

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

MA No. 105/1999

c/w

CFA No. 07/2006

Reserved on: **14.12.2023**

Pronounced on: **30.12.2023**

MA No. 105/1999

Ghulam Mohammad Matoo (since dead)
(substituted by his LRs)

- 1. Imtiyaz Ahmed Matoo**
S/O Ghulam Mohammad Matoo
- 2. Riyaz Ahmed Matoo**
S/O Ghulam Mohammad Matoo
Both residents of Sector No.1
S.K.Colony Qamarwari Srinagar

- 3. Nighat Nissar Khan**
D/O Ghulam Mohammad Matoo
(W/O Nissar Ahmad Khan)
R/O House No. 33, Sector 1st
Hilalabad Qamarwari Srinagar

...Petitioner(s)/Appellant(s)

Through: Mr. G.A.Lone, Advocate with
Mr. Mujeeb Andrabi, Advocate.

Vs.

- 1. Ghulam Rasool Sofi**
S/O Mohammad Akbar Sofi
R/O Mir Behri C/O Token Section
Traffic Manager, S.R.T.C Srinagar
- 2. Rafiq W/O Abdul Rashid Shah (Banday)**
- 3. Fayaza Rasool W/O Ghulam Ahmad Shah(Banday)**
- 4. Mohammad Illiyas Banday**
S/O Mohammad Maqbool Shah (Banday)
Respondents 2 to 4 residents of Kathi Darwaza
Saida Kadal Srinagar.

...Respondent(s)

Through: Mr. Nissar Ahmad Bhat, Advocate.

CFA No. 07/2006

1. Rafiq W/O Abdul Rashid Shah (Banday)
2. Fayaza Rasool W/O Ghulam Ahmad Shah (Banday)
3. Mohammad Illiyas Banday
S/O Mohammad Maqbool Shah (Banday)

**Residents of Berun Kathi Darwaza
Saida Kadal Srinagar.**

...Petitioner(s)/Appellant(s)

Through: Mr. Nissar Ahmad Bhat, Advocate.

Vs.

1. Ghulam Mohammad Mattoo
S/O Ghulam Qadir Matoo
R/O Qamarwari Srinagar
2. Ghulam Rasool Sofi
S/O Mohammad Akbar Sofi
R/O Mir Behri C/O Token Section
Traffic Manager S.R.T.C Srinagar
3. Abdul Aziz Shawl
S/O Kh. Salam-ud-Din Shawl
R/O Kalashpora Srinagar
At present Nigeen Near NIT
Hazratbal Srinagar.

...Respondent(s)

Through: Mr. G.A.Lone, Advocate.

CORAM:

HON'BLE MR. JUSTICE M. A. CHOWDHARY, JUDGE

JUDGMENT**MA No. 105/1999**

1. The instant Civil 1st Appeal has been preferred by the appellant- Ghulam Mohd. Matoo, who has been substituted by his legal representatives after his death during the pendency of the Appeal, whereby the judgment and decree dated 23.07.1999 (for short 'impugned judgment/decreed'), passed by the learned Additional District Judge Srinagar (for

short 'the trial court'), in terms whereof the suit of the appellant titled '*Ghulam Mohd. Matoo Vs. Ghulam Rasool Sofi & Ors.*', initially instituted before this Court on 03.05.1984 and later transferred to the trial court on 09.06.1989, was dismissed, is sought to be set aside.

2. For convenience, the parties before this Court as appellant and respondents shall be referred as 'plaintiff' and 'defendants', as per their status before the trial court.
3. The plaintiff instituted the suit for declaration of agreement to sell dated 19.10.1977 pertaining to the land measuring 05 kanals 06 marlas comprising of survey No. 438 min situated at Gulab Bagh Srinagar, as null and void, ineffective and unenforceable as against the rights of the plaintiff, with the prayer for grant of injunction for restraining the defendants from interfering into the possession of the plaintiff over the suit land. The suit was instituted in this Court on 30.05.1984 which was later transferred to the trial court, where it was registered as Civil Original Suit (COS) No. 29/1989 on 09.06.1989.
4. Shorn of minute details, the plaintiff's suit was that the agreement to sell was vitiated by fraud and deception and is without consideration; that the plaintiff has not consciously executed any such document with the defendants 2 to 4 nor have these defendants accepted this agreement; that the agreement to sell is not in accordance with law and being invalid from its inception was ineffective and unenforceable as against the rights of the plaintiff; that during the pendency

of the suit, the defendants forcibly dispossessed the plaintiff and therefore, through an amendment the prayer of possession of the suit land was sought by the plaintiff for delivery of the possession to him, as he was the absolute owner of the property and the defendants being trespassers had no right to hold the same in their possession.

