shah. Learned counsel for the appellants and respondent No.3 opposed the contention in C.M No. 648/2021 and argued that respondent No.1 could not ratify the actions of Syed Ali Aamir Abbas Shah dating back to 2012 by swearing a fresh power of attorney dated 22.06.2021 that he now wished to bring on record through C.M No. 648/2021 during adjudication of this second appeal.

8. It has been admitted before this Court by respondent No.1 that respondent No.3, who was not impleaded as a party in the suit in which the impugned judgments were passed, was a necessary party whose rights are to be affected by a decision related to the subject-matter of the suit, and consequently C.M No. 634/2018 was filed to implead him as a party. The impugned judgments were thus passed in the absence of and without hearing respondent No.3, who is admittedly a necessary party, and without affording him his Article 10A rights. The impugned judgments and decrees suffer from a material infirmity.

9. Further even to the extent of respondent No.1, the learned trial court and the learned appellate court both failed to appreciate that Syed Ali Aamir Abbas Shah was not duly authorized to adduce evidence before the learned trial court and consequently the judgments rendered on the basis of appreciation of such evidence also suffer from a material illegality and are liable to be corrected in exercise of jurisdiction by this Court under section 100 of CPC.

10. For the above reasons, this appeal is **accepted**, the judgments and decrees passed by the learned Civil Judge and the learned Additional District Judge dated 23.02.2015 and 05.09.2015, respectively, are set aside and the matter is **remanded back** to the learned Civil Judge who will treat the suit as pending and decide the same, after affording all parties the opportunity of hearing, including respondent No.3, who will be impleaded as a party in the suit, within a period of three months. The parties are directed to appear before the learned Civil Court on **26.07.2021.**

(BABAR SATTAR)
JUDGE

Saeed.