



NOT 'JUST' A PURCHASE

Case Study on Court Settlement of Disputes in
Pakistan.



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“Not ‘Just’ a Purchase”: Case Study on Court Settlement of Disputes in Pakistan

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This case study is part of the project being undertaken by Policy Research Institute of Market Economy (PRIME) with support from Atlas Network. The aim is ‘Making Pakistan a Trusted Business Partner’ through improving Pakistan’s ranking and score in ‘Enforcing Contracts’ and to improve the overall ranking of the country in the World Bank’s Doing Business Index over 2016-18.

A lengthy, cumbersome and costly mechanism to seek enforcement of contracts is detrimental to the business environment of a country. Investors shy away from such economies where rule of law is weak and uncertainty looms large. Therefore it is important for achieving a favourable investment climate in the country that business contracts get honoured and where a dispute arises, it can be settled at a suitable cost and time duration.

All names mentioned in the case herein have been changed to protect privacy. Real court cases, where final order has been passed, have been picked for illustrating the nature of disputes and the issues with the contract enforcement mechanism in Pakistan. The case studies do not mean to comment on the justness or unjustness of the arguments presented by any party to a case.

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Case Summary

Behram entered into an agreement with Ahsan to purchase a real estate property. Ahsan was implied to be acting on behalf of the true owners of the property. Behram paid for the property, took its possession and the title of ownership was transferred to his name. The true owners approached the court seeking to regain ownership of the property as Ahsan was not acting on their behalf while carrying out the transaction. Trial court accepted the plea of the true owners and ordered for annulment of the transaction and ordered Ahsan to pay back the full amount of transaction along with interest for the period. Ahsan was also ordered to pay the cost of litigation to both the parties. Behram and Ahsan separately challenged the decisions against them. High Court upheld the original decision of the trial court.

Background

On 21st Dec 1993, Behram entered into an agreement with Ahsan to purchase a two canal property with a house built on one canal of land. Ahsan claimed to represent the four women who were the true owners of the property. Rs. 400,000 was paid to the true owners as earnest money through Ahsan. Later, Behram paid for the purchase through various instruments which were acknowledged as consideration for the sale. Sometime later, one of the four true owners of the property expired and her share devolved to her legal heirs. Two weeks after her death, five of the six true owners of the property transferred the ownership of one canal of land via a gift deed in favour of Behram.

Dispute

In October 1994, two months after the transfer of ownership, the true owners of the property filed a lawsuit in the court of Civil Judge Peshawar, where they adopted the stance that they are the owners of one canal of land in the disputed property. They challenged the two gift mutations carried out in favour of Behram to be illegal.

On the 10th of June 1997, Behram filed a lawsuit against Ahsan and others claiming to be true owners of the disputed property. Through this lawsuit, Behram sought fulfilment of the agreement to sell, dated 21.12.1993.

Next month on 26th of July 1997, the true owners filed a separate lawsuit against Behram for the remaining one canal of land, not previously challenged in court.

Trial Court Proceedings

Two years later in September 1999, all the three lawsuits were consolidated and the learned civil judge framed thirteen issues. The parties produced their pro and contra evidence. Seven years after consolidation of the three suits, the trial court issued its order in November, 2006.

Court Order

The suit of true owners against Behram for annulment of transaction was decided in their favor. The suit of Behram against true owners was decided against Ahsan who was ordered to return Rs. 1,800,000 to Behram along with interest at bank rate for the period of February, 1994 to November, 2006. Moreover, Ahsan was ordered to pay the entire cost of the suit to both parties.

Behram's Appeal

Feeling aggrieved from the judgment, Behram and Ahsan separately went into appeal to the Peshawar High Court. The main thrust of the worthy counsel for Behram was that he was a bona fide purchaser of disputed property for valuable consideration, vide Agreement to Sell and thus, he was entitled to the protection envisaged under section 41 of the Transfer of Property Act, 1882 (Act); that it was the conspiracy of the entire family headed by Ahsan, which led to Behram parting with the sum and arranged for him to take physical possession of the disputed property.