5. It was claimed that the plaintiff and defendant No.1 had purchased 10 kanals 12 marlas of land comprising of survey no. 438 situated at Gulab Bagh Zakura Tehsil Ganderbal from its original owners in equal shares and that by means of agreement to sell, unlawfully and fraudulently, the entire land was brought into existence by defendant no.1 on 19.10.1977 in favour of the defendants 2 to 4 and same was also attributed to the plaintiff even though the plaintiff had not consciously or willingly executed the said agreement and had not received any consideration for its execution; that notwithstanding the said agreement and the recitals contained therein, the plaintiff remained in possession of his share of land, measuring 5 kanals 6 marlas, falling on the eastern side of survey no. 438, as the plaintiff and defendant no.1 had partitioned the land between them, with a common pathway leading to the share of the plaintiff in the land.
6. It had been asserted that the agreement to sell was never acted upon as the same was invalid and therefore, the defendants 2 to 4 obtained sale deeds from defendant no.1, to the extent of 5 kanals 6 marlas of land which had fallen to his share in the survey number in question; that the sale deed

rightly does not make any mention of the agreement to sell as the same, to the knowledge of defendant 2 to 4 was invalid. The defendants 2 to 4 obtained the possession from defendant no.1 to his share of land taking advantage of the sale in their favour, the defendants dispossessed the plaintiff forcibly during the pendency of the suit; that the plaintiff sought amendment in the plaint which was granted on 10.10.1991 making it possible for the plaintiff to seek possession of the land in dispute measuring 5 kanals 6 marlas from the defendants; that the defendants absented and thereafter ex parte proceedings were initiated against them; that the plaintiff led both oral and documentary evidence but the trial court after holding the agreement to sell to be not in conformity with the provisions of Section 54 of the Transfer of Property Act committed grave error leading to miscarriage of justice, dismissed the suit.

7. It has been further pleaded that the trial court while dismissing the suit rejected the evidence of plaintiff on flimsy grounds as if the trial court was deciding the criminal case against the defendants, in which a judgment of acquittal has been passed in their favour; that the court below after holding the agreement to sell to be contrary to the statute, was bound to pass the decree for possession of the suit in favour of the plaintiff rather than dismissing the same on the perfunctory grounds that the document cannot be declared to be void and therefore the suit deserves dismissal.

8. Against an elementary principle of law that the possession of land under an agreement to sell which is not in accordance with law and is without consideration is unlawful and the persons in possession is a trespasser; that the trial court has ignored these well established principles of law leading to miscarriage of justice as admittedly the plaintiff is the owner of the land and defendants have no right, interest or title to remain in possession of the property.
9. It has been further pleaded that the agreement to sell was never acted upon or accepted by defendants 2 to 4 and even if the plea of fraud was not proved, the agreement does not create any right in favour of the defendants, as they have not received possession of the property under the agreement because in the subsequent sale deed obtained by them from defendant no.1 there was no reference to the agreement and the sale deeds contain recital that the possession has been received by them to the extent of share of defendant no.1 in the land by virtue of the sale deed executed by him in their favour; that the plaintiff had sufficient evidence with regard to sale deed executed on 16.10.1984 by the defendants 2 to 4 with the sole purpose of substantiating his claim that the agreement to sell was neither acted upon nor does it find place or reference in the two sale deeds each for 2 kanal 13 marlas of land under survey no. 438 min by defendant no.1 in favour of defendants 2 to 4; that the trial court ignored this important aspect of the case and dismissed the suit on

hyper technical ground that the agreement cannot be declared void and therefore the suit was dismissed.

10. The plaintiff claimed to have brought enough evidence on record to prove his title over the suit land and also to prove that he was dispossessed from suit land during the pendency of the suit and is therefore entitled to decree for possession, however, the trial court ignoring the material evidence by not considering it in its proper perspective and the conclusion deducible are illogical and legally perverse, as such, the judgment and decree passed by the court below is liable to be set aside.

11. The impugned judgment and decree has also been challenged asserting that the trial court has ignored the provisions of Section 138 of the Transfer of Property Act, which lays down that the possession of the land in Kashmir Valley without a registered sale deed is *per se* illegal and the person in possession is a trespasser having no right to hold the land and despite making reference to this provision before the trial court during the course of arguments the same has not even been referred to by the court below; that the trial court has indulged in a unique type of hair splitting in holding that the plaintiff has not produced evidence to show, on what point of time the barbed wire used by him around the land was taken away by the defendants, although the plaintiff has specifically stated that during the pendency of the suit, he was dispossessed and thereafter an application

for amendment was made by him for the purposes of seeking recovery of possession from the defendants.

12. It was enough in the facts and circumstances of the case for the plaintiff to show that he was dispossessed and it is immaterial in the suit for recovery of possession to prove the date of dispossession except in a case when the dispossession has taken place more than 12 years next before the institution of the suit, as in that case it is hit by time and the person in possession may claim adverse possession, however, in the present case all these factors were foreign to the issue as the plaintiff was dispossessed during the pendency of the suit, as such the trial court was totally incorrect in dismissing the suit and refusing to grant decree for possession in favour of the rightful owner as against the trespasser.

