JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.F.A. No.03 of 2019

Muhammad Aslam Khokhar

Versus

Muhammad Sarwar and others

Appellant by:	Mr. Naveed Malik, Advocate.
Respondent No.1 by:	Ex-parte.
Respondent No.2 by:	Mr. M. Islam Sindhu, Advocate.
Respondent No.3 by:	Ch. Usman Aslam, Advocate.
Respondent No.4 by:	Mr. Aftab Ahmad Butt, Advocate.
Date of Hearing :	09.05.2022.

SAMAN RAFAT IMTIAZ, J.:- Through the instant Regular First Appeal, the Appellant [Muhammad Aslam Khokhar] has assailed the Judgment and Decree dated 07.11.2018 (as corrected on 18.12.2018) ("**Impugned Judgment & Decree**") passed by the Court of the learned Civil Judge 1st Class (West), Islamabad, whereby the Suit for Specific Performance of Contract, Permanent and Mandatory Injunction filed by the Appellant was decreed in the terms that Respondent No.1 [Muhammad Sarwar] is liable to pay an amount of Rs.3,090,000/- to the Appellant.

2. The necessary facts of the case as per the Memo of Appeal are that the Appellant filed a Suit for Specific Performance of Contract, Permanent and Mandatory Injunction against the Respondents before the Civil Court contending therein that Respondent No.1 was provisionally offered a residential plot in Cat-IV, measuring 30x60, in Sector G-14, by the Respondent No.4 [Federal Government Employees Housing Foundation/FGEHF] on ownership basis. Thereafter, the Respondent No.1 was not in a position to pay the installments, therefore, the Respondent No.1 offered to sell and the Appellant agreed to purchase such plot vide Agreement to Sell dated 25.11.2006 ("**Subject Agreement**") executed between the

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Appellant and Respondent No.1. The total profit of the suit plot was decided as Rs.1,000,000/- out of which the Appellant paid Rs.950,000/- to the Respondent No.1 as per the Subject Agreement and it was agreed that the remaining sale consideration i.e. Rs.50,000/- shall be paid at the time of taking over the original allotment letter and execution of the requisite documents. The Appellant paid the remaining price of the plot in the office of Respondent No.4 and accordingly Plot No.15, Street No.43, Size 30x60 Sector G-14/1, Islamabad ("**Subject Plot**") was allotted to the Respondent No. l. After allotment of the Subject Plot, the Appellant repeatedly visited the Respondent No.1 and asked time and again to transfer the Subject Plot in the name of the Appellant but the Respondent No.1 delayed the matter on various pretexts. The Appellant approached the Respondent No.4 and the Appellant was stunned to learn that the Respondent No.1 has transferred the Subject Plot to the Respondent No.2 in connivance with each other and with the help and assistance of Islamullah s/o Allemullah and Muhammad Athar Khalil and Qari Khalil-ur-Rehman only to deprive the Appellant of his valuable rights and the Respondent No.2 further transferred the same in the name of Respondent No.3.

3. The said suit was instituted in the year 2011. The Respondents No.2 to 4 put in their appearance before the learned Trial Court through submission of written statement and the Respondent No.1 submitted his conceding written statement before the learned Trial Court. After completion of evidence by the parties arguments were heard and the learned Trial Court passed the Impugned Judgment and Decree which according to the Appellant is on the basis of erroneous grounds and does not touch upon the stance of the Appellant, hence the instant appeal.

4. The learned counsel for the Appellant argued that the learned Trial Court erred in not granting specific performance of the Subject Agreement despite coming to the conclusion that neither the Agreement nor the receipt of Rs.950,000/- was denied by the Respondent No.1; that it is settled law that monetary compensation is not adequate

relief when property is involved; that the learned Trial Court did not appreciate the evidence on record and reached the erroneous conclusion that the Respondent No.2 was a bonafide purchaser despite the fact that Respondent No.1 had specifically stated that Respondent No.2 had played fraud upon the Respondent No.1 and that the Respondent No.1 had transferred the Subject Plot to the Respondent No.2 under the impression that she was the Appellant's nominee. He relied upon *Muhammad Saleem Vs. Muhammad Shafi*, 2004 YLR 1882 (Lahore), *Messrs Pioneer Housing Society (Pvt.) Limited Vs. Messrs Babar & Company*, PLD 1999 Lahore 193 and *Mst. Noor Jehan Vs. Muhammad Rafique*, 1995 CLC 43 (Peshawar).

