

Stereo. HCJDA 38.
Judgment Sheet
IN THE LAHORE HIGH COURT,
LAHORE.
JUDICIAL DEPARTMENT

....

Civil Revision No. 23551/2023.

Raja Muhammad Khubaib.

Versus

Addl. District Judge, Lahore & others.

JUDGMENT

Date of hearing: **05.06.2024.**

Petitioner through: Ms. Sabahat Rizvi, Advocate.

Respondent No.2 through: Mr. Maqsood Ahmad Ghuman,
Advocate

Respondent No.3 through: Mr. Ishfaq Amir, Advocate.

Respondent No.4 – [had no adverse interest to the petitioner]

ASIM HAFEEZ, J. This and connected *Civil Revision No.38993/2023* are directed against consolidated judgment & decree dated 21.02.2023, whereby appellate court dismissed appeals preferred by the petitioner and respondent No.3, against judgment & decree dated 30.07.2022 of the court of first instance, which decreed petitioner's suit for specific performance of agreement to sell of 30.11.2020 [time for performance was extended twice with mutual concurrence], and directed petitioner to pay additional amount of Rs.6,769,350/-, over and above the consideration amount agreed under the agreement. Petitioner is aggrieved of the imposition of payment of additional amount. Respondent No.3 objects to the decree of specific performance on the premise that agreement stood rescinded upon failure of the petitioner to arrange balance consideration of

Rs.24,500,000/- by the end of second extended period, which was 28.02.2021.

For quick and complete understanding, operative part of the judgment of the trial court is reproduced hereunder,

“This civil suit is hereby decreed subject to payment of Rs.67,69350/0 in addition to the remaining consideration Rs.245,00,000/- by the plaintiff to the defendant No.1 within 30 days of this order. In case of this failure to pay the said amounts within 30 days, suit of the plaintiff shall be deemed dismissed and in said case the defendant No.1 would be bound to return the earnest money Rs.65,00,000/- to the plaintiff within next days 30 days. There is no order as to cost.”

2. Factual narration provided in the opening paragraphs of judgment of the appellate court is sufficient for understanding underlying facts, still some material facts, potentially touching the subject matter controversy, need amplification. Factum of Agreement to sell dated 30.11.2020, execution thereof and conditions embodied therein constitute admitted facts. First cut-off date was 02.01.2021, which was extended till 30.01.2021 and finally to 28.02.2021. There is no dispute that date for performance was extended due to injunctive order against property in question. Earnest money of Rs.6,500,000/- was paid and balance consideration payable was 24,500,000/-. Petitioner had arranged for pay-orders for balance consideration before 02.01.2021. Parties agree to disagree on two issues. Petitioner alleged that he was ready and willing to perform his obligations, but respondent No.3 was not in Pakistan till July 2021. Conversely, respondent No.3 took stand that pay-orders arranged were cancelled before 28.02.2021 and petitioner had no funds to pay, which situation attracted default clause and agreement, wherein agreeably time was of the essence in terms of clause 3, stood cancelled and earnest money was liable to be forfeited. Suit was instituted on 20.05.2021.

3. Arguments heard; record perused, and Court concluded as follows.
4. Controversy touches down upon two questions. Whether imposition of compensation through additional payment is justified and secondly, whether agreement stood cancelled upon alleged default and was time essence of the contract – in the context of second issue the burden lies on the respondent No.3 to prove factum of default of the petitioner and establish that timely performance was central to the enforceability of the contract.
5. First thing first. Whether imposition of compensatory amount – additional payment – was justified. Upon perusal of the judgments of the courts, which concurrently decided in favour of additional payment, it is found that findings with respect to additional payment were erroneous. Concept of compensating, in monetary terms, is essentially a tool to recompense the party that suffered loss, injury or disadvantage. Loss caused; injury occasioned; disadvantage suffered, in contractual arrangements, would, correspondingly, be the cause and effect of default committed or failure attributable to one of the parties to the contract. Hence, before subjecting defaulting party to the obligation of compensating the non-defaulting party, it is imperative to substantiate 'factum of default'. It is axiomatic that trial court reached conclusion that 'Now the plaintiff and defendant No.1 are equally responsible for non-performance of the suit agreement to sell on 28.02.2021' [observed in paragraph 11 of its judgment]. If that was the position how could petitioner be penalized by subjecting it to payment of additional payment when failure was attributed to both the parties. Appellate court failed to identify and reject blatant discrepancy in the judgment, and instead endorsed the illegality. This peculiar mistake is fatal to the sustainability of the judgments. It appears that Courts misread the evidence and overlooked effect thereof. Evidently,