Defence Argument

The legal counsel for the true owners contended that the disputed property was owned by *PardaNasheen*¹ ladies, who had not given any authority to Ahsan to sell it to Behram; that Behram during his testimony has confirmed that during the process of the entire transaction, Ahsan did not have any written authority on behalf of the true owners; and that the actual owners of the disputed property immediately on having gained knowledge about the transaction challenged the same in Court; and that Behram was not legally entitled to the protection provided under section 41 of the Property Act, 1882.

Ahsan's Appeal

Ahsan's counsel contended that as Behram was in possession of the disputed property, the interest imposed was excessive.

High Court's Findings

In essence, the sole contention of the worthy counsel for Behram was that he was entitled to the protection provided under Section 41 of the Act. To consider this contention of the worthy counsel, the Court had to resolve the controversy framed in issue No.5, which was in terms that;

¹A woman, who by her custom, is barred from showing her face in public.

Issue No.5.

Whether the rights of plaintiff (Behram) are protected under section 41 of Transfer of Property Act, 1882?

To seek protection under Section 41 of the Act, all five of the below-mentioned conditions had to be met.

- (i) The transferor is the ostensible owner;
- (ii) The transfer is for consideration,
- (iii) He has by consent express or implied of the real owner,
- (iv) The transferee has acted in good faith,
- (v) The transferee took reasonable care to ascertain that the transferor had power to transfer.

Transferor is the Ostensible Owner.

The honorable Justice ruled that it was evident that Ahsan never represented himself to be the ostensible owner of the disputed property. At best, his role and status can be considered as the identifier of the *PardaNasheen* true owners, in the Agreement to Sell, and thereafter, as their agent, when he transferred the peaceful possession of the disputed property to Behram.

Transfer is for consideration.

Behram's payment of Rs.1,800,000/- to Ahsan got recognised as consideration for the sale.

Transfer or having expressed or implied consent of the owners.

Behram during his cross-examination admitted that Ahsan had no written power of attorney on behalf of the true owners. The possibility of Ahsan having implied consent of true owners also got ruled out.

Transferee acted in good faith.

Knowing very well that Ahsan was not the true owner of the disputed property, Behram still proceeded with the transaction, which surely does not reflect positively on his bona fide. It may, however, be said that this action on his part was due to his negligence and not mala fide. But negligence was ruled out in view of the fact that Behram was a law graduate. Moreover, the fact that Behram recorded the transaction as a gift would leave no doubt about his true intentions. This intentional recording of the transaction as a gift was frankly conceded by him to be only to avoid payment of taxes/duties and the challenge of prospective pre-emptors. These deliberate steps taken by Behram would thus, accumulatively portray his conduct far from being in good faith.

Reasonable care to ascertain the authority to transfer.

The judge further concluded that reviewing the evidence in the cases, it was very much apparent that Behram entered into the agreement to sell, knowing very well that he was not the true owner and yet proceeded therewith without protesting or demanding any written power of attorney from Ahsan to act on behalf of the true owners. As discussed earlier, the steps taken and the concessions made by Ahsan in facilitating Behram to take possession of the disputed property can in no way absolve Behram from taking the reasonable care, to ensure that Ahsan had the authority to transfer the disputed property on behalf of the true owners. More so, when he being a lawyer, knew the importance thereof. Thus, Behram would also not qualify the test of fulfilling this crucial condition precedent of reasonable care for availing protection provided under section 41 of the Act.

Judgment of High Court

From the above findings, the Honourable Justice noted that Behram had not been able to prove all five condition precedents for being entitled to avail the protection provided under section 41 of the Act. In such a situation, the judicial consensus is that even if a single condition precedent is not fulfilled, then the purchaser cannot avail the protection provided under section 41 of the Act.

Accordingly, for the reasons discussed above, the Court found itself in consonance with the findings recorded by the trial Court for refusing the relief sought by Behram. He was neither able to prove the Agreement to Sell nor his good intention. However, the payment of Rs.1, 800,000/- he made to Ahsan having been proved was duly appreciated, and accordingly, a decree to that extent along with interest was correctly passed in his favour.

The honourable Justice noted that the conspicuous silence of Ahsan during the trial court proceedings and his noticeable absence from the Court proceedings would not justify his present stance of avoiding the interest awarded by the trial Court in favour of Behram.