13. It has been further pleaded that the revenue record sufficiently proved before the court below, also does not reflect the agreement to sell in question, as the same was never acted upon and the possession of the plaintiff and defendant no.1 continued to be shown ever after execution of the so-called agreement to sell. On the other hand the possession continues to be recorded in the name of the plaintiff and the extracts of 'Girdawari' and 'aks-shajra' proved as (EXP-A) and (EXP-B) respectively in the trial court led to irresistible conclusion that the plaintiff is the owner of the suit land entitled to recovery of possession from the defendants who have forcibly disposed the

plaintiff; that the trial court had misinterpreted the judgment of this Court reported in **1986 SLJ 476** and held that ‘it related to a question whether specific performance of the agreement could be enforced and not to a question whether agreement to sell can be declared void; that the distinction sought to be made is incorrect as the question before the High Court was whether an agreement to sell is not in conformity with the provisions of Transfer of Property Act, can be said to be valid and this Court had held that such an agreement is invalid and is not enforceable. It had also been held that when the agreement to sell is not signed by both the parties, it cannot be said to be a document enforceable in law. Admittedly defendants No. 2 & 3 have not accepted the document as the same does not bear their signatures and is therefore invalid; that whole host of oral evidence comprising of the depositions of plaintiff, Ghulam Mohd, all his witnesses, Ali Mohd., Mohd. Latief, Ghulam Nabi, Ghulam Rasool Sofi and Ab. Aziz Ahangar have been ignored and the suit was dismissed by the trial court and finally it was prayed that the judgment and decree impugned be set aside and the suit, dismissed by the trial court, be decreed.

- 14.** Learned counsel for the appellant-plaintiff, while reiterating the assertions made in the memorandum of Appeal, argued that the plaintiff had filed the suit, whereby he had challenged the ‘agreement to sell’ as being sham and invalid, which was not contested by the defendants, as after their

initial appearance for spot inspection of the suit property, had not filed written statement before the trial court; that the plaintiff had sought amendment of the suit with regard to his dispossession, which was allowed and after leading ex-parte evidence by the plaintiff, the trial court, though held the agreement to sell to be unenforceable being invalid, but dismissed the suit; that against the ex-parte judgment, the defendants also filed the appeal before this Court which was allowed and the case was remanded back to the trial court and thereafter the trial court decreed the suit against which the connected appeal bearing CIA No.7/2006 has arisen. He has further argued that the remand order was challenged before the Division Bench of this Court, who made reference of the Appeal to the Full Bench of this Court with regard to its maintainability and that the Full Bench had held that the LPA is maintainable before the Division Bench. He further argued that the Appeal, having been allowed by the Division Bench, the Appeal against the decree of the trial court was remanded back to the Single Bench.

15. Mr. G.A.Lone, learned counsel for the plaintiff, while making reference to Section 54 of the Transfer of Property Act, argued that the agreement to sell was claimed to be executed by the plaintiff and defendant No. 1 and defendant No.5 on behalf of defendants 2 to 4; that the 'agreement to sell' was not acted upon, as subsequently two sale deeds were registered, one at Ganderbal and another at Srinagar by defendant No.1, without making reference to the impugned

‘agreement to sell’ in the suit; that the trial court after leading ex-parte evidence by the plaintiff, passed ex-parte judgment holding that the ‘agreement to sell’ in question was invalid, not in conformity with Section 54 of the Transfer of Property Act and was not enforceable, however, the trial court had not declared the same as illegal and as a result plaintiff’s suit was dismissed; that there was no question with regard to dispossession of the plaintiff as the basis of the suit was agreement to sell only; that such agreements were prohibited under law at the relevant point of time, and the possession could only be taken after the registered sale deed; that defendant no.5 had no authority to execute the agreement, as has also been held by the trial court, therefore, the agreement to sell in question, was required to be declared as sham transaction.

- 16.** Mr. Lone, further argued that, as per the recitals in agreement to sell, the parties have stated that in view of the ban with regard to sale of property in question, the agreement is being executed and as soon as the ban is lifted, permission shall be sought for transfer of the land in question in accordance with law, and that if the sale deed is not registered then the earnest money was to be returned along-with penalty; that no such permission was applied at any point of time and even if part payment is accepted that cannot mature the transaction into transfer of the title; that the ban with regard to transfer of the land was lifted in the year 1979 but the defendants had not filed suit for specific

performance of contract, neither any adverse possession was pleaded through any other suit. He has drawn the attention of this Court to the law laid down by this Court, in a case reported as **1986 SLJ 476**, in which it was held that all the parties to agreement are required to sign the agreement but here is the case where all the parties to the agreement had not signed the same rather in place of defendants 2 to 4, who were stated to have shown their intention to purchase the land in question and defendant no.5 is a stranger to the agreement without any lawful authority had signed the agreement on their behalf; that defendant no.5 during the pendency of the Appeal died and therefore, prayed to be deleted from the array of respondents, to which this Court as appellate court had agreed. However, the same was challenged before the Division Bench which also agreed to the observations of the Single Bench. In Para-13 of the Division Bench judgment, wherein it was held that defendant no.5 being a broker had no right, whatsoever, in the property, as such, he was not a necessary party. It was finally prayed that the Appeal be allowed and the trial court judgment, whereby suit of the plaintiff was dismissed, be set aside and the suit be decreed.