Rs.6,500,000/- was paid as earnest money. Pay-orders for balance consideration of Rs.24,500,000/- were arranged before the first performance date – [this fact was admitted by respondent No.3, who appeared as DW-1]. Time was mutually extended in wake of an injunctive order, which injunctive order remained intact till 09.02.2021. Final performance date was 28.02.2021. It is not disputed that pay-orders for Rs.5,400,000/- and Rs.800,000/- were cancelled before 28.02.2021 and other two payment orders, for substantial amount, became ineffective after the filing of the suit on 20.05.2021. Notably, under the orders of the Court balance amount of Rs.24,500,000/- was deposited before 06.07.2021. In these circumstances, how lack of willingness could be attributed to the petitioner – no reasoning was found in the judgments. There is another aspect of the matter. Respondent No.3 appeared as DW-1, who admitted that he went to U.S in January 2021, after the agreement, and came back in the last week of July 2021. And who further admitted that he was not in Pakistan at the time of the extension of time-period for performance on 30.01.2021 and 28.02.2021. One of the conditions of the agreement was physical presence of the respondent No.3 before DHA, Lahore, at the time of transfer of the plot – [condition 4 of the agreement]. In these circumstances, whether finding of default on the part of petitioner is legally sustainable. I lay hands on decision in the case of “Muhammad Siddique v. Muhammad Akram” (2000 SCMR 533), where Hon’ble Supreme Court had awarded compensation, over and above the agreed consideration but in the context of different facts – wherein suit, though within limitation, was instituted after nine years of the agreement therein. In said circumstances, compensation was awarded.

6. In view of the aforesaid, I find the findings recorded and direction of payment of additional amount of Rs.6,769,350/- unjustified, unlawful and devoid of reasoning.

7. Now I take up second issue, regarding significance of the performance within stipulated time. No doubt that timelines for performance were provided in the agreement and same were extended on two occasions. Without commenting on the circumstances leading to extension of time, the relevant question is whether petitioner had defaulted after 28.02.2021 and whether any intent of timely performance of agreement was demonstrated on the part of the respondent No.3. There is no hard and fast rule to determine whether time is the essence of the agreement, no doubt performance timelines in the agreement had significant bearing on the question of timely performance and effect of failure, but mere elapse of cut-off date, *proprio vigore* would not non-suit the buyer but such determination is dependent upon facts and circumstances encountered in each case. Respondent No.3 admitted absence from Pakistan during material times, who remained in U.S from January 2021 till last week of July 2021. Written statement is silent regarding issuing any notice of default on the part of the petitioner. No notice of cancellation was issued, let alone alleged. Respondent No.3 was the only witness appeared. No document was brought on record to show that any authority was extended to any person to undertake process of transfer of plot, in the absence of respondent No.3. Learned counsel for respondent No.3 cited following decisions to support argument of significance of time in the context of effect of non-performance, “MUHAMMAD ASLAM and others. Vs. MUHAMMAD ANWAR.” (2023 SCMR 1371), “ASIM JAMSHAID. VS. SHAHZAD IQBAL MALIK and others.” (2023 CLC 1100), “MST. SAMINA