The last paragraph of the High Court's judgment read, "Accordingly, for the reasons stated hereinabove, all the appeals being bereft of merits are dismissed, as the judgments and decrees of the learned trial Court are not only based on correct appreciation of evidence, but also in accordance with the applicable principles of law. Thus, the decision passed by the trial Court is maintained."

Commentary

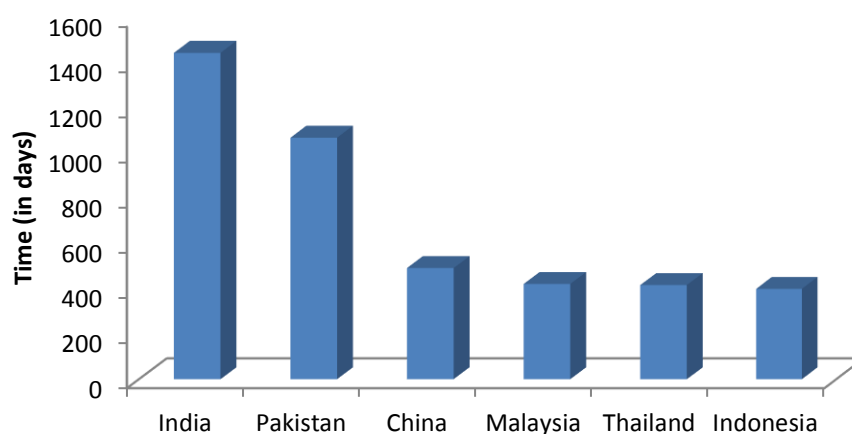
A consolidated case seeking enforcement of contract by one party, and seeking permanent injunction by the other party, took twelve years to be decided by the civil court. Then when the case goes to appeal stage, it takes the High Court a further nine years to announce its verdict. All in all, the dispute took twenty-one years to be resolved by the courts of law.

Thus, twenty-one years after purchasing a property, it transpired that the purchase has been nullified and that the purchaser must vacate the property, with his ownership having been revoked. Another way to look at the same is that it took twenty-one years for the aggrieved owners of a property, to reclaim what was theirs. One thing which is much appreciable in this case is the order by the trial court and its subsequent upholding by the High Court that Ahsan must recompense both the parties to the case for their legal expense as both the parties had suffered mainly due to his acts of commission and/or commission. Order to pay costs will create a deterrent for people who fail to meet all requirements of commercial contracts and at the same time it will reduce the burden of cases on the courts of law.

One way to resolve such cases swiftly and to reduce the case load on the judges is to set up Alternate Dispute Resolution (ADR) centres. The World Bank's Doing Business 2018 report has recorded no reforms in Pakistan in the area of 'Enforcing Contracts' during 2016/17. On the overall measure of 'Ease of Doing Business', the report has ranked Pakistan at 147th place out of 190 countries assessed.

On the measure of 'Enforcing Contracts', Pakistan is ranked at 156th. On Quality of judicial processes index (0-18), Pakistan scored a meagre 5.7. On average, it takes 1071 days to settle a commercial dispute in courts of law (See graph below for comparison of economies on the basis of time taken to enforce contracts). The cost in terms of percentage comes to 20.5% of claim value, which is too high; and thus, it is often unfeasible to approach the courts to settle commercial disputes. The graph below depicts the average time it takes to settle a commercial dispute in courts, from the moment the plaintiff files the lawsuit in court until payment.

Time Taken to Resolve a Dispute in Court



Source: World Bank, Doing Business, 2018²

²<http://www.doingbusiness.org/~media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB2018-Full-Report.pdf>

There is no court or division of a court dedicated solely to hearing commercial cases. Although there are laws setting overall time standards for key court events in civil cases but these time standards are not adhered to in more than 50% of cases. There are no electronic case management tools for use by judges or lawyers. The law does not even regulate the maximum number of adjournments that can be granted. As far as court automation is concerned, neither can complaints be filed electronically, nor is it possible to serve process electronically for claims filed before the court.

The judgments announced in commercial cases at all levels are not made available to the general public through publication in newspapers. Forewarned is forearmed. If such cases are published, awareness about legal lacunas, ill-practices regarding commercial contracts, and how to safeguard against them, will improve. It will enable businessmen to avoid common pitfalls involved in commercial contracts, and perhaps also reduce the courts' burden.