17. Learned counsel for the contesting respondents-defendants, ex-adversus, argued that handing over of the possession with regard to the suit land was admittedly recited in agreement to sell, executed in the year 1977, whereas the cancellation of agreement was sought by the plaintiff in the year 1984; that

the plaintiff had failed to prove dispossession as had alleged in his amended suit; that in view of the agreement to sell, executed by the plaintiff, signatory to the document in question, therefore, the defendants had permissive possession and that the plaintiff had failed to substantiate in his evidence as to when he was dispossessed and therefore, the trial court had rightly held that the plaintiff had failed to prove as to when he was dispossessed; that the suit was hit by limitation in terms of Article 62 of the Limitation Act, which provides that such suit has to be filed within three years; that if a 3rd party comes forward on behalf of certain persons and vendors accept his authority, the vendors are then estopped from raising any objection with regard to his authority to act upon the persons with whom the vendors had agreed for a transaction; that a 3rd person had implied authority, in terms of Section 186 of the Contract Act as an agent can act upon the instructions of proposed vendors; that on behalf of defendants 2 to 4, as vendees, one Abdul Aziz Shawl appeared before the court of Sub Registrar and the plaintiff, as vendor, had remained contented and satisfied with the authority of the agent of vendees; that the trial court had rightly held that it was for the plaintiff to prove about the authority contrary to the recitals.

18. Mr. Nisar Bhat, further argued that Chapter-X of the Transfer of Property Act deals with agency and argued that Section 182 of Contract Act deals with principles, agent and agency and as per Section 185, consideration is not

necessary component of the contract; that the authority can be expressed or implied and need not always to be expressed as is being projected by the plaintiff. He also referred to Section 226 of the Contract Act, which provides for enforcement and consequences of contracts executed by the agents. He has referred to and relief upon **AIR 1921 Lahore 48** and **1987 (Supp.) SCC 689** to buttress his arguments in this behalf. He has further argued that the plaintiff is estopped to dispute the agreement when he fully knows about his right in 'agreement to sell' in terms of Section 115 of the Evidence Act, which deals with the estoppel.

19. He has further argued that the plaintiff had filed the suit seeking declaration to cancel the agreement to sell with regard to the suit land and this Court passed a direction to restrain the defendants from interfering into the suit land, however, on the application moved by the defendants, the Court Commissioner was appointed, who reported that the possession with regard to the suit land was with the defendants, however, later the suit was transferred to the trial court where it was dismissed and the Appeal was filed which was allowed and the suit was remanded back. The trial court passed the judgment again in absence of defendants which was challenged before this Court, however, the Appeal was dismissed and LPA was filed which was held by the Division Bench, as not maintainable, however, the Full Bench of this Court reversed the same. He further argued that the 'agreement to sell' is the basis of the suit in question

which had not been proved so as to bracket the same as illegal and the defendants on the basis of the agreement to sell have been enjoying the permissive permission over the suit land. He has referred to and relied upon the judgment of this Court reported as **1972 J&KLR 236**, stating that this Court had passed the judgment in a similar facts.

Mr. Bhat also relied upon the recent judgment of Supreme Court reported as **2023 LiveLaw (SC) 479** titled '**Ghanshyam Vs. Yogendra Rathi**'. Paras- 3 and 4 will be advantageous to reproduce here under:-

"3. The plaintiff-respondent instituted a suit for eviction of the defendant-appellant from the suit premises which is part of H-768, J.J. Colony, Shakarpur, Delhi and for mesne profits on the averment that he is the owner of the said property by virtue of an agreement to sell dated 10.04.2002, power of attorney, a memo of possession and a receipt of payment of sale consideration as well as a "will" of the defendant-appellant bequeathing the said property in his favour; the possession of the suit premises was handed over to the plaintiff-respondent pursuant to the agreement to sell subsequently on the request of the defendant-appellant the plaintiff-respondent allowed the defendant-appellant to occupy the ground floor and one room on the first floor of it for a period of 3 months as a licensee; the defendant-appellant failed to vacate the suit premises despite expiry of the licence period and termination of licence vide notice dated 18.02.2003.

4. The defendant-appellant contested the suit on the ground that the aforesaid documents have been manipulated on blank papers but without disputing the execution of any of them or that the possession memo was not executed or that the sale consideration as per the agreement was not paid."

20. Mr. Lone in rebuttal has argued that all the judgments cited by the opposite counsel were passed on legal agreements but not on the agreement which has been declared as invalid and unenforceable by the trial court and the defendants have not challenged the declaration with regard to invalid agreement by the trial court. He also argued that the trial court had recorded that the agent had no authority, which has also not been challenged by the other side and as such, no such plea can be raised at this appellate stage by the defendants. He further argued that the Division Bench of this Court in this case has returned a finding that the defendant No.1 was a land broker and therefore, the defendants cannot plead now with regard to agency in terms of the Contract Act. He also disputed the applicability of the judgment of this Court reported in **1972 J&KLR 236**, relied upon by the other side, as this Full Bench judgment was with regard to the land in Jammu Province and not in Kashmir Province, where there was statutory provision that no title of the land in Kashmir Province can be changed in absence of non-payment of entire consideration amount. He further argued that the agreement in question itself recited that there was ban with regard to the sale of the land in question, probably in view of the Prohibition of Orchards Act 1975 and there was no claim of agency or ownership, which can be made now in presence of any such recital in the agreement to sell. He has relied upon the judgment of Supreme Court in a case titled

Shakeel Ahmed Vs. Syed Akhlaq Hussain reported as **2023/INSC/1016**, in support of his arguments.

21. Heard, perused the record and considered.

22. From the pleadings of the parties and the submissions made by learned counsel for the parties at bar, the following facts emerge:

- I) *That the plaintiff and defendant No.1, as co-owners of the land measuring 10 kanals 12 marlas comprising of survey no. 438 situated at Gulab Bagh Zakura having been purchased by plaintiff and defendant no.1 in equal shares and entered into an agreement to sell with defendants 2 to 4 through defendant no. 5, who was land broker, by way of agreement to sell dated 19.10.1977. The defendant no.1 subsequently sold his share i.e. 5 kanals 6 marlas to the defendants 2 to 4. The plaintiff's land measuring 5 kanals 6 marlas was however, not transferred by sale deed and he filed the suit before this Court on 03.05.1984 seeking to declare the agreement to sell dated 19.10.1977, as null and void, and also later through amendment sought possession of the land in question to be restored to him.*
- II) *The trial court had to consider as to whether the agreement to sell was null and void and whether the plaintiff was entitled to restoration of possession of the suit land measuring 5 kanals 6 marlas in his favour, or as to whether on the strength of agreement to sell the land is vested in the defendants 2 to 4 on the strength of agreement, executed by plaintiff and defendant no.1 with defendants 2 to 4 through defendant no.5.*

23. The defendants, after filing of the suit by the plaintiff before this Court and passing of the direction to restrain them from

interfering peaceful possession of the plaintiff over the suit land, moved an application for spot inspection by Court Commissioner and that this Court allowed that application and Commissioner was appointed. The Court Commissioner, after spot inspection reported that the possession of the land in question was with defendants 2 to 4, as such, plaintiff moved an application for amendment of the suit which was allowed vide order dated 16.10.1991 by the trial court and thereafter another application for amendment was moved which was also allowed on 04.02.1999 and the amended plaint was subsequently filed on 06.03.1999.

24. It is borne from the record that defendant 2 to 4 did not contest the suit and the plaintiff in support of his case examined as many as six witnesses including defendant no.1, who was co-sharer with the plaintiff.

25. The plaintiff had examined himself, who stated that the land measuring 10 kanals 12 marlas comprising of survey no. 438 situated at Gulab Bagh was purchased by him along-with defendant no.1 in equal shares and was also partitioned by them and that his share falls on the eastern side and both had a common path. He alleged that defendant no.1 in the month of October 1977 executed fraudulent agreement to sell documents regarding which he had filed suit in the year 1984 before the High Court; that the defendant no.1 executed sale deeds in favour of defendants 2 to 4, which included plaintiff's land by their land by removing wire. PW-2 Ali Mohd. Stated that he used to purchase fruits from

the plaintiff and defendant no.1 and used to pay the amount i.e., cost of fruits to the plaintiff upto the year 1982 with annual rate of Rs.3000/-. PW-3 Mohd. Latif (Patwari) stated that the extract of Girdawari (EXP-A), available on file was with regard to survey no. 438 and was correct as compared to the original record. He also stated that 'aksi shajra' (EXP-B) for this land was also correct. PW-4 Gh. Nabi, stated that the plaintiff and defendant no.1 had purchased the land measuring 10 kanals 12 marlas in equal shares and partitioned with the joint path and the land of the plaintiff was on the eastern side. He further stated that in the year 1974, he was working as driver for the plaintiff and used to spray the orchard with medicines and the cost of spray and usufruct was jointly shared by the parties till 1984.

26. PW-5 Gh. Rasool Sofi, who is defendant no.1 in the case, and was stated to be joint owner with the plaintiff, stated that he and the plaintiff had purchased the land measuring 10 kanals 12 marlas about 25/26 years back and both of them were owners in equal shares with separate possession. He also stated that he had sold his share of 5 kanlas 6 marlas to one Mohd. Sidiq Banday and did not know what happened to the land of the plaintiff. He also does not remember as to whether the agreement in question was executed for whole of the land or not. PW-6 Aziz Ahanger (S.O Records), had stated that the defendant no.1 had executed the sale deeds in favour of the vendees by two different sale deeds on 11.06.1984 and 12.06.1984 before Sub Registrars concerned

and admitted the contents of the sale deeds (EXPWRK 1, EXPWRK 2), as correct. He also stated that as per the agreement dated 19.10.1977 recorded by the Petition Writer- Aziz ud din, as is evident from page no. 100 of his Register for the year 1977-78, executed by Gh. Rasool and others in favour of Mst. Rafiq and others, and the copy of the agreement (EXPWRK 4) was correct as compared to the Register of Petition Writer.