5. On the other hand Respondent No.1 was proceeded against ex-parte on 03.03.2022. Whereas learned counsel for the Respondents No.2 and 3 vehemently opposed the arguments advance by the learned counsel for the Appellant and prayed for dismissal of the instant appeal. Learned counsel for Respondents No.2 submitted that the Respondent No.2 and 3 are bonafide purchasers and that the Impugned Judgment is based on sound reasoning and correct appreciation of the law and facts. He relied on *Inayatullah Khan Vs. Shabir Ahmad Khan*, 2021 SCMR 686, *Bakht Baidar Vs. Ghulam Nabi*, 2020 CLC 2024 (Islamabad).

6. No relief has been claimed against the Respondent No. 4 as such it was impleaded as a pro forma party and even otherwise the Impugned Judgment is not against the same.

7. We have heard the arguments advanced by the learned counsel for the Appellant and perused the record.

8. Examination of the pleadings of the parties and the evidence on the record reveals f that the Appellant entered into the Subject Agreement in November, 2006 with the Respondent No.1 which was produced as Ex-P1 whereby it has been recorded that the Respondent No.1 has been provisionally offered the Subject Plot by

the Respondent No.4 and that he has agreed to sell the Subject Plot to the Appellant in consideration of Rs.1,000,000/-. Out of the said amount, receipt of Rs.950,000/- in cash by the Respondent No.1 has been acknowledged in the Subject Agreement itself as well as by way of a separate receipt issued by the Respondent No.1 which was produced as Ex-P3 whereas the balance sale consideration of Rs.50,000/- as per the terms of the Agreement was to be paid at time of transfer of the Subject Plot. As per the Appellant's examination-in-chief the remaining sale consideration of Rs.50,000/- was also paid by the Appellant to the Respondent No.1 in the office of the Respondent No.4 and accordingly the Subject Plot was allotted to the Respondent No.1.

9. The Subject Agreement is not denied and the sale transaction agreed upon by and between the Appellant and the Respondent No.1 therein as well as receipt of sale consideration is also admitted by the Respondent No. 1 in its written statement. However, the issue is that notwithstanding the admitted Subject Agreement, the Subject Plot was subsequently sold and transferred by the Respondent No.1 in favour of the Respondent No.2 and further transferred by Respondent No.2 in favour of Respondent No.3, who claims to be "bonafide purchasers for value without notice".

10. As far as the transaction between Respondents No. 1 and 2 is concerned, interestingly Respondent No.1 alleged that Respondent No.2 along with three other individuals committed fraud and misrepresentation by creating an impression that the Respondent No.2 is the nominee of the Appellant due to which he transferred the Subject Plot to the Respondent No.2 and that no amount whatsoever was paid by the Respondent No. 2 to the Respondent No. 1. Further that Respondent No.2 and the other three individuals stated that the original documents pertaining to the Subject Plot have been lost by the Appellant and as such they also initiated the proceedings for the issuance of duplicate documents from the Respondent No. 4. Here it is pertinent to mention that the Appellant had stated in his Examination-in-chief that the original documents had been handed over to him by the Respondent No. 1. It has not been

clarified but it is assumed that the original documents handed over were the provisional allotment letter as the final allotment letter was issued by the Respondent No. 4 after execution of the Subject Agreement and according to the plaint was not handed over to the Appellant by the Respondent No.1 despite repeated demands by the Appellant.

11. In any event, the learned Trial Court observed that no evidence was produced by the Respondent No.1 in support of such allegations whereas on the other hand the Respondent No.2 exercised due diligence by obtaining an affidavit (produced as Ex. D2/3) from the Respondent No.1 to the effect that the Respondent No.1 has not sold the Subject Plot to anyone other than the Respondent No.2. Further that it was admitted that no application was made to the Respondent No.4 by the Appellant restraining Respondent No.4 from transferring the Subject Plot. Therefore, the learned Trial Court held that the Respondent No.2 and 3 acted with due care in good faith and they had no knowledge about the sale agreement by and between the Appellant and the Respondent No.1. As such the learned Trial Court concluded that the initial onus to prove their status as "bonafide purchasers for value without notice" stood discharged and shifted upon the Appellant.