RIFFAT and others. Vs. ROHAIL ASGHAR and others.” (**2021 SCMR 7**), “MUHAMMAD JAMIL and others. Vs. MUHAMMAD ARIF.” (**20021 SCMR 1108**), “MUHAMMAD YOUSAF. VS. ALLAH DITTA and others.” (**2021 SCMR 1241**), “MUHAMMAD ABDUR REHMAN QURESHI. VS. SAGHEER AHMAD.” (**2017 SCMR 1696**), “HAMOOD MEHMOOD. VS. MST. SHABANA ISHAQUE and others.” (**2017 SCMR 2022**), “MUHAMMAD SAFDAR KHAN and another. Vs. MUHAMMAD NADEEMABBASI and another.” (**2021 MLD 617**), “MIRZA SHAFAAT ALI BAIG. VS. Wg.Cdr. (Rtd.) KHURSHID ANWAR and another.” (**2020 YLR 886**) and “MUHAMMAD SIDDIQUE and 6 others. Vs. ABDUL AZIZ RATALVI and 7 others.” (**2016 YLR 612**). Decisions cited were rendered in wake of peculiar circumstances in each case, and no commonality of facts and circumstances were found. In the instant case, both the courts dismissed the plea of cancellation of agreement, which findings show no error of law or irregularity in the exercise of jurisdiction. Respondent No.3 failed to prove factum of default on the part of the petitioner and also failed to make out a case for cancellation of the agreement in the context of condition 3 of the agreement. Respondent 3’s counsel emphasized on the decision rendered in the case of MUHAMMAD ASLAM and others. Vs. MUHAMMAD ANWAR (*supra*) without appreciating the factum of admission of failure on the part of the buyer to arrange for remaining consideration on the date of performance. In the case at hand pay-orders of Rs.18,300,000/- were not cancelled at the time of final performance on 28.02.2021 and on said date respondent No.3 was not available in Pakistan. Likewise, facts of cited case of “MST. SAMINA RIFFAT and others. Vs. ROHAIL ASGHAR and others. (*supra*) are distinguishable, wherein intention to purchase was conspicuously lacking, besides failure of the plaintiff to deposit the amount

despite direction by the Court – in instant case balance amount was deposited under the directions of the Court.

8. There is another flaw in the judgment of the trial court, and affirmed by the appellate court. Court observed that in case petitioner failed to pay balance consideration within 30 days, respondent No.3 would be bound to return earnest money. This is contrary to the terms of the agreement. Agreement provided that in case the buyer fails to pay the remaining amount – buyer is petitioner – earnest money shall be treated forfeited. Agreement says that in case the seller fails or refuses to arrange for the transfer, he shall be bound to return doubled amount of earnest money, this latter condition is not applicable since the buyer had opted for enforcement of the agreement by resorting to remedy for enforcement of agreement. Now what would happen if the petitioner failed to pay the balance consideration within 30 days, without further ado earnest money had to be forfeited.

9. In view of the above, Civil Revision No.38993/2023 is dismissed. And Civil Revision No.23551/2023 is allowed and judgments and decrees of the trial court and the appellate court, to the extent of allowing / decreeing additional amount of Rs.6,769,350/- against the petitioner and direction to return earnest money upon failure of the buyer to pay balance consideration are, hereby, set-aside and declared of no legal effect. And suit of the petitioner is, hereby, decreed in following terms,

“Petitioner’s suit is decreed subject to payment of remaining consideration Rs.24,500,000/- to respondent No.3 within 30 days of signing of this order. And in case of petitioner’s failure to do the needful, that is to pay the balance consideration within 30 days,

petitioner's suit shall stand dismissed and consequently the paid earnest money of Rs.6,500,000/- shall stand forfeited, and respondent No.3 shall be entitled to retain forfeited earnest money of Rs.6,500,000/- and thereupon petitioner shall have no claim against the property in question. No order as to the costs."

10. Office shall accordingly prepare the decree sheet.

**(Asim Hafeez)
Judge**

Decision signed on June 21st 2024.

Approved for reporting.

JUDGE.

Imtiaz Nasir