- 27.** The trial court, after scanning and sifting of the evidence on record, observed that the agreement to sell dated 19.10.1977 had been executed by virtue of which both, plaintiff and defendant no.1, had agreed to sell the entire land in favour of defendants 2 to 4. The said agreement to sell (EXPW-RK04) recited that the plaintiff and defendant no.1 had agreed to sell, however, due to prohibition of alienation of the land, sale deed could not be executed and that by virtue of the agreement, it was agreed that the land in lieu of Rs. 80,560/- i.e., @ Rs.7600/- per kanal will be sold to defendants 2 to 4 out of which Rs.24,000/- were received and further Rs.40,000/- were to be received at the time of execution of the agreement and the remaining amount of Rs.16560/-, were to be received at the time of execution of sale deed, and that the possession of the land stand delivered to the executants i.e., defendants 2 to 4, with further condition that the plaintiff and defendant no.1 shall not cause any interference with the land and they shall return the amount in lump sum

and will also indemnify the proposed purchasers in case on any count their possession will be disputed.

28. The trial court observed that it has been proved that the defendant no.1 had sold the land measuring 5 kanals 6 marlas under survey no. 438 in favour of defendants 2 to 4 vide sale deeds EXPWRK 1 and EXPWRK 2, however, he had failed to prove and establish the alleged fraudulent execution of the agreement to sell (EXPWRK4). The trial court proceeded to observe further that no-doubt the plaintiff had produced defendant no.1 as witness, however, he had not supported the version of the plaintiff as he stated that he does not know as to what plaintiff did to his portion of land i.e. 5 kanals 6 marlas and at the same time that he does not remember as to whether ‘agreement to sell’ was executed for whole of the land or not.

29. The trial court further observed on the basis of the evidence, that the plaintiff’s contention that pursuant to agreement to sell the possession had not been delivered to defendants 2 to 4 as was mentioned in agreement to sell but same evidence does not appear to be sound and cogent because one of the witnesses Ali Mohd. had stated that till 1982 he used to purchase fruits of the land from the plaintiff and defendant no.1, whereas, defendant no.1 had categorically stated that he and the plaintiff had their separate possession over the respective lands, as such, both of them should have made the same version, and that one witness Gh. Nabi, stated that the parties were getting usufruct of the land jointly but the

defendant no.1's statement had not supported the same and the plaintiff had also stated that the land was partitioned between plaintiff and defendant no.1.

30. It has been further observed that mention of agreement to sell is not, therefore, in the extract of Girdawari, as the entries of 1975 continued with obvious reason i.e., in view of the Agrarian Reforms Act. The trial court further observed that the plaintiff had failed to show as to when he had been dispossessed from the land in question and simply by saying that the defendants had removed the barbed wire and taken over the possession, and the same be restored, does not appear that a person who is deprived of his possession will watch as a silent spectator and it does not stand to the reasons.

31. The trial court while, discussing as to whether the agreement to sell EXPWRK4, can be declared as void, has observed that the legal position cannot be denied that in terms of Section 54 of the Transfer of Property Act, the agreement to sell does not confer any right and also that the agreement to sell does not bear signatures of defendants 2 to 4, as such, the agreement to sell does not create any interest or charge but at the same time the question as to whether agreement to sell is a pure contract and it is in effect a sale. The trial court proceeded further to observe that it is the cumulative effect of the recitals of the documents which ought to be considered and the recitals of the documents presents a different position i.e., as per the documents

possession has been delivered on payment of part amount of consideration but the defendants have not chosen to prove the recitals of the documents by contesting the case. However, at the same time the plaintiff too has not been able to prove anything contrary to the recitals of the documents because it is the plaintiff who had challenged the agreement so it was for him to prove the adverse to the recitals of the said documents.

32. The trial court finally while addressing the question as to whether the agreement can be declared void or not, recorded that the defendants 2 to 4 though being not signatories to the documents, however on their behalf one Ab. Aziz Shawl, had accepted the terms of the contract and as per Section 54, both the parties should have signed the documents but the signatures of Ab. Aziz Shawl, while acting on behalf of the defendants has affected his signatures on behalf of other defendants. The trial court has further observed that in absence of defendants being ex-parte, it was not known as to whether the said Ab. Aziz Shawl had any authority to accept the terms of the contract by signing on behalf of the defendants, still documents cannot be declared to be void.

33. The trial court held that the agreement can be said to be not in conformity to the provision of Section 54 of Transfer of Property Act, which in turn would give rise to a situation as to whether specific performance of the agreement could be enforced, but that is not the point to be decided, and finally it was held that the documents on the said ground cannot be

declared to be void and while relying upon the judgment of this Court reported as **1986 SLJ 476**, to reject the suit resulting into its dismissal.