12. Indeed the initial onus to prove that the subsequent transferee is the bonafide purchaser is on him as held in *Abbas Ali Vs. Liaqat Ali*, 2013 SCMR 1600. However, not having notice does not discharge the burden of the Respondent No.2. Essentially the Respondent No.2 claims to be "bonafide purchaser for value without notice" which standard has several components including but not limited to that such purchaser has acquired interest through payment of valuable consideration. The Respondent No.2 produced sale agreement dated 14.05.2010 between Respondent No.1 and Respondent No.2 which records payment by Respondent No.2 partly in cash and partly vide pay order. However, neither documentary evidence of the pay order nor any witness to such payment was produced by the Respondent No. 2. On the

other hand, as noted above the Respondent No.1 categorically denied receipt of any amount as payment from the Respondent No.2. In such circumstances, we do not agree with the conclusion reached by the learned Trial Court Respondent No. 2 discharged his initial burden of proof.

13. Having said that admittedly the Respondent No.2 sold the Subject Plot to Respondent No.3. The latter has not only produced the sale agreement as Ex.D3/1 executed by him with the Respondent No.2 dated 13.01.2011 but the Respondent No.2 has also not denied receipt of sale consideration from him. There is no allegation of fraud made by the Appellant against the Respondent No.3 or of connivance between him and the other Respondents nor is there any evidence on the record that he had prior knowledge about the Subject Agreement between the Appellant and the Respondent No. 1. As such we are satisfied that the Respondent No.3 is certainly a bonafide purchaser for value without notice. It would therefore be inequitable and unjust to Respondent No.3 who is not at fault if specific performance of the sale agreement dated 25.11.2006 is granted in favour of the Appellant.

14. In this regard we are fortified by *Sheikh Akhtar Aziz Vs. Mst. Shabnam Begum*, 2019 SCMR 524, in which the Honorable Supreme Court held as follows:

> *"16.* ***Finally, there is no cavil with the proposition that relief of specific performance is discretionary in nature and despite proof of an agreement to sell, exercise of discretion can be withheld if the Court considers that grant of such relief would be unfair or inequitable.*** *In the facts and circumstances narrated hereinabove, we are in no manner of doubt that the High Court was quite justified in refusing to exercise discretion in favour of the appellant.* ***However, at the same time, the High Court was careful and circumspect in ensuring that the interest of the appellant was also adequately safeguarded in so far as it directed that the sum of Rs.50,000/- which had admittedly been paid to and received by Respondent No.8 be returned to the appellant along with mark up at the bank rate calculated from the date when it was paid till it was fully recovered.*** *We find that the order of the High Court is well reasoned, supported by the record as well as the principles of law as pronounced by this Court. It merits no interference."* [Emphasis added].

15. In view of the above, the learned Trial Court has rightly refused specific performance of the Subject Sale Agreement while also adequately safeguarding the interest of the Appellant vide the Impugned Judgment whereby the suit has been

decreed by holding the Appellant entitled to receive the amount paid by him to the Respondent No. 1 along with compensation.

16. Before parting with this judgment, it is pertinent to note that several documents have been made part of the record as "marked" documents. Time and time again this Court as well as the Honorable Supreme Court has held in various judgments including in the cases of *State Life Insurance Corporation of Pakistan Vs. Javaid Iqbal*, 2011 SCMR 1013, *Chaudhary Wajid Ayub Vs. Malik Rizwan Ahmed*, PLD 2020 Islamabad 250, *Asif Ali Hashmi Vs. Muhammad Arif Mian*, PLD 2015 Islamabad 191 and *Pakistan Engineering Consultants Vs. Pakistan International Airlines Corporation* PLD 2006 Karachi 511 that documents not produced but only marked cannot be considered by Courts as legal evidence of fact. In view of such pronouncements, we have neither considered nor mentioned the marked documents.

17. Consequently, instant appeal is **dismissed**.

(MOHSIN AKHTAR KAYANI)
JUDGE

(SAMAN RAFAT IMTIAZ)
JUDGE

Announced in the Open Court on _____.

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