34. The contention of learned counsel for the plaintiff is that in absence of signing of the agreement by the proposed vendors with regard to sale of landed property, the agreement cannot be termed to have been executed or accepted by them on the strength of the signature of a land broker.

35. Learned counsel for the contesting defendants has though projected that the said person Ab. Aziz Shawl was an agent in terms of the Contract Act, acting on behalf of the other defendants seems to be untenable in view of him being held as land broker by the Division Bench of this Court in case titled **Mst. Rafiq & Ors. Vs. Ghulam Mohammad Matoo & Ors. (LPAC No. 8 of 2016)** arising out of these cases. In Para 13 of the said judgment, it has held that the agreement was executed through him like a broker, as such, in the suit no relief has been claimed against him and his presence in the suit is neither necessary nor proper, therefore, when it has been authoritatively decided by the Division Bench of this Court that the said Ab. Aziz Shawl, who had signed on behalf of the contesting defendants was simply a land broker, he cannot be stated to be an agent of the contesting defendants so as to attract the provision contained in Chapter-X of the Contract Act, to which the attention has been drawn by the learned counsel for the defendants to canvass his arguments with regard to agency of Ab. Aziz

Shawal and that while acting as an agent on behalf of defendants 2 to 4, the agreement can be said to have been executed by the defendants 2 to 4 as principal through their agent.

36. Next legal point, which has been raised by the learned counsel for the defendants is with regard to estoppel in terms of Section 115 of the Evidence Act, which he asserted that the plaintiff established that he fully knew about his role in the agreement to sell, even if the plaintiff knew with regard to his role in the agreement to sell, he cannot be said to be estopped from raising legal issues, at the most he starts raising factual issues only.

37. The contention of learned counsel for the defendants that on the basis of the agreement to sell, the possession as per the recitals of the agreement had been delivered to defendants 2 to 4, as such, relief for restoration of possession was also not tenable in view of the permissive possession on the strength of agreement to sell. The plaintiff had laid sufficient evidence before the trial court to prove that the land was purchased by him along-with defendant no.1 in equal shares and that they had partitioned the land and that the agreement was executed with regard to entire land of both of them. The defendants 2 to 4 purchased the share of defendant no.1 from him by executing two sale deeds and without making any mention or reference of the agreement to sell in question, therefore, the contention of learned counsel for the defendants that the possession had been taken over by

defendants 2 to 4 on the strength of agreement to sell is belied in view of later sale deeds executed by defendant no.1 as vendor in their favour as vendees, stating the possession was delivered on the date sale deeds were executed without making any reference to the earlier possession as claimed by them.

38. The judgment of this Court in a case **Dina & Ors. Vs. Tirlok Singh & Ors.**, reported as **2009(4) JKJ(HC) 587**, relied upon by the learned counsel for the defendants, was with regard to the land in Jammu province, as in the case of landed property in Kashmir province, there was different provision as has been held by the Full Bench of this Court in **Gh. Qadir & Anr. Vs. Gh. Hussain**, reported as **1972 JKLR 236**. The relevant portion of the judgment is reproduced as under:-

“...It is manifestly clear that where the plaintiff voluntarily executes a contract of sale puts the proposed vendee in possession of the property and receives the entire consideration money, there is not special equity in his favour to allow him to turn round and claim the property after a long time merely because the price of the property has increased. He cannot be allowed to repudiate the fiduciary obligation arising out of the contract nor can the court aid him to commit fraud by dispossessing a prospective vendee who has done all that was required of him to do for purchasing the Property...”

39. Transfer of Property Act, which provides that the title of the land situated in Kashmir province is not transferred unless the entire sale of consideration is paid. This was a case wherein admittedly part payment of consideration was stated to be paid, therefore, law laid down by Full Bench, is not applicable to the facts of the case on hand.

40. Section 138 of the Transfer of Property Act, which deals with regard to transfer of immovable property, after due registration, is relevant to the subject and is reproduced as under:-

Transfer of immovable property after due registration -

(1) No transfer of immovable property except in a case governed by any special law to the contrary, shall be valid unless and until it is in writing registered and (the registration thereof has been completed in accordance with Sub-section (3) of Section 61 of the Registration Act, 1977).

(2). No Court shall entertain a suit for pre-emption in respect of transfer of any such immovable property unless the transfer complies with the provision of Sub-section (1).

(3). No person shall take possession of or commence to build or build on any land in Province of Kashmir which has been transferred or has been contracted to be transferred to him unless and until such transfer becomes valid under the provision of Sub-section (1).

(4). No person who has obtained a transfer of immovable property referred to in Sub-section (1) shall apply for and obtain from any Revenue or Settlement Officer or Court any alteration in any existing entry in any settlement record of paper, unless such person produces before such officer or court a duly executed registered instrument (the registration whereof has been completed in the manner specified in Sub-section (1)).

And no such officer or court shall alter or cause to be altered any such entry except upon tide production of an instrument registered in the aforesaid manner: Provided that nothing in this section applied to a lease of agricultural land for one year or to a lease of any other land for a period not exceeding seven years. Provided also that nothing in Sub-sections (3) and (4) shall be deemed to apply to transfers by will or by any rule of interstate succession or by the operation of the law of survivorship.”

41. Sub-section 3 of Section 138 of the Transfer of Property

Act, thus, provides that no person shall take possession of, or commence to build or build on, any land in the Province of Kashmir which has been transferred or has been contracted to be transferred to him unless and until such transfer becomes valid under the provision of Sub-section (1), which says that no transfer of immovable property, except in a case governed by any special law to the contrary, shall be valid unless and until it is in writing registered and the registration thereof has been completed in accordance with sub-section (3) of Section 61 of the Registration Act, 1977. Therefore, as against the explicit statutory provision that no person shall take possession of any land in the province of Kashmir, which has been transferred or has been contracted to be transferred to him unless and until such transfer becomes valid by way of registration, as such, the possession shall not be recognized under the law. Thus, the plea of the defendant Nos. 2 to 4, who claimed to have been taken over the possession on the basis of the ‘agreement to sell’, is simply not tenable and cannot be sustained.

- 42.** Once the trial court has reached the conclusion that the ‘agreement to sell’ cannot be acted upon for being not in conformity with Section 54 of Transfer of Property Act, and was declared to be invalid, it could make no difference as to why the document was not declared to be void. If the agreement is invalid in the eyes of law, how the result by acting upon it can be valid, be that the possession of the land or title of the same. So far as the question of dispossession of the plaintiff from the suit land is concerned, the same also seems to be addressed in a casual manner as it was a clear stand of the plaintiff that he has been dispossessed during the pendency of the suit and the insistence of the trial court with regard to particular date when he was dispossessed, seems to be unwarranted.
- 43.** After setting aside the judgment by a Single Bench of this Court, the case was remanded for fresh trial. However, the order passed by the learned Single Judge, remanding the case, was later interfered with by the Division Bench and Full Bench of this Court.
- 44.** Learned counsel for the parties submitted that the decree passed by the trial court, has become redundant in view of the Appeal being retained, as ordered by this Court, for fresh consideration of the Appeal on hand, initially and then finally with the dismissal.
- 45.** Viewed thus, the trial court judgment seen from any angle, seems to be untenable and unsustainable given to the facts and circumstances and evidence led by the plaintiff which

had remain unquestioned being in ex-parte. As a result the Appeal is allowed and the impugned judgment and decree passed by the trial court is, hereby, set aside. The suit is granted declaring the agreement to sell dated 19.10.1977, null and void, invalid, ineffective and unenforceable as against the rights of the plaintiff over the suit land. The defendants 2 to 4 are directed to restore the possession of the suit land of the plaintiff. The parties shall bear their own costs. Decree sheet shall be drawn accordingly.

46. Lower court record shall be sent down along-with the copy of this judgment.

CIA No. 07/2006

47. Another development that had taken place for disposal of the Civil Original Suit, which has been the subject matter of MA No. 105/1999, that after the Appeal being allowed before the Single Bench of this Court, the case was remanded back to the trial court for fresh disposal and the trial court vide impugned judgment and decree dated 28.02.2005 in CIA No. 07/2005, had granted the suit against which this Appeal was preferred by the defendants. The trial court vide impugned judgment and decree disposed of the case in the following terms:

“i. Decree for declaration to the effect that the agreement to sell dated 19.10.1977 and registered on right on the defendants 2 to 5. Consequently plaintiff continues to be the owner of the land measuring 5 kanals and 6

marlas in survey no. 438 situated at Gulab Bath, Zakoora Tehsil Ganderbal.

ii. Decree for possession of the said land measuring 5 kanals and 6 marlas under khasra no. 438 situate at Gulab Bagh, Zakoora Tehsil Ganderbal (towards eastern side), is passed in favour of the plaintiff and against the defendants 2 to 5. Decree sheet be drawn accordingly...”

48. Since the judgment of the learned Single Judge, which allowed the Appeal and remanded the case to the trial court for fresh determination, also became the subject matter of the LPA before the Division Bench and ultimately reached before the Full Bench of this Court, and the Full Bench held that the LPA before the Division Bench is maintainable and the Division Bench allowed the LPA and remanded the case back to the Single Bench for fresh determination of the Appeal.

49. Learned counsel for the parties submits that in view of the developments having been taken place before different Benches of the High Court and also in view of the MA No. 105/1999 being pending before this Court, this Appeal has been rendered as redundant and is not required to be decided in view of the judgment passed in MA No. 105/1999.

50. Viewed thus, particularly on the face of the submissions of learned counsel for the parties, the Appeal, is, accordingly

disposed of having been rendered as redundant and necessitating, no determination.

51. Disposed of accordingly.

(M. A. CHOWDHARY)
JUDGE

Srinagar
30.12.2023
Muzammil. Q

Whether the Judgment / Order is Reportable: Yes / No

Whether the Judgment / Order is Speaking: Yes